THE HIGH COURT

[2013 No. 9253 P.]

BETWEEN

DECLAN HOMAN

PLAINTIFF

AND

ETMAR LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Cross delivered on the 20th day of April, 2018

1. The plaintiff was born on 17th November, 1963. At the time of this accident, he resided in Co. Offaly and was employed by the defendant, a company owned by his brother, delivering goods especially furniture goods on behalf of various retailers to customers.

2. On 13th December, 2011, the plaintiff was engaged in the delivery of a mattress to an apartment block in the Sandyford Industrial Estate, Dublin. This delivery was the fifteenth or sixteenth delivery made on the day and it was approximately 5pm in the evening. The plaintiff drove a lorry, hired by the defendants from another company and he was assisted, on the day, by another brother, Daniel. The plaintiff together with his brother manoeuvred the mattress straight out from the back of the lorry onto the ramp which was level with the back of the lorry some 5ft or more up from the ground. The plaintiff's brother was at the lorry end and the plaintiff was at the back end of the ramp when the plaintiff's brother took one hand off the mattress to lean down to get the pendant or remote control which controlled the ramp in order to lower it to the ground and at that time a very severe gust of wind blew the mattress off the ramp together with the plaintiff causing the plaintiff to be injured.

3. The case was opened on basis of three allegations of negligence, first that the plaintiff was not adequately trained or trained at all in the method of removing the mattress from the lorry, second that the defendant ought not to have required the plaintiff to perform this manoeuvre given the weather conditions which were blustery at the time and third, that there was a defect in the lorry in that the pendant or remote control to operate the tailgate and lower it to the ground was in this lorry situated on the ground rather than being bracketed on the side of the lorry which positioning caused the plaintiff's brother to have to lean down in order to take hold of it.

4. There was a full defence pleaded including a plea of Act of God.

5. After the opening of the case, counsel on behalf of the defendant objected in that the personal injury summons pleaded that the plaintiff was obliged to unload the mattress without help or adequate equipment or training and in the particulars, inter alia, pleaded failure to provide the services of an assistant and further by letter for particulars, the defendant queried whether the plaintiff was working with the assistance of a co-employee at the time, and the query was answered, to the effect, that *"the plaintiff was working with the assistance of Danny Homan…the plaintiff's brother who was not on the truck at the material time as he was on the ground"* and counsel on behalf of the defendant further objected that it was not until, by letter of 7th March, 2018, that the plaintiff advised that the case would be made that the truck provided was unsuitable in that there was no bracket to place the pendant used for the operation of the tail lift thereby causing Danny Homan, the plaintiff's brother, to release one of this hands from the mattress to reach to pick up the pendant remote control from the truck floor.

6. Counsel on behalf of the defendant contended that, in effect, a new case was being made on different facts. He did not contend that there was any specific prejudice to them other than the failure of the plaintiff to properly describe the case in the pleadings and consequently claimed an entitlement to amend the defence and plead the Statute of Limitations due to the alleged new case now being made. The defendant also contended that there was specific prejudice in that insofar as a case was now being made on the opening that the truck was defective (in that the pendant was not positioned in a bracket on the side of the truck but was on the ground which required the plaintiff's assistant to reach down) it would, if made in good time have enabled the defendant to investigate that claim and if necessary join as a third party the supplier of the truck.

7. On hearing the application, the court directed that the plaintiff furnished amended pleadings to clarify how the accident occurred, on the basis as opened by counsel and gave liberty to the defendant to file an amended defence and at the same time, the court directed that case which the plaintiff sought to make alleging that the truck was defective because the pendant was not fixed to the side, could not be made as the defendant could have considered the issue of joining the owner of the truck as a third party and it would be unfair to allow the plaintiff to make an entirely new case which was, in effect, only suggested some days before the case was opened.

8. Accordingly, the court allowed the case to proceed on the allegation of a failure of training and the alleged negligence in allowing the operation to be performed in adverse windy conditions.

9. The case proceeded a total of five days and evidence was heard from the plaintiff, his brother and assistant, Daniel Homan, Mr. Paul Romeril, Engineer, Dr. O'Hara, the plaintiff's general practitioner, Mr. Brazil, a consultant in Accident and Emergency Medicine and Ms. Ciara McMahon, Adult Guidance Vocational Consultant on behalf of the plaintiff. Other medical evidence was agreed on behalf of the plaintiff. Evidence was also adduced on behalf of the defendant from Mr. Colm Maguire, Engineer and Mr. Frank McManus, Consultant Orthopaedic Surgeon.

10. On application on behalf of the defendant it was agreed that submissions be made to the court but by further agreement between the parties, these submissions were in written form which were handed into the court.

Liability

11. The plaintiff's cause of action on the basis the court allowed it to proceed, is essentially the same as the case originally made and is in no way barred by the Statute of Limitations and submissions to that effect by the defendant are rejected.

12. The plaintiff had unloaded or assisted in unloading some fifteen loads from the lorry prior to the accident without difficulty from the wind. On this occasion, the plaintiff parked the lorry in an entrance alleyway parallel to the entrance to the block of apartments as this was the only feasible place to do so. This was accepted by the defendant's engineer. Neither the plaintiff or his brother had

complained to the management about the wind previously in the day and as the plaintiff said, the gust took him by surprising and blew him off the tailgate.

13. The meteorological report which was admitted in evidence indicates that it was windy that day with some high gusts but the general weather was not exceptionally bad. As the defendant's engineer, Mr. Maguire, said it must have been a particularly strong and unusual gust to blow the mattress and the plaintiff off the tailgate.

14. I do not accept the proposition that the defendants were, in any sense, negligent in requiring the plaintiff to work on the day in question. The plaintiff had made no complaint about the wind and indeed there was no reason for him to do so because the actual gust was exceptional and caught the mattress nearly at right angles as it was being reversed out of the truck, blowing it and the plaintiff off the tailgate. The defendant does not have a duty in the circumstances to be watching the weather at all times and indeed, given the sudden nature of this gust, no reasonable system would have resulted in a prohibition of the plaintiff doing the task. On that aspect of the case, the plaintiff must fail.

15. I do not have to adjudicate on the issue of the pendant being placed on the ground rather than bracketed on the side of the truck as this is no longer part of the case. However, for the sake of completeness having heard the evidence I have come to the conclusion that whether the pendant was on the ground or on a bracket on the side of the wall of the truck, the plaintiff's brother or assistant would have had to have reached down or over to it and thus releasing one of his hands from the mattress in order to manoeuvre the tailgate down. If the plaintiff's assistant was reaching over to a wall bracket to get the pendant when the sudden and unexpected gust of wind occurred, the accident would have happened in any event. Thus, any allegation that the truck was defective in a negligent manner must be rejected.

16. The only matter that concerns me is the issue of training.

17. It is common case accepted by Mr. Maguire on behalf of the defendant and by Mr. Romeril on behalf of the plaintiff that the tailgate in its position is a platform which requires the plaintiff to work from a height. It is not and cannot be disputed that there is a statutory duty under the Safety and Health Acts for a worker who is working from a height from which he is liable to fall that he must be adequately trained.

18. Section 8 of the Safety, Health and Welfare at Work Act 2005 requires every employer to ensure "*so far is reasonably practical*", the safety, health and welfare of his or her employers and this duty was defined by Charleton J. in *Quinn v. Bradbury* [2012] IEHC 106, as being:-

> "*…to take such measures as are reasonable and practicable in the circumstances … in order to ensure that no employee is injured while at the workplace…The ordinary duty of care can be fulfilled by guarding against hazards; by the issuing of a warning (in the rare circumstances where a warning is sufficient); by the provision of proper plant and equipment; by appropriate training; by requiring the implementation of appropriate safety measures with commensurate discipline; and by establishing and enforcing a sense of awareness as to what may occur should the procedures and precautions for avoiding accidents not be followed. The Court accepts that as a matter of common law and in accordance with s. 8(2)(i) of the Act of 2005 that some hazards can never be totally eliminated. The aim must be to make a hazardous task as safe as it can reasonably and practicably be made.*"

19. Furthermore, s. 9 of the 2005 Act requires an employer to furnish information in relation to hazards, safety, health and welfare at work and the risks identified by risk assessment including protective and preventative measures.

20. Article 97 of the Safety, Health and Welfare at Work (General Application) Regulation 2007, require an employer to ensure that work at a height is carried out only when weather conditions do not place safety and health of an employee at risk and the 2007 and 2012 General Application Regulations set out at Article 98, the duties of employers in terms of risk avoidance when working at heights and s.

> (d)(ii) refers to the fact that when measures at taken to avoid risks of falling that these measures do not eliminate such risks, the employee must provide additional training instruction or other suitable and effective measures to prevent so far as practical any employee falling a distance liable to cause personal injury.

21. None of the above statutory duties were complied with by the defendant. It is further the case as agreed by Mr. Maguire and as stated by the plaintiff and his brother and emphasised by Mr. Romeril that the plaintiff received absolutely no training in relation to the work being carried out. The defendant's safety statement is confined essentially to safety of office work and does not refer to any safety requirements or advice or training in relation to the loading or unloading of furniture including mattresses from heights or otherwise.

22. It is clear, therefore, that the defendant is in breach of statutory duty on a number of counts in their failure to have any training of the plaintiff, failing to assess the risk etc. as specified above.

23. The issue in relation to training and Breach of Statutory Duty, however, is whether these breaches were in any way causative of the accident that occurred. Mr. Maguire on behalf of the defendant says that, in effect, it must have been a very significant gust of wind which caused the accident and that it was impossible to predict where such a gust was coming from and though he accepted that the only training, the plaintiff received was in manual handling and lifting of loads such as boxes and that this was not satisfactory, Mr. Maguire gave opinion that the lack of training was, in effect, irrelevant to what was, in effect, from a legal point of view an Act of God.

24. This is essentially also the essence of the submissions on behalf of the defendant in this case.

25. The defendant's submissions, and indeed the case being made by the defendant was one which when the case was opened and when the evidence was being given by the plaintiff in person, I strongly suspected would be persuasive, notwithstanding the undoubted breaches of statutory duty and the extremely unsatisfactory nature of the plaintiff's training. As Mr. Romeril said, no training would have prevented the gust of wind.

26. However, the evidence of Mr. Romeril was very significant in this case. Mr. Romeril said that rather than bringing the mattress straight out from the lorry, the safe method of unloading a lorry such as this was for the operatives to make a 90 degree turn so that the broad surface of a mattress would be facing the ope of the lorry and only the side of the mattress would be presented to where the wind was coming from. Mr. Romeril's evidence was that the plaintiff ought to have been trained to turn the mattress at right

angles to the ope irrespective of the wind direction. Mr. Romeril said that were a gust of wind to come from behind the truck rather than from its side, the effects of such a large gust would have worst to been to blow the mattress towards the ope of the truck rather than off the side. Mr. Romeril was of the opinion that any risk assessment would have identified the potential hazard and training would have required the plaintiff to put the mattress at a 90 degree angle.

27. I accept Mr. Romeril's evidence had the plaintiff been adequately trained and stood at the side of the tail lift holding the side of the mattress as right angles to the ope of the lorry rather than standing at the end of the tailgate with the full dimensions of the mattress open to the wind, it is unlikely that this accident would have occurred.

28. I have come to the conclusion, the accident occurred due to the defendant's breach of statutory duty and negligence and their failure to assess any risks and in their failure to train the plaintiff and to warn him of the hazards, especially working from a height like this and in particular, in the failure of the defendants to train the plaintiff to turn the mattress at right angles after exiting onto the tailgate.

29. The method of unloading a lorry by turning the load to a 90 degree angle is supported by health and safety literature as identified by Mr. Romeril and accordingly the defendant failed to provide a safe system of work and a safe place of work and failed to carry out a risk assessment of the work at height and manual handling dangers of unloading the mattress, their failure to train the plaintiff and in particular their failure to train the plaintiff in safe methods of manual handling mattresses in the circumstances.

30. That the particular gust of wind was unpredictable does not result in a successful defence of Acts of God on behalf of the defendant. The purpose of proper training and proper procedures in unloading equipment from heights is to reasonably prevent accidents including accidents caused by extreme weather conditions as is clearly specified in the Regulations. The fact that the defendants have been found not liable for requiring the plaintiff to work in the weather conditions prevailing at the time does not excuse them from their liability for their failure to have any adequate or indeed any training regime or instructions for the plaintiff to take into account possible extreme weather conditions.

31. Contributory negligence has been alleged against the plaintiff in particular for the parking of the truck where it was parked but having heard the plaintiff and indeed Mr. Maguire, the defendant's engineer, it is clear that the plaintiff had no practical alternative and contributory negligence cannot succeed against him.

Quantum

32. The plaintiff was thrown off the tailgate onto the ground some considerable distance away from the lorry and injured his back. Initially, he thought he was merely bruised and completed the delivery. A few days later, he went to his GP complaining of low back pain which worsened over time. He was x-rayed in Tullamore Hospital and these x-rays revealed no bony injuries and was diagnosed with soft tissue injury and given analgesics. His pain worsened and in February 2012, his GP sent him for an MRI scan which indicated a longstanding degenerative changes in his thoracic spine from T4 to T8 and some wedging of T5 to T6 vertebrae also of longstanding without any nerve root impingement. The plaintiff had not previously suffered from any significant back pain though he did have twinges from time to time but these had always cleared up rapidly. He was advised to take physiotherapy but instead went to an osteopath who provided some ten or more sessions. He suffered sleep disturbance and limitation of straight leg raising.

33. He was sent to see Mr. Brazil, Consultant in Emergency Medicine, by his solicitor in April 2013 and identified his pain levels at three out of ten mostly but from time to time this pain would increase on any activity. The plaintiff was criticised by counsel for the defendant for not returning to the orthopaedic unit in Tullamore Hospital where he was initially x-rayed but as no evidence of bony damage in x-rays was discovered, it was not unreasonable for the plaintiff to pursue the route of Mr. Brazil.

34. The plaintiff used to play sports, train youngsters in basketball and was reasonably active before the accident but his range of movement became markedly restricted and he has not been able to return to this activity. He was referred by Mr. Brazil to Dr. Chambers in the Mater Hospital for pain management who saw him in June 2014, and he complained of aching pain in his low back. Another MRI scan was performed with similar result. The plaintiff at a late stage underwent physiotherapy with Claire Lyons, this did not help very much and Dr. Chambers gave him a number of steroid injections. The initial injections gave some relief but further sessions gave less and less relief and he was prescribed various medications and pain patches. He has recently taken up aquatherapy.

35. Mr. Brazil identified the plaintiff as having chronic back pain and indicated that he was not fit to go back to work and indicated he probably would not be fit to return to his previous work and that his chances of recovery were decreasing over time and Mr. Brazil was of the view that he will have ongoing pain on a daily basis but should be able to do some other work. The plaintiff indicated that in more recent times he had made some recovery and improvement which he ascribes to aqua-therapy and Mr. Brazil was encouraged by this. The plaintiff's GP, Dr. O'Hara indicated that most persons with such an injury would recover after six to twelve months and Mr. Brazil agreed with this but indicated that a number of persons do not fall into this category.

36. When giving evidence, the plaintiff was clearly in pain which could be seen from his facial expressions and would shift to stand from time to time and then sit down again. Mr. McManus, the defendant's surgeon, noted this and regretted that the plaintiff had not any physiotherapy up to the time he first examined him and stressed that mobility was the key to recovery. Mr. McManus was of the view that the plaintiff has a degenerative disease and also symptoms suggestive of soft tissue injury to his spine. On examination by Mr. McManus, the plaintiff was reluctant to move but Mr. McManus in his evidence concluded that this was because of pain.

37. It was put to the plaintiff in cross examination that he was guilty of "*gross exaggeration*". This evidence was not accepted by Mr. Brazil or indeed Mr. McManus when he gave evidence on behalf of the defendant. Mr. McManus had sight of the other defendant's medical reports from Mr. McQuillan who examined in January 2014 and January 2016, and Mr. McQuillan did indicate "*a significant degree of elaboration*" but this evidence was not supported by the doctors who gave oral testimony and was not supported by the reports from Dr. Chambers, the plaintiff's pain consultant which reports were also admitted. Mr. McManus concluded that the plaintiff's actions at his medical examinations were due to the pain he was in at the time.

38. If the defendant's allegation of "*gross exaggeration*" had been accepted by the court, it could have resulted in the entirety of the plaintiff's case being dismissed. A party ought not hurl serious allegations of bad faith when they knew or ought to have known that these allegations were not supported by the expert they intended to call to give evidence and especially where that expert gave an entirely benign explanation for what he and Mr. McQuillan found. As no obligation was made on behalf of the plaintiff in this regard, I have consequently only assessed the case as one of compensatory damages.

39. The plaintiff has not been able to work since the accident and I accept that to be the case. However, the plaintiff has been able to go on a number of continental holidays including one to Orlando, Florida and these holidays were paid for by his second wife. The plaintiff went to Sitges in Spain in January 2018, to Orlando in October 2017 and to Tenerife in April 2017 and to Corfu in January

2017 and he also went on to a number of other holidays financed by his wife.

40. The plaintiff was not asked about his pain on the flights to these destinations but neither did he volunteer that the flights caused him particular pain and I must concluded, therefore, as Mr. Brazil indicated that the plaintiff indeed has chronic pain but that on most occasions his pain is on the range of three out of ten and though chronic is not usually severe but I also accept the pain does flair up from time to time to a severe level.

41. The plaintiff would be well advised to follow an exercise regime as per medical advice. He has now taken up of swimming which is beneficial but also he should undertake other exercises in order to loosen up his muscles. Neither Mr. Brazil or Mr. McManus was optimistic that the plaintiff will make a full recovery. However, the plaintiff is not making the case that he has suffered catastrophic injuries but that he has longstanding chronic pain.

42. Whereas every person is obliged to mitigate their loss, it does not seem to have been brought home to the plaintiff that he ought to have utilised early mobilisation and physiotherapy rather than going down an alternative medical route but the plaintiff is not to be faulted in contributory negligence for this fact.

Special Damages
43. The amounts of the special damages have been agreed subject to liability. The out of pocket special damages including future medication amounted to €30,086.98 which I accept.

44. The loss of earnings to date is agreed figure of €160,241 which is reasonable. The plaintiff's absence of work to date is reasonable and he had an excellent work record prior to the accident and I believe he is entitled to the sum in full.

45. A figure for total loss of earnings into the future of €292,153 has been agreed subject to liability.

46. I have come to the conclusion that such a figure assumes that the plaintiff will never work again. I note the evidence from the plaintiff's vocational assessor, Ciara McMahon, which I accept that the plaintiff's opportunities for work given his limited educational attainments and his injury are limited and as she says:-

> *"why one is slow to conclude that a man of his age would not have returned to the workforce in some capacity given his ongoing symptoms of both physical and psychological nature coupled with his limited education and work history, Mr. Homan is likely to encounter significant difficulties in terms of competiveness and further commercial employment".*

47. Accordingly, I will assume that he will be able to do some work in the future and will reduce the gross claim for future loss of earnings by one third and note that a further reduction for future loss of earnings on the principle of Ready v. Bates should also be made, and accordingly, I will allow a figure of €160,000 for future loss of earnings. The total of the said special damages come to €350,327.98.

General Damages
48. The plaintiff's condition is chronic but it is not of the debilitating nature of some such back injuries.

49. I have previously expressed my concerns about the revised book of quantum and its objectivity given that a significant proportion of the statistics that go into it are compiled from insurance company's records and it is unclear at the least as to whether an insurance company's assessment of the amount of reduction a defendant allowed, given liability factors would be the same as that which a plaintiff's advisors would suggest. General damages might of say €100,000 might be paid which the insurance company calculated to be say 50% of the full value of a case but had the plaintiff's solicitor been consulted, he might have suggested that the €100,000 represented say 33% of the full value. The other, of course, could equally be the other way around but despite referring to this on a number of occasions in various decisions no satisfactory explanation has been given to me of the methodology employed in the current "*Book of Quantum*" which would allow me to have great confidence in it.

50. In any event, the injuries must be classed in a moderately severe category due to the persistence of same and I will assess general damages as follows:-

Pain and suffering to date €50,000

Pain and suffering into the future €30,000

Conclusion
Special damages €30,086.98

Loss of earnings to date €160,241

Loss of earnings into the future €160,000

Pain and suffering to date €50,000

Pain and suffering into the future €30,000

Total €430,327.98

51. I have been furnished with an RBA figure for the total loss of earnings figure of €50,230.82, which should be deducted from the total leaving a net award of €380,097.16, which I believe is fair and reasonable in all the circumstances.