Neutral Citation No. [2014] NIQB 36 | *Ref:* **HOR9157**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **24/03/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

CHRISTOPHER BOYD

Plaintiff;

and

FARRENS CONSTRUCTION LTD

Defendant.

JUDGMENT

HORNER J

INTRODUCTION

[1] The plaintiff is aged 52 years. He was born in April 1961. He had been employed by the defendant as a labourer for a number of years prior to 7 March 2005. On that day he was working for the defendant who was the main contractor involved in the construction of the Victoria Square development. He was driving a dumper truck on Upper Church Lane when he lost control and it rolled over causing him to suffer a nasty fracture to his left elbow. He brings this claim against the defendant, his employer, alleging negligence and breach of statutory duty on its part. Essentially he claims:

(i) He was not properly trained to drive dumper trucks, and in particular this dumper truck, which being hydrostatically controlled, had only one pedal.

(ii) The defendant failed to carry out a risk assessment and therefore was ignorant of the risks it was running. If it had carried out a risk assessment, the plaintiff would not have been injured.

(iii) The plaintiff was required to reverse the truck out of the defendant's site at Victoria Square and along the public road and this was unsafe.

(iv) The dumper pedal was defective in that when the plaintiff released the pedal which should have brought it to a halt, the dumper truck continued on its way.

(v) There was a failure to provide and use a banksman while the dumper truck was carrying out its operations.

These allegations comprise breaches by the defendant of both its common law duties as employer and of various statutory duties. I do not consider it necessary to set out each of the relevant statutory duties.

In the statement made by the plaintiff after the accident on 15 March 2005 the plaintiff said:

> "For approximately one hour I drove the dumper for 6 or 7 loads …. At approx. 11.30 I was reversing back for another load, as I neared the digger I removed my foot from the accelerator but the dumper continued backwards. The dumper mounted the digger's tracks and turned over on its side."

[2] At the outset, I should record my gratitude for the contributions, both written and oral, made by counsel for the plaintiff and the defendant.

FACTS

[3] There were a number of facts which were not in dispute:

(i) The plaintiff had been employed by the defendant for 10 or more years and worked at various sites including the major civil engineering works carried out by the Department of the Environment at Duncrue Street. He had also worked on the construction of Coolkeeragh Power Station. During the course of his work with the defendant, the plaintiff drove two-pedal and three-pedal controlled dumper trucks on a regular and repeated basis.

(ii) The plaintiff had no prior experience of driving hydrostatically controlled dumper trucks before the day of his accident. These are dumper trucks with one pedal which acts as an accelerator when pressed. When it is not depressed the vehicle stops. Mr McBride, engineer for the plaintiff, told the court that he was surprised how

quickly "it came to a halt" when his foot was removed from the pedal. He had driven a vehicle with similar controls to the one involved in the accident as part of his researches.

(iii) The plaintiff had to reverse out of the gate enclosing the Victoria Square site works on to Upper Church Lane keeping close in to the side of the road and then manoeuvre his dumper truck around the digger which was moving rubble and stones from the road. It was these stones which the digger was lifting and placing into the dumper truck for disposal.

(iv) There was a general risk assessment produced to the court during the course of this hearing which dealt with the use of plant on site on a general basis.

(v) No risk assessment of this particular operation had been carried out. There was a generic risk assessment produced to the court during the course of the hearing which dealt with the use of plant on site.

(vi) In the course of the operation the plaintiff lost control of the dumper and it ended up on its side resting against a window-ledge of one of the business premises in Upper Church Lane. It was not disputed that it had climbed the digger's tracks, a height of some 12-15 inches and it had then gone across the road on two wheels for a distance of approximately 5 feet, before it rolled over and came to a rest.

(vii) The plaintiff does not have a driving licence to drive a motor vehicle on the public highway.

(viii) At the time of the accident the plaintiff was operating the dumper truck without the benefit of a banksman.

There were a number of matters which were in dispute:

(i) The defendant claimed that the plaintiff not only had considerable practical experience in driving dumper trucks but that he had also attended a course in the use of dumpers in March 2001. The plaintiff denied attending any course in respect of the use of dumper trucks and claimed that the defendant must have confused him with his uncle, Charles Boyd, who had the same initial as he did. As I have said the plaintiff did accept that he had driven dumpers on many occasions before the accident but he denied any experience or training in the use of those with hydrostatic controls until the day of the accident.

(ii) There was a keen contest as to whether it was unsafe to require the plaintiff to reverse the dumper out of the Victoria Square site on to Upper Church Lane. Mr McBride, a Consulting Engineer, gave evidence on behalf of the plaintiff. Mr Wright, a Consulting Engineer, gave evidence on behalf of the defendant. Mr McBride said that the system of reversing on the public highway was unsafe. Mr Wright denied that it was unsafe in the circumstances given the plaintiff's view and pointed out that even if Mr McBride's advice was followed, there was a requirement at some stage to execute a three-point or five-point turn on the public highway which carried with it considerable risks to the general public. Both agreed that any risk arising out of reversing the dumper was primarily run by pedestrians.

(iii) The plaintiff claimed that the controls of the dumper were defective because the pedal did not work when it was released. It was suggested that a stone may have prevented the release of the pedal when the plaintiff took his foot off it. The plaintiff was adamant that he had taken his foot off the pedal but that the dumper did not respond. The defendant denied that there was any possibility of a stone preventing the pedal being released. The dumper had been used after the accident without incident or complaint. No defect was ever found in its controls or in the controls of any other hydrostatically operated dumper.

(iv) The defendant claimed that the accident was a simple case of driver error. The plaintiff had not been looking where he was going and had misjudged the distance between the digger and the dumper as he endeavoured to manoeuvre the dumper around the digger.

[4] It is clear from the medical evidence that the plaintiff has not tried to exaggerate the effect of his injuries. Certainly that was my impression of him when he gave his evidence. I observed him closely giving his evidence. I thought for the most part, he did so truthfully and without exaggeration. There was a matter which did give me cause for concern. This was the issue of training. He claimed that there was an error in the defendant's records. Namely he denied that he had ever attended a dumper truck training course in March 2001. I concluded he was misleading the court on this issue for three reasons:

(i) He said that the "C Boyd" in the records, who had undertaken the dumper truck training course, was his uncle who was employed by the defendant at that time. It would have been straightforward for him to have called his Uncle Charles to confirm what he told the court or even to have served a statement from his uncle to that effect. There was no suggestion that the uncle was dead or indisposed or unable to give evidence. He simply failed to confirm his nephew's explanation.

(ii) During the course of the hearing the plaintiff telephoned Mr O'Neill who was a construction manager on site at the time of the accident and asked him to confirm over the phone that Mr O'Neill had told him on the telephone after the accident that he had not been trained to drive a dumper. Mr O'Neill denied that he had ever expressed any such comment. No plausible explanation was given as to why the plaintiff did not tell the court about this when he gave evidence. I would have expected the plaintiff when challenged about the training he had received by Mr Stitt QC, to have told the court about this conversation with Mr O'Neill after the accident. I found Mr O'Neill to be a convincing witness and I concluded that no such discussion had taken place between the plaintiff and Mr O'Neill during any telephone conversation after the accident. I concluded that the plaintiff was testing Mr O'Neill to see if he would back up his story that he was not properly trained.

(iii) The plaintiff explained that he could not have attended the course on dumper truck driving on 13 March 2001 because it was a Monday and he was off ill that day. It was put to him by Mr Stitt that in fact 13 March 2001 was a Tuesday. The plaintiff then claimed that he had been ill for two days. I simply did not believe this answer. I noted that the plaintiff did not dispute any of the other records relating to the many other courses he had attended over the years with the defendant. There is no doubt that there was such a course because the plaintiff says he was off sick and his uncle attended it. I therefore attach no significance to the fact that the name of the provider of this course is not contained in the records.

[5] So I conclude on the basis of the foregoing that the plaintiff was essentially honest, but prepared to tailor his evidence if he needed to do so, in order to try and succeed in his claim against the defendant.

[6] There are three possible ways the accident could have happened. I accept the plaintiff's evidence that he was not speeding. The top speed of these dumpers is approximately 10 mph. The plaintiff himself claims that he lifted his foot from the pedal some 5 feet from the digger. If that is right, the accident should not have happened. There are three possible explanations.

(a) The plaintiff raises his foot and the vehicle does not react. It mounts the track of the digger and then crosses the road on two wheels.

(b) The plaintiff misjudges the position of the digger, mounts the track, brakes too late, loses control and crosses the road on two wheels.

(c) The plaintiff lifts his foot off the pedal and then slams it down in a panic. The dumper mounts the tracks and crosses the road out of control on two wheels.

[7] There are certain overlaps between versions (a) and (b). The plaintiff when giving his evidence was adamant that he removed his foot from the pedal. He was tested on this in cross-examination and stuck to his story. I consider that it is unlikely that the plaintiff would have lifted his foot off the pedal and then depressed it in a panic because he was used to a two or three-pedalled control. If he had panicked and tried to depress the pedal to stop it, then it would have been adjacent to the pedal from which he had lifted his foot, being used to the two or three-pedalled system. However, this was emphatically not the plaintiff's evidence. Having reviewed all of the evidence, I consider such a scenario is pure speculation.

[8] The plaintiff claimed that some defect in the braking system prevented the dumper from stopping when he released his foot from the pedal. This was the case he pleaded. It was suggested as a possibility that some stone might have lodged in the braking mechanism and this prevented the pedal being released. I have no doubt from listening to the expert evidence in this case from a number of different witnesses that this possibility can be discounted. There was no evidence of any stone ever having entered the braking mechanism of these dumpers before and after the accident although they are used widely on construction sites throughout the British Isles. No convincing mechanical hypothesis was put forward to explain how a stone could have prevented the pedal being released. I reject this as a possible cause of the accident. Accordingly I am satisfied on the balance of probabilities that this accident was caused by the plaintiff misjudging the manoeuvre around the digger, mounting the track of the digger and losing control of the dumper. This was a straightforward driver error on the part of the plaintiff.

[9] Mr Fulton gave evidence on behalf of the defendant. Part of his expertise is training drivers of this type of plant. He came with an extensive curriculum vitae evidencing his longstanding involvement in providing training to the construction industry. He had provided training to the defendant's employees from time to time. He was an impressive witness. He made it clear that if the plaintiff had been sent for training to his organisation then:

(i) Such training as he would have received on a dumper would have been on a two or three pedal dumper. He would not have received any practical training on a hydrostatically controlled one pedal dumper.

(ii) Given his experience, the plaintiff would have been asked to perform a practical exercise on the dumper three times. If he had accomplished that successfully, he would have been considered adequately trained. It is noteworthy that the plaintiff had performed the operation of

loading and unloading the dumper six times before the accident without incident or complaint.

[10] I am satisfied that the plaintiff was very experienced and that he had received adequate training in the use of dumper trucks. He was adequately qualified both by training and experience to drive a one pedal dumper. If he had been sent for training in 2005, he would have learnt nothing to add to his font of knowledge. I am satisfied from the totality of the evidence adduced that driving a one pedalled dumper is straightforward and is akin to controlling a golf buggy or a dodgem car. Its controls should have presented no foreseeable problem to the plaintiff.

[11] An issue rose late in the day about the failure to use a banksman when the plaintiff was carrying out this operation. Mr Wright for the defendant did not accept that a banksman was necessary. I offered Mr Bentley QC for the plaintiff the opportunity to take further instructions from Mr McBride as this issue had been partly provoked by documents discovered late by the defendant. Mr Bentley QC declined to do so and quite candidly in his forthright manner and in the best traditions of the Bar told the court that he had spoken to Mr McBride and that he could not add anything to this issue. I conclude that given the clear view that the plaintiff enjoyed operating the dumper a banksman was not required and would not have prevented this accident from happening.

OUTSTANDING ISSUES

[12] The two central issues which emerged as the case progressed were:

(i) Was the decision which had been taken to require the dumper truck to reverse out of the Victoria Square site, a careless one?

(ii) Was the failure to carry out a risk assessment an effective cause of the accident?

[13] A document from CITB suggested that it might be safer to reverse a dumper as the visibility was better. However, it is probable that this advice applies only in respect of a dumper loaded with debris because in those circumstances the driver's view over the load might be restricted.

[14] The safety instructions for the operation of earth-moving machinery recommended that reversing should be eliminated, if at all possible. Mr Wright, when questioned by Mr Bentley QC, suggested this related to large plant with substantial blind spots - the very opposite of the situation here. I have no doubt from the plaintiff's evidence that he enjoyed a clear unobstructed view while reversing. He was asked to perform a straightforward operation. He had performed it successfully 5 or 6 times before. He simply made an error of judgment that was just as likely to happen if he was going forwards as if he was going backwards. I

accept the plaintiff's evidence that reversing the dumper did not present him with any particular problem. Mr Wright thought reversing a dumper had other advantages in these particular circumstances. It avoided a 3 or 5 point turn, there was a perfectly adequate view when reversing and that in the circumstances "this is the occasion when the safer option is to reverse". On the evidence I agree with his opinion.

[15] There was of course no risk assessment carried out for this particular operation. It was claimed that this was a time limited operation likely to last two days and that therefore a risk assessment was unnecessary. It was asserted that the generic risk assessment, which I have referred to, was sufficient.

[16] Regulation 3 of the Management of Health and Safety at Work Regulations (NI) 2000 provides at 3(1):

> "Every employer shall make a suitable and sufficient assessment of:-
>
> (a) The risks to the health and safety of his employees to which they are exposed whilst they are work;
>
> (b) The risks of the health and safety of persons not in his employment arising out or in connection with the conduct by him of his undertaking;
>
> (c) For the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him on the relevant statutory provisions and by Part II of the Fire Precautions (Work Place) Regulations (NI) SR 2001/348."

[17] According, to Munkman on Employer's Liability (16th Edition) at 10-20 states that a suitable and sufficient safe system requires:

> "…a systematic examination of the workplace, examining the hazards present and the likelihood of their arising; the extent of this assessment will vary with the complexity of the operation. The risk assessment is intended to identify the measures to be taken to comply with the employer's statutory duties."

I do not consider that the generic risk assessment in respect of plant was in the circumstances "suitable and sufficient".

[18] In Allison v London Underground Limited [2008] EWCA Civ. 71 the Court of Appeal stressed the importance of carrying out a suitable and sufficient risk assessment. Smith LJ said at paragraphs 57 and 58 :

> "Plainly, a suitable and sufficient risk assessment will identify those risks in respect of which the employee needs training. Such a risk assessment will provide the basis not only for the training which the employer must give but also for other aspects of his duty, such as, for example, whether the place of work is safe or whether work equipment is suitable.
>
> Risk assessments are meant to be an exercise by which the employer examines and evaluates all risks entailed in his operation and takes steps to remove or minimise those risks. They should be a blue print for action. I do not think that Judge Cowell was alone in underestimating the importance of risk assessment. It seems to me that insufficient judicial attention has been given to risk assessment in the years since the duty to conduct them was first introduced. I think this is because judges recognise that a failure to carry out a sufficient and suitable risk assessment is never the direct cause of an injury. The inadequacy of a risk assessment can only ever be an indirect cause. Understandably judicial decisions have tended to focus on the breach of duty which has led directly to the injury."

[19] In Uren v Corporate Leisure (UK) Limited and Ministry of Defence [2011] EWCA Civ. 66 Smith LJ provided further helpful guidance at paragraph 39:

> "It is obvious that the failure to carry out a proper assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind

> would necessitate hypothetical consideration of what would have happened if there had been a proper assessment."

[20] I am not persuaded that any different system for the disposal of rubble would have been adopted if a risk assessment had been carried out. On the evidence before this court the plaintiff was trained and experienced in the use of dumper trucks, and the one pedalled dumper should not and did not cause him any difficulty in its operation. Further training would have made no discernible difference. His unobstructed view as he emerged from the Victoria Square site was excellent, there were other risks from a 3 or 5 point turn, which would have been required, I find, if he had driven out forwards and which made reversing the safer option.

QUANTUM

[21] The plaintiff suffered a severe fracture to his left elbow region. He is right hand dominant. He was taken by ambulance to the Royal Victoria Hospital where he was operated upon by Mr Swain. The fracture was reduced and plated. The plaintiff complains of restriction of movement and it is noted that flexion and extension are significantly limited. Pronation and supination are also limited. There is diminished sensation down the ulnar border of the forearm. Wrist movements are full and pain free but wrist power and grip are weaker than normal. The plaintiff experiences intermittent burning "in the left elbow". Mr Price who examined the plaintiff describes on-going neurological problems with pain and paraesthesia in his fingers. The plaintiff may be prone to early degenerative change affecting the elbow joint. Mr Yeates thinks there will be secondary degenerative change in the region of his elbow over the ensuing 10-15 years following his accident and this may cause him some difficulties continuing with his occupation as a labourer beyond his late fifties. I consider that the value of the plaintiff's claim for general damages is £35,000 which includes damages for his other more modest soft tissue injuries. I also think that it would be appropriate to award him £15,000 for potential interference with his working capacity in the future because the possible risk of degenerative change in the elbow of his non-dominant arm. This can only be done by an award of a lump sum under Smith v Manchester Corporation. If I had to award damages in this case, then I consider £50,000 exclusive of the CRU to represent reasonable compensation.

Conclusion

[22] On the basis of the totality of the evidence which has been adduced in this case, I am not persuaded by the plaintiff that the defendant bears any fault for this accident. Having seen and heard the witnesses give evidence I am not satisfied there was any breach by the defendant of any of its common law duties. For the reasons I have given I do not consider that there was any breach by the defendant of its statutory duties save in respect of its failure to provide a sufficient and suitable

risk assessment for this particular operation. For the reasons given, I do not find that this failure was causative of the plaintiff's injuries.