Neutral Citation: [2014] IEHC 579

THE HIGH COURT

[2013 No. 6526 P.]

BETWEEN

JOHN LAWLOR

PLAINTIFF

AND

CARROLL SYSTEM BUILDINGS (1970) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 27th day of November 2014

1. Section 26 of the Civil Liability and Courts Act 2004, provides that:-

> "(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that –
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> (a) is false or misleading, in any material respect, and
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> (b) he or she knows to be false or misleading,
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> the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
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> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that –
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> (a) is false or misleading in any material respect, and
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> (b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
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> (3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.
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> (4) This section applies to personal injuries actions –
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> (a) brought on or after the commencement of this section, and
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> (b) pending on the date of such commencement."

2. It was not disputed at the hearing of this action that the provisions of this section and of s. 25 of the Act of 2004, apply to the present personal injuries action. Section 25(1) of the Act makes it an offence to give or dishonestly cause to be given or to adduce or cause to be adduced, evidence in a personal injuries action which is false or misleading in any material respect and, which the person knows to be false or misleading. It further provides at subs. (2) that it shall be an offence:-

> "(2) If, after the commencement of this section, a person gives, or dishonestly causes to be given, an instruction or information, in relation to a personal injuries action, to a solicitor, or person acting on behalf of a solicitor, or an expert, that –
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> (a) is false or misleading in any material respect, and
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> (b) he or she knows to be false or misleading."

3. The term "dishonestly" is given the same definition as in s. 26(3) of the Act. An "expert" for the purpose of the section is defined in subs. (5) as a person who has a special skill or expertise and who:-

> "(a) has been engaged by or on behalf of a plaintiff or defendant in a personal injuries action to give expert evidence in that action, or
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> (b) for the purposes of or in contemplation of a personal injuries action has been requested to carry out an examination or investigation in relation to any matter for which such special skill or expertise is necessary."

4. There is, however, no provision as in s. 26 of the Act that the court shall dismiss the plaintiff's action by reason of any of the matters specified in s. 25(2). The court was referred to the decisions of the Supreme Court in *Ahern v. Bus Éireann* [2011] IESC 44 and *Goodwin v. Bus Éireann* [2012] IESC 9.

5. In a request for further and better particulars dated the 12th September, 2012, the solicitors for the defendant sought the following particulars arising out of the Civil Bill issued on the 19th May, 2003 and, the replies to particulars dated the 24th April, 2009:-

> "11. Please state whether the plaintiff has had any disease, illness, sickness or medical complaint either prior to or subsequent to the onset of the symptoms complained of in the within proceedings and if he has, please state:-
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> (i) when it occurred;
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> (ii) details of the symptoms;
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> (iii) the treatment received;
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> (iv) the names and addresses of all medical practitioners from whom treatment was sought."

6. The answer given in replies dated the 22nd October, 2012, was "No".

7. In the Particulars of Personal Injuries endorsed on the Civil Bill it is pleaded that:-

> "The Plaintiff was advised by his medical consultant to cease his employment with the Defendant and the Plaintiff continues under review and further particulars of personal injury will be furnished in due course when the same become available."

8. This advice appears in a letter dated the December, 2002, from Neil J. Brennan, Consultant Respiratory Physician, to the plaintiff's solicitors, who had referred the plaintiff to him. In the first paragraph of this letter, Mr. Brennan States:-

> "I examined Mr. Lawlor 10.12.2002. He was working in a Joinery for the last twelve years but for the last eighteen months has noticed wheeze and shortness of breath."

9. Therefore the onset of the symptoms occurred first in or about the 10th June, 2001. The then statutory period of limitations was three years. The Ordinary Civil Bill was issued out of the Circuit Court office at Kilkenny on the 19th May, 2003. An application by the defendant to amend its Defence delivered in 2007, was refused by this Court (Cross J.) on the 3rd June, 2014. This application was grounded on the Affidavit of the defendant's solicitor sworn on the 30th May, 2014, where it is deposed as follows:-

> "9. At the time of the delivery of the Defendant's Defence, the delay on the part of the Plaintiff had not been so egregious and unreasonable as to warrant a plea to the effect that he had been guilty of inexcusable and inordinate delay. Having regard to the manner in which the claim has been prosecuted in the intervening period, however, the question of delay and the prejudicial effect thereof has become a real and significant issue between the parties. In the premises, an amendment of the Defence to include a plea that the Plaintiff has been guilty of inordinate and inexcusable delay has become necessary so as to ensure that the real issues in controversy between the parties are addressed and determined at the trial of the action and I pray this Honourable Court to permit the Defendant to amend its defence to include a plea of inordinate and inexcusable delay.
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> 10. In relation to the Statute of Limitations, the medical report furnished by the Plaintiff record that he developed respiratory difficulties in or around 2001 and that they had largely settled by 2002. He worked for the Defendant between 1991 and 2001 and he alleges that he was exposed to excessive levels of dust throughout this period. The date of the accrual of his cause of action will be a matter for medical evidence. At the time of the delivery of the Defendant's Defence, the Plaintiff's medical records had not been provided to the Defendant's solicitors. Those records have now been furnished and the Defendant is desirous of raising a defence under the Statute of Limitations Act 1957, as amended. In the circumstances of the case, I say that the issue of the date of the accrual of the cause of action and the related question of whether the Plaintiff's claim is statute barred are live issues in dispute between the parties and that the Defendant ought to be permitted to amend its Defence to raise it at the trial of the action."

10. In the course of his examination-in–chief by senior counsel for the plaintiff, Dr. John Curtin who had been the plaintiff's doctor since 1984 and who gave evidence in the case for the plaintiff, referred to the plaintiff's medical records and stated that he had been told by Dr. Carmel Condon, who was a locum tenens in his practice at that time, that on the 23rd August, 1999, she had formed the impression that he was suffering from exercise induced asthma and had advised the plaintiff to use an inhaler. The relevant portion of the entry in the medical record is:-

> "Adv. Re inhaler
>
> imp. exercise induced asthma – (word indecipherable) from C.C."

11. It was submitted by senior counsel for the defendants that this was clear evidence that the plaintiff must have been fully aware that he had a very relevant "disease, illness, sickness or complaint", on the 23rd August, 1999, more than three years prior to the issue of the Ordinary Civil Bill. The answer "No" at reply No. 11, of the replies to further and better particulars was therefore false and misleading and the plaintiff knew that it was false or misleading at the date of swearing of the Affidavit of Verification on the 12th November, 2014, *inter alia*, verifies the contents of those replies in the schedule thereto.

12. Discovery of these medical records had been made prior to the 30th May, 2014, as appears from the affidavit sworn by the solicitor for the defendant to ground the motion to amend the Defence to plead the Statute of Limitations, laches and inordinate and inexcusable delay. However, this entry in the Medical Records appears not to have been adverted to by either side until well into the evidence at the hearing of this action, when Dr. Curtin was being brought by senior counsel for the plaintiff through his record of medical certificates issued by him in respect of the plaintiff's many absences from work. Senior counsel for the defendant submitted that the defendants were entitled to rely on the answer given in the replies to further and better particulars as this was verified by the affidavit sworn pursuant to the provisions of s. 14 of the Act of 2004.

13. No application was made on behalf of the defendant to stay the further hearing of this action to enable the defendant to bring another application to amend its Defence to plead the Statute of Limitations. Given the availability of this entry in the disclosed medical records, it is difficult to see how it could be established that this was "new evidence" which had been withheld from the defendant or which could not reasonably have been known to the defendant at the time of the making of the initial application on the

3rd June, 2014. The hearing continued and at the close of the plaintiff's case, senior counsel for the defendant applied for a direction. This was principally advanced on the basis that the evidence adduced by the plaintiff, taken at its highest, did not establish by reason of this evidence introduced by the plaintiff that (as pleaded at para. 4 of the Indorsement Claim):-

> "Between in or about January 1991 and June 2001, the Plaintiff was acting in the course of his employment with the Defendant and was engaged in the operation of a variety of machines whilst working with timber and in the course of carrying out his said work, the Plaintiff was exposed to serious quantities of dust in the air and to the inhalation of such dust and as a result thereof, the Plaintiff has suffered severe personal injuries, loss, damage, inconvenience and expense."

14. This application for a direction was refused and the hearing continued to its conclusion. In my judgement to dismiss the plaintiff's action at this point would result in an injustice being done. Even if I do not accept the plaintiff's evidence that he had a very poor memory and could not remember what happened two months ago, I find that it is unlikely that the plaintiff would have recalled on or about the 22nd October, 2012, that in 1999 – thirteen years and two months previously, - a doctor in Dr. Curtin's practice had told him to get an inhaler. Dr. Condon was not called as a witness. There was no evidence of what she had said to the plaintiff on the 23rd August, 1999. There was no evidence as to whether or not the plaintiff had followed her advice and obtained an inhaler and was instructed in its use. The evidence clearly established that he continued to play hurling and football at club level. It is also significant to note that the record shows that the reason why the plaintiff had attended Dr. Curtin's surgery on the 23rd August, 1999, was to have a suture removed from inside his left upper lip, which had been inserted following a sports injury. How the issue of an inhaler arose at all is therefore left unascertained. This entry in the plaintiff's medical records in Dr. Curtin's practice was available to the lawyers on both sides of this action who, it appears, failed to notice it until Dr. Curtin gave evidence in chief during the course of the hearing. There was no evidence that the plaintiff himself had these records at any time in his personal possession. While the reply given on the 22nd October, 2012, was clearly incorrect, on the 30th May, 2014, five months prior to the hearing, the true position could have been known to both sides. It could also have been known to the defendant before the making of the application to this Court (Cross J.) to amend the defence to plead the Statute of Limitations, laches and inordinate and inexcusable delay.

15. It was further submitted by senior counsel for the defendant that the plaintiff's action should be dismissed because the plaintiff had given information to his own and to the defendant's medical expert, who had examined him for the purpose of or in contemplation of this personal injuries action. Senior counsel for the defendant submitted that the plaintiff had withheld vital information from Dr. Neil J. Brennan, who gave evidence in the case for the plaintiff and, Prof. Stephen J. Lane, who gave evidence in the case for the defendant, as to his extraordinarily high level of absenteeism from work during his employment by the defendant. Senior counsel for the defendant submitted that the plaintiff had failed to inform either expert that in the very important period, 1999 to the end of 2002, the plaintiff was absent from work as follows: in 1999, four weeks; in 2000, 24 weeks and three days; in 2001, 24 weeks and, in 2002, eight weeks. This information, senior counsel submitted, was vital to the experts in considering the extent of the plaintiff's alleged exposure to wood dust and in particular hard-wood dust. Senior counsel for the defendant submitted that both experts "were profoundly put on a wrong path by this highly egregious omission".

16. Prof. Lane in his report to the solicitors for the defendant dated the 25th November 2013, stated:-

> "He has no typical asthma risk factors. He was not chesty as a child, is non-atopic and there is no family history of asthma."

Prof. Lane told the court in cross examination that he invariably asked a patient, "have you any family history of asthma" or "does any person in your family have asthma". He was certain that he had put one or other of these questions to the plaintiff and had placed a mark in the "No" box in his original consultation notes. I accept the evidence of Prof. Lane that this information is very important in the diagnosis of asthma. In his letter to the plaintiff's solicitors dated the 11th December, 2002, Dr. Neil J. Brennan states, "one sister has asthma". When Prof. Lane's report was received the solicitors for the defendant immediately drew his attention to this statement and he corrected his report to that extent.

17. Unlike s. 26, there is no power given to this Court by s. 25 to dismiss a plaintiff's action for giving an instruction or information to an expert which is false or misleading in any material respect and which he or she knows to be false or misleading. This is most likely because such an instruction or information is not evidence given on oath in the course of a hearing or the subject of a verifying affidavit sworn prior to the commencement of a hearing. In any event, while both experts accepted that the plaintiff's levels of absenteeism were an important matter to be taken into account in arriving at a diagnosis of the plaintiff's condition neither considered that a knowledge of this information would have led them to reach a different opinion. The plaintiff's misstatement to Prof. Lane that there was no family history of asthma was immediately brought to his attention on receipt of his report. The only impact of the correction was to strengthen the diagnosis which he had already made on the basis that this typical asthma risk factor was not present in the plaintiff's case. If I were constrained to dismiss the plaintiff's action on these grounds, which I am satisfied I am not, I should in any event have declined to do so for these reasons.

18. Senior counsel for the defendant referred to the reply given on the 22nd October, 2012, to the defendant's request for further and better particulars dated the 12th December, 2012. The reply was as follows:-

> "7. The Plaintiff who is a non drinker and a non smoker noticed in 2000 that he was continuously short of breath and attended his General Practitioner in Ballingarry, Dr. Curtin who was concerned about this and referred him to a Respiratory Physician, Mr. Neil Brennan of the Mercy Hospital in Cork and he attended Mr. Brennan frequently following that initial examination."

19. In a letter to Dr. John T. Curtin, dated the 11th December, 2002, Dr. Neil J. Brennan stated:-

> "This man who is your patient was referred to me by Cleary and Cleary, his Solicitors, because of concern about his job."

In his evidence Dr. Curtin told the court that this was the first he knew about the matter and he had not been asked for details of the plaintiff's medical history. In addition, senior counsel for the defendant pointed out that the evidence established that the plaintiff had been seen on two occasions only by Dr. Brennan, - on the 10th December, 2002 and the 27th December, 2008, and on both occasions at the request of the plaintiff's solicitors. In his letter to the plaintiff's solicitors dated the 5th March, 2008, Dr. Brennan stated, - "I confirm that I have re-examined the above man today, 27th February, 08. I have not seen him for over five years". Senior counsel for the defendant referred to an Affidavit sworn on the 25th July, 2012, on behalf of the plaintiff in the course of an application to the County Registrar seeking to have the plaintiff's action transferred from the jurisdiction of the Circuit Court to this Court. At para. 3 of this affidavit, it is averred as follows:-

> "3. I say that the within, the Plaintiff had been employed by the Defendants at the Defendants factory for thirteen years and due to the injury received by him he was unable to qualify for the redundancy payment of €20,800. The total special damages are set out in the schedule attached."

20. The application was refused by the County Registrar on the 24th October, 2012. The defendant accepted that this item of claim was not advanced during the appeal to her Honour Judge Faherty on the 15th February, 2013, when an order transferring the proceedings to this Court was made.

21. Senior counsel for the defendants referred to an Affidavit sworn on behalf of the plaintiff on the 3rd April, 2012, for the purpose of the appeal from the Order of the County Registrar. At para. 3 of that affidavit it is stated, inter alia, that:-

> ". . . It is now ten years since the Plaintiff ceased work at the joinery and whilst his symptoms improved upon removing himself from exposure to hardwood dust, the Plaintiff continues to suffer from shortness of breath and wheeze on exertion. The Plaintiff was reviewed by a Consultant Respiratory Physician on the 19th July, 2011, and the Plaintiff's Consultant advised that he would require long term treatment with an inhaled corticosteroid to achieve satisfactory control of his asthma. . . ."

22. Senior counsel for the defendant submitted that the plaintiff was seen by Dr. Neil J. Brennan (who gave evidence that he retired in July 2009), on two occasions only. On the 10th December, 2012, Spirometry showed an F.E.V. of 74%. On the 27th February, 2008, the FEV baseline was found to be 71%. Senior counsel for the defendant submitted that this clearly indicated that the plaintiff's asthma had got much worse after he ceased working with the defendant. The plaintiff resigned from his employment with the defendant on the 24th April, 2003. From the 2nd January, 2003 to the 28th April, 2003, the plaintiff submitted fourteen medical certificates from Dr. Curtin stating that he was incapacitated from work due to "occupational asthma" and one such certificate citing "chest infection".

23. As part of the Special Damage the plaintiff also claimed €1,600 for loss of earnings for one month together with €550 for loss of overtime. The case was opened to me on that basis. However, this claim was abandoned, as it had to be abandoned, as the plaintiff was paid by the defendant until he resigned on the 28th April, 2003 and he commenced work with his present employers one week later. All these misstatements in the replies to particulars and in the affidavits sworn in the course of the transfer applications are greatly to be deprecated and ought not to have occurred. I accept however, what was admitted in open court that the claim for loss of redundancy entitlement arose from a misinterpretation of the legislation by the solicitors for the plaintiff. This claim was abandoned before the appeal from the Order of the County Registrar to her Honour Judge Faherty. The claim for loss of earnings and overtime was in effect disowned by the plaintiff himself in the course of his examination in chief. It was then immediately withdrawn. The other misstatements are made as part of the Indorsement of Claim on the Ordinary Civil Bill and in an affidavit sworn on the 3rd April, 2012, not by, but on behalf of the plaintiff in the course of the appeal from the Order of the County Registrar. While the plaintiff will not be permitted to disclaim or disown these misstatements I am not satisfied that even though it is stated that this affidavit is made "for and on behalf of the plaintiff and with the express authority thereof", that either the deponent or the plaintiff knew that this was misleading. While the plaintiff's asthma did not improve, but in fact got significantly worse on leaving the defendant's employment there may yet have been an improvement in his symptoms. In his report dated the 5th March, 2008, Dr. Brennan states:-

> "Essentially he has been doing reasonably well. He has changed his job to driving a track machine (excavator) there is no dust involved and if there is, he closes the windows. He has been doing this for three years and having no problems with it."

In fact the plaintiff had been doing it since approximately the second week of May 2003, for almost five years.

24. The misstatements in the Indorsement of Claim, that the plaintiff had been referred by Dr, Curtin to Mr. Brennan and, that he had attended Mr. Brennan frequently were manifestly incorrect by reference to Mr. Brennan's reports, in particular his report of the 11th December, 2002. Without condoning these misstatements in any way, I do not consider that they were in any material respect misleading as Mr. Brennan's reports were furnished to the solicitors for the defendant.

25. The court will therefore refuse to make an order dismissing the plaintiff's action on foot of s. 25 or s. 26 of the Civil Liability and Courts Act 2004.

26. I am satisfied on the evidence that the defendant's factory at Ballintaggart, Callan, Co. Kilkenny was rebuilt to the then highest standards in the woodworking industry in 2007 following a major fire. While the fixed exhaust/extractor system was, I find, both extensive and very powerful, the evidence established that it could not entirely eliminate all airborne wood dust in the area of the factory where woodcutting and machining was carried on. This area is known as the "machine shed" and will be so referred to for the remainder of this judgment. This is the area where the plaintiff worked for most, if not all, of his employment with the defendant from 1991 to 28th April, 2003. I am satisfied that this machine shed was and is an entirely self-contained area with no interconnection with any other part of the factory. The plaintiff started work with the defendant as an apprentice when he was sixteen years of age having left school after attaining the Group Certificate.

27. I find on the evidence that between 1991 and 1999, the plaintiff was principally engaged in cutting white deal and other soft-woods to precise lengths and dimensions for use in the mass manufacture of doors and windows. There was no evidence that the dust associated with this operation presented a foreseeable risk of injury to the plaintiff's health. It was not contested that in 1999 the defendant, in response to market trends in the construction industry at that time, began to use more hardwood – oak, teak and mahogany – in the construction of the doors and windows. Prior to that date, the plaintiff accepted that there had been some use of these hardwoods, but I am satisfied that such use was very limited.

28. From periodic health and safety assessments, which it is legally obliged to carry out, the defendant was or should reasonably have been aware that hardwood dust was then recognised as a probable or likely cause of occupational asthma by the medical profession and by those involved in the occupational health and safety sector. I am satisfied on the evidence that this was not just an advanced minority opinion, but since 1980 at least, had represented the mainstream opinion of that sector the medical profession dealing with respiratory complaints and allergies. I find that this was so, despite Prof. Lane's reservations that the basis for this belief was somewhat narrow as it depended upon research confined to Western Red Cedar (in fact a softwood) and Iroko (a tropical African hardwood).

29. Hardwood dust therefore represented a known, material and foreseeable risk to the health of persons working with those hardwoods. The defendant therefore owed a duty of care, by statute and at common law to its employees so engaged to take all reasonable care to provide them with a place of work and/or proper protective equipment sufficient to protect them from this risk of

injury through the inhalation of such dust. I find that the defendant failed to discharge this duty of care to the plaintiff by failing to provide him with a safe place of work and with effective protection in the form of a mask or respirator.

30. On some unidentified date in 1999 the plaintiff commenced working exclusively on two machines, a spindle moulder and a morticer using mostly hardwoods. He claimed that these machines, the former in particular, produced substantial quantities of dust. This was denied by the defendant.

31. I am satisfied on the evidence that the morticer produces some, but little dust. I am satisfied that this machine was not designed by its manufacturers to be linked directly into a factory exhaust/extractor system. I am satisfied that the chain cutters, (like a bicycle chain rotating in a vertical access with each link armed with two chisel-like blades), which cut square holes and tenons in wood produced some, but little wood dust, but considerable quantities of woodchips which were expelled to the left and right of the person operating the machine onto the factory floor. From there they were scrapped at intervals using a wooden paddle to reduce dust, into the floor-level opening of a large exhaust/extractor pipe otherwise kept closed by a metal door. I find on the evidence that a similar system was employed in all major woodworking factories in this State and in Great Britain.

32. I am satisfied on the evidence that the spindle moulder produced a substantial amount of fine woodchips and wood dust. The interchangeable cutting blades, mounted on a vertical drive shaft, rotated in a horizontal plane so that woodchips and dust were forcibly expelled into a metal basin behind the cutting blades and the steel wood guides of the machine. From here it was sucked directly into the fixed exhaust/extractor system of the factory by two large diameter flexible plastic pipes attached to the back of the machine. I am satisfied that this 75hp exhaust/extractor system had always to be working in tandem with the spindle moulder or the latter would rapidly clog up due to the quantity of woodchips and wood dust generated by it.

33. It was put in cross examination to Mr. Vincent O'Hara of Tony O'Keeffe and Partners, Consulting Engineers (a witness in the case for the plaintiff) and evidence-in-chief was given by Mr. Michael Delaney, financial and administration director of the defendant who has worked with that company since 1990, that a NISAST Report, prepared by Mr. Timothy O'Sullivan, a senior occupational hygienist, following an assessment carried out by him on or about the 5th December, 2005, stated that the level of total inhaler dust, (all dust inhaled through the nose and mouth) and of respiral dust (dust capable of penetrating into the lungs and alveoli) in the machine shed was well below the occupational exposure limits recommended by the Health and Safety Executive. Mr. O'Sullivan was not called in evidence by the defendant and this report was not admitted into evidence. Mr. Francis O'Toole, former managing director of the defendant from 1997 until his retirement four or five years ago, stated in cross examination that another similar report had been prepared in 2003. He said that the person who carried out the assessment and prepared that report was now unfortunately deceased. No report from this assessment in 2003 was produced or admitted into evidence. Mr. O'Toole accepted that he did not know if there had been any similar reports prepared between 1970 and 2003.

34. I can place no reliance whatsoever on this evidence other than to accept that such assessments were made and such reports were furnished. Mr. Delaney gave evidence that the same spindle moulder and morticer were in use on the 5th December, 2005, as had been in use during the period 1999 to 2003. Both these reports post date the period of the plaintiff's employment with the defendant. The court had no evidence as to the conditions in which or the methodology by which the tests were made or the results obtained or how the findings of 2003 and 2005 could be extrapolated back to prove the air quality in the machine shop throughout the period 1999 to the end of 2002.

35. The 14 photographs taken by the plaintiff in the machine shed, in he said, January 2003, (before he resigned from the defendant's employment on the 28th April, 2003, and after his first consultation with Dr. Neil J. Brennan on the 10th December 2002) undoubtedly show wood dust lying on the upper surfaces of pipes, girders, light covers and other flat and sloping surfaces in the machine shed. Some of these photographs also show dust adhering to the surface of the unrendered cement-block wall of the machine shed. I am satisfied that the plaintiff had to climb approximately 20 feet on a ladder to take most of these photographs.

36. Mr. Francis O'Toole told the court that this dust had been accumulating since the machine shed had been rebuilt in 1970. No inference can be drawn from these photographs other than that, as admitted, even the powerful exhaust/extractor system operating in this machine shed since 1970 was not capable of extracting all wood dust at source so that some escaped into the general air space of the machine shed. No photographs of either the spindle moulder or the morticer were produced by either the plaintiff or the defendant even though the Ordinary Civil Bill was served on the defendant on the 20th May, 2003, just three weeks after the plaintiff had resigned from his employment with them.

37. In his report sent to the plaintiff's solicitors on the 11th December, 2002, Mr. Neil J. Brennan records, something which the plaintiff must have told him, that:-

> "Before two months ago very little protection was worn, but in the last two months he was wearing a mask. This mask is difficult to wear because it is against his face, becomes very sweaty and he tends to take it off at times to catch he breath."

The plaintiff's evidence to the court at the hearing was that once he commenced working at the spindle moulder and the morticer machines, he wore a face mask for about 60% of the time. He stated that refill filters for these masks were not always available when he went to the store man, Mr. Jackie Kelly, to get them. He said that sometimes it could take a week or more before new filters became available. One of these masks was produced in evidence. It consists of a simple oval shaped gauze filter, 14.5mm wide by 11mm high, clipped to a very basic soft aluminium frame and held in place by an adjustable elasticated cord. The plaintiff said that it did not completely block out the wood dust which came in over the top of the filter and got into his nose and mouth.

38. Mr. Vincent O'Hara told the court that these masks did not provide a good fit or seal so as to prevent the inhalation of wood dust and therefore did not comply with the provisions of regulation 21 of the Health and Safety at Work (General Application) Regulations 1993, dealing with the provision of personal protection equipment. Mr. O'Hara referred the court to the United Kingdom Health and Safety Executive publication, first published in 1990, entitled "Respiratory Protective Equipment – a Practical Guide for Users", and he gave it as his opinion that the plaintiff should have been provided with at Disposable Filtering Face-Piece Respirator of the type illustrated at Fig. A3.1 of that publication. The texts accompanying this illustration provides as follows:-

> "RESPIRATORS
>
> Respirators give protection against dusts, gases and vapours by filtering the contaminated atmosphere before it is inhaled by the respirator wearer. They may be either:

(a) simple filtering devices (negative pressure respirators) where the wearer's lungs are used to draw air through the filter, or

(b) powered devices incorporating a battery-driven fan to draw air through the filters and deliver it to the wearer.

Respirators are available with filters which will remove dusts, gases or vapours from the atmosphere. In general, dust filters will give protection against any particulate matter, but gas and vapour filters will only remove substances for which they are specifically designed. (see main text, paras. 13 to 16).

Disposable filtering facepiece respirators

(Fig. A3.1)

These respirators are made wholly or substantially of filter material, which is moulded into a facepiece and covers the nose and mouth of the wearer. The facepiece is held in place with straps which may be adjustable. Air is drawn through the material of the facepiece by inhalation. On some models an exhalation valve is incorporated into the mask. Where there is no valve, exhaled air passes back through the filter material and around the edges of the facepiece. Filtering facepieces are mainly used for protection against dusts, although some models are also available for use against gases and vapours. For dusts and other particulates, 3 classes of disposable respirator are available . . . ."

39. In cross examination Mr. Delaney stated that in 2002, the defendant purchased masks of the A3.1 type recommended by Mr. O'Hara. This was too late for the plaintiff, who started to experience problems with shortness of breath and wheeze in June 2001, particularly when jogging. On the 10th October, 2002, Dr. Curtin wrote to Mr. John Casey who was then the factory manager as follows:-

"I reviewed John today and he appears to have an asthmatic condition which would be exacerbated by any dust and I would appreciate if you could supply him with a very good dust mask. We are starting him on inhalers today."

I am satisfied from an Invoice to the defendant from Kilkenny Welding Supplies Limited dated the 18th October, 2002, that a Safir Respirator Mask and dust filter cartridge was purchased by the defendant for use by the plaintiff. There was however, no evidence that the plaintiff ever used this mask. He was seen by Dr. Neil J. Brennan on the 10th December, 2002 and he did not return to work with the defendant after the Christmas holiday in 2002.

40. Mr. Delaney accepted that until 2002 the only type of mask provided for employees working in the machine shed was the type of mask produced in evidence and which was condemned as inadequate by Mr. O'Hara. Mr. Delaney stated that the company considered that the powerful extraction/exhaust system was sufficient to keep wood dust levels in the machine shed well below the recommended occupational exposure level and that therefore there was no requirement for individual dust masks. He said that no expert had recommended to the company that individual dust masks should be worn by employees in the machine shed. The company acknowledged that some people were sensitive to dust, so it provided the masks and left it to the decision of the individual employees working in the machine shed to wear the mask if they thought fit. The defendant's 1994 Safety Statement referred to the fact that:-

"Respiratory protection may be required in areas where a health hazard exists due to the accumulation of dust, fumes, mist or vapour."

41. Mr. Delaney gave evidence that the men working in the machine shed did in fact wear the dust masks while actually operating the machines. When they were not operating machines, he recalled that they allowed the masks to hang around their necks. This accords with the plaintiff's evidence that he wore the dust mask about 60% of the time. The plaintiff told Dr. Neil J. Brennan, as recorded by him in his report to the plaintiff's solicitors dated the 11th December, 2002, "that in the last two months he is wearing a mask", but "until then very little protection was worn". The plaintiff's evidence to the court was that he started to wear the dust mask provided by the defendant after he was transferred to work on the spindle moulder and morticer in 1999.

42. In my judgement, the evidence for the need for proper and effective dust masks in the machine shed was this entirely voluntary decision by the employees themselves to wear the dust mask while actually using the machines. I am satisfied that the reason for this is the fact that when actually operating the machines, the employees face is very near or over the work. It was not therefore an issue of the general air quality in the machine shed, but of the air quality within the proximate zone where woodchips and wood dust were being produced at great speed and force. The employees themselves, by their actions demonstrated that they considered that they needed effective dust masks while actually operating the machines. This should have been clear to the defendant had it been taking proper care for the safety of its employees in the course of their work.

43. The only type of dust mask provided by the defendant to the plaintiff was, I find, for the reasons I have already given, ineffective to provide proper protection against the inhalation of hardwood dust. This should have been known to the defendant prior to 2002. The defendant knew or ought reasonably to have known that the employees were dealing with a recognised cause of occupational asthma so that the risk to them from ineffectual dust masks was clearly foreseeable. The plaintiff's evidence of supplies of filters for the type of dust mask available before 2002 not being constantly available is, if true, really irrelevant as I am satisfied that these masks were ineffective to prevent or even decisively reduce the inhalation of hardwood dust. A prudent and careful employer would have noted that despite the extractor/exhaust system in operation in the machine shed, the employees themselves considered that they needed to use and did in fact use a dust mask when actually operating the machines and the defendant in discharge of its legal and statutory duty to provide a safe place of work and proper protective equipment for its employees should have ensured that the employees were provided with proper effective dust masks. I am satisfied on the evidence that such masks were readily available in 1990 and were inexpensive to provide.

44. Therefore I find that the defendant was guilty of negligence, breach of duty and breach of statutory duty in this case. I do not find the plaintiff guilty of the contributory negligence alleged in the defence. I am satisfied that he did wear the type of dust mask provided, at least from 1999 onwards while actually using the spindle moulder and the morticer and that he did not fail to take sufficient care for his own safety or fail to exercise due care and attention.

45. A key issue in this case, was whether the inhalation of hardwood dust between some unidentified date in 1999 and June 2001 caused the plaintiff's asthma. Dr. Neil J. Brennan concluded that the plaintiff suffering from occupational asthma caused by the inhalation of hardwood dust. Prof. Stephen J. Lane is of a contrary opinion and considers that the plaintiff suffers from common asthma which was exacerbated for a time by his exposure to hardwood dust.

46. In *Best v. Wellcome Foundation Incorporated* [1993] 3 I.R. 421, (Supreme Court) Finlay C.J. held as follows at p. 462:

> "I am satisfied that it is not possible either for a judge of trial or for an appellate court to take upon itself the role of a determining scientific authority resolving disputes between distinguished scientists in a particular line of technical expertise. The function which a court can and must perform in the trial of a case in order to achieve a just result is to apply common sense and a careful understanding of the logic and likelihood of events to competing opinions and conflicting theories concerning a matter of this kind."

I am satisfied that I must adopt this approach in the present case.

47. I am not satisfied on the balance of probabilities that the exposure of the plaintiff to dust, in particular hardwood dust in the period 1999 to 2002, inclusive, during the course of his employment with the defendant, caused the asthma from which he undoubtedly suffers. The fact that the plaintiff started to complain within two years of his being changed to the spindle moulder and the morticer machines working principally if not exclusively with hardwoods is important. Prof. Lane in his report dated the 25th November, 2013, to the solicitors for the defendants states:-

> "The vast majority of occupational asthma cases occur within two years of commencing employment. . . ."

48. I find that his complaining within this timeframe indicates that there was some proximate connection between this work and the plaintiff's asthma. I consider it significant that out of a workforce of between 20 and 30 persons employed in the machine shed in the period of 1971 to 2003, and even since, the plaintiff alone developed asthma. The fact that a blood relative in the first degree, his full sister, has suffered from asthma since infancy renders it more likely that this polygenetic condition from which both suffer was inherited. Dr. Carmel Condon on the 23rd August, 1999, formed the impression that the plaintiff was then suffering from exercise induced asthma. Prof. Lane pointed out that this should not be read as inferring that the plaintiff's asthma was caused by exercise, though he said this can occur in very rare cases amongst top level athletes. I am satisfied on the evidence that at this date the plaintiff could not have been exposed to hardwood dust for a sufficient time or in sufficient quantities to cause occupational asthma. I am satisfied on the evidence of Prof. Lane that occupational asthma is not caused by a single catastrophic exposure as for instance as might occur in the case of exposure to sulphuric acid fumes. It will further be recalled that in his letter to the then factory manager dated the 10th October, 2002, Dr. Curtin wrote:-

> "He appears to have an asthmatic condition which would be exacerbated by any dust."

49. I find that after the plaintiff *de facto* left the employment of the defendant at Christmas 2002, contrary to both what Dr. Brennan and Prof. Lane expected and, to what I am satisfied is considered to be a key feature of occupational asthma, his condition did not improve, but in fact disimproved very significantly. I am satisfied on the evidence that this is consistent with poorly controlled common asthma, where the sufferer does not fully appreciate the seriousness of his or her condition, but is inconsistent with occupational asthma. Despite changing to outdoor work in May 2003, - drive tracked excavators and a JCB digger, in 2005 and again in 2013 the plaintiff's asthma was found on medical and scientific testing by D. Brennan and Prof. Lane respectively to have seriously worsened. Prof. Lane told the court that when he examined the plaintiff on the 21st November, 2013, he considered his asthma to be possibly life threatening. I accept the opinion of Prof Lane that his situation was indicative of poorly controlled common asthma but not of occupational asthma.

50. I find on the balance of probabilities that the plaintiff's asthma was not caused by any negligence, breach of duty or breach of statutory duty on the part of the defendant. I am however satisfied that his common asthma was exacerbated for a period by the inhalation of hardwood dust due to the negligence, breach of duty and breach of statutory duty of the defendant.

51. I find, on the evidence that the onset of symptoms occurred in June 2001, when the plaintiff began to notice shortness of breath and wheezing while jogging. Though Dr. Condon formed the impression that the plaintiff was suffering from exercise induced asthma on the 23rd August, 1999, I am satisfied on the balance of probabilities that in June 2001, the breathlessness and wheezing was due to the exacerbation of his common asthma by the inhalation of hardwood dust.

52. I find that the plaintiff suffered a mild to moderate exacerbation of his common asthma in June 2001, which began to diminish after he de facto left the employment of the defendant at Christmas 2002. After the 17th April, 2003, he was no longer certified unfit for work due to "occupational asthma" by Dr. Curtin. The evidence established that he had no difficulty in carrying out his work with his present employer and there was no suggestion of any further absences for work due to asthma. His review by Dr. Neil J. Brennan on the 27th February, 2008, was at the behest of his solicitors in connection with the present action. His ability to exercise and to participate at club level in hurling and football may well have been affected during this period by breathlessness and wheezing. The plaintiff on the balance of probabilities most likely suffered discomfort, some pain and anxiety. Prof. Lane found the plaintiff to be completely non-allergic both clinically and on skin allergy testing and he did not have sinusitis, or hay fever or any other form of upper airway symptomatology. I find on the balance of probabilities that any asthma symptoms which the plaintiff has experienced since, at the latest, the end of 2003, are solely due to the fact as found by Prof. Lane that his asthma was very poorly controlled and that he used his inhalers only when symptomatic and not as preventative therapy.

53. The court will award the plaintiff generals damages in the sum of €35,000. There will be a further award of €1,500 in respect of Special Damage. There will therefore be an order in favour of the plaintiff in the sum of €36,500 together with appropriate costs.