THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 218
Court of Appeal Record No. 2017/499

High Court Record No. 2010/5534P

Edwards J.
Costello J.
Donnelly J.

BETWEEN/

FELIX MOOREHOUSE

PLAINTIFF/APPELLANT

- AND -

THE GOVERNOR OF WHEATFIELD PRISON, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 31st day of July 2020

1. This is an appeal from the decision of Barton J. in the High Court ([2017] IEHC 535) dated 15 August 2017, dismissing the plaintiff's claim for damages for personal injuries suffered by him allegedly due to the negligence and breach of duty (including statutory duty) of the defendants and their servants or agents. For consistency with the judgment of Edwards J. delivered in this appeal, I shall refer to the appellant as the "plaintiff" and the respondents as the "defendants".

The background

2. The facts of this case are tragic and describe a terrible accident resulting in horrific, life-changing injuries to the plaintiff while he was a prisoner and under the care of the first named defendant. The trial judge has set out, in considerable detail, the facts of the case which should be read in conjunction with this judgment. I confine myself in this judgment to those facts which are relevant to this judgment.

3. The plaintiff was an inmate in Wheatfield Prison on 27 November 2008 when the fingers of his left hand were accidentally, traumatically amputated while he was attending a training workshop at the prison. He has been disadvantaged and faced challenges his entire life. He was illiterate and innumerate on leaving school at the age of eleven. The only vocational training he ever received was a practical welding course run by FAS for members of the travelling community. The trial judge held that all aspects of the plaintiff's personal, family, social and vocational life have been blighted by habitual drug abuse, which commenced when aged eighteen. He had been convicted of serious offences and served several terms of imprisonment when the case came on for trial.

4. Prisoners at Wheatfield attended a training workshop at the prison where they can attain qualifications in welding. This involved learning how to cut or crop steel bars into shorter lengths of steel which are then used by the trainees for welding. There was a cutting/cropping and punching machine in the workshop known as the GEKA Minicrop which was used to cut lengths of steel bars which could then be welded by the participants as part of their training. The GEKA was fitted with an adjustable device known as a hold-down guide which serves as a safety guide. The guide guard was adjustable and removable, without the use of a tool. The cropping facility could be operated without the guide guard in position and consequently the cropping blades were exposed, accessible and clearly visible to the operator and anyone supervising the operation of the GEKA. When the guard is absent it is possible to insert a hand into the cutting space.

5. Prisoners were given training on the use of the GEKA and once they had shown that they were competent in the use of the machine, they could use it without seeking permission from the supervising officers.

6. On the day in question, a problem arose with the GEKA. Two other prisoners were using the cropping facility, as a result of which a steel bar which they were trying to cut jammed between the cropper blades. The problem was reported to the Supervisor, Industrial Training Instructor (ITI) Nicholson. He removed the steel bar and instructed Prison Officer Maher to make sure that no one used the machine. ITI Nicholson left the workshop and went to the office to obtain an out of order sign to place on the GEKA. He was delayed for a short while by a telephone call.

7. Prisoners in the vicinity of the GEKA were instructed not to go near the machine, but those working elsewhere in the workshop would not have been aware that the machine was out of order and was not to be used. Prisoners who had been trained and had demonstrated competence in the operation and safe use of the cropping facility could use the GEKA without seeking permission to do so. Other than the prisoners in the immediate vicinity, they were not alerted to the fact that they should not use the machine.

8. At his request, the plaintiff had commenced a structured methadone programme on 16 September 2008. He had used illicit drugs before commencing the programme and had smoked heroin while on transfer to Wheatfield Prison. The trial judge held that, as a matter of probability, he continued to use illicit drugs both before, during and after the accident, although details of the type, quantity and level of illicit drug use were not canvassed with the plaintiff. The trial judge held that it was probable that if a urine test had been carried out on a urine sample taken from the plaintiff on the day of the accident it would have tested positive for some or all of the substances cannabis, benzos, opiates and

methadone. The plaintiff had received his prescribed dose of methadone prior to attending the workshop on the day of the accident.

9. The plaintiff was a trainee on the welding course. On the day in question, he attended the workshop. As I have described, the GEKA developed a problem and ITI Nicholson disabled the machine and left the workshop to find an out of order sign to place on the GEKA. This left Officer Maher alone with the trainees in the workshop. He had been instructed to ensure that no one used the machine. Officer Maher left his position beside the GEKA to fetch more steel bars from a storeroom for use by the trainees, thereby leaving the prisoners unsupervised and the GEKA unguarded. While both ITI Nicholson and Officer Maher were out of the workshop, the plaintiff operated the GEKA without the guide guard in place and the four fingers of his left hand were amputated by the unguarded GEKA. The precise circumstances of how this occurred is central to the case.

The pleadings

10. The plaintiff set out his case in his Personal Injury Summons, which was amended on a number of occasions, the final version of which was dated 21 October 2014. He pleaded as follows:-

> *"On or about the 27th day of November, 2008 whilst the Plaintiff was an inmate in Wheatfield Prison, in the County of the City of Dublin, which said prison was under the control of the First Named Defendant, and whilst the Plaintiff was under the influence of a controlled drug to wit Methadone administered by an agent of the First Named Defendant, the plaintiff was participating in a training programme where he was cutting metal with a guillotine steel cutter, the Plaintiff's left hand became caught in the cutter, in consequence whereof the Plaintiff suffered severe personal injuries, loss and damage and expense."*

The plaintiff did not plead that he had taken or was under the influence of illicit drugs.

11. The particulars of negligence are set out at paras. 8(A)-(M). The pertinent particulars read:-

"C. Failing adequately or at all to supervise the Plaintiff and in particular failing to have an officer present in the room adjacent to the workshop where there was present a cutoff switch;

D. Permitting the Plaintiff to operate at the machine when they knew or ought to have known that it was unsafe and dangerous for him so to do in general terms and specifically allowing and permitting the Plaintiff to operate at the machine when they knew or ought to have known that he was under the influence of a controlled drug to wit Methadone;

E. Failing to have a guard in place on the machine;

F. Allowing the Plaintiff to operate at the machine without proper formal training;

...

H. Failing to instruct the Plaintiff in the proper use of machine with a guard or back – stop;

I. Failing to isolate the power to the machine;

J. Having in place a defective foot pedal;

K. Having in place a defective power drive;

L. Failing to have in place any warning signs; and/or if signs were present to ensure that the Plaintiff was capable of reading them."

12. There was a general plea of failing to comply with the provisions of the Safety and Welfare at Work Act 2005 and the Safety, Health and Welfare at Work (General Application) Regulations (undated).

13. No one from the defendants witnessed the incident and the defendants required the plaintiff to prove that he was injured in the manner he alleged. In their amended Personal Injury Defence, the defendants pleaded at para. 2:-

"(c) The Defendants deny and require proof that the Plaintiff's left hand became caught in the cutter in the manner alleged.

(d) The Defendants deny and require proof that the incident or accident occurred in the manner alleged.

...

(f) The Defendants deny and require proof that the Plaintiff was caused to suffer the alleged personal injuries and/or loss and/or damage and/or expense in the manner alleged."

14. At para. 3 they pleaded:-

"(a)(-1) The Defendants deny that the incident occurred as alleged.

(a)(0) The Defendants deny that they are guilty of the alleged or any negligence or breach of duty or breach of statutory duty.

(a) The incident or accident was caused by the negligence and breach of duty and/or recklessness on the part of the Plaintiff.

(b) The Plaintiff was the author of his own misfortune.

(c) The Plaintiff acted contrary to warning signs in operating and/or purporting to operate the machine as alleged.

(d) The Plaintiff acted contrary to oral instruction from the Defendants, their servants and/or agents in operating and/or purporting to operate the machine as alleged.

(e) The Plaintiff acted contrary to oral warnings and/or instruction from fellow inmates in operating and/or purporting to operate the machine.

> (f) *The Plaintiff removed guarding from the machine in operating and/or purporting to operate same as alleged.*
>
> (g) *The Defendants, their servants and/or agent had shut down the machine.*
>
> (h) *The Defendants, their servants and/or agent had given instruction not to operate the machine.*
>
> (i) *The Plaintiff was not authorised to operate the machine."*

15. At para. 4(i) it was pleaded that:-

> *"Further if the accident or incident occurred in the manner alleged or at all and/or if the Plaintiff suffered the alleged or any personal injuries, loss and damage then the Defendants will claim that they are not responsible and/or liable or not wholly responsible or liable to the Plaintiff by virtue of the fact that same arose and/or was caused wholly and/or partly by the negligence and/or contributing negligence on the part of the Plaintiff for the reasons set out above."*

It was clear from the pleadings that the defendants did not accept the plaintiff's account of the accident and required him to prove that it occurred in the manner alleged by him, and that they asserted that he was responsible for his injuries as he was said to be the author of his own misfortune.

The decision of the High Court

16. The trial judge delivered a most careful and comprehensive reserved judgment. He noted that there was an almost complete conflict of evidence in relation to induction and training, particularly with regard to the GEKA, and in relation to the circumstances of the accident. He examined the plaintiff's case in scrupulous detail under various headings: Training; Safe use and operation of the GEKA; Instructions not to use the GEKA; Guarding and the Stop bar; Position of hand; Prison Officer Maher; Effect of Methadone/Illicit Drugs; Did the plaintiff get an instruction not to go near or use the

machine; Was the plaintiff responsible for the removal of the guide guard; Did the defendants breach the provisions of the Safety Health and Welfare at Work Act 2005 and the provisions of the Safety Health and Welfare (General Applications) Regulations 2007, in particular Regulations 33 and 34.

17. At paras. 48 and 49 he held:-

> *"48. The Plaintiff gave a very particular account of the circumstances in which he came to be in the workshop, what he was doing and how it was being done at the time of the accident. In relation to the actual occurrence of the accident it was the only direct account available to the Court which, if accepted, meant that he was performing a permissible function as part of his welding course at an unguarded and dangerous machine at a time where he did not want to be in the workshop and was adversely affected by methadone.*
>
> *49. Of the many matters in controversy between the parties,* ***the resolution of the issue as to how and in what circumstances the accident occurred is fundamental to the outcome of the case since on the Defendant's case whatever the Plaintiff was doing, the accident occurred in a way and manner otherwise than as described by him*** *in circumstances where he had been advised the reasons why and had been instructed not to use or go near the GEKA on the day."* (emphasis added)

<u>The trial judge's assessment of the plaintiff's evidence</u>

18. The trial lasted for twenty-seven days. The plaintiff gave evidence before the trial judge and was cross-examined for two full days. The trial judge had ample opportunity to assess the plaintiff. He said that he was "not satisfied that the Plaintiff intentionally set out to mislead the experts to whom he spoke or this Court especially when, as they must be, the obvious deficiencies in his memory, educational and social background circumstances

are taken into account." However, in a preceding paragraph he held that "[w]hatever the reason certain aspects of the Plaintiff's evidence were variously inconsistent, inaccurate or contradictory". He said that the plaintiff "did not impress me as a witness on whose evidence alone the Court could rely…".

19. The trial judge specifically rejected much of the plaintiff's evidence and specific factual assertions, including central aspects of his case. He held that the accident was not attributable to the methadone taken by the plaintiff (particular D), he rejected his claim that he had not been trained or instructed in the use of the GEKA (particulars F and H) and the plaintiff's case that the accident was caused by a defective foot pedal or power drive (particulars J and K).

20. A major issue between the parties was whether or not the plaintiff had been instructed and trained in the safe use and operation of the GEKA. The plaintiff claimed he had received no such training. The trial judge held it was "highly improbable that the Plaintiff would not have been instructed in the safe use and operation of the cropping facility of the GEKA particularly as use of this facility was an integral part in producing the materials required for his own welding work."

21. The plaintiff said he had no recollection of seeing the safety video or DVDs prior to commencing in the workshop and that he was put straight on to welding, such that his knowledge came from merely watching other prisoners. The trial judge stated he did "not accept that the Plaintiff's source of knowledge in relation to the use and operation of the cropping facility was confined to watching other prisoners".

22. A second major ground of contention was whether the fact that the plaintiff had consumed methadone was a causative factor in the accident. The plaintiff said he had received his daily dose of methadone and it had made him feel very sleepy and drowsy and, in general, he could not think straight on methadone. The trial judge accepted the

evidence of the defendants that a prisoner who presents to a workshop exhibiting signs of being unwell or of being inebriated in any form would be refused entry, and that the plaintiff met with ITI Nicholson and "it is highly unlikely that he was exhibiting any such signs at this time." Furthermore, having considered, in detail, evidence as to the possibility that the consumption of methadone or illicit drugs played a role in the events at issue, the trial judge rejected this plank of the plaintiff's case, concluding that the consumption of illicit drugs and/or methadone "played no material role in the cause of the accident."

23. The plaintiff challenged the reliability of the evidence of the defendants' witnesses. He claimed he was wearing runners and not PPE boots, but was nevertheless admitted into the workshop. It was suggested that a member of the prison staff must have removed his runners and put on his boots while he was unconscious after the accident. The trial judge said:-

> *"I am quite satisfied that the Plaintiff would not have been admitted to the workshop without wearing the required PPE, including his boots."*

24. There was a dispute whether Officer Maher was present in the workshop which related to an allegation that there were insufficient officers on duty to supervise the prisoners in the workshop. The plaintiff said that he had no recollection of seeing Officer Maher on the afternoon in question. The trial judge found as a fact "that Officer Maher was present in the workshop on the afternoon of the accident."

25. The plaintiff gave evidence that the stop bar was missing from the back of the GEKA at the time of the accident. This was hotly disputed by the defendants. A photograph taken by Industrial Training Manager (ITM) Austin Stack showed the stop bar fitted in position at the back of the machine. The court concluded, "I reject the Plaintiff's evidence that the back stop was missing."

26. The plaintiff gave evidence that, given the absence of the back stop from the GEKA, it was necessary to judge the length of the steel bar to be cut by eye and he tried to do so with the assistance of Mr. Ducie, a fellow prisoner. The trial judge found the plaintiff's evidence in respect of this to be "unconvincing and incorrect".

27. The trial judge summarised the plaintiff's account of how the accident occurred as follows:-

> *"On his [the plaintiff's] account, the accident involved a three-stage process, firstly his hand got caught, secondly, he called out for help which did not come and thirdly, the blade came down unexpectedly on his fingers."*

He concluded:-

> *"I consider this aspect of the Plaintiff's account of what happened in the moments before the accident to have been unlikely and the Court so finds."*

After extensive consideration of all matters at issue between the parties, the trial judge concluded that the case the plaintiff was making against the defendants did not "stand up to scrutiny."

<u>Other evidence concerning the mechanism of injury</u>

28. The trial judge rejected the plaintiff's account of guiding the steel bar with his left hand on top of the bar while he fed it into the GEKA with his right hand. He accepted the evidence of Mr. Romeril, the engineer called by the defendants, in particular in relation to the glove worn by the plaintiff on the day in question, and the mechanics of how the damage sustained by the glove could be caused. There was little damage on the dorsal side of the glove, but it was severed on the palmer side. This fact could not be controverted. Mr. Romeril conducted tests on comparable gloves with and without a metal bar under the glove. His evidence was that damage to one side only of the glove, and not to the other, was produced when it was cut without resting the glove on a metal bar. A test glove was

practically completely severed on both sides when placed on a metal bar and cut by the machine. The trial judge accepted the explanation of Mr. Romeril and rejected that of Mr. Tennyson, the engineer called on behalf of the plaintiff. Having carefully considered all the evidence, the trial judge concluded that the damage to the plaintiff's glove was not consistent with the plaintiff's hand being on a metal bar as described by the plaintiff. The trial judge held:-

> *"On my view of the evidence it is highly probable to the point of near certainty that whether the Plaintiff's hand was palm upwards or palm downwards, if the cropper blade was to make contact and cut the bar, which the Plaintiff says he was using, it would have been necessary for the blade to cut through the glove almost completely as demonstrated by the damage to the glove in test number one."*

29. The trial judge expressly rejected the plaintiff's evidence on certain crucial matters. He rejected his account of the accident. He accepted objective evidence which contradicted the plaintiff's case. The severance of the glove on the palmer but not the dorsal side disproved that the plaintiff's hand was on a metal bar when he sustained the injury, and it disproved that he was guiding the metal bar with his left hand, palm down on the bar as he had maintained. The fact that the backstop was in place undermined the plaintiff's explanation that it was necessary to judge the length of the bar to be cut by feeding it into the aperture of the GEKA, as it merely had to be inserted until it met the backstop in order to produce the desired length of steel. He found as a fact that the plaintiff's left hand was not resting on a steel bar at the time when he operated the machine and that it was palm upwards when the blades of the cropper descended. As the trial judge said "[t]he Plaintiff gave a very particular account of the circumstances in which he came to be in the workshop, what it was he was doing and how it was being done at the time of the accident", and he rejected it as not bearing scrutiny.

Findings against the defendants

30. The trial judge was critical of the defendants and made important findings against the defendants. In particular, he held that if properly fitted and adjusted, the guide guard would have prevented any part of the plaintiff's hand entering the cropping compartment to the point where it would have been in the path of travel of the shear blades. The injuries could not have been sustained had the guide guard been so positioned. The identity of the individual and responsibility for the removal of the guide guard was not resolved at trial, though he held that the plaintiff was not responsible for its removal. He held that had there been supervision in the work and training area of the workshop at the time of the accident it is highly unlikely that the accident could or would have occurred. He said that it was "folly" not to utilise a lockout device on the GEKA, which was intended to be used when the guard was removed, and he held that the plaintiff had not been instructed on the day not to use the GEKA. At para. 166 he said:-

> *"If an accident occurred in the way manner and circumstances contended for by the Plaintiff I am satisfied…that there was a breach of statutory (sic) [duty] on the part of the 1st, 2nd and 3rd Defendants in failing to comply with the provisions of the 2005 Act with regard to requirements relating (sic) [to] the provision of a Safety Statement and Risk Assessment under that Act and with regard to the duties owed to the Plaintiff and the 2007 Regulations, in particular regulations 33 and 34."*

31. As I have said, despite these findings against the defendants, the trial judge dismissed the plaintiff's case. The reasons for the dismissal are set out in paras. 166, 186 and 187 of the judgment:-

> *"166. If an accident occurred in the way manner and circumstances contended for by the Plaintiff I am satisfied having regard to the reasons given and the findings made*

that there was a breach of statutory (sic) [duty] on the part of the 1st, 2nd and 3rd Defendants in failing to comply with the provisions of the 2005 Act with regard to requirements relating (sic) [to] the provision of a Safety Statement and Risk Assessment under that Act and with regard to the duties owed to the Plaintiff and the 2007 Regulations, in particular regulations 33 and 34. However, as stated earlier in this judgement, ***the fundamental question in controversy between the parties which goes to the very core of the case made by the Plaintiff concerns the circumstances of the accident, in particular the way and manner in which the Plaintiff says that it occurred. The law requires the Plaintiff to establish, on the balance of probabilities, the case which he makes against the Defendants at the centre of which is the description of an accident which has given rise to the injuries and loss in respect of which he seeks to recover damages from the Defendants.***

…

186. For all these reasons [set out in paras. 167-185], the Court finds that the Plaintiff's left hand was not resting on a steel bar at the time when he operated the machine and further finds that the Plaintiff's hand was palm upwards when the blade of the cropper descended, an action which resulted from his pressing the floor pedal.

187. Whatever the Plaintiff was doing and whether or not that involved a deliberate act, the Plaintiff has failed to satisfy the Court on the balance of probabilities that the accident occurred in the way, manner and circumstances described in evidence. Accordingly, having failed to discharge the onus of proof cast upon, the Court is required to dismiss his claim and will so order." (emphasis added)

The appeal

32. The plaintiff appealed and argued that the rejection of his account of the way, manner and circumstances of the accident does not, as a matter of law or logic, lead to the rejection of his claim. He argued that the trial judge failed to have due regard to certain findings in reaching his conclusion to dismiss the claim. The Notice of Appeal sets out twenty-one grounds as follows:

(1) The Learned High Court Judge erred in the law and on the facts in concluding that the plaintiff's claim should be dismissed by reason of the fact the accident, the subject matter of these proceedings, did not occur exactly as described by the plaintiff, in circumstances where he found breach of statutory duty on the part of the defendants in the absence of which breach the accident would not have occurred.

(2) The Learned High Court Judge erred in law and on the facts in failing to have due regard to the disadvantages suffered by the plaintiff in relation to describing the accident, due, *inter alia*, to the lack of education of the plaintiff, and the fact that, at the time of the accident, the plaintiff was using illicit drugs, in addition to Methadone. Whereas, the Learned Trial Judge was aware of the plaintiff's memory difficulties (see Judgment parags. 94 and 95), the Learned High Court Judge failed to have due regard to that fact in relation to the plaintiff's evidence as to the exact manner in which the accident occurred.

(3) The Learned High Court Judge erred in failing to have sufficient regard to the fact that even if the plaintiff was mistaken in his description of how the accident occurred, the plaintiff had not "… intentionally set out to mislead the experts to whom he spoke or this Court …". (See Judgment parag. 97).

(4) The Learned High Court Judge erred in law and on the facts in failing to have due regard to his finding (see Judgment parags. 3, 4 and 51), that the GEKA Minicrop machine at which the accident occurred, required guarding to minimise, or avoid the risk of injury, but that at the time of the accident, the guide-guard had been removed, and that same had been removed by a person other than the plaintiff.

(5) The Learned High Court Judge erred in law and on the facts in failing to have due regard to his finding (see Judgment parag. 4) that if fitted and properly adjusted, the guide-guard would have prevented any part of the plaintiff's hand entering the cropping compartment to the point where it would have been in the path of travel of the shear blades, and that the injuries sustained by the plaintiff could not have been sustained had the guide-guard been so positioned.

(6) The Learned High Court Judge erred in law and on the facts in failing to have due regard to the fact that the plaintiff was permitted to use the machine in question, in spite of the considerable danger for the plaintiff in doing so, in particular by reason of the fact that the guard thereof had been removed prior to the accident by a person other than the plaintiff. (See Judgment parag. 102).

(7) The Learned High Court Judge failed to have regard to the concession by the plaintiff in cross-examination, that it was possible that when the blade came down, the plaintiff's hand was palm upwards. (See Judgment parag. 61).

(8) The Learned High Court Judge erred in law and on the facts in failing to have due regard to the fact as found by him (see Judgment parag. 10), that had there been supervision in the work and training area of the workshop at the time of the accident, it is highly unlikely that the accident could, or would, have occurred.

(9) The Learned High Court Judge failed to have due regard to his finding that Officer Maher unnecessarily left the GEKA machine to get welding rods, that had he not done so, it is almost certain that the accident could not, and would not, have occurred, and that ITI Nicholson and Officer Maher were both aware that some prisoners (including the plaintiff) would not have heard an instruction not to go near, or use, the machine, and that any trained prisoner (including the plaintiff) who was unaware of the problem which might arise in using the GEKA machine, might attempt to use it when both ITI Nicholson and Officer Maher were away. (See Judgment parags. 133 – 135).

(10) The Learned High Court Judge failed to have due regard to the fault on the part of Officer Maher in leaving the GEKA machine in circumstances where ITI Nicholson had given him an express instruction to make sure that no one used same. (See Judgment parag. 139).

(11) The Learned High Court Judge failed to have due regard to the fact that, contrary to the evidence given by Officer Maher, the plaintiff was not instructed not to use the GEKA machine shortly before the time of the accident.

(12) The Learned High Court Judge failed to have due regard to the fact that but for the breach of statutory duty on the part of the defendants, as found by the Learned High Court Judge, the accident would not have occurred.

(13) The Learned High Court Judge failed to have due regard to his finding that but for breach by the defendants of their statutory duty in relation to failure to use the lockout device by a padlock preventing the machine from being restarted, the accident could not, and would not, have occurred. (See Judgment parag. 157).

(14) The Learned High Court Judge failed to have due regard to his own finding (See Judgment parag. 164) that;

> "… The pre-accident practice of not utilising the lockout device by fitting a padlock when the guard was removed for servicing or other reasons provides no excuse or defence in law to an allegation of negligence and breach of statutory duty in circumstances where the manufacturer and/or a supplier of the GEKA provided a device the purpose of which was largely if not wholly concerned with the health and safety of those using, operating or servicing the machine."

And to his further finding (in relation to failure to use the lockout device) that;

> "… it was folly to permit the practice which rendered it nugatory."
>
> (See Judgment parag. 165).

(15) The Learned High Court Judge was incorrect in his finding that the defendants had submitted that the plaintiff had caused the accident deliberately (see parag. 167 of his Judgment).

(16) The Learned High Court Judge failed to have due, or any regard to his own finding that it could not be safely concluded that there was no steel bar, or that such was not being used by the plaintiff when he sustained his injuries. (See Judgment parag. 168).

(17) The Learned High Court Judge failed to have due, or any regard to his finding that the extent of wear on each of the two blades of the machine was unknown, and that as to which of the blades actually performed the cutting, and therefore the resulting damage seen in the accident, and test logs, was unascertained.

(18) Given that the Learned High Court Judge found unproved the extent of wear on the respective blades of the machine, and as to which blade performed the

cutting, he illogically concluded that if the plaintiff's hand was resting on a steel bar or flat, his fingers could not have been amputated without the glove material being completely cut away on the dorsal side. (See Judgment parags. 169, 170).

(19) In relying on the evidence of Mr. Romeril, B.E. (engineer for the defendants), the Learned High Court Judge failed to have due or any regard to the effects of changes in the cutting efficacy of the blades on the machine, which had occurred between the plaintiff's accident on 27th November, 2008, and the time when Mr. Romeril, B.E. carried out his tests on same.

(20) The Learned High Court Judge erred in law and on the facts in finding that because the accident had not "… occurred in the way, manner and circumstances described in evidence", the plaintiff's claim should be dismissed. This is inconsistent with his conclusion and acceptance (See Judgment parag. 94);

> "That the Plaintiff experiences and has experienced memory difficulties was readily apparent from his evidence and the way in which that was given, difficulties which may be attributable one suspects, at least in part, to his drug addiction."

It is further inconsistent with the conclusion of the learned Judge (See Judgment parag. 97);

> "Having had an opportunity to observe his demeanour as he gave his evidence I am not satisfied that the Plaintiff intentionally set out to mislead the experts to whom he spoke or this Court especially when, as they must be, the obvious deficiencies in his memory, educational and social background circumstances are taken into account."

(21) The Learned High Court Judge erred in law and on the facts, in holding (see parag. 178 of the Judgment) that the evidence of the Plaintiff concerning the moments immediately prior to the accident, in particular the positioning of the Plaintiff's hand, did not stand up to scrutiny, in circumstances where the Plaintiff accepted, during cross-examination, that his palm may have been upwards at the time of the accident.

The defendants joined issue with all the grounds of appeal.

Discussion

33. In its essentials, this is an appeal about causation and the circumstances when a court may infer causation. The onus of proof rests on the plaintiff. McMahon and Binchy, *The Law of Torts* (4th ed., Bloomsbury Professional, 2013), in a passage approved of by Irvine J. in *Connaughton v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 203, states at para. 9.01:-

> *"As a general rule, a plaintiff in an action for negligence must plead and prove negligence on the part of the defendant in order to succeed. The plaintiff must convince the judge, on the balance of probabilities, that the defendant was negligent. Anything less will not be sufficient."*

34. In *Connaughton*, Irvine J. approved of the following passage from Salmond and Heuston, *Law of Torts* (21st ed., Sweet & Maxwell, 1996) at para. 30:-

> *"The burden of proving negligence is on the plaintiff who alleges it - or as practitioners often put it, the plaintiff must prove causation. It is not for the doer to excuse himself by proving that the accident was inevitable and due to no negligence on his part;* ***it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of the defendant****. Unless the plaintiff produces reasonable evidence that the accident was caused by the defendant's negligence, there is no case*

> *to answer, and it is the duty of the judge to enter judgment for the defendant. It is not necessary for the plaintiff to show that the defendant must be found guilty of negligence, or to eliminate every conceivable possibility by which the accident may have been caused without negligence on the defendant's part. This rule is particularly important when the injured person has either been killed in the accident or has no recollection of it.* ***But the plaintiff's evidence must pass beyond the region of pure conjecture and into that of legal inference****. The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess.* ***An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. It follows that there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish****. It is to be noticed that this question is to be decided not by weighing the evidence of the plaintiff against the defendant but by disregarding altogether the evidence of the defendant, and* ***by asking whether that of the plaintiff is per se and apart from any contradiction, sufficient or insufficient or bring conviction to a reasonable mind.****"* (emphasis added)

35. It is not necessary for the plaintiff to eliminate every conceivable possibility by which the accident may have been caused without negligence on the defendant's part in order to succeed. Neither does it mean "that the plaintiff "has got to have a story" which explains how the accident occurred". In some cases, the plaintiff may not be in a position to give evidence as to how the accident occurred and the plaintiff asks the court to infer certain facts from facts he or she has been able to prove. This is described by Salmond and Heuston as passing beyond the region of pure conjecture into that of legal inference. The

distinction between a conjecture of no legal value and a legal inference is critical. In *Connaughton*, Irvine J. held:-

> *"42. It is accepted that the plaintiff is not required to discount every possibility whereby the accident could have been caused other than by negligence on the part of the defendants* ***but the law requires that the plaintiff adduce evidence that gives rise to a reasonable inference that the defendants' negligence was the cause.****"* (emphasis added)

36. The inference which the court is asked to draw must be reasonable. The court must be satisfied that, apart from any contradiction, the evidence of the plaintiff is sufficient to infer the facts which cannot be proved but which are sought to be inferred. This applies where a plaintiff cannot adduce evidence of the cause of the events complained of. Different considerations arise where the plaintiff could adduce evidence of those facts but fails, without any reasonable explanation, to do so or where the plaintiff adduces such evidence which is rejected. Care must be taken where the court is requested to infer facts which are contrary to actual evidence which is adduced and rejected. If the rejected evidence is central to the case advanced, and is not merely peripheral or incidental, it seems to me that if a court were to infer facts contrary to the actual case advanced this would amount to the court recasting the case of the plaintiff, which is not its function and is impermissible.

37. In this appeal, the plaintiff invites the court to infer, in light of the proven negligence and breach of duty of the defendants, that the defendants are liable for the resulting injuries to the plaintiff. This is not a case where he cannot give an account of the accident. He can and he did. His positive case as to the mechanism of the accident has been rejected so he argues, as an alternative, that it is not necessary to establish the manner in which it

occurred; it is sufficient if he proves that he was injured and that but for the negligence of the defendants he would not have been injured.

38. It is of course permissible, and by no means unusual, to advance cases in the alternative. Frequently, applying a but for test will be sufficient to establish causation against a defendant, depending on the facts of the particular case. None of this is in controversy. However, the plaintiff advanced a very particular account of how he was injured and, in the alternative, he says that he is not required to give an account as to how he was injured, or that the court may disregard the account he gave, and that it is sufficient to prove that the negligence of the defendants permitted the accident which occurred to occur. This submission omits the further, and to my mind, critical question: what effect, if any, does the fact that he gave an account of the accident which was rejected by the trial judge have on the issue of proof of causation which rests on the plaintiff?

39. The court has been referred to authorities where the plaintiff has been unable to give an account of how the accident actually occurred and where the court was prepared based on the facts which were established to infer further facts which resulted in a finding of liability against the defendants in those cases.

40. The first was *Ellis v. William Cook Leeds Ltd* [2007] EWCA Civ 1232. In that case, the plaintiff was badly injured at work but had no memory of the accident itself. No one witnessed the accident or the injury to the plaintiff. There was no expert witness to assist the court. There was no account of how the plaintiff was injured. The court accepted that reasonable inferences could be drawn as to how the plaintiff came to be struck in the face by a hook suspended from a crane, which the plaintiff had been using to move a casting which was too heavy to lift by hand, and which had fallen into a space between racks in the blasting area of the defendant's premises. May L.J. held at para. 18:-

> *"There is, however, no challenge to the judge's finding that it was foreseeable that a casting of this kind might become jammed. That being so, using this crane with these hooks to move this slipped casting was not, in my view, a safe system of work. On this basis, the judge's finding on liability is supportable, although not for the precise reasons he gave."*

The inference, in the absence of any evidence as to how the plaintiff was injured, was central to the finding for the plaintiff. There was no discussion as to the role, or limits of the role, of inferences of fact in the judgment.

41. The second case to which we were referred was *Gonzalez v. Pointing* [2017] EWCA Civ 347. This was an application for leave to appeal. The plaintiff was injured outside the Russell Square tube station in the vicinity of a kiosk operated by the defendant which sold handbags and other items. She sustained a deep laceration to her forehead. The trial judge was asked to determine "Did the claimant sustain injury to her head when one of the flaps fell on her head as she walked under the canopy." The plaintiff was unable to say precisely how she was injured. The judge said that where there is no direct evidence to establish causation, it is permissible for the court to draw inferences. He dismissed all possible other causes of her injury and held that the most likely cause or mechanism was contact with a flap from the canopy which fell and struck her head. Flaux L.J. held at paras. 8 and 9:-

> *"… Unlike in cases where the defendant succeeds on a submission of no case to answer, in the present case, since the judge was concerned simply with the question of fact, all the evidence was called and the straightforward exercise the judge was engaged in was evaluation of the evidence and a decision of the question asked. In doing so, he was entitled to draw inferences and indeed would have been obliged to*

do so if appropriate, and could not be precluded from doing so by some artificial restriction now said by Mr Cherry to arise as a matter of law.

9. In my judgment despite Mr Cherry's submissions, there was evidence available from which the judge could draw the inference which he did."

The application for leave to appeal was refused.

42. It is the law that the court may draw inferences from established facts where there is no direct evidence as to causation. However, I find these cases to be of limited, if any, assistance in this case precisely because the plaintiff here knows what happened and gave a detailed account of how the accident occurred.

43. Different considerations apply where the plaintiff is in a position to give an account of the events leading to the injuries sustained. In *Holt v. Holroyd Meek Limited* [2002] EWCA Civ 1004, Potter L.J. in the Court of Appeal in England and Wales held:-

"13. The extent to which a judge can, or should, take the course of finding for a claimant whose story has changed or whose account the judge does not wholly accept is something of an old chestnut in personal injury cases. ***If a claimant advances a set of circumstance or a mechanism for his accident which the judge is satisfied is false or at any rate totally unreliable, then that is one thing. The judge should not then, because of his view that he does in fact know how the accident occurred which, although differing from the claimant's account, is nonetheless consistent with liability, give judgment on the basis of a finding to that effect.*** *On the other hand, it frequently happens that a judge is satisfied that the circumstances recounted by the claimant are broadly correct and that the accident happened much as he described, albeit the claimant may have embroidered or sought to improve his case, or may be mistaken about some aspect of it. If the judge is satisfied that, stripped of the detail or circumstances which he rejects, the essential facts are*

> *nonetheless clear, that they are not (sic) [at] odds with the general thrust of the claimant's case and that they are such that the ingredients of liability are established, then he is at liberty, and indeed is, in my view, obliged to give judgment accordingly."* (emphasis added)

I accept that it is a correct statement of the law in this jurisdiction.

44. The plaintiff relied upon *Ellis v. Translink* [2012] NIQB 112 to support his appeal. In my judgment, this case is, when properly understood, an example of the latter type of case identified in *Holt*. The plaintiff gave evidence that in the course of his employment driving a bus, the front suspension failed. He said he sustained a jarring injury to his right wrist as a result of a severe jolt against the steering wheel. The engineer who gave evidence on his behalf said that the immediate cause of the failure was a fault in the rubber joint in the axle which resulted in the air bags emptying at a steady rate from the system. It was established that this would take around three and a half minutes, and that the deflation did not involve a sharp or sudden drop or collapse as the air dissipates. Counsel for the defendant submitted that the plaintiff's claim should be dismissed on the basis that the plaintiff's description of the accident was inconsistent with the evidence of his expert witness.

45. Maguire J. concluded that the plaintiff was an honest and straightforward witness who was not seeking to embellish or otherwise improve upon what was a simple narrative. At paras. 26-28 of the judgment he said:-

> *"[26] When considering the plaintiff's evidence about the incident the court does not approach it requiring a perfect account. It must pay due regard to the nature of what it is that is being expressed. Expressions like "dropped sharply" or "bounced" or "collapsed" are all relative and should be read with due allowance for context. The*

bus was already running hard and the witness is seeking to find words to recall ex post facto the specifics of what occurred at a particular point in an already fraught journey.

[27] The evidence of Mr Donaghy it seemed to the court had its limitations. He did not inspect the actual bus in which the breakdown of the suspension occurred and he did not inspect the surface of Tennant Street until long after the accident. The court is prepared to accept the description given by Mr Donaghy of how the suspension of the vehicle was lost… The likelihood is that the loss of the front suspension probably began shortly after the bus left the depot at Short Strand. While the plaintiff said the bus was running smoothly initially, by the time it entered onto Crumlin Road the plaintiff was aware of a problem. At this stage the loss of the airbags was either partial or complete. If partial, the loss would have been complete within a short period of time. By the time the bus was travelling towards the Shankill Road along Tennant Street the cushioning effect of the airbags would have significantly been reduced if not lost altogether. By this point the ride being given by the bus to the driver would have been hard and at the very least uncomfortable. The road surface was concrete apart from areas of repairs effected in asphalt. No road surface is perfect. There were joints between the concrete slabs and patching in places sometimes using asphalt. There were also some undulations, according to Mr Donaghy, as the bus travelled along the road. The court reads Mr Donaghy's evidence as being that as the bus went along Tennant Street the ride which the driver would have experienced would at the least have been hard and uncomfortable. The likelihood is that at this time the suspension would have consisted of no more than two small rubber bars one at each side at the front axle.

[28] In the light of all of the above should the plaintiff's claim (sic) be dismissed on the basis that he, upon whom rests the onus, has failed to prove that his wrist injury was caused by the loss of the bus's front suspension? While the court acknowledges that the language used by the plaintiff to describe the incident in Tennant Street sits uneasily with Mr Donaghy's description of what occurs within a bus when there is a loss of front suspension, it is not satisfied that it should reject the plaintiff's account for this reason. ***The court's starting point is that it has reached the view that the plaintiff gave honest testimony before it. On the issue of the plaintiff's credibility it seems to the court that it must make a considered assessment. It observes the witness and reaches a view. It cannot sit on the fence. The court has to decide whether it believes that the plaintiff's injury was received as the bus travelled along Tennant Street as a result of the loss of the front suspension. The answer is that it does even though the language the plaintiff used to describe the occurrence can be said when placed against Mr Donaghy's technical evidence to overstate the effects of the evacuation of the airbags would have on the bus. In the court's view Mr Donaghy's overall evidence is not irreconcilable with the plaintiff's account, in view of the matters recounted above.*** *But, even if it was, the court would, if necessary, be prepared to infer causality given the proven negligence of the defendant, the plaintiff's injury and the probability that such an injury could be caused by this form of negligence even if it is not possible to be sure about the precise mechanism: see paragraph [28] of Toulson LJ's judgement in* Drake v Harbour *[2008] EWCA Civ 25."* (emphasis added)

46. Maguire J. accepted that the plaintiff gave honest testimony and he was satisfied that the injury occurred as a result of the loss of the front suspension of the bus that he was driving. He carefully analysed the evidence of the engineer, Mr. Donaghy, and concluded

that the alleged inconsistencies between the accounts of the plaintiff and Mr. Donaghy's evidence were more apparent than real. He concluded that the evidence was not irreconcilable with the plaintiff's account. He held for the plaintiff on the basis that he accepted the plaintiff's evidence and, contrary to what was submitted by the defendant in that case, there was no evidence which contradicted the plaintiff's evidence.

47. This must be contrasted with the situation in this case. While the court accepted that the plaintiff did not intentionally set out to mislead the experts or the court with incorrect versions of the events, nonetheless the court held that he was not a witness upon whose evidence alone the court could rely. He expressly dismissed certain crucial aspects of his claim as being "wrong", "unlikely", "highly unlikely" and "improbable", while he simply rejected other evidence outright. Critically, he rejected that the plaintiff's hand had been resting on a metal bar before or at the time the GEKA was operated, as he had described in evidence.

48. Furthermore, the trial judge expressly accepted evidence which contradicted that of the plaintiff. He held that the backstop was in place. He held that the plaintiff's hand was not on the metal bar, and it did not simply slip off the bar. He held that it was facing palm upward when he was injured. He held that the damage to the glove and the positioning of the amputations were consistent with the plaintiff's hand being straight rather than at an angle at the time the blade descended. Far from being "reconcilable" with the evidence of the plaintiff, the evidence of Mr. Romeril and ITM Stack, which was accepted by the trial judge, directly contradicted the plaintiff's account of the accident and led to the conclusion that he could not have been injured in the manner he alleged.

49. In *Ellis*, Maguire J. said that he would have been prepared to infer causality given the proven negligence of the defendant in any event. The comments are strictly *obiter dicta* as he gave judgment for the plaintiff on the basis that he was satisfied that the

circumstances recounted by the plaintiff were broadly correct and that the accident happened much as he described it, albeit that he may have been mistaken about some aspects of it. By way of contrast, in my judgment, in this case the court could not infer causation based on the proven negligence of the defendants, as to do so would be contrary to the rejection of the plaintiff's positive case on causation. Therefore, *Ellis* is of no assistance to the plaintiff.

50. In my judgment, a proper application of *Ellis* and *Holt* supports the case of the defendants and leads to a rejection of the plaintiff's appeal. The evidence of Mr. Romeril regarding the mechanism of the injury is not only "not irreconcilable" with that of the plaintiff, it contradicts it. Further, in *Ellis* the trial judge accepted the evidence of the plaintiff in its essentials, while in this case the trial judge rejected it as it did not "stand up to scrutiny." The central account of plaintiff's case, not merely peripheral or incidental details of it, was found not to be credible by the trial judge.

51. Therefore, this is a case which falls into the first category of cases identified in *Holt.* It follows that the court should not, because it believes it knows how the accident occurred, which, although differing from the plaintiff's account, is consistent with liability, give judgment on the basis of a finding to that effect.

52. The onus of proof has not shifted to the defendants. They are not required to prove that the accident occurred in a manner which exculpates them. Their defence was that, whatever the plaintiff was doing, he was not cutting a steel bar in the manner he asserted. There was nothing improper or unfair in defending the case in this way, particularly as the defendants had no direct knowledge of how the accident occurred. It is for the plaintiff to produce reasonable evidence that the accident was caused by the defendants' negligence. This includes inferences that can reasonably be drawn from that evidence. But, if the

plaintiff fails to produce reasonable evidence that the accident was caused by the negligence of the defendants, there is no case to answer.

53. The plaintiff in this case advanced a set of circumstances, or a mechanism for his accident, which the trial judge rejected. In those circumstances, the court should not then speculate that it does in fact know how the accident occurred and attempt to fill the gap left by the rejection of the plaintiff's explanation. As Salmond and Heuston said, a conjecture may be plausible, but it is of no legal value, as its essence is that it is mere guess. The trial judge, correctly in my view, expressly declined to engage in this form of speculation. At para. 177 he said:-

> "*I accept the submissions made on behalf of the Defendants that the Court is not concerned with nor should it seek to resolve the issues between the parties by engaging in speculation. Insofar as the question as to the circumstances of the actual accident, in particular the way and manner in which it occurred is concerned, that like any other question of fact, has to be decided on the evidence.*"

54. This is consistent with the passage from Salmond and Heuston quoted above, and with the authorities on inferring facts, and correctly states the law. In my judgment, the rejection of much of the plaintiff's evidence, and its contradiction by objective evidence to the contrary, precludes the court in the circumstances of this case from inferring causation in favour of the plaintiff.

55. If the plaintiff is to succeed in light of the findings of the trial judge, the court must infer facts which are contradicted by (i) the plaintiff's own evidence (which was rejected by the trial judge), and by (ii) the evidence of the defendants' engineer (which was accepted by the trial judge). None of the cases opened to the court go this far. On the contrary, *Holt* makes it clear that this is not the law.

56. The evidence of the plaintiff which was rejected by the trial judge was not peripheral or incidental to the issue of liability. It was essential. The plaintiff proved that but for the negligence of the defendants the accident could not have occurred. The trial judge accepted this. The plaintiff submits that this is sufficient to establish liability. I do not agree in the circumstances of this case where his positive version of how the accident occurred was rejected. Counsel for the defendants submitted that a breach of duty, whether statutory or otherwise, cannot be causative of an unaccepted version of events. I agree. The plaintiff asks the court to infer from the proven facts that, notwithstanding the rejection of his account of the accident, the court should accept that he has established that the defendants caused the accident which occurred. For the reasons I have explained, I do not accept that it was open to the trial judge, or this court on appeal, so to do.

Conclusion

57. There is a very significant and real distinction between the inability to describe or recall something on the one hand, and proffering definitive evidence on the other hand. The plaintiff advanced a specific case over a period of days which was not accepted. I accept that the plaintiff is illiterate and innumerate, suffers from significant social disadvantages and that all aspects of his personal, family, social and vocational life have been blighted by habitual drug abuse, and that his circumstances are amongst the most disadvantaged in the state. However, that does not mean that he is not required to prove his case, or that the trial judge is not required to assess the reliability and credibility of his evidence and to reject it if it proves not to be credible or correct. This is not unfair to the plaintiff, nor does it involve disregarding his difficulties in giving evidence, as was contended on his behalf. The court was required to assess the reliability, or accuracy, of his recall of events and of his evidence. In my judgment, the fact that the plaintiff gave a very particular account of the circumstances in which he came to be in the workshop, what

it was he was doing and how it was being done at the time of the accident, which was rejected by the trial judge, must have consequences which, in this case, are fatal to his claim.

58. The trial judge identified the core issue in the case at para. 166 of the judgment:-

> *"If an accident occurred in the way manner and circumstances contended for by the Plaintiff I am satisfied having regard to the reasons given and the findings made that there was a breach of statutory (sic) [duty] on the part of the 1st, 2nd and 3rd Defendants in failing to comply with the provisions of the 2005 Act with regard to requirements relating (sic) [to] the provision of a Safety Statement and Risk Assessment under that Act and with regard to the duties owed to the Plaintiff and the 2007 Regulations, in particular regulations 33 and 34. However, as stated earlier in this judgement, the fundamental question in controversy between the parties which goes to the very core of the case made by the Plaintiff concerns the circumstances of the accident, in particular the way and manner in which the Plaintiff says that it occurred.* ***The law requires the Plaintiff to establish, on the balance of probabilities, the case which he makes against the Defendants at the centre of which is the description of an accident which has given rise to the injuries and loss in respect of which he seeks to recover damages from the Defendants."*** (emphasis added)

At para. 187 he sets out the decision of the court:-

> *"Whatever the Plaintiff was doing and whether or not that involved a deliberate act, the Plaintiff has failed to satisfy the Court on the balance of probabilities that the accident occurred in the way, manner and circumstances described in evidence. Accordingly, having failed to discharge the onus of proof cast upon [him], the Court is required to dismiss his claim and will so order."*

59. I find no fault with the approach of the High Court judge. In my judgment, he approached his task correctly, scrupulously assessed the evidence, considered and applied the relevant legal principles correctly, and properly rejected the invitation to infer liability against the defendants in the circumstances. Having rejected the plaintiff's account of the accident, he refrained from improper speculation as to the alternatives. In my judgment, the plaintiff's case on causation was correctly rejected by the trial judge and I would uphold his decision. This conclusion disposes of all but three of the grounds of appeal.

60. Insofar as grounds 17, 18 and 19 of the Notice of Appeal relate to the trial judge's acceptance of the evidence of Mr. Romeril and the weight he attached to it, I am satisfied that he was entitled to accept his evidence and that he weighed it carefully and appropriately. No reasons have been advanced on appeal which would warrant an interference with the judgment of the trial judge in his assessment of the evidence.

61. For these reasons, I would dismiss the appeal.