Neutral Citation Number: [2011] IEHC 489

THE HIGH COURT

2010 3091 P

BETWEEN

DAMIAN WARCABA

PLAINTIFF

AND

INDUSTRIAL TEMPS (IRELAND) LIMITED, DUBLIN AIRPORT AUTHORITY PLC AND RYANAIR LIMITED

DEFENDANTS

Judgment of Mr Justice Charleton delivered on the 22nd of November 2011

1. The plaintiff Damian Warcaba was born in Poland on 9 May 1986. After finishing secondary school he studied information technology in his home town for a year, but he did not finish the course. On quitting college he came to Ireland. He worked first for DHL Couriers, as a general operative, and then did other part-time work. In 2007 he joined Ryanair, which is agreed to be the responsible defendant for what follows, as a ground handling agent. This work involved handling luggage inside the terminal. He then did training for aircraft luggage machines and passenger embarking and disembarking and began to work on Dublin Airport tarmac outside.

2. When an aircraft landed, Ryanair workers were expected to turn the plane around in 25 minutes. The last five minutes of this involved the aircraft waiting on the tarmac with its doors closed before being pushed back onto the taxiway. While this timing is quick, it is not complained of in the context of the accident which the plaintiff suffered on 18 July 2008. When an aircraft landed it taxied to its place on the stand. It was secured by locking or securing the wheels of the aircraft. The luggage doors were accessed and an automatic baggage handler was put in place. Aircraft stairs were brought by a mechanical float close to the disembarking doors for passengers. These were left some three metres back from the fuselage, so that a collision would not damage the aircraft skin. The stairs were unhitched and then manoeuvred manually so as to rest gently against the aircraft. During training, the plaintiff was told that at least two people had to effect this manoeuvre. During that training, however, there were comments made by other staff members, not as I understand it by the trainers, indicating that while this was the theory, the reality on the ground would be different. The tension between theory and practice is at the core of this case.

3. On the day of the accident two planes were being dealt with on adjacent stands. The plaintiff was on the inbound plane while an outbound plane was being made ready to leave. The plaintiff stopped the inbound aircraft; pinned the front wheel; put stop chocks under the wing wheels; connected the steps onto the float; stopped at the appropriate distance from the aircraft; and then moved to manoeuvre the steps manually into the correct position. He found he was alone. Other members of the team had gone to the outgoing aircraft and were taken up with it. He therefore did what he testified that he had done on many previous occasions; that which was expected of him, which was to pull the stairs on his own for two or three metres so as to connect it with the passenger door of the plane.

4. The engineers for the plaintiff and the defendant have both agreed that for one person to pull the stairs was a dangerous manoeuvre. The initial pull strength required was 47 kg, while to keep the stairs in motion required a pulling strength of 35 kg. With two people coordinating, as the training specified, these loads are considerably reduced well into safe levels. While the plaintiff was pulling the stairs, he felt something slide in his back. When the stairs were in place he returned to the float and drove it around the aircraft but while trying to reverse it into position for another task he turned his back approximately 180° and realised that he had suffered damage. On being unable to lift luggage, a supervisor was called. The plaintiff was brought to the canteen and from there he was brought in an ambulance to Beaumont Hospital. He lost two months from work but he was paid during that time.

5. Ryanair claims that what the plaintiff did was in breach of its standard operating procedures. The defendant claims that help was on hand, should the plaintiff have requested it, as he ought to have. The defendant has argued that the plaintiff voluntarily, and in breach of instructions, engaged in a dangerous manoeuvre and that in consequence he alone is responsible for the accident. Mr Con Dooney, Ryanair's regional manager for Irish airports, testified that all trainees receive five days of instruction covering all aspects of the job. As to the use of aircraft stairs, he said that the Ryanair policy was three men or a minimum of two men on the manoeuvre. This was not just an empty aspiration, he claimed, because every day he was in Dublin he would be on the tarmac at 07:00 hours and then three to four times a day thereafter. To have one person manoeuvring stairs would be exceptional, he asserted, and if it occurred the supervisor would stop it and remonstrate with the employee. Thomas Leonard, the ramp training coordinator of Ryanair told the court that he has conducted training since 2006. That training emphasises a minimum of two staff to manoeuvre a stairs and a requirement for employees to ask for assistance when required. He told the court that he was on the ramp on occasion and if he ever saw an employee pulling a stairs on their own he would reprimand that person. A document was produced showing that the plaintiff had been trained on various occasions in these manoeuvres. In addition, a training manual was produced which indicated "steps should be manoeuvred in by hand (it takes at least two people or more depending on weather conditions) to pull steps".

6. I am satisfied that what Mr Dooney and Mr Leonard told me about is the aspiration of Ryanair. As against that, I have the evidence of the plaintiff. His experience as an employee is likely, if truthful, to be far more representative of what happens on the ground than that of management staff. On being cross-examined he gave a clear account of being expected to manoeuvre the steps on his own on previous occasions. He was never pulled up or remonstrated with by supervision staff, he said. This was what was expected of him in order to effect a swift turnaround of aircraft. He was not taking a short cut; rather he was following the effective procedure that existed in reality. I observed the plaintiff closely in the witness box. While his English was halting and required translation from Polish on occasion, it was clear to me that he was making no attempt to evade questions or to play for time by pretending not to understand. He gave a clear account, with impressive detail, of the circumstances with which he was met in consequence of one crew being stretched into dealing with two adjacent aircraft. I am satisfied that nothing in the Ryanair rostering records indicates that there was an abundance of, or even sufficient, workers to effect this task. The plaintiff made no attempt to exaggerate his injuries or to float a situation of peril through deceit in order to strengthen his case. Watching the plaintiff, it was clear that he was actually recollecting that of which he was speaking. He referred to the equipment used on the ground by Ryanair as being old and

sometimes being in need of repair. He was challenged on the basis that he had made a number of inconsistent statements to doctors as to how the accident had occurred. I am completely unimpressed, notwithstanding the skilled advocacy involved. The accident report form describes the accident which occurred in the manner which he alleged. Doctors tend to concentrate on injuries and use a history merely as a background for the exploration of a medical condition. The plaintiff also testified that while working for a different firm, Servisair, on a later date, he was not harried with several tasks nor was the ground handling crew split between different craft. Planes were turned around with dispatch, but not in a rush due to the arrival and dispatch of a number together which one crew was expected to deal with. The equipment was also better. In addition, there is the issue of discipline. Knowing, as Ryanair management must have known through the supervisor of his team, that the plaintiff had suffered an accident pulling a stairway on his own, it is striking that he was neither admonished face to face, nor written to, nor disciplined in any way. Furthermore, although I have received a lot of evidence about the deprecation of this practice, there has been nothing to indicate employees being put on report or otherwise dealt with in circumstances where they took risks of this kind in order to speed up the turnaround of an aircraft. Any such reference was impossibly vague. I prefer the plaintiff's evidence. It is more probable and it is also inherently credible.

7. In these proceedings two other incidents are complained of as wrongfully exacerbating the plaintiff's back condition. On 12 November 2008 the plaintiff had returned to his employment and had been working for a number of weeks. He went back, he said, because he enjoyed his work and although his back had been painful he felt it had progressed to a level where he might pursue his duties in full. A flight arrived from Poland carrying 150 to 190 bags. These were said to be heavy bags, many of them over the allowed limit. He unloaded some 70 bags. These bags went down the automatic conveyor belt but then had to be transferred manually over to a luggage trolley. The plaintiff's back felt tired so he asked another man to help. The supervisor advised him to get painkillers and sent him home. The third incident occurred a few days later on 14 November 2008. The plaintiff was on an 11 month contract, as opposed to being a permanent employee, and was anxious to obtain a second contract of similar duration. In consequence, he was attempting to impress his employer with his diligence. He had therefore returned to work. Together with two other employees he was engaged in manoeuvring a manual luggage conveyor belt, referred to in evidence as a "Wampo". In the course of that manoeuvre something happened with the wheels causing them to lock and the plaintiff, who was pulling the device, suffered a sudden recurrence of back pain. He thought it was just a short pain so he went to sit down. The plaintiff's supervisor was contacted and in due course he was conveyed to Beaumont Hospital.

Liability
8. The general duty of an employer towards his employees is set out in section 8 of the Safety, Health and Welfare at Work Act 2005. This provides:-

> (1) Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.
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> (2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:
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> (a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;
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> (b) managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk;
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> (c) as regards the place of work concerned, ensuring, so far as is reasonably practicable—
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> (i) the design, provision and maintenance of it in a condition that is safe and without risk to health,
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> (ii) the design, provision and maintenance of safe means of access to and egress from it, and
>
> (iii) the design, provision and maintenance of plant and machinery or any other articles that are safe and without risk to health;
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> (d) ensuring, so far as it is reasonably practicable, the safety and the prevention of risk to health at work of his or her employees relating to the use of any article or substance or the exposure to noise, vibration or ionising or other radiations or any other physical agent;
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> (e) providing systems of work that are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to health;
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> (f) providing and maintaining facilities and arrangements for the welfare of his or her employees at work;
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> (g) providing the information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees;
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> (h) determining and implementing the safety, health and welfare measures necessary for the protection of the safety, health and welfare of his or her employees when identifying hazards and carrying out a risk assessment under section 19 or when preparing a safety statement under section 20 and ensuring that the measures take account of changing circumstances and the general principles of prevention specified in Schedule 3;
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> (i) having regard to the general principles of prevention in Schedule 3, where risks cannot be eliminated or adequately controlled or in such circumstances as may be prescribed, providing and maintaining such suitable protective clothing and equipment as is necessary to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;
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> (j) preparing and revising, as appropriate, adequate plans and procedures to be followed and measures to be taken in the case of an emergency or serious and imminent danger;
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> (k) reporting accidents and dangerous occurrences, as may be prescribed, to the Authority or to a person prescribed under section 33 , as appropriate, and
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> (l) obtaining, where necessary, the services of a competent person (whether under a contract of employment or

otherwise) for the purpose of ensuring, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.

(3) Any duty imposed on an employer under the relevant statutory provisions in respect of any of his or her employees shall also apply in respect of the use by him or her of the services of a fixed-term employee or a temporary employee.

(4) For the duration of the assignment of any fixed-term employee or temporary employee working in his or her undertaking, it shall be the duty of every employer to ensure that working conditions are such as will protect the safety, health and welfare at work of such an employee.

(5) Every employer shall ensure that any measures taken by him or her relating to safety, health and welfare at work do not involve financial cost to his or her employees.

9. This section expresses in a useful way what previously would have been the common law duty of care of an employer towards workers. The section requires little analysis. The duty of an employer is to take such measures as are reasonable and practicable in the circumstances of the work performed to ensure that no employee is injured while at the workplace. The more hazardous the work involved, the more stringent is the duty on the employer to ensure that an accident does not occur. Even apparently simple and straightforward work, however, may carry the risk of an accident occurring. This must be guarded against by reasonable measures which are practicable in the circumstances. The duty of care can be fulfilled by guarding against hazards; by issuing a warning (in the rare circumstances where a warning is sufficient); by the provision of proper plant and equipment; by training; by insisting on the implementation of safety measures with appropriate discipline; and by enforcing a sense of awareness as to what may occur should the procedures and precautions for avoiding accidents not be followed. Ryanair clearly set a standard in training, however it is to be regretted that that standard was not adhered to in practice. Had that standard been enforced, which I am satisfied it was not, sufficient care would have been taken. The defendant is therefore liable for the accident which occurred on 18 July 2008. As regards the second incident of baggage handling of 12 November 2008, the defendant is not liable. The plaintiff had himself certified as fit and returned to enthusiastic work on the basis of representing himself to be fully fit for the duty of arduous baggage handling. The bags in question, while heavy, were within what the plaintiff's engineer testified to as being an acceptable lifting weight for an able-bodied male at the centre point of his body of 25 kg. As regards the third incident on 14 November 2008, I accept the plaintiff's evidence that the luggage handling machine locked while it was being manoeuvred. There was therefore a deficit in proper plant and equipment. I am thus dealing with the main accident and one exacerbation of its effects.

Quantum

10. After the third incident, the plaintiff was not re-employed by Ryanair. He spent approximately two and a half months on illness benefit and this brought him up to early February 2009. He then was required by the Department of Social and Family Affairs to undergo an official examination. This certified him as fit for a non-heavy work. In September 2009 he took a similar job to that which he had held with Ryanair with Servisair. He was able to do this job for some months. From January 2010 the plaintiff decided to go back to what he had been partially trained to do in information technology. Together with another person he set up his own business. This work is sedentary but requires some driving and moving about.

11. After the accident on 18 July 2008, the plaintiff was in severe pain for a number of weeks. He took medication and looked after himself. At some stage he went on holiday to Poland where some of his relations were working in a spa resort. There he received some treatments, including laser treatment and water treatment, having earlier undergone physiotherapy in Ireland. He would have done more but for the fact that he had very little money. His explanation in that regard is completely genuine. Returning to work after two months, he coordinated with his fellow employees in Ryanair in an attempt to work himself back to fitness. In order to return he had himself medically certified by a doctor as fit. In that context it was not unreasonable for Ryanair to require him to handle baggage in the usual way. No liability arises, therefore, in respect of the second incident. I infer that the occurrence of the third incident may have convinced his employer that they would be better off not offering him a new contract. It is clear that over the course of 18 months after the accident the plaintiff was suffering from a significant ongoing back injury. The plaintiff had not been an enthusiastic sportsman prior to July 2008. He did even less in the way of sport after the accident. He has now returned to doing some sport on a very occasional basis. Pain in his back continues. Observing the plaintiff in court, it is clear that he takes care of his back and it is also clear that his truthful character has ensured that he has offered no exaggeration to the court. As of the date of the trial, November 2011, he has difficulties hoovering, moving house and carrying goods. Driving for a long period of time exacerbates his back problem. Riding a bicycle in a low position brings on back pain. During the winter his problem is more severe than during the summer. In all seasons, his condition is activated if he is seated in the one position, such as when at his desk or driving.

12. The plaintiff was examined by three doctors. I have read the medical reports. The court would have liked the benefit of oral evidence on the problems which arose in this case, however, only Doctor Thackore was available during the trial. Counsel for the defendant, however, agrees that there is sufficient evidence for the Court to make a proper decision as to quantum.

13. On scanning, the plaintiff was found to have moderate changes at the L4 S1 junction in his back. These had occurred prior to the accident. I am satisfied that he had no prior pain problems. An incident of pain some months previously lasting 24 hours, noted in one of the medical reports, does not constitute a prior back problem. No reasonable person would describe a transient condition over a day as a medical condition. It is probable that had the accident of 18 July 2008 not happened at some stage in the future the plaintiff would have begun to experience difficulties with his back because of the pre-existing issue. Doing the best I can with the evidence before me, the probability is established that years of pain and difficulty have been added to the plaintiff's life when otherwise these would have been absent. Doctor Thackore describes the pre-accident changes to the plaintiff's back in a reasonable way. He was of the view that there was a good prognosis for the plaintiff's back into the future if the plaintiff looked after himself. As of 17 July last, the plaintiff had recovered to some 75% of his prior condition. Further improvements can be expected. The kind of changes seen on scanning can start in the teenage years. A person of the plaintiff's age with a normal healthy back can go through life without incident but if there is an aggravation, such as a car accident, I accept that in ordinary course a period of difficulty of 18 months to two years can be expected before the back will settle down. Something similar can be expected for the plaintiff, but that is not the full picture. The base level is not going to be the same as it was before. Instead, according to Doctor Thackore whose evidence impressed me, the base level will be back to a new and worse level. As he put it, a back previously experienced as a normal back becomes further subnormal. This is not therefore a case of a healthy back which experiences pain as a result of an accident and which then returns to its former asymptotic level. None of the medical reports convince me that scenario is probable for this plaintiff. Instead, the plaintiff has had difficulty over two years and his back is now settled to the problematic level at which he can expect it to be for the rest of his life.

Turning to the Personal Injuries Assessment Board Book of Quantum, to which I am obliged to have regard, I note that a figure of €16,300 can be allowed where a back injury has substantially recovered within 12 months. That is not this case. Where recovery

occurs within 24 months the appropriate figure is between €11,700 and €19,600. That is relevant but the plaintiff's problems will continue. I would assess the period of two years since the accident as requiring damages of €15,000. A significant ongoing back problem as a result of an accident carries a guideline figure of €18,300-€69,700. I assess this injury as being towards the lower end of that scale. The correct figure for pain and suffering into the future is €25,000. The reality is that the plaintiff will have years of discomfort and be required to care for his back into the future. Absent the accident and the aggravation, allowing for normal stresses to his back that at some stage in the future would have made his back symptomatic, he has probably been made to suffer for several years.

14. On special damages, I notice a sum of €7,281 is claimed as a net sum. The plaintiff received some social welfare benefits. I would welcome discussion with counsel as to the appropriate figure. I am satisfied, however, that the plaintiff was unable to do heavy work as and from the accident in July 2008. A reasonable period of time for him to have realised this and to have sought alternative employment must be provided for. He has now returned to information technology and since January 2010 has been running a small business with a friend. That is a fair response to his duty to mitigate the damage he has suffered.

Order

15. On hearing submissions from counsel, I will make a decree in an appropriate amount reflecting the plaintiff's entitlement damages for pain and suffering in the sum of €40,000, together with appropriate provision for special damages and costs.