THE HIGH COURT

[2013 No. 4175 P.]

BETWEEN

JIM CONNOLLY

PLAINTIFF

AND

FAS AND WERKHUIZEN LANDUYT N.V.

DEFENDANTS

JUDGMENT of Mr. Justice Cross delivered on the 20th day of July, 2017

Issues

1. The plaintiff was born on 20th September, 1977, and is a carpenter by trade who had a fairly consistent working record until the economic downturn and on 11th July, 2011, while attending as a trainee of the first defendant at a wardrobe and cabinet making training course at the first defendant's premises in Dundalk, he sustained a significant injury.

2. He suffered the injury when he emerged from a room in the first named defendant's premises carrying his tools in his tool bag in his right hand and saw that his passage was, in effect, blocked by some trolleys and in order to obtain a passage, he pushed back a sliding table being part of a Panel Saw machine which consisted of a platform with a saw and a sliding table to accommodate large pieces of timber with the fingers of his left hand underneath the sliding table which became caught between the edge of the sliding table and the edge or metal plates of the platform and as a result he suffered significant injuries to his middle and ring fingers. The saw was manufactured by the second named defendant.

3. The plaintiff brought the proceedings in negligence and breach of statutory duty against the first named defendant, in effect his employer, in respect of the allegations of a safe place of work and safe machinery and for negligence and breach of duty against the second named defendant for manufacturing and supplying an allegedly defective product. The case against the second named defendant was on the basis of the manufacturing of a defective product and no pleading points were taken.

Liability

4. There is no contest in relation to what occurred. The plaintiff went through a door to pick up tools and return back to the workplace after a relatively short time. When he returned, the sliding panel of the saw was fully extended up towards the door he had entered and his path of travel was blocked off by trolleys. He put his left hand under the extension and brought it back towards its end so as to enable him to get round the saw. He pushed the sliding table back its full length towards the platform. In the course of this manoeuvre, the plaintiff's left hand encountered a sheering tip positioned underneath the platform which had the effect of significantly injuring his finger.

5. The saw is manufactured by the second named defendant and is similar to conventional circular saw. There is a large fixed saw table with a conventional circular saw blade protruding through. There is a large integrated sliding table running on ball bearings whose purpose is to support large sheets of timber.

The First Named Defendant

6. It was not serious contested that the first named defendant was not in breach of duty to the plaintiff as the plaintiff's employer. It is accepted by the engineers for all three parties that the edge of the table presented a sheering hazard and in this regard, I specifically accept the evidence of the engineer for the first named defendant, Mr. Mooney. I also accept the very frank evidence of the first named defendant's employee, Mr. McGuiness, who was the supervisor involved in the first named defendant's risk assessment.

7. The first named defendant carried out a risk assessment on the saw and while they identified the risks of the saw itself, they did not identify the particular risk of a sheering industry at the end of the platform when the sliding table is retracted. Mr. McGuiness fairly accepts that the risk assessment ought to have identified this hazard as it was a plain one and in this he is supported by Mr. Mooney, the first named defendant's engineer, as well as, of course, Mr. Tennyson who gave evidence on behalf of the plaintiff. Since the accident, the first named defendant, with the agreement and cooperation of the second named defendant, have fabricated a "*D-plate*" to the front of the sliding panel which has the effect of neutralising the hazard.

8. Indeed, the first named defendant did not significantly contest that it had a liability to the plaintiff but rather sought to fix liability upon the second named defendant, the manufacturer of the saw.

9. In addition, a case was made on behalf of the plaintiff against the first named defendant that they have a duty to have a safe means of access to any egress from his place of employment. This is undoubtedly the case but I do not believe that the positioning of the trolleys so as to obstruct the plaintiff's pathway was a significant *causa causans* of the ultimate injury. The injury was caused by the sheering hazard in the machine.

10. The first named defendant is liable to the plaintiff and this results from their negligence and breach of Statutory Duty in relation to the risk assessment and also the breaches of Statutory Duty under the Safety in Industry Acts in failing to have a safe system and place of work in that they allowed the unprotected sheering hazard to be on the machine.

The Second Named Defendant

11. The machine as designed presented a sheering hazard. The second named defendant maintains, and I accept, that the machine was in place since 1995, used by trainees in FAS with no reported past incidences. Many thousands of the machine were manufactured by the second named defendant for sale in Europe and I accept that there have been no other similar accidents in the history of these machines. The machine as designed was certificated by an independent certifying authority in France in 2010, as meeting the European Machinery Directives. I accept the contention of Mr. Conlon, the Engineer, on behalf of the second named defendant that the design of the sliding table does not fail European standard EN1870-18:2013. This is the "*safety of woodworking machines … dimension saws standard".* This standard requires a handle of the rear of the machine which was fitted. The directive is silent as to any protection at the front end of the sliding panel. The European standard does not refer to the sliding end at all and accordingly the machine does not fail this standard. It was argued by Mr. Tennyson on behalf of the plaintiff that the machine does

fail to meet various applicable standards in particular EN349 1993 "*safety of machinery – minimum gaps to avoid crushing parts of the human body*" but I shall deal with this aspect when considering the issue of the product being defective.

12. The fact that the second named defendant failed to identify the risk of a sheering hazard in their risk assessment does not necessarily impose on them the same duty of care as an employer has in relation to the employer's risk assessments which are a statutory feature of the health and safety legislation.

13. Similarly, the fact that the second named defendant's machine was certified by an independent certification body does not necessarily exempt them from liability for a defective product.

14. I have come to the conclusion that the product was defective as manufactured. The defect could have been addressed by the simple addition of the "D-plate", which that was inserted by the first named defendant with the agreement of the second named defendant at the end of the sliding table which does, in effect, prevent someone's fingers from getting injured in the manner that befell the plaintiff.

15. A manufacturer may be liable for injuries caused by defective products in negligence as in *Donohue v. Stevenson* [1932] A.C. 562, an authority clearly established in this jurisdiction by *Power v. Bedford Motor Company* [1959] I.R. 391, and followed since then. I do not find any negligence against the second named defendant however.

16. A manufacturer is also potentially liable under the strict liability of the Liability for Defective Products Act 1991, which provides at s. 2(1):-

> "*The producer shall be liable in damages in tort for damage caused wholly or partly by a defect in his product.*"

A product is "*defective*" if "*it fails to provide the safety which a person is entitled to expect, taking all circumstances into account…".* The product is manufactured by the second named defendant is a defective product within the meaning of the 1991 Act given the danger of a sheering injury at the unprotected end of the sliding table.

17. This liability is not dependent on any wrongful conduct by the manufacturer but on truth of the fact of damage and of the defective product.

18. The 1991 Act at s. 6 provides as a defence, *inter alia*, that:-

> "*The defect is due to compliance by the product with mandatory Regulations issued by the public authorities.*"

19. This potential defence, however, does not offer the second named defendant an answer to the plaintiff's claim in that though I accept that the saw was not in specific breach of any EU standards, there was no obligation on the second named defendants to manufacture the saw in the particular manner.

20. Another potential defence arises under s. 6(e) of the 1991 Act which provides:-

> "*That the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered…*"

I do not believe that the state of scientific knowledge had anything to do with the failure to discover this defect and accordingly, this defence is not open to the second named defendant.

21. Accordingly, I have come to the conclusion that the second named defendant is also liable to the plaintiff for the manufacturing of a defective product. The fact that other persons were not injured before the plaintiff is not an answer as the successful allegation against the second named defendant is a breach of strict liability.

The Plaintiff

22. It is contended on behalf of both defendants but in particular the second named defendant that the plaintiff was guilty of contributory negligence for putting his hand under the sliding table. This case was argued more by the second than the first named defendant.

23. Mr. Conlon, Engineer, on behalf of the second named defendant stated that it ought to have been clearly evident to the plaintiff as he moved his hand under the sliding table that if it made contact with the track in the platform that there was a possibility of an injury.

24. Given that the neither of the defendants in their risk assessments identified this hazard, it is entirely unrealistic to expect that the plaintiff who though a trained carpenter ought to have anticipated when he pushed the sliding table back to the platform that when it made contact with the plaintiff, there would have been the sheering hazard created by the hidden nip in the platform. The fact that the plaintiff was pushing the sliding table back from its front is not, of itself, suggestive of any negligence on the part of the plaintiff.

25. Accordingly, the plaintiff cannot be guilty of contributory negligence.

Degrees of Fault

26. The plaintiff is entitled to succeed jointly and severally against each defendant.

27. The first named defendant and the second named defendant are liable to the plaintiff by way of breach of statutory duty. The first named defendant was also negligent in relation to their risk assessment. The first named defendant as employer has a higher duty of care to the plaintiff than the second named defendant. That is, of course, not the end of the issue as under the Civil Liability Act 1961, the court has to determine the degrees of fault, rather than the duty of care, in relation to the injury to the plaintiff. The second named defendant was the manufacturer and I accept they were not actually aware until this accident that they had manufactured what was, in effect, a hazardous machine but notwithstanding that fact they must also be held to have a substantial degree of fault in relation to the accident. The fault of the first named defendant is substantially greater than that of the second named defendant.

28. In assessing the degrees of fault, I will assess the first named defendant as being two thirds at fault and the second named defendant, one third but that the plaintiff is clearly entitled to a joint and several decree against both of the defendants.

Quantum
29. There is little or no difference between the parties in relation to general damages.

30. In relation to special damages, the plaintiff claims that he was offered employment by McCaughey Developments (his previous employers) in April 2012 and claims loss of earnings to date and into the future. I believe that the plaintiff clearly is at a loss of earnings to date. I believe the plaintiff was and still is and will continue to be unable to perform his previous trade as a carpenter. I do not believe, however, that he would be entitled to the entirety of the figures advanced on his behalf, as the employment situation in the building trade up to say the last two years is difficult to say the least. I do not accept the evidence from Ms. Kelly on behalf of the defendant after the levels of employment for trained carpenters such as the plaintiff in the last number of years. A rate of 17% unemployment in the construction industry does not apply to trained carpenters such as the plaintiff and I prefer Ms. Keenan's evidence.

31. I note that the plaintiff's figures do allow for the fact that McCaughey's ceased trading in 2014 but have returned in 2016 and no sum is claimed in respect of those years in which his then employer was not trading. The economic recovery was commencing and it is possible that the plaintiff would have found alternative work in firms other than McCaughey's in 2014/2015 but the plaintiff has fairly limited his claim to the years 2012, 2013, 2016 and 2017.

32. Notwithstanding that fact, I think that the claim of €73,073 less €13,503 actually received and totalling a net claim of €59,570 is excessive as it assumes constant employment which was probably not realistic and I would allow the plaintiff a net sum of €40,000 for loss of earnings to date being €53,503 less €13,503.

33. In relation to the plaintiff's future loss of earnings, the plaintiff is, at present, working in low paid cleaning work and hopes to qualify as a carer. Ms. Keenan has expressed some doubts as to whether the plaintiff will be able to find employment as a carer given his disability in relation to lifting *etc*. But I have witnessed the plaintiff and believe that he is likely to be able to earn into the future. The work that is potentially available to the plaintiff would result in somewhat more earnings than that of a carer but the plaintiff has limited his claim to a carer's earnings as it is the career that he wants to pursue. If he does not work as a carer, he will, I believe, find work at a similar rate. I note that the plaintiff has not advanced the claim for loss of earnings on the basis of a loss at €1,000 per week gross which apparently is available to carpenters at the present moment but rather on the general likely earnings as indicated in the trade, of approximately €549 per week. From this sum, would be deducted his likely earning of €225 per week and I accept Ms. Carter, the Actuary's capitalised figure of €166,212 to the age of 68. This figure does not take into account any deduction for *Reddy v. Bates* and I will reduce it by more than 20% being fair to the parties to have a net loss of earnings into the future of €130,000.

34. The other special damages are an agreed sum of €4,000 for medical expenses and the other matter in issue is the cost of one spinal implant for the plaintiff.

35. The spinal implant may well not alleviate the plaintiff's problems and I discuss that later. However, it will hopefully afford him some relief and I believe that it is reasonable to allow him for one implant though he may need more into the future and the sum for that is €27,500.

General Damages
36. The plaintiff suffered an injury to his finger and the top of his middle finger of his left hand was amputated and he received a laceration to his ring finger. He was given painkillers and antibiotics and taken by ambulance to Our Lady of Lourdes Hospital in Drogheda and he was operated on the next day.

37. The plaintiff is unable to perform his work as a carpenter, he cannot use tools, and he cannot play games on his PC. If he turns on his bed he wakes with exquisite pain. He has numbness in his fingers. The injury to his left middle finger is a crush injury. He has sensitivity over the pulp and the tip of the finger extending from the distal inter-phalangel joint to the tip of the nail. He has a full range of movement in the metacarpal-phalangel and inter-phalangel joints in the finger of his left hand. He has a scar extending from the base of the nail on the underside of the finger around the vola aspect of the finger which is almost of full circumference in nature measuring 2cm to 3cm.

38. In hospital in Drogheda, he was operated and treated with a K-wire and suturing. The wound was very sore with abnormal nail growth which was painful and the pulp is very sensitive. The plaintiff's main ongoing problem indeed is the sensitivity and it is painful not alone on touch but also in cold weather. The plaintiff uses a Difene spray for his finger approximately four times a day.

39. On medical examination, the plaintiff lacked the terminal ten degrees of hyperextension of his middle finger of his left and it was noted that he has some increased sweating the left hand when compared to the right and hypersensitivity,

40. I have viewed the plaintiff's finger and I have had the benefit of the medical reports from Dr. Gleeson, Mr. Barry, Dr. Ide, Dr. Moorehouse, Dr. O'Keeffe, and Mr. Grieve on behalf of the plaintiff. I have also had the benefit of the report of Mr. Colin Riordan, Plastic Surgeon, on behalf of the defendant.

41. Mr. Riordan is of the view that the sensitivity is likely to be permanent and that this sensitivity and increased sweating will have an adverse effect on dexterity. While Mr. Riordan was of the opinion that the plaintiff would be able to return to his trade as a carpenter, I accept the evidence of the plaintiff's doctors and of the vocational assessor, Ms. Keenan, to the effect, that this is not the case. I believe that the plaintiff would have returned had he been able to do so as he is the supporter of his family from a financial point of view. While the stimulator should be of assistance in relation to the pain the plaintiff is suffering it is not probable that he will be able to return to work as a carpenter even if the stimulator is successful.

42. Dr. Declan O'Keeffe recommends a spinal cord stimulator to be implanted and the costs have already been referred to. Dr. O'Keeffe is of the view that the plaintiff has neuropathic pain in the finger and what he describes as complex regional pain syndrome of his left extremity and has recommended the stimulator to deal with his pain.

43. Accordingly, the plaintiff's general damages must be assessed as somebody who has had a significant but not by any means a catastrophic injury.

44. Insofar as the Book of Quantum is concerned, fractures of a severe and permanent condition which would require surgery and may result in incomplete union range up to €56,400 and a sum of €51,000 is referred to for partial amputation of the middle finger.

45. My obligation is, of course, only to have reference to the Book of Quantum figures. The plaintiff has some scaring and his main problem is the ongoing permanent hypersensitivity which will be assisted by the implant which I believe should result in damages not

referred to in the categories suggested in the Book of Quantum, and accordingly, being fair to the plaintiff and the defendant, I will assess the general damages to date in the sum of €50,000 and general damages in the future in the sum of €30,000.

Summary
Agreed special damages €4,000
Cost of implant €27,500
Loss of earnings to date €40,000
Loss of earnings into the future €130,000
General damages for pain and suffering to date €50,000
General damages into the future €30,000
Total €281,500
46. The plaintiff is, therefore, entitled to a decree jointly and severally against each defendant in the sum of €281,500 which I believe to be fair and reasonable in all the circumstances.

47. The defendants are liable one to each other on the ration of two thirds against the first named defendant and one third as against the second named defendant.