

THE HIGH COURT

[2014 No. 10613 P.]

BETWEEN

ZDENEK HRDLICKA

PLAINTIFF

AND

ANDREW BEST ROOF LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Cross delivered on the 24th day of June, 2016

1. The plaintiff is a carpenter originally from the Czech Republic who arrived in Ireland in September 2005 and is married with three children.
2. The plaintiff brings these proceedings in negligence against his former employer as a result of an incident that occurred at his then place of employment on the 9th December, 2013, when he was allegedly assaulted by another employee, Z., of the defendant and sustained significant injuries including a potential extremely serious injury to his right eye which was hit with a hammer in the affray. Fortunately the plaintiff's sight was not affected in the long term though at one stage this was a real possibility.
3. Separate proceedings have been initiated by the plaintiff against his alleged assailant.
4. The plaintiff claims against his employer not on the basis of vicarious liability but for the failure to supply a safe system and place of work on the basis that the employer knew or ought to have known of the danger that would be posed to the plaintiff by Z. and failed to take any proper steps to avert it.
5. Not surprisingly there is a total conflict of evidence on the facts between the plaintiff and various witnesses who gave evidence on behalf of the defendant.
6. The plaintiff alleges that some few weeks prior to the index incident he was working at a site in Naas for the defendant when a colleague Z had an argument with him following which Z. telephoned the plaintiff and threatened to kill him.
7. The plaintiff further alleges that a colleague S. (who was not available to give evidence) rang the principal of the defendant company, in the plaintiff's presence, after the incident in Naas to advise him of the threats posed by Z. and of his fears and the fears of the plaintiff in respect of Z.
8. Nothing happened for some weeks as Z. was away on his annual holidays but on 9th December, 2013, the plaintiff was sent to work at another site in which the defendant's were providing carpentry services in Monkstown, Co. Dublin and he was surprised to see Z. on the site and there was an early morning confrontation with Z. in which the plaintiff alleges Z. repeated his threats. Whereupon the plaintiff says he telephoned his managing director who was not on site to indicate that the threats were real and he requested to be taken off the site and to be put to work elsewhere. The managing director declined indicating that they were working on different floors and that the plaintiff was to telephone the managing director if anything happened.
9. During the day the plaintiff heard Z., who was originally from Georgia, speaking in Russian, a language which the plaintiff understood and referred to the plaintiff to fellow workers as a "dumb ass" and a "condom".
10. The plaintiff further alleges that at approximately 5pm at the conclusion of the work day he was going towards his car in the car park and he passed Z. on the pathway who was with another person and he heard Z. saying to this other person in Russian words to the effect "look at that condom". The plaintiff then turned around and words were exchanged and the plaintiff alleges that he was hit on his head with the pallet which Z. was carrying which caused an injury and a mark to his forehead and then the plaintiff punched Z. causing him to fall to the ground and Z. picked himself up and reached for a hammer and hit the plaintiff over the eye with the hammer causing him his injuries.
11. The plaintiff alleges that these injuries were caused, inter alia, by the negligence of the defendant in its failure to provide a safe system of work for the plaintiff in its failure to adhere to the warnings in the knowledge that Z. posed a threat to the plaintiff and that an assault or injury to the plaintiff was likely to occur without intervention by the defendant.
12. The plaintiff was the only witness on his behalf, the medical reports having been sensibly agreed by the parties.
13. There is no doubt but that the plaintiff sustained as stated a very nasty injury when he was hit with a hammer on his right eye, he suffered bruising and swelling a diminution of his visual acuity in his right eye, abrasions, watery eyes, he sustained double vision by happily he made an excellent recovery and his vision has returned.
14. The defendant's account of the incident was entirely different. Z. gave evidence to the effect that after an issue of when the contact in Naas, there was a disagreement as Z. was of the view that the plaintiff was not up to the job that he was required and had "zero personality" and in particular he was not prepared to take any instructions from Z.
15. The plaintiff did not agree that Z. was in any way his superior but I accept the evidence from the defence that in fact Z. was placed in a position of acting or temporary foreman while the managing director was not on site. This position was probably not fully communicated to the plaintiff but is a clear source of misunderstanding between the parties. The plaintiff considered he was equal in status to Z. and Z. considered he was the plaintiff's superior.

16. Z. agrees that he had a telephone conversation with the plaintiff after another employee S. seemed to have turned against Z. and Z. suggested to the plaintiff that he was "*telling lies*" to S. but Z. denied any threats to the plaintiff. Z. then telephoned his managing director indicating that the plaintiff was not up to the job and was not taking instructions.

17. On 9th December, Z. said he arrived at Monkstown and he was immediately confronted by the plaintiff who said to him are you going to smash my face or who is going to smash whose face, it is not clear precisely what was said and Z. said that that conversation ended with him suggesting that the plaintiff leave him alone. He agrees that he did refer to the plaintiff as a "*condom*" during the day but he did not address the plaintiff in those terms and he was not particularly aware that the plaintiff would have heard him.

18. Z. then says that at the close of the day, he was walking with a colleague, A., as the plaintiff passed by then he did refer to him in the similar derogatory terms, the plaintiff turned round and spoke to him and then Z. alleges the plaintiff punched Z. a number of times causing him to fall back. His hoodie was placed by the plaintiff over his head causing Z. to be blinded. He was playing around with his hand which may have contained some tools, he fell to the ground dropping his tools and the plaintiff was kicking him and the hoodie was over his face that he could not see anything and when he was dragged to his feet by his colleagues, the plaintiff was not anywhere to be seen and Z. could not say how the plaintiff came to have his injuries.

19. The defendant's case was supported by the evidence of N., who was a Czech employee who knew Z. for some two weeks before the incident but did not know the plaintiff. He did hear Z. saying to him about the plaintiff in Russian the derogatory language in the terms previously referred. He says he saw the fight from a distance of about 40m and his first sight was the plaintiff walking towards Z., Z. had his toolbox on his shoulders. He said the plaintiff reached Z. and he saw that he grabbed Z's jacket and that the plaintiff was the first person to strike the other and he pulled Z's jacket over his head and started kicking Z. when he was on the ground and Z. from the ground was swinging tools around and the matter only lasted a few seconds. N. agreed that it was only three weeks previously to his giving evidence that he was reminded of the incident and asked to give a statement.

20. The final witness for the defendant was A., the managing director, who is a Ukrainian who had employed Z. and engaged him as a probationary foreman. Z. was on the site in Naas towards the end of October 2013, when Nick was there and that on 31st October, he got a phone call from Z. indicating that Z. was not happy with the plaintiff who would not take instructions from him. That Z. did not advise him of any threats from anyone to anyone on a physical basis and that he denied getting any call from S.

21. A. then said that Z. went on holidays and on the morning of 9th December, 2013, he got a phone call from the plaintiff from the site in Monkstown to tell him "*that something is going to happen*" and that Z. is "not nice" and A. said that Z. would be working at a different floor and that he could take instructions on the day from the site foreman rather than Z. and that if anything of concern were to occur, the plaintiff was to give A. a ring.

22. A. denied any previous incidents involving a fight and he indicated he did not consider nor it would occur to him that a fight would take place.

23. A. also says that on 9th December, he had, in fact, no other site available for work but he did not believe that any physical incident was going to happen. He was aware that workers frequently utilise foul language to each other on building sites but that nothing serious comes from that fact.

24. After the incident, both the plaintiff and Z. were let go from the defendant's employment. What Occurred?

25. It is clear that in Naas, an incident occurred causing "bad blood" between the plaintiff and Z. The incident probably arose from a misunderstanding as to Z's position as temporary foreman of which the plaintiff was unaware. In any event, I believe that some threats were made by Z. to the plaintiff. I should observe that the plaintiff is a larger, taller and heavier person than Z. The plaintiff said that he has put on weight since the incident but I believe he was always the bigger man.

26. I also find that this incident between the plaintiff and Z. caused some friction to previously good relations between Z. and S. and that S. did phone A., his managing director, and conveyed concerns to him in the presence of the plaintiff. I fully accept that A. now has no recollection of that telephone conversation and probably did not think that anything unusual was being told to him.

27. I also find that on the morning of 9th December, there was a further confrontation between the plaintiff and Z. The nature of the confrontation suggests to me that the plaintiff was correct that some threats were being made. I do not see if the confrontation was merely about issues of authority that the plaintiff would have rung A. and as A. confirmed, indicated to him that something bad was going to happen.

28. In relation to the assault itself, it is common case that when the plaintiff passed by Z., Z. made a derogatory remark about him to his fellow worker. This remark caused the plaintiff to turn around and to "*square up*" to Z. It is unfortunate that Z's companion did not attempt to cool matters at the time but I accept the plaintiff's evidence that Z. did strike the plaintiff on the forehead with his mallet. This explains the indentation mark on the plaintiff's forehead. This element of the confrontation was presumably not seen by the witness N. who was 40m or so away and it was immediately followed by the plaintiff throwing a number of punches at Z. causing him ultimately to fall to the ground and drop his tools.

29. The witness, N., must be incorrect when he implied that the injury may have occurred when Z. appeared to be on the ground playing around with possibly a hammer or something in his hand. I accept the evidence both from Z. and the plaintiff that Z. had his hammer in his hand at the time when he was still standing up or had raised himself up to his feet. The blow to the plaintiff is unlikely to have been caused while Z. was on the ground as suggested by N. I also accept that at some stage, in the incident, the plaintiff had the whole of Z's jacket over his head so as to temporarily blind him.

30. What undoubtedly occurred, however, was that Z. did use a hammer which hit the plaintiff and caused the significant injuries complained of.

The Law

31. As stated above, this is not an action in assault. I am not judging the rights or wrongs of the plaintiff's actions vis-à-vis Z. and Z's actions vis-à-vis the plaintiff from the point of view to who or what extent was the guilty party. My analysis above, however, indicates that I believe that the first blow was struck against the plaintiff and that the injury to the plaintiff was caused by a hammer being wielded in a dangerous manner by Z.

32. This action, however, is an action in tort, not alleging vicarious liability for the actions of Z. but alleging direct negligence as

employer. The defendant, as employer, clearly has a duty of care to the plaintiff to provide a safe system of work and a safe place of work. If the defendant is or ought to be aware of specific threats to the health and safety of their workers, then the employer has duty to take reasonable steps to avoid the injury.

33. These propositions are, in no way novel or in no way create new obligations so that the principles as set out in *Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84; or in *Whelan v. Allied Irish Banks plc* [2014] IESC 3, need not concern us. The issue in relation to liability is what the defendants knew or ought to have known about the likelihood of injury to the plaintiff and whether they could have reasonably done anything to avoid it.

34. As stated above, I have found that the defendants, through their managing director, A., were advised of previous threats by Z. to the plaintiff and were further advised on the morning of the incident that these threats had been repeated.

35. In *Elmontem v. Nethercross Limited t/a Roganstown Golf and Country Club and Max Usi* [2014] IEHC 91, Herbert J. in his judgment delivered 28th February, 2014, considered the liability of the defendants in the circumstances where the second named defendant was a head chef of the first named defendant "without warning struck the plaintiff who had remained sitting behind his desk battering him violently about the face and head with both fists". Herbert J. rejected the plea on behalf of the plaintiff that the employer were vicariously liable for the assault by their employee on the plaintiff adopting the test of "close connection" between the acts complained of and the nature of the plaintiff's employment as set out by the Supreme Court in *O'Keeffe v. Hickey* [2009] 2 I.R. 302.

36. Again, as stated the plaintiff in this case is not making any claim based upon vicarious liability.

37. In relation to the direct liability of the employer in the Elmontem case above, Herbert J. accepted liability on the basis that the employer through its general manager:-

"...was aware that the second defendant had on a previous occasion in a fit of temper caused physical injury to a fellow employee in the course of their joint employment. I am satisfied that Mr. Brady knew or ought to have known that there was a very real risk, not just a mere possibility, that this could occur again, if for any reason the second defendant's temper became aroused and that this exposed his fellow employees, including the plaintiff, to a risk of physical injury. I am satisfied that it was reasonably foreseeable that the second defendant was likely to prove a source of danger to other employees of the first defendant because of his apparently ungovernable temper."

38. In the Elmontem case above, the previous assault was with another employer but the defendant, Mr. Brady, was aware of that fact.

39. Herbert J. goes on to say:-

"...the cause of the previous assault was not a personal antipathy between the second defendant and a particular fellow employee no longer on the scene. The cause was the second defendant losing his temper to an almost maniac level with a co-worker over some dispute or perceived grievance in the course of their work. A real risk of a recurrence therefore remained. In my judgment the making of such an assumption would not and did not excuse the employer from taking no measures whatsoever to prevent a recurrence. The first defendant did not exercise reasonable care and, certainly did not exercise all due care to put in place measures to prevent or to protect against, such an event. This was not a risk which could be entirely eliminated, but in my judgment was one which could have been adequately controlled without grossly disproportionate or expensive measures."

40. It is in the light of those principles that I examine the plaintiff's claim against his employer. I find that to be aware that there was "bad blood" between Z. and the plaintiff is one thing, and the fact that the plaintiff was so concerned about Z's possible behaviour that he called his employer on the phone is of greater assistance to the plaintiff in determining whether he can establish liability. However, the obligation on the employer is to do what is reasonable. I do not find that the failure of the employer to remove the plaintiff, or Z., from the site in Monkstown (even if there were any other sites available) was a breach of their duty of care to the plaintiff. The employer was aware that there was "bad blood" between the two workers. They were aware also that frequently on building sites rough language is used and parties may have intense rivalries but in the absence of any previous physical assaults such as occurred in the Elmontem case (above), to impose upon the defendants an obligation to segregate in different sites, the plaintiff and Z. is, in my view, to impose too strict a liability upon the employer. The managing director, A., not unreasonably indicated that Z. and the plaintiff would be working on different floors, that the plaintiff could take instructions from the foreman on the site rather than from Z. which seemed to be a source of contention between the plaintiff and Z. and was advised to phone A. in the event of any difficulty. The defendant, in this case, has not acted unreasonably.

41. Essentially, that regime as established by the defendants worked satisfactorily throughout the day even with Z. making derogatory comments about the plaintiff until a further comment was made at the end of the day in which the plaintiff foolishly turned around to Z. rather than ignore it and the incident developed on the lines that I have described above. I hold that the defendant was not negligent in all the circumstances of the case and though on my findings it appears the plaintiff was the more innocent party in the assault (without deciding that issue), he is not entitled to succeed as against his employer.