

THE HIGH COURT

[2018 No. 5295 P.]

BETWEEN

PHILIP KEANE

PLAINTIFF

AND

DERMOT MCGANN GROUNDWORKS LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 29th day of November, 2018**Background**

1. This accident arises from an incident which occurred on the 26th October, 2017, when in the course of the plaintiff's employment with the defendant company, the plaintiff suffered an injury which led to the loss of his left index finger. This incident occurred as a result of hydraulic oil coming into contact with the said finger. While the plaintiff was in hospital undergoing surgery for the amputation of the said finger, he was diagnosed with grade IV sarcoma of the axilla which required further intensive treatment and in result of which he is now in remission.

The plaintiff's case

2. The plaintiff described how he was working as a general operative at the private residence of a client of the defendant company, when on the 26th October, 2017 at Ahascragh, Country Galway, a tractor being driven by Dermot McGann began leaking fluid. The plaintiff maintains that Dermot McGann asked him to find out where the leak was coming from. While the plaintiff accepts that he did extend his left hand to clear his vision because there was dirt at the site of the leak, he contends that he was invited to do so by the defendant. At that point there was a consistent low intensity leak which turned into a spurt of hydraulic oil. The plaintiff thought that there was a leak at the connection of a pipe and Dermot McGann contended that it came from a faulty bolt on the machine which began leaking oil. The plaintiff believes that during his inspection of the leak, the steering on the tractor turned when the defendant reversed same.

3. The plaintiff extended his hand forward to see where the source of the leak was and it became a spurt of oil. His belief at the time was that the tractor was running - he felt a sting but there was no mark on his finger. He believes the accident happened sometime between 3.30 pm and 4 pm and he attended the doctor between 4.20 pm and 4.30 pm.

4. The plaintiff confirmed that he was not wearing work gloves on the date of this accident. He attended Dr. Ian O'Connor, general practitioner, that afternoon, who administered a tetanus injection. He continued to work with the defendant for a couple of hours subsequently but on the 1st December, 2017 he noticed blackness on the vein.

5. The plaintiff attended Dr. Bart Maloney, general practitioner, who diagnosed blood poisoning and administered painkillers and antibiotics. After Christmas the injury deteriorated, causing great pain to the plaintiff over the Christmas period.

6. On the 5th January, 2018, Dr. McGloin, general practitioner, diagnosed that there was a danger of loss of his finger and sent the plaintiff straight to the accident and emergency department in University Hospital, Galway. On the 7th January, 2018, Professor Padraig Regan, plastic surgeon, ensured that a washout of the finger took place. Amputation occurred on the 9th January, 2018, when it was clear that there was no possibility of saving the finger. The plaintiff remained in hospital and was in a lot of pain and on medication and could not be discharged until he learned to manage the pain. One week after this accident while in hospital, a sarcoma of the axilla was diagnosed and the plaintiff underwent chemotherapy and radiotherapy in respect of this condition which was not related to the complaint which had led to the loss of his index finger. The plaintiff indicated to the court in his evidence that he continues to suffer from pain at the site of the stump of the finger as the nerves are not dead and he may require further surgery to correct the situation. If that is not successful, the medical evidence indicates that a second operation might even be necessary. The plaintiff suffered and continues to suffer from soreness, sensitivity to touch and does not have the grip or power in the hand which he used to have. The injury is to the left index finger and the plaintiff is right hand dominant. He finds however that he has no power grip with the left hand and is not able to do as much DIY as before. He used to play hurling with his son Nevin. His hand does not have the same movement now.

7. In terms of his earnings, the plaintiff indicated that he did a couple of days' work in 2017 and earned €100 per day. He said that he worked on the 1st, 4th and 5th of December, 2017 and on the 25th, 28th, 29th and 30th of November, 2017. On the 5th December, 2017 due to the pain in his hand he was obliged to leave work early. Coincidentally, the defendant company decided to run down his own work because at the time his son who was 24 years of age had had a very serious accident.

8. The plaintiff received training when he began work with the defendant in June or July 2015. He had successfully completed the Safe Pass course and confirmed that in 2013 he had scrapped his motor vehicle and does not have a driving licence at present.

9. The plaintiff indicated that he had worked for Earls Engineering doing seasonal work but had been laid off in July 2017 and that since that time he had only worked a couple of days per week. The plaintiff did not have any work until the 26th October, 2017. The plaintiff's contention is that he has not yet looked for work because he has not regained his full strength and is still undergoing some treatment in relation to the neuroma type pain being treated by way of infusions. He would consider working in the area of safety guard lighting, FRS motorway work, working on council roads or working as a lollipop man; however, he would not be interested in working as a driver.

10. The plaintiff agreed that he was standing to the right of Dermot McGann at the time of the incident.

11. This court notes that the defence alleged that had the plaintiff sought medical help sooner that the finger could have been saved and that they intended calling a medical witness to this effect. As the case progressed, however, counsel indicated that the said medical witness accepted Professor Padraig Regan's findings as the treating consultant. It was also accepted by the defence that earlier intervention would not have saved the finger as suggested earlier in the case.

12. The plaintiff denied a number of allegations put to him including his denial that he cut his finger with a knife as suggested. He

further denied that he went drinking in a public house on the 5th December, 2017 rather than attending a GP as requested. This witness denied categorically the defendant's version of events as put to him.

13. The plaintiff on re-examination indicated that he did not touch the oil leak although he was near it and said that the tractor was reversing, which he had told the defendant to stop doing. He said he had his finger an inch away from the leak but when he walked towards the machine, it was not moving or had stopped. He agreed that he was not asked to put his finger on the nut in question and that he investigated the accident without gloves but he said he was never asked to stay away from the machine. He had nothing to do with machinery in the normal course of his work. He did not realise there was any danger.

The medical evidence

Evidence of Dr. Michael McGloin, GP

14. This witness described himself as the plaintiff's general practitioner and described the plaintiff as an extremely healthy man whom the GP had only seen twice since 2007 for minor issues. He described the type of injury suffered by the plaintiff as an extremely rare one which he as a GP had only seen on a couple of occasions although he was qualified as a specialist GP since 1984. In relation to this particular injury, he described amputation phantom pain with ongoing discomfort at the site of the plaintiff's finger and stated that treatment was complicated by the treatment for a grade IV sarcoma of the axilla in respect of which the plaintiff has had chemotherapy and radiation.

15. Treatment of the finger stump is ongoing and the plaintiff is to have a second infusion for pain at the site of this injury.

16. The plaintiff's mental health is moderate and his ability to lift is moderate. This witness described the loss of his finger as having a severe effect on his manual dexterity with a loss of function and a loss of pincer grip which will continue.

17. This witness stressed to the court that it was the plaintiff's mother who had "dragged" her son to the doctor's surgery and had explained to the doctor that her son had a fear of both doctors and medicine and had prefaced the communication with that information.

18. This witness said that he was very disturbed by the appearance of the plaintiff's finger on the 5th January, 2018 in that it was swollen to two or three times its normal size with tissue fluid leaking.

Evidence of Mr. Pdraig Regan, constructive plastic surgeon and reconstructive hand surgeon

19. This witness gave evidence that he had treated about three cases of this type annually for the last 30 years. He described the level of force from the hydraulic oil as a capillary pressure in the finger with very high tension into the digit. This causes high pressure within the finger. He added that the site of the infection is difficult to identify as the entry point seals off and it is therefore hard for a doctor to diagnose save through taking a history of trauma to the digit. This surgeon commended the initial GP action taken as appropriate in that he administered a tetanus jab and he added that a general practitioner might just see one of these cases in a lifetime whereas a hand surgeon would see such cases more often.

20. In addition, this witness commended the administering of two antibiotics as appropriate treatment by the plaintiff's GP and further added that the broad-spectrum antibiotics which were given were appropriate. Following the washout procedure, he described the tissue as devitalised and after a formal discussion where the patient was informed that the digit was non salvageable and would have affected the rest of his hand if not treated, it was decided to amputate the left index finger. He said that the amputation operation was successful in terms of the long term function of this patient's hand.

21. The witness explained that the neuroma at the stump of the finger occurs when the nerves are divided and they mushroom out and are very sensitive. He said that while pain is not always present, it is in this particular case.

22. This witness said that there was tenderness at the moment interfering with the patient's grip and hand function and that further surgery at a cost of €1,700 was necessary in respect of the neuroma conditions. This operation was not always successful and might require a second operation, in his opinion.

23. This witness confirmed categorically that even if the patient had been treated earlier it was highly unlikely that the finger could have been salvaged. This witness anticipated that the plaintiff's ability to work outdoors would be impaired given the poor mobility in his hand, stating that with any digit loss there is temperature intolerance and the hand becomes very cold and a person gets more tired and has more difficulty.

24. This witness stressed the high pressure nature of the injury has caused immediate damage. His professional opinion was that he could not see this patient going back to a major labouring job given the severity of the injury coupled with temperature intolerance.

Report of Dr. Mary McInerney, Consultant Psychiatrist

25. This Court received the report of Dr. Mary McInerney, Consultant Psychiatrist, of the 20th day of June, 2018 where she noted the plaintiff's disappointment in himself with regard to work, finding things monotonous at home and his preference to be back working. She diagnosed the plaintiff as having classic symptoms of adjustment disorder and advised mindfulness. She noted that the plaintiff had taken one such class and understood that he would be attending further classes and that he had attended a psychotherapist.

26. In her report she noted that the plaintiff was not back to full strength following his treatment for cancer. Working as a teleporter or working forklift controls which are on the right side of the machine were appropriate positions for him, in her opinion.

The expert evidence

Evidence of Mr. Tom Hayes, Civil Engineer

27. Mr. Hayes described himself in private practice as an engineer since 1986. He explained that there was a dangerous current leaking from a pin hole in a nut on the machine in question which gave 2,000 pressure PSI thereby ejecting a lance of fluid into tissue and he said this can develop, as it did, into a spurt. In his experience he had never come across such an injury from a nut on a machine but he felt that the simple movement of turning or steering something changed the pressure in the system.

28. In relation to the issue of the plaintiff not wearing gloves on the occasion of this accident, this witness gave evidence that the normal gloves would not protect a person from such a toxic fluid. He did add that pertex gloves are produced now which can handle

or protect from up to 10,000 PSI but are not commonly found and have only been developed as a product since 2016. Even if the plaintiff had been wearing the gloves he normally wore at work, this witness said they would not protect a person from such an injury as this.

29. This witness gave his professional opinion that neither appropriate training nor risk assessment had been carried out, stating that the obvious inference from this was that there was no risk assessment prepared.

30. This witness accepted that the plaintiff had been trained in the Safe Pass course and while reference was made to the plaintiff's training records, his professional view was that this was a management failure - the plaintiff ought to have been prevented from going to the leak. He was a groundsman and he would not have expected a groundsman to have any specific training for this situation. He felt that there ought to have been a generic risk assessment for the entire workforce with a specific risk assessment for the minor leak situation and that the employer should have protected the plaintiff, who did not have experience in driving or maintaining a tractor.

31. This witness noted that the plaintiff was standing on the offside of the tractor when he spotted a little leak of oil. In this regard this engineer felt that the literature suggests that if one stands more than four feet away, it is unlikely that there would be damage, but that inside four feet it is likely that there would be damage. This witness said that the plaintiff was rubbing quite close to the site of the leak but the appropriate step in such circumstances would have been to turn off the machine and get a mechanic. He also said that the defendant ought to have been aware of what the plaintiff was doing.

Evidence of Ms. Elva Breen, Occupational Assessor

32. Ms. Elva Breen, the assessor, described the plaintiff as having the capacity to earn €17.00 an hour as a general operative and had he not had cancer he might have re-trained or obtained other employment giving him €582.00 net of tax per week. The plaintiff's evidence was, however, that he earned between €350.00 and €380.00 per week and that his pre 2016 average net earnings were €357.00 per week. This Court notes that his average earnings for the year 2017 were €279.00 per week giving him a net of €14,521 or an average of €318.00 net per week over 2016 and 2017.

33. Ms. Elva Breen indicated that the plaintiff had passed his Leaving Certificate and had only worked only ever as a general operative. He had done hard labour since leaving school and this had vocational implications for him. His hand difficulties would mean he would not be fit to work in his pre-injury capacity. Prior to this he liked to be the man on the ground and she did not envisage him having a very "hands on role" as he had before. She described the cost of him getting the appropriate licence as between €1,500 and €2,000 and these are dealt with in the items of special damage.

34. Considering, his limitations, he would have difficulty getting the general operative rate of €17.04 per hour that he would be more in line for minimum wage type work. He accepted the physical difficulties he had as set out by his medical witnesses.

Evidence of Mr. Brendan Lynch Actuary

35. This witness gave evidence on behalf of Seagrave-Daly Lynch Actuaries and the report was prepared by Nigel Tennant, Actuary. Mr. Lynch was happy to stand over the contents of the report and had used the figures set out to him by Ms. Elva Breen, Occupational Assessor, in her report and also based his evidence on the assumption that the plaintiff would have work available to him. He assumed normal life expectancy and, further, that there would be some once off possible future costs as set out at p. 4 para. 1.

36. For 42 weeks' loss of earnings up to the 31st October, 2018, he noted the sum of €13,686. He noted that the plaintiff had social welfare in the sum of €4,538 from the 17th January, 2018 to the 20th March, 2018 and that his RBA certificate requires renewal, meaning that if he is given loss of earnings for the sick period there would have to be a payment due to be paid back to social welfare of €4,532.

37. Mr. Roy Finucane FCCA reported on his figures that if one were to work 40 hours a week, this averaged over 52 weeks giving €318 per week at €12 per hour. By contrast 40 weeks at €10 an hour would give an average of €288 per week, €12 per hour at 40 weeks would give an average of €339 per week and at €15 per hour would give an average of €404.

Evidence of Mr. McGann, defendant

38. He described himself as director of the defendant company and that he runs a 30-acre farm as well. He described his family situation and the fact that his son had a very serious accident. He had let the plaintiff go in the summer of 2017 but took him back after his son's accident, paying him €100 per day net of tax. He sorted out the tax for him and introduced into evidence a black book diary in which he kept an accident report for this particular accident. This noted that the accident had occurred at 3.34pm.

39. This witness said he went to the plaintiff who said his finger was slightly sore and said he advised the plaintiff to give it a little press to take the pressure off it. They then stopped at O'Dwyer's Hardware where the employee in the hardware googled hydraulic oil injuries at the request of Dermot McGann. It turned out that it was a bolt on the machine which caused the difficulty and he said he bought a replacement. His evidence was that the accident was caused by a pin hole leak in the bolt. He agreed that the plaintiff had spotted the leak when they were backing up the tractor.

40. This witness's evidence was that he offered to drive the plaintiff to the GP but that the plaintiff had made his own arrangements. The plaintiff did not work for a number of days after that but did work on the 6th November, 2017.

41. This witness gave evidence that he told the plaintiff that when they completed the jobs in hand that he was going to close down for a while and that he had no work for him, although the plaintiff disputes that he was ever given this information.

42. This witness explained that he was having insurance difficulties in relation to cover for this accident and that proceedings had been instituted both against his insurer and the broker concerned. An issue arises as between the parties on the evidence in that the plaintiff believed he noticed the leak and told the defendant. However, the defendant gave evidence that they both noticed it and that Dermot McGann was reversing and continued to do so. He said it was a gentle flow of oil at that stage which only increased when he locked the steering. He denied that the plaintiff had been asked by the defendant to find the source of the leak. In his evidence, although not pleaded, the plaintiff said, according to the defendant, to "back away" and the defendant argued that the plaintiff had kept his finger on the leak and he said that the plaintiff had hopped up on the tractor. This was noted as fresh evidence. He said that he believed the plaintiff to have been on the drawbar of the tractor. This was disputed by the plaintiff.

43. Of some significance is the fact that the defendant argues that he found the leak himself after that and that when the defendant had started the tractor, oil came out and then he stopped the tractor. Although this witness was cross-examined as to how he could have been driving a tractor yet arguably see the plaintiff put his finger on the leak at the same time, he said he was telling the court that he was looking out the window of the hatch as he backed up and that he could see everything from the window of the tractor.

44. This witness was asked why for the first time in the defence it was suggested that he looked down and saw the leak himself but that this was not put either to the engineer Mr. Hayes or to the plaintiff. The defendant argued that the plaintiff hopped on the drawbar and put his finger over the leak, which the plaintiff insisted had not happened.

45. This witness agreed that he did not say this in his note, that this all happened so quickly and that there was nothing that he could do. He said he did stop the tractor after the plaintiff cried out and that it was put to him that the plaintiff knew nothing at all about hydraulic oil injection. He argued that he did not tell him to put his finger on the leak and that it all happened in three to four seconds.

46. There was no explanation from the defendant as to why he had not written down his particular version being relied upon i.e. from the cab of the tractor he saw the plaintiff put his finger over the nut and that when he later got the new part he put the new nut on the tractor.

47. This witness had no real answer to the question put to him that it was odd he didn't put the date on his accident report. He argued that it was a couple of days later and he wrote it from his own notes. This witness offered to bring the plaintiff home after the accident and to bring him to a doctor but he said the plaintiff had made his own arrangements or did not accept his offer and that he didn't write down everything that happened on site.

48. A letter written to the insurers dated the 20th June, 2018 was opened to the court. This recites that he contended that they saw a tiny leak etc. from the testing oil. This witness said that the plaintiff did not indicate what he intended to do in terms of taking action in respect of the said leak that he just did it. He blames the plaintiff, whom he says told him to "stay reversing" and asserts that the plaintiff was standing up on the drawbar. He agreed that the action of turning the wheel to full lock would hydraulically give more pressure, confirming that turning the wheel caused the oil to be a full jet of oil.

49. This witness was asked about the inspection stage when the plaintiff's engineer was present and indicated that the impression was that the plaintiff saw the leak and alerted the defendant who asked him to check the source of the leak. However, the defendant indicated that he showed the assessor the faulty nut and that the plaintiff was not present at that stage. Significantly this witness did agree that a risk assessment is necessary for every job and operates for every site continuously. He said he handed in a method statement for every job. His view was that the risk of hydraulic oil was not identified and that he never thought it was going to happen and that it was an accident.

Findings of fact/liability

50. This Court prefers the evidence of the plaintiff to that of the defendant. The plaintiff was consistent throughout his evidence as to his version of how the accident happened and the court accepts his evidence in that regard. He was a general operative and was not trained either in driving or in servicing machinery. This Court takes the view that on the balance of probabilities, this accident happened as described by the plaintiff. In that context this Court asked the defendant at the end of his evidence who was in charge of the plaintiff and he indicated that he was the person in charge in relation to the plaintiff. He was the person giving the instructions and the defendant company was therefore obliged to provide a safe place of work and a safe system of work for the plaintiff. The plaintiff gave evidence that he had no knowledge whatsoever about hydraulic oil or its effects. The defendant was in control of the tractor in every respect and ought to have been aware of the dangers it posed to the plaintiff of a hydraulic oil leak, as being reasonably foreseeable. This Court finds that on the balance of probabilities, this accident occurred when Mr. McGann turned the wheel on the tractor to full lock and that this changed what was a low intensity leak into a jet, thereby causing significant injury to the plaintiff.

51. The defendant ought to have instructed the plaintiff to stand well back from the hydraulic oil leak as soon as he realised that there was such a leak and he should then have insured that a mechanic was called to deal with the problem.

52. Evidence was heard from the plaintiff's engineer and this Court accepts it, that even if he had had the normal protective gloves he wore to work, which were shown to the court, that these would have gone no way to protect the plaintiff from hydraulic oil in the circumstances of this accident.

53. The court finds that the plaintiff suffers and continues to suffer as a result of this accident which has caused and will cause a significant limitation on the amenities of life as set out in the plaintiff's evidence. Notwithstanding the medical and occupational therapist's evidence that the plaintiff will have difficulty continuing as a ground worker, this work would be the plaintiff's preferred option. The court must take into account the plaintiff's anxiety about this accident as expressed by him and on his behalf. His fear of medicines and doctors is a factor which he has to contend with going forward, his sense of failure being something he will have to live with as a result of this accident. This Court notes that the plaintiff is continuing under the care of a consultant pain specialist and is on Amitriptyline, described as essentially acting analgesic, deemed helpful when treating neuropathic pain conditions.

54. There is no doubt that the plaintiff will suffer a loss of opportunity as a result of this accident in that there is significant limitation on the types of work he can seek going forward. In the alternative, if he chooses to stay working as a groundsman, it is going to be very difficult for him to sustain his involvement in that type of work, given the evidence of the consultant plastic surgeon who described cold and extra tiredness also as factors inhibiting continuation with such work.

55. This Court accepts the plaintiff's version of events on the balance of probabilities. Given his status as a groundsman, it is quite believable that he would immediately alert his employer to a leak in the machine which he had noticed. The Court does not accept Dermot McGann's version of events when he says that they both saw the leak and that the plaintiff moved to take action before he could prevent him, nor does the Court accept that it is realistic to suggest that the defendant could see everything from the window of his tractor, nor do I accept that the plaintiff was standing on the drawbar as suggested.

56. In view of this Court, the plaintiff has not exaggerated his claim in any sense and the Court found the plaintiff to be truthful and understated. The medical evidence bears out that he has suffered significant injury and suffering which is ongoing.

57. This Court takes the view that the notes on which the defendant relied were not accurate and were prepared solely for the defence of this case.

The Law

58. It is clear that the plaintiff was exposed to a danger/hazard in his place of work by virtue of the defective machinery and management of same which caused the plaintiff to be contaminated with hydraulic oil. There was an onus on the Defendant to maintain safe machinery which was fit for purpose, thereby ensuring that no such injury would occur, and to supervise the plaintiff to ensure the safe operation of the machine.

59. It is quite clear that there was a failure to provide a safe place of work or a safe system of work for the plaintiff. There was an absolute failure to see and ensure that the plaintiff would be safe when carrying out his work and the defendant exposed the plaintiff to a risk and indeed to an injury and damage of which the defendant knew or ought to have known. The defendant failed therefore to take any or any adequate precautions to protect the plaintiff from the risk of injury.

60. There was no particular risk assessment carried out for the particular job in question on the day of this accident. There was a statutory duty imposed by the 2005 Act and Regulations thereunder and in particular s.19 thereof.

61. There is a duty of care of an employer to his employees and this is well settled law. The employer must take reasonable care for the safety of his employee/servant in all the circumstances. The question is as to whether in this case the employer took such steps as were reasonable and prudent in the all the circumstances. This Court notes the plaintiff's engineer's evidence as to the steps which the employer ought to have taken in the circumstances, i.e. stop the tractor, switch off the engine and call a qualified mechanic to inspect the tractor, identify the problem and repair the leak. Had the defendant done this he would have been following his own guidelines with reference to his own risk assessment policies which clearly state in relation to machinery servicing breakdowns etc. that "only qualified or authorised personnel are to switch out interlocks, remove fixed guards, clean, inspect or carry out maintenance work on any machinery". In addition, the defendant failed to carry out the daily maintenance checks on the tractor which ought to have been done to ensure that it was safe and trouble free. Above all, his own guidelines stated that there should not be an attempt to operate the machine and in a case where there was a supervisor to notify such a person immediately. In this case the defendant was supervising the operation in hand.

Conclusion

62. The medical witnesses and the evidence of Ms. Elva Breen, Occupational Therapist, all bear out the plaintiff's case. He has a significant injury which is permanent and he has pain which will require a least one operation and possibly a second one.

63. Subsequently, the claim for loss of earnings to date was withdrawn. In relation to future loss of earnings, while the plaintiff must mitigate his losses and while it seems to this Court that he is not unwilling to do so, nonetheless, his stated preference would be to continue to work as a groundsman as opposed to undertaking work as a driver, for example.

64. Given the evidence the Court has heard, in particular the medical evidence, the plaintiff's capacity to work as a groundsman is lessened and he therefore suffers and will continue to suffer loss of ongoing opportunity.

65. This Court assesses the general damages including pain and suffering to date and pain and suffering into the future and an amount of damages to cover loss of opportunity in the sum of €100,000. To this must be added €5,315.69 special damages giving a total of €105,315.69. This Court has had regard to the Book of Quantum (Revised).