THE HIGH COURT

1981 No. 6198P

BETWEEN/

ANTHONY HUGHES

PLAINTIFF

AND

J. J. POWER LIMITED
AND COLLIERS LIMITED

DEFENDANTS

Judgment of Mr. Justice Blayney delivered the 11th day of May 1988.

The Plaintiff claims damages for negligence and breach of contract arising out of repairs carried out by the Defendants to a combine harvester in August 1980.

At the time of the events out of which the action arose the Plaintiff was the owner of a farm of about one hundred acres in the County Wexford. He had a Fahr combine harvester and he used to grow about forty acres of barley every year. In addition to harvesting his own barley he used also cut about three hundred and fifty acres of barley on contract for other farmers in the neighbourhood. In 1983 the Plaintiff transferred his farm to his three sons.

The first named Defendant, J. J. Power Limited (to whom I shall refer as "Powers") is a company carrying on the

business of dealing in tractors and other agricultural machinery. It also services all types of agricultural machinery. The company's business is carried on in Ferns, County Wexford.

The second named Defendant, Colliers Limited, is a company carrying on a light engineering business in Carlow, Bunclody and Waterford.

The facts on which the Plaintiff's claim is based I find to be as follows.

On Thursday the 14th August 1980 the Plaintiff called into Powers in Ferns and asked Mr. J. J. Power, the proprietor of the firm, to send out one of his mechanics to service his combine harvester. Powers had been servicing this particular combine harvester, which the Plaintiff had bought in 1972, since 1975. The following day, the 15th August, was a holiday, and Mr. Power arranged that his fitter, Andrew Lacy, would go out to the Plantiff's farm to service the combine harvester on Saturday the 16th August.

The Plaintiff did not give any evidence. His son Joseph Hughes, who was the principal witness called on behalf of the Plaintiff, said that his father had had a nervous breakdown. Joseph Hughes claimed in evidence that he had rung Powers about the 20th July and had spoken to Mr. Power and that a mechanic and apprentice came out a fortnight later. I do not accept that evidence.

Andrew Lacy duly went out to the Plaintiff's farm on the morning of the 16th August at about 9 a.m. There was nobody at the farm when he arrived. The combine harvester was in a hayshed and he set about servicing the different parts of the

machine other than the engine. About three hours after he arrived Joseph Hughes came along. He took a battery out of a tractor and started up the combine harvester. When the engine started Mr. Lacy heard a knocking noise which sounded like a piston knocking. He decided to take off the head of the cylinder which was furthest from the fan which drew in the air to cool the engine. The cylinder head is secured to the engine block by four bolts. He was able to remove two of the bolts but the other two were so tightly stuck in the block that they sheared off close to the surface of the block. He then removed the cylinder head and cylinder barrel and found that both the piston and the cylinder lining were badly scored. Mr. Lacy decided that it would be necessary to bring the engine into Powers and this was done on Monday the 18th August. Mr. Lacy came out with a Hyac crane; lifted the engine from the combine harvester and put it in Joseph Hughes' trailer. Mr. Hughes then brought it into Powers. There was a complete conflict between the evidence given by Joseph Hughes and the evidence given by Andrew Lacy of what happened when Mr. Lacy came out to service the combine harvester. Mr. Hughes claimed that there was no knocking noise in the engine when it was started up first and that this noise appeared only after the engine had been serviced by Mr. Lacy. I do not accept that evidence. I am satisfied that the damage to the piston and cylinder lining had been done before the engine was started in order to enable the combine harvester to be driven out of the hayshed. I accept Mr. Lacy's evidence that he did not even service the engine.

While the engine was in Powers, Mr. Lacy took the cylinder

head off the cylinder next to the one in which the piston had been damaged and the cylinder which was one away from that again. In taking off the two cylinder heads he sheared a further four bolts.

Joseph Hughes came and removed the engine from Powers on Wednesday the 20th August. He took it away in a trailer which had been lent to him by Mr. Power. The condition of the engine when leaving Powers was that the cylinder heads on three out of the six cylinders had been removed, and the sheared ends of six cylinder bolts were still in the engine block.

On Friday the 22nd August the engine was brought to Colliers Limited. There was a complete conflict between the evidence of Joseph Hughes and that of Joseph Collier as to who brought the engine to Colliers. Mr. Hughes claimed that he had brought it and that he had taken the engine direct from Powers to Colliers. Mr. Collier on the other hand said that he had never seen Joseph Hughes before in his life and that the man who had brought the engine was an elderly man in or around his own age. He also said that before the engine was brought to him he had received a telephone call asking him if he would remove fourteen broken studs from an engine block. Joseph Hughes claimed that no 'phonecall had been made to Colliers before the engine was brought to them. Once again I reject the evidence of Joseph Hughes. On the 4th September, 1980, very soon after the events in question, Mr. Collier, at the request of the Plaintiff, prepared a report giving an account of what had happened and in that report he refers to having personally received a telephone call from a Mr. Hughes asking if he could undertake the removal of some fourteen broken studs from a

cylinder block.

Joseph Hughes also claimed in evidence that between twelve and fourteen studs had already been sheared at the time the engine left Powers. I do not accept this evidence either. As I stated earlier, I am satisfied that only three of the cylinder heads had been removed while the engine was in Powers.

I will deal more fully later with the conversation which took place between Mr. Collier and the person who left in the engine. After it had been left in efforts were made to remove the ends of the bolts still embedded in the engine block. Solvent was put on the six studs of the first three cylinders. One of the studs in the first cylinder, which had broken off about one inch above the cylinder block, was removed with a stud extractor. The one beside it was drilled and was removed with an easy-out. When the next two studs were being drilled, the drill skidded and damaged the cylinder block. It is in respect of this damage, and the consequential damage alleged to flow from it, that the Plaintiff claims damages.

While the Plaintiff's claim is laid in negligence and breach of contract, it is in reality a claim in negligence in that it is a claim for an alleged breach of the duty of care which each of the Defendants owed to the Plaintiff by reason of having undertaken to carry out the necessary repairs to his engine.

What is the nature of that duty? It seems to me that it is very well described by McNair J. in his charge to the jury in Bolam .v. Friern Hospital Management Committee 1957 1 W. L. R. 582 where he said at page 586:-

"The test is the standard of the ordinary skilled man

exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

I will deal firstly with the question of Powers liability. What has to be determined is whether Mr. Lacy fell below the standard of the ordinary skilled man exercising and professing to have the special skill of a fitter or mechanic. In my opinion he did. While he could not be faulted for having sheared two of the bolts securing the first cylinder head, as it was resonable for him to take off that cylinder head to see if the piston was damaged, and he could not have anticipated that two of the bolts were so tightly embedded in the block that they would break, when it came to taking off the second and third cylinder heads the position was wholly different. He ought to have known then from his experience with the bolts securing the first cylinder head that he might have difficulty in getting other bolts out. And he ought to have taken the appropriate measures to try to ensure that the bolts would come out and not shear. What measures should have been taken is apparent from the evidence of Richard Murphy, an engineer and fitter with Deutz, the firm which manufactured the engine, and of Gerard Weafer, the fitter and mechanic employed by Colliers. Mr. Murphy said that if you have difficulty with bolts, you apply penetrating oil. And the first thing that Mr. Weafer did when the engine was brought to Colliers was to put solvent on the six sheared bolts in the first three cylinders. And as a result he got one of the bolts out with a stud

extractor.

Mr. Lacy put no penetrating oil or any other solvent on the bolts. In taking out the bolts securing the second and third cylinders he proceeded in exactly the same way as he had in taking out the bolts securing the first cylinder. He said in his evidence that there was no other way. He said of the bolts that they either come out or they don't come out. In my opinion in doing what he did he fell short of the standard of the ordinary skilled fitter mechanic who I am satisfied on the evidence would have used penetrating oil or some other solvent to help getting the bolts out. I am of opinion accordingly that he was negligent and Powers are vicariously responsible for his negligence.

Was his negligence the cause of the damage, or would it have occurred anyway? In other words, were the bolts which sheared so tightly embedded in the block that the use of penetrating oil or some other solvent would not have made any difference? That was clearly the view that Mr. Lacy took. He said there was no other way of getting them out and they either come out or they didn't. I do not think he was right in this and as a qualified fitter/mechanic whose skill was being relied upon he ought to have known about using solvents. And that this was the correct way of dealing with the problem is confirmed by the fact that Mr. Weafer, having used solvents, was able to get out with a stud extractor one of the sheared bolts which had been holding the first cylinder head.

There is a further factor also. After Mr. Lacy had sheared the two bolts at the Plaintiff's farm, he told Joseph Hughes that "it was now a machine shop job" indicating that it would

be necessary to bring the engine to an engineering works to have the bolts taken out. Since this was the case, and since there was clearly a risk of further bolts being sheared if he tried to take off any of the other cylinder heads, he ought to have told Joseph Hughes to bring the engine straight away to an engineering works. In Duncan .v. Blundell 3 Stark Page 6 Bayley J. said in his judgment:-

> "Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not."

In my opinion Mr. Lacy, in proceeding to take off the next two cylinder heads in the circumstances made an incorrect judgment and one which ought not to have been made by a fitter/mechanic of ordinary competence. The reason he gave for doing what he did was that it was the normal thing to do when you found a piston damaged by over heating. No doubt that is so, but this was not a normal situation so what he did normally was not the appropriate test. In proceeding as he did he left out of account the fact that two of the bolts had sheared when he was taking off the first cylinder head. Also, he was venturing into what was for him unknown territory, as his evidence was that he had never before seen a bolt breaking. He ought to have realized that he had not the skill to deal with the situation and, since he was aware, as he had told Joseph Hughes, that it was a job for a machine shop, he ought to have advised him to bring the engine to a machine shop straight away.

What damage and loss resulted from Mr. Lacy's negligence?

The Plaintiff claimed damages under two headings, firstly, the cost of repairing the combine harvester, or alternatively the reduction in its value by reason of the damage done to it, and secondly, consequential loss under two headings: firstly, the cost of hiring a contractor to cut his own barley in 1980, and secondly, a sum equal to the profits which he lost by reason of not being able to do contract work in 1980, and which he lost in the next two years by reason of having lost his clientele.

Under the first heading the Plaintiff is in my opinion entitled to the reduction in value of the combine harvester resulting from the damage done to the engine block when the bolts were being drilled in Colliers for the purpose of removing them. It was suggested that the drilling was a novus actus interveniens and so Powers could not be responsibile for the damage caused by it. I do not accept this submission. It ought reasonably to have been foreseen by Mr. Lacy that if any bolt was sheared it would have to be drilled in order to get it out and so the drilling in Colliers was reasonably foreseeable and for that reason was not a novus actus interveniens.

The damage to the block was relatively slight. Bill Vigors, a machinery dealer from Rathdrum who took the combine harvester from the Plaintiff as a trade-in, gave evidence that all the bolt holes in the block were perfect except two. He plugged these and re-drilled them; re-assembled the engine and put it back in the combine harvester. He hired the combine harvester to a contractor in 1981 and sold it in the following year. Mr. Collier also gave evidence that if the block had been left with him he could have repaired it in the same way that Mr. Vigors did.

On the other hand, Mr. Richard Murphy, an engineer and fitter with Deutz, the manufacturers of the engine, said that from Deutz's point of view the block was too damaged to be used again, and Mr. Kenneth Robinson, the motor engineer called by the Plaintiff, said there was an element of chance in plugging a block and that there was only a fifty-fifty chance of its being successful. I accept the evidence of Mr. Murphy and Mr. Robinson. I do not think the Plaintiff should have had to accept repairs to the block which only had a fifty-fifty chance of success. I am satisfied accordingly that the reduction in the value of the combine harvester must be approached on the basis that the block could not be repaired.

Joseph Hughes' evidence was that the combine harvester had been worth £8,000 with an undamaged block; Mr. Robinson's evidence was that it was worth between £6,000 and £8,000. Mr. Vigors gave approximately £5,500 for it on a trade-in. I think it reasonable in the circumstances to find that as a result of the damage to the engine the combine harvester had been reduced in value by £2,000 and I would allow that figure under this head.

The first item of consequential loss is the cost of hiring contractors to cut the Plaintiff's own barley in 1980. The Plaintiff paid Patrick Lennon £776 and James Murphy, £200 a total of £976. I consider that the Plaintiff is entitled to recover this sum. If Mr. Lacy, when he discovered the damaged piston on the 16th August 1980, had immediately advised the Plaintiff to send the engine to a machine shop to have the other cylinder heads removed, and the two sheared bolts taken out of the block, I consider it probable that the Plaintiff

would have got the engine back in time to cut his own barley, and so he would not have incurred the expense of hiring the two contractors.

But as regards the loss of the Plaintiff's contracting business, the position in my opinion is different. It was not Mr. Lacy's negligence which caused this. The cause was the damage to the piston in the engine which was already there before Mr. Lacy went to service the combine harvester. He diagnosed the damage, and confirmed it by taking off the first cylinder head. At that stage there had been no negligence on his part. But even if at that stage he had advised the Plaintiff to bring the engine immediately to a machine shop, I consider the work could not have been done in time to enable the Plaintiff to fulfil his contracting commitments. Harvesting began on the 15th August. The earliest the engine could have been sent to a machine shop was on Monday the 18th August, the day the engine was taken out of the combine harvester and brought to Powers. In the machine shop the other five cylinder heads would have had to be removed and the engine totally dismantled so that the two sheared bolts in the block could be removed. In order to remove the other cylinder heads, a number of the bolts would probably have had to be cut and then drilled in order to remove them. The piston and cylinder lining in the first cylinder would have had to be replaced, and the whole engine reassembled and put back in the combine harvester. I think it unlikely that all this could have been done in time to allow the Plaintiff do the contracting work he had undertaken, bearing in mind that he would have had to cut his own forty acres first. It follows that even if there had

been no negligence on Mr. Lacy's part he would still have lost the contract work in 1980 and in subsequent years. Accordingly, this item of consequential loss is not due to Mr. Lacy's negligence and so is not recoverable.

The Plaintiff claimed also that as a result of the delay in harvesting his own barley the yield was three quarters of a tonne less per acre than it would have been if the barley had been cut at the correct time. I am not prepared to allow this claim for two reasons: firstly, because the delay was due principally to the damaged piston, and not to Mr. Lacy's negligence, and secondly, because there was insufficent proof to support the claim. The only evidence was the oral evidence of Joseph Hughes who said that the normal yield was two to two and a half tonnes per acre; that the actual yield was one and a quarter tonnes per acre, and that the price paid was £85 per tonne at 20% moisture. Joseph Hughes said that the receipts for the amount obtained for the barley in 1980 were at home, but although the case went on for a number of days after he gave this evidence the receipts were never produced. In the absence of documentary evidence of the quantity of barley sold in 1980 and the price obtained for it I could not be satisfied that this loss was incurred.

There is one other small item of damage - Joseph Hughes said that he paid Peter Heaney £50 for bringing the engine block to Dublin. This item is also recoverable.

The total of the damages to which the Plaintiff is entitled as against Powers is accordingly £3,026 made up as follows:

Reduction in value of the combine harvester		£2,000
Cost of hiring contractors		£ 976
Paid to Peter Heaney		£ 50
	TOTAL	£3,026

There remains to be considered the claim against Colliers. This can be dealt with quite briefly. When the evidence had concluded, and before Counsels' closing submissions, I made certain findings of fact. In doing so I indicated that I accepted Mr. Joseph Collier's evidence that the engine had not been left into Colliers by the Plaintiff and that Mr. Collier had told the person who left it in that it would be at his own risk and that he (Mr. Collier) could not accept responsibility for it. In saying this he was referring to the fact that some of the studs would have to be drilled out and he was not prepared to accept responsibility for any damage which might result from this.

In my opinion the effect of Mr. Collier saying this, and of its being accepted by the Plaintiff or by the person acting on his behalf who left the engine in (and it clearly was accepted since the engine was left with Mr. Collier) was to import into the contract a term that Mr. Collier should not be liable for any damage which might be done to the engine in the course of the studs being removed. The damage in respect of which the Plaintiff claims falls into this category and so Colliers are entitled to rely on this term as relieving them from liability.

It was submitted on behalf of the Plaintiff that what Mr. Collier said was ambiguous. I do not think it is. It seems to me to mean clearly that Colliers were not prepared to accept

responsibility for any damage which might be done to the engine in the course of getting the bolts out. The only doubt that arises is whether the Plaintiff could claim that what was excluded was liability for damage caused by breach of contract only and not liability for damage caused by negligence, but in my opinion this is not possible on the facts of this case. There was no strict contractual duty imposed on Colliers. The contractual duty was the same as the duty which arose in tort, namely, to exercise the ordinary skill of an ordinary competent man exercising Colliers' particular trade. There was, accordingly, only a single duty imposed on Colliers, though arising both in contract and in tort, and there was nothing that the exclusion could apply to other than a failure to comply with that duty. The exclusion applied therefore to Colliers' liability both in contract and in tort.

The case is distinguishable from cases like White .v. John Warrick and Co. Limited 1953 2 All E.R. 1021 where the Plaintiff was able to point to two separate duties arising in contract and in tort and have the exclusion clause related to the duty in contract only. The Plaintiff had hired a tradesman's cycle from the Defendant and while he was riding it the saddle tilted forward and he was injured. The contract of hire provided that "nothing in this agreement shall render the owners liable for any personal injury". In the absence of such a term the Defendants might have been liable on two grounds: in tort, for negligence, and in contract (even without negligence) for supplying a defective cycle. It was held that the clause excluded liability for breach of the Defendants' contractual duty only so that they could still be liable in tort if negligence were proved. Denning, L.J. said in his

judgment at page 1025:

> "In this type of case, two principles are well settled. The first is that, if a person desires to exempt himself from a liability which the common law imposes on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is that, if there are two possible heads of liability on the defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence."

In the present case there were not two heads of liability, but one, breach of a single duty of care, since it was the same duty that arose both in contract and in tort.

As I am satisfied that Colliers excluded liability even if they were negligent, I do not have to consider whether they were negligent or not. If I had had to consider this, I would have found on the facts that the cause of the damage to the block was that the bit slipped while two of the bolts were being drilled and that the probable cause of the bit slipping was that the bolts in question had not sheared straight across but at an angle. On these facts it would have been open to doubt as to the whether the Plaintiff had discharged the onus which lay on him to prove negligence. So even if Colliers had not excluded liability, the Plaintiff might still not have succeeded against them.

Taking the view as I do that liability was excluded, I

dismiss the action against Colliers and in accordance with the earlier part of my judgment I award the Plaintiff £3,026 damages against Powers.

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