

SHERIFFDOM OF LoTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 38

PN1177/17

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

IAIN ROBERTSON DUNCAN

Pursuer

against

MICHELIN TYRE plc

Defenders

Pursuer: Henderson; Allan McDougall & Co
Defenders: Boyle; Clyde & Co

Edinburgh, 15 May 2018

Introduction

[1] This is a claim for damages for personal injuries to the pursuer arising from an accident at work said to have been caused by the fault and negligence of the defenders.

[2] I heard evidence from the pursuer; and Afton McMurray, Ian Sturrock, Edward McGrath and Graeme Madden, all employees of the defenders.

[3] Certain matters, including quantum, were agreed between the parties in terms of joint minutes numbers 21 and 22 of process.

[4] Having considered the evidence and submissions, I made the following findings in fact.

Findings in fact

[5] The defenders carry on the business of manufacturing tyres.

[6] Part of the production process is the production of narrow bands or strips of rubber.

This step of production is done via a cold feed mill machine known as a CBL-F. Only qualified operators are allowed to operate the CBL-F.

[7] Among other parts, the machine incorporates two mill cylinders (front and rear) and a series of 'knives' which consist of circular blades ("blades") each of which is about the diameter of a CD. Each blade is located on a spindle on the end of a hydraulic arm ("arm"). Each blade has a guard. There are six arms on the CBL-F. Each has one blade, apart from arm AB2 which has two blades. Below the mill cylinders and the blades is a mill tray into which trimmings of rubber fall.

[8] Each arm can be in one of two positions. In the higher position, the blade is in contact with the front mill cylinder and is about 6 inches above the mill tray. In the lower position, the blade is not in contact with the front mill cylinder and is about 2 inches above the mill tray.

[9] When the CBL-F is in operation, the mill cylinders rotate slowly. The front mill cylinder rotates upwards as the operator faces it (clockwise if viewed from the right hand side of the CBL-F). The friction between the mill cylinder and the blades when they are in the raised position cause the blades to rotate in the opposite direction.

[10] At the date of the pursuer's accident (see below), an operator of the machine standing facing it would have a grey box to his right. The controls to the machine are located on the box. These include the switch for each arm allowing it to be raised or lowered as the case may be.

[11] Straight ahead of him, the operator would see the front mill cylinder which sits horizontally at about chest height and runs from one side of the machine to the other. The cylinder is about 5 feet wide. Viewed from the front of the CBL-F, the rear mill cylinder is in close proximity to, but behind, the front mill cylinder.

[12] Just below the front mill cylinder, an operator would see immediately in front of him a yellow and black safety bar, known as a Lunn bar, again running horizontally. Behind the Lunn bar and at about the same height is a roller in the form of a smaller metal cylinder.

[13] Below the Lunn bar, the operator would see the arms, each with blades at the end nearest the front aspect of the front mill cylinder.

[14] Put simply, the rubber is automatically fed into the CBL-F and is taken down through the narrow gap between the front and rear mill cylinders. As it emerges at the lower edge of the front mill cylinder, it comes into contact with the blades if they are in the raised position. The rubber is thereby cut into strips, then passes up and over the smaller metal roller and out of the front of the CBL-F and across the gangway to another machine where it is fed onto a conveyor belt.

[15] A known problem with the CBL-F was that while it was operating, pieces of rubber could be dislodged during the cutting process. These could be either "crumbs" from the cutting process itself or pieces of rubber dislodged from the rubber strips by their coming into contact with the top edge of the blade guards. This latter phenomenon was more common with softer rubbers such as type ML24780. The rubber thus dislodged from the strips could get into the gap between the blades and their guards; and on AB2, into the gap between the two blades. This could cause the blades to jam, thereby interfering with the efficient cutting of the rubber. When softer rubbers were being milled, blockages could occur on the CBL-F as often as three times per shift or even more.

[16] In about August 2011, the pursuer commenced work for the defenders as an agency worker. In about September 2011, the pursuer was taken on as a direct employee on a probationary basis: production 6/18/2. He was employed as a production operator.

[17] Over the next two years, the pursuer was given training on, and gained experience of, operating CBL and CBF mills.

[18] At some stage, the CBL-F machine was introduced into the defenders' factory. It is more sophisticated than the CBL and CBF machines, being capable of processing more than one type of rubber and having a greater degree of computer-controlled operation. The knife configuration is different from that on the CBL and CBF machines.

[19] In about August 2013, the pursuer underwent training to enable him to carry on the role of production operator on the CBL-F machine. His training commenced on 19 September 2013.

[20] The training was overseen by Mr McGrath. Mr McGrath commenced work for the defenders in 1984. During his employment with them, he has performed a number of roles, including in the PFG department ("PFG"). In 2007, he was appointed as a training instructor. While in PFG, Mr McGrath operated the CBL, CBF and CBL-F machines and trained other employees how to use them. By the time he came to train the pursuer, Mr McGrath had been a training instructor for six years.

[21] The initial part of the pursuer's training was done by Mr McGrath. This lasted for about two hours and covered the main safety aspects of operating the CBL-F. Thereafter the pursuer worked under the supervision of the Training Support Operator who is an experienced machine operator who has been selected to provide training. The pursuer's training ended on 2 September 2013, by which time he had completed 75 hours training relevant to the post of CBL-F operator. The training covered all aspects of machine and

operator safety: production 6/19/1. It concluded with a validation process, overseen by Mr McGrath, looking at all the operator's competencies: 6/19/12-13.

[22] The defenders had also produced a Hazards on Post document for all personnel in respect of the CBL-F: production 6/3; and a Method of Work for operators thereof: production 6/4. Neither of these dealt specifically with clearing blockages but the former did identify certain specific hazards:

- a. the risk of personal injury due to product cutting knives at the CBL-F with the instruction to employees "Be aware, keep hands/fingers and clothing well clear"; and
- b. the risk of personal injury during any intervention with the machine at the CBL-F with the instruction "**Stop** appropriate part of machine. Clear problem before restarting. **DO NOT** attempt to clear problem while the machine is running": production 6/3/6.

[23] The pursuer was aware of the instructions contained in these documents. He had seen them during his training. Copies of them were available in the "post dossier" kept near the CBL-F.

[24] The pursuer was expected to be on the factory floor five minutes before the commencement of his shift for a "handover". On one occasion, his co-worker, Brian Lawrence, who was just going off shift, explained to the pursuer that they had been having problems with the crumbs inhibiting the blades from turning. Mr Lawrence showed the pursuer how to remove rubber build-up from the blades using a hand-held mill knife after the mill cylinder had been switched off and blades on the hydraulic arms moved into the lower position.

[25] After completing his training in September 2013, the pursuer operated the CBL-F about 2 to 3 shifts per week. During that period, the effective operation of the AB2 blades in particular were affected the build-up of rubber on them on a regular basis.

[26] On about 12 June 2014, at about 5:30 PM, the pursuer was working in PFG on the CBL-F. He was wearing anti-cut protective gloves and foam ear defenders.

[27] The pursuer and Craig Taylor were working together. Not long before the end of the shift, ML24780 rubber was being milled in the CBL-F. The pursuer was working at the front of the machine. Craig Taylor was working close by.

[28] The pursuer was standing in front of the machine looking over the Lunn bar into it. He noticed that the blade on knife AB2 was not turning. He could see that the nut on the opposite end of the spindle from the blade was not turning. He realised that the problem was a build-up of rubber on hydraulic arm AB2 which has two blades and is located second from the left as an operator looks at the machine. The 'run' (length) of rubber going through the CBL-F was coming to an end. Once it had finished, the pursuer lowered the hydraulic arms for knife AB2. He obtained a hand held mill knife from the top of a flat area to the right of the machine. Taking it in his right hand the pursuer squatted down and sought to remove the rubber build-up from the blades on AB2 by putting the blade of the hand held mill knife in between the circular blade and its guard and thereby levering the rubber free.

[29] Having done so, the pursuer stepped back over to the control panel and pressed the switch which raised AB2 back to the position in which the blades were in contact with the front mill cylinder. He moved back to the front of the mill holding the mill knife in his right hand. He noticed that there was still a piece of rubber in one of the AB2 blades. He reached into the machine and tried to pull it free. He felt a tug on his glove. The tip of the glove on

his left hand was pulled into nip between it and the mill cylinder. His finger tip was severed. At some stage, the Lunn bar was activated and the CBL-F stopped.

[30] The pursuer turned to his co-worker, Craig Taylor, told him that he had injured his finger and asked him to call an ambulance. As he turned, he dropped the mill knife.

[31] The pursuer made his way to the security gate at the entrance to the factory. An ambulance was called. Mr Sturrock, who had left the factory a short time earlier and had only just arrived home, was notified of the accident by telephone. He made his way back to the factory. Mr Madden was just about to leave the factory when he was advised of the accident by telephone. He went to the security gate where he found the security guard and the pursuer. He made sure that an ambulance was being called and made his way to the CBL-F machine. That took him about five minutes. At about the same time, Mr Sturrock arrived. The police arrived shortly thereafter.

[32] In the meantime, an ambulance arrived at the factory gate. The pursuer was transported on it to a side door of the factory close to the CBL-F machine.

[33] A paramedic came into the factory and spoke to Mr Madden. Mr Madden's understanding was that the paramedic wanted to know if the tip of the pursuer's finger has been located. Mr Madden went out of the factory to speak to the pursuer to try and obtain information about where he had been when the accident had happened with a view to potentially locating the finger-tip. Mr Madden found the pursuer sitting in the back of the ambulance. He asked him where he had been standing at the time and the pursuer replied:

"I was in front of mill standing to the left-hand side."

[34] Mr Madden then asked him what he had been doing and the pursuer replied:

"I was trying to clean rubber jammed in between the guard and the knife. I thought I had cleared it all but still bit in 1 knife went in to get it and someone shouted on me

looked around and knife cut tip of my finger off shouted to get Craig to phone an ambulance.”

[35] At around the same time, Mr Sturrock spoke to the pursuer in the rear of the ambulance. He asked him how he was doing. The pursuer replied:

“Its (*sic*) all my fault, I was stupid, I was trying to get a bit of rubber hanging down from the knives and the next thing I felt was a tug on my glove which I thought was caught.”

[36] Mr Madden then returned into the factory. The fingertip could not be found. The paramedic indicated that having been through the front and rear cylinders of the mill and subjected to high temperature, it was not likely to be viable in any event. The ambulance left, taking the pursuer to hospital.

[37] Mr Madden then took some photographs on his mobile phone: production 6/2/1 – 5.

[38] The police arranged a photographer to come and take photographs. In the meantime, Mr Madden made a note in a notebook he had with him of his conversation with pursuer. The following morning, Mr Madden typed up his notes on his work computer: production 6/9.

[39] Mr Sturrock next saw the pursuer about an hour later at Ninewells Hospital. He and the pursuer began speaking in general about how the pursuer’s finger was. The pursuer volunteered that he felt “stupid/embarrassed” about what had happened and that he knew that he shouldn’t have done it. Mr Sturrock asked him what he meant and the pursuer replied: “I just tried to remove a tail of rubber still jammed in the knives and just felt the glove being pulled, next thing I felt this.” The pursuer then held his hand up.

[40] Mr Sturrock noted down what the pursuer had said during his two conversations with him: production 6/10.

[41] On 16 June 2014, four days after the accident, the pursuer came in for a meeting with Mr Sturrock. During the course of that meeting, Mr Sturrock asked the pursuer to run through the events of the accident.

[42] The pursuer's account was as follows:

- a. that he was coming to the end of the run of ML 24780, not the best of rubbers for running conditions; an additional roller had been fixed to the machine to help prevent the band of rubber from catching the top of mill knife guards; some thin shavings were still coming off the back of the bands (of rubber) which were rubbing against the top of the mill knife guards and falling down and jamming into the gap between the mill knife and the mill knife guard, causing the knife to stop rotating;
- b. at this point, the pursuer had lowered the mill knives, checked them to see if they were clear by physically trying to turn them around, which they did apart from 2BB which was jammed with rubber; the pursuer used a hand-held mill knife to remove the jammed rubber from between the mill knife and the mill knife guard; the pursuer then put the mill knives back into their raised position; he then crouched down to see if the mill knives were running free, with his right hand still clutching the hand-held mill knife at his left hand on the mill tray under the mill knife assembly;
- c. at this point, Mr Taylor, who was standing a short distance away to the pursuer's right asked what quality (type of rubber) they were going on to next; the pursuer had turned to see what Mr Taylor was saying and as he twisted to his right, his left hand, which was on the mill tray, instinctively came up and into contact with the underside of one of the mill knives, possibly 1BB; the pursuer at first thought

that his glove had been caught, felt a tug and came to his feet and realised that part of his finger was missing because he could see a bit of bone sticking out of his glove.

[43] Mr Sturrock typed up his notes of his meeting with the pursuer and these were printed off and signed by both of them: production 6/11/1-2.

[44] Shortly thereafter, Mr Madden was told of the version of events given by the pursuer during his meeting with Mr Sturrock. Mr Madden went to the CBL-F machine. He attempted to replicate what he had been told the pursuer said he had been doing. He found that his arm would have had to be inside the CBL-F “up to his shoulder” to reach the blades.

[45] A new system was put in place immediately after the pursuer’s accident whereby the unblocking of knives was only to be carried out by an engineer, rather than a machine operator. In due course, a large grille was placed across the front of the CBL-F to prevent access to the area below the arms.

[46] The letter of intimation of the pursuer’s claim issued by his solicitors and the initial writ based on information were provided by the pursuer. In particular, the initial writ prepared on the pursuer’s instructions and warranted in May 2017 averred that the pursuer’s accident had happened while he was using the hand held mill knife to clear a blockage. It did not suggest a two stage process of clearance followed by observation.

[47] The pursuer has not been consistent in his account of the accident circumstances.

[48] As a result of his accident, the pursuer suffered certain injuries and losses. The damages to which is entitled if his claim succeeds in its entirety are properly valued at £15,000.00 inclusive of interest to 18 April 2018.

Grounds of decision

Has the pursuer proved his version of events?

Submissions for pursuer

[49] In summary, Mr Henderson submitted that the pursuer was a reliable and credible witness. His evidence should be largely accepted. He gave evidence in a straightforward manner. He gave a coherent and reliable account of what had happened in the accident. The pursuer was perhaps not the smoothest historian and got confused at some points during his evidence of the accident, which explained apparent inconsistencies.

[50] There was no attempt to exaggerate or to make the position in which he found himself on 12 June 2014 any worse than it was. For instance:

- a. when asked to describe the noise the noise experienced in the prep department, he spoke to it being “quite loud”;
- b. on the nature of the work he described it as “quite heavy”;
- c. when in in examination-in-chief he was asked to elaborate he described it as “just work.”

[51] In some respects Ian Sturrock’s evidence was not reliable. He spoke to there having been a method for operators clearing rubber blockages from the machine. He was unable to speak to the written source of the method himself. His evidence was that he relied on the PTI to have ensured that the pursuer knew the method. He was defensive and dogmatic at times under cross-examination.

[52] Edward McGrath’s evidence was lacking in reliability insofar as his knowledge of what specific training the pursuer had received was concerned. He insisted that the pursuer would have encountered a blockage in the machine yet he himself had spent only a brief time with the pursuer at the start.

[53] Graeme Madden spoke to how he believed the accident had occurred based on the pursuer's own version. This evidence was unreliable and should be rejected.

[54] The pursuer's evidence was that the accident had happened when he was crouching down observing the blade moving, with his left hand balancing on the mill tray. Craig Taylor spoke. The pursuer was distracted. He turned to his right. It followed that if the pursuer turned to his right his left hand might move, as it did in the accident, towards the blades.

[55] Craig Taylor's recollection was noted by Ian Sturrock at interview: production 6/8. Paragraph 6 thereof substantiates (broadly) the pursuer's account. Ian Sturrock accepted that he did his best to note what Craig Taylor said and accepted that it was an accurate record of what Craig Taylor had said.

[56] It was persuasive evidence in the pursuer's favour that the two people who were there at the time (albeit that it appears Craig Taylor did not witness the injury) have a consistent account of what happened immediately before the injury.

[57] The quoted paragraph of 6/10 (Ian Sturrock version) [capitals; first paragraph] was put to the pursuer. He explained that the words were taken out of context. "Fault" related to concluding it was his own fault for being distracted. Ian Sturrock did not know about the operation of the machine. Moreover, the pursuer was the only person who saw it happen. His evidence was to be preferred to the hearsay evidence (albeit admissible) of the maker reporting what was allegedly said. In any event the words "...I was trying to get a bit of rubber hanging down from the knives and the next thing I felt was a tug ..." may be interpreted as the pursuer trying to clear the blockage; then at a next stage feeling the tug, not precluding the occurrence of the observation process that the pursuer describes. The pursuer has the best evidence. The pursuer's version was to be preferred.

[58] Production 6/9 (record of talk, Graeme Madden) was put to the pursuer. The pursuer spoke to not recalling the conversation. The pursuer was the only person who saw it happen. His evidence was to be preferred to the hearsay evidence (albeit admissible) of the maker reporting what was allegedly said. The pursuer has the best evidence.

[59] In relation to 6/10 and 6/9 and their content, the pursuer had had a very serious injury. He was likely to have been in shock; Afton McMurray spoke to him seeming shocked, white in the face and sweating a bit when the pursuer was with the paramedic. Ian Sturrock thought that the pursuer was in a state of shock. It follows that the pursuer may not have known what he was saying.

[60] Production 5/1/4 (report of Mr Cowie) was put to the pursuer. The pursuer was the only person who saw it happen. His evidence should be preferred to the hearsay evidence (albeit admissible) of the maker reporting what was allegedly said. In any event the words "As he was clearing a blockage a colleague spoke to him and he was momentarily distracted" may be interpreted as the pursuer using the motion of the blades to clear any rubber left. Moreover, the pursuer had an explanation for Mr Briggs's version which was that he had got mixed up: production 6/17/2. The expressions of the pursuer's solicitor in the letter were explained as a misunderstanding; and the pursuer spoke to placing reliance upon his lawyer's drafting.

[61] Graeme Madden spoke to how he believed the accident had occurred based on the pursuer's own version. He had gone to the machine to see if it was possible. This was described. He described pipework restricting access to knives. He referred to photograph 5. This evidence is unsatisfactory and unreliable. There was no proper explanation of the theory of how the accident could not have happened. The passage of evidence concerning having to insert his arm almost up to his armpit (in response to a leading question, like

many others at this stage and so lacking in value) was lacking in detail and unconvincing. There were no specific measurements provided. The photographs were inadequate and there was a vague and unsatisfactory explanation about how at the particular angle it was not possible just to lose one finger. No evidence was given of the witness's experience in or expertise in respect of accident reconstruction. The evidence was wholly unreliable and not credible and fell to be rejected as basis of explanation of the accident.

Submissions for defender

[62] In summary, Mr Boyle submitted that the pursuer's evidence was both internally and externally inconsistent. During evidence in chief, there were variations in his evidence.

[63] He was unclear on the following points:

- a. whether and to what extent he had cleared the rubber before observing?
- b. whether and to what extent he could see the blade turning before the accident?
- c. whether the piece of rubber had been "kicked out"?
- d. what was the size of the marble sized rubber?

[64] The pursuer had started his evidence about the accident itself with a very brief account which Mr Henderson had then had to spend a considerable amount of time clarifying to obtain anything like a coherent account of what had happened.

[65] It was also possible to contrast his various versions of events in evidence with:

- a. statement to Graeme Madden: production 6/9;
- b. statements (x2) to Ian Sturrock: production 6/10;
- c. statement to Ian Sturrock: production 6/11;
- d. presumption about the Allan McDougall precognition which will have informed the letter of claim: production 6/18/8, and the initial writ;

- e. presumption about the Allan McDougall precognition which will have informed the initial writ (adjusted) and so the record;
- f. history provided to Mr Cowie FRCS: production 5/1/4;
- g. history provided to Mr Briggs FRCS: production 6/17/2.

[66] The pursuer's variety of versions of events also contrast externally with the evidence of Ian Sturrock, Edward McGrath and Graeme Madden and also with the physical evidence as shown in the photographs and also with the physical dimensions of the CBL-F mill.

[67] The pursuer's version of events cannot be explained by the passage of time or the normal ambiguity that one would expect over a period of 4 years. As the pursuer accepted, this was his most significant life event and he had no credible explanation for the changes in his evidence over the first two days of the proof in addition to his changes over the history of the claim.

[68] The only credible explanation is that the pursuer has been deliberately dishonest. The pursuer was not a reliable and credible historian of the events concerned. His evidence ought not to be preferred to that of Ian Sturrock, Edward McGrath and Graeme Madden and also the physical evidence in the case.

[69] By contrast, the evidence of Ian Sturrock, Edward McGrath and Graeme Madden should be preferred.

Discussion

[70] On this issue, I prefer the submissions for the defenders. I did not find the pursuer to be a credible and reliable witness. To be fair to him, my impression was that he was not a naturally articulate man and I do not criticise him for that. But his original account of his accident in evidence in chief was sketchy and incomplete and I agree with Mr Boyle that it

took considerable questioning by his own counsel to obtain something approaching a coherent account.

[71] I proceed on the basis that no one of the factors relied on by Mr Boyle on its own would have inevitably have entitled me to make an adverse finding as to credibility. But the cumulative effect of these is significant and ultimately compelling. The most significant parts of that evidence are the pursuer's own statements in the aftermath. I consider that these were truthful; and truthfully reported. The other inconsistencies are more in the make-weight category but do not assist the pursuer.

[72] I note also that the pursuer himself accepted that he would have had a better view of the blades from a standing position and could not say why he had crouched down to look at them. His view from that angle was less clear.

[73] There was no explanation as to why the pursuer had put his hand into the mill tray to a position which took them near to the rotating blade. The access point was not clear. In my view, a person crouching in the manner described would be much more likely to rest a hand for balance on or near the outside of the mill tray. I also cannot understand the mechanism of the pursuer's hand moving forward and up if he were turning towards Mr Taylor.

[74] It was not entirely clear from the pursuer's account whether he had ever switched off the mill cylinders or whether these remained rotating when arm AB2 was lowered and while he removed the rubber blockage with the mill knife. But in my view, that does not matter. It is clear that the mill cylinders – and hence the AB2 blades were turning – when the pursuer reached in to try and remove the piece of rubber which remained after he had tried to remove the blockage with the hand held knife.

[75] Whether he did so from a standing or crouching position is also not clear. I think it is more likely to have been the latter. But in my view, that too does not matter.

[76] What is clear is that the pursuer was not carrying out merely an observation exercise when his hand was caught. Instead, he was actively engaged in trying to remove a piece of rubber when the mill cylinder was turning and the AB2 blades were up, engaged with the mill cylinder and rotating. That is (i) different from the pursuer's account in evidence and (ii) in clear breach of instructions which the pursuer was aware of.

[77] For all these reasons, I have concluded that the pursuer's account cannot be accepted. That means that the pursuer has not proved his version of events and the defenders must be assoilzied.

Other issues

[78] Both Mr Henderson and Mr Boyle lodged written submissions and addressed me on the legal as well as evidential and factual matters.

[79] I have not re-produced what was said on these matters or commented on them given the decision I have reached on the issue set out above and since Mr Henderson accepted – properly in my view – that the pursuer's case of fault against the defenders was periled on proving the pursuer's factual case on record. Since I have concluded that the pursuer's version is not to be accepted, I need say nothing further about issues of fault or contributory negligence.

[80] Quantum on a full liability basis was agreed.

Disposal

[81] I shall repel the pursuer's pleas in law; sustain the defenders' pleas in law; assoilzie the defenders from the craves of the writ; and, as agreed with parties, reserve all questions of expenses. If the issue of expenses can be resolved between parties, good and well. If a hearing is needed, this can be arranged through my clerk.