

**THE HIGH COURT**

**2004 6677 P**

**BETWEEN**

**RODNEY FORDE**

**PLAINTIFF**

**AND**

**CENTRAL PARKING SYSTEM IRELAND LIMITED TRADING AS CONTROL PLUS**

**DEFENDANT**

**Judgment of Ms. Justice Irvine delivered on 25th day of October, 2011**

1. The plaintiff in these proceedings was born on 15th December, 1972 and presently resides in Tallaght in Dublin.
2. At the times relevant to this claim, the defendant was a private limited company involved in the business of clamping motor vehicles illegally parked in Dublin City and elsewhere. The business of the defendant has since been taken over by another legal entity. The plaintiff had been working with the defendant for a number of months as part of its clamping operations team at the time he sustained the injuries, the subject matter of these proceedings.
3. The plaintiff claims that at approximately 9pm on 26th August, 2003, he sustained a significant injury to his back when fitting a clamp to a car at Fishamble Street, Dublin. He maintains that this injury was sustained by reason of the negligence and/or breach of duty and/or breach of statutory duty on the part of the defendant, its servants or agents. In particular, he contends that he was not provided with a safe system of work and that he was required to work with equipment which was defective.
4. The case made on behalf of the plaintiff in the course of the present hearing was that one of the component parts of the clamping mechanism used by him at the time of his injury, namely an item known as a "November bar" was defective. It is alleged that the relevant November bar was probably bent and that this caused it to become snagged, stuck or wedged such that the plaintiff injured his back when trying to dislodge it. Allied to this claim was an assertion on the part of the plaintiff that employees were obliged in every case to fit a November bar to a car which was being clamped and that complaints had been made about the difficulty of trying to fit these devices particularly having regard to the quota they were expected to achieve.
5. The defendant in its formal defence denied the pleas of negligence and breach of duty alleged against it and raised a number of pleas of contributory negligence. These included an assertion that the plaintiff did not take care for his own safety, did not act in accordance with his training and/or overextended himself in performing the manoeuvre which caused his injury. In evidence, the defendant maintained that the injury was not caused either in the manner alleged by the plaintiff or for the reasons advanced on his behalf.

**The Clamping Operation**

6. The November bar is part of the clamping mechanism designed to restrict the ability of a motorist to remove or drive out of a clamp. It is a U-shaped piece of steel or a hook like type of device which is perhaps best seen in photograph No. 4 in the a series of photographs introduced into evidence by Mr. Cathal Maguire, Consulting Engineer retained on behalf of the defendant.
7. The component parts of the clamping mechanism are shown in photograph No. 1. The process of how the clamp is assembled is shown through photographs 5 – 10 inclusive. The operator places chocks in position either side of the wheel to be clamped. He then places what is called a tyre bar over the top of the tyre and attaches it to the front of the clamping mechanism as shown in photograph No. 7. He should then proceed to fit the November bar. He does this from a kneeling position in which, according to the defendant's evidence, the operator's body should be at right angles to the car to facilitate access to the socket into which the November bar should be slotted which is on the inner side of the chock. That socket, with the November bar in its resting position, is clearly shown to the right of photograph No. 10. Attached to the chock on the left of photograph No. 10 is a paddle which is not material to this claim.
8. It is agreed that the operator should reach in to locate the socket on the inside of the chock and that this is a relatively blind operation by day or night. The operator inserts the end of the November bar which has a stepped profile into the socket. When that end of the bar is full inserted, the other end should have slipped over the inner metallic wheel rim into empty space between the wheel supports or suspension components thus making it impossible for the driver to drive off. The successful positioning of the November bar is clearly depicted in photograph No. 10. The November bar may have to be rotated or lifted a little to make sure that the free arm will slip over the wheel rim depending on the depth of the individual wheel rim, before it can be locked into position with a key at the back of the chock as shown in photograph No. 11.

**The Evidence**

9. The plaintiff says that he was fitting a clamp to the relevant car sometime after 9pm when it was dark. He described trying to push the November bar into its socket and told the court that it would not slot in, in the manner just described. He states that the bar became jammed or stuck. He then tried to pull it out in order to replace it. However, he was unable to release the bar. In the course of his efforts he felt a pain in his back. He tried to stand up but was unable to fully extend. He called out to his colleague, Mr. McCarthy, who was working with him at the time. He came over with a replacement and removed the one which he had been unable to dislodge.
10. The plaintiff told Dr. Ryan, Accident and Emergency Consultant, in April 2004 that he felt something give in his back when he was "jerking the bar on the clamp" in the course of his duties. He told his Consulting Engineer, Mr. Peter Johnston that he had difficulty

fitting the November bar and had exerted some degree of force to try get it into position. He told him that when he could not fully fit it, he decided to remove it but he couldn't as it had become wedged in position. As he was struggling to manipulate the bar from the wedged position he sustained his injury. Mr. Johnston also advised the court that the plaintiff told him that subsequent to the day of the injury, he came to the view that the November bar which he had been trying to fit may well have been bent.

11. Notwithstanding the multitudinous varied allegations of negligence and breach of duty made in extensive pleadings and further particulars of negligence, this case ultimately was put forward by the plaintiff on the basis that he was furnished with a November bar which was defective and bent and that it was this defective piece of equipment that caused the bar to become wedged. Accordingly, critical to the plaintiff's case on liability is whether or not the November bar concerned did in fact jam or become wedged in the manner and for the reason advanced by the plaintiff as it was the alleged force exerted by the plaintiff in trying to remove it that caused the plaintiff's injury.

12. Mr. Peter Johnston in his evidence confirmed that he was told by the plaintiff that he believed that the November bar was probably bent in a manner such that the open jaw of the unit was reduced thus making it more difficulty to slip the free arm over the wheel rim. A photograph was produced to the court showing one such bent bar. He told the court that kits of wheel clamps should not have included such a defective November bar and it was foreseeable that such a bar could cause an injury to an employee. Mr. Johnston told the court that if the bar was bent in the manner suggested by the plaintiff, it was likely that it had jammed some distance onto the wheel rim but could not be fully pushed beyond the wheel rim or easily withdrawn.

13. Whilst the plaintiff had told Mr. Johnston that he believed the bar was bent, in evidence told me that he thought the bar might have been bent but was unable to say that he had seen any bend in the bar at the relevant time.

14. The defendant in evidence maintained that the injury was not sustained by the plaintiff in the manner alleged and that on the balance of probabilities the injury occurred without any negligence on the part of the defendant and when the plaintiff was routinely carrying out his work, albeit with his body incorrectly positioned. The defendant, in particular, denied that the relevant November bar ever became wedged or stuck as alleged by the plaintiff and relied upon the evidence of Mr. Dermot McCarthy, the plaintiff's fellow employee, who had experienced no difficulty in removing the bar which the plaintiff maintained had become wedged in position. The defendant also relied upon the evidence of Mr. McCarthy and Mr. Spencer, the Health and Safety Officer, as to the likelihood of the bar having been bent as described by Mr Johnston. In addition, the defendant relied upon the evidence of Mr. Maguire, Consulting Engineer, who stated that he could not explain how, having regard to the mechanism concerned, the November bar could ever become jammed or wedged as contended for by the plaintiff.

15. Apart from the formal evidence tendered to the Court the defendant placed particular reliance upon the pleadings which made no mention of a defective and/or bent November bar and the account given by the plaintiff as to how he sustained his injuries as recorded in an Incident report form in the weeks following his accident. Finally, in coming to its conclusions the defendant urged the court to take into account certain evidence which it submitted established that the plaintiff's evidence in general lacked credibility and asked the court to conclude that he had exaggerated his claim to the point that the same should be dismissed.

#### **Liability Conclusion**

16. There is no doubt, in my mind, but that the plaintiff sustained a serious injury to his back in the course of trying to apply a clamp to a car at Fishamble St, late on the evening of 26th August 2003. However, the fact that he sustained this injury does not automatically render his employer liable in damages unless he can establish that the company was negligent or in breach of its duties as an employer and I am not satisfied that the plaintiff has discharged the relevant onus of proof. He has not satisfied me, on the balance of probabilities, that the November bar which he used on the relevant night became jammed in the manner alleged by him. Neither am I satisfied that he injured his back using significant force to remove a November bar that had become jammed in the course of a clamping operation.

17. In coming to these conclusion, I have in particular had regard to the following matters, namely:-

(i) In the weeks immediately following the plaintiff's injuries, an incident report form was prepared by Mr. Keenan. The plaintiff does not dispute that the information recorded in that incident report accurately records his account of events. That account reads as follows:-

"After locking the clamp I moved to lock the November arm, as trying to manoeuvre the November arm into the wheel I felt a sharp pain in my back, when I tried to stand up, I noticed I couldn't."

There is nothing in this statement referring to the November bar becoming jammed or to the plaintiff having to exert any unusual or excessive force on the arm either to try to insert it or remove it. Neither does the report mention that the bar was bent or was in any way defective. The plaintiff merely stated that he felt a sharp pain in his back when trying to manoeuvre the arm into position and that when he tried to stand up he found it difficult.

(ii) The statement of claim delivered in March 2005 merely refers to the plaintiff's injury being sustained by reason of a defective clamp. Neither do the particulars of personal injuries set out therein make any mention of the mechanism becoming jammed or the plaintiff injuring himself in the course of seeking to free the November bar. The particulars merely state:-

"While attempting to fit a clamp to the wheel of a motor vehicle, the plaintiff felt something give in his back and experienced immediate and severe pain. His back locked and he had difficulty straightening up."

The particulars of negligence in the same document do not assert that the item which was defective was the November bar or that it was bent or that the mechanism jammed. Indeed, the description of events given in the statement of claim is consistent with the incident report form insofar as neither document refers to the November bar becoming jammed or the plaintiff needing to exert any additional force on the mechanism in the course of the manoeuvre.

(iii) Further particulars of negligence were furnished by the plaintiff's solicitors on 15th May, 2010, seven years after the injury was sustained in which the plaintiff for the first time, in the course of the pleadings, sought to rely, *inter alia*, on a claim that the November bar being used by him at the relevant time was bent. Even at this point in time, the allegation made by the plaintiff was that the effect of the bar being bent was to cause him to exert more pressure than would normally have been the case in order to try to get the tip of the bar over the wheel rim. There was no mention of the bar

becoming jammed or wedged as was maintained in the course of evidence.

(iv) Mr. John McCarthy, who was working with the plaintiff at the time he sustained his injuries told the court that the plaintiff called him over stating that he was not able to fit the November bar. He went over with a new November bar. This he stated would be standard procedure. He removed the November bar which had been left in position by the plaintiff without any difficulty or effort. He did not find the mechanism jammed. He did not try to reposition the November bar and simply replaced it with another bar which he had brought over with him.

(v) Whilst the plaintiff maintained that the November bar jammed or wedged because it was defective, he himself did not notice it was defective or bent. Neither did Mr. McCarthy, who took away the offending November bar, notice that it was bent. Further, Mr. McCarthy stated that he had never seen a November bar of the type which is used on ordinary vehicles that was bent. The only November bars which he had seen damaged or bent were those which were used on larger vehicles such as jeeps or heavy goods vehicles. Further he told the court that if a driver of one of these larger vehicles was to drive off with a clamp attached the November bar could be damaged but the damage inflicted would cause the mouth of the November bar to be expanded rather than reduced.

(vi) Mr. Spencer, who trained the plaintiff, stated that either a November bar goes in smoothly or it does not. It simply cannot get stuck. He stated that because of the internal structure of various wheels, if an operator could not get the November bar fitted probably he was probably not lifting it high enough or was lifting it up too high. But either way it could not become jammed. In relation to bent November bars he stated that he had not seen November bars which were used on ordinary vehicles which had been bent.

(vii) Mr. Stephen Keenan, Health and Safety Officer, told the court that had the plaintiff complained to him at the time he was preparing the incident report form that the November bar he was using had been defective that he would have taken possession of it and would have taken it out of circulation.

(viii) Mr. Maguire, the defendant's Engineer, explained that if a motorist drove off with a clamp attached, the November bar would be damaged in such a fashion as to cause the mouth of the apparatus to be widened rather than reduced as is suggested occurred in the present case.

(ix) Mr. Maguire also told the court that a November bar which was bent in the manner described by Mr. Johnston would either go in over the rim of the car, assuming it was lifted the correct level, or would not and would hit the wheel rim and be rejected. It could not become jammed in the manner contended for by the plaintiff and his engineer.

18. In all of the circumstances, I am not satisfied firstly that the plaintiff has established on the balance of probabilities that the November bar which he was using at the time he sustained his injury was bent in the manner alleged. Further, I am not satisfied on the basis of the evidence that the November bar being used by the plaintiff at the time he sustained his injury jammed such that he injured his back in seeking to dislodge it. Even if I am incorrect on the first of these findings of fact, I am satisfied on the engineering evidence that even if the bar was defective in the manner described by the plaintiff, it could not have become jammed such as to require the plaintiff use excessive force in attempting to remove it.

19. In coming to my conclusions, I have also had the benefit of seeing and observing the plaintiff give his evidence. Having considered that evidence against the backdrop of all of the other evidence, I have to say that I did not find the plaintiff's account of the events of the night of 26th August, 2003, to be convincing. In this regard, my opinion was only marginally coloured by the following factors:-

(a) The plaintiff's failure to disclose in his replies to particulars, his short lived but very significant incident of back pain three years prior to the events the subject matter of this claim, notwithstanding direct questioning on this issue both by the defendant's solicitors and Mr. Sheehan, the defendant's consultant orthopaedic surgeon.

(b) The plaintiff's admission that in 2004/2005 when he had substantial periods out of work allegedly as a result of back pain, he was in a position to assist in the building of his house. He admitted being able to work on the roof, take rafters up the scaffolding and with assistance to move sheets of 8 x 4ft timber. He was able to do all of this at a time when he was protesting to Mr. Sheehan that he was unable to lift or carry out regular domestic duties such as hoovering by reason of back pain.

(c) The plaintiff's instructions to Ms. Paula Smyth, Occupational Rehabilitation Consultant, that at all relevant times he was in receipt of disability payments following his resignation from his employment when, with the exception of a very short period of time he was in fact in receipt of job seekers benefit/job seekers allowance.

20. In coming to my conclusions regarding the applicant's credibility I have disregarded the other matters which I was urged to take into account by counsel for the defendant.

## **Conclusion**

21. Whilst I am satisfied that the plaintiff sustained a serious injury to his back in the course of his employment on 26th August, 2003, I am not satisfied that his injury was sustained as a result of any negligence, breach of duty or breach of statutory duty on the part of the defendant. I reject as a matter of fact, the plaintiff's assertion that his injury was sustained by reason of excessive force exerted by him on a defective November bar which he has maintained became jammed on a wheel of a car at Fishamble Street on the relevant date.

22. It is not for the court to seek to second guess how the plaintiff sustained his injury. However, having regard to the evidence of Mr. Sheehan, the plaintiff's pre-existing degenerative changes in his back left him vulnerable to precisely the type of injury he sustained regardless of exposure to any of the types of force referred to by the plaintiff in this case. Having said that, I think it highly likely that the injury was sustained whilst the plaintiff was fitting a clamp in the usual manner perhaps aided and abetted by the plaintiff taking up an incorrect position at the time of applying the clamp as was depicted in the relevant photographs and as adverted to by Mr. Maguire in the course of his evidence.

23. For all of the aforementioned reasons, the plaintiff's claim must fail.