

THE HIGH COURT

[2022] IEHC 533

[2019/3503 P.]

BETWEEN

FERGUS MALONE

PLAINTIFF

AND

EDENDERRY LIVESTOCK MART LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Ferriter delivered on the 29th day of September 2022

Introduction

1. This judgment concerns the plaintiff's claim for damages for alleged negligence on the part of the defendant arising from an accident which occurred in the defendant's mart premises in Edenderry, County Offaly on 5 August 2017 whereby the plaintiff was attacked and gored by a young bull while in one of the holding pens at the mart. The plaintiff suffered nasty injuries at the time, including five broken ribs, and was left with the longer-term damage of an injury to his left shoulder and psychological damage including ongoing PTSD symptoms. The defendant fully denies liability. The defendant's essential case is that there was no negligence on its part in terms of the systems it had in place in the mart on the day and that, in any event, the plaintiff was entirely the author of his own misfortune in that, the defendant maintained, the bull attacked the plaintiff after the plaintiff provoked the bull by hitting him on the head with a stick. The plaintiff strongly denied that he was the author of his own misfortune and laid the blame for the accident instead squarely on the defendant for bringing about a situation where animals were being funnelled back into the pen in which the plaintiff was standing at a time when the plaintiff had been asked by the defendant's manager to steer bulls out of that pen, resulting in the bull in question becoming "spooked" and charging at the plaintiff.
2. The defendant called five witnesses as to the fact of the accident. The plaintiff was the only witness who gave evidence of the accident from his perspective. The animals in question were the plaintiff's brother's animals and the plaintiff's brother was called to give brief evidence in relation to one issue of dispute (namely, whether the bull in question had been "dehorned" shortly prior to the accident, such as to make it more sensitive to contact in his head area). The plaintiff also called an expert witness, Mr. James Kirwan, who is an experienced agricultural consultant. The defendant did not call any expert evidence.

3. As we shall see, this case is a salutary lesson in the extent to which recollections of the same underlying event can vary quite radically as between the observers to that event.

Summary of conclusions

4. For reasons which I will explain, I have concluded that the plaintiff's account of the events is the most accurate and reliable. I do not believe that he hit the bull and thereby provoked the attack as alleged by a number of the defendant's witnesses. Insofar as the plaintiff used his stick against the bull, in my view, on the balance of probabilities, he did so after the bull became spooked or agitated and charged at him. In my view, the defendant was negligent in its operation of its system for getting animals from the arrival pen to the "crush" or chute where they would be checked and stamped before being led on to the sales ring. In short, the defendant acted negligently, after one of the animals in question became blocked in the chute, by turning animals back in through an open gate into the holding pen where the plaintiff, at the defendant's instruction, was seeking to drive remaining animals out and into the "runway" in the direction of this chute area. I accept the evidence of the plaintiff's expert, Mr. Kirwan, that this was not a safe or appropriate system; rather, when it became clear that an animal was blocking up the chute, the appropriate course of action was to close the gate from the runway/chute area into the holding pen and arrange for the animals to be directed into the runway area for safe containment there. This was not done. The failure to take this course of action resulted in the animal which attacked the plaintiff becoming spooked and the plaintiff being put in the way of immediate harm. There was no realistic way of the plaintiff escaping that harm or otherwise protecting himself given how quickly the incident happened. I do not believe the plaintiff was guilty of contributory negligence in the circumstances. As regards assessment of damages, in light of the nature of the injuries sustained and the fact that the plaintiff has ongoing injuries, I have assessed an appropriate level of general damages as being €75,000. There are no special damages arising.

Background

5. The plaintiff is a cattle farmer who, at the time of the hearing, was 53 years of age. The plaintiff lives with his wife and they both work a farm in the Edenderry area of Offaly. The plaintiff has both dry stock and milk cattle and also produces hay and silage on his farm. The plaintiff and his wife have fostered fifteen children over the years and they have one remaining foster child with them who is seven years old and will be with them until he is eighteen.

6. On the morning of the accident, 5 August 2017, the plaintiff arrived at the mart very early (around 5:30am) with his trailer to unload a load of cattle. He went home then to milk cows on his farm and then returned with a second load of cattle, around 09:30am. When he had finished unloading that second load of cattle in the mart, he met his brother, Joseph Malone, who had also arrived to unload a consignment of some six or so young bulls (who were Aberdeen Angus and Limousin bulls of about twelve to eighteen months age).

7. At this point in the mart day, there was only one mart staff member dealing with animals arriving in the arrival or holding pens. That employee was Mr. Liam Byrne. At this point, the plaintiff was standing to the left of a row of four arrival pens. His brother's animals had been unloaded from his brother's trailer into the holding pen nearest an area called the "chute". The process that applied was that farmers unloaded their animals from the backs of trailers into a holding pen. The gate into the holding pen at the loading end would then be closed. There was another gate at the other end of the holding pen that led to a "runway". When the appropriate time came, animals were let out (usually by mart staff) from the holding pen into the runway area. The runway area was gated at both ends. Animals would then be driven from the runway area into the narrower chute area. In the chute area, which was also gated at both ends, the animals would have their tags and passports checked and, assuming all was in order, would then be stamped on their hinds so that they could be identified in the sales ring. When the animals were ready to be dispatched from the chute area to the sales ring, the gate at the far end of the chute would be opened and the animals would be driven around by mart staff to the sales ring which was on the opposite side of the mart premises. There was also a walkway area parallel to the runway and the chute (on the opposite side from the holding pens) which farmers could walk down to look at cattle.

8. After arriving with his animals, and unloading them into the holding pen, the plaintiff's brother was temporarily distracted by other business. As Mr. Byrne was on his own, and the plaintiff's brother was temporarily unavailable, Mr. Byrne asked the plaintiff to help him drive the plaintiff's brother's animals from the holding pen into the runway area. That much is agreed. Mr. Byrne says that, as a number of the animals were coming through from the holding pen onto the runway and into the chute area (there was very little runway to deal with here as the holding pen in question was the one nearest the chute area), one of the animals blocked up the chute (probably by turning sideways in the chute). This caused a logjam in the process of getting the animals into the chute. The plaintiff says that he was unable to see the chute area from where he was standing and, therefore, did not see that an animal had become blocked. Mr. Byrne ultimately accepted in his evidence that he sought to move the animals that were in the chute/runway area back in to the holding pen through the gate between the holding pen and the runway (which had remained open throughout). The plaintiff was in the holding pen area with the

ash stick that he normally used when he was around animals, seeking to get the remaining animals into the runway as he had been requested to do.

Did the plaintiff cause the accident by hitting the young bull with a stick?

9. What happened next is the subject of significant dispute. The plaintiff says that he was seeking to get the remaining couple of animals out of the holding pen area and into the runway area when one of the animals, who was on the way back into the holding pen, made for him. He says that the animals had all stopped:

"The next minute there was a lad come running up along the side and his tongue out roaring. He hit me and drove me back into the corner. And I tried to hit him or I don't know whether I did hit him or not in self-defence to save my life at that stage but I mustn't have got a right clatter at him because I would have broke the stick. But he gored me in the corner and knelt on me and destroyed me." (Transcript Day 1, p. 37, lines 15 to 26).

10. I found the plaintiff to be a wholly credible witness and honest and frank in his evidence and recounting of events as best he remembered them. He was prepared to make appropriate concessions when he was unsure of particular facts. The plaintiff is crystal clear that his stick was only used in self-defence and that he did not hit the young bull on the forehead before the animal charged him as claimed by a number of the defendant's witnesses.
11. The plaintiff gave evidence that, in his long life as a farmer, he had never hit an animal the way he was alleged by the defendant's witnesses to have hit the animal here. He said that it would have been very foolhardy of him to hit a young bull on the head in that manner as that would only provoke the animal. I accept that the plaintiff was an experienced farmer who knew how to handle himself around young bulls and would not and did not hit the young bull other than in self-defence.
12. As detailed below, there were a number of aspects of the defendant's witnesses' evidence which I found to be unreliable. In so stating, I should make clear that I am not expressing the view that any of the defendant witnesses deliberately misled the Court. Memories can be infirm for all sorts of reasons which have nothing to do with dishonesty. Insofar as the various defendant witnesses expressed the view that the plaintiff hit the animal in question on the head, I am satisfied on the balance of probabilities that insofar as the

plaintiff may have hit the animal on the head at any point, he only did so in self-defence after the animal charged at him.

13. As already noted, five witnesses gave evidence on behalf of the defendant being Liam Byrne, Martin Sullivan, Jack Hayes, Laurence O'Brien and Alvin Wallace. The defendant's witnesses' accounts as to when and how the plaintiff was alleged to have struck the animal on the head varied in material detail. I will address these variations below.
14. Liam Byrne, the sole mart employee on duty in the holding pen/chute area at the time of the accident, stated in his direct evidence that the plaintiff hit the animal on the forehead after he, Mr. Byrne, had turned the animal back into the pen, and that the animal went for the plaintiff after being hit. I found Mr. Byrne to be generally defensive in his evidence and to be vague on material detail. Mr. Byrne claimed he was not on the step which was in an elevated position alongside the chute area, even though the plaintiff in his evidence placed him there. Mr. Byrne was unclear in his oral evidence as to whether all of the animals had been moved out of the pen into the chute; however, in an account, put to him in cross-examination, which he had given to an expert engaged by the defendant (but which expert was not called by the defendant), he suggested that all the animals had been moved out of the holding pen before the accident. The plaintiff was clear that a number of the animals had not yet been moved out of the holding pen at the time of the accident and that the problem was caused by Mr. Byrne turning animals back into the pen at the very time that the plaintiff was driving the remaining animals out of that pen.
15. It seems to me that, on the balance of probabilities, that after one of the animals blocked the chute, Mr. Byrne sought to turn back the animals then in the chute into the holding pen while the plaintiff was at the same time driving animals out of the pen, causing the animal that attacked the plaintiff to become spooked and to charge at the plaintiff. I am satisfied that insofar as Mr. Byrne saw the plaintiff hitting the animal, this occurred after the animal was charging for the plaintiff.
16. There were also materially unreliable aspects to the evidence of the defendant's next witness, Martin Sullivan. Mr. Sullivan, who was on the opposite side of the runway to both Mr. Byrne and the plaintiff, claimed that he saw the plaintiff "beating the life" out of the animal with a big black stick. The stick in question was produced in evidence; it was an ash stick and not a black stick. None of the other witnesses referred to the plaintiff beating the life out of the animal or repeatedly striking the animal such as to cause the animal to charge at the plaintiff. In my view, insofar as Mr. Sullivan observed the plaintiff

using his stick repeatedly, it was while witnessing the plaintiff acting in understandable self-defence after the animal charged at him.

17. Jack Hayes also gave evidence that he saw the plaintiff hit the bull on the head. He said that, from where he was standing, he could not see Liam Byrne. Mr. Hayes was in fact standing outside a holding pen which was some two pens away from the pen in which the incident occurred. It seems to me that his ability to observe "up close" precisely what happened would necessarily be diminished in those circumstances. Mr. Hayes' account was lacking in specificity and detail as to precisely when he saw the plaintiff hitting the animal and, it seems to me, that insofar as he did see Mr. Malone hitting the animal, he saw him doing so in self-defence after the animal charged the plaintiff.

18. Alvin Wallace gave evidence that he observed the incident from the walkway side i.e. the walkway adjacent to the runway area, at a remove from the pen. He gave evidence that he saw the plaintiff hitting the animal on the top of the head and that the animal then came for the plaintiff and knocked him back. Mr. Wallace maintained that the animal in question was freshly "skulled" or dehorned. This latter allegation was not one that had been made at any point in the proceedings up to that point and appears to have first emerged at the hearing. The contention was put to the plaintiff in cross-examination who was clear in his evidence that the bull who attacked him had not been dehorned. This led the plaintiff's legal team to call the plaintiff's brother, Joseph Malone, to give evidence to deal with the question of whether or not the animals had been freshly dehorned. Joseph Malone gave evidence, which I fully accept, that the animals in question had not been freshly dehorned and, in fact, were dehorned some five or six months previously. The evidence clearly established that, while a freshly dehorned animal may be very sensitive around the head and horn area for a week or two after dehorning, there would be no such sensitivity many months later. Mr. Wallace's evidence as to the attacking bull being dehorned undermined the overall reliability and accuracy of his recollection of the accident.

19. Laurence O'Brien also gave evidence. The plaintiff credits Laurence O'Brien with saving his life as he, along with Jack Hayes and another man, diverted the bull and got the plaintiff to safety after he had been attacked. Mr. O'Brien claimed in his evidence that he saw the plaintiff hitting the animal. Mr. O'Brien was written to by the plaintiff's solicitors on 5 January 2021 in a letter which stated:-

"We are advised that you witnessed this incident and that you in fact leapt into the holding pen to try and distract the bull who was viciously attacking our client. We

would be obliged if you could kindly furnish us with a written statement in your own words as to your own recollection as to what happened on the date in question."

20. Mr. O'Brien claimed in his evidence that he had never received this letter let alone replied to it. However, an email from Sharon O'Brien, Mr. O'Brien's wife, dated 14 January 2021, was produced in evidence which expressly referred to the plaintiff's solicitor's letter of 5 January 2021 and stated:-

"Whilst I can confirm I did assist Mr. Malone to get out of the pen in question, I have no knowledge/recollection of what happened."

21. The email, while sent by Sharon O'Brien, was signed "Laurence O'Brien".
22. In the circumstances, I cannot accept Mr. O'Brien's evidence as reliable including his account in the witness box of him having seen the plaintiff hit the animal over the head before the animal charged at the plaintiff.
23. The plaintiff gave evidence that in general, young bulls could become spooked with strangers and noise and that they tended to bolt towards the light if spooked. A number of the defence witnesses accepted that this was generally so although a number of them also emphasised that it was not dark in the mart building on the day of the accident. For example, Mr. Hayes fairly agreed in cross-examination that matters were made difficult for the plaintiff when bulls were turned back at him, and he did accept that animals spooked would go for the daylight even though he said that there was no material difference in the light inside and outside the mart here. The plaintiff's expert Mr. Kirwan gave evidence that when cattle are frightened or nervous (such as in a mart) they will seek to escape or run to safety towards daylight. I accept that the likely cause of the animal in question charging at the plaintiff was that he had become spooked in the process of being turned back from the chute and that he made for daylight in the direction of the plaintiff.
24. In summary, I accept that on the balance of probabilities that the young bull who attacked the plaintiff did so following becoming spooked after the logjam in the chute and that he charged the plaintiff as a result of becoming spooked and not as a result of being hit on the head with a stick by the plaintiff.

Liability

25. For the reasons set out above, I accept that the plaintiff was not the cause of the accident. However, that is not the end of the matter: the question arises as to whether the accident resulted from negligence on the part of the defendant.

26. The plaintiff's agricultural consultant expert, Mr. James Kirwan, expressed the view that the mart was short-staffed at the time of the accident in circumstances where there was only one staff member (Mr. Byrne) available to deal with Mr. Malone's brother's animals from the holding pen through the runway and chute process. He said, in his view, there would normally be two to three staff for this purpose. He expressed the view, which I accept, that the mart takes over responsibility of the animals from the point of their discharge by their owner into the arrival/holding pen. He expressed the view that it would not be unusual for an animal to get stuck in the chute area in which case the appropriate process was to circle the animals back in the runway to get them sorted out to re-enter the chute. He said that, in doing so, it would be important to have the gate from the holding pen into the chute closed.

27. Mr. Kirwan expressed the opinion said that if there had been sufficiently experienced staff on duty in the morning, they would have ensured to shut the gate from the holding pen (where the plaintiff had entered at the request of Mr. Byrne) into the chute once there was an issue in the chute. Mr. Kirwan expressed the opinion, which I accept, that the failure to operate proper systems on the day of the accident was the cause of the plaintiff being exposed in the very damaging way he was to the risk of attack by the young bull.

28. As regards the adequacy of the systems in place for driving animals from the pens into the chute and for dealing with any issue which might arise in the chute, Mr. Byrne ultimately accepted under cross-examination that it would not be a safe system to drive animals back into a pen where another person was seeking to drive animals out of that pen at the same time.

29. In my view, the defendant was negligent in driving young bulls back into the pen which the plaintiff was driving animals out of (at the plaintiff's request) at the same time; the defendant should rather have closed the gate into the pen after the logjam occurred in the chute, and circled the animals, who were not still in the pen, in the runway area until they had settled with a view to then driving them safely back into the chute.

Contributory Negligence?

30. I do not believe that there is any basis for contributory negligence on the plaintiff's part. He entered the holding pen to assist the defendant at the request of the defendant's employee. Mr. Byrne sought to maintain in evidence that the plaintiff could have climbed out of the pen to escape the threat of the spooked young bull and that he did not tell the plaintiff to stay in the pen. This does not appear to me to give appropriate regard to the reality of the incident and the speed with which it happened. There was nothing the plaintiff could have done to avoid the bull charging at him once that bull was driven back into the holding pen. It was not feasible for him to escape or otherwise avoid that attack.
31. Accordingly, I do not believe this is a case in which there has been any contributory negligence on the part of the plaintiff.

Damages

32. The plaintiff spent some ten days in Tullamore Hospital following the accident. He sustained five broken ribs and severe soft tissue damage to his lower left back and soft tissue damage with loss of power to his left shoulder and arm. He experienced severe pain and sleep disturbance and nightmares in the months following the accident. It was some three months before he could do any work at all on the farm. He gave evidence that his ability to do any heavy work with his left shoulder has been significantly compromised since the accident. He is unable to milk his cattle properly or lift heavy objects. He gets help from his wife and from neighbours.
33. In the couple of years following the accident, the plaintiff was seen by Mr. John Lunn, orthopaedic consultant, and also attended his local GP.
34. Mr. Lunn's first report (dated 31 May 2019) noted that, on an MRI of the plaintiff's left shoulder on 20 March 2018, there was "no significant structural abnormality". Nerve conduction studies conducted in November 2018 showed normal results. The "present complaints" at that time were stated to be "ongoing problems predominantly related to left shoulder". Mr. Lunn advised that the plaintiff consider an arthroscopy with a view to determining whether there was any internal damage in his left shoulder. The plaintiff said that he had not undergone that procedure given that he had a heart condition. The plaintiff suffers from a very irregular heartbeat, and he takes medication daily for this. He was concerned that going under anaesthetic for an arthroscopy would be risky given his heart condition.

35. This report also noted that:

"discomfort at night time, can lie on his side but will wakes him. During the day no rest pain but mechanical pain. Very limited in what he can do. The physical nature of his work means that he cannot fence or carry for any prolonged period of time. Prolonged work provokes severe pain and weakness in the left arm. He presently employs two people milking as he cannot reach and hold out in front of him with the left hand for any prolonged period."

36. In Mr. Lunn's second report, dated 16 October 2020, no significant changes in the symptoms noted in the previous report were observed. The second report noted that the plaintiff was unable to do repetitive heavy manual work, unable to work in the milking parlour and that he still needed to hire someone to cover for the activity he used to be able to do. Mr. Lunn's "impression" in this report was that:

"Symptoms continue without change. Now three years following the injury. At some point he may need to consider surgical exploration/repair/release of biceps. Symptoms are unlikely to change at this point. I don't anticipate him returning to heavy manual work in the absence of surgery."

37. The plaintiff also gave evidence that he had been on medication for PTSD symptoms and that he continued to have sleeping difficulties. His GP, Dr. Donal Sheehan, had noted in a report of 5 February 2018 that:

"Mr. Malone's psychological state is improving slowly. However he remains troubled with intermittent morbid anxiety and sleep disturbance with nightmares. He has developed moderate degree posttraumatic stress disorder as a result of his accident. Again... the prognosis for full recovery in this area is guarded."

38. The plaintiff gave evidence that he still has difficulty sleeping, some five years on from the accident. His medication to deal with sleeping issues had recently been increased.

39. The plaintiff accepted under cross-examination that he had not seen any specialist in relation to his injuries for some three years prior to the trial (i.e. since some two years

after the accident) but explained that this was so because his injuries had largely plateaued and that he believes that at this point he is as good as he is going to be.

40. It is important to note that this case is one which predates the recently introduced Personal Injuries Guidelines and I have accordingly assessed damages by reference to the principles applicable prior to the introduction of those guidelines. In my view, in light of the injuries and symptoms sustained as a result of the accident, as set out above, the plaintiff is entitled to compensation for pain and suffering to date of €45,000. Given that he is likely to have residual limitations in his left shoulder for the foreseeable future which will continue to impact significantly on his ability to work as a farmer, given that he is still suffering some PTSD symptoms and sleeping issues, and given that he is still at 53 a relatively young man, in my view, an appropriate level of compensation for pain and suffering into the future is €30,000.

Conclusion

41. In the circumstances, I will make a total award of damages to the plaintiff in the sum of €75,000.