

**THE HIGH COURT****[2022] IEHC 312****2016 /8063 P****Between****STEPHEN WILLIAMSON****Plaintiff****And****DENNIS J NYHAN And ANDREW WILSON****Defendants****JUDGEMENT OF MS JUSTICE BUTLER DELIVERED ON 26 MAY 2022**

1. The plaintiff was engaged by the second defendant on the 8 September 2015 to travel with the second defendant to collect cattle which the first defendant had sold to the second defendant's father from the first defendant's out-farm at Ballineen, County Cork. The plaintiff, who was 28 years of age at the time, had an employment history consisting mostly of manual labour and had no particular training or experience in handling livestock. In the course of this task the plaintiff sustained a serious crush injury to his right lower arm with a displaced fracture to the radial head of his right elbow. The medical evidence has been agreed between the parties and I will revert to it later in this judgement.
2. Although the second defendant filed a full defence to the plaintiff's claim, he did not attend the hearing, was not represented and no evidence was offered on his behalf. There is no doubt that, as the plaintiff's employer, the second defendant bore primary responsibility for ensuring his safety at work both at common law and under statute. Equally there is no doubt that in circumstances where the plaintiff had no particular experience in handling livestock and had received no training or instruction in this area, the second defendant was in breach of his duties to the plaintiff as his employer and is liable to him for this accident. Where this is not obvious from the plaintiff's evidence, it is clear from the evidence given by the engineers who appeared on behalf of both the plaintiff and the first defendant. Therefore, in circumstances where the plaintiff will succeed in full against the second defendant, the

issues to be dealt with in this judgement concern whether the first defendant is also liable to the plaintiff (as a joint tortfeasor or concurrent wrongdoer) and whether the plaintiff is guilty of any contributory negligence.

3. This case proved complex for a number of reasons. At issue is the liability of the first defendant to someone who was not the first defendant's employee but who was present on his land for the purposes of carrying out work on behalf of another person. Further, the first defendant places great significance on the fact that the plaintiff's employer, namely the second defendant, was present throughout the events leading up to and at the time of the accident.
4. The fields, gates and pen discussed in evidence are all part of the first defendant's lands. However, the case against the first defendant is not one pleaded under the Occupiers Liability Act, on the basis, correctly in my view, that liability under that act relates to the static condition of an occupier's land (including any structure or object placed on the land) as distinct to a transient operation being carried out on lands. In his evidence, the plaintiff criticised the adequacy of the pen into which the cattle were herded at various points in the operation. He regarded this pen as makeshift when compared to a permanent 'one way' shed with which he was familiar on another farmer's land. However, neither engineer suggested that the gates and pen arrangement on the first defendant's land was inherently unsatisfactory. Consequently, this case is not really concerned with the adequacy of the infrastructure in the first defendant's lands but with the question of who bore responsibility for the system being used for the movement of cattle and the safety of those involved in this movement.
5. The cattle in question were the first defendant's cattle which were being sold to the second defendant's father, a cattle dealer, to be brought to a mart, presumably for further sale to a factory. There was no evidence given as regards the precise mechanism of this transaction nor the point at which ownership in the cattle had moved or would move from the first defendant.
6. The real difficulty in the case arises from the almost complete conflict of evidence as between the plaintiff and the first defendant as regards what occurred leading up to the accident. There are some differences between their accounts as to the accident itself but these are not as great as the widely diverging accounts of the surrounding circumstances. Matters are complicated further because the account of the accident in the plaintiff's engineers report is to some extent inconsistent with the account given by the plaintiff in evidence although I note that the account in the first defendant's engineers report – based

on an account communicated to the first defendant's engineer from the plaintiff *via* the plaintiff's engineer at a joint inspection – is largely consistent with the plaintiff's evidence. Finally, there are differences between the parties as to what occurred in the immediate aftermath of the accident but the plaintiff has fairly conceded that as he was in a state of shock and suffering from considerable pain he cannot contradict what the first defendant states occurred immediately afterwards.

7. Therefore, the court has had to consider the evidence quite closely in order to assess, on the balance of probabilities, what is likely to have occurred as regards this accident. It may be useful at the outset of this judgement to outline the extent to which the two accounts overlap. I will then look at the technical evidence given by the engineers as regards the layout of the area, the configuration of the gates and the likely location and configuration of the second defendant's trailer which was being used in the operation. Finally, in light of this I will examine the conflicting evidence of the parties.
8. Insofar as there is agreement between the parties it is not disputed that the plaintiff was employed by the second defendant and was brought by the second defendant to the first defendant's out-farm where the second defendant was due to collect cattle which had been sold by the first defendant. It is not disputed that cattle could be and were, moved from one field (the right hand field) into a pen at the mouth of the second field (the left hand field) through a passage created by opening the gates to both fields and tying them together. It was accepted by all involved that cattle can behave unpredictably especially in the presence of persons who are unfamiliar to them. It is not disputed that after the main group of cattle to be sold had been loaded onto the trailer, a single cow had to be retrieved from the right hand field although the reason why a single cow had to be retrieved was very much in issue. It is not disputed that the first defendant organised the retrieval of this cow by bringing it back to the pen accompanied by a heifer. The presence of the younger cow was designed to keep the cow calm. It is not disputed that the heifer then had to be released back into the right hand field which necessitated the opening of the right-hand gate. It is not disputed that the plaintiff was standing in the vicinity of the right-hand gate at this point although exactly where and how he came to be standing there are very much in issue. It seems to be agreed that the accident occurred when the cow attempted to follow the heifer back into the right hand field and that somehow the plaintiff's right arm was caught and crushed between the cow's head and the right-hand gate leading to the injuries complained of. The actual mechanics of the accident are unclear and certainly are not agreed.

9. Two engineers gave evidence, Mr Murphy on behalf of the plaintiff and Mr Twomey on behalf of the first defendant. In their reports and in their evidence both engineers describe the configuration of the two adjacent fields with a recessed access off the public road and provided helpful photographs which made the witnesses' description of events clearer than might otherwise have been the case. They described how the gates to the two fields were situated at slight and opposing angles to the public road such that each gate opened at the side nearest the other and, when opened, the two gates could be tied together so as to create a sealed or contained passage through which cattle could be moved from one field into the other. They also described and their photographs showed how the mouth of the left hand field had a second gate some 8 m back from the first with the sides of the area between the two gates reinforced with pallets and similar material to create a pen. Thus, not only could cattle be moved between the two fields through the passage created by the open gates, they could also be moved from the right hand field into the pen.
10. Mr Murphy on behalf of the plaintiff described the usual method of loading animals from a pen onto a trailer such as that brought by the second defendant to the first defendant's premises on the date in question. The trailer is reversed into the recess towards the pen. The solid back gate of the trailer can be lowered to form a ramp up which the animals are herded into the trailer itself. Further, there are gates on either side of the trailer which can be opened alongside the ramp. These gates both direct the animals up the ramp and prevent them falling from the side. Mr Murphy's evidence, based on the plaintiff's account, was that the gate to the left hand field (i.e. at the mouth of the pen) opened flush with the gate at the side of the trailer. This created a single barrier from one side of the exit from the pen to the trailer. The gate to the right hand field was opened and closed to let cattle through. This meant that when the right hand gate was closed there was a gap between that gate and the trailer through which a cow could move rather than mount the ramp when leaving the pen.
11. Mr Murphy, who was himself raised on a farm, regarded it as entirely sensible that someone would be placed in that gap to prevent the cow moving through the gap and towards the road. He did not however regard it as sensible that the plaintiff stand there if he did not know what he was doing, had no experience with cattle and was not provided with a stick or other item to keep the cow back. On the contrary he regarded this as placing the plaintiff in an area of high danger.
12. The focus of Mr Twomey's evidence was on the undoubted responsibility of the second defendant as his employer to ensure the plaintiff's safety at work. In circumstances where the plaintiff had no training nor experience in handling cattle he was of the view that the

plaintiff should have remained in the second defendant's vehicle and taken no part in the moving of the cattle. Likewise, in circumstances where the plaintiff accepted that he knew cattle could behave unpredictably, he should have stayed in the vehicle. Mr Twomey said he had difficulty understanding the dynamics of the accident and in understanding how the gap the plaintiff referred to arose. In his evidence Mr Twomey indicated that the plaintiff's arm had hit the centre post between the two gates. This was not consistent with the manner in which the accident is pleaded in the personal injury summons (paragraph 3), with the account provided by the plaintiff in the updated particulars of negligence on 25 September 2020 nor the evidence given by the plaintiff. In all of these accounts it is pleaded that the plaintiff's hand was caught against the gate and not the gatepost. It is also not consistent with the first defendant's evidence. Crucially the first defendant did not suggest that the plaintiff's arm had hit the gatepost but that the plaintiff had stuck his arm out and put his hand through the gate. This will be considered further below. It may be that a misunderstanding as to whether the plaintiff's arm was caught against the gate or the gatepost has made the dynamics of the accident and the identification of a gap more difficult for Mr Twomey.

- 13.** As previously noted, the evidence of the parties themselves is conflicting on virtually all the surrounding circumstances of the accident. This conflict includes matters of no relevance to the question of liability such as the number of cattle the first defendant had sold and whether the second defendant had brought another man in addition to the plaintiff to assist with the task. The plaintiff states that only himself and the second defendant travelled to the first defendant's farm. The other man working for the second defendant at the time, a Polish national, remained in a scrapyard which was the location in which the plaintiff usually worked. The first defendant states that when he arrived at his farm the second defendant was already there and in the process of moving cattle with the assistance of two men, the plaintiff and another man whom he thinks may have been called Donovan or Donaghue.
- 14.** The plaintiff's recollection is that the second defendant was to collect four cattle. He describes the second defendant's jeep and trailer being parked off the road in the recessed area and the first and second defendant having a conversation about sorting out the gates. The gates were then opened and tied together after which all three men (the plaintiff and both defendants) walked down the right hand field in order to bring up the cattle. He describes a large number of cattle, perhaps up to 20, being herded from the field into the pen. The trailer was then turned to face the pen. The first defendant pointed out the cattle

to be moved into the trailer and the others were left back into the right hand field, the gate of which was opened for that purpose. The gates at the back of the trailer were opened and three of the four cattle to be moved were loaded onto the trailer. The fourth inadvertently went back into the right hand field with the main bunch. Consequently, that cow had to be retrieved.

- 15.** The first defendant's account is materially different. He states that he had sold six, not four, older dry cows to the second defendant's father who had seen the cattle when he bought them a week earlier. He states there was a specific arrangement that the second defendant would collect the cattle at 6 pm. He intended having the cattle to be moved ready in the pen before the second defendant arrived. However, when he arrived at his out-farm at 5:30 pm the second defendant was already there with two men. The two gates were already opened and tied together and the three men were in the right-hand field gathering up the six cows – and only six cows - and moving them towards the gate. He saw the plaintiff, whom he regarded as a trespasser, by a ditch in the field. When asked how the second defendant knew which six cows were to be moved, the first defendant insisted that the second defendant would be able to identify the six dry cows which had been fattened over the summer as most of the rest were younger heifers. However, on the first defendant's account, the second defendant did not in fact identify the cattle correctly and brought up one wrong cow which had to be released back into the right-hand field while the other five were loaded on the trailer. That meant that a single correct cow had to be retrieved from the right-hand field.
- 16.** Thus, both accounts reach a point where a single cow had to be retrieved from the right-hand field with the others intended for sale already loaded onto the trailer. They differ as to whether the cow in question had previously been herded into the pen and, of course, by whom and under whose direction the herding operation had taken place. It is notable that in giving his evidence the first defendant was clearly exercised by the fact that the plaintiff had been brought onto his land by the second defendant and that he was now being sued by the plaintiff when he regarded the second defendant as solely responsible for the plaintiff's safety. He was also clearly annoyed by the fact that the second defendant had turned up earlier than arranged as the presence of the strangers and the trailer made the cattle agitated.
- 17.** Although different in their detail, it is clear from both accounts of the retrieval of the single cow that the first defendant took control of this part of the operation. The plaintiff describes driving with the first defendant in his jeep into the right-hand field and being told by the first defendant to bring a small heifer with the cow in question as the heifer would help to

keep the cow calm. According to the plaintiff these two animals were moved up the field by the first defendant driving behind them whilst the plaintiff walked alongside keeping them on track. The two animals were then secured in the pen.

18. The first defendant strenuously denies that he drove his Jeep into the field. Instead, he states that he walked down the field with another person, clarified by him as being the second defendant, and brought the cow and heifer back to the pen. He describes the cow as sulky because she had seen the trailer. The heifer was brought with the cow because it is easier to move two animals than a single animal.
19. The accident occurred when the heifer was being let back into the right-hand field and the cow was being loaded onto the trailer. The plaintiff states that he was told by the first defendant to stand between the trailer and the right-hand gate to stop the cow attempting to follow the heifer or going through the gap onto the road. The first defendant was standing inside the right-hand gate and opened it to allow the heifer through and was then in the process of closing it. The second defendant was standing in the pen to hunt to cow onto the trailer. On the plaintiff's account the cow bolted and came running towards him looking "*stone mad*". He jumped out of the way but as he did so the gate hit his back and the cow's head hit his arm between the elbow and wrist and pushed it back hitting against the gate. The plaintiff heard the noise of his elbow breaking. In effect the gate, the cow and the plaintiff all collided together with the plaintiff's arm caught and crushed between the gate and the cow. The plaintiff's wrist swelled up and he experienced severe pain. He was too shocked to stand, fell to the ground and rolled under the gate. He thinks that the cow continued into the field but as he was shocked he was not certain of this and accepted the first defendant's account of the cow being backed into the pen.
20. The crucial difference between the plaintiff's account and that of the first defendant is that according to the first defendant he did not speak to the plaintiff and did not direct him to stand in the gap. In his direct evidence the first defendant stated that he did not speak to the plaintiff at all, he merely asked the second defendant who the plaintiff was. Apparently, he wanted the plaintiff - and perhaps also the second defendant and the other man, if present - out of the way as he could manage the task himself. Under cross-examination the first defendant confirmed that he did not discuss with the plaintiff or the second defendant what he planned to do in relation to the release of the heifer and the loading of the cow onto the trailer. He regarded this as obvious. However, instead of saying that he did not speak to the plaintiff at all, the first defendant now stated that he had asked the plaintiff and the other man to stand back by the road as he felt their presence would frighten the cattle. He agreed

that if the plaintiff had been his employee he would have advised him to take care in the circumstances and would have provided him with a stick etc.

- 21.** He then describes the plaintiff as taking a couple of steps back in towards the gate because he was coming to help. He acknowledged he was aware that the plaintiff was standing near him but said nothing to the plaintiff because he didn't want to "abuse" the men the second defendant had brought with him. The first defendant's evidence placed the plaintiff standing near the gate-post. Having said in his direct evidence that there was no gap, the first defendant appeared to accept under cross-examination that there was a gap or an opening on the right hand side between the trailer and the gate. When asked how that gap was being blocked, his reply was that the gates could be opened and closed and that he did this every day of the week. The first defendant disputes the plaintiff's description of the cow as bolting and being stone mad. He described her to his engineer as an old slob of a cow and to the court as a pet of a cow. He accepts that the cow moved to follow the heifer by pushing or squeezing her way out and describes the plaintiff as sticking his hand inside through the gate to stop the cow. In the first defendant's view the plaintiff simply put his hand in the wrong place because he was totally inexperienced. Finally, after the incident the first defendant states that the cow was backed into the pen, the five cattle in the trailer were off-loaded into the pen and all six were loaded together, without incident, back onto the trailer.
- 22.** In circumstances where there is a complete conflict of evidence, the task of the court is to ascertain which of the two accounts is more likely to have occurred. There may be elements of each account which are inherently plausible or implausible and elements which vary depending on the perception of the person giving evidence. For example, in this case the plaintiff, who was unfamiliar with cattle, describes the cow as bolting towards him and as being stone mad. The first defendant, who is an experienced cattle farmer describes the cow, which he had known for years, as being a quiet animal albeit possibly a bit agitated due to the presence of strangers and a trailer. I accept that the cow was not an inherently dangerous animal, save to the extent that all animals can behave unpredictably. However, I also accept that for someone in the plaintiff's position with no experience of cattle, having a large cow moving determinedly towards you is a frightening experience and he may well have perceived the cow as moving more quickly than it was and as being mad. This is not really a key factor in the occurrence of the accident but serves to illustrate how the same events can be perceived differently by different people.

- 23.** Having considered all of the evidence I am satisfied that it is more likely that the accident occurred in the manner described by the plaintiff. There are three main reasons for my conclusions in this regard. Firstly, it seems unlikely that the second defendant, on arriving at an out-farm which he had not previously visited, would open the gates to two fields and begin collecting six cows which had not been identified to him from a herd of 18 or 20. . It may well be that the second defendant arrived early and that first defendant had intended having the cattle ready before the trailer arrived. However, on the first defendant's account the second defendant would have had to have arrived nearly an hour before the appointed time to have the gates set up and the cows selected and practically moved out of the right hand field before he himself arrived at 5.30 pm. It seems more likely that the plaintiff's account of a discussion taking place between the two defendants regarding the organisation of the gates before the collection of the cattle began is correct
- 24.** Secondly, the first defendant's account of the plaintiff having stuck his hand through a gate in an attempt to stop a moving cow on the opposite side of the gate seems inherently unlikely. There is no logical reason why the plaintiff would have done this or why he would have thought that a hand stuck through a gate would be sufficient to stop a moving animal. When pushed on this, the first defendant rationalised his evidence by saying that this must be how the plaintiff's hand got caught as if the plaintiff put his hand over the gate or to the side of the gate the cow would have brushed past it. It does not seem that this aspect of the first defendant's evidence is based on what the first defendant actually saw and remembers; rather it is based on conjecture on his part as to how the accident occurred. It is notable that this account was not put to the plaintiff in cross examination.
- 25.** I have also had great difficulty in understanding how, if the plaintiff was standing near the gate post as the first defendant says (he described it as the round pole), he could have put his right arm through the gate in order to stop the cow. If he were standing at the gate post facing either the road or the pen then it is his left arm which would have been nearer the right hand gate. It is only if the plaintiff were standing at the gatepost with his back to what was going on and facing down into the right hand field that his right arm would have been next to the gate. None of the witnesses have suggested that the plaintiff was standing with his back to the moving cow. The plaintiff's account of his arm being caught between the cow and the gate as the cow moved towards him and he was standing in a gap between the trailer and the right hand gate is, on balance, more likely.
- 26.** Thirdly, the first defendant's evidence as regards his interactions with the plaintiff was inconsistent and varied between his direct evidence and his cross-examination. Whilst he

maintained throughout that he did not ask the plaintiff to stand in the gap or to stop the cow, his initial account of not having spoken to the plaintiff at all appears incorrect in light of his subsequent account of having told the plaintiff and the other man the first defendant says was present to stand back on the road. Whilst initially disputing the presence of a gap, the first defendant ultimately accepted that there would have been a gap on the right-hand side between the gate and the trailer. If the first defendant's account were correct it begs the question as to why he did not tell the plaintiff to get out of the way when he became aware that the plaintiff had moved forward and was standing near the right-hand gate. I think it is more likely than not that the plaintiff was, as he says, asked by the first defendant to stand in this gap in order to prevent the cow moving through it.

27. Therefore, I accept that although the plaintiff was employed by the second defendant the movement of cattle on the first defendant's farm on the date in question was an exercise largely directed and controlled by the first defendant. The first defendant's direct engagement with the plaintiff was limited but I accept that the first defendant told the plaintiff to stand between the trailer and the right-hand gate to block a potential gap that would arise between the gate, the trailer and the road as the gates were being opened and closed to let the heifer back into the right-hand field and to load the cow to the trailer. I also accept that the mechanism of the injury was the crushing of the plaintiff's lower arm between the cow and the gate rather than the plaintiff sticking his hand through the gate.
28. These findings are not of themselves determinative of whether the first defendant is legally liable for the plaintiff's injuries. At the conclusion of the trial counsel on behalf of both parties made helpful legal submissions on the issue of liability. Rather than set out the detail of the submissions made I propose to deal with the issues as raised by the parties.
29. It was argued on behalf of the plaintiff that the first defendant owed him a statutory duty under either section 12 or section 15 of the Safety Health and Welfare at Work Act 2005. Under section 12 of the 2005 Act an employer is placed under a statutory obligation to manage and conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that in the course of the work being carried on, individuals at the place of work who are not the employer's employees, are not exposed to risks to their safety, health or welfare. "*Employer*" is defined under section 2(1) of the 2005 Act by reference to the employer's relationship to an employee, the latter being a person working under a contract of employment. No evidence was adduced to suggest that the first defendant is an employer of any person. In the absence of such evidence, the court cannot conclude that the first

defendant is an employer for the purposes of the duties imposed by section 12 of the 2005 Act.

- 30.** The scope of section 15 of the 2005 Act is broader than section 12 in that it applies to any person who has control of a place of work, the means of access to or egress to from that place of work or any article or substance provided for the use of persons at the place of work even if the person in question is not an employer. Under section 15(3) a person to whom the section applies is required to ensure that the place of work, the means of access thereto and egress therefrom and any article substance provided for use in the place of work are safe and without risk to health. However, the duty imposed by section 15 appears narrower than that imposed by section 12. Section 12 creates a general duty imposed on employers to protect the safety health and welfare of individuals who are not the employees of that employer in the carrying out of the employer's undertaking. Although section 15 applies to persons who are not employers, the duty created covers only the place of work, access to and from the place of work and articles and substances used at the place of work.
- 31.** It seems to me that by specifying these matters, section 15 is deliberately not imposing a duty in respect of the system of work operated by a person coming within the scope of the section. In this case the issue is not the safety of the first defendant's premises, nor the means of access or egress, nor of any article or substance provided by the first defendant. Rather it is the safety of the system for the movement of cattle which was under the control of the first defendant. Counsel argued that the opening of the gates to the field and the pen constituted "*access*" to a place of work. In my view this would stretch the normal meaning of the phrase "*access to a place of work*". The set up with the gates to the two fields opening onto a recessed area off the public road all together comprised the place of work. In any event, as previously noted, neither engineer criticised the arrangement in itself. It was the movement of the cattle which created the danger, not the place of work or any access to it. Consequently, I do not think that the plaintiff has established the applicability of either section of the 2005 Act.
- 32.** The issue comes down to whether the first defendant was in breach of a common law duty of care. Notwithstanding the first defendant's protestations that had the second defendant not arrived early he could have organised the cattle himself without any problem and that he was effectively confronted with the situation not of his making, even on his own account the first defendant took charge of the retrieval of the cow and of the operation from that point forward. Therefore, as the plaintiff's counsel submits, the first defendant was in charge of the operation at the time the accident occurred. The first defendant knew the

propensity of cattle to act unpredictably, especially in the presence of strangers and consequently was, or should been, aware of the danger posed to the plaintiff when in the vicinity cattle which were being moved.

- 33.** The first defendant argues that as the plaintiff was unknown to him he was entitled to assume that he was properly trained and that in any event he was the second defendant's responsibility. I accept that liability for this accident rests primarily with the second defendant who employed the plaintiff to carry out a task for which the plaintiff had little or no prior relevant experience and for which the second defendant did not provide any training or instruction. However, in my view that does not absolve the first defendant of all liability. Nor does the physical presence of the second defendant at the time of the accident, especially as, on the plaintiff's account the second defendant was in the pen when the plaintiff and the first defendant were in the vicinity of the right hand gate and the first defendant told the plaintiff to stand in the gap.
- 34.** The first defendant was organising an operation in which the plaintiff was playing an active part. Whilst the first defendant's initial plan may have been derailed by the early arrival of the second defendant with the plaintiff, the operation which was being carried out at the time the accident occurred was still one for which the first defendant was responsible. It is also difficult to understand why the first defendant would have assumed that the plaintiff was properly trained when he does not suggest that he took any steps to enquire as to whether this was so either from the plaintiff himself or from the second defendant and this is despite having had a conversation with the second defendant as to who the plaintiff was. Further, I have found that the first defendant asked the plaintiff to stand in the gap and therefore in an area proximate to the moving animals which was, according to Mr Murphy, a source of danger to the plaintiff.
- 35.** Based on these findings I hold both defendants jointly and severally responsible for the plaintiff's injuries. Regarding the apportionment of responsibility as between the two defendants, I find the second defendant, the plaintiff's employer, to be 80% responsible and the first defendant to be 20% responsible.
- 36.** The first defendant has expressly pleaded that the plaintiff was himself negligent and thus was either responsible for or contributed to the occurrence of the accident and the damage which he sustained. Apart from general assertions that the plaintiff failed to take care for his own safety, the basis for this plea is a positive assertion that the plaintiff attempted to block a moving animal when he knew ought to have known that it was dangerous to do so and failed to use his common sense. If the plaintiff had, as suggested by the first defendant,

stuck his hand through a gate in an attempt to stop a moving animal entirely at his own instigation, then there might have been some merit in this plea. However, this version of events is not consistent with the evidence. Firstly, I have accepted that the first defendant directed the plaintiff to stand in the gap and thus in the vicinity of the moving animal. Secondly, I have not accepted that the plaintiff stuck his hand through the gate as described by the first defendant. The plaintiff's own evidence was not that he intervened to stop the moving animal but that he attempted to jump out of its way at which point his arm was caught between the cow's head in the gate.

- 37.** The first defendant's engineer, Mr Twomey suggested that the plaintiff was in breach of the duties owed by an employee in respect of his own safety under s.13 and in particular s.13(1)(e) of the 2005 Act. Section 13(1)(e) imposes a duty on employees not to engage in improper conduct or other behaviour that is likely to endanger their own safety. Whilst the provision is broad enough to capture a range of potential behaviours on the part of an employee in my view simply being in the wrong place at the wrong time – especially when asked to stand there by the person who was in charge of the operation – is not of itself improper conduct on the part of an employee.
- 38.** In evidence the plaintiff accepted that he was aware that animals, including cattle, can act unpredictably. However, the first defendant had a far greater knowledge of cattle than the plaintiff and a greater appreciation of the fact that transportation and movement are particular sources of stress for cattle (see section 7 of the HSA Code of Practise for preventing injury and occupational ill-health in agriculture). A similar observation might be made about the second defendant who was a cattle dealer. In my view it was not unreasonable for the plaintiff to assume, if he were being asked by the defendants to participate in the movement of these cattle, that the defendants believed it was safe for him to do so. Given that the plaintiff had been brought to the first defendant's premises by his employer in order to assist with the loading of the cattle, I do not think the first defendant's engineer's suggestion that the plaintiff should have remained in the second defendant's jeep for his own safety was a realistic one. It may have been open to the first defendant to insist that the plaintiff and any other person who might have been present remove themselves from the vicinity of his animals and remain in a vehicle until the operation was complete, but he did not do so. Therefore, I do not make any finding of contributory negligence against the plaintiff.
- 39.** The medical evidence in this case was not seriously disputed. The plaintiff gave an account of his right wrist immediately becoming swollen and experiencing severe pain at the scene

of the accident. The second named defendant drove the plaintiff to meet with his wife and then the plaintiff's wife took him to SouthDoc in Bandon which referred him to CUH where he came under the care of Mr Fleming an orthopaedic surgeon specialising in hands and upper limbs. X-rays taken in the A & E department demonstrated a displaced fracture of the radio head the right elbow which was confirmed on a CT scan. The plaintiff underwent surgery to manipulate the fracture fragment and the elbow was immobilised for a number of weeks in a plaster cast. After removal of the cast the plaintiff was referred for physiotherapy which continued for a number of months. He was followed up in the fracture clinic at CUH. Although he made some initial improvement his progress plateaued and he was left with particular difficulty rotating the forearm into pronation. Later x-rays confirmed that while the fracture had united there was some mal alignment at the fracture site.

- 40.** In 2020, some five years after the accident, the plaintiff was referred for second opinion in circumstances where he continued to complain of ongoing restriction of movement and pain in his elbow which was occasionally severe. He also continued to have difficulty lifting and carrying heavy items and carrying out certain tasks. Examination by Mr David Morrissey, consultant orthopaedic shoulder and elbow surgeon, confirmed that while the plaintiff had almost full flexion, extension and supination he had only 20 degrees of pronation (i.e. a 50 degree deficit). Mr Morrissey was of the view that surgery was not advised as there was a significant risk that the outcome for the plaintiff would be worse than his current situation. It is not expected that the plaintiff will make any further recovery. This prognosis, i.e. continuing pain, stiffness and limitation of movement which is unlikely to benefit from surgery, is largely accepted by the defendant experts. In addition one of those experts, Mr Dolan, notes the plaintiff's complaints of numbness in one of his fingers and of his hand and arm going dead if driving or using a mobile phone even for a short period.
- 41.** This accident has undoubtedly had a significant impact on the plaintiff's life. In addition to his physical injuries, he felt depressed as a result of his ongoing difficulties and attended a counsellor. He continues to use analgesia in respect of the pain but is cautious about the use of stronger painkillers which have been prescribed for him. He describes difficulty tying his shoelaces and buttons, using a mobile phone, lifting and carrying. His family are heavily involved in road bowling, an activity in which he used to participate with his cousin. He is now physically unable to participate as a result of which he feels left out and that these family relationships have been negatively impacted. He was out of work for two

months after the accident; he worked for a period doing manual labour building sheds but was only able to manage a 3 day week and he is currently working for a mental health charity collecting furniture and other donations. This involves occasional lifting and he compromises by trying to use his left side rather than his right.

- 42.** In deciding the appropriate level of general damages for this injury I have taken a number of factors into account. Firstly, the accident occurred when the plaintiff was a relatively young man aged only 28. He has been left with a permanent injury from which he is likely to suffer for over 50 years. Secondly, the plaintiff left school at junior certificate level and has spent most of his working life engaged in manual labour and general operative type positions. Therefore, the physical restriction he describes in the use of his right arm is likely to affect him in most of the types of employment he is likely to secure. The pain he experiences when he is required to use his right arm for heavy tasks in the course of any employment he has had since the accident is something he will likely experience for the rest of his working life. Thirdly, the plaintiff is right handed which increases the impact of the injury and makes the constant compromise of using his left hand awkward for him. Fourthly, I accept that the plaintiff has suffered psychologically as a result of sustaining this injury (although not to the extent of requiring psychiatric treatment) and that it has impacted negatively on his ability to participate in certain activities including road bowling which was important to him in the context of his family's involvement in that sport.
- 43.** In light of these factors I award the plaintiff the sum of €35,000 for his pain and suffering to date and a further sum of €50,000 for his pain and suffering into the future making a total sum of €85,000 in respect of general damages. I will hear the parties in respect of any special damages claimed.