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2018/56279

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

IAN MAURICE MAGEE

Plaintiff

and

KENNETH AND JOCELYN STEWART

Defendants

_____

MAGUIRE J

Introduction

[1] The plaintiff is a man born on 12 January 1979. When he was aged 38 years he was involved in an accident while at work on 8 November 2017. The accident took place at the farm of the defendants, Kenneth and Jocelyn Stewart. This farm is situated to the north of the town of Larne near to Ballygally.

[2] The relationship between the plaintiff and the defendants is dealt with in the pleadings. The plaintiff in his Statement of Claim alleged that at the material time he was employed as a farm labourer by the defendants. At paragraph 1 of the defendants' defence it is stated that:

> "The defendants admit that the plaintiff was employed by them as a farm labourer."

Accordingly, the court will approach this judgment on the basis that the plaintiff was employed by the defendants, at the material time, as a farm labourer, although it appears clear from the evidence given at the hearing that there is more than a little room for doubt as to what precisely the plaintiff's terms and conditions of employment were.

[3] There is no actual dispute about the fact that the plaintiff was involved, as described, in an accident around tea time on 8 November 2017 at or about the upper yard of the defendant's farm. At that place, it appears that the first-named defendant was driving a vehicle variously described as a "telehandler" or as a "JCB". A feature of the vehicle was that it contained a boom which was situated to the driver's right hand side. It is, in effect, a substantial flexible arm which can be raised or lowered by the driver. At the end of the arm an attachment can be attached to it. At the material time, an attachment called a muck rake was attached to it.

[4] The plaintiff, when the accident occurred, was sitting on a ledge to the driver's right hand side. This he should not have been doing as the ledge, as will be seen in a moment, was not a safe place for a person to be sitting on. What occurred in simple terms is that the driver (the first-named defendant) decided to bring the arm down from a raised position. Unfortunately, the driver did not notice that the plaintiff was sitting on the ledge before bringing the boom down and the trajectory of the boom as it came down meant that it struck the plaintiff causing him serious injuries to his shoulder and spinal area. It appears that the driver did not become aware of the plaintiff's accident until after it had occurred and, in its aftermath, the plaintiff was taken to hospital where he was later treated for his injuries.

[5] Unfortunately, apart from the basic facts described above, there are relatively few other facts agreed between the parties in this case and, in reality, the court has been faced with two different scenarios in relation to what occurred on that late afternoon/evening leading to the accident. The court, in effect, is left to decide whether either scenario, on the balance of probabilities, is correct.

[6] Before considering the scenarios which have been put before it, the court will indicate now that this judgment, by agreement with the parties, will concern itself with two issues: first, that of whether the defendants are liable to pay damages in respect of the accident to the plaintiff; and second, whether any damages payable by the defendants should be reduced by reason of the contributory negligence of the plaintiff. In the light of written submissions received from counsel after the close of the evidence, it appears plain that the first issue has been conceded by the defendants on the basis that even if the court was to accept the defendants' favoured scenario, it has now been acknowledged by the defendants that they have been guilty of negligence at common law by failing to see the plaintiff before the point at which the first-named defendant lowered the boom or set its lowering in progress. In view of this concession, it will not be necessary for the court to seek to determine various issues in relation to breach of statutory duty which arise on the pleadings, as it is inescapable that if the court was to accept the plaintiff's favoured scenario it would inevitably follow that on that scenario the defendants would also be liable at common law in negligence for the plaintiff's personal injuries, loss and damage.

The Hearing

[7] The hearing in this case took place over 4 days and was wide ranging in its scope. On the plaintiff's side, the plaintiff himself gave evidence and, on his behalf, an expert witness, a Dr Marrs gave evidence. On the defendants' side, both Mr Stewart and his wife gave evidence and, in addition, evidence was given by a Mr McCowan, an independent contractor used by the Stewarts, who features in the narrative accounts of both parties.

[8] The court has considered all of the evidence carefully but it proposes in this judgment to limit its discussion only to key points, as it sees them, though it takes into account the totality of what has been said.

[9] The court expresses its gratitude to Mr Ringland QC and Mr Park BL, who appeared for the plaintiff, and to Mr Cartmill BL, who appeared for the defendants, for their examination and cross-examination of witnesses and their helpful written submissions provided to the court after the evidence was completed. As before, the court wishes to state that it has taken into account the totality of what has been said, though it will limit it discussion to key points.

[10] In what follows the court will summarise the plaintiff's and the defendants' scenarios. It will then provide its assessment of the witnesses and will set out its findings of fact. This will be followed by the court's overall assessment of the case.

The Plaintiff's Scenario

[11] The plaintiff's version of events is focussed on the day of the accident. He was, he said, due to work at the defendants' farm that day and arrived there around 07:30 hours. His first task was to milk cows. He thinks the farm had about 80 cows and he worked with the two defendants during this activity. This task took an hour and a half – two hours. After that he did general farm work and later, in the afternoon, he became involved in silage cutting at a substantial field, still part of the farm, which was about one mile away from the main farm buildings.

[12] There were three people, he said, engaged in the silage cutting operation: Mr Stewart, the first-named defendant; a Mr McCowan; and himself. They had all travelled separately from the farm buildings to the field. The plaintiff drove a tractor with a trailer attached; Mr Stewart did likewise, though his trailer contained a silage cutter; and Mr McCowan drove the JCB. Having arrived at the field and got organised, silage cutting took place throughout the afternoon. The trailers were used to bring the cut silage back to what was described as the "upper yard" which was part of the farm buildings complex.

[13] It got dark as the afternoon wore on, and around 6pm work ceased at the large field. The three people, described above, then made their way back to the farm buildings. A feature of this movement was that the two tractors and trailers

(including the silage cutter) were left, according to the plaintiff, in the field and all three men came back on the JCB. Its driver then was Mr Stewart. Mr McCowan stood on a step to the driver's left whereas the plaintiff sat on top of a ledge, as the court has already mentioned. The JCB, the plaintiff said, was fitted with lights. Its return to the farm buildings involved travelling down a metalled minor road most of the way. A feature of the JCB, as already mentioned, was its boom or arm. Attachments could be attached to the boom as a way of enabling it to handle and transport particular materials. The boom could go up and down and could also extend or retract as appropriate.

[14] According to the plaintiff, on the way back to the farm from the field, the boom was in a raised or semi-raised position with a substantial spiked implement attached to it which the plaintiff described as a "muck rake". In his evidence, the plaintiff said that he had on occasions driven the JCB and had travelled sitting on the ledge, maybe, 20 times over a period of years. He also said that there were occasions when he had travelled on the vehicle when the boom had a bucket attached to it – travelling in the bucket. This had occurred on a similar number of occasions over a period of years.

[15] On this occasion the plaintiff's recollection was that the JCB was towing one of the trailers.

[16] When the JCB arrived at the farm buildings it first of all left off its trailer in the "main yard". This could be achieved by detaching it mechanically without the driver having to leave the cab. The JCB then went to the upper yard, which is only a short distance from the main yard. In the plaintiff's account, this was the place where the accident occurred. The plaintiff was sketchy as to the details of the accident, save to say that after the JCB came into the yard, the boom began to come down and hit him while he was still seated. At the time he was seated on the ledge. The plaintiff's opinion was that he could not understand why the boom was lowered by the driver. In particular, it was his view that it was not lowered in order to enable the driver to see his right wing mirror (which had been a suggestion which arose from the defendants' pleadings). In the witness's opinion the wing mirror would not have been obstructed by the boom at the height to which it had been extended.

[17] The plaintiff was adamant that he had boarded the JCB in the field, as he had described, and had not boarded it in the upper yard (which was also a suggestion that was put to him by counsel).

[18] As a result of the boom striking him, the plaintiff sustained significant injuries which he outlined to the court, especially to his left shoulder and back.

The Defendants' Scenario

[19] According to the defendants, the accident giving rise to the plaintiff's injuries happened quite differently from the description of it in the plaintiff's version.

According to Mr Stewart, the silage cutting proceeded in the afternoon but he maintained that only two persons and two vehicles went to the large field being cut. These persons were the plaintiff, who drove a tractor towing a trailer and himself who also drove a tractor with a trailer including the silage cutter. In his account, both he and the plaintiff, cut grass at the field then used a tractor or tractors to transport the silage from the field back to the upper farm.

[20] An important part of Mr Stewart's description of events was that neither Mr McCowan nor the JCB at any stage that day had been working at or near the field where the grass was being cut. Their role in the operation was quite different from that of him and the plaintiff.

[21] In particular, Mr McCowan's role was to stay at the upper yard and receive trailer loads of cut grass for the purpose of these being deposited in a silo pit which stored the grass. Mr McCowan's job at the upper yard was to operate the JCB and its boom for the purpose in hand, which involved using the muck rake attachment to manipulate the grass into the silo.

[22] It followed from the above account that the plaintiff was entirely mistaken in his evidence when he placed Mr McCowan at the field and placed the JCB also at the field. The JCB at all times was at the farm buildings and the notion that at the end of the cutting the JCB had been used to transport all three from the field back to the farm buildings was wrong. In his evidence, there could be no question of valuable farm machinery being left insecure in a field, as the plaintiff's evidence *vis a vis* the trailers suggested. He also repudiated the suggestion that the silage cutter had broken down and been left in the field.

[23] According to Mr Stewart's evidence, the plaintiff and he had at the end of the grass cutting returned to the farm buildings, each in their own tractor (together with trailers) and the plaintiff's account of him travelling on a ledge at the front of the JCB and Mr McCowan travelling on a step to the left of the driver's cab, was entirely made up. The witness was anxious to make clear to the court that he would never permit persons to travel in either of these positions, both of which, in his view, were dangerous places on which to travel. Moreover, he had never seen persons travelling in such positions, he said, and if he had seen this occur he would have put a stop to it. The plaintiff's evidence to the contrary was therefore, in his opinion, entirely false.

[24] How then did Mr Stewart account for the accident which he admitted had occurred? In essence, the circumstances of the accident arose after the plaintiff and he had both returned to the farm buildings. He said he had left the field first and had parked his tractor in the main yard. The plaintiff had followed him and had gone to the upper yard. He said that the plaintiff's tractor had a trailer attached to it and it was detached from it at the upper yard.

[25] Mr Stewart said that after he had left off his tractor at the main yard he walked up to the upper yard and when he got there Mr McCowan went off to feed cows in the main yard, some 50 metres away. Mr Stewart said he got into JCB and drove it down to the main yard to pick up a spare trailer. At this point according to Mr Stewart the boom was not raised but was at ground level but when he got into it he lifted the boom up to what he says was a safe height, between 1-2 metres.

[26] When he arrived at the upper yard he said he could see the plaintiff "dandering about". He then detached the trailer from the JCB. To do this he got out and organised a block on which to place the trailer. This done, he reversed the JCB into a position at which he could release it so that it sat on the block.

[27] According to Mr Stewart he needed to manoeuvre the vehicle in a confined space. This necessitated him reversing over a distance of 20 metres. He said he looked over his shoulder and began the manoeuvre. To enable him better to see the wing mirror to his right, he said he decided to bring the boom down and pressed the requisite switch for this purpose.

[28] It was just after this point that he noticed the plaintiff's feet sticking out ahead of the front of the JCB. It appears that he was unaware of the plaintiff's presence before this at or on the JCB. He had not seen him at the point where he activated the boom coming down but he accepted that the boom struck the plaintiff as it came down and that the plaintiff must have been on the JCB.

[29] Mr Stewart's version of events, in its essentials, were supported by Mr McCowan when he was called to give evidence.

[30] In particular, Mr McCowan stated that he was a self-employed contractor and had worked for the defendants, on and off, over a period of some 4 years.

[31] Mr McCowan said he arrived at the farm around 8:30-9:00 am and had been engaged in other duties until lunch time (around 1-2pm). His work that afternoon had been to remain at the upper yard with the JCB which had a muck rake attachment on the boom. He awaited loads of silage arriving from the cutting of the silage at the field approximately one mile away. The silage came up from the field on a trailer attached to a tractor and it was Mr Magee who drove the tractor and trailer to him with its load. Once the load arrived, the contents of the trailer were emptied into the silo at the upper yard and he, Mr McCowan, used the muck rake to accomplish the purpose of getting the silage into place in the silo pit and positioning it there.

[32] According to Mr McCowan this activity occurred throughout the afternoon and he finished around 17:30 hours. He then left the upper yard to go and milk cows. In his evidence, it was a rainy, dark evening and was cold. The lighting in the upper yard was poor.

[33] The witness said that he was not present at the time of the plaintiff's accident but heard about it later.

[34] When the plaintiff's version was put to him in cross-examination, Mr McCowan denied that it was correct and was adamant that the JCB had not travelled to the field where the silage was being cut and had rather stayed under his control at the upper yard, as herein before described. It followed from this that he had not himself gone to the field and indeed remained at the upper yard and that accordingly there was no question of him having travelled back from the field standing on a step beside or to the left of the driver *en route*.

[35] Mr McCowan went further and in response to a line of questioning he indicated that he had not, during his time around the farm, seen anyone being carried either on the step to the left, or on the ledge to the right, of the driver below the boom or had seen anyone being carried in a bucket attachment for the boom.

[36] At the same time, he accepted that sitting under the boom of the JCB would, if it occurred, be dangerous.

[37] When he parked the JCB to go and milk cows he said he had ensured that the boom was level with the ground and the handbrake engaged.

[38] The witness was questioned in detail about the timings of loads arriving and being dealt with by him and about the point at which he finished his part of the job at the silo pit. At times he appeared to be somewhat confused in his responses.

Assessment of the main witnesses

[39] The key witnesses whose evidence requires careful assessment in this case are the plaintiff, Mr Stewart and Mr McCowan.

[40] While Dr Marrs gave evidence about the operation of the JCB, his evidence was not controversial and the court is content to accept it. Of importance, Dr Marrs was clear that if a person had been sitting on the ledge (as the plaintiff claimed) the driver of the JCB ought to have seen him. Moreover, he was equally clear that the boom should not be lowered if the driver can't see its route of descent.

[41] Mrs Stewart gave evidence but this mainly dealt with much wider issues than what had been occurring that afternoon. Much of her evidence was directed at quantum issues though she did say that it would not be usual to leave a trailer or silage cutter at a field away from the farm for security reasons. In her view there had been a number of pieces of machinery stolen from fields in the local area in the period coming up to November 2017, the date of the accident.

[42] In considering the weight it should give to the evidence of the key witnesses the court will bear in mind the now well-known approach of Gillen J (as he then

was) at paragraph [13] of his judgment in *Thornton v Northern Ireland Housing Executive* [2010] NIQB 4 in respect of the credibility of witnesses. He said:

> "In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:
>
> - The inherent probability or improbability of representations of facts.
> - The presence of independent evidence tending to corroborate or undermine any given statement of fact.
> - The presence of contemporaneous records.
> - The demeanour of the witnesses e.g. does he equivocate in cross-examination?
> - The frailty of the population at large in accurately recollecting and describing events in the distant past.
> - Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication?
> - Does the witness have a motive for misleading the court?
> - Weigh up one witness against another."

The Plaintiff

[43] As regards the plaintiff's evidence, the court finds itself drawn only to accepting those parts of it which may be supported by other material before the court. Thus, while the court accepts that the plaintiff received his injuries by reason of being struck by the boom of the JCB after Mr Stewart had decided to bring it down while the plaintiff was seated on the ledge, the court found much of the plaintiff's other evidence unsatisfactory. In particular, the court had misgivings about the plaintiff's descriptions of the hours he had been working at the defendant's farm after he had resumed employment with the defendants in or about early May 2017. The plaintiff sought to make the case that he worked 5 days per week doing a 12 hour day. For this, he said he was paid £50 per day. On the other hand, Mr Stewart offered a very different account in which the plaintiff, he claimed, was working for just 2-3 hours a day for 2-3 days per week. Apparently, the plaintiff was paid by cheque and a number of cheque stubs were produced. These, however, did not demonstrate that the plaintiff was paid any particular rate of pay or that he was paid any regular amount at set intervals. The cheques (some 14 or so in all) were in differing amounts and there was no form of statement explaining how each sum was calculated. It appears that payment was being made without regard to tax or national insurance or other form of deduction. It seemed to the court that it was most unlikely that the arrangement which the plaintiff claimed existed was accurate and that the plaintiff was probably exaggerating his hours of work. At the same time, the court can only also be critical of the absence of any proper system being in place for dealing with this aspect of the plaintiff's employment for which responsibility would rest with the defendants.

[44] In similar vein, the court found less than convincing the plaintiff's evidence in respect of his involvement in his own farm and, in particular, in respect of his activity as a sheep farmer. Two aspects of this gave rise to concern. Firstly, the plaintiff maintained that he had a flock of sheep (some 75 or 80) with which he worked prior to the accident. However, as a result of the accident, he said he sold off most of his sheep, save for a few, which he quantified as 12/13. However, the plaintiff was unable to produce to the court any documentation relating to his sheep or their sale and despite efforts made by the defendants to procure a court order for the production of such documentation, which efforts were successful, nothing had been provided to the defendants or in turn to the court. In truth, the plaintiff failed to provide any coherent reason for the non-provision of such materials, though he did say that the deal he entered into to sell off the majority of his flock was for cash only, presumably meaning that it was not captured in writing. On this issue the court views the plaintiff's approach to be unsustainable, as it was pointed out by Mrs Stewart, who works for the Department of Agriculture, that there is a range of documents which must be kept by those who own a flock of sheep. In addition, there are also requirements which would apply to the plaintiff as a person who is in receipt of single farm payments. Notwithstanding the above, the court was left to ponder why the plaintiff had failed to deal with this aspect both before the trial and during it. Either it is a case of gross inefficiency or it is a case of him not wishing the court to be told the whole story. Unfortunately, the net effect is that this sort of behaviour diminishes a litigant's credibility not just on the issue in question but more generally.

[45] The second aspect of this topic which also caused the court concern related to the plaintiff's evidence that he, in effect, with the few sheep he now has, has taken a back seat in relation to work at his farm. This was part of a more general argument the plaintiff made to the effect that, by reason of the accident, his ability to do farm work had become limited and that he could no longer do any heavy work.

[46] While it is right to acknowledge that some of the medical evidence in relation to the plaintiff does indicate that the plaintiff's spinal injuries may affect his ability to do heavy farming work in the future, he was unable to explain why there were references in the medical records and reports suggesting that in the period leading up to the hearing he had been doing heavy or physical work at his farm. Mr Yeates, Consultant Orthopaedic Surgeon, in one of his reports on the plaintiff, noted that he had calluses on his hands which in his opinion indicated that he had at the time of the examination (4 February 2019) been engaging in physical work. Similarly, it appears from a medical note of 21 September 2018 that the plaintiff had recently been involved in manhandling a ram on his own. Another medical record (of 8 March 2019) made reference to the plaintiff suffering from pain in his hands (apparently a long standing complaint of the plaintiff unrelated to the accident) when trying to lamb sheep.

[47] The court suspects that the plaintiff was not anxious to present himself as a person who after the accident remained fit for heavy work but that he had forgotten

or was not aware of the facts that his medical records would be available to the defendants, as would medical reports prepared on him. The impression left with the court, however, is that his posture before the court was less than candid.

[48] Other smaller points have also been weighed in the balance by the court. For example, the court was struck by the fact that the plaintiff, notwithstanding the gulf between each side's scenarios, did not provide to the court any explanation as to why either Mr Stewart or Mr McCowan would wilfully have denied the plaintiff's account. Certainly no past behaviour or feud or disagreement was drawn to the court's attention.

[49] Finally, the court found the way the plaintiff gave his evidence worthy of some note. It appeared from his evidence in chief that his recall of events just before the accident when the JCB was in the upper yard was limited as he offered little in the form of a detailed statement of all that occurred. However, when under cross examination, at the point when counsel was putting the defendant's case to him, he appeared only to deny the defendant's version without adding to the limited information he provided in his examination in chief. This left with the court the impression that the plaintiff's recall might not be complete. Of course, this might be so because the accident occurred out of the blue and without warning and to this, the court accepts, it would be reasonable to add that shock may have set in (there was an unresolved dispute as to whether the plaintiff had been rendered unconscious at any stage). The effect on the court is that it considers that it should bear in mind that the plaintiff's recall may have been impaired as a result of the accident.

Mr Stewart

[50] As it happens, the court found itself also concerned about placing reliance on Mr Stewart's evidence without the existence of confirmatory evidence.

[51] In some areas, Mr Stewart was relatively frank with the court. For example, when cross- examined he was ready to accept that he lowered the boom without any warning and without checking for the presence of the plaintiff. He accepted that in conditions of poor light when it was known to him that the plaintiff was in the vicinity the operation of lowering the boom could be dangerous. He accepted that the movement of the boom was his responsibility and that, in fact, it did strike the plaintiff on its way down.

[52] On the other hand, there were passages in his evidence which were difficult to listen to without wincing. Among these was his evidence about health and safety obligations in the environment of the farm. In this area he showed no knowledge of such requirements. There was an absence of instructions for those working at the farm and an absence of any documentation relating to the assessment of risk for employees. No accident book was produced and there was no written report of the plaintiff's accident, notwithstanding its seriousness. Often Mr Stewart's response to

questions in this sphere was simply to say that the plaintiff was an experienced person who would know the dangers. However, when it was suggested to him that he was in breach of his responsibilities as an employer, he simply remarked that he had to hold his hands up.

[53] Another cause for judicial wincing related to the terms and conditions of the plaintiff's employment. These seemed to be non-existent, at least in formal terms. What permeated the witness's approach was casualness and uncertainty. At one point he claimed that the plaintiff was paid the minimum wage but when asked how much that was he had no answer. On occasions, the witness floated an answer to particular questions and then when questioned about it ditched the answer in favour of a 'don't know' or 'can't remember' correction.

[54] It is right, however, to record that Mr Stewart did not make any concession in respect of his general version of events that day and, despite being heavily pressed by counsel for the plaintiff, held to the position that neither the JCB nor Mr McCowan had been part of the cutting operation at the field that afternoon and that both vehicle and person had remained at all material times at the farm itself. He, therefore, robustly, denied that part of the plaintiff's case which asserted that he drove the JCB from the field to the upper yard with McCowan to his left on the step and with the plaintiff sitting to the driver's right on the ledge.

[55] In respect of the witness's own version of events leading to the accident at the upper yard Mr Stewart was unable to provide any explanation for the fact that on his own version of events the plaintiff must have boarded the JCB and sat on the ledge without any apparent purpose and without the witness seeing this occur.

Mr McCowan

[56] Finally, as regards Mr McCowan, the court also had reservations about his evidence. When examined in chief he strongly confirmed Mr Stewart's account of what work was being done by the different members of the team. In particular, he held firmly to his own role being that of the person using the muck rake to lift the cut grass from the trailer which had come from the field to the silo pit. However in cross examination he appeared somewhat at sea when subjected to detailed questions about such issues as the temporal progress of the work; how long it took to discharge the contents of a trailer; and at what time he left the upper yard to go to milk cows. At one stage, towards the end of cross-examination Mr McCowan broke down under the pressure of Mr Ringland's questioning and the court adjourned for a period for the witness to recover himself.

[57] What certainly did emerge from this witness's evidence was that the witness was favourably disposed towards the Stewarts for whom he had worked as a contractor for several years and who still works for them on a contract to contract basis. This fact alone would not, however, mean that the witness's evidence was incorrect but it is a factor to consider.

[58] Much the same can be said of the fact that during Mr McCowan's evidence he indicated that he had a low professional opinion of the plaintiff – who he viewed as lazy and as wanting to take short cuts.

[59] Overall, the court will make its assessments bearing in mind that none of the key witnesses in this case gave evidence which the court would place in the 'convincing' category and all three of the key witnesses, to a greater or lesser extent, left the court with question marks about the accuracy of their accounts.

Findings of fact

[60] In approaching a case of this kind the court will begin by reminding itself that the burden of proof to the civil standard rests on the plaintiff. It is for the plaintiff to prove that the accident which befell him was as a result of the negligence of the defendants.

[61] As regards the issue of contributory negligence the burden of proof (to the same standard) is on the defendants.

[62] The court finds the following principal facts:

(a) The plaintiff at all material times was the employee of the defendants.

(b) The plaintiff's accident occurred at the upper yard of the defendants' premises. It probably occurred in or around 17.30 hrs.

(c) At the time of the accident the JCB was being driven by Mr Stewart, the first named defendant.

(d) At the time of the accident the plaintiff had seated himself on a ledge in the JCB to the front and right of the driver of the vehicle.

(e) The driver did not see or perceive the presence of the plaintiff at the point when he activated the vehicle's system for lowering the boom which had been in a raised or semi-raised position at the time.

(f) The driver should not have lowered the boom without first carrying out a proper check to ensure that it was safe to do so. If such a check had been carried out on the balance of probabilities he would have been able to see or detect the position of the plaintiff and have aborted his proposed action.

(g) At all events, the boom was lowered and it struck the plaintiff on its way down causing him injuries.

(h) As a result the plaintiff fell from the ledge onto the ground and it was at this stage that the driver of the vehicle realised that the plaintiff had been present and had been struck by the boom.

(i) The ledge of the vehicle where the plaintiff has situated himself was a dangerous place for anyone to sit. It was not designed as a seat and self-evidently, a moment's thought would indicate that it is in the path of the trajectory of the boom descending from a higher level. As an experienced farm worker the plaintiff should have been aware of this though this danger should have been highlighted by the employer to all employees.

(j) The court is not satisfied that the accident happened in line with the general picture described by the plaintiff. In other words, the court is not persuaded that the context for the accident provided by the plaintiff is correct. The court therefore rejects the general scenario as described by the plaintiff *viz* that all three men had travelled from the scene of the grass cutting to the farm buildings – a distance of around a mile – in or on the JCB. The court further finds that Mr McCowan had not been grass cutting at the field that afternoon and nor had the JCB been there.

(k) It is more likely that the accident occurred as a result of the sort of manoeuvring of the JCB in a confined spaced described by Mr Stewart in his evidence but the court is not satisfied that it has sufficient evidence to elevate this to a finding of fact.

(l) The court is unable to make a finding as to why the plaintiff decided to use the ledge as a seat or what he was doing on the vehicle when the accident occurred. The same would, on the probabilities, have been the case if the court had accepted the broad scenario described by the plaintiff in that if the JCB had been being used to transport the plaintiff from the field to the farm itself, it is difficult to see why, once at the farm, the plaintiff had not simply got off it before the accident occurred.

(m) The plaintiff's injuries were attributable to the accident.

Overall assessment

[63] In the light of the findings above the court is satisfied that the plaintiff's claim in common law negligence against the defendants has been made out. The court will therefore find in favour of the plaintiff.

[64] As regards contributory negligence, the court is satisfied that, in line with the Northern Ireland statute[1], the plaintiff's damages should be reduced to an extent

[1] Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948

which the court considers just and equitable having regard to the plaintiff's share in the responsibility for the damage.

[65] The court will bear in mind the helpful summary of the principles at play when considering this issue which is found at paragraph 6.76 of Munkman on Employer's Liability (16th Edition).

[66] While the plaintiff put himself into a position of risk by sitting on the ledge of the JCB, where he clearly should not have been, the court considers that the lion's share in terms of blameworthiness for the accident rests with the defendants, in particular, the first named defendant. Without his failure to pay due care and attention before lowering the boom, there would not have been an accident and he, himself, accepted that he should have checked before taking this step.

[67] In the court's judgment, the case does not fall into the category of a momentary carelessness or inadvertence on the plaintiff's part.

[68] Having regard to the standard of what, on the facts of this case, would be just and equitable, the court will reduce the damages payable to the plaintiff for the defendants' negligence by 25%.

[69] The court orders accordingly.