THE HIGH COURT

[2009-7435P]

BETWEEN

THOMAS FANNING

PLAINTIFF

AND

PHILIP MYERSCOUGH AND JANE MYERSCOUGH

DEFENDANTS

JUDGMENT of Mr. Justice Sean Ryan delivered on the 27th March, 2012

1. The plaintiff was born on the 24th August, 1949 and is now 62 years old. This case is about an accident that befell him in the course of his work with the defendants on the 4th March, 2008. The accident happened at Baroda Stud, which the defendants owned and operated at the time. They have since moved to a different location.

2. Mr. Fanning was getting down from a tractor and had one foot on the ground and one on the last step when, as he claims, the door swung suddenly against him and caused him to lose his balance and fall down to the ground, resulting in a serious injury to his left foot.

3. He sustained a fracture of the calcaneus bone of the left foot which was treated by immobilisation in a plaster cast and the fracture went on to heal after two months. However, the plaintiff continued to complain about leg pain which became chronic. He was assessed by orthopaedic and pain specialists and was ultimately referred to Prof Tierney, a consultant vascular surgeon. He had pain relieving injections and medication. He underwent physiotherapy and he uses orthotics and a walking stick. He had underlying vascular disease and required inpatient hospital treatment by angiogram and then angioplasty to treat a thrombosis behind his left knee. There is a risk of recurrence of this problem which if it happened would be more difficult to deal with and there are statistically small risks of serious further complications.

4. The plaintiff is unable to return to his previous work and this employment and earning options are very limited. He had hope and intended to continue working until age 70 years.

5. The case was fully defended and the issues that arise are as follows:

> (i) Liability: the question in this respect is whether the door- restraining strut, which operates hydraulically, was defective at the time of Mr. Fanning's accident.
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> (ii) Was Mr. Fanning guilty of contributory negligence in alighting from the tractor by walking forwards out of the cab and down the steps rather than by turning towards the cab and coming down backwards?
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> (iii) Can the serious vascular condition that affected the plaintiff's lower left leg be attributed to the accident?
>
> (iv) The impact of the injury on Mr. Fanning's working and earning capacity for the period when he would have been expected to continue working.

Liability

6. It was not disputed by the defendants that a slamming door on the tractor could have caused the plaintiff to lose balance and fall to the ground. The debate focused almost entirely on the condition of the restraining strut on the left-hand door of the tractor cab. This operates hydraulically to hold the door in position and to prevent it from swinging unrestrained. If it was working properly, the accident could not have happened in the manner described by Mr. Fanning. His evidence was that the strut had not been operating properly for a period of months prior to the accident and that he had complained about it to his superior, Mr. Tim Woodlock. Mr. Woodlock denied that the plaintiff had ever reported the defective strut to him. He said that if he had done so, it would have been a very simple matter for him to mention it to the mechanic, Mr. Doyle, and get it fixed. Mr. Doyle came around regularly to fix machinery, including the tractor, and he also carried out servicing on a regular basis. Mr. Doyle confirmed this in evidence and produced invoices showing the work that he did on the tractor between September 2007 and March 2009.

7. On 23rd March, 2009, Mr. Doyle submitted an invoice for work that he did on this tractor after the door had been damaged. The work included straightening the door, replacing broken glass and fitting new struts to each of the doors. As to why both struts were replaced, Mr. Doyle explained that they came in pairs and there was no call to withhold one of them until such time as it might be needed and that it was his practice to fit a new pair of struts if he got them. Mr. Woodlock's evidence was that the door had been damaged shortly before this work was done in March 2009. However, he did not have any direct knowledge as to whether the strut had been interfered with at the time of the damage to the door.

8. It is possible, of course, that the strut was working properly up until it was damaged in the incident that gave rise to Mr. Doyle's visit to fix the door and replace the glass. That is the inference that the defendants put forward. Another possibility is that the strut was already damaged and that when Mr. Doyle was fixing the door in March 2009 he also replaced the defective strut as well as the non-defective one on the other side.

9. I have direct evidence from the plaintiff that the strut was not working for some time before the accident. That would date the malfunctioning of the door apparatus to some time in 2007. Mr. Fanning says that he mentioned that to Mr. Woodlock and Mr. Woodlock denies that he did so. Leaving this reporting question aside for a moment, it is clear that the strut needed to be replaced in

2009 and for that purpose a pair had to be ordered but there is no direct evidence other than that of the plaintiff as to the timing of damage to the strut. Specifically, there is no evidence to say that the strut was damaged in the incident that affected the door in 2009.

10. If the strut was, in fact, defective, then the door could slam, as Mr. Fanning testified. The defective door would constitute a breach of statutory duty in the provision of safe equipment and that would be sufficient for the plaintiff to succeed in the circumstances of the case.

11. As between the versions and the proper inferences to be drawn, I am slow to conclude that Mr. Fanning has manufactured this story of the defective strut for the purpose of fabricating a case. There is no direct evidence to establish that the strut was damaged in the 2009 incident when the door glass was smashed. Mr. Woodlock in his evidence first said that he thought the strut was bent or damaged in the later incident that gave rise to the repair work carried out by Mr. Doyle, but he retreated from that to the position that the stmt, he believed, must have been damaged, otherwise it would not have needed to be replaced.

12. With regard to reporting, I think, on balance, that Mr. Fanning probably did tell Mr Woodlock. But I very much doubt that Mr. Fanning's mentioning the matter to Mr. Woodlock was sufficiently important to give rise to a visit from Mr. Doyle to repair it. It did not come over as a serious complaint that needed to be addressed immediately or promptly.

13. As to Mr. Doyle's visits and why he did not repair the strut on occasions when he serviced the tractor, it may be, I think, that his focus would have been on the particular task or service rather than on a general appraisal of the vehicle and all its parts.

14. My conclusions on the allegedly damaged door strut are:

(i) The strut was defective at the time of the accident;

(ii) The plaintiff mentioned it to Mr Woodlock;

(iii) It remained in a damaged state until the door was fixed by Mister Doyle in 2009;

(iv) Neither Mr Woodlock nor Mr Fanning thought it was a serious danger;

(v) The defendants were in breach of their statutory duty to provide safe equipment and appliances and to ensure that they were maintained in that condition.

15. In light of these conclusions, having regard to the issues raised between the parties, the plaintiff must succeed.

16. The onus on an employer seeking to establish contributory negligence is higher when the employee has proven breach of statutory duty as compared with common law negligence. There is of course a duty on every employee to take care of his own safety.

17. The plaintiffs consulting engineer Mr Romeril acknowledged that Mr Fanning alighted from the tractor the wrong way. Instead of turning to face the cab of the vehicle and retreating down the steps while holding the safety handle provided for that purpose, Mr Fanning walked forward out of the cab. This meant that it was difficult if not impossible for him to keep hold of the handle and most unlikely that he did so.

18. The offending door was to his side at first and then behind the plaintiff so that he was unable to see it. Mr Fanning's heel was on the step of the vehicle. It is obvious, and confirmed by Mr Romeril, that the impact force of the tractor door would have been light. This means that Mr Fanning was in a precarious, unbalanced position such that a slight blow was enough to knock him to the ground.

19. The plaintiff was aware of the two relevant circumstances, being the loose door and the correct way to go down steps. The latter point is so obvious that I believe an experienced man like Mr Fanning might well have considered it to be insultingly patronising if he had been told how to get down out of a tractor.

20. I assess contributory negligence in this case at 50%.

21. The continuing medical problems that the plaintiff is experiencing appear to be attributable to the sequelae, in the form of nerve damage, of the thrombosis that formed in his lower leg. The connection of this condition to the accident is somewhat tenuous and there is no clear evidenceon it. Prof Tierney was careful and scientific in his approach and concluded as a matter of probability that the connection was established. Trauma could produce a thrombosis in a person with Mr Fanning's vascular condition and the temporal coincidence of the leg symptoms tipped the balance. I accept Prof Tierney's evidence.

22. The defendants left Baroda Stud a short time after the accident and moved to a new location in Co Wicklow. Mr Fanning's employment with them ceased in September, 2008 in circumstances that gave rise to a claim for unfair dismissal which it is unnecessary to explore. If he had not been injured and disabled, I do not think he would have continued in their employ in the new stud.

23. Having regard to the evidence of Ms Paula Smith, vocational assessor, and that of the plaintiff and the medical evidence, my view of the plaintiff’s employment and earning capacity is as follows.

(i) There was no reality in thinking that Mr Fanning, who does not drive, would have commuted to work in the new stud;

(ii) He hoped to continue working until age 69 or 70;

(iii) He would have got work on and off as a farm or stud worker on a seasonal basis;

(iv) At his age he was not going to get a permanent position;

(v) As he got older, he would encounter more difficulty in doing work, in getting work and in staying in good health- one indicator of this last point is Fanning's vascular condition.

24. In accordance with these findings I assess damages as follows:

(i) loss of earnings past and future: €90,000- (this is one half of the actuaries calculation that made on the assumption of full employment up to Mr Fanning's intended retirement);

(ii) general damages in the past €50,000;

(iii) general damages in future €30,000

(iv) other expenses (orthotics etc) €2500.

25. This comes to €172,500 and the plaintiff is entitled to 50% of that because of my finding as to contributory negligence, so there will be judgement in the sum of €86,250.