Neutral Citation No. [2012] NIQB 50

Ref: **GIL8554**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered: **06/07/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BILLY MORROW

Plaintiff;

-and-

DUNGANNON AND SOUTH TYRONE BOROUGH COUNCIL

Defendant.

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GILLEN J

Introduction

[1] In this matter the plaintiff (dob 21 January 1974) claims damages for personal injuries, loss and damage by reason of the negligence and breach of contract of the defendant in and about the instruction, supervision, management, control and assistance of the plaintiff whilst performing weightlifting exercises at Dungannon Leisure Centre on 7 January 2010.He suffered a fracture of the spinous process of C7 (clay shoveler's fracture) in the incident.

Background facts

[2] It is common case that the plaintiff has been a member of the fitness leisure centre at Dungannon (hereinafter called "LC") for one year at the time of the accident. At that time he was attending approximately 3-5 times per week and paying a fee of £30 per month.

[3] Within the LC there are two fitness areas. One is predominantly equipped with cardiovascular machinery (hereinafter called "the CV area") which includes treadmills, cycles etc. The second area is mainly equipped with fixed weight training stations and free weights (hereinafter called "the FW area").

[4] Both parties in the action accept that at the time of joining LC the plaintiff completed a medical assessment form and received an induction in the CV area including the use of resistance machines.

[5] It was a matter of dispute between the parties whether he received any induction in the FW area. The plaintiff contended that he had never received any such induction and picked up how to operate the weights from observing others who were performing the relevant activities in this area. He claimed in particular he was given no advice about posture, choice of weights, technique or breathing.

[6] Mr Taffee, a fitness instructor in the LC for about 8 years, claimed that at the time of the CV induction, the plaintiff was informed that after a period of working in the CV area, if he wished to go into the FW area he should approach a member of staff who would show him how to use the free weights and give him an induction into the area. Mr Taffee subsequently claimed that the plaintiff was in the event given three hours of instruction in the FW area over a period of about four days.

[7] It was the plaintiff's contention that after about three months in the CV area he commenced to regularly attend the FW area as well as the CV area for about an hour each day that he attended. He lifted light weights and generally made use of the machinery there including a Smith machine. It was his case that he had undertaken legs squats using the Smith machine and generally lifted anything from 5 kilograms to 60 kilograms in weight. By the time of his accident he was attending 3-5 mornings per week over a period of about nine months. He asserted that any time he lifted more than 40 kilograms, someone was always present with him namely either a member of staff (a spotter) or someone else in the gym.

The day of the accident

[8] On the day of the accident ("DOA") the plaintiff initially attended in the CV area. Having undertaken some exercises there, he moved on to the FW area. Before doing so he informed Mr Taffee of his intention and the latter informed him he would join him in about ten minutes which in fact he did. The plaintiff asserted that he did some warm up work on dumbbells as he had been previously advised to do.

[9] It was the plaintiff's case that after Mr Taffee arrived, he advised the plaintiff to use the squat rack. He had commenced squat lifting at about 30 kilograms, progressed to 60 kilograms and after an exchange with Mr Taffee he squat lifted 100 kilograms. In short the barbell was loaded with 100 kilograms (which in fact would make a total of 120 kilograms since the bar is 20 kilograms of weight). The plaintiff claimed that this was a substantial increase in the leg squats compared to his normal lifting, that he had never lifted such a heavy weight before, and that he was encouraged to do this by Mr Taffee. He claimed in evidence before me that he had performed one squat, and although he was tired he was "egged on" by Mr Taffee to perform a second rep. On the third lift he felt a crack in his neck and clearly at this stage he had sustained the serious injury earlier described in [1].

[10] It is common case that Mr Taffee was with the plaintiff at the time of the injury to his shoulder / neck. His presence fulfilled the role of a "spotter" ie. someone who observes the lift, checks technique, helps the lifter to move the barbell into the correct position to begin the lift and is actively on standby to render any assistance during each repetition of the lifts.

[11] I pause to observe at this stage that it is common case that the plaintiff had purchased a weightlifting belt, weightlifting gloves and had sought information about nutrition from Mr Taffee in order to aid his weightlifting albeit Mr Taffee asserted he had directed him to a shop in Cookstown for nutrition advice.

The plaintiff's case

[12] It was the plaintiff's case that he was not used to leg squatting using 100 kilogram weights. It was his contention that the accident was a consequence of excessive load bearing and poor technique i.e. the weight load which Mr Taffee encouraged the plaintiff to lift was far too great for him in terms of his capabilities and physique. Mr Taffee had failed to offer the plaintiff an induction course in the FW area or to explain good technique using a bar initially with light weights. In short the plaintiff was not given any proper instruction, was encouraged to lift an excessive weight outside the range of safe practice and there was a failure to identify the risk of injury to him.

[13] Mr Petherick, a highly experienced and well qualified sports consultant, gave evidence on behalf of the plaintiff. He made the following points inter alia:

- Inadequate instruction/information on technique had been given to the plaintiff.
- In an ideal world both the FW area and the CV area ought to be fully staffed.
- Staff should attend training courses on risk assessment procedures.
- There was an inadequate record card system dealing with the details of induction/programming for the plaintiff/continuous assessment of the plaintiff.
- Staff should be instructed to watch for poor technique.
- The muscle groups involved in squatting involve almost exclusively the upper part of the lower limbs, thighs and abdomen. The bar ought to be placed on the shoulders with no pressure over them other than to hold the bar. The injury that occurred was in the neck/shoulder region and therefore self-evidently the correct technique had not been used. He had never come across an injury of this kind and it could only have been caused by poor technique. He noted that the plaintiff's consultant surgeon Mr Cook had observed in a medical report of 21 April 2010 that the plaintiff had a rather unusual injury as a consequence of weightlifting. "It is a type of injury more commonly known as clay shoveler's fracture and occurs due to strenuous lifting against resistance". He had never encountered this injury before and it

was Mr Petherick's case that if the plaintiff had been using a proper technique he would not have been strenuously lifting against resistance in the shoulder area. Mr Petherick felt that the plaintiff must have been attempting to force the bar up using his shoulders and arms which of course would be entirely the wrong technique. The spotter ought to have observed this technique incorrectly being used and should have immediately drawn the attention of the plaintiff to it.

- There ought to have been continuous progress assessment of the fitness instructors and in particular Mr Taffee who had only reached a limited level of proficiency.

The defendant's case

[14] Mr Taffee, a fitness instructor of eight years experience with the defendant, made the case that he had told the plaintiff to seek advice when, after a period, he had moved from the CV to the FW area. When he did that Mr Taffee had given him an induction for a period of about three hours over a four day period. He was given advice on each separate set of equipment and that is why the induction period was extended and so long.

[15] He also claimed that he had seen the plaintiff lifting 100 kilograms on previous occasions to the DOA. The plaintiff had been given advice and instruction on technique, posture, breathing and appropriate weights. Mr Taffee claimed that he had spotted for the plaintiff on a number of occasions in the FW area. He had told him that the golden rule was that weights should never be increased by more than 5 kilograms on any lift (2½ kilograms on each side of the bar).

[16] Dealing with the accident Mr Taffee claimed that on this occasion the plaintiff was squatting using 98 kilograms. This was a similar weight to that which he had observed him successfully squat lifting on previous occasions. He had completed a full set of six repetitions (reps) squat lifting and was on the second set, third rep when the accident occurred. Mr Taffee was immediately behind the plaintiff observing his technique and it looked good to him. He saw nothing wrong in what this man had been doing.

[17] The defendant called Professor Boreham, also an extremely experienced and highly qualified sports consultant and a former international decathlete. On behalf of the defendant he made the following points:

- Squat lifting involves a number of muscles including some use of the shoulder muscle area. One uses the back of the neck to hunch up in order to provide a platform for the bar and one rotates the scapula outwards to hold the chin up. The main stress of course is at the bottom of the lift at the thighs and abdomen but the shoulder muscles do have a role and contract strongly in order to keep the bar on the shoulders.

- He had never come across an injury of this kind in weight lifting. Given that squat lifting is one of the most regular exercises used in a FW area and that poor technique may be frequently employed particularly by novices, it illustrated to him that an injury such as this was not likely to be caused by poor technique. One would have expected this injury to be much more common if it was caused by poor technique.
- In his view the accident had been caused by internal forces acting on the shoulders. There would be no outward sign if the plaintiff was attempting to lift the bar with his arms simply because he would not be physically able to do so given the weight and it would not be obvious to anyone that he was attempting to do it. All a spotter can do is watch the posture and technique provided he has already given the proper advice on technique and posture. The shoulder muscles are in play because of the resting area of the bar but the spotter would find it impossible to observe if, as asserted by Mr Petherick, the plaintiff was trying to force the bar off his shoulders.
- It was an unfortunate accident which occurs in sport from time to time and was not the fault of the defendant.

Legal principles

[18] Any physical exercise or sport carries with it a certain level of risk for those involved. A proper balance has to be struck between the benefits such activity confers on the participant and the risks involved. Injuries can sometimes occur that are not preventable and are simply part of the risk of the exercise itself. A person agreeing to participate in such exercise is considered to have consented to this natural level of risk of injury (see Uren v Corporate Leisure (UK) Ltd [2010] EWHC 46 (QB)).

[19] Gymnasiums and workout rooms present a risk area for weightlifters. This is particularly the case where persons are still learning proper techniques for weightlifting and exercise. The standard of care for those such as the defendant who provide such facilities and contract with persons such as the plaintiff to use them is that they owe the same duty of care to lawful visitors as any occupier and are governed by the same principles of negligence set out in Donoghue v Stevenson with a need to provide proper instruction, supervision and warning etc.

[20] In arriving at the standard appropriate in any given case the court will take into account the prevailing circumstances including the sporting object, the demands made upon the participant, the inherent dangers of the exercise , its rules, conventions and customs, the standard skills and judgment reasonably to be expected of a participant and the standards, skills and judgment reasonably to be expected of someone such as the defendant and Mr Taffee in instructing monitoring and supervising the plaintiff.

Discussion

[21] I commence by opining that this defendant needs to urgently review its policy on written documentation for the use of persons attending this LC. Both Mr Petherick and Professor Boreham were of the view that the system of documentation should be improved. Consideration should be given to the following areas:

- A written risk assessment for the equipment at the facility including the FW area.
- Written confirmation that induction has been carried out (no such record was kept in this case) in both the CV and FW areas signed by the client.
- A card index system recording what the client has been advised to do together with his progress from time to time. The spotters should have access to those cards.
- The presence of a sign outside the FW room warning/reminding people of the necessity to have an induction before using it.
- On-going courses of professional development for employees.

[22] However notwithstanding the inadequacy of the carding/documentation system in this leisure centre, I am satisfied that it played no role in the accident to this plaintiff. My conclusions on the facts of this accident are as follows.

[23] I found the plaintiff a very unreliable historian and having watched him and Mr Taffee give evidence, I had no doubt that Mr Taffee was by far the more reliable witness. Certain illustrations will suffice.

[24] First, the plaintiff told me that he had never squat lifted 100 kilograms weight before the DOA. This contrasted sharply with what he had told Mr Petherick who had recorded in his report "He had previously completed a one-off leg squat with bar weight as high as 100 kilograms". Moreover in the course of the pleadings, the plaintiff's replies to particulars from the defendant included the following answer "he had previously completed a one-off squat with a bar as high as 100 kilograms". I found the plaintiff's denial to me that he had ever lifted this weight to be disingenuous and I accepted entirely Mr Taffee's suggestion that he had observed him lifting this weight on several occasions prior to the accident.

[25] Secondly in evidence before me the plaintiff claimed that he had only completed two squats and was on the third when the accident occurred. This contrasted sharply with what he had told his own expert who had recorded "Mr Taffee advised that the plaintiff should attempt three sets using 100 kilogram weights (including the bar) beginning with a set of six squats. This was followed by a short rest. The plaintiff was then asked to undertake a second set with the same weighted bar followed by a rest. During the third set, when the plaintiff was undertaking the third repetition, he heard a "crack"". Mr Cooke the consultant surgeon was informed by the plaintiff that there had been three sets of weights

lifted. Finally the statement of claim made precisely that case. Accordingly once again I found Mr Taffee much more reliable when he suggested that the accident had occurred after a full set of lifts and on the second set he had hurt himself. This seemed to be much more credible given the contradictions in the plaintiff's evidence.

[26] Thirdly, the plaintiff specifically denied in cross-examination that he was a well muscled young man at the time of the accident. I found this implausible given the length of time that he had been engaging in weightlifting. In any event Mr Cooke his consultant described him as "a well-muscled man". I believe that this was an attempt by the plaintiff to minimise the experience that he had in weightlifting and the length of time that he had been so engaged.

[27] It was a characteristic of his evidence that he was prepared to tailor his account to suit what he considered best served his claim. On the other hand I found Mr Taffee a much more credible witness who gave his evidence quietly, effectively and with proper concessions. I believed him when he told me that the plaintiff had sought advice when he eventually went to the FW area and that he had been given an induction period. This was a plaintiff who had gone to the trouble of buying a weightlifting belt, weightlifting gloves and was seeking assistance on nutrition. I have no doubt that this is a man who would have readily sought out help and assistance at the commencement of and during the course of his excursions into the FW area. Mr Taffee struck me as a conscientious fitness instructor who took a genuine interest in his work and in those lifting weights. I found him entirely believable when he told me that he would undoubtedly have taken the plaintiff in detail through the various free weights over a period of three hours in the course of four days, that he would have told him to follow "the golden rule" of increasing weights only by 2½ kilos on each side, and that he had given the plaintiff full advice on technique, posture, breathing and appropriate weights. I disbelieved the plaintiff's denial that this had occurred. Both parties agreed in any event that Mr Taffee had on various occasions spotted for the plaintiff prior to this action and that he was present supervising him on the day the accident actually happened. Hence in this case I consider that the absence of documentation played no role in the accident given the care, instruction and attention that I am satisfied Mr Taffee had given to this plaintiff prior to the accident and on the DOA. It is wholly implausible to suggest that Mr Taffee had encouraged the plaintiff to increase his weight bearing from 60 kilograms to 100 kilograms without any intervening weights. Not only would this have been entirely contrary to the golden rule outlined by Mr Taffee but it would have amounted to muscular suicide with absolutely no logical reason. What purpose would be served – other than to court obvious injury - for a fitness instructor to suggest almost a 70% increase in weight? Having observed Mr Taffee giving evidence I am certain he would never have done this.

[28] There is no doubt that neck, shoulder and back injuries are amongst the most serious that can occur in the weights room. It is important that correct lifting techniques are observed and that the squat lifting is done through the legs with the large muscles of the thighs and buttocks taking the force. Thus the leg squat exercise

is designed to improve muscular strength in the thighs, buttocks, hamstrings and lower back. Correct body alignment is vital. The head should be kept upright, facing forward, the abdominal core muscles held tight and the lower back slightly arched at all times and never rounded. I am satisfied that this is precisely what Mr Taffee was well versed in looking out for and that he saw no reason to doubt that the plaintiff on this occasion was performing the technique properly.

[29] I preferred the evidence of Professor Boreham to Mr Petherick in a number of areas. It seemed to me common sense that with a load of 100 kilograms on the plaintiff's shoulders Professor Boreham had to be correct in concluding that there would be at least tensing of the muscles of the shoulders and that they would be in play because of the resting of that weight in that area. I also considered that it was a matter of common sense when Professor Boreham asserted that it would be very unlikely for a spotter to observe a lifter attempting to raise the bar off his shoulders during a squat lift simply because it would be impossible to actually raise the bar with his arms and therefore there would be no observable sign of the lifter attempting this at a time when he probably was grimacing with exertion at the bottom of the lift coming upwards. I also considered that there was a rational basis for Professor Boreham's assertion that this was an extremely rare injury (see the evidence also of Mr Cook FRCS) that was not necessarily connected with technique because otherwise it would be a much more common injury rather than the rarity that it clearly is. It is seems to me that Professor Boreham was correct in asserting that the technique may well have seemed appropriate to the spotter especially since this man had in my opinion gone through at least one full set of six repetitions and was mid-way through the second set when the accident occurred. This had given Mr Taffee a good opportunity to view his technique and to make a judgment that he was lifting properly. Since I believe Mr Taffee was a conscientious observer, I see no reason to accept Mr Petherick's assertion that the lack of technique must have been obvious. On the contrary, if the accident was caused by attempting to raise the weight with his arms rather than through his thighs and lower abdomen, there would have been no obvious outward sign of this occurring. One has to bear in mind that this man had been lifting weights, including weights as heavy as this, for an hour each day for 3-5 days over nine months with the benefit of advice and assistance from a spotter. I do not believe him to be a novice in these circumstances. He was well aware of the inherent risks in lifting weights which occur without negligence on the part of anyone. Hence he had bought a weightlifting belt and gloves etc.

[30] I have determined therefore that this man has been injured in the course of an exercise which by its very nature carries a measure of risk. In this instance he has suffered a very rare injury in a sporting activity which he must have known carried some risk irrespective of the steps taken by the defendant to care for him. I find there was no blame attaching to Mr Taffee or the defendants. I consider that the plaintiff was lifting a weight he was used to in a safe environment which was properly organised with adequate facilities in circumstances where he had been properly instructed and monitored by an experienced and appropriately trained

spotter. His injury was simply an unfortunate accident in the context of an exercise where the risk of injury is inherent.

[31] In all the circumstances I therefore dismiss the plaintiff's action.