FOR ELECTRONIC DELIVERY

UNAPPROVED

THE COURT OF APPEAL

Edwards J.

Costello J.

Donnelly J.

Neutral Citation Number [2020] IECA 218
Record No: CA 2017/499

High Court Record No: 2010/5534P

FELIX MOOREHOUSE

Plaintiff/Appellant

V

THE GOVERNOR OF WHEATFIELD PRISON,

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND & THE ATTORNEY GENERAL

JUDGMENT of Mr. Justice John Edwards delivered on the 31st of July 2020.

Introduction

1. For convenience, the plaintiff/appellant shall be referred to throughout this judgment simply as the plaintiff, and the defendants/respondents shall be referred to simply as the defendants.

2. This is an appeal from the judgment and Orders of the High Court (Barton J) in these proceedings, 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 each of them, their servants or agents; and further refusing the defendants' application for their costs and making no order as to the costs of the proceedings.

3. The judgment appealed against (which now bears the neutral citation [2017] IEHC 535) was delivered on the 15th of August 2017, and the Order of dismissal arising consequentially therefrom, and ancillary orders, now also appealed against, were made on the 3rd of October 2017 and perfected on the 6th of October 2017.

The Procedural History of the Claim

4. The proceedings were commenced by Personal Injuries Summons dated the 10th of June 2010 in which it was alleged that *"on or about the twenty-seventh 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 participating in a training program where he was cutting metal with a guillotine steel cutter, the plaintiffs left hand became caught in the cutter, in consequence where of the plaintiff suffered personal injuries, loss and damage and expense."*

5. It was further pleaded that *"the aforesaid personal injuries, loss, damage and expense were occasioned to the plaintiff by reason of the negligence, breach of duty and breach of statutory duty on the part of the defendants, and each of them, their servants or agents."* Thereafter some thirteen particulars of negligence and breach of duty (including statutory duty) were pleaded. Insofar as statutory duty was pleaded there was a single plea that there had been a failure 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 (- regarding the latter no year or SI number was specified). The Personal Injuries Summons further particularised at some length the injuries sustained by the plaintiff in the incident complained of. In very brief summary, he sustained a traumatic amputation of the index, middle, ring and little fingers of his left hand.

6. The plaintiff swore an affidavit of verification of the contents of the said Personal Injuries Summons on the 7th of July 2011 in which he deposed, *inter alia*, that *"the assertions, allegations and information contained in the said Personal Injuries Summons which are in my own knowledge are true. I honestly believe that the assertions, allegations and information contained in the said Personal Injuries Summons which are not within my own knowledge are true"*

7. The defendants raised a Notice for Particulars dated the 5th of August 2010 which was replied to on the 23rd of August 2010. Amongst the additional information provided in the Replies to Particulars was that there were thirteen of the plaintiff's fellow inmates present between the workshop and the canteen and that another prisoner, a Mr. Ducie, had stated to the plaintiff that he had witnessed the accident. Further, it was stated that the accident had occurred in the workshop at some time between 2:45PM and 3:45 PM on the date in question. It was further asserted that the head supervisor of the training unit was not present at the time of the incident was notified immediately by a fellow inmate and had attended the scene very soon after the incident. The machine in which the plaintiff had injured his hand was still running when the head supervisor arrived and he had to turn it off by the mains in the office. A further affidavit of verification by the plaintiff in respect of the information provided in these Replies to Particulars was sworn by him on the 7th of July 2011. It was in similar terms to his previous affidavit save for the fact that it referred on this occasion to his Replies To Particulars rather than to his Personal Injuries Summons.

8. A Personal Injuries Defence was filed by the defendants on the 12th of August 2011 with an accompanying affidavit of verification. This defence traversed, alternatively required proof, of each and every substantive claim made by the plaintiff and further pleaded a number of matters by way of positive defence. These included assertions that the plaintiff had acted contrary to warnings, and/or instructions, including a specific instruction not to operate the

machine; that the plaintiff had removed guarding from the machine; that the plaintiff had ignored, or acted contrary to, safety training; and that the plaintiff was the author of his own misfortune. Further, it was contended that if the accident occurred in the manner alleged or at all, same arose and/or was caused wholly and/or partly by the negligence and/or contributory negligence of the plaintiff.

9. Further, by a letter of the 11th of August 2011 the defendants' solicitors raised certain rejoinders to the plaintiffs replies to particulars, and the plaintiff's solicitors replied on the 2nd of November 2011. These exchanges contained nothing of materiality to the issues that arise on this appeal. Some further replies to particulars were later furnished by the plaintiff on the 14th of November 2013 indicating that the plaintiff had been directed to attend the workshop in question or otherwise he would receive a record of an infringement/breach of the Prison Rules for failing to attend work.

10. On the 2nd of November 2011 the plaintiff's solicitors wrote to the defendants' solicitors requesting voluntary discovery of documentation relating to risk assessments in respect of the operation of the machine in question, safety statements concerning the operation of the machine in question and training records and instruction sheets concerning the machine in question. The discovery requested was substantially agreed to and an Affidavit of Discovery by an Assistant Governor of Wheatfield prison was sworn on the 18th of December 2012.

11. The plaintiff's solicitors served Notice of Trial on the 4th of October 2013, and shortly thereafter the plaintiff changed his solicitors. Upon coming on record his new solicitors, by a Notice for Further Particulars, and a Notice for Further and Better Particulars, both dated the 7th of November 2013, sought further and better particulars of various aspects of the defendants' Personal Injuries Defence.

12. On the same date, i.e., the 7th of November 2013, they also requested yet further voluntary discovery from the defendants. On this occasion documents, statements and records relating to any investigation of the incident was sought; together with records relating to the prison staff roster on the day in question; standing orders and instructions relating to how the workshop itself, any machinery therein and any prisoners with access thereto was/were to be supervised; and any documents relating to the regulation of health and safety of prisoners, and in particular the plaintiff, under the Prison Rules and Regulations. This was followed by a further request dated the 14th of November 2013 for yet more voluntary discovery. On this occasion what was sought was maintenance records in respect of the machine in question. The reason given was that the plaintiff contended that up to the time of the accident the machine was defective, would often switch on and off and that it also created unusual noises when operating. The request further sought records of all repairs and/or alterations to the machine in question subsequent to the accident.

13. On the 12th of December 2013 the plaintiff furnished further Particulars of Personal Injuries.

14. On the 5th of February 2014 the solicitors for the plaintiff wrote to the solicitors for the defendants enclosing yet another Notice for Further Particulars in respect of the Personal Injuries Defence (and which was characterised by the plaintiff as a "Consolidated Notice for Particulars" in circumstances where for the most part it re-iterated the queries raised in the earlier Notices for Further Particulars dated the 7th of December 2013 which had not yet been replied to). The letter also enclosed a purported Amended High Court Personal Injuries Summons and enquired if the defendants had any objection to the proposed amendments. Significantly the amendments sought included pleas that the plaintiff had been under the influence of a controlled drug, to wit Methadone administered by an agent of the first named defendant, at the time of the accident, that the defendants had allowed and permitted the

plaintiff to operate the machine in question when they knew or ought to have known that he was under the influence of Methadone; that the defendants had failed to have an officer present in the room adjacent to the workshop where there was a cutoff switch, and that if warning signs were present that the defendants had failed to ensure that the plaintiff was capable of reading them.

15. Both requests for voluntary discovery were refused by a letter from the defendant solicitors dated the 19th of February 2014, and various reasons were given. In this refusing to provide the maintenance records sought in the request dated the 14th of November 2013 the defendants asserted:

> "Refused. The plaintiff has at no time until the said request for voluntary discovery sought to assert that the machine was defective and/or would often switch on and off and created unusual noises when operating including at engineering inspection. The plaintiff has never sought to put that case on affidavit by Affidavit of Verification or otherwise.
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> The claim submitted to the Injuries Board subsequent to an engineering inspection was very explicit in that it claimed 'the foot pedal malfunctioned while he was pushing a bar into place'. If the plaintiff wishes to put that alternative version on affidavit then please do so."

16. The plaintiff's solicitors being dissatisfied with the response to the request for voluntary discovery filed a motion seeking court ordered discovery on the 16th of May 2014.

17. While I have attempted up until now to unfold the procedural chronology in a linear way, it is convenient to deviate from it momentarily at this point to explain what occurred in relation to the discovery motion. The discovery motion was not dealt with until the 23rd of February 2015. In terms of its outcome, the plaintiff was largely successful in obtaining the discovery he was seeking subject to certain temporal limitations. A further Affidavit of

Discovery was sworn in that regard by the Assistant Governor of Wheatfield Prison on the 15th of May 2015. However, at the opening of the trial itself at the beginning of December 2015 the form of this affidavit was objected to by the plaintiff's side. By Order of the trial judge (Barton J) dated the 2nd of December 2015 the defendants were required to submit yet another Affidavit of Discovery, this time in the form required by the Rules of the Superior Courts. This further Affidavit of Discovery was then filed on the 26th of January 2016.

18. Returning to where I left off in the main procedural chronology, on the 19th of February 2014 the Defendants also furnished replies to the aforementioned Consolidated Notice for Further Particulars served by the plaintiff on the 5th of February 2014 in respect of the Personal Injuries Defence. The replying document of the 19th of November 2014 variously asserted that the plaintiff was not entitled to seek the particulars sought at that point; that the information sought did not constitute particulars to which the plaintiff was entitled; that the information sought had either already been provided, or was a matter for evidence, or did not arise from the pleadings; and that the nature of the defendants' claim (i.e., their defence) was clear.

19. In response to the intimation that they had received from the plaintiff's solicitors that the plaintiff wished to amend his Personal Injuries Summons, the defendants issued a Notice of Motion dated the 20th of February 2014, and returnable for 10th of March 2014, seeking, *inter alia*, a hearing date; an order and/or a declaration that the pleadings were closed; and an order and/or a declaration that the plaintiff was not entitled to amend his cause of action and/or pleadings. The plaintiff filed a cross motion dated 25 February 2014 seeking an order pursuant to Order 28 Rule 1 of the Rules of the Superior Courts granting him liberty to amend his Personal Injuries Summons in the manner sought by him. The defendants' motion was grounded on an affidavit of Ms Nessa Leonard, a solicitor with the State Claims Agency. An affidavit grounding the plaintiff's motion and responding to the defendants grounding

affidavit was sworn and filed by Mr. Gerard F Burns of Burns Nolan, solicitors for the plaintiff.

20. The motion came on for hearing before Mr. Justice Irvine in the High Court on 12th of March 2014. The defendants' motion was struck out with no order and the plaintiff was granted liberty to amend his Personal Injuries Summons in some but not all of the respects in which he desired to do so. Amongst the proposed amendments that were refused were those asserting that he had been permitted to operate the machine while under the influence of Methodone, and that the defendants had known or ought to have known that he was under the influence of Methodone at the material time.

21. The plaintiff appealed to the Supreme Court against that part of the High Court's Order of the 12th of March 2014 that had refused some of his desired amendments. The appeal was successful, and the Supreme Court granted the plaintiff liberty to amend his Personal Injuries Summons in the manner sought by him.

22. On the 15th of July 2014 the solicitors for the plaintiff filed a Reply joining issue with the defendants on their defence save and insofar as the same contained admissions, and pleading by way of special reply to paragraphs 3 and 4 of the Personal Injuries Defence that the plaintiff was at all material times illiterate and so affected by Methadone administered to him by the defendants as to fail to appreciate, sufficiently or at all, the dangers of the task in which he was involved at the time of the accident.

23. On the 21st of October the plaintiff filed his Amended Personal Injuries Summons in accordance with the Order of the Supreme Court of the 12th of March 2014, which had been perfected on the 9th of October 2014.

24. On the 24th of November 2014 the defendants filed an Amended Personal Injuries Defence in which they reiterated the matters pleaded in the original Personal Injuries Defence (including their substantive pleas of negligence and breach of duty on the part of the

plaintiff); joined issue with, traversed or required proof of each of the additional matters pleaded in the Amended Personal Injuries Summons; pleaded that the incident did not occur as alleged; and further pleaded in addition, or in the alternative, to the existing pleas of negligence and breach of duty by the plaintiff that the incident or accident was caused by recklessness on the part of the plaintiff.

25. A new Notice of Trial was served on the 8th of April 2015. Thereafter there were exchanges of Notices to Produce, concerning Notices to Admit Facts (no facts were in fact admitted), and Schedules of Witnesses and Expert Witnesses and Reports, as required by the Rules, and the dispute about the court ordered Affidavit of Discovery previously alluded to.

26. The trial finally commenced on the 1st of December 2015, and continued on the 2nd, 3rd, and 4th of December 2015, following which there was a week's break. It subsequently resumed and ran through the 15th, 16th 17th, and 18th of December 2015, when there was a further break for the Christmas vacation. It resumed again in the New Year and ran through the 21st, 22nd, 26th, 27th, 28th and 29th of January 2016, and continued into the following month when it ran through the 2nd, 3rd, 4th 5th, 9th, 10th, 11th and 12th of February, 2016 when there was a further short break. It resumed yet again and ran through the 16th, 18th and 19th of February 2016 by which point the evidence in the case had been concluded. Closing submissions then took place on the 26th of May 2016 following which judgment was reserved. Judgment was delivered on the 15th of July 2017, and final orders were made on the 3rd of October 2017.

The High Court's Judgment.

27. The judgment begins with a description of the Wheatfield prison facility and the educational and vocational facilities provided therein. It proceeds to a description of the reception procedures when a prisoner is committed to Wheatfield and notes that doing nothing in Wheatfield is not an option. Prisoners are expected to undertake educational and

vocational courses although there are options and choices available to them in that regard. In paragraphs 8 to 10 the judgment briefly describes the appellant's personal circumstances and background. At paragraph 11 the High Court judge records that on the 27th of November 2008, whilst serving a sentence for burglary in Wheatfield, the plaintiff suffered a traumatic amputation to the fingers of his left hand when using a GEKA Minicrop shear and punch machine in the welding workshop of the prison. He further noted that liability for the accident was fully contested.

28. At paragraph 12 of the judgment (due to a formatting error the judgment in fact contains two paragraph 12's, and this particular reference is to the first of these) the High Court makes forty-one discrete findings of fact in subparagraphs (i) to (xli) inclusive. On the understanding that this Court's judgment will be read in conjunction with the High Court's judgment to which detailed reference may be had where necessary, it is not proposed to reproduce this lengthy list in my summary of the High Court's judgment.

29. The High Court judgment then sets out the background to the accident in terms of the plaintiff's reception into Wheatfield on the 20th of August 2008 and the options and choices that he availed out in terms of educational and vocational courses. It was noted that having had some previous experience at welding, and that being his preference he was assigned to the European norm 287 level 1 practical welding course. He attended that for four weeks before being absent for several weeks due to an in growing toenail. The accident occurred on his first day back on the course after this absence.

30. The next section of the judgment, running from paragraphs 14 to 28 is entitled "The GEKA Minicrop Machine", with subsections entitled "Controls" and "induction and Training", and describes the machines function, design and mode of operation as a metal shearing guillotine, noting that there was broad agreement between the engineers on both sides of the case as to the machine's relevant engineering specifications. The judgment

describes certain of the operational and safety features on the machine such as the operator's foot pedal, a dual purpose hold down guide and safety guard (sometimes called "the guide-guard"), an adjustable stop bar at the back of the machine for use in determining the length of the steel bar section to be cut, the "on/off" and "emergency stop" buttons, certain function switches and an "isolator switch" located within a padlockable facility. The judgment also records that a power isolation switch was located in the workshop office but that operation of that switch results in the loss of power to all power driven machines in the workshop and not just the GEKA machine. The particular task for which the machine was routinely used in the Wheatfield training workshop was described, namely for cropping lengths of flat steel bar for use by welding trainees in their welding booths To the extent that there was controversy as to how exactly the accident could have occurred the respective positions of the experts on each side were described. With regard to training and instruction the judgment noted that the day-to-day responsibility for this rested with Industrial Training Instructor (ITI) Jonathan Nicholson

31. The High Court's judgment goes on to describe in some detail how prisoners are introduced to workshop courses and the induction that they receive. It notes the existence of a small partitioned classroom within the workshop where inductees are shown videotapes and DVDs which include health and safety information, the correct use of PPE, and concerning the operation of machines and manual handling. It records that the prisoners are then walked around the workshop and shown where various processes are carried out. The judgment notes that the prisoner is individually familiarized with the workshop machinery, tools, equipment and layout and that restricted areas to prisoners are also identified. The judgment further notes the existence of an Irish Prison Service (IPS) policy on foot of which no prisoner is permitted to enter the workshop if feeling unwell, or if he is intoxicated or under sedation.

32. At paragraph 36 *et seq* the High Court's judgment describes the European norm 287 level 1 course. It notes that ITI Nicholson gave evidence that the plaintiff had received and completed the appropriate induction training, had been provided with a locker and PPE, had been familiarised with the workshop layout and plant and equipment, and received instruction and training in the use operation and dangers connected with the cropping facility of the GEKA, that he had been supervised in using the machine and that he had demonstrated his competency to use the cropper safely. Moreover, ITI Nicholson had no issues with the plaintiff and described him as a nice mannerly lad who gave him no reason for concern; that he was "no bother".

33. The next section of the judgment concerns the accident the subject matter of the present claim. It outlines the plaintiff's account and deals specifically with controversies in the evidence concerning the level of training which the plaintiff had received, the contention that he had been instructed not to use the GEKA machine, whether the guide-guard and stop bar were on the machine at the time of the accident, and the position of the plaintiff's hands and in particular his left hand at the time of the accident. Central to how the trial judge ultimately decided the case, were the following observations which are contained at paragraphs 48 and 49 of the judgment:

> *"48. 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. 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."

34. The plaintiff's actual account of the accident is described at paragraphs 53 to 55 inclusive, of the judgment, with a further detail noted by the trial judge at paragraph 63, and these bear quoting in full:

"53. Shortly before the accident he noticed a problem when (sic) *the GEKA while it was being used by another prisoner. A piece of steel which the prisoner was trying to cut kept jamming, the machine wouldn't cut it properly and was making noises; the steel bar bent a bit until the machine ultimately cut through it at which stage it was his turn to use it. It was no part of his evidence that he had seen ITI Nicholson extracting the bar or dealing with a problem, as far as he was concerned there was no reason why he should not have used the machine.*

54. He picked up a steel bar which he estimated was about two or two and half metres in length but otherwise had the same dimensions as the steel bar seen in the engineers' photographs being held into the machine by Mr Romeril except that he was able to hold the end of the bar he intended to cut with his right hand. He presented the bar to the cropper by pushing it with his right and guiding it with his left hand. There was no stop bar on the machine so he had to judge the length of steel that he wanted to cut by eye. Another prisoner, Mr. Ducie, was standing beside the machine; he helped the Plaintiff to judge the required length and saw him cut the first piece before turning to walk away just as the Plaintiff went to cut a second flat.

55. Once again, he needed to judge the required length by eye. He pushed the bar with his right hand guiding it with his left. He wasn't quite happy with the position and moved the bar towards the right-hand side of the opening to the cropper. Somehow his left hand got caught in the machine, possibly because of a steel splinter on the bar. He was shouting for help but nobody came. He knew from watching other prisoners that pressing one of the buttons on the control panel would turn off the machine so he tried to stop it by reaching over with his right hand. He did not see the emergency stop button but managed to push what he identified as a green button, there was no response; the next thing he knew was that the blade came down on his fingers."

"63. In answer to a question from the Court, the Plaintiff said that when he finished manoeuvring the bar into the desired position his left hand was in the pathway of the blade; it was at that moment that 'his foot went on the pedal'.

35. In the next section of the judgment, the trial judge considers the evidence and issues arising in relation to training in the safe use and operation of the GEKA machine, in relation to guarding and the stop bar, and in relation to the position of the plaintiff's hand at the time of the accident. Significantly, with regard to the latter, the judgment records:

"61. Whilst he accepted under cross examination that it was possible his left hand may have been palm upwards when the blade came down, his recollection was that it was palm downwards on the steel bar as demonstrated in the engineer's photographs. It was also put to him that no bar was found in the machine after the accident and that he was not cutting a piece of steel at all, suggestions which the Plaintiff also rejected.

62. I took it from these suggestions, from the nature of the damage caused to the glove which he was wearing and the explanation for the damage to the glove offered by Mr

Romeril, that the accident had happened while the Plaintiff was doing something other than cutting a bar and that whatever he was doing it involved the accidental or deliberate placing of his hand into the cropper which he then activated."

36. The judgment goes on to review the evidence of Prison Officer (PO)Vincent Maher whose role it was to assist ITI Nicholson and to supervise the prisoners both in relation to security and course participation. With regard to the accident circumstances his evidence was that the plaintiff was assigned to sweeping duties and he did not see the plaintiff do anything in the workshop that afternoon other than performing sweeping duties. The plaintiff had seemed fine to him. He described how two other prisoners had encountered a problem when using the GEKA that afternoon. His evidence was that the steel bar they were trying to cut jammed in the machine and that they had tried to free the bar but were unable to remove it. ITI Nicholson was called to deal with the situation. He eventually managed to free the bar, and having done so turned off the power, engaged the isolation switch and pressed the emergency stop. His evidence was that ITI Nicholson then stated to those nearby who included PO Maher, the two prisoners whose bar had become jammed, and the plaintiff, that the machine was out of order, that it was not to be used by anyone, and that he was going to the office to get an "out of order" tag to put on it. The judgment records a finding that PO Maher did not stay in the vicinity the machine but rather proceeded to walk around the work and training area, performing his supervisory duties. While doing so, he had remembered there was a shortage of welding rods and decided to go and collect these from the workshop store. PO Maher gave evidence that, as he was proceeding there, the plaintiff, who was still in the vicinity, asked him if there was something wrong with the GEKA machine and that he had replied that there was, that it was out of order and that it wasn't to be used. The accident occurred while PO Maher was in the store. Both ITI Nicholson and Industrial Training Manager (ITM) Stack gave evidence that they were in the office with the plaintiff after the

accident and had heard him repeatedly apologising to ITI Nicholson for going near the machine when he knew that he had been told not to do so. The High Court judge that this evidence was uncontroverted.

37. In the next section of the judgment the High Court reviewed the evidence in relation to subsequent (i.e. post-accident) investigations into the accident circumstances.

38. At page 35 of the judgment, commencing at paragraph 92, the High Court judge outlined his conclusions in relation to the post-accident investigations. He was of the view that there had been an approach to the defence of the claim which might euphemistically be described as a *"circling of the wagons"*. He expressed concern about the circumstances surrounding the making of statements by ITI Nicholson and PO Maher and concluded that the court was warranted in approaching their evidence with circumspection.

39. At paragraph 95 *et seq* the High Court judge sets out his conclusions with respect to the plaintiff's evidence. These were that:

> *"95. Whatever the reason certain aspects of the Plaintiff's evidence were variously inconsistent, inaccurate or contradictory; he did not impress me as a witness on whose evidence alone the Court could rely, nevertheless, this view has to be tempered not only because of his genuine memory difficulties but also by virtue of his acceptance when the record was put to him in respect of some though not all facts material to his claim that he was either mistaken, could not remember or was wrong.*
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> *96. This observation is particularly pertinent in circumstances where the Defendants have called his credibility into question and have invited the Court to dismiss these proceedings on a number of grounds not the least of which is that he intentionally misled the Court and others acting or retained on his behalf in relation to matters fundamental to his claim.*

97. The onus of proof in this regard rests with the Defendants. 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.

98. By way of example the Plaintiff had no recollection of seeing the videos or of undergoing induction training but accepted that he had been provided with his own PPE and locker, that he had been spoken to individually at occasion when he sought admission to the workshop, that he had been assigned and had undertaken welding work and that he had been complimented on the quality of his work by ITI Nicholson, however, he did not accept that he had received any training or instruction in the safe use and operation of the GEKA, insisting that he had only ever undertaken welding. Although he had seen a steel bar jamming in the machine shortly before he went to use it he had no recollection of seeing ITM Nicholson freeing the bar.

99. ITI Nicholson's evidence was that the Plaintiff had an average attendance on the course, which he estimated at between 50 and 70%, before going absent on what transpired to be medical grounds. Induction was carried out in accordance with procedures which included viewing of safety videos and DVDs. Manual handling training was given by ITM Stack and the Plaintiff was trained in basic welding moreover, he had been fully instructed, trained and supervised in the safe use and operation of the GEKA. I accept this evidence and the record of the Plaintiff's attendance on the course, such as it is."

40. The High Court's judgment then sets out its conclusion on the issues raised in respect of training in the use and operation of the GEKA cropping facility, which was to the effect that as a matter of probability the plaintiff had been instructed in the safe use and operation of

that machine as use of this facility was an integral part in producing materials required for his own welding work. Further, he concluded that, whether the plaintiff had been assigned sweeping duties on the afternoon in question, or not; the plaintiff had been entitled to use the GEKA without obtaining permission to do so,

41. The High Court judgment then goes on to consider the evidence with respect to the effect of Methadone/ illicit drugs, before concluding that it was highly unlikely that the plaintiff was exhibiting any signs of being unwell or inebriated in any form when he was admitted to the workshop that afternoon. The High Court judge preferred the evidence of an expert put forward by the defendants, a Dr Scully, concerning the likely effect on the plaintiff of having had a dose of Methadone earlier that day, and concluded that the administration of Methadone alone and/or in combination with other illicit substances which may likely have been ingested by the plaintiff played no material role in the cause the accident.

42. Ultimately, the High Court's conclusion in relation to the accident was as follows:

> *"129. Prisoners are instructed in the use and operation of the cropping facility so that they cut steel bars into sections which they use for welding. Once a prisoner has satisfied ITI Nicholson as to his competency in the safe use and operation of the cropping facility of the GEKA, the prisoner was free to use the machine without seeking permission although it was usual for prisoners to advise ITI Nicholson of their intention to do so; his evidence* [was that] *if a prisoner failed to advise him* [it] *would not result in a reprimand.*
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> *130. Having regard to the nature of the problem which developed when prisoners Nay and McLoughlin were using the cropping facility attributable to a bluntness of blades, subsequently confirmed and dealt with by Listers in January, 2009 and which resulted in the bar which they were attempting to cut becoming jammed, it is probable that ITI Nicholson's attention would have been drawn to the problem and that he would have*

responded by dealing with it in the way described. I accept his [evidence] *in this regard. I also accept his evidence corroborated by the evidence of Officer Maher that prisoners in the vicinity of the machine, including prisoners Nay and McLoughlin were instructed to stay away from it, that he was going to the office to get an out of order tag and that before he left to do so he instructed Officer Maher that no one was to use the machine.*

131. Although there were thirteen prisoners on courses in the welding shop that afternoon there is no evidence that any prisoners other than those in the immediate vicinity of the machine were told by ITI Nicholson that the machine was out of order and was not to be used. The fact that he did not inform other prisoners of the problem and that he knew trained prisoners could use and operate the cropping facility without seeking permission is consistent with the realisation on his part that in his absence a prisoner who had not heard his instruction might attempt to use the machine; this is also consistent with his instruction to Officer Maher that the machine was not to be used. I am also satisfied and find that Officer Maher was present in the workshop on the afternoon of the accident.

132. The Plaintiff denied that he was in the vicinity of the machine when ITI gave the instruction. Unless the Plaintiff was present at the time he, like other prisoners in the workshop who were not in the vicinity, would have been unaware that the machine was not to be used. When ITI Nicholson left the work and training area to go to his office I have little doubt that he and Officer Maher did not expect, if they considered it at all, that the time involved in getting the tag would have been more than a few minutes. Coincidentally with his arrival in the office the phone rang, it was Governor Walsh with whom ITI Nicholson then had a conversation.

133. ITI Nicholson having left to get the tag, Officer Maher proceeded to walk around the workshop performing supervisory duties. While doing so he decided to go into the store room to get some welding rods, something which I am satisfied was not then an essential task. Why Officer Maher left the GEKA notwithstanding the express instruction given to him that no one was to go near or use the machine was never satisfactorily explained.

134. Nevertheless, I am satisfied and find that whatever the reason, had Officer Maher remained at or near the machine it is probable to the point of near certainty that the accident could not and would not have occurred. Whatever about his ability to give effect to the instruction had he remained at or near the machine, once he left the work and training area and went into the workshop store the instruction could not have been implemented, moreover, the work and training area was then left unsupervised.

135. In the circumstances reliance on the IPS policy of establishing trust between prisoners and staff was clearly ill-advised in the circumstances. ITI Nicholson and Officer Maher were aware that some of the prisoners would not have heard the instruction and that any trained prisoner unaware of the problem might attempt to use the GEKA when both were away."

43. The High Court judge then turned to specifically consider the controversy as to whether the plaintiff had received an instruction on the day in question not to go near or use the machine. He reviewed the evidence regarding that controversy with care, before concluding:

"144. The prisoners knew that engaging in an unauthorised activity, particularly anything dangerous, would have negative consequences, including prohibition from further attendance on the course, accordingly, and having regard to the Plaintiff's

profile presented both by Officer Maher and ITI Nicholson as a willing and cooperative prisoner up until the day of the accident as well as the negative consequences for him for any disobedience, it is in my judgment highly unlikely that he would have disobeyed an express instruction not to go near or use the machine and the Court so finds.

145. In coming to this conclusion, I have not overlooked the evidence of Officer Maher, ITI Nicholson and Assistant Governor Stack that when they attended the Plaintiff in the office shortly after the accident he repeatedly apologised for having gone near the machine when knew that he ought not to have done so. It is common case that the Plaintiff was in excruciating pain and in shock after what happened to him; it is not surprising in the circumstances that he has very little recollection of post-accident events until he woke up in hospital. It follows that the evidence of these witnesses is uncontroverted.

146. However, a conclusion that his remarks are consistent only with having received an instruction to that effect does not necessarily follow; such remarks are also consistent, and on my view of the evidence, are more likely attributable to the training and instructions on the safe use and operation of the machine given to him so recently by ITI Nicholson."

44. Next, the judgment considers the controversy concerning removal of the guide guard. The High Court judge ultimately indicated:

"I accept the Plaintiff's evidence and find that he had not seen the guide-guard being removed and had not been instructed or trained how to do so. Consequently, the Court finds, as a matter of probability, that whoever was responsible for the removal of the guide-guard, it was not the Plaintiff."

45. The next section of the judgment deals with the aspect of the claim which is based on breach of statutory duty and considers the statutory requirements with respect to the guarding of machines. Following a detailed consideration of the evidence, and submissions on the law from counsel, the High Court concluded on this issue:

> *"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 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 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."*

46. The judgment then moved to a consideration of the defendants' claim that the plaintiff was in effect the author of his own misfortune. This went further than a mere claim that he had been wholly or contributorily negligent himself. The trial judge construed it as a submission that *"the plaintiff had acted deliberately or with reckless disregard for his own safety"*. Although not pleaded as such in express terms, it was characterized by the trial judge as amounting to reliance on a legal defence based on what has been known to generations of lawyers as the *ex turpi causa* principle, i.e., deriving from the latin maxim *"ex turpi causa*

non oritur actio" (the approximate translations of which include: "from a dishonorable cause an action does not arise"; alternatively "of an illegal cause there can be no lawsuit"). The defence were understood by the trial judge to be suggesting that while using the machine the plaintiff had been engaged in some form of deliberate but unauthorised (and it is to be inferred dangerous) conduct or practice which had resulted in his left hand being placed in the cutting path of the guillotine's blades just as they were activated. This suggestion had been based on two circumstances that had emerged in evidence. The first was that no flat steel bar was found in the vicinity of the machine in the aftermath of the accident. The second was the engineering evidence, based on several reconstruction tests carried out by Mr. Paul Romeril, a forensic engineer retained by the defence, to the effect that the plaintiff's hand was palm upwards at the time of the accident.

47. The trial judge found that it was clear from the evidence that apart altogether from prison staff, prisoners were also involved in tidying up and shutting down activities in the workshop following the accident and that against that background 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.

48. With respect to the contention that the plaintiff's hand was palm upwards at the time of the accident the trial judge considered the engineering findings and the theories in that regard offered by both sides' experts. He observed:

> *"176. 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 be necessary for the blade to cut through that glove almost completely as demonstrated by the damage to the glove in test number one."*

49. In the circumstances the trial judge concluded:

"178. On my view of the evidence the Plaintiff's account of what occurred in the moments before he suffered the amputation injuries to the four fingers of his left hand does not stand up to scrutiny. On the Plaintiff's account, Mr. Ducie, who attended Court over a number of days but did not give evidence, was present when the Plaintiff successfully executed the first cut from the steel bar; he then turned and had just begun to walk away when the accident occurred.

179. If the Plaintiff's hand had become jammed in some way in the machine as a result of which he tried to press buttons on the control panel and was shouting out for help one would have expected other prisoners, including Mr. Ducie, or Mr. Nicholson, who was in his office close by or Mr. Maher, who was in the store, to have heard and answered his call; the Plaintiff says nobody came. The response of prisoners and staff to the accident was almost immediate, 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.

180. That any delay between the Plaintiff's hand being caught and the operation of the blade might be attributable to an uncovenanted stroke or to a defect in the foot pedal, which featured in earlier investigations, are was equally improbable; I accept Mr. Romeril's evidence that a definitive defect in the foot pedal or in the operation of the machine resulting in an uncovenanted stroke would be a very serious matter which would have to be dealt with to ensure the safe use and operation of the machine. There is no evidence of any post-accident remedial work carried to the machine concerning problems of that nature.

181. I found the Plaintiff's evidence concerning the absence of the back stop and the necessity of having to judge a length of steel bar to be cut by eye with the assistance of Mr. Ducie to be unconvincing and incorrect. No reason emanated from any of the

evidence as to why it would have been necessary to remove the stop bar at the back of the machine. It was certainly not suggested to the Defence witnesses that after the accident they had refitted the bar and that Assistant Governor Stack had then photographed the machine with the bar in position."

50. The trial judge went on at paragraph 183 of his judgment to expressly reject the plaintiff's evidence that the backstop was missing. At paragraph 184 he addressed the plaintiff's response, while under cross-examination, to the suggestion that his left hand had been palm upwards. The trial judge stated:

"He was definitive that his gloved hand was on the bar palm downwards at the moment where the asked occurred".

It was pointed out to us at the appeal hearing that the trial judge was factually incorrect on this, and our attention was drawn to the plaintiff's concession while being cross-examined that his hand *"could have been"* palm upwards, before adding that *"I don't recall"*. (Book G, Appellant's transcript extracts, 3rd December 2015, p.17 (per internal transcript pagination, p.130, lines 21-28, Q's 709 and 710)).

51. At paragraphs 185 and 186, having considered the evidence from both side's engineers, respectively, as to possible explanations for the damage seen on the glove post-accident, the trial judge concluded:

"185. Accepting Mr. Romeril's evidence as being a more likely explanation for the damage seen on the accident glove, if the Plaintiff's hand had simply slipped off a bar before or at the time when the cropper was operated the severed damage to the glove would most likely have been to the dorsal side. However, the damage to the accident glove is on the palmer side, furthermore, the damage to the accident glove and the positioning of the amputations is consistent with the Plaintiff's hand being straight rather than at an angle at the time when the blade descended.

186. For all these reasons, 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."

52. The trial judge then, at paragraphs 187 to 189, set out his overall conclusion and rendered the decision now appealed against. He said:

*"**Decision***

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 [him]*, the Court is required to dismiss his claim and will so order.*

188. I have read the medical reports which were admitted in evidence and prepared on the Plaintiff's behalf. As stated at the outset, there is no doubt that the Plaintiff has suffered very serious and permanent injuries which have affected him psychologically as well as physically. However, having regard to the findings made and the conclusions reached an assessment of damages in respect of these injuries does not fall for consideration. Had it been necessary to do so I will add for completeness sake that the Court would have found the Plaintiff guilty of contributory negligence and breach of statutory duty for which in all the circumstances of the case he would have had to bear a heavy apportionment of fault.

189. Having failed to discharge the onus of proof cast upon him the Court is required by the law to dismiss the Plaintiff's claim and will so order"

The Grounds of Appeal

53. The Notice of Appeal sets out twenty-one grounds as follows:

(1) The learned High Court judge erred in 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 do 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 do 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 "… 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. (Good 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 cause 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 the 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 in logically 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 paragr. 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.

54. The Notice of Opposition filed on behalf of the respondent's joins issue with the appellant on each one of his grounds of appeal.

Submissions

55. Written submissions, supplemented by relevant authorities, were received from both parties in advance of the appeal hearing and these submissions were amplified in the course of the oral hearing. We were grateful for the assistance provided by these helpful submissions.

56. It is not proposed to review in detail each side's submissions. Rather, they will be referred to, as required, in addressing the substantive issues in the next section of this judgment.

57. Moreover, in the written submissions prepared by the plaintiff's legal team the grounds of appeal are conveniently grouped and dealt with in the following way:

- grounds 1, 7, 12, 20 and 21 are dealt with together;
- grounds 2 and 3 are dealt with together;
- grounds 4, 5 and 6 are dealt with together;
- grounds 8, 9, 10 and 11 are dealt with together;
- grounds 13 and 14 are dealt with together;
- grounds 15 and 16 are dealt with on their own and separately;
- grounds 17, 18 and 19 are dealt with together.

58. In responding to the plaintiff's written submissions, the defendants have helpfully adopted the same groupings.

Discussion and Decision on the Appeal.

The core issue

59. Following a careful consideration of the High Court's judgment, the grounds of appeal and the submissions of the parties, it is clear that the core issue on this appeal relates to the onus of proof on the plaintiff, and whether he had discharged it.

Some subsidiary issues

60. Amongst subsidiary issues arising for consideration in that overall context are issues relating to (i)a plaintiff's obligation to plead with specificity the circumstances in which he contends his accident occurred, particularly in light of the policy considerations underpinning the procedural reforms in personal injuries cases implemented by the Civil Liability and Courts Act 2004; and (ii) a plaintiff's obligation to notify the defendant(s) with sufficient specificity of the case that he is making and that the defendant(s) is/are required to meet, having regard generally to the natural justice principle of *audi alteram partem* and particularly when facedwith a defence which asserts either a claim of contributory negligence(as in this case); or a claim that the plaintiff's conduct amounted to a *novus actus interveniens* rendering any negligence or breach of duty (including statutory duty) that may have been committed by the defendant(s) *a causa sine qua non* and not *a causa causans,* or perhaps pleading in the alternative both contributory negligence and *novus actus interveniens.* In the present case *novus actus interveniens* was not specifically pleaded either as a standalone defence or in the alternative; rather the high-water mark of the defendant's defence as pleaded in the amended Defence dated the 24th of November 2014 was that the plaintiff's incident or accident was *"caused by … negligence and breach of duty and/or recklessness on the part of the plaintiff".*

Grounds 1, 7, 12, 20 and 21

61. The submissions on behalf of the plaintiff contend, correctly in my view, that the judgment of the High Court judge made express findings of negligence and breach of duty (including breaches of statutory duty) on the part of the defendants.

62. In terms of breaches of statutory duty there was an express finding (at paragraph 166 of the judgment) that the defendants had failed to comply with the provisions of the Safety, Health and Welfare at Work Act 2005 ("the Act of 2005)" relating to the provision of a Safety Statement and Risk Assessment under that Act, and that they had breached the duties

owed by them to the plaintiff under the Safety, Health and Welfare (General Application) Regulations 2007 ("the 2007 Regulations"), and in particular Regulations 33 and 34 thereof. The fact that the guide-guard was not a fixed guard and could be easily removed without tools was ostensibly a breach of Regulation 33(f) of the 2007 Regulations. Further, there was an express requirement in Regulation 34(i) for the equipment to be fitted with a clearly identifiable device to isolate it from its energy source. The GEKA machine did have such a device which required the use of the padlock but this was not utilised. There was an express finding (at paragraph 157) that if the lockout mechanism on the machine had been activated and padlocked the accident could not and would not have occurred. The High Court judge further commented that:

> *"In my judgment, 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 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."*

63. In terms of ordinary negligence, there was an express finding (at paragraph 134) that had PO Maher remained at or near the machine it was probable to the point of near certainty that the accident could not and would not have occurred.

64. There was also an express finding (at paragraph 144) that it was highly unlikely that the plaintiff would have disobeyed an express instruction not to go near or use the machine, and an implicit finding that he personally had not received any such instruction.

65. Much of the written submissions on behalf of the plaintiff in relation to these five grounds are devoted to identifying the evidence which supported these findings. It is sufficient to say that they identified the relevant evidence in general terms as that relating to:

the failure to provide a fixed guard on the machine; the fact that the removable guide guard was not fitted to the machine at the time of the accident; the fact that in circumstances where there was no fixed guard on the machine, and the removable guard guide was not in position, the lockout mechanism on the machine was not activated and padlocked; the absence of a lockout protocol such as the one that was implemented post- accident; and the leaving of the machine unsupervised while it was in a dangerous state, i.e. not locked out when the guide-guard was not in place, in circumstances where some persons in the workshop, including the plaintiff, had not been not apprised that it was in that dangerous state and that it was not to be used.

66. It is contended on behalf of the plaintiff that the trial judge erred in law in dismissing the plaintiff's claim despite these findings of negligence and breach of duty on the defendant's part, in the absence of which he had found *"the accident could not and would not have occurred"*. It is further contended on behalf of the plaintiff that the trial judge ostensibly dismissed the claim because he was not satisfied that the accident occurred exactly as described by the plaintiff, and it is submitted that he was wrong to do so. The submissions contend that if the identified negligence and breach of duty (including statutory duty) existed, had the accident occurred in the way, manner and circumstances contended for by the plaintiff (in terms of how his hand came to be in the path of the shearing blades), it must logically follow that even if his hand came to be in the path of the shearing blades otherwise than in the manner and circumstances contended for by the plaintiff, there was nevertheless the same negligence and breach of statutory duty. Their case is that the *causa causans* of the accident was the fact that the plaintiff's hand was permitted be placed in the path of the shearing blades in circumstances where it was foreseeable that he might attempt to operate the machine, due, *inter alia*, to the absence of a guard, due to inadequate supervision, due to the failure to lock out the machine, due to the failure to warn the plaintiff and due to the

various other respects in which it is contended the defendants were negligent and in breach of duty (including statutory duty) towards him.

67. It was submitted that the plaintiff had sufficiently established the circumstances of his accident to discharge his burden of proof. While he was unable to explain to the satisfaction of the judge precisely how his hand came to be in the path of the shearing blades, there could be no doubt that the machine was in such a condition that it permitted of his hand being placed in the danger zone, and ultimately that was the essential proof that he was required to discharge and, it was contended, did discharge We were referred to a description of the burden of proof in an action such as this in Salmond & Heuston on *The Law of Torts* (London: Sweden Maxwell) 21st edn. at page 244, where the authors state:

> *"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 or has no recollection of it."*

68. Reliance was also placed on behalf of the plaintiff on *Connaughton v Minister for Justice, Equality and Law Reform* [2012] IEHC 203 where Irvine J stated:

> *"A plaintiff in a negligence case bears the onus of proving causation on the balance of probabilities. However, the plaintiff does not have to rule out through their*

evidence every possible factual scenario whereby the damage was caused other than by negligence on the part of the defendant."

Irvine J subsequently went on to say on to say:

"The plaintiff merely has to adduce evidence that gives rise to a reasonable inference that the damage was caused by the defendants negligence."

69. Counsel for the plaintiff has not sought to dispute that the trial judge found the plaintiff's account as to exactly what he was doing at the time of the accident to be unsatisfactory and unconvincing. The submissions make the point that the essential discrepancy between the plaintiff's description of the accident, and the findings of the trial judge, was that the plaintiff thought that his hand was palm downwards (although he conceded in cross-examination that that might be incorrect) whereas the trial judge concluded that the accident occurred when the plaintiff's palm was upwards. It was contended on behalf of the plaintiff that this discrepancy did not justify dismissal of the plaintiff's claim.

70. Counsel for the plaintiff contends that the essentials of his claim were in fact made out, namely that he was permitted to use a GEKA cropper in the circumstances where it was in a dangerous state and unfit to be used by virtue of its guide guard being removed and the machine not being locked out. The plaintiff's legal team say that the proximate and factual cause of the accident was the fact that, regardless of how the plaintiff was attempting to use or operate the machine, and whether what he was doing was safe or unsafe, it was possible, in circumstances where the machine was unguarded and not isolated, and unsupervised while it was in that state, for him to place his left hand in the pathway of the shear blades. His injury occurred because the machine was activated while his left hand was in that position. It is said that "but for" the fact that his hand was capable of being placed in the pathway of the shear blades the accident would not have happened.

71. The plaintiff's legal team go further and say that not only was that the factual cause of the accident, it was also the legal cause of the accident. In making this case, they acknowledge the asserted defences of contributory negligence and recklessnessbut insist that any intervention by the plaintiff would not have broken the chain of causation between the defendants' actions or omissions and the plaintiff's injury. This is so because the defendant's negligent acts and omissions were the *causa causans,* and any contributing or intervening actions by the plaintiff which might be subject to criticism could at most represent a *causa sine qua non*.

72. With respect to a specific statement by the trial judge at paragraph 167 of the judgment that *"it was submitted on behalf of the defendants that the plaintiff had acted deliberately or with reckless disregard for his own safety"* it is disputed in the appellant's written submissions that any such submission was made. While a full transcript of the arguments has not been placed before this court, it is clear from the express pleas in the Amended Personal Injuries Defence to the effect that (i) the plaintiff was the author of his own misfortune, (ii) that the incident or accident was caused by the negligence and breach of duty and/or recklessness on the part of the plaintiff and (iii) that the plaintiff exposed himself to risk of damage or injury of which he knew or ought to have known, that this was part of defence case. Accordingly, I reject the contention that there was anything unfair in the trial judge's said allusion.

73. For completeness, and although nothing turns on it, the trial judge was in my judgment possibly incorrect in characterising the defendants' claim that the plaintiff was the author of his own misfortune as representing reliance on the *ex turpi causa* principle. He would certainly have been correct in that regard if it had been expressly suggested that the plaintiff had intentionally injured himself e.g. for the purposes of setting up a compensation claim, but seemingly neither the pleadings, nor the evidence, nor the defence's submission

went quite that far. There was, however, clearly a pleaded claim of recklessness and, as is made clear in McMahon and Binchy on *"The Law of Torts"* (Bloomsbury Professional: London and Dublin) 4th edn, (from para [2.57] to [2.82] inclusive) conduct which is said to be subjectively reckless (i.e involving more than gross carelessness; but rather flying in the face of an apprehended risk, indifferent as to its outcome) can amount to an *novus actus* sufficient to break the chain of causation. It is clear that having pleaded recklessness the defendants may have been seeking to make that case. Ultimately, however, there was no finding of subjective recklessness.

74. Predictably, the defendants contend in their submissions, that there was no error on the part of the trial judge and they point out that the finding of negligence and breach of duty (including statutory duty) in paragraph 166 of his judgment was qualified by the words *"[i]f an accident occurred in the way manner and circumstances contended for by the plaintiff"*. Moreover, they point out that the trial judge had gone on to say:

> *"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."*

75. The defendants maintain that the trial judge dismissed the plaintiff's case not because the accident did not occur exactly as described by the plaintiff but because the plaintiff's evidence and account as to what occurred on various factual matters did *"not stand up to scrutiny"* or was *"unconvincing and incorrect"* or was *"improbable"*.

76. The defendants point to the fact that the High Court judge had noted that the plaintiff had failed to call Mr. Ducie. While it is true that Mr. Ducie had been identified as having witnessed the accident in Replies to Particulars, the plaintiff's testimony at trial had been to the effect that Mr. Ducie had been assisting him when cutting the first bar in judging by eye the correct length of it but that as the plaintiff went to cut a second length of bar, which is when the accident happened, Mr Ducie had begun to walk away at that point. The plaintiff's evidence that Mr Ducie was walking away was uncontroverted. However, even though Mr Ducie may not have seen the actual accident, and there was certainly no obligation on the plaintiff to call him, he would have been able to describe what the plaintiff was using the machine for, and how he had made the first cut, and how he, Mr Ducie, had assisted him. While it was noteworthy that the plaintiff had failed to call Mr Ducie, and the trial judge is not to be criticised for having noted it, it must also be recognized that equally there could possibly many reasons, not necessarily suspicious or sinister, why a decision might have been taken not to call Mr. Ducie.

77. A further point made by the defendants is that the case law relied upon by the plaintiff on inferring causation has, they maintain, no application or relevance to the circumstances of this case. The defendants contend that this is not a case where the injured party has either been killed or has no recollection of it. They maintain that the plaintiff has first-hand knowledge of the events and about what occurred, whereas the defendants have no direct knowledge of them. Moreover, the point is again made that the plaintiff could have called Mr. Ducie. They point to the procedural history of the case and maintain that it is relevant that the plaintiff has changed his account and the basis of his claim several times. They say that the plaintiff was afforded considerable opportunity to give, and in fact gave, a very clear and definitive narrative about the accident, but that that narrative was simply rejected by the trial

judge for good and legitimate reasons. The defendants say there was nothing unfair in him having done so and that he was right to dismiss the claim.

78. It is common case that the trial judge was not satisfied *"on the balance of probabilities that the accident had occurred in the way, manner and circumstances described in evidence"*. However, what the trial judge clearly meant by this was that he did not accept the plaintiff's account as to how his left hand came to be in the pathway of the shearing blades. Specifically, with regard to the position of the plaintiff's left hand, the trial judge records (at paragraph 62 of his judgment) that *"I took it …that the accident had happened while the plaintiff was doing something other than cutting a bar and that whatever he was doing it involved the accidental or deliberate placing of his hand into the cropper which he then activated."* It begs the question, to which the plaintiff's counsel have already provided a suggested answer, was the plaintiff in fact required to prove how his left hand came to be in the pathway of the shearing blades in order to establish causation? The trial judge was not in any doubt as to the fact that the plaintiff's left hand had been in the path of the shearing blades, or as to the fact that the plaintiff had suffered a devastating injury on account thereof. He was also not in any doubt but that the defendants had been negligent and in breach of duty (including statutory duty), and that but for that negligence the plaintiff's hand could not have been in the path of the shearing blades when they were activated. The essential question is whether it was necessary for the plaintiff, in order to prove a causal link between the plaintiff's negligence and his injury, to have established on the balance of probabilities how his left hand came to be in the path of the blades; or was it enough for him to prove merely that by virtue of negligence and breach of duty (including statutory duty) on the part of the defendants the set up and supervision of the machine at the material time was such that it permitted placement of a hand in the path of the blades, that there had been such placement, and that injury had resulted?

79. We were referred, *inter alia*, to the cases of *Ellis v Translink* [2012] NIQB 112, *Gonzalez v Pointing* [2017] EWCA Civ 347 and *Ellis v William Cook Leeds Ltd* [2007] EWCA Civ 1232.

80. I have found the case of *Ellis v Translink* to be of considerable assistance. This was a decision of Maguire J in the Queen's Bench Division of the High Court of Northern Ireland in which the court found for the plaintiff in circumstances in which it was somewhat difficult to reconcile the plaintiff's only account of how he suffered his accident with the evidence given by his automotive engineer (a Mr. Donaghy). The basic facts of the case were that the plaintiff was a bus driver and claimed to have suffered an injury when the front suspension of the bus that he was driving collapsed. He sued the defendants who were his employer and the owners and operators of the bus claiming that he had suffered injury due to their negligence and breach of duty. The plaintiff recalled that as a certain point on his journey, and when he was the sole person on board the bus, "I had a really big bump. The bus went up and down," following which he felt injury to his right hand, and particularly his wrist. There was no dispute that the front suspension of the bus, which was an air cushion suspension, had failed on the day in question. However, the evidence of the plaintiff's own automotive engineer was that the failure would have led to a gradual deflation of the air cushions in the suspension over approximately three minutes. As a result of losing the cushioning of the airbags the vehicle height would fall by 85 mm. However, this loss of height would be gradual and not abrupt. Following the deflation of the airbags both the driver and any passengers in the bus would experience an uncomfortably hard ride. While on a smooth road this might only give rise to discomfort, if the bus travelled over bumps or speed humps, or if the road surface was uneven, persons on the bus would be likely to suffer seat disturbance, i.e. being moved about in their seat. The plaintiff had had no complaint about the road surface on which he had been

travelling and the engineering evidence that regard was that it was a concrete road which had been patched in places with asphalt.

81. The defendants, who called no evidence themselves, sought a non-suit on the basis that the court should reject the plaintiff's account as being in irreconcilable conflict with the evidence of his expert, Mr. Donaghy. They argued that the Plaintiff had failed to prove his claim, and specifically had failed to establish the necessary causality between the accident alleged and the injury for which damages were sought.

82. The trial judge had been impressed by the plaintiff and considered him to be an honest and straightforward witness who is not seeking to embellish or otherwise improve on what was a simple narrative. He commented:

> "[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."

83. Maguire J also felt that the evidence of the engineer had had its limitations. It is not necessary to go into that for the purposes of this judgment. What is, however, of clear relevance to the context of the present case is how the trial judge resolved the liability issue. He stated:

> "[28] In the light of all of the above should the plaintiff's claim should 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 of the precise mechanism: see paragraph [28] of Toulson LJ's judgement in *Drake v Harbour* [2008] EWCA Civ 25."

84. The case of *Drake v Harbour* referred to by Maguire J involved an appeal to the England and Wales Court of Appeal from the Queen's Bench Division of the High Court in that jurisdiction. The plaintiff, who had been successful before the High Court, was a householder whose house was being rewired by the defendant but while she was temporarily absent. While the house was undergoing rewiring, it caught fire in the middle of the night. The seat of the fire was subsequently identified as being in the loft, where the defendants had been using temporarily rigged festoon lighting. The trial judge had found as a fact that the

defendant was negligent in using old cabling for the festoon lighting without properly inspecting it. He found the specific seat of the fire within the loft as being the festoon lighting cabling. The evidence was that if the old cabling was damaged, using it without proper inspection carried with it the risk of causing such a fire. The trial judge had been prepared to infer causation in the circumstances even though the claimant had not been able to demonstrate the exact mechanism which led to the arcing and overheating that ultimately caused the fire.

85. The Court of Appeal upheld the trial judge's decision. Longmore LJ, who gave the principal judgment, stated:

> "It is convenient to deal with causation first. It seems to me that in a case where negligence has been found and the damage which has occurred is the sort of damage which one might expect to occur from the nature of the work which the defendants have been carrying out, a court should (as Chadwick LJ said in the slightly different context of Roadrunner v Dean [2003] EWCA Civ 1816 para 29)
>
> '… be prepared to take a reasonably robust approach to causation.'
>
> That is just what HHJ Wilcox did in the case. He considered other possible causes of loss and said that no operative cause of the loss had been established which was
>
> '… at least as likely as that the defendants failed to check that the insulation was not unacceptably damaged or that any existing damage was not exacerbated by their activity in assembling the light fittings and the cable.'
>
> By this he meant, as I read his judgment, that it was more likely that the fire was caused by the defendants' negligence than that it was not. That was a conclusion that was open to him on the evidence and I am not persuaded that it should be disturbed."

86. There was also a concurring judgment from Toulson LJ., in which the key passages relevant to the issue of inferring causation are in paragraph 27 to 29, where he states:

27. “The extent to which "positive or scientific proof of causation" is required must be a matter of judgment in each case and depends on the evidence as a whole. There is also a significant difference between, on the one hand, relying on inference to establish both breach of duty and causation of loss and, on the other hand, relying on inference to find a causal connection between proven breach of duty and ensuing loss.

28. In the absence of any positive evidence of breach of duty, merely to show that a claimant's loss was consistent with breach of duty by the defendant would not prove breach of duty if it would also be consistent with a credible non-negligent explanation. But where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense. The court must consider any alternative theories of causation advanced by the defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence.

29. In this case the judge found that the first defendant was negligent in using old cabling for the festoon lighting without properly inspecting it. He found that the cabling was the seat of the fire. If the old cabling was damaged, using it without proper inspection carried with it the risk of causing such a fire. The first defendant has put forward two suggested causes of the fire, loose fitting of the lamp holders on the festoon cable and

> moisture inside the lamp holders. I do not see that either of those causes can be described as an inherently non-negligent cause, for either of them could be associated with a lack of proper inspection. But in any event, for the reasons given by Longmore LJ, the judge was entitled to regard them as improbable explanations. He was therefore entitled to conclude as a matter of probability that the fire resulted from the defendant's established negligence, even though the claimant had not been able to demonstrate the exact mechanism which led to the arcing and over heating that ultimately caused the fire."

87. While the cases of *Ellis v Translink* and *Drake v Harbour* can only be of persuasive influence, it seems to me that they exhibit the correct approach in order to do justice in circumstances where a plaintiff is an honest but imperfect historian, or simply unable by dint of circumstances to account with specificity as to how the accident in fact occurred, and the true *causa causans* of an accident is capable of being inferred separately from the plaintiff's own account and sometimes, as in the *Ellis* case, and I would suggest the present case, notwithstanding the plaintiff's own account. I reject the submission on behalf of the defendants in the present case that the case law on inferred causation has no application, or that it is confined to circumstances where the plaintiff is unable to give an account of the accident through injury, death or illness. While the parties were unable to bring to our attention any reported case in Irish jurisprudence dealing with inferred causation other than in the context of the plaintiff being unable to give an account through injury, death or illness, there seems to me to be no reason in principle why the ability to infer causation should not extend in the interests of justice to a case where an honest plaintiff is, for whatever reason, is an unreliable historian and it is otherwise possible to determine the true *causa causans* of

his/her accident. In this context it should be recalled that the trial judge in the present case made an express finding that the plaintiff had not sought to mislead the experts or the court.

88. I find further support for the correctness of this approach in the cases of *Gonzales v. Pointing* and *Ellis v William Cook Leeds Ltd.* While these cases have different facts they further demonstrate the overall principle.

89. The *Gonzales* case involved an application for leave to appeal against a decision at first instance in favour of the plaintiff, in which the defendant was found liable for having caused a deep laceration to the plaintiff's forehead while she was in the vicinity of a kiosk selling handbags outside Russell Square tube station in London, which was operated by the defendant. The plaintiff was unable to identify the exact mechanism by means of which her injury had been caused. However, circumstantial evidence suggested that a triangular flap hinged on the edge of a canopy over the kiosk's retail window had likely become detached and that it had fallen on her. It was argued on behalf of the defendant that the plaintiff had failed to discharge her onus of proof in circumstances where there was no direct evidence to establish causation. That submission was rejected by the Court of Appeal on the basis that in the circumstances of the case it was permissible for the court below to draw inferences as to causation. It must be acknowledged that the circumstances of this case are somewhat distinguishable from those in the present case since the plaintiff simply could not say what had happened to her.

90. The same was true in the case of the plaintiff in *Ellis v William Cook Leeds Ltd*, who was seriously injured at the foundry where he worked, although circumstantial evidence suggested he had been struck in the face by a crane's hook that he had just attached to a casting, or possibly by the chain attached to that hook, after the casting in question (a laser spindle) had fallen between some racks and had become jammed so that, when the plaintiff commanded the crane to attempt to lift it, tension had increased on the chain and hook until

something gave. It is unnecessary for present purposes to delve into the specific detail of the evidence as recorded in the report of the case. It is sufficient to state that no witness actually saw the accident and it had happened so fast that the plaintiff could not say precisely how it had occurred. The plaintiff's case was that the system of work in which it was possible for castings to become jammed was unsafe, that the defendant had been negligent in operating an unsafe system of work and that it could be inferred that his accident had been caused by that unsafe system. The defendant's primary submission had been that the plaintiff had failed to establish causation, while arguing in the alternative that, even if the defendant was primarily liable, the plaintiff's own actions had contributed to the accident which should give rise to a finding of contributory negligence. The trial judge had been prepared to infer causation in the circumstances of the case and found the defendant primarily liable but attributed 25% contributory negligence to the plaintiff. On appeal the Court of Appeal upheld the trial judge's inference of causation but found the plaintiff to have been 50% contributorily negligent.

91. Having considered these cases I am satisfied that it was not in fact necessary, although it was desirable, for the plaintiff to have cogently explained how his left hand came to be in the path of the shearing blades. The *causa causans* of the accident was the fact that the plaintiff, regardless of what he was doing, was able to place his left hand in the path of the shearing blades, due to acts or omissions of the defendants found by the trial judge to have been negligent and in breach of duty (including statutory duty) owed to the plaintiff by the defendants. The evidence was that the plaintiff was permitted to operate the machine in normal circumstances. The court was satisfied on the balance of probabilities that the plaintiff was unaware that the machine was out of order and was not to be used on that account. The trial judge found that as regards exactly what the plaintiff had been doing with the machine, he was a poor and unreliable historian, and that this was possibly attributable to various

factors including memory difficulties and drug addiction (paragraph 94 of the judgment) and educational and social background circumstances (paragraph 97 of the judgment). However, he was satisfied that the plaintiff had not intentionally set out to mislead.

92. In my judgment the claim should not have been dismissed simply because the plaintiff had failed to provide a cogent explanation for how his hand came to be in the path of the blades, because in the absence of evidence establishing on the balance of probabilities that the plaintiff had been subjectively reckless (of which there was no finding), the plaintiff's own actions would have been no more than a *causa sine qua non* and not the *causa causans*. The plaintiff had adduced adequate proof of the *causa causans* of his accident and should therefore have succeeded on the primary liability aspect of his case. I am therefore prepared to uphold grounds 1, 12, and 20 and am prepared set aside, on these grounds alone and before considering any other aspects of the appeal, the judgment and order of the High Court dismissing the plaintiff's claim.

93. I would not uphold grounds 7 and 21 as they are premised on a suggestion that the trial judge's conclusion that the plaintiff's evidence concerning the positioning of his left hand did not stand up to scrutiny and was not supported by the evidence. It seems to me that notwithstanding the erroneous finding that the plaintiff was definitive that his gloved hand was on the bar palm downwards at the moment when the accident occurred, it was nonetheless perfectly understandable and reasonable for the trial judge to have concluded that the plaintiff's account of what exactly he was doing, and how exactly his hand came to be in the path of the blades was unsatisfactory overall and did not stand up to scrutiny. There was certainly evidence to support that view.

94. To have concluded that the trial judge was wrong as a matter of law to have found that the plaintiff had not discharged his burden of proof , and to have dismissed the plaintiff's claim on that basis, is not to suggest that the plaintiff's failure to provide a cogent explanation

for how his hand came to be in the path of the blades should have had no consequences for the plaintiff. He was facing contentions of contributory negligence and/or recklessness raised by way of defence, and the trial court might well have felt justified on the evidence in drawing inferences adverse to him on those issues, and attributing possibly significant fault to him based on his own actions (or omissions) in the absence of a cogent and satisfactory explanation provided by him for what exactly it was that he was doing at the material time, and how exactly it was that he came to place his left hand in the path of the blades. Indeed, adverse inferences were very likely to have been drawn, given the trial judge's comment that *"[h]ad it be necessary to do so I will add for completeness sake that the Court would've found the plaintiff guilty of contributory negligence and breach of statutory duty for which in all the circumstances of the case he would have had to bear a heavy apportionment of fault"*. This court is not able to address such issues in circumstances where it did not hear the evidence at first-hand and has not even been provided with a full transcript, merely transcript extracts. I consider, therefore, that the matter requires to be remitted to the High Court to be resumed and progressed to a conclusion in the light of this Court's order setting aside the dismissal of the claim.

95. I should say that in terms of the subsidiary issues identified earlier in this judgment relating to pleading, and the entitlement of a defendant to know what case it is that he is required to answer, no case was made out by the defendant that he did not know the case that was being alleged against him. The defendants in this case complain that the plaintiff has never explained satisfactorily what it was that he was doing at the time of the accident, and how his left hand came to be in the path of the shearing blades, but that is not the same thing as saying that the defendant does not know the case that he is required to meet. That case is that the plaintiff was allowed or permitted to place his left hand in the path of the shearing blades of the GEKA, and thereby to suffer injury, due the negligence (and breach of duty

including statutory duty) of the defendants in, *inter alia*, allowing the plaintiff to use the GEKA machine when it was unguarded, in failing to ensure that the GEKA machine was locked out when it was unsafe to be used, and in failing adequately supervise the workshop so as to ensure that nobody would attempt to use the GEKA machine when it was out of order and/or unsafe to be used.

96. While the defendants did complain at various stages before the case came on for trial that the plaintiff had changed or modified the basis of his claim, and this is true, amendments to the pleadings had been allowed and the defendants' pleading points were no longer live issues at the trial. The lack of a satisfactory explanation on the part of the plaintiff, both in his pleadings and in the evidence, for what it was he was doing, was indeed something that could be, and was, and no doubt at any resumed hearing will again be, exploited by the defendants in connection with the pleas of contributory negligence and recklessness.

Grounds 2 & 3

97. Grounds 2 & 3 are addressed to the correctness of the trial judge's conclusion that the plaintiff had failed to prove his case in circumstances where he had not provided a satisfactory explanation concerning what it was exactly that he was doing, and as to how exactly it was that he had come to place his left hand in the path of the shearing blades, in the light of the plaintiff's acknowledged lack of education, drug addiction, and memory difficulties. It was suggested that the trial judge had erred in law and on the facts in failing to have sufficient regard to those circumstances in making the finding that he did.

98. I am satisfied that the trial judge did have adequate regard to those factors. However, for the reasons set forth in the last section of this judgment, whether he was justified in dismissing the claim was not dependent on whether the plaintiff had, or could provide, an adequate excuse for not being able to explain what exactly it was that he was doing. That was a collateral issue. The core issue was whether it was necessary for the plaintiff to provide

such an explanation and for the reasons already outlined I have concluded that it was not necessary. Accordingly, the claim ought not to have been dismissed. I do not consider it appropriate, however, to separately uphold Grounds 2 & 3.

Grounds 4,5 & 6

99. These grounds complain that the trial judge, in arriving at his determination and in assessing whether the appellant had discharged the onus of proof cast upon him, failed to attach due weight to various findings of fact identified in these grounds of appeal. In circumstances where I have already determined that, as a matter of law, it was sufficient for the plaintiff to prove that, by virtue of negligence and breach of duty (including statutory duty) on the part of the defendants, the set up and supervision of the GEKA machine was such at the material time that it permitted placement of a hand in the path of the blades, that there had been such placement by the plaintiff, and that injury had resulted, these complaints are, it seems to me, rendered otiose. I am not therefore prepared to uphold grounds 4, 5 and 6.

Grounds 8, 9, 10 and 11

100. These grounds contain yet further complaints that the trial judge, in arriving at his determination and in assessing whether the appellant had discharged the onus of proof cast upon him, failed to attach due weight to various findings of fact (as specifically identified in these four grounds of appeal). These complaints also seem to me to be otiose having regard to my decision to uphold the core complaint that the trial judge was wrong, as a matter of law, to have concluded that the plaintiff had not discharged his burden of proof simply because he had provided no cogent and satisfactory explanation of what it was he was doing at the material time, and how his hand had come to be within the path of the shearing blades. I am not therefore disposed to uphold grounds 8, 9, 10 and 11.

Grounds 13 and 14.

101. Again, these grounds amount to yet further complaints that the trial judge, in arriving at his determination and in assessing whether the appellant had discharged the onus of proof cast upon him, failed to attach due weight to various findings of fact (as specifically identified in these two grounds of appeal). Again, they are otiose in light of my decision to allow the appeal on the core issue as reflected in grounds 1, 12 and 20. I am not therefore disposed to uphold grounds 13 and 14.

Ground 15.

102. This relates to a complaint that the High Court judge's finding that a submission had been made by the defendants to the effect that the plaintiff had caused the accident deliberately was erroneous, as no such case was either pleaded nor made in evidence. I have already addressed this issue in holding that, while it is technically true that no such case was either pleaded or made in evidence, the defendants had nevertheless put forward a clear plea of recklessness which, at the level of "subjective recklessness" if there was evidence to support it, would import the concept of flying in the face of an apprehended risk, indifferent as to its outcome. However, as I have already observed, the court below did not find that there had been subjective recklessness. Even if the trial judge had been erroneous in his belief that the defendants had sought expressly to make the case that the appellant had cause the accident deliberately there is nothing in the judgment of the court below to suggest that this had any influence or impact on the trial judge's decision to dismiss the claim. There is nothing to suggest that even if he believed that such a claim was being made that he thought there was any substance to it. Rather, he dismissed the claim because he did not believe that the plaintiff had discharged his burden of proof in circumstances where he had failed to provide a satisfactory explanation for what it was he was doing and for how his left hand had come to be in the path of the shearing blades. I am not therefore disposed to uphold Ground of Appeal no 15.

Ground No 16

103. The complaint here is that the trial judge failed to attach adequate weight to his finding (at paragraph 168 of his judgment) that it could not be safely concluded that there was no steel bar in the vicinity of the machine in the aftermath the accident or that such a steel bar was not being used by the plaintiff when he sustained his injuries. With respect to the appellant, the finding in question, while relevant to the issue as to what the plaintiff was doing, and how it was that his hand came to be in the pathway of the blades (possibly a *causa sine qua non*), it was in no way relevant to the *causa causans* of the accident as established in the evidence. The trial judge's error was in failing to correctly identify the *causa causans* and in concluding that the plaintiff had not discharged his onus of proof with respect to it. Whether or not the trial judge attached adequate weight to the finding the subject matter of this complaint would have had no bearing on this. I am not therefore prepared to uphold Ground of Appeal No 16.

Grounds 17, 18 and 19

104. The complaints made in this group of grounds are focussed on findings with respect to the extent of wear on each of the blades of the GEKA machine. However, these findings, whether right or wrong, could only be relevant in the context of the sub issue as to whether the plaintiff's gloved left hand was in fact palm up or palm down when it met the shearing blades. They could have no bearing whatever on the *causa causans* of the accident, namely, that regardless of what the plaintiff was engaged in while using the machine, his hand was allowed or permitted to be placed in the path of the shearing blades when they were activated, due to the fact that they were unguarded, the fact that the GEKA machine was not electrically isolated in circumstances where it was unsafe to be used, and the fact that it was unsupervised. Nor could they have had any bearing on whether the plaintiff had discharged his onus of proof with respect to the *causa causans*. Even if the trial judge had arrived at a

different conclusion with respect to whether the plaintiff's explanation was satisfactory based on the findings highlighted, that would not have cured trial judge's legal error notwithstanding that it might have, for the wrong reasons, yielded a favourable result for the plaintiff. I am not therefore disposed to uphold Grounds of Appeal 17, 18 and 19.

Conclusion

105. I would allow the appeal on Grounds 1, 12 and 20 and quash the order dismissing the plaintiff's claim. Further, I would remit the matter to the High Court to be resumed and progressed to a conclusion in the light of that order.

106. I would dismiss the remaining grounds of appeal.

107. The parties are invited to make submissions in writing with respect to the issue of costs and, if considered necessary, as to the form of the Court's Order in the light of the judgments delivered. The plaintiff is granted four weeks from the date of electronic delivery of the Court's judgments within which to file his submissions. The defendants will thereafter have a further four weeks within which to file their submissions. Both sides are further granted liberty to apply in writing through the Court's Registrar in the event of any difficulty in that regard.