

THE HIGH COURT

Record Number: 2009 No. 3770P

Between

John M. Thompson

Plaintiff

And

Pat Cleary trading as Pat Cleary & Sons Hauliers and Irish Cement Limited

Defendants

Judgment of Mr Justice Michael Peart delivered on the 15th day of March 2012:

1. The plaintiff is a very experienced heavy goods vehicle driver, held in high regard by the first named defendant who was his employer for about 10 months prior to the 20th July 2007, which is the date on which the plaintiff sustained a significant back injury when he fell from the top of a ladder which was fixed to the back of a large articulated cement container vehicle which he was operating on that date, and which allows access to the top of the vehicle.
2. Prior to his employment with the first named defendant which commenced around September 2006 the plaintiff had extensive experience as a truck driver both here and in South Africa. He is a South African national who came to this country in 2005 having obtained a work permit for continental truck driving. The first named defendant gave him a job in September 2006, and obtained the necessary visa to enable the plaintiff to take up his employment here. There has been some controversy around the fact that the plaintiff was never given employment as a continental truck driver, though the first named defendant had thought that might materialise. But that controversy is not relevant to liability for the plaintiff's accident and injuries, which is the first issue for decision.
3. The vehicle in question was a large articulated vehicle attached to which was tri-axle bulk cement container with an access ladder at the rear. The plaintiff was tasked with calling to Irish Cement at Ringsend in Dublin in order to fill the container with dry cement and then deliver it to customers of Irish Cement. By the date of this accident he had been in the employment of the first named defendant for about ten months. During the course of any particular day he would call to Irish Cement anything from three to five occasions, meaning that by the date of this accident he had drawn cement from the depot at Ringsend on perhaps 800 occasions during the 10 months or so since his employment commenced.
4. In order to fill the container with dry cement the plaintiff was required to position the container below a silo on the premises of Irish Cement at Ringsend having previously opened two lids or flaps at the top of the container, hence the necessity for the access ladder. Having filled the container the plaintiff would then need to drive the vehicle forward from the silo, park it up and ascend the ladder again in order to close the flaps, and also remove any excess cement which may be present at the top of the container. The removal of any excess cement from the top of the container was a necessary and strict requirement as, if it was not done, this excess would inevitably fall to the ground and cause a hazard either in the depot itself or on the road outside. Irish Cement would not permit a container to leave the depot unless all excess cement had been removed.
5. Irish Cement has available on site a shallow trough with some inches of water therein beside which there is a gantry. The normal procedure is for the container once filled with cement to be driven forward from the silos and down a short slope into the trough of water, where it would remain while the driver gets out in order to clean the container from a high gantry alongside the trough. This would be normally done by the use of either a high pressure hose or low pressure hose, both being available at the side of the gantry. But in dry weather conditions and where the excess cement is only slight, the driver may choose to ascend the access ladder at the back of the container and use a brush to simply sweep off any excess cement from the top of the container, and without the need to hose the container down from the top of the gantry provided. Where hosing down the wheels or side of the container the driver can use either the low pressure hose or the high pressure hose while on the ground and without ascending the gantry at all.
6. In damp or wet weather, brushing excess cement from the top of the container with the brush is not effective as the excess cement is damp and cannot therefore be simply brushed off easily, as it can when dry. In such conditions either hose may be used. The evidence has been that on the morning of this accident it was raining, but not heavily. The plaintiff stated that there was a drizzle of rain.
7. An important fact in the present case is that the plaintiff's employer had instructed him that on no account should the container be driven into the water trough since it was known that the design of the access slope into the trough meant that there was a likelihood that the diesel tank attached to the vehicle would come into contact with the ground as it descended into the trough, and there was a risk that the diesel tank could be damaged. Therefore, the plaintiff was required to adopt a different methodology in order to clean off excess cement from the container as he would be unable to use the high gantry in order to hose down the top of the container. It was necessary instead to park the container alongside the trough, and some yards away therefore from the high gantry at the trough, and carry out the cleaning process without the assistance of the gantry as it was not close enough to the container when parked on the far side of the trough.
8. Another possible option, and one which Irish Cement and Mr Cleary, the plaintiff's employer, say was perfectly feasible for the plaintiff, was to have reversed the container into the trough instead of driving it forward into it, as this would avoid the diesel container coming into contact with the ground at the entrance slope of the trough. However, that is not something which the plaintiff ever did, as there was risk that when reversing the tyres might rub off the sides of the slope and become damaged.
9. Yet another possible option, according to both defendants, would have been for the plaintiff to park the container along the other side of the gantry, which would have enabled the plaintiff to avail of the gantry even though the container was not in the trough. The evidence is that there is enough space along that other side of the gantry for this to have been done, unless of course there were other vehicles parked on that side, making it impossible to locate the container there too. In fact the plaintiff has suggested that on this date there were such vehicles, but I do not think that his recollection is sufficiently clear to establish that fact to the

point of probability.

10. Another important fact in the present case is that as far as both the first and second named defendants are concerned, it was made absolutely clear to the plaintiff that under no circumstances could the power hose be used for cleaning the container other than by using it from the top of the gantry or while standing on the ground. In other words, for the purpose of this case, it was absolutely forbidden for the plaintiff to ascend the ladder at the back of the container while carrying the power hose in order to use it while standing on or walking along the gangway which runs the length of the container. The best that the plaintiff can say is that he does not recall ever being told not to use the high pressure hose from the top of the container. He is quite adamant about that he was never told, either by Irish Cement or by Mr Cleary. Mr Cleary has stated that the importance of this cleaning operation and the strict compliance with the rule that the power hose may not be used on the top of the container is such that if any of his drivers was to breach the rules in this regard, or did not clean their containers prior to leaving the depot, Irish Cement would not permit them onto the site at all in the future. It was for this reason that, according to Mr Cleary, there is no doubt whatsoever that he fully informed the plaintiff of the rules in this regard.

11. Con Power, the very experienced and strict site supervisor at the Ringsend depot, has stated that without exception all drivers using this depot are instructed in very clear terms that under no circumstances may the power hose be used while standing on top of a container, and that the plaintiff would have been so informed when he first started to collect cement from that depot. Not unreasonably or unexpectedly he cannot specifically recall so informing the plaintiff, but he is adamant, and I accept it having heard him, that he would have done so. The reason for this rule is that because the pressure of water in the power hose is considerable (3 bar) it is dangerous to do so as the user could be thrown off balance and fall. This is a matter of absolute importance to Irish Cement from a health and safety viewpoint, and there are no exceptions permitted. Mr Power has made that very clear in his evidence. It is also the case that beside the gantry where the power hose is stored awaiting use, there is a red water pump housing with hoses attached, and on this red housing there is a warning on a large white panel with large black lettering which states: "WARNING: PRESSURE HOSE CAN NOT BE USED WHILE STANDING ON TOP OF TANKS - USE FROM GROUND OR GANTRY ONLY."

12. In my view the location, size and nature of this warning is entirely consistent with what Mr Power has stated as to the importance attached to the rule that under no circumstances should the power hose be brought by the driver up the ladder at the rear of a container and used while standing on top of the container.

13. In addition, and this is important from the point of view of the plaintiff's employer, the ascending of the ladder at the rear of the vehicle while holding this power hose in one hand, presents the obvious danger that it prevents the person carrying it up and down the ladder from maintaining at all times a three point contact on the ladder, thereby increasing the risk that the person may fall. This hose is two metres in length from the trigger to the end of point where the water emerges, and is attached to the water pump at the gantry by hosing that is heavier, stronger and less flexible than a normal low pressure garden hose such as the low pressure hose available on the site below the gantry. It poses an obvious risk to any person ascending or descending this ladder holding it in one hand.

14. I am also satisfied from the evidence given that during the first week in which the plaintiff was employed by the first named defendant, during which the plaintiff was accompanied to the depot by Mr Cleary senior on three days, and Mr Emmet Cleary on two days in order to show him the ropes, so to speak, the plaintiff was informed of this rule by both Mr Patrick Cleary and Emmet Cleary, his son, and of the danger of using it other than while standing on the ground or while on the gantry provided.

15. Bearing in mind that by the date of this accident the plaintiff had been working for Mr Cleary for about 10 months and had been visiting the depot to collect cement between three and five times per day, it is relevant to note that the day of this accident was the first occasion on which the plaintiff, according to his evidence, had ascended this ladder with power hose in hand, and it is noteworthy that no sooner had he reached the top that he was immediately spotted by the ever-watchful Mr Power and told in no uncertain terms to immediately descend. There is no evidence that upon being so told the plaintiff engaged Mr Power in any conversation to inquire why he was being told to get down. He appears to have understood precisely why this instruction was being given. It does not appear to have come as any surprise whatsoever to him, since he immediately began to comply. I am left in no doubt that the plaintiff was aware that what he was doing was not permitted.

16. On the date of this accident the plaintiff had filled the container with cement. But when he climbed up to the top of the container when the filling operation was completed in order to close the flaps through which the cement is poured into the container, he noticed, according to his evidence, that there was more than the usual small quantity of excess cement to be cleaned from the top of the container, and he considered that it was not possible to clean off the container by means of a brush. Since it was drizzling rain at the time, brushing would not in any event have been effective, according to the evidence which has been given.

17. After he had parked up on the far side of the trough, not being permitted to drive forwards into the trough, he went to where the low pressure hose and the high pressure hose were located at the foot of the gantry. He says that the driver of the previous container which had been filled had told him that the low pressure hose was not working. He did not check that this was so, and instead, immediately picked up the high pressure hose from the ground where it was lying. In any event the plaintiff says that the low pressure hose would not be adequate for the purpose of cleaning off the large excess of cement which was left on the container after he had filled up. Neither does he consider that using the high pressure hose while standing on the ground beside the container would have enabled the top of the container to be cleaned of the excess cement given the height of the container off the ground. He considers that in the circumstances presented to him on this morning he had no alternative but to ascend the ladder at the rear of the container with the power hose in order to clean the top of the container, as otherwise he would not be permitted by Mr Power, the site supervisor, to leave the depot. He says that on all other occasions he had been able to brush off any excess cement without using any hose, and that it was only the unusual amount of excess cement left on the container on this one occasion that forced him to use a hose, and for the first time since he started working for the first named defendant.

18. The fact that this hose was simply lying on the ground and not located at the pump where the warning sign is fixed in position meant, according to the plaintiff, that he did not see that warning sign. Neither did he have to go to the pump housing itself and on which the warning sign is affixed, in order to press the green button to turn on the pump as it was already turned on, presumably because a previous user of the power hose had not on completion of his hosing pressed the red stop button. This is said to account for the fact that the plaintiff did not see the warning sign on this particular occasion.

19. There has been no evidence given by the plaintiff as to how he knew that the power hose was turned on, but presumably the plaintiff must have pulled the trigger and discovered that the pump was turned on. However, it does not in my view get over the difficulty presented to the plaintiff by the fact that this was not the first time that he had been on these premises. In fact, as I have indicated, it appears that he had collected cement from this depot on about 800 occasions during the ten months since starting his employment. It seems highly improbable that on none of that great number of occasions on which he had collected cement at this

depot he did not see, or was not aware of, this very prominent warning, even if it is accepted, and it is not, that he was never informed verbally either by Mr Power of Irish Cement or by his employer or Emmet Cleary during his first week's induction training, that under no circumstances can he use the power hose from the top of the container. He must have seen the sign and, therefore, been aware of this absolute rule.

20. It goes without saying that in order to succeed in these proceedings at all, and before the question of any contributory negligence arises for consideration, the plaintiff must establish facts on the basis of the balance of probabilities, from which this Court can be satisfied that either or both of the defendants have been guilty of negligence.

21. In that task, the plaintiff is assisted by a Consultant engineer, Mr Flahavan. He has prepared two reports. He describes his investigations and reaches certain conclusions. Firstly, he concludes that this accident happened because the plaintiff fell "*due to the awkwardness of the lance and hose he was carrying*". Secondly he concludes that the wash bath or trough and gantry is unsatisfactory in so far as it prevents certain vehicles from entering it due to the sharp lip on the entry. Thirdly, he concludes that the use of the low pressure hose to wash the vehicles is less than satisfactory. Fourthly he concludes that Mr Power, the site foreman, should have taken the hose from the plaintiff before he descended the ladder, as this would have allowed the plaintiff to descend unencumbered by the hose. Fifthly, he concludes that as Mr Cleary, the plaintiff's employer, was aware of the risk of damaging the truck while entering the trough he should have advised the plaintiff not to use the power hose and lance when the gantry was not available to him. Accordingly, Mr Flahavan is of the opinion that both the first and second named defendants have a liability in this case.

22. There is little doubt that Mr Flahavan is correct in concluding that the plaintiff's fall was caused or at least contributed significantly by the fact that at the time he started to descend the ladder having been told to do so immediately by Mr Power he was carrying the power hose. It is reasonable to conclude on the balance of probabilities that the carrying of the hose impaired his ability to descend safely.

23. There is also no doubt that if the vehicle had been able to enter the trough the plaintiff would have been able to hose it down from the safety of the gantry as intended, and this accident would not have happened.

24. It is also possible that the use of the low pressure hose may not have been effective, if the amount of cement to be washed away was as great as the plaintiff states. Nevertheless he did not even attempt that method which would not have presented the same obvious danger to him if he ascended the ladder with that hose. He could have simply dropped that hose safely to the ground when descending rather than carrying it down the ladder. It is accepted that descending the ladder is a more hazardous manoeuvre than ascending.

25. In so far as Mr Flahavan has concluded that Mr Power should have assisted the plaintiff having told him to get down, by taking the power hose from him, the evidence is clear that in fact Mr Power was in his office at the time he first saw the end of the power hose appearing above the container, and that when he got to the front of the truck he shouted to the plaintiff to get down, and that by the time he had got around to the back of the vehicle the plaintiff had already fallen to the ground. There was no opportunity in my view for Mr Power to offer the plaintiff the sort of assistance which Mr Flahavan suggests would have been appropriate.

26. In so far as Mr Flahavan concludes that Mr Cleary was aware of the risk and should have advised the plaintiff that he should not use the power hose and lance when the gantry was not available, I am satisfied that he did in fact give that advice and instruction to the plaintiff. I am in no doubt about that having heard that evidence, even though the plaintiff denies that this instruction was given to him, either by Mr Cleary or by Mr Power.

27. If one accepts that this was the first occasion on which the plaintiff was faced with a situation where a greater excess of cement than normal needed to be washed away before departing from the depot, and if one accepts that the plaintiff was aware, having been so instructed, that under no circumstances was he permitted to mount the ladder at the back of the container carrying the power hose so as to wash the container down with the power hose, one must ask what alternatives were open to the plaintiff to address the situation short of disobeying his clear instructions. One must ask whether in those circumstances the plaintiff was left with no alternative but to disobey the instruction and expose himself to a risk, which if things went wrong and the plaintiff became injured as a result, the defendants or either of them are guilty of negligence and liable for the plaintiff's injuries.

28. The critical fact in this case, and one which Mr Flahavan had not been aware of when preparing his report, is that the plaintiff had been clearly and unequivocally instructed that under no circumstances was he to ascend the ladder to the top of the container with the power hose. In so far as he did so, contrary to that clear instruction, he undertook a risk to himself. He could for example have attempted to clean the container with the low pressure hose. If it is a fact that this hose was not operational for some unknown reason, and he had discovered that upon trying to use it, he could very easily have gone to the site foreman and explained that he was unable to use that hose, and sought advice from the foreman as to what alternatives he had. Mr Power may well have suggested parking up the container on the other side of the gantry so that it could be hosed down from the safety of the gantry. If there were vehicles in the way for that to be a viable option, Mr Power could easily have arranged for them to be moved so that the plaintiff could park alongside the gantry and use the power hose from the gantry. Alternatively, the plaintiff could have contacted his employer and explained that there was so much excess cement to be cleaned that he could not do so by using the low pressure hose, or that the low pressure hose was not working, and he could have sought advice as to what course he should adopt in order to address the situation. Mr Cleary was very familiar with this depot himself having carried cement from it on many occasions. He knew Mr Power also and could have contacted him and discussed the problem and arrived at an agreed solution.

29. It seems to me that the one thing which the plaintiff could not do, without assuming liability himself for the consequences, was to take the law into his own hands and do the very thing which he knew he was forbidden to do, namely carry the power hose up the ladder so as to use it in a way which was absolutely forbidden on safety grounds. Yet that is what he did, and he seeks to claim that it is the fault of his employer and/or Irish Cement that he injured himself by having done so. That makes no sense either as a matter of law or otherwise.

30. In my view, and I very much regret having to make this finding from the plaintiff's point of view, the plaintiff brought this unfortunate incident upon himself by disobeying a very clear instruction given to him by both his employer and by Irish Cement. That was the immediate cause of the accident. Behind that immediate cause of the plaintiff's injury is the undoubted fact that the truck in question could not enter the trough unless in reverse, and that the safety of the gantry was unavailable unless accessed from the other side of the gantry. But those factors are not the direct cause of the plaintiff's injuries. He could have explored other options besides doing the very thing which he knew was not permitted because there was danger involved, dangers which both his employer and Irish Cement were aware of and for that reason warned the plaintiff about. The plaintiff's Personal Injury Summons makes the usual series of pleas of negligence in cases of this kind, and without dealing with each individual plea individually and in detail, I can

say, based on the evidence I have heard and the conclusions which I have reached that I am not satisfied that the plaintiff has discharged the onus of proof upon him to establish negligence against either defendant. In layman's language I cannot identify anything which either defendant ought to have done which they did not do. On the other hand it is easy to identify what the defendant did that he ought not to have done.

31. For these reasons, I must dismiss the plaintiff's claim, and I will so order.