Neutral Citation Number: [2008] IEHC 412

THE HIGH COURT

Record Number: 2007 147 P

BETWEEN

IVOR LENDRUM

PLAINTIFF

AND
CLONES POULTRY PROCESSORS LIMITED

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 10th day of December 2008

1. The plaintiff is now aged 62 years and on the date of the accident giving rise to the present proceedings, the 22nd April 2003 he was aged almost 57 years of age. On that date he was employed by the defendants as a Dispatch Manager at its premises at The Enterprise Centre, Clones, Co. Monaghan, where his duties included loading up the defendant's delivery vans, at the rear of these premises, with poultry products for delivery to other parts of the country.

2. The defendant's said premises is one of a number of business premises located at this Enterprise Centre. That Enterprise Centre has access thereto from the south off a road referred to as 98 Avenue by means of a wide unmarked gateway, and at the north end, as of the date of this accident, had an exit gate leading to a roadway in the direction of Rosslea Road. Both gates were open and this facilitated access and egress for staff employed by businesses, including the defendant company, as well as providing a shortcut used on a regular basis by members of the public generally wishing to go either to or from 98 Avenue to Rosslea Road. It is uncontested that this shortcut was used regularly by members of the public generally, though it is likely that most of such persons would be local, since one would need to know that this short-cut was available through the area.

3. I am satisfied that the roadway in question through the Enterprise Centre, and particularly the area of roadway at the rear of the defendant's premises where this incident occurred is a public place for the purposes of the definition of 'a public place' contained in the Road Traffic Act, 1961. That conclusion is confirmed, in so far as it requires to be, by the evidence of Garda Sheridan who stated that if a person was driving on this section of roadway while drunk he/she would be charged with the offence of drunk driving.

The accident

4. As I have stated, the accident giving rise to the present claim occurred at the rear of the defendant's premises while the defendant was engaged in loading product into the back of a van belonging to the defendant company which was parked roughly opposite the rear entrances to the premises. The laneway on which the van was parked was part of the roadway which I have described. It is approximately 11 metres in width at that point, and the van in question was parked in a position opposite these entrances and against a low wall on the other side, meaning that in order to get to the van in this parked position on this occasion it was necessary to cross to the far side of the roadway. There is no evidence before me as to whether the defendant required the van to be parked on the far side of this roadway when being loaded, rather than on the near side, but that may be dictated by the fact that on the near side between two of the three entrances into and out of the back of the premises, there is a large green Portakabin which is used apparently as a canteen.

5. The plaintiff has described how on this date at about 4pm he was situated at the back of the van, loading produce from the defendant's premises. The van had its doors in the open position, which meant that the doors were open to 90 degrees only, and not therefore protruding beyond the width of the van itself. He has described that as he was carrying out his tasks at the back of the vehicle he became aware of a car approaching from behind him, and from the noise of the engine formed the view that it was travelling very fast in his direction. In other words the car was approaching at speed from behind him. Because of this speed he was fearful that the driver of the car would not be able to safely negotiate the roadway ahead of this van, and could hit a wall. It appears from photographs of the locus that once the driver would pass this van it would need to negotiate its way onto a narrow piece of laneway which veers up to the right in the direction of the exit onto Rosslea road. The plaintiff feared that it might collide with a high wall instead of accessing this narrow stretch of laneway. In any event as the car passed the van the plaintiff came out from behind his van to the outer side in order to get a view of how the car progressed to the laneway. He said that he took a couple of paces towards the front of the van and looked forward in the direction in which the car was travelling in order to see what would happen. In fact the car made its way successfully into the narrow laneway, and proceeded on its way. At that point the plaintiff turned around again, or to use his own words "wheeled around", in order to return to the back of his van to continue the loading of product.

6. He described how, having turned round to return to the back of his van he suddenly found himself on the ground with his right foot trapped under the right wheel of another car which had come up the lane from the same direction as the previous car. He had not heard that car approaching and had not seen it. He simply found himself on the ground with his foot trapped. The driver of that car got out, enquired of the plaintiff how he was, and thereafter got back into his car and reversed his car in order to release the plaintiff's foot from under the front wheel. He got up and hobbled as best he could but was in a lot of pain. The car drove off, and he did not make a note or otherwise remember the registration number of this car. I do not have the impression that this car departed in any manner which would suggest that it was escaping or leaving at speed. I have certainly not been given such evidence. The plaintiff did not take a note of the registration of this car, though he believes it was an English registration plate, since it was yellow but was not a Northern Ireland number, and was not an Irish registration.

7. I will come to the precise injury sustained in due course.

8. The plaintiff has given evidence that he was never given any instruction by his employer as to how to conduct himself safely in the lane when loading up a van with product. Neither was there any health and safety notice.

9. Robert Burke, an engineer, of Herr Engineering & Design, has given evidence in accordance with his report. He has stated that at the locus of this accident and in the area of the Enterprise Centre as a whole, there are no warning signs, speed limit warnings, or anything which would warn a car driver that care must be taken because of the presence of people working in the area, either at the entrance to the Centre or anywhere within it.

10. He is of the view that measures could and should have been taken by the plaintiff's employer to warn passing motorists, in particular those who pass at the rear of its premises, to ensure as far as possible the safety of its employees who may be working there. These measures would include the designation of a particular area for loading up vans in that area, ensuring that the area was kept clear, the placing of appropriate signage to warn drivers to take care, the placing of a speed limit for cars of about 10 mph, the placing of speed ramps, as well as ensuring that the gate at the exit point onto Rosslea was at all times kept closed to prevent this route being taken as a short-cut for traffic to that road.

11. He is also of the view that the defendant should have provided high visibility clothing for its employees working in this rear laneway in order to increase the visibility of those employees while working in this area. He is of the opinion that the failure to take such measures means that the plaintiff was required to work in an unsafe environment, and that the defendant's failures in that regard constitute a breach or breaches of the Safety, Health and Welfare at Work (General Application) Regulations 1993.

12. When cross-examined by Eoghan Fitzsimons SC for the defendant, he accepted that there would also have been an onus on the plaintiff to take reasonable care for his own safety while working. In that regard Mr Fitzsimons suggests that the only reason that this accident happened was that the plaintiff "*went on a frolic of his own*" by wanting to observe the first vehicle as it proceeded past the van, and that this was not part of his work activity, and was simply a traffic accident at the back of the premises, especially since it occurred in "*a public place*".

13. Joseph P. Osborne, a consulting engineer, who prepared a report for the defendant, gave evidence in accordance with that report. He disagrees that the measures suggested by Mr Burke would have prevented this accident from occurring, and opined that it was simply a traffic accident and unrelated to any defects in the safety of the workplace or system of work. He is of the view that the defendant company simply has the use of these premises and that it is the Enterprise Centre which has the responsibility for matters such as road signs and other warnings to drivers passing through. He also believes that any drivers passing through this way for a shortcut would be local people and would already be aware that there may be people working at the rear of this premises. He believes that there is no need to have any signage in the roadway for such drivers. In his report he states that the blame for this accident must rest with the driver of the car and to an extent the plaintiff, and that "*it is difficult to know …… what Clones Poultry Processors could have done to avoid the accident*".

Conclusion on liability
14. The first thing to be said is that there is no evidence before me in these proceedings that any complaint exists in relation to the manner in which this vehicle was being driven on the area at the rear of the defendant's premises, either prior to or at the time of making contact with the plaintiff's foot and causing him to fall to the ground. The plaintiff has said that he did not either hear or see the car before this happened. The claim being made is in these proceedings is only against the defendant company, the plaintiff's employer for failing to provide a safe place of work and/or a safe system of work. There has been evidence in the case that a second set of proceedings has been commenced against the MIBI seeking damages for negligence by an untraced driver, but it has been agreed between the plaintiff's solicitor and the MIBI that the present proceedings would be determined ahead of the latter.

15. The personal injury summons in the present case recites a large number of allegations of negligence in this regard, but it unnecessary to set them out in detail. They can all be conveniently dealt with as a claim related to a safe place of work and safe system of work.

16. Mr Fitzsimons has suggested that no warnings or high visibility clothing would have served any purpose in preventing this incident from occurring, and that the sole cause of the plaintiff's injury was the plaintiff's own action - one outside the course of his employment, by deciding to come away from the back of the van in order to watch the progress of the first car which was travelling at speed. He suggests that if the plaintiff had simply ignored that and continued to do his work at the back of the van in the normal way, this accident would not have happened. For this reason, he suggests that this accident did not occur during "*the course of his employment*".

17. I believe that to be an unduly restrictive meaning to "in the course of employment". The plaintiff's work required him to work in this laneway in order to load up the defendant's product into the delivery van, and the defendant must be taken to have been aware that drivers were in the regular habit of using this area as a shortcut to the other road. That means that the defendant must be taken to be aware that such traffic would on a regular basis pass the point where the delivery vans were parked. The plaintiff was at work on that occasion, and engaged upon his duties, albeit that for a moment or two he looked at a passing car. I do not think that such a brief moment when his mind was on something which was not strictly work-related is sufficient to take the accident outside "the course of his employment".

18. In my view the defendant as employer was under a duty to take care not to expose the plaintiff to any danger at work which was reasonably capable of being anticipated, and this required them to take reasonable steps to ensure the plaintiff's safety while at work in the lane. It seems to me that no steps whatsoever were taken in that regard. Nevertheless, it is also the case that some of the measures identified by Mr Burke as appropriate to have been taken would not have had any impact in preventing this particular accident. There is a lack of causation therefore in relation to some of these suggested measures.

19. However, I feel that a reasonable precaution to be taken by the defendant would have been to provide the plaintiff with a high visibility jacket for use while working in the laneway on which there would be passing cars on a regular and known basis. That would have made the plaintiff more visible to the driver of the car as he turned back to return to the back of the van.

20. In addition, the absence of warning signs of any kind will have contributed to the driver failing to be alerted to keep a lookout for men or women working at the rear of the premises.

21. On the other hand, while speed ramps may well be a good idea generally, and a reasonable precaution for the defendant to have in place outside their premises in this Enterprise Centre, their absence on this occasion is irrelevant to causation since there is no evidence that the car in question was travelling other than very slowly. If that were not the case, it is probable that the plaintiff would have heard the car, as he had heard the first car, and in addition it is unlikely that the driver would have simply been able to stop his car trapping the plaintiff's foot in the process. The same comment applies to the erection of speed limit signs.

22. But I accept that in circumstances where the defendant's employee is required to load up a van with its product at the rear of the premises, and in an area where traffic is known to pass, it would be a reasonable measure to have a clearly designated and safe area for the van to be located while being loaded, and if possible in a position on the near side of the laneway, rather than against the low wall on the far side. That was absent in this case. It was reasonably foreseeable that an accident of this kind might occur if appropriate precautions were not taken to protect the plaintiff.

23. In these circumstances, I am satisfied that the defendant company breached its common law duty of care to the plaintiff by failing to ensure that this workplace, which includes this area for the purpose of this case, was safe in all the circumstances. I need not conclude the matter on the basis of any breach of statutory regulations.

Contributory negligence
24. That said, however, I am satisfied that the plaintiff must bear a significant portion of the responsibility for this unfortunate occurrence. He also was well aware of the existence of passing traffic on this laneway. He was a mature and responsible employee,

occupying the post of dispatch manager, as well as having other general duties. He must be taken as being aware that he must take reasonable care for his own safety while working in that environment. He accepts that he need not have moved to the outer side of the van from the back of the van in order to watch the progress of the first vehicle which passed him. It was not that act which was lacking in care for his own safety, but rather the manner in which he appears to have simply turned round to return to the back of the van, without apparently checking whether it was safe to do so, or anticipating that there might be a vehicle approaching. He failed to either see, or even hear the approaching car. It seems to me that he made that manoeuvre without any thought for any possible risk from cars which he was aware were in the habit of passing on that stretch of laneway. He ought to have taken more care for his own safety to ensure that it was safe to return to the back of the van. His failure to do so contributed significantly to this accident, even though his employer might also have taken greater care to ensure that his workplace was safer.

25. I believe that the plaintiff must be found to have contributed to this accident to the extent of 40%.

The injuries
26. In the immediate aftermath of this accident, the plaintiff was in considerable pain having had his foot trapped beneath the wheel of the car. He was able to hobble, however. His employer brought him to hospital, where it was discovered that he had sustained a fracture base of his 5th metatarsal in his right foot. No plaster cast was applied, but rather a light ankle support. His recovery from this injury was somewhat slower than had at first been anticipated, as the bone had been slow to unite, but by 17th September 2003 he is reported as being fully healed, and he returned to work on the 6th October 2003.

27. His social and leisure life was disrupted. He is a keen cyclist and was unable to pursue that interest until the following spring. He was unable to play golf or go hill-walking for about one year.

28. The only ongoing symptom is that sometimes in cold weather he has discomfort but he makes little of this.

Damages
29. I assess general damages for past pain and suffering in the sum of €28000. As the plaintiff has fully recovered he will have no future pain and suffering. Special damages have been agreed at €2700, making a total of €30,700. From this figure I must deduct the sum of €12,280 in respect of 40% contributory negligence, leaving a sum of €18,420 in respect of which judgment will be entered against the defendant.