

THE HIGH COURT

[2023] IEHC 31

[Record No. 2020/600 P]

BETWEEN

PATRICK O'BRIEN

PLAINTIFF

AND

BUS ÉIREANN

DEFENDANT

JUDGMENT of Ms Justice Bolger delivered on the 20th day of January, 2023

1. The plaintiff was and is employed by the defendant as a bus driver. He claims damages arising from an assault on him by an unidentified assailant during his employment on the evening of 6 April 2018. For the reasons set out below, I find in favour of the plaintiff with contributory negligence of 15%.

The assault

2. CCTV footage of the assault showed the assailant got onto the bus at a stop close to the terminus in Mayfield, stabbed the plaintiff with a syringe, and grabbed the bag of money close to the plaintiff in his driver's cab. The assailant was able to get access to the plaintiff because the screen between the passenger and the driver's cab was in the upright position.

The screen

3. The screen is a safety screen intended to protect the driver from assault. Had the screen been closed down and locked by the plaintiff, it is unlikely that the assault would have occurred. It is clear that the plaintiff did not have enough time to close the screen as the assault took place very quickly.
4. The plaintiff's undisputed evidence was that he always drove the bus with the screen up as it was very difficult (though not impossible) to hear passengers when the screen was down, even though there are holes in the screen to enable communication when it is down. He had been shown at his training how to put the screen up and down and was told that that it was there for his safety. Whilst all parties agreed there was some discussion during training about the risk of assault, no evidence was proffered by the defendant to challenge the plaintiff's case that:-
 - (1) the screen was always up during the training;
 - (2) the screen was always up when he commenced his shift;
 - (3) he was never advised, whether at training or throughout his employment, to put the screen down at certain times of the day or in particular locations;
 - (4) he was never supervised or reprimanded about the screen being consistently up.

5. The defendant said it was company policy that the screen should be closed. There was no evidence of this ever being communicated to the plaintiff during his training or his employment. The defendant referred to the plaintiff's trade union's involvement in the design of the screen but gave no evidence of any engagement with the trade union or anyone else about the need to ensure that drivers, including the plaintiff, should keep the screen down and locked to protect themselves from the risk of assault. The plaintiff was supervised by the defendant's inspectors from time to time which focussed primarily on revenue issues. No inspector ever discussed the screen or the need to close it with the plaintiff, even though the screen would have been open during any such supervision.
6. The risk to drivers of passenger assault was clear to the defendant in the aftermath of the Supreme Court's decision in *Corkery v Bus Eireann* (unreported, Supreme Court, 6 May 2003) where a driver in Cork city had been assaulted in a similar manner by a person who wished to steal the money the driver was known to be holding in his cab. It is significant that Keane C.J., in upholding the High Court's finding in favour of the plaintiff, referred to the fitting of the screen and the elimination of cash in the driver's possession, as a "standard precaution in the industry and one that a reasonable employer should have adopted".
7. From 2014 to the date of the incident, there were eight separate incidents of threats of assault or actual assault on the defendant's drivers which the defendant recorded. There were fourteen other incidents of actual or threatened violence or disorderly behaviour from passengers. There was also a theft of money from the driver's cab some weeks before the incident which was not included in the defendant's analysis as it took place when the driver had left the bus. Those incidents, coupled with the findings of the Supreme Court in *Corkery* set out above, mean that the defendant was or ought to have been aware of the risk of its drivers, including the plaintiff, being assaulted, a risk elevated by the driver carrying money in their cab that is accessible to anyone if the screen is down.
8. The plaintiff's engineer describes the screen as a risk control measure identified by the defendant to deal with the known risk of assault, but criticised the defendant for having failed to properly utilise it by allowing or condoning the driver's practice of keeping the screen up. The plaintiff's engineer questions why the screen was capable of being opened at all if it was to be kept down to protect the driver. The court shares this questioning of the wisdom of allowing the screen to be opened, especially in the light of the defendant's success in ensuring the screen is always kept down since the introduction of covid restrictions.

Negligence/breach of duty

9. The plaintiff claims negligence in relation to the failure to provide the plaintiff with a safe place and system of work, failure to carry out any or any proper or adequate risk assessment, being in breach of the Safety, Health and Welfare at Work Act 2005 and a failure to ensure that the drivers' seating area was totally enclosed and did not permit access to passengers with the intent of assaulting the driver. Counsel for the plaintiff scoped out the plea of breach of statutory duty in their oral submissions, emphasising s.

8(2) of the 2005 Act and subs. (b), (c), (e) and (j) and placing particular emphasis on (h). Those provisions provide as follows:

“8(2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:

...

(b) managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk;

(c) as regards the place of work concerned, ensuring, so far as is reasonably practicable—

(i) the design, provision and maintenance of it in a condition that is safe and without risk to health,

(ii) the design, provision and maintenance of safe means of access to and egress from it, and

(iii) the design, provision and maintenance of plant and machinery or any other articles that are safe and without risk to health;

...

(e) providing systems of work that are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to health;

...

(h) determining and implementing the safety, health and welfare measures necessary for the protection of the safety, health and welfare of his or her employees when identifying hazards and carrying out a risk assessment under section 19 or when preparing a safety statement under section 20 and ensuring that the measures take account of changing circumstances and the general principles of prevention specified in Schedule 3;

...

(j) preparing and revising, as appropriate, adequate plans and procedures to be followed and measures to be taken in the case of an emergency or serious and imminent danger”.

10. Counsel relied on s. 2(6) of the Act and the statutory definition of “reasonably practicable” which is as follows:

“For the purposes of the relevant statutory provisions, ‘*reasonably practicable*’, in relation to the duties of an employer, means that an employer has exercised all due care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work”..

Counsel described this as a very high standard requiring an employer to do everything possible to assess and control a foreseeable risk.

11. Counsel for the defendant submitted that “reasonably practicable” does not impose an absolute standard and that the evidence demonstrated the defendant having taken reasonably practicable steps in providing the screen and advising the plaintiff that it was there for his safety.

Decision on Liability

12. The risk of assault on the plaintiff was a reasonably foreseeable risk and should have been addressed by the defendant by way of a suitable and effective control measure. Whilst the plaintiff was supplied with a screen that would likely have prevented the assault had it been kept down, at no time was he ever instructed or advised to keep it down and was simply advised that it was there for his safety. The defendant knew or ought to have known that the screen was always up during the plaintiff’s shift. Had the defendant instructed the plaintiff to keep it down, I believe that that would have occurred, just as it has over the recent past due to covid protective measures being put in place.
13. The defendant owes the plaintiff a duty of care and statutory duties which are not unlimited, as confirmed by Irvine J. in *Martin v. Dunnes Stores* [2015] IECA 85 where she said that an employer is not an insurer for its employees’ welfare. The standard expected of an employer is to do what is reasonably practicable. The defendant’s evidence was that they treated their employees as adults and were not constantly over their shoulders but left it to them to assess the risk of assault. However, it is not sufficient for an employer to put a system in place to address an identified risk and then sit back and leave it to the employee to determine when and how that system should be actioned and do nothing to challenge its employees constantly ignoring it. There is a statutory duty on the employer, set out at s. 8(2)(g) of the 2005 Act, to provide “information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees”. It was commendable for the defendant to put in place a screen which, when down and locked, would protect its drivers from the foreseeable risk of assault. Nevertheless, provision of the screen was not enough. Section 8(g) requires the employer to provide the information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees Subsection (h) requires the employer to determine and implement the safety, health and welfare measures necessary for the protection of the safety, health and welfare of his or her employees when identifying hazards and carrying out a risk assessment under s. 19 or when preparing a safety statement under s. 20 and ensure that the measures take account of changing circumstances and the general principles of prevention specified in Schedule 3, and (j) requires the preparing and revising, as appropriate, of adequate plans and procedures to be followed and measures to be taken in the case of an emergency or serious and imminent danger.
14. There was no evidence of the risk of assault being addressed by the defendant in a risk assessment or the defendant preparing a safety statement or plans and procedures to be

followed or measures to be taken in the case of an emergency or serious and imminent danger. The defendant should not have stopped at just providing the screen and showing the plaintiff how to put it up and down, but should have also communicated, implemented and supervised the company's policy of keeping the screen down to its employees.

15. Here, the defendant provided the screen, showed the plaintiff how to put it up and down, and then required the plaintiff to take full responsibility for assessing the risk of assault without any discussion of the risk or implementation of any of the steps envisaged by s. 8, including supervision and preparation of revised plans and procedures to be followed and measures to be taken in the case of an emergency or serious and imminent danger.
16. The plaintiff laid heavy emphasis on the decision of the Supreme Court in *Corkery*. Keane C.J. held that the provision of a screen so as to ensure the driver could not be physically contacted during his driving and an arrangement to ensure the driver had no access to cash were precautions that a reasonable employer should have taken (my emphasis). The defendant contended that it did provide a screen of the type required by that decision, which it says the plaintiff chose not to use.
17. The defendant took no steps to ensure that the driver had no access to cash. On the contrary, the evidence shows that the defendant was always aware that the plaintiff had cash (sometimes significant amounts) and, as recently as a few weeks before the accident, that cash on its buses acted as an allurement to persons who wished to steal it.
18. The defendant did provide the screen but failed to take further steps that were required to ensure, insofar as was reasonably practicable, that the driver could not be physically contacted.
19. I am, therefore, satisfied that the defendant failed in its common law and statutory duties to, insofar as reasonably practicable, provide the plaintiff with a safe place of work as required by s. 8 of the Health, Safety and Welfare at Work Act 2005, in particularly in relation to communication, implementation and supervision of the defendant's policy on keeping the screen down to protect its drivers from assault.
20. I have had regard to s.13 of the Act and the plaintiff's duty to take reasonable care to provide for his own health and safety. Had the plaintiff kept the screen down and locked, this accident would not have occurred. That involves some level of contribution by him, which I consider to be modest in the light of the defendant's failure to ensure that the plaintiff was informed of the need to keep the screen down and supervised in relation to doing so and the defendant's apparent condoning of the plaintiff's consistent practice of never putting the screen down. I assess the plaintiff's contribution at 15%.

Quantum

The plaintiff's Injuries

21. The plaintiff attended at A&E and was treated with medication for hepatitis and HIV. He was later seen by Dr. Maloney, consultant in infectious diseases, and advised to continue with hepatitis B vaccination, reassured and discharged. The defendant referred him to a

counsellor. He continued to attend with his GP over the following months and was prescribed sleeping medication and eventually in June 2019 he was prescribed antidepressant medication. The plaintiff had returned to work in March 2019 but continued to experience anxiety and panic attacks. He was advised by the defendant's Chief Medical Officer to come off his antidepressant medication because of his driving, which he did. The defendant arranged and paid for a course of CBT therapy in 2020 and the plaintiff found this, and the input of the defendant's HR, helpful.

22. The plaintiff's GP referred him to Dr. Walshe, consultant psychiatrist, in 2020 who found features of post-traumatic stress disorder in the mild severity range, depressive features and an adjustment disorder with an anxiety component. Dr. Walshe recommended trauma CBT. The plaintiff attended with Dr. Campbell, consultant psychiatrist for the defendant, in April 2022 and she opined that the plaintiff may have fulfilled the diagnostic criteria for post-traumatic stress disorder at one point but at that time did not fulfil the criteria as his symptoms had improved. She considered the plaintiff would benefit from further CBT and an adequate trial of an antidepressant. The plaintiff did not avail of this advice but confirmed in his evidence that he had given up antidepressant medication because of the CMO's advice, that he could not afford further CBT, and the defendant had limited its provision of CBT to ten sessions. Neither claim was disputed by the defendant.
23. The plaintiff's injuries are purely psychological and not covered by the book of quantum. The plaintiff's counsel relied on the analysis of the Supreme Court in *Coakley* in which very similar injuries had been sustained in similar circumstances and where the High Court had awarded €5,000 for the actual trauma of the incident itself, €5,000 for the shock, distress and agitation, €35,000 for post-traumatic stress disorder, €25,000 in respect of the anxiety suffered due to the possible contraction of AIDS and hepatitis and €30,000 for sexual dysfunction, as well as €68,000 for future damages, giving an overall award, including special damages, of €170,000. Keane C.J. in the Supreme Court said he would not regard that as an unreasonably excessive sum and affirmed the judgment of the High Court.
24. The plaintiff's counsel also relied on the decision of this Court in *Ryan v. The Minister for Public Expenditure and Reform* [2021] IEHC 652, where the plaintiff had sustained a needle stick injury which he claimed had exacerbated previous symptoms of anxiety and psychological trauma and which was followed by a subsequent traumatic injury and a period of cannabis dependency which rendered the plaintiff permanently unfit for work. General damages of €100,000 were awarded.

Decision on quantum

25. The needlestick injuries caused the plaintiff worry and stress about the, albeit low, risk of developing HIV or hepatitis, a risk which continued for approximately three months in relation to HIV and six months in relation to hepatitis. This caused significant issues in his physical and emotional relationship with his wife from which the relationship does not seem to have fully recovered. He has also experienced issues in his relationship with his

children because of the greater vigilance he now exercises in his care of them. The plaintiff developed post-traumatic stress disorder which rendered him unfit for work for almost a year. He continued to experience difficulties at work for some time thereafter, some of which continue to date but at a lesser level than previously.

26. I am awarding €70,000 general damages for the plaintiff's post-traumatic stress disorder, the trauma of the incident and the distress and personal consequences of being at risk of HIV and hepatitis. I am also awarding €5,000 in respect of pain and suffering into the future.
27. I do not consider the plaintiff has failed to mitigate his losses because, even though he has ceased his antidepressant medication and has not availed of further CBT in spite of the advice of both psychiatrists, this was as a result of advice furnished by the defendant's CMO, viz-a-viz the antidepressant medication, and as a result of the defendant's decision not to fund further CBT sessions for the plaintiff in spite of their psychiatrist's recommendation that the plaintiff would have benefitted from same.
28. I therefore award the plaintiff a total of €75,000 plus his special damages, which I discount by 15%.
29. My indicative view on costs is that costs should, in accordance with s. 169 of the Legal Services Regulation Act 2015, follow the event and the plaintiff is entitled to his costs to be adjudicated upon in default of agreement. If the parties wish to make submissions as to a different order to be made viz-a-viz costs I will consider same.