

# THE HIGH COURT

[2022] IEHC 607

[2017/9021P]

**BETWEEN**

**MYLES MCDERMOTT**

**PLAINTIFFS**

**AND**

**TEAGASC THE AGRICULTURAL AND FOOD DEVELOPMENT**

**AUTHORITY**

**DEFENDANT**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 4<sup>th</sup> day of November, 2022**

1. This is a claim for personal injuries. In summary, the Plaintiff (Mr. McDermott) is a farmer and bovine embryologist of considerable experience. He was engaged by the Defendant (Teagasc) to carry out pregnancy tests on cattle at Teagasc's premises at Grange, Dunsany, County Meath. The testing was to be carried out by introducing each cow to a cattle crush, where the animal was restrained in a neck brace. Mr. McDermott stood behind the cow, inserted his left arm into the rectum, and by use of a probe photographed the cow's uterus. The resulting image can then be inspected by Mr. McDermott to see whether the cow is pregnant. The cattle crush comes with an iron bar which can be placed between the animal and the embryologist. If the bar had been in place during Mr. McDermott's examination of the cattle on the day in question, he would have been fully protected from injury by any movement backward on the part of an animal. Mr. McDermott, although fully aware of the protection that the use of this bar would provide, but it was not his common practice to use

one. This was because using the bar would slow down the process of checking the animals, this would mean that less cattle would be done in the day, and (as he was paid by the beast) he would earn less money. Mr. McDermott, in his evidence, accepted that he was aware of the use of the bar as a safety feature in other places, but that he had made a conscious decision that he did not need the bar at Dunsany and therefore did not ask about the availability of the bar; (pages 56 and 57, day 2). The bar was, in fact, available for use by Mr. McDermott and (had he asked for it) he would have been provided with it.

2. The importance of Mr. McDermott's decision can be seen in light of what happened. While being examined by Mr. McDermott, one cow became "fretful and tremorous and anoxic" (page 10 day 1). The neck brace had to be released to relieve the animal. Mr. McDermott called out (though the precise details of what he said are disputed), the gate was released so that the neck brace loosened, the cow fell onto Mr. McDermott and he was injured.

3. The pleaded claim focused on the sudden release of the front gate neck brace, the failure to warn Mr. McDermott that the brace was about to be released, and the failure to wait until Mr. McDermott had moved out of "proximity to the beast". The more relevant particulars are set out here;

- (a) Suddenly and without warning released the front gate neck brace permitting and or allowing the beast to move backwards when the Plaintiff was in close proximity to the beast;

- (b) Failed to warn the Plaintiff that they were going to press the release button on the front gate neck brace;
- (c) Failed to wait until the Plaintiff was safely out of proximity to the beast prior to pressing the release button;

4. The Defence asserted, among other things, that Mr. McDermott was retained as a specialist and was an independent contractor. It is further pleaded that Mr. McDermott was responsible for his own injuries as follows;

- a. Failed to step back from the animal or out of the cattle crush;
- b. Remained in the same place and/or within the cattle crush notwithstanding distress on the part of the animal;
- c. Remained in the same area and/or within the cattle crush notwithstanding direction given by him to the employee of the Defendant that the neck brace be released;
- d. Failed, prior to and having requested that the gates be loosened, to take any or any adequate steps to ensure his own safety/wellbeing;
- e. Failed to bring his knowledge and experience in the area to bear;
- f. Failed to exercise the simple and obvious expedience of stepping back away from the animal or out of the crush;

5. Two other matters should be mentioned at this stage. While the Summons claimed that there has been a loss of earnings on the part of Mr. McDermott, these were not particularized. On the day of the trial, Mr. McDermott's solicitors notified the solicitors for

Teagasc of a loss of earnings claim for 75,000 euro. In addition, Mr. McDermott's engineer identified in his report a further alleged defect which was not pleaded but which was agitated at the trial. This stated defect (that "the design of this crush causes a trap of the head if the animal falls down, causing a choking effect") is attributed to Mr. McDermott rather than to his engineer (paragraph 3.18 of the report of Mr. Hayes).

6. The balance of this judgment is arranged under the following headings;

1. The Evidence.

2. The Submissions of the Parties.

3. Decision.

### **THE EVIDENCE**

7. Mr. McDermott's evidence was heard over two days, albeit the first of these was somewhat truncated. He is clearly a very accomplished and justifiably self confident person. He described his practice in embryology, which includes procuring the superovulation of pedigree cows, bull fertility testing and reproductive scanning. It was the last of these, which Mr. McDermott described as a form of pregnancy testing, that he was engaged upon when he was at the Teagasc premises on the 14th of October 2015. Mr. McDermott had been doing this type of work for a lengthy period (25 years) at that time, had a PhD (which he "did" with Teagasc), had worked with Teagasc at Belclare for 8 years (where this type of testing was "an intrinsic part" of his work) and had been carrying out this form of pregnancy testing at Teagasc in Dunsany for 3 years prior to the accident.

**8.** On the day of the incident, there were about 300 cows for Mr. McDermott to test. At the time of his injury, he was about halfway through. On average, he would test 1 cow per minute; Mr. McDermott did not quantify in his evidence how many minutes it would take to test an individual cow if the restraining bar had been used, but it would have been a slower process. While he described the crush box in use that day as a Rolls Royce version, Mr. McDermott expressed the view that two straight rails would be safer "on the cow"; if the animal became distressed it could go down to the ground on her front feet without restraint. In the Dunsany crush box, an animal in distress would panic, lose its front footing, and then be suspended by its neck which would (unless the cow is released) lead to its death. This process could take minutes.

**9.** Mr. McDermott described the incident at the core of this case. He said;

"The animal was locked in the neck rails and got into that similar situation that I was alluding to. It panicked and I had my hand in the animal and the first reaction of the animal that I experienced is the shaking of the animal and that is symptomatic of anoxia and straightaway I knew there was trouble."

**10.** Mr. McDermott went on, in an important part of his evidence;

"...when I recognized what was happening I said 'we're in trouble here' or something to that effect. I don't remember the exact words."

A few minutes later, Mr. McDermott stated that he had said something to the effect of "this cow is in trouble".

**11.** He testified that this type of episode had happened on several previous occasions in this sort of crush at Dunsany. Of the occasion in question, he said that the animal fell back on him, he felt a searing pain, and he felt that he "had to wait a moment for the cow to get up off my foot to get out of there."

**12.** Asked to comment on what he felt about what ought to have happened, Mr. McDermott emphasized that he should be "out of there" before the cow was released. He said that the cow should have been released enough to relieve the pressure on her, but not so much that the cow came back on him. Asked if the doors or the gate opened too much, Mr. McDermott said that he "reckoned so", but that "the pain was such that I just didn't know what had happened really..."

**13.** Mr. McDermott then described his injuries, his treatment, and his recuperation. He also gave evidence about the effect of his injuries on his professional life and on his earnings.

**14.** On the restraining bar (or the "anti-backing bar" as he described it) Mr. McDermott explained that the bar was not present on the day he had his accident, and that;

"... it would have stopped the cow falling back on me and prevented the cow from making any backward movement whatsoever. Even if the cow fell down as she did, the bar would have held her in place because the bar is under her hind quarters."

**15.** On the same topic, and asked by his counsel if prior to the accident he had expressed concern to Teagasc about the crush box, Mr. McDermott said;

"...I think it's a poor design for somebody that's operating at the back of that crush in the absence of a backing bar...to have that restriction in the neck rail..."

Mr. McDermott had shared these concerns with Teagasc on a number of occasions before the accident.

**16.** Mr. McDermott, towards the end of his direct evidence, stated that the operator of the crush box (and therefore the person responsible for releasing the gates) came to him while he was waiting for the ambulance and said "I'm sorry" to which he replied "It's fine". Mr. McDermott very fairly characterized this as two people "just trying to make the best of a bad situation" until the ambulance arrived. The operator, Ms. Simone McCabe, is an important witness whose evidence will be described later in this judgment.

**17.** Mr. McDermott was cross examined on the issue of the restraint bar. When it was put to him that the bar was "at all times in place on the cattle crush" he replied that it was "at the side of the cattle crush", before adding that he never saw it used while he was there although he accepted that it "was available to be used..." This is very different to his direct evidence and to the opening of the case by his counsel (Day 1, page 9; "The bar wasn't present on the

day, which may be an issue in the case"). As will be clear shortly, Mr. McDermott then sought to qualify this evidence.

**18.** Mr. McDermott accepted that he was retained by Teagasc because he was "the expert in this area", and that he implements the system by means of which the work is to be done. He agreed that he ordained the system for the inspection of the animals, directed the Teagasc employees in his system of inspecting the animals, and directed them in the assistance that they were to give to him.

**19.** When counsel for Teagasc returned to the question of the restraint bar, Mr. McDermott changed his account from not disputing that it had been present "at all times" to the following;

"I never saw that bar until that day we went up and it was as clear as daylight to me that the bar had never been used."

**20.** He said that he had "genuinely" never seen the bar before the day of the inspection. It was then put to Mr. McDermott that he had told Mr. Hayes (his engineer) at the inspection that it was not his practice to use the restraint bar, the answer was;

"I mentioned to him that I hadn't seen it. I didn't say it wasn't there."



That answer is a somewhat evasive one. It does not address why Mr. McDermott told his engineer that his practice was not to use a restraint bar which in any event was not there. In later evidence, Mr. Hayes stated that it was his recollection that Mr. McDermott had said to him that "it wasn't his practice to use the rear restraint bar" (Day 2, page 85) though this evidence was later subject to an attempted qualification.

**21.** Mr. McDermott was then cross examined about Ms. McCabe., and her intended evidence. He agreed that he had worked with her before on numerous occasions, that on occasion he stayed in the crush and performed a scan even if an animal was in difficulty (depending on the degree of distress and risk involved), that Ms. McCabe was helping Mr. McDermott on this occasion and that she was "very much under [his] guidance and direction in terms of how she provided that assistance on the day".

**22.** Mr. McDermott agreed "absolutely" that Ms. McCabe "was appropriate in closing the doors on the animal". He also agreed that he was "as close to the animal, as [he could] be and that there was adequate space in the crush to step back (though he disagreed with the precise amount of space put to him by counsel). Mr. McDermott further accepted that there was adequate space on either side of the crush to get out.

**23.** Mr. McDermott accepted that he had, in earlier conversations, told Ms. McCabe of the danger of asphyxiation of animals if a cow went down on her front legs (as happened here), that while he was "internal to the animal" Mr. McDermott could actually feel the

tremor which would indicate that asphyxiation was or would be underway. Against that background, none of it in dispute, it was put to Mr. McDermott that he had said to Ms. McCabe;

"She's going. Loosen the gate."

Mr. McDermott's immediate reply was;

"I don't recall saying that, but the obvious thing to do to take the pressure – is to take the pressure of the cow's neck. And that can be done slightly without opening the gate fully. Now, I would have said she was going and then I would have – the minute I would have felt that, I would have stepped back and got out. I wouldn't say I released the animal back on me"

**24.** Having been questioned closely about the alleged instruction, Mr. McDermott gave evidence that he was "95%" sure that he had not given such a direction. Over the next period of questioning, Mr. McDermott stated that he couldn't recall exactly what he had said as "it was a pretty traumatic situation", pointed out forcefully that he would not have said to loosen the gate as "the cow would fall back on me" as a consequence, and said that there was "no point in going back to a back bar - that's a sealed compartment. If I could step back further, and the cow falls back fully, she could crush me against a back door." Mr. McDermott appeared to suggest (at question 189, Day 2) that what he said was "the same thing" as what counsel had put to him Ms. McCabe would say he said. He gave evidence that he had told Mr. Hayes what he said at the time of the incident, and suggested that Mr. Hayes would explain why this was not in the engineer's report.

**25.** Apart from what he said at the time, Mr. McDermott was examined about what happened. He said that it was "quite possible" that Ms. McCabe had loosened the animal, that the animal remained restrained, but in trying to get back up on her front legs the beast lost her footing and her backside fell to the ground. Mr. McDermott did ultimately contend that "even the partial release of the cow allowed the cow a slight movement backwards and when the pressure was gone off her neck, she fell back." This evidence, slightly speculative as it is, appears to accept that the loosening of the gate by Ms. McCabe was partial and (at least to some extent) controlled. Nonetheless, Mr. McDermott maintained that he was in the process of moving away ("I had my hand out and I was taking a backward step and my left leg was still there" -Day 2, page 33) and should have been given time to leave safely.

**26.** It was then suggested to Mr. McDermott that he had stayed in the vicinity of the animal as he was confident that he would be able to calm her and carry on with the procedure. This was, Mr. McDermott replied, "a rubbish comment".

**27.** Following further examination on the nature of the crush, and its advantages and disadvantages, Mr. McDermott was asked about his loss of earnings claim. Though accepting that there were costs associated with generating revenue, and tax to be paid on earnings, Mr. McDermott accepted that neither of these had been deducted from the claim of 75,000 euro.

**28.** After his cross examination, and before any reexamination, Mr. McDermott was asked by me to clarify some of his evidence. It was at that point that he gave the evidence

about the use of the bar described at paragraph 1 of this judgment. He also stated that he had never asked about the availability at Dunsany of the restraint bar as he did not think it necessary; "that crush would hold any animal" ... Asked about why, given his stated concerns about the safety of the crush, he continued to attend at Dunsany, Mr. McDermott said;

“MR. JUSTICE O’MOORE: But I suppose it comes back to just a sort of common sense question, Mr. McDermott – if you had said to Teagasc people and made it your business to say to Teagasc people in the years leading up to the accident that this was a device that was dangerous to you potentially as an operator, why did you go back to examining cows there if you were going to a potentially dangerous situation?

A: I would have thought there was a codicil there that it was only dangerous if the animal was released. But I am talking about the danger to the animal as in the danger of the animal choking.

Q: MR. JUSTICE O’MOORE: Mmm.

A: And clearly, you know, it’s only after the event that it’s easy to be wise. Now, I see the danger to myself as well, you know.”

**29.** At this point, it is worth observing that this last evidence is unconvincing. The danger to the operator is something that Mr. McDermott obviously had in mind when warning about the design of the crush box (see pages 5 + 6) and there was no element of hindsight about it. Equally, his evidence had been that, on occasion, animals became distressed when held by this form of neck brace. In those circumstances, it would be necessary for the gate to be

loosened; the use of a restraint bar on a regular basis therefore appears to be required and failure to do so introduces a real danger in the procedures being carried out by persons in the position of Mr. McDermott.

**30.** The next witness was the engineer, Mr. Hayes, who went through a series of photographs describing the machinery and procedure involved in the accident. Having described what he understood had happened at the time, Mr. Hayes offered a view that the work being undertaken by Mr. McDermott was "inherently risky" as the animals concerned were restrained and may get distressed. He then said;

"...the key when I looked at it, Judge, was that there was a rear restraint bar on the side of the crush which wasn't being used."

**31.** Mr. Hayes disagreed with the evidence of Mr. McDermott that the bar was not necessary as the controller (in this case, Ms. McCabe) secures the cow's head. On the facts of the accident, Mr. Hayes said that questions arise about the training of the operator, and the carrying out of risk assessments (the nature of which remained unspecified). Mr. Hayes felt, as he stated in his report, that Teagasc should have "insisted that the rear restraint bar be used." Mr. Hayes also contrasted the crush box used at Dunsany with other forms of restraint which allowed animals to slide down in distress rather than risk asphyxiation. In contrasting this form of crush with that used by Teagasc in Dunsany, Mr. Hayes agreed that the latter type of crush made use of the rear restraint bar very important as the only response to distress

in an animal was to release the gate to some extent, therefore allowing room for the cow to move vertically.

**32.** Under cross examination, Mr. Hayes accepted Mr. McDermott's expertise as an embryologist, but distinguished that from any expertise in risk management. He suggested that Mr. McDermott did not share his view that failure to use the rear bar was dangerous, but was of the opinion that it was for Teagasc to carry out a risk assessment (which would have shown that the bar needed to be used) and then "make sure it was used" (Day 2, page 85).

**33.** As noted in paragraph of this judgment, Mr. Hayes then accepted that Mr. McDermott had said to him that it was not his practice to use the restraint bar. Mr. Hayes was then asked why his report did not record this decision not to use the bar "by choice". His response was;

"That wasn't my understanding."

It was immediately put to Mr. Hayes that he had just given evidence to the contrary. He replied;

"My understanding was that he wasn't aware of the presence of the restraint bar. That was the evidence he gave."

Some minutes later, Mr. Hayes was asked to comment on the report of Teagasc's engineer (Ben Harte), which recorded that Mr. McDermott "acknowledged that it was not common practice or, indeed, his practice to utilize this restraining bar." Revealingly, Mr. Hayes

accepted that what Mr. Harte had recorded was correct and, moreover, was said in the presence of Mr. Hayes.

**34.** This exchange is a regrettable one. Mr. Hayes, an expert witness with established obligations to the court, accepted that Mr. McDermott had stated a position about use of the restraint bar. When pressed, he avoided the question and instead reverted to Mr. McDermott's evidence. When it was put to him that a fellow expert would support the proposition, he then accepted unequivocally that Mr. McDermott had in fact stated in his company that his practice was not to use the bar. This protection of what might be perceived as Mr. McDermott's interests persisted when Mr. Hayes conceded that he had not, in his report, noted this important comment by Mr. McDermott and could not explain this omission. The failure to record Mr. McDermott's practice is all the more surprising given that Mr. Hayes placed a great deal of emphasis in his report on the importance of using the rear restraint bar; indeed, the first factor identified in his report by Mr. Hayes as contributing to the accident was;

"Failure to use rear restraint bar;"

Even if Mr. Hayes felt that this was ultimately not a matter for which Mr. McDermott was responsible, it would have been important for the court to have been fully aware of all the circumstances in coming to its own view about where liability lay.

**35.** Mr. Hayes was then pressed about what was said by Mr. McDermott before the gate was loosened, an issue which he accepted as being critical. His notes describe Mr. McDermott saying;

"Do not recall telling Simone to open the neck rail or release the pressure on her neck."

**36.** The distinction between not remembering the instruction and denying that the instruction was ever issued was accepted by Mr. Hayes.

**37.** Finally, Mr. Hayes accepted that, even with the form of neck restraint recommended by him, a rear restraint bar was still used.

**38.** The final witness for the Plaintiff was his accountant, Mr. O'Hanlon. In light of the decision I have made on liability, I will not describe this evidence in any detail

**39.** The Teagasc evidence was give on the third and final day of the trial. It began with Ms. McCabe, who said that she was a lecturer in Agriculture at the Institute of Technology in Dundalk, covering Health and Safety, Farm Quality Management, Genetics and Genomics and Animal Husbandry. In October 2015 she was a PhD student at the Teagasc premises in Dunsany, having started in July 2014. Pregnancy scanning was carried out on each animal "a minimum of four times a year", and as a result Ms. McCabe had met Mr. McDermott twice in 2014 and about five or six times in 2015; she assisted Mr. McDermott on all of these occasions. Throughout all this time, the restraint bar had always been in place to the side of the crush. Ms. McCabe then described her role as operator of the crush on the relevant day, and the first knowledge she had of the problem with the cow. She said that Mr. McDermott said to her;



"She's going, loosen the head gate,"

**40.** Ms. McCabe said that she saw Mr. McDermott was removing his arm from the animal, and stepped back slightly ("not a full step") as he spoke. She moved the control lever slightly so that it wasn't gripping the neck of the animal so tightly, but the animal's head was never fully released. She then checked that the animal was okay, and only realized that Mr. McDermott was injured when he said "my leg's gone". The animal had been down on her front legs when she was choking, and her back end went "more or less straight down" on the loosening of the gate.

**41.** On cross examination, Ms. McCabe described her experience of testing. She had been at Dunsany for a summer placement in 2013 for eight weeks. She was then in Dunsany for about eighteen months before the accident, and "would have run the cows through that crush twice a day for two weeks straight. There would have been thousands of animals having gone through the crush by the time that this incident occurred. " (Day 3 - page 17). She conceded that this would have been for numerous different trials, not just fertility testing. Ms. McCabe was involved in blood sampling (from the rear of the beast as well as the head) twice in 2014 and about six times in 2015.

**42.** Ms. McCabe maintained that, when an animal is in distress and the gate is loosened, they will tend to go downwards. It could happen that the animal would go backwards, but this

is unlikely to be significant as "the animal is usually caught right behind the ears" - (Day 3, page 20).

**43.** Ms. McCabe accepted that a cow in distress in the crush creates potentially a dangerous situation. Loosening the gate, which could release the pressure on the neck, would relieve the pressure but Ms. McCabe emphasized that "it's not a case of just open or close..." the gate. It was, she said, a question of dictating how open or closed the gate was.

**44.** Ms. McCabe was asked, in some detail, about what Mr. McDermott had said to her. It was put to her that the report of Mr. Harte records the following;

"The Plaintiff shouted to Simone McCabe to 'loosen the gates'..."

It was then put to Ms. McCabe that in her direct evidence she said that she was told;

"She's going, loosen the head gate."

Finally, it was put to Ms. McCabe that counsel for Teagasc had cross examined Mr. McDermott to the effect that he had said;

"She's going, loosen her."

It is worth noting at this point that counsel for Teagasc corrected this initial question (Day 2, page 23) by adding;

"148 Q. Or 'loosen the gate'?"

Ms. McCabe's reply was;

"A: Well, okay, aside from "head gate" or "gate" it was still the same command of: "*she was going, to loosen her.*" So, okay, maybe the wording has changed along the way, it's probably like Chinese whispers but it was still the same command that there was an issue with the cow to "*loosen the head gate*".

**45.** Ms. McCabe was, understandably, asked why Mr. McDermott would give such a command when he was "standing right behind the cow in a position of peril." Her response was;

"Because it's what we have done previous times. If this situation occurred before he would indicate to us there was a problem, the gate would be loosened, he would wait for the cow to stand up and he would continue scanning."

The question was, in effect, asked again to which Ms. McCabe replied;

"Why would I loosen the gate if there was someone there who thought that was in an obvious dangerous situation. I wouldn't loosen the gate without an instruction."

Ms. McCabe was then alleged to have panicked at the time to which she answered, with some coolness;

"It's an emergency but it still doesn't warrant a panicked response."

**46.** For a third time Ms. McCabe was asked about why she would be told to open the gate by a person "in a position of trouble." Again, she replied that similar situations had occurred in the past, yet Mr. McDermott had comfortably and competently handled them without removing himself.

**47.** The evidence that Mr. McDermott had, on at least a number of occasions in the past, remained in the pen when the cow's head was released, was both surprising and at odds with the case presented on his behalf. It was also not a proposition put to him in cross examination. It was repeated in Ms. McCabe's reexamination. She said that, where animals had gone down on their front and were not in distress, Mr. McDermott would continue to scan them in that "downward position". Where animals were "getting tight", then the head gate was loosened, and the animal had "just stood straight up again and [Mr. McDermott] continues to scan..." In the current case, the animal wasn't able to stand up, and fell back. It was always restrained however, and just "reacted in a different manner to the previous times before." In answer to questions from the Court, Ms. McCabe said that she had loosened the gate on these earlier occasions more or less to the same extent that she did so in this instance. On these earlier times, she responded to Mr. McDermott telling her to open the gate.

**48.** It is worth noting that, at the end of her cross examination, Ms. McCabe stated that (while a Teagasc operative could have offered that the bar be used) "Mr. McDermott indicates to us what way he wants to work."

**49.** In light of the evidence of Ms. McCabe on cross examination, Mr. McDermott was afforded a chance to deal with it. He was asked two questions, the first was whether he would accept as a general proposition that he had previously instructed Ms. McCabe to loosen the gates. He replied;

"A: It will be a reaction, I have to qualify this situation insofar as I make a judgment on each case as I see it, on its merits. In this case the cows legs were in under the back legs. In other cases the cow wouldn't have that posture. So, if a cow hadn't the back legs under it, it's most likely not going to fall back it's going to go down, if anything, but if it has its back legs under it directly, the likely indication is the cow will stand up but in this case the cow was hanging and the back legs under it. There was only going to be one outcome, the cow had to come back."

**50.** The second question was whether Mr. McDermott had remained in place behind the cow when giving instructions that the gate be loosened. He said;

"It may have happened on one or two occasions. A lot of occasions I would have gotten out."

Mr. McDermott was not questioned further.

**51.** Eddie Mulligan, a Teagasc technician, gave evidence that the rear restraint bar had never been removed from the crush, that it had always been there and remained there, and that it was part of the machine and was "available". He said that Teagasc only used it in extreme situations, namely cases where the animal would not be "too keen on getting their heads caught." Under cross examination, he said that the bar worked "very well" in stopping an animal coming backwards. He was also asked about the fact that the more the control lever was pulled, the more the gate would open and he agreed with this proposition.

**52.** The engineer called to give evidence for Teagasc was Mr. Bernard Harte. Mr. Harte confirmed that he had asked Mr. Hayes whether Mr. McDermott would normally use the restraint bar, and (after inquiring with the Plaintiff) Mr. Hayes reported back that Mr. McDermott's position was that it was neither his practice nor common practice that the bar be used. Mr. Harte expressed a view about Mr. McDermott's legal status (a private contractor engaged by Teagasc) and the level of control he had over the operation on the day. He also stated (as Mr. McDermott appeared to have accepted) that there was vacant space available to the Plaintiff into which he could have stepped, and side doors through which he could have escaped. The engineers both agreed that the rear restraint bar should have been used, and that it would have avoided the injuries to Mr. McDermott.

**53.** Mr. Harte testified about the suitability of the crush for pregnancy testing, and said that the choking hazard is no worse in the Dunsany crush than the other model preferred by Mr. Hayes. He agreed with Mr. Hayes that the rear restraint bar on the alternate model is materially the same as that on what he described as "the accident equipment".

**54.** Cross examined, Mr. Harte accepted that a different crush (with parallel bars) would prevent choking but said that it would not prevent kicking. He accepted that the operation on which Mr. McDermott was engaged was a hazardous one. Mr. Harte stressed the importance of the instruction which he understood had been given by Mr. McDermott (to loosen the gate). He was questioned closely on what he had been told by Ms. McCabe about this instruction. Mr. Harte accepted that he only wrote down that Mr. McDermott said "loosen the gates" and did not recall any other form of words being given to him. He stressed, nonetheless, that loosening the gate had been "the crucial instruction". He also gave evidence that Mr. McDermott was "the controller of the operation", that initially it was up to him to issue the instruction at the appropriate time, and that the "proper" instinct of the lever operator "would be to do whatever the tester is telling her." Finally, Mr. Harte accepted the rather general proposition that there is "a big safety duty on the person outside the crush as well as the person inside the crush"; it was not put to him, on foot of that acceptance, that Ms. McCabe had failed to discharge this duty.

**55.** With this, the evidence concluded. I will now set out the arguments of the parties. These were made in the form of written submissions delivered some weeks after the hearing.

## **SUBMISSIONS**

**56.** The written submissions on behalf of Mr. McDermott rely on section 12 of the Safety Health and Welfare at Work Act 2005, which states;

"Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare."

They further rely on the judgment on Barniville J in *McWhinney v Cork County Council* [2018] IEHC 472, and in particular on a passage referring back to the judgment of the Supreme Court (O'Flaherty J) in *Boyle v Marathon Petroleum (Ireland) Ltd* [1999] IESC 14. In considering *Boyle*, Barniville J observed;

"The Supreme Court was not stating that in all cases the onus of proof was on the Defendant at the very outset to show that it had taken all steps as were 'reasonably practicable' to make and keep the place safe. In a case, such as the present case, where it is not conceded by the Defendant that the presence of an open drain in the rear yard of the fire station was unsafe, the onus must first rest on the Plaintiff to demonstrate at least to a prima facie level that the presence of the open drain was a hazard or potentially unsafe and only then would the onus or burden pass to the Defendant to demonstrate that it had acted so far as was reasonably practicable to ensure that



persons, such as the Plaintiff, were not exposed to a risk to their safety, health or welfare."

**57.** The submissions then go on to refer to two passages in the evidence where the design of the crush and the carrying out of the pregnancy testing were variously described as dangerous or hazardous. The submissions build on this evidence to argue that, even if the evidence of Teagasc is correct, Ms. McCabe "ought to have made sure, at the very least at the rear of the crush or out of the crush altogether before partially releasing the cow's head." Ms. McCabe ought, it is submitted, to have either exited or released the gate in a more gradual way.

**58.** It is accepted in the submissions that the court may find contributory negligence on the part of Mr. McDermott for his failure to direct the placing of the rear restraint bar or (if Ms. McCabe's evidence is accepted) for directing the gate to be loosened.

**59.** Even if these submissions are correct in suggesting that section 12 of the 2005 Act applies, and that the decision in McWhinney is therefore relevant, they are mistaken in the correct application of the test. There is no doubt that placing one's arm into the rectum of a fully grown cow (while in the immediate vicinity of its rear) presents dangers. One of the hazards is that the cow will fall down or fall back or both. That is why there is a neck brace holding the cow's neck in place so that it cannot move. Of course, the neck brace can itself cause distress or death to the cow. That is why there is a rear restraint bar available with the

crush. If the animal becomes distressed, the brace or gate can be loosened without any risk to the person examining it. That risk is removed by use of the restraint bar.

**60.** In providing a crush box equipped with a restraint bar, Teagasc have acted to extinguish the risk to the Plaintiff of the sort of injury that he has suffered. Even if the release levers are operated in an emergency in a way that is wholly unsatisfactory, the examiner is at no risk of harm if he uses the restraint bar while carrying out his work. I do not accept the evidence of Mr. Hayes to the effect that Teagasc should have insisted that the restraint bar be used in the circumstances of this case. Leaving aside the attempt to tailor his oral evidence to assist Mr. McDermott, and the unexplained failure to include in his report Mr. McDermott's revealing statement that it was his practice not to use the bar, it strains the phrase "reasonably practicable" beyond its limits were this view to be accepted. Mr. McDermott is clearly a very competent, experienced and qualified man, not lacking in confidence. He accepted that he was in charge of the pregnancy testing operation, and the evidence that Ms. McCabe was there to assist him and be directed by him was not meaningfully challenged. The attempt by Mr. Hayes to distinguish between Mr. McDermott's competence as an embryologist and as a risk assessment specialist is unconvincing. One does not need to be an engineer to realize that failure to use a rear restraint bar exposes someone to injury in the event that the cow becomes distressed, and the gate is therefore loosened. It was also not "reasonably practicable" to require Mr. McDermott to use the bar, given his reasons for not using it. These included not only his view that it was not required but also his acceptance that if he used the bar less animals would be processed per day (Day 2 - Page 56). Mr. McDermott gave no indication that he could have been persuaded (or successfully directed) to use the bar; indeed, the thrust

of the evidence is to the contrary as the entire pregnancy testing process was done on his terms.

**61.** On a proper application of section 12 and of *McWhinney*, the Plaintiff fails. That remains the case even if one approaches the analysis in the way proposed by the Plaintiff's lawyers. Confining the approach to Ms. McCabe's operation of the levers, and accepting her evidence as to what was said by Mr. McDermott, there is no failure on the part of Teagasc in its obligations to the Plaintiff. The background to what happened is that Mr. McDermott had, on a number of occasions prior to the relevant day, told Ms. McCabe of the danger that a cow in distress could quickly die. He had also told her that he could feel the tremors indicating actual or imminent asphyxiation when his arm was in the cow. That is, of course, a level of insight that no one outside the crush could have. In other words, Mr. McDermott could be expected to know how immediate the danger to the cow was; Ms. McCabe could not. In those circumstances, the command to Ms. McCabe to loosen the gate as the cow was "going" was a direction which she acted reasonably in obeying. The suggestion that Ms. McCabe should have waited until Mr. McDermott left the crush is also misplaced. Surprisingly but unmistakably the evidence established that, on a number of occasions in the past to Ms. McCabe's knowledge Mr. McDermott had stayed in the crush despite having the head gate loosened. Against that pattern of actions by Mr. McDermott himself, complying with his instruction in the terms in which it was given did not breach any duty owed to him by Teagasc. Understandably and reasonably, Ms. McCabe's focus was not on Mr. McDermott but rather on the cow whose safety Mr. McDermott had asked her to ensure by loosening the gate; see her evidence on Day 3, at page 11.

**62.** I also accept the evidence of Ms. McCabe as to how she loosened the gate, and how the cow reacted to the diminished restraint. Ms. McCabe did not simply open the gate, or loosen it excessively, but rather did just what was required (as summarized at paragraph 40 of this judgment). Inevitably, this freed the animal to some extent, thereby allowing her to fall as described by Ms. McCabe.

**63.** It will be plain from this last section of the judgment that the evidence of Ms. McCabe is preferred over that of Mr. McDermott. I will now explain why this is so.

**64.** In their submissions, counsel for Mr. McDermott offer no reasons why I should accept one account over another. Instead, quite properly, they are happy to leave the matter to me. Counsel for Teagasc do suggest three reasons why the evidence of Ms. McCabe is to be accepted. These are;

(a) The evidence of Mr. McDermott was equivocal and inconsistent; In particular, he told his engineer that he did not recall telling Ms. McCabe to open the neck rail or release pressure on the cow's neck; that is a very different proposition to the eventual position taken in his sworn evidence, that Mr. McDermott was "95%" sure that he had given no such direction.

(b) Mr. McDermott made much of the lack of sense in directing the gates be opened when he was in the vicinity of the cow; However, it transpired that in the past he had remained in the crush despite directing that the gate be loosened.

(c) The Plaintiff accepted that the words he did speak were designed to prompt some action to address the cow's predicament. Ms. McCabe took action to help the animal. The action of Ms. McCabe in loosening the gate before Mr. McDermott had moved away was consistent with the previous occasions when he had stayed with a cow despite the gate being released to some degree.

**65.** These points provide persuasive reasons in themselves why the evidence of Ms. McCabe is to be accepted. To them can be added two further factors;

(d) The impact on Mr. McDermott's credibility by the changing of his evidence on the presence of the rear restraint bar. This is set out at paragraphs 17, 19 and 20 of this judgment. This contradictory and evasive evidence reduces the level of confidence that can be placed in Mr. McDermott's account of the accident.

(e) The way in which the two witnesses presented themselves on this point... Mr. McDermott came across as unsure on this issue, perhaps understandably given the trauma of the injuries he suffered moments after he shouted out to Ms. McCabe. Ms.

McCabe, on the other hand, was collected and calm in her evidence. The variation in the accounts attributed to her of what Mr. McDermott had said did not throw her, notwithstanding persistent and skillful questioning. For the sake of completeness, I should say that these variations were no more than would be expected and were in large measure explained. They were certainly less significant than the disparity between the accounts of Mr. McDermott as described earlier. The observations of Collins J in *Tumusabyezu v Muresan* [2021] IECA 191 about the limited importance of the demeanor of a witness are understood, but nonetheless in this case it is a factor which is to be taken into account. It is by no means, however, a decisive one.

**66.** These factors go mainly towards the question of what was said by Mr. McDermott to Ms. McCabe. On this, I accept Ms. McCabe's account. On exactly what Ms. McCabe did, and how the cow reacted, there is really only the evidence of Ms. McCabe as Mr. McDermott accepted that his vision was obscured (Day 1, Page 27) and, more importantly, the resulting pain has made precise recollection difficult (Day 1, Pages 28 and 30)

**67.** Given my assessment of the evidence, and my conclusions on the Plaintiff's submissions, it is only necessary to consider the Defendant's submissions on one further matter. This was the claim, not pleaded but foreshadowed in the report of Mr. Hayes, that the form of neck restraint used in *Dunsany* was unsatisfactory. At paragraph 3.18 of his report, Mr. Hayes recorded;

"Claimant's view was that the design of this crush causes a trap of the head if an animal falls down, causing the choking effect. Otherwise he felt that the crush was very suitable and top of the range,"

**68.** This report was disclosed less than a fortnight before the trial began. In itself, it did not indicate a fresh string to Mr. McDermott's bow as it merely set out the opinion of the Plaintiff, and not of his engineer. Mr. Hayes did not, in his report, identify this alleged defect as contributing to or causing the accident. However, this claimed defect did feature in the opening and was subject to an objection by counsel for Teagasc. The evidence proceeded with the objection continuing. In his evidence, Mr. McDermott clarified his complaint about the design of the gate. He said (Day 2, at Page 5) that it was a poor design for someone operating "at the back of that crush in the absence of a backing bar..." Of course, the bar was at all times available to Mr. McDermott as operator (a fact wrongly denied by him in his evidence up to that point). The availability of the bar robs this complaint by Mr. McDermott of any validity, for the reasons set out earlier in this judgment. If anything, it fortifies my decision on the lack of merit in the Plaintiff's main claim. On Mr. McDermott's own analysis, and without any risk assessment qualifications, he had identified the importance of using the restraint bar.

**69.** Despite the fact that his report did not contain any opinion on his part as to the inadequacy of the crush system, Mr. Hayes gave evidence about an alternative system with parallel tubes at the head of the beast allowing it to move up and down vertically thereby reducing or removing the risk of choking. The existence of an alternative, even a better

alternative, does not mean that the system used by Teagasc fell below standard and Mr. Hayes did not seem to say that it did. When Mr. Harte was cross examined, while it was put to him that the alternative was "safer" it was not suggested that the crush used at Dunsany was substandard, or its use wrong in some way. Mr. Harte made the fair point that the alternate crush could avoid problems in pregnancy testing but could be less useful where the head had to be in a fixed position. He concluded that; "You know, you don't have separate crushes for different procedures"; Day 3 at Page 55. This was not challenged.

**70.** On this evidence, no case is made out that the use of the relevant crush by Teagasc was negligent, in breach of any duty (statutory or other) or in breach of contract. Tellingly, in their written submissions Mr. McDermott's counsel do not engage at all with the relevant evidence on this aspect of the claim.

**71.** However, the primary finding on this part of Mr. McDermott's case is that it is not pleaded, and cannot be properly advanced. While the Summons contains several generic and open textured claims, this specific allegation about the suitability of the crush should have been specifically pleaded. Had it been, Teagasc could have taken certain steps to protect its position, notably by considering joining a third party who may have supplied, manufactured or warranted as suitable the crush in question. It was open to the Defendant to raise particulars, but that does not excuse the Plaintiff from properly setting out his case. The way in which the claim emerged is also important; even on receipt of the Hayes report a fortnight before trial, it was not at all clear that this was now part of the case being made. The observation in the report seems to be more a note of Mr. McDermott's personal position than



notification that the suitability of the crush is now going to be part of the case. Finally, despite the issue being raised very promptly by counsel for Teagasc, no application was made to amend the pleadings either over the three days the case was at hearing or in the course of the written submissions. For these reasons, this portion of the Plaintiff's claim cannot proceed.

**72.** For the sake of completeness, I should say that (had I not found against the Plaintiff for the reasons already set out) I would have had considerable sympathy for the submission made by Teagasc that Mr. McDermott's claim is to be approached not by reference to section 12 but by reference to section 7 of the 2005 Act. However, it is not necessary now to decide this issue.

## **DECISION**

**73.** I will dismiss the claim made by Mr. McDermott against Teagasc. The proceedings are listed for mention on the 8th of November 2022 to deal with any outstanding matters, including costs.