Neutral Citation: [2017] IEHC 173

THE HIGH COURT

[Record No. 2015/9724 P]

BETWEEN

JAKUB NEUZIL

PLAINTIFF

AND

TESCO IRELAND LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 1st day of March, 2017

1. The plaintiff is seeking damages for personal injury, loss, damage, inconvenience and expense arising from an accident which occurred on 22nd December, 2014 at a distribution premises run by the defendant at Donabate, Co. Dublin. The plaintiff is and was an employee of the defendant at all material times.

2. The plaintiff was born on 16th January, 1986 in the Czech Republic, he then moved to Ireland after leaving school where he has worked for the last ten years with the defendant company as a warehouse operator. The plaintiff gave evidence of his normal work loading materials in the warehouse in question.

3. On the date of the accident the plaintiff described how he had begun his work at 6am taking full cages with loads onto a trailer. This was the work he did as a warehouse operative. Given that the premises would close for two days for Christmas, the plaintiff described the accident as occurring at the busiest time of the year when the workers were under pressure and needed to work fast.

4. At 9am on the morning of the accident, the plaintiff was asked to take up a different task. A trailer had been discovered to have empty cages in it which was not regular and it had to be emptied. In order to speed up the process of emptying this trailer a section manager who had been supervising loading on the day of the accident, took the plaintiff and another worker to remove these cages from the particular trailer so that the work of loading that trailer could begin. There was uncontroverted evidence that the trailer had a deadline for leaving the depot at 3.30pm that afternoon and the supervisor's evidence was that they had to go faster to meet that deadline.

5. Mr. Savic drove one LLOP (Low Level Order Picking Truck) with three cages out of this trailer. The plaintiff then reversed his LLOP into the trailer and attached three cages to same and he drove out onto a ramp and he began to lose one of the cages at the back of his load. The plaintiff gave evidence that after he had reattached the third cage he started to drive out again and was watching this cage behind him. He described watching quickly in front of him and still checking behind him to see if the cage was falling down again but described how he hit another machine with the side of the LLOP. The plaintiff described how the back of that machine pulled his leg out and its raised cage bit into his shoes and pulled him out of the machine. The plaintiff's evidence was that they had been told to move the cages to one side always and that the other stationary LLOP should not have been parked in his way. The plaintiff believed that his own foot was safe inside his own platform at the time of the accident and had he been given a high boot, the injury would not have occurred.

6. The plaintiff was administered first aid and was driven to the VHI clinic in Swords for x-ray and treatment and was obliged to remain out of work for a six week period following this accident. The plaintiff had been critical of what he said was a Welfare Meeting and Accident Pack Investigation on 9th January, 2015 both pages of which were signed by the plaintiff and by a Mr. William Dunne who also gave evidence. The plaintiff's evidence was to the effect that he feared losing his job when asked many times and having replied that he was not responsible for the accident, he finally gave in and agreed that he was responsible. Mr. Dunne denied that any pressure was put on the plaintiff and he had no authority to fire him. Mr. Dunne accepted that the plaintiff was a good employee.

7. The plaintiff agreed under cross-examination that he had seen Mr. Savic drive off the trailer but that he could not see around the corner and that he was looking to see the cages which had been slipping down behind him. While the plaintiff accepted the basic premise that he had to look where he was going, he said he had to check the cages behind which were falling down. The plaintiff's opinion was that when he was looking there were no obstructions.

8. The plaintiff agreed that he did training regularly although in effect he said that some of the training was quite casual. Various documentation was put before the Court in relation to health and safety training. Particular reference was made by counsel for the defendant to the "Mechanical Handling Equipment Safety and You Participant's Workbook" which had been filled in by the plaintiff and the Practical Test which was completed in relation to the LLOP on 2nd January, 2014. The plaintiff accepted that issues in relation to his driving of the LLOP were brought to his attention although they were minor issues. Counsel for the defendant outlined that this documentation demonstrated that the training was extensive and he would have been told to watch where he was going when driving.

9. The plaintiff indicated that he needed to look sideways at the time of this accident, that he could not see through full cages and that he wanted to get out from the ramp to avoid losing the cage and that he got off the ramp safely and started losing the cage on the flat concrete floor. The plaintiff described the situation as being the most pressured time of year and that what was normally a one person job was at this point involving three people and that there was pressure to clear the trailer fast to prepare it for loading. The plaintiff said that his role at the time of the accident was to make sure the cage was stable and that he wanted to turn to the front and off the ramp and he described claw like forks on the cages which can slip down and that he had to watch these cages as he was not on flat level. The last cage was a heavy cage with empty crates and he was under pressure and he felt he was not going at a speed which was too great in the circumstances.

10. Mr. Christophe Tabbard, the section manager, gave evidence that he was supervising loading on the day of the accident and he confirmed that empty cages had been found in a particular trailer and that they had to be moved so that that trailer could be filled with goods. The supervisor was in the trailer lining up cages in blocks of three for the plaintiff and Mr. Savic to take them off the trailer. Mr. Tabbard agreed that he did not notice the LLOP on the left which was stationary and agreed that he could not have seen it because he himself was still inside the trailer in question.

11. Mr. Marko Savic gave evidence in relation to where he had parked the particular LLOP he stated that there was no right or wrong

way to park in that particular spot. When the plaintiff arrived as he took out the first three cages with his LLOP, Mr. Savic said he saw the last cage falling off the plaintiff's LLOP and that Mr. Tabbard told the plaintiff to "watch it". Mr. Savic confirmed that if a cage is falling off you look back to ensure they do not fall off but he said the plaintiff looked back for too long and that he should have looked forward and glanced back, that he himself would make sure to drive forward and glance back. It was put to Mr. Savic under cross-examination that if he were to do matters by the book he should have parked the machine on the left with the forks down but he argued that he was only going to be stopped for a maximum of one minute. Mr. Savic did not accept that he had done anything wrong in the manner in which he had left the machine. Mr. Savic did not accept that they were under pressure although it was busy.

Engineering Evidence

12. Mr. Searson, engineer, gave evidence on behalf of the plaintiff. He described the docking level as a transition from warehouse to trailer and that there were two very long devices that go out and penetrate under the wheels of the cages and that to operate this one presses a button and that in raising up the casters the wheels are raised as required and he described them as fixed at one end and rotating. This witness described the maximum level of delineation as being a relatively small angle and that the docking crew adjust the level. When the angle is to the maximum there is a possibility of one cage sliding off. This witness referred to ties at the sides of the lorry as shown in photograph three and said that it would take no more than three minutes to manoeuvre the tying of these cages to the LLOP and that that would enable the driver to concentrate on driving. Illustrating his evidence with photographs eight and nine, he illustrated that in the event of the prongs or tynes being raised, that if they come in contact with another similar machine that there would be penetration. These are described as prongs and that they should always be put down and that the positive benefit if they are down is that they will not be any inflicted injury if there is a collision between two LLOPs.

13. Mr. Searson made reference to a training manual which showed that failure to lower the forks or the platform gives a five penalty point sanction for not lowering the forks on a safety basis. This witness felt that the cages if tied up would mean a proper system of operation and had the second LLOP machine not been abandoned this would have avoided the difficulty which arose. This engineer's evidence was to the effect that had the plaintiff's foot been whether fractionally in or fractionally out of the platform, it had become crushed between two items and this was his opinion of how the accident happened. His view was that the second LLOP machine ought to have been parked in a place for parking such machines because with the tynes up, penetration occurred.

14. Mr. Searson did not accept that the plaintiff was reckless but felt that the weight of the machines was a factor and he said when the plaintiff cleared the corner he should have looked but had the tynes been down there would have not been an injury. Mr. Searson also indicated that it was important to follow instructions in terms of a proper system of work and his conclusion was that the injury being a crush of the ankle was caused by the tines of the other LLOP which permitted penetration. Mr. Searson refused to accept the contention that the plaintiff had been reckless in not looking at his path of travel and he said that the plaintiff did not know there was a parked LLOP in his path and he referred to each cage weighing one tonne. This witness accepted that the plaintiff should have looked forward when he turned the corner but he said had the tines been down we would not be here and there would have been no injury.

15. Mr. Terry, consulting engineer for the defendant, gave evidence that his point was that the plaintiff was not looking forward that he had driven and he had turned right and left and had accelerated after a short distance and was steering and he said that he had a side saddle pose and that had he glanced forward he would have seen the vehicle. Mr. Terry indicated that there was a system in place and that the driver should have been looking where he was going. This witness did not accept that tying the cages to the vehicle would have prevented the problem occurring and it was not the practice anywhere and would attract its own problems. This witness accepted under cross-examination that it was an uncontested fact that this incident occurred at a very busy time of the year and that there were changes in the gradient between the trailer and the warehouse and changes in the position of the gradient and he agreed with this and he added that there was a pneumatic adjustment as items were unloaded.

16. Mr. Terry confirmed under cross-examination that the plaintiff had been asked by his manager to fix the cages to the LLOP machine and he agreed that this was the case and that there was one not properly secured cage. This witness also agreed that Mr. Savic had been told by the supervisor to watch the cages and that he passed on that instruction to the plaintiff. This witness agreed that the plaintiff was trying to watch the cages and that he collided with a LLOP. Mr. Terry disputed that the stationary LLOP ought to have been placed in a designated car parking unit which did exist in this massive warehouse but his contention was that these LLOPs have to stop every twenty seconds and that during the use of the vehicle there was no designed parking zone. Mr. Terry's evidence was to the effect that the plaintiff had solved his problem with the cages but then had taken both a right and left turn and had accelerated and that in exhibiting his care for the cages on his load, this driver in this instance left everyone else uncared for.

17. This engineer was adamant that there was no proof to say the injury would not have occurred had the prongs not been raised. While this witness accepted that tynes were raised and that the mechanism caused the injury but his view was that there was no case to be made for lowering the tynes on every occasion a vehicle stopped because they stopped every twenty seconds. This engineer did however accept that one should not leave a forklift with no load and with the forks protruding because it was not easy to see the forks and he agreed that one should not go off at a break or at the end of a shift and leave a forklift in such a situation although this was not the case here. It would be an impossible requirement to lower the forks every single time he pauses although accepting that the training manual required the lowering of the forks at the end of the shift. This witness did agree that it was the plaintiff's evidence that when he went into the trailer the second LLOP was not there and he assumed the way would be clear on his exit. This engineer did agree however that had the tynes been lowered the injury may not have occurred although the plaintiff should not have had his feet out either. It was put to him as a matter of probability if the cages were not an issue that the plaintiff would have been looking forward and he agreed with that and he accepted completely that the plaintiff had to look back to reset his cage but he made the point that the plaintiff controlled acceleration and should not look back while moving forward.

Legal submissions

18. The plaintiff's case is essentially that there was an obligation on an employer to have a safe system of work in place and a safe place of work and that the plaintiff is entitled to have competent employees. It was submitted that, in accordance with their engineering evidence, the cages should have been tied to the LLOP so that the plaintiff could have concentrated on where he was going and that the other LLOP should have been parked appropriately out of the way. It was also submitted that the plaintiff was under the control of his employer and followed the instructions of his supervisor, Mr. Tabbard to watch the cages.

19. Reference was made to the Supreme Court decision of *Lynch v. Binnacle Ltd* [2011] IESC 8 where it was held, allowing the appeal from the High Court, that the fellow employees of the appellant had committed a breach of duty of care to the appellant by absenting themselves at the time of the incident. The employer was vicariously liable for this breach and the employer bore prime responsibility for a safe system of work not being in operation. The appellant as an experienced handler of cattle should have appreciated the risks involved and contributory negligence would be assessed at 33% and that case was remitted to the High Court for assessment of damages. Fennelly J. cited the following passage from the case of *McSweeney v. J.S. McCarthy Ltd.* (Supreme Court, unreported,

28th January, 2000):-

> "It is well established that an employer is under a common law duty to provide his employees with a reasonably safe system of work. I know of no principle which exempts an employer from this duty only because their employee(s) are experienced, or know or ought to have known, of the dangers inherent in the work. Certainly, there are many factors which come into play in assessing whether, in the circumstances of the particular case, the system of work was reasonably safe or not. Among these are the experience of the workman concerned, the level of danger involved, its complexity and so on."

20. It was argued on behalf of the plaintiff that the defendant is vicariously liable for the actions of Mr. Savic who negligently left the LLOP in the position where the plaintiff crashed into it and leaving the forks up. It is accepted on behalf of the plaintiff that a person should generally watch where they are going when driving such a vehicle. Counsel for the plaintiff submitted that the system of work was flawed because the cages were falling and he was doing what he was told ("watch it").

21. The defence case in summary was that if the plaintiff had not spent time looking over his shoulder and in three separate directions the accident would not have occurred. The defendant argued that the plaintiff caused the accident by not looking where he was going and that he was not actually under extra pressure to the extent that he would not be required to look where he was going. Counsel for the defendant submitted that there was a safe system of work in place in the defendant's premises and that adequate training had been provided.

Liability
22. This Court accepts the plaintiff's evidence and as supported in fact by the evidence given by Mr. Tabbard the section manager that on the occasion in question they were under such pressure and that could not wait for Mr. Savic to do the job on his own and therefore brought the plaintiff with him to help. It seems to this Court that Mr. Tabbard was the person giving the instructions and he had assembled three people to do the work which would normally be done by one person.

23. This Court finds that the plaintiff was very direct in his evidence and did not exaggerate the circumstances at all. He described feeling under pressure and when he was told to "watch it" that is precisely what he tried to do and was conscious of that instruction. This manoeuvre was examined a number of times by this Court on CCTV. It is clear from the clips on CCTV that there was a vigorous effort being made to undertake the tasks in hand. It seems to this Court that given the circumstances the plaintiff was under significant pressure to obey the instructions as he received them and that he was under pressure to "watch it" and that was said. This Court notes that the plaintiff was under pressure to ensure that he followed his instruction and to avoid any cage decoupling from the LLOP as had previously occurred. The significant liability for this accident rests with the company in failing to ensure a safe system of work for this employee. It is particularly noted that the second stationary LLOP was parked right in his path and that as a matter of pure logic it should have been parked safely in a parking place given the speed at which this exercise was being conducted. The defendant is liable for the actions of the driver of the second LLOP who abandoned this vehicle in a stationary position directly in the path of the plaintiff was significantly responsible for this accident in particular in that he left he tines or prongs up and that this in fact caused this accident. This second LLOP ought to have been parked well away out of the path of the plaintiff and in a designated place. However, when driving forward the plaintiff ought to have been looking forward to a greater degree and this Court finds him 20% liable for this accident. This Court prefers the evidence of Mr. Searson engineer for the most part notwithstanding that the plaintiff is held to be 20% liable.

Quantum
24. All of the medical reports have been agreed and handed into Court. Dr. Grzegorz Sushy examined the plaintiff in relation to this right ankle, soft tissue injury at work on the date of this accident and noted that he was treated conventionally with gradual but slow improvement and an MRI dated 13th May, 2015 showed quite extensive bone oedema throughout the talus, predominantly lateral, and to a lesser extent in the posterior aspect of the distal tibia. This also showed bone oedema on the margins of the examination of the tarsometatarsal joints.

25. Mr. Gary O'Toole for the plaintiff examined the plaintiff and noticed some ongoing sequelae as a result of the accident and noted as of 29th September, 2015 that the ongoing sequelae can take over a year to settle down and while he did not expect long term consequences as a result of the accident and noticed that the main noticeable problem will probably be a decreased range of motion in his ankle. He did not expect this to improve much more than it has done at the moment. Dr. O'Toole noted that the MRI of 13th May, 2015 showed again some increased signal within his deltoid ligament and that he had subtle change within the complex of the anterior talofibular ligament. He also noted that this gentleman is not able to enjoy his previous pastimes of skateboarding and running but is able to cycle. He noted that his right ankle does not dorsiflex as much as the left ankle and the plaintiff's evidence was that he could not crouch to the point of having his heel touch the ground.

26. Mr. Michael Stephens gave his opinion in a report of 10th August, 2016 that this man sustained soft tissue injuries particularly to his medial deltoid ligament due to a crush injury and says that this would explain why his symptoms did go on for much longer i.e. that the deltoid ligament is slower to heal. He felt that there was some residual swelling or a rather thickening of the deltoid but that this should lessen in time and not give long term significant problems because the ankle is stable but that he does have objective restriction at the extremes of dorsiflexion which may reflect slight tightening of the deltoid ligament following the soft tissue injury.

27. In summary the plaintiff suffered as a result of this injury a loss of the amenities of life and indeed was out of work for six months. Medically he feels that the right foot is stiffer than the left and it is occasionally sore particularly noticeable with weather changes and if he walks a long distance.

Conclusion
28. This Court awards damages for pain and suffering to date in the sum of €58,000 and for pain and suffering into the future in the sum of €20,000. Items of special damage including loss of earning and medical costs are agreed at €5,806 giving a total award of €83,606 less 20% for contributory negligence giving €66,884.80.