

THE HIGH COURT

[2014 No. 5944 P]

BETWEEN

ANDREW MCTIGUE

PLAINTIFF

AND

CONNACHT GOLD CO OPERATIVE SOCIETY LIMITED, CONNACHT GOLD LIMITED AND
AURIVO CO OPERATIVE SOCIETY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 22nd day of June, 2017 at Galway

1. I start with a saying often attributed to Mark Twain: *"If I had more time I would have written a shorter letter"*. That might be applied to this judgment which is delivered the day after the three-day trial which concluded at 15:15 yesterday and before I took up a further trial which was finished this morning. Having said that, it helps, wherever possible, to deliver a judgment, when matters remain fresh in everyone's mind and to have impact as soon as possible for the parties.

Undisputed Facts

2. The plaintiff, who is a tall, nearly 60-year-old bachelor, took over a farm from his parents outside Westport about 30 years ago. He has rented and continues to rent a further 100 acres. He now has 75 cattle. His farming activities may be described as fattening cows and rearing sheep. He buys cattle in regularly and sells his livestock to factories and other farmers.
3. On Wednesday 15th June, 2011, the plaintiff drove his jeep and trailer to the defendant's mart premises at Ballinrobe ("the mart"), which is a mart attended by him regularly. He ended up on that day buying five one-year-old heifers of varying weights for between €515 to €680 each, which went through the selling ring and onto a holding pen in the mart pending their collection. He separately agreed to buy a then nearly seven-year-old cow with a three-week and four-day-old calf for €1,050. There is a copy of a buyer's statement with these details issued on the 15th June, 2011, to the plaintiff. Nothing turns, for the purposes of these proceedings, on the time of legal ownership transfer of the cattle, or whether title in the cow ever vested in the defendant.
4. The mart started around 11.00 that day and, according to Mr. Thomas McGuire, (manager for nine years at Ballinrobe Mart and having worked at the mart for 41 years) was not busy, relatively speaking. Some 215 cattle arrived for sale and 175 were sold.

Release to the plaintiff

5. After the plaintiff finished his bidding, he went off to nearby Kilmaine for some repair job and came back after *"the dinner"*, as he said, to collect the heifers, cow and calf. The heifers had been brought to one holding pen and the cow with calf afoot to another holding pen, where there were other cows with calves. Mr. Paddy Conroy, who did not give evidence, had the task at the mart of checking the lot number and tag of each

animal against the paperwork before the animals were released to the plaintiff. The plaintiff had a running account with credit facilities from the defendant.

Personnel

6. *On Tuesday last, 20th June, 2017, the defendant produced in Court, and for the plaintiff's legal team, a manuscript list of fourteen employees, of which there were ten who were termed "yardmen", identified by Mr. McGuire in evidence. Mr. McGuire explained last Tuesday that by the time of the collection by the plaintiff around 15.00 on the 15th June, 2011, he had already let three of those yardmen go home. He was candid in his recollection of what little was going on in the mart and mentioned that it was now nearly six years since the relevant date.*

Reversing of trailer

7. The plaintiff had backed his trailer into pen 3 in the loading area, opened the gates and let down the ramp of the trailer. He then went through the process described earlier with Paddy Conroy before bringing the animals from their holding pen into pen 3 with the hope of driving them out onto the trailer at the other exit of pen 3. In the course of this operation, the cow reacted to him in pen 3 in such a way as to cause him to be knocked violently to the ground.

Kieran Dixon

8. Mr. Dixon is a cattle agent for some 35 to 40 years. In addition to rearing cattle like the plaintiff, he travels to marts in Mayo and Galway for the cattle factory firm, Dawn Meats, and other farmers to buy cattle. There is no dispute that Mr. Dixon, who was nearby, admirably rescued the plaintiff from the menacing cow. He pulled the plaintiff out of the pen and roared for help.

Injuries

9. The remaining salient features, which are not in dispute, arise from the description of the plaintiff's injuries by the plaintiff and in the following medical reports admitted into evidence without calling the authors to give evidence.
 - (i) Mr. Alan Hussey, consultant plastic surgeon, 27th November, 2013, to the plaintiff's solicitors.
 - (ii) Mr. Ken Carr, consultant orthopaedic surgeon, 20th September, 2016, to the plaintiff's solicitors.
 - (iii) Mr. Aidan Devitt, consultant orthopaedic surgeon, to the defendant's solicitors dated 2nd February, 2015 and 13th July, 2016.
10. The plaintiff was brought by ambulance to the Accident and Emergency Department of University College Hospital Galway, where he was seen at 17:40, with excruciating pain from his severely fractured right forearm, more particularly the right radius and ulna. Open reduction and fixation of the fractures were performed in surgery. A skin graft from

his right thigh was required. Suffice to say that the continuing most visible scar of 21cm by 6cm and contour effect indicate the extent of the procedures undertaken.

11. The earlier amputation of the plaintiff's right thumb in 1999, for which he received £105,000 in damages, according to the replies to particulars delivered in 2015, had no effect on his fractures and treatment.
12. The plaintiff's recovery was slow and he had difficulty in mobilising due to the soft tissue injuries to the lower extremities and pelvis. He was given a splint and discharged from hospital on the 2nd July, 2011, which was removed on the 3rd August, 2011. By September 2011, he was encouraged to actively use his right upper extremity but to avoid heavy lifting.

Loss of opportunity

13. The plaintiff, although challenged about his general claim for loss of opportunity as opposed to specific loss of earnings, estimates that he has lost 50% of his power in that arm. Remarkably, he can lift animal feed bags but this can cause pain later. It is the difficulty with the fertiliser bags and other chores which require more strength and for which he gets help from what he describes as "*obliging friends*". His sister and her husband helped out and it is testament to the community spirit, which thankfully survives in Mayo, that the plaintiff is offered such help, including the driving home of his jeep and trailer with the heifers without the cow and calf after the incident.
14. The plaintiff complained about the continuing pain from his cervical spine which he attributes to the incident. Radiological evidence from June 2011 reveals that the plaintiff had pre-existing degenerative disease throughout his cervical spine. One CT scan showed a possible undisplaced fracture of the lamina of the C5, according to Mr. Carr's report of the 20th September, 2016. In short, the plaintiff's principal injury linked to this incident is that to his right forearm. He has other complaints, the serious and permanent condition description for the right forearm. The plaintiff is entitled most of which could have been temporarily exacerbated by the incident. The plaintiff's sequelae fall within to damages if liability is established for an additional amount for specific interference in other areas of his body and life.

The legal basis for the plaintiff's claim

15. I preface this part of the judgment by mentioning the Latin maxim *procul ad urbe*, which was mentioned by Kearns J. in the Court of Criminal Appeal in 2006 in the Nally case (*DPP v. Nally* [2006] IECCA 128; 4 I.R. 145) but this is not to take away from the erudite and helpful submissions made by senior counsel for the plaintiff and the defendant.
16. Mr. Jordan, senior counsel for the plaintiff, succinctly focused the Court's attention on the overlap between the common law cause of action in negligence with the specific statutory duty in s. 15(3) of the Safety, Health and Welfare at Work Act 2005 ("the 2005 Act"), the relevant excerpt of which might be paraphrased as follows: the defendant shall ensure, so far as is reasonably practicable, that the means of access or egress from the place of work are safe and without risk to health.

17. Throughout the questioning of Mr. Moloney, (agricultural consultant) called by counsel for the plaintiff, along with Mr. McGuire, (manager of the mart), and Mr. Geoffrey Fitzjohn, (surveyor and land management consultant with experience in Scotland and Ireland), called by counsel for the defendant, views were expressed about the import and effect of: -
- (i) The Health and Safety Authority booklet on 'Guidance on the Safe Handling of Livestock at Marts and Lairages' published in 2010, ("the 2010 HSA booklet"); and
 - (ii) The HSA guidance booklet on 'Safe Handling of Cattle on Farms' published in 2011, ("the 2011 HSA guide").
18. Counsel for the plaintiff in that context suggested two propositions: -
- (i) keep farmers away from the loading areas and let trained mart operatives load; or
 - (ii) ensure mart employees are charged with assisting loaders who are in that role.
19. He also posed two particular periods when the plaintiff's injury could have been avoided in the context of the HSA guidance: -
- (i) at the time when the plaintiff failed to drive the animals through loading pen 3, having taken them from the loading pens; or
 - (ii) when the plaintiff makes a specific effort to load.
20. Counsel for the plaintiff rightly acknowledged that a breach of statutory duty does not take away from a claimant's own breach of duty *per se* when one is considering the issue of contributory causes for an incident giving rise to a claim for damages. However, he emphasised that if the plaintiff established that the defendant had failed in its statutory duty to provide safe egress as submitted, then the breach of duty of the plaintiff at the time of his specific effort causing the cow to react would not have occurred and there would be no need for this Court to decide upon the most controversial dispute as to fact in the trial concerning whether the plaintiff cruelly treated the cow which was protecting her young calf.
21. Mr. McCarthy, senior counsel for the defendant, stressed that no action or omission would have warded off the unanticipated and surprising actions of the plaintiff and the cow while he relied upon the established custom and practice of the plaintiff, Mr. Roper of Ballyglass, and Mr. Dixon, concerning the loading of animals purchased at the mart, on their own.

Witnesses as to events in dispute

22. Mr. Roper struck me as a decent neighbour who cares properly for animals. He was asked by Mr. Armstrong, who sold the cow (while Mr. Armstrong was waiting in Knock Airport for a flight to the UK), to collect the cow and calf after the incident. He did not remember any problem with the specific injuries to the cow's head or an ingrown horn. He readily agreed that a cow can be expected to protect a young calf and he carries an

ash stick for herding and driving cattle. A stick is not used to strike but to be waved and tapped, as one often sees in a scene of taking cattle home or out.

23. Similarly, Mr. Dixon impressively came to the plaintiff's rescue and communicated with the defendant as to the circumstances of the incident. Mr. Dixon struck me as having no agenda and must be credited with recollecting what can only be described as disturbing activity on the part of the plaintiff. He outlined how his antennae were tuned into the plaintiff's loss of reason and respect for animals by his words and actions because he was dealing with his own animals in the very next loading pen, which is pen 2 on drawing number 20309/L001 produced for the Court. I am satisfied on the balance of probabilities that the plaintiff, in colloquial language, "*lost the head*" when the cow did not enter the trailer. He was impatient, certainly, and I was indeed taken by the evidence of Mr. Dixon that he would have considered transporting the cow and calf separately. It was only a few miles and the plaintiff's trailer was not as big as that of Mr. Dixon. Instead of seeking assistance, the plaintiff went to his jeep and took out a metal bar as opposed to a stick or brush handle before getting back into pen 3. It is disconcerting to think that the plaintiff has given a contrary impression under oath about a handle not produced at pretrial inspections but only produced in Court for the first time since six years ago for consideration by the defendant and its advisers as to what he allegedly used in the pen.
24. It is not for me today to decide on whether the plaintiff deliberately contrived and identified a handle which was not present at the time of the incident. It remains for me to decide on the balance of probabilities as to whether the handle produced in Court was used on the cow or whether the plaintiff used a steel tubular object. I have no hesitation, having listened carefully to all of the witnesses, that Mr. Dixon's account is more accurate. He gave a graphic account of the plaintiff holding a bar and of the plaintiff cruelly abusing the cow before she jammed the plaintiff and got down on her two knees to keep the plaintiff away from the calf and herself.
25. Apart from the fact that the plaintiff was seriously injured and brought away by ambulance, followed by serious surgery, which must have a natural effect on memory, his priority was to get away from the cow and get help. How did the handle produced get back into the jeep and how can I square an account from an independent impressive witness who rescued the plaintiff with a version or impression sought to be given by the plaintiff? I cannot do so. I cannot square the plaintiff's account and this thereby affects his credibility.

The available assistance

26. The plaintiff told the court that he expected Mr. Conroy, the mart employee, who checked the tags and lot numbers against documentation before releasing the animal, to follow him down. This is at odds with the account of usual practice given by other witnesses. The defence concentrated on the fact that the plaintiff could have asked for help and was an independent minded person. Mr. Dixon, in answer to myself, described how he had sought assistance in similar circumstances. He usually does not seek assistance. Cows and heifers follow the path of least resistance and the railings in the mart also direct them. The use of a sorting paddle, mentioned on p. 17 of the 2010 HSA booklet, or an

ash stick, as mentioned by Mr. Dixon and Mr. Roper, together with the availability of two or more people to drive cattle, are methods which might be described as best practice. I do not accept that the plaintiff expected Mr. Conroy to follow as it would have left Mr. Dixon waiting for his animals to be released by Mr. Conroy.

27. The plaintiff, like the other witnesses who use the mart, know employees and others to see and can mention matters of concern.

Breach of statutory duty

28. Counsel for the plaintiff submitted that s. 15(3) of the 2005 Act imposes a positive obligation upon the defendant mart to take measures. The 2010 HSA booklet at para. 4.1 requires someone to be in charge and to have management authority in order to achieve safe systems of work. As stated "*management control is a key role and responsibility for safe handling of livestock ...*" and ultimately rests with management. There are no exceptions.
29. This type of guidance, as opposed to a specific directive for every case, is one way by which the safety and health at workplaces under EU and national legislation is driven. Counsel for the plaintiff submitted that the defendant mart cannot abrogate this positive duty by relying on users of its mart to call for help. It must be proactive. Senior counsel for the defendant concentrated on the plaintiff taking responsibility for the consequences of his own action and referred to s. 13 of the 2005 Act. In fact, s. 13(1)(e), which prohibits improper conduct, is the most relevant statutory provision.
30. As far as this Court is concerned, there is considerable merit in the submission made on behalf of the plaintiff. Mr. McGuire, the manager of the mart, was the only person called to give evidence as to fact of management and rosters on the day of the incident. Although he accounted for the number of employees on the premises and his knowledge of the defendant's concern about safety, I am satisfied that there were no staff present around the loading pens which were used by the plaintiff and Mr. Dixon. It has to be the case that if there were employees floating around in such a manner to be of ready assistance that they would or should have intervened to prevent the plaintiff from "*losing the head*". Mr. McGuire cannot be everywhere but no attempt was made by the defendant to identify which employees were tasked to be in and around the loading pens. If such an employee was there, he would have been able to speak to the plaintiff and to assist Mr. Dixon in rescuing the plaintiff. In this day and age, it behoves an enterprise like the defendant, which operates a mart, not only to maintain safety standards but to promote safe and humane handling of animals also. The story relied upon by the defence in these proceedings is a story which does not favour the plaintiff specifically, but also does not favour the agriculture industry which prides itself in compliance with EU and national regulations for safety and the treatment of animals.
31. Having said that, and lest any inference to the contrary be taken, it is this Court's view that the other men who gave evidence of farming, including the agricultural consultants, demonstrated their understanding and adherence to the principles which are now part and parcel of the cattle industry.

32. In short, I find that the defendant abrogated its duty by not having employees tasked specifically to supervise or assist in the loading of cattle by new owners.

Apportioning responsibility

33. The plaintiff had the opportunity to seek help and was so cruel to the cow as to cause a situation where the foreseeable event to protect the young calf arose. On the other hand, the defendant had no specific warning that either the plaintiff or the cow would have reacted as they did. But having considered the evidence of Mr. Dixon about seeking help and the general situation in the mart that has emerged from the evidence of other witnesses, I find that the defendant's abrogation of its duty contributed to the foreseeable event of the plaintiff "*losing the head*" and acting in a way which created a dangerous situation. If the defendant had specifically tasked employees to assist in or around the loading bays, neither the plaintiff nor Mr. Dixon, on the balance of probabilities, would have got into the position they found themselves.
34. I am conscious of the Supreme Court's decision in *Conole v. Redbank Oyster Co.* 1976 1 I.R. 191, and the oft quoted passage of Henchy J. at pp. 196-197 about the direct and proximate cause of the accident. The plaintiff initiated the event which caused the cow to react, but the failure to fulfil the positive statutory obligation of the defendant to manage and take charge led to the plaintiff foreseeably losing control of his own situation. In the circumstances the Court apportions 75% of the liability to the plaintiff and 25% to the defendant.

Damages to be awarded

35. As for damages, the effects on the plaintiff have been outlined already. The Court takes into account the plaintiff's his reliance on his sister, brother-in-law and neighbours, particularly for a year after the dreadful injury he suffered. General damages from 2011 to date are assessed at €65,000 and into the future at €30,000. I should say that I heard the plaintiff's account concerning his reduced power but weigh that against the opinion expressed in the medical reports having regard to the plaintiff's credibility. The Court concludes that the plaintiff would have modified his work in any event. His age and pre-existing degenerative change contributed to the pain and ongoing restriction.
36. There is an agreed amount of special damages of €1,000. Therefore, the plaintiff is entitled to an award of €24,000.
37. The Court, at the request of counsel for the parties defers making any order until they agree on the terms thereof.

Postscript

38. On 28th June, 2017, an order was made by consent striking out the proceedings with no further order.