Neutral Citation [2015] IEHC 762

THE HIGH COURT

[2009 No. 7651 P.]

BETWEEN

MOHAMMED ALI SALEH

PLAINTIFF

AND

MOYVALLEY MEATS (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Cross delivered on the 3rd day of December, 2015

1. The plaintiff was born on 27th February, 1966, and is a married man with adult children. He brings this action as a result of an injury allegedly suffered in the course of his employment with the defendants on 11th January, 2007. A full defence has been filed by the defendants and all matters including the plaintiff's credibility have been put in issue.

2. The plaintiff was born in Egypt and was working in a family butcher shop when he and eleven other butchers were recruited by the defendant to come to Ireland to work as butchers/slaughter hall operatives in the defendant's factory. In Egypt, the plaintiff had worked as a butcher in a shop whereas in Ireland the plaintiff was working as an operative in the slaughter hall of the defendant's meat processing factory.

3. Cattle and sheep are slaughtered and eviscerated in the defendant's slaughter hall to produce sides of animals and are then transferred to a chill room in the factory. The slaughtered animals are suspended on an overhead rail and transported to fixed work stations. Each operative performs different tasks at different work stations and the carcases are then transferred by the overhead rail onto the next station and the operative proceeds to deal with the next carcase.

4. There is some dispute as to the speed and the volume of carcases concerned. The plaintiff believes that at the time of the accident, he was dealing with beef and he had only fifty seconds to finish his task. I accept the evidence from the defendant's witness, Mr. McNamara, that on the occasion of the accident, the time between carcases would have been somewhat longer. It remains to be said, however, that the system was one that required each operative to deal speedily with the task in hand.

5. Initially, the plaintiff was assigned to work at a stomach removal work station at which he worked for some two years. Subsequently, he was reassigned to work at a station known as the "pluck" removal work station.

6. The pluck removal station comprised of a stand with open (grippy) threads. The floor of the platform was some 4ft 2inches above ground level. The carcases were hanging from the overhead rail conveyed to the work station approximately 1ft 2 inches in front of the stand. The operative standing on the platform was required to reach forward to the carcase and begin the task of removing the pluck from the carcase which was suspended from the overhead rail in front of him. The operative started the task of removing the pluck standing in an upright position and he concluded the task bent forward to below the waist. While cutting, the operative held the pluck in one hand and cut with the other. Once the pluck was freed from the carcase with the trachea being cut, the operative was required to lift the pluck from the carcase and twist and turn through some 180 degrees and placed the pluck upon a hook some 2ft from the back edge of the platform. The operative had to lift the pluck over a railing and stretch out to attach it onto the hook. The pluck, itself, was not very heavy but it was slippery and somewhat awkward and bloody and gloves were required to be worn by the operative.

7. The plaintiff was assigned to the pluck removal work station for approximately three and a half years. He says and I accept that he made complaints to the defendant that he was suffering some back strain as a result of working at the pluck station and he was moved to the "spinal cord removal" work station in June 2005. The defendant denies that any representations were made in relation to the plaintiff's back and contend that he was moved for operational reasons. As stated, I accept that the plaintiff did make complaints about his back and it is not clear to me or indeed relevant as to why he was moved.

8. The spinal cord removal work station involved lighter work which, in particular, did not involve the turning of 180 degrees and the stretching manoeuvre at his previous station. I accept that from time to time after he had been officially moved to the "spinal cord removal" work station, the plaintiff was required to work at the pluck removal work station when other staff were absent from the factory.

9. I also accept that the plaintiff was instructed to work at the pluck removal work station on 11th January, 2007. The defendant denies that this is so because they do not have a record of it. The relevant witness who might have supported the defendant's contention was not called to give evidence however.

10. The plaintiff complains that as he was working at the pluck removal station performing the tasks as outlined above that he sustained a pain in his back and requested to be brought to the doctor and this was initially refused but was taken to the doctor who was the company's doctor subsequently in the day and a diagnosis of disc prolapse of his lumbar spine with sciatica was made.

Liability

11. The plaintiff contends the system of work provided by the defendant at the pluck removal station was unsafe. At the time of the engineering inspection, the system in operation at the pluck removal station had been changed. The plaintiff believes that it was changed because of the accident and the dangers inherent thereto. Undoubtedly, the system as at present operates is, in accordance with the evidence of Mr. Semple, the plaintiff's engineer, which I accept far less strenuous than the system that was in place in 2007. The system now in place does not involve the twisting and turning manoeuvre but rather the pluck is dropped onto a moving "conveyor belt" which runs below the raised platform. The defendant says that the system was changed for operational reasons. In any event, given the fact that the defendant denies knowledge of the accident occurring in the manner that the plaintiff

has alleged or at all, I doubt that the plaintiff's accident was the cause of the alteration. An alteration in the work system post an accident is not, necessarily, of any great relevance as to the negligence at the time of the accident. What is at issue in this case as in every other such case is whether the employer was negligent or in breach of statutory duty at the time. It may be that a particular accident causes a change in the system of work because a diligent employer realises that improvements can and ought to be made. It may also be that after a particular accident if no improvements are made that liability would attach to a defendant for a subsequent similar accident. None of those considerations are relevant to this case and this case must be examined as to the safety or otherwise of the system in place at the time of the accident.

12. The plaintiff contends that the system was unsafe: firstly that there was a breach of ss. 6(1) and 6(2)(d) of the Safety, Health and Welfare at Work Act 1989, and ss. 8(1) and 8(2)(d) of the Safety, Health and Welfare at Work Act 2005, and of Regulation 28(a) of Safety, Health and Welfare at Work (General Application) Regulation 1993. Under this heading, the plaintiff contends that the negligence and breach of duty that the defendant failed to have in place in 2007, the safer system of work that they put in place subsequent to the accident, and in particular that they failed to have in place a system that did not require the plaintiff to engage in the twisting manoeuvre, as described above.

13. Secondly, the plaintiff condemns the defendant's system of work for their failure to properly instruct or train the plaintiff.

14. The plaintiff's case in relation to training is that when he first went to work in the pluck station, he worked with an employee for some two weeks who showed him how to do the task to remove the pluck and to hang it on the hook but the defendant did not provide any training in relation to the lifting or twisting manoeuvre, as described. The plaintiff complains a breach of s. 6(2)(e) of the 1989 Act.

15. In this regard, the plaintiff relies upon the evidence of Mr. Searson who said that an operative performing the operation in the manner that you normally do, i.e. rotating your spine while carrying the load is a dangerous operation. The operative ought to have been told that he must rotate on the balls of his feet so that his hips and shoulders were kept in the correct and ergonomic position and to be as close as possible to the railing with the feet approaching the rail.

16. The plaintiff further submits that the defendant was negligent in requiring the plaintiff to work on the pluck removal station on 11th January, 2007, when they knew or ought to have known that he was suffering from back pain when he was required to work on the pluck removal work station. I accept that the plaintiff had made complaints, in particular to Mr. Daly in the past about back problems in relation to the pluck station but I do not accept that the plaintiff complained about his back on the morning he was sent to the pluck station (Day 1, 24 line 16).

17. The defendant denies that any accident occurred as is alleged by the plaintiff denied that he was required to work on the pluck station on the day at all and deny that the plaintiff's injuries are, in accordance, with his evidence or that he suffered any significant injury at all. The defendant also maintains that the "on the job" training, as described above was adequate.

18. The question of the plaintiff's injuries will be discussed later but dealing with liability as well as the injuries, the defendant adopts the conclusion of their medical expert, Mr. Hutchinson, in relation to the plaintiff "given his lack of truthfulness about his disability, it is difficult to accept anything that he states about his ongoing symptoms as being accurate" and the defendant submits and concludes that (this) "neatly encapsulates not just the medical evidence but the entirety of the evidence before the court".

19. In particular, the defendant in their submissions point to what they describe as a significant number of "inconsistencies, evasions and exaggerations" in the plaintiff's evidence. The defendant complains that the plaintiff failed to call corroborating evidence from fellow workers as to the way the factory was managed.

20. The defendant also states that in the personal injuries summons, the case made by the plaintiff was different from the case now being made i.e. in the plenary summons, the plaintiff pleaded, *inter alia*:-

> "In the course of his employment with the defendant, the plaintiff was required by the defendant to work continuously and repetitively under severe time constraints, filleting and lifting the organs and innards from carcases of meat for approximately nine hours per day."

21. The defendant accepts that it is the case that the plaintiff did make the case as to inadequate training and identified the injury as being caused on 11th January, 2007. However, the defendant contends that the plaintiff's claim emerged in June 2013, some six years and six months after the accident, shortly after the plaintiff's engineer, Mr. Semple, inspected the premises.

22. The plaintiff's original engineer passed away and Mr. Semple was engaged and it was only after a motion before the High Court required inspection facilities to be provided that the plaintiff and his engineer and translator were allowed to inspect the factory on 1st March, 2013.

23. The defendant does not make the contention that they are in any way misled and cannot defend the action rather they are complaining that the plaintiff is bound by the action as pleaded and has now substantially changed the grounds of his case. I do not accept that submission.

24. The plaintiff, at all stages, makes the case that when working at the "pluck station", this work was strenuous. At all times, he made the case that the injury occurred in January 2007. It is not surprising that the legal case is only refined after inspections and reporting. It is to be regretted that it required a motion before the High Court to facilitate this.

25. I have carefully examined all the alleged "inconsistencies, evasion and exaggerations" which are referred to by the defendant in their learned submissions and I do not accept the conclusions made out for them by counsel for the defendant.

26. Considerable difficulties in this case were caused, not through any fault of either party, but before the accident and after the accident in the court proceedings by the fact that the plaintiff has not a command of English and that his evidence required a translator. I would add at this time that the translator who performed in a highly professional manner and was of great assistance to the court. But while the plaintiff was working with the defendant, communication with his superiors was only possible with the aid of one Egyptian co-worker.

27. I do not find that the plaintiff has made a substantially different case in evidence than in pleadings and I note that the defendants are not, in any way, prejudiced though they make a different point in this regard. Neither do I find that the fact that there were some inconsistencies in evidence between the plaintiff's and defendant's witnesses, some of which was not challenged by

the plaintiff in the course of the trial is ground for the defence as suggested in this regard. Both parties chose not to call as witnesses a number of persons who had been listed in their schedule. This is an entirely usual course of action. The plaintiff gave evidence of the fact of the accident and no witness contradicted him on this particular point. Therefore, I hold that there was no need for the plaintiff to call any of the scheduled fellow workers to corroborate that, in respect of which, no evidence has been proffered to deny.

28. It is clear that the plaintiff had and still has grievances against his employers for not heeding his complaints in relation to his back for not facilitating him going to his doctor and for their attitude to him after the accident. And undoubtedly, this grievance was translated into some indignation on his part. The issues in this case, however, are not any grievances the plaintiff may have with his employer but whether his employers were negligent at the time.

29. To return to the allegations of negligence and breach of statutory duty alleged by the plaintiff:-

> (a) I do not find that the fact that the defendant subsequently changed their system to a safer one, of itself, is grounds for a finding against them. Undoubtedly, the present system is much less strenuous for operatives and undoubtedly they have, pursuant to s. 8(2)(d) of the 2005 Act, an obligation, *inter alia*, to revise their system of work, to make it safe, but I do not believe that the plaintiff has made out a case that in 2007, the operation of the system of work, assuming that the system was safely operated, was negligent or in breach of statutory duty.
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> (b) I accept the plaintiff's submissions that the defendant did not properly train the plaintiff in the task. I accept Mr. Searson's evidence of what sort of training would be required and that putting the plaintiff to watch a fellow employee do the job without any instructions as to the safe method of performing the turning and twisting manoeuvre was entirely inadequate. I find that the defendant in this regard was negligent and indeed in breach of statutory duty. The defendant operated a system in 2007 that required specific training of its operatives at the pluck station in the manner as suggested by Mr. Semple in order that the system could be operated safely and for the failure to have such a system in place, the defendant must be liable.
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> (c) After some hesitation, I do not believe that the plaintiff's case against the defendant that they were negligent in assigning the plaintiff to work on the pluck station knowing that he had a sore back has been made out. I accept that the plaintiff had previously complained about his back while working on the pluck station but I do not find that the plaintiff has made out the case that require him to work on the pluck station on 11th January, 2007, of itself, was negligent.

30. What was negligent and in breach of statutory duty was the defendant's failure to properly train the plaintiff or at all in what ought to have been his correct posture to avoid strain.

31. For the reasons as outlined above, the plaintiff has not been adequately trained, I do not find any contributory negligence.

Quantum
32. I must consider the quantum of this case under the heading of compensatory damages and possible aggravated/exemplary damages.

Compensatory Damages
33. The plaintiff was brought to the defendant's doctor, who did not record any specific accident or incident but diagnosed disc prolapse. The plaintiff had an MRI examination, in Egypt, which did, indeed, reveal left sided L4/5 disc prolapse. Urgent decompression was performed in Ireland. Unfortunately, the plaintiff developed a recurrent disc prolapse and required a second decompression. The plaintiff has been diagnosed by Mr. Frank Chambers as have suffered from "what is deemed a failed back syndrome with persistent back and leg pain and associated foot weakness despite maximum treatment including surgical and medical". Dr. Chambers advises that the condition usually carries a bad prognosis and that it has plateaued and would anticipate little change in the future. The plaintiff presents as a person who has been radically compromised with what occurred. He walks with two crutches. He is unable to work and will be unable to work into the future and he has a miserable existence. He spends most of the day at home and his marital relationship has suffered. He has been depressed.

34. Dr. Pearce Maloney, General Practitioner, who acts as the company doctor gave evidence on behalf of the defendant confirmed that contrary to the plaintiff's belief, it is not only persons who suffer injuries from cuts etc that are referred to from the defendant's factory but other injuries as well. Dr. Maloney gave evidence from his practice notes that on 11th January, 2007, the plaintiff attended at his practice and was seen by his partner presenting with left leg pain and commenting that he had pain in his back for the previous two months. The doctor recorded "[he] seems to have had this for some times query two months heavy left leg". Dr. Maloney then saw the plaintiff on the next day and he indicated that he had some symptoms for the previous two months but he suffered severe pain on 11th.

35. I do not see the general practitioner's notes as being contrary to the story as given by the plaintiff. I accept that the plaintiff was suffering from some back pain from time to time before January 2007. Indeed, this is the case that he made himself in that because of previous pain he had asked to be moved. I do not believe that the function of doctors in their note taking is to act as private investigators and in particular, given the translation difficulties, a literal parsing and analysing of the doctor's medical notes is of little assistance.

36. The plaintiff was recommended to have an MRI scan and this he had performed in Egypt as it was both quicker and cheaper to be done than in Ireland. The defendant submitted that the Egyptian medical report does not refer to an accident or a particular incident. That is true. The purpose of the MRI scan report is to record what was found and the scan recorded that the plaintiff had damaged his disc. The Egyptian physician had no function in obtaining evidence of the cause of the plaintiff's disc damage but merely to correctly record the findings of the scan.

37. Oral evidence was given in this matter by Dr. Pearce Maloney, as stated on behalf of the defendant and by Dr. Frank Chambers on behalf of the plaintiff. The other medical evidence was given through various reports that were handed into court.

38. The plaintiff was referred to Dr. Chambers, Consultant in Anaesthesia and Pain Medicine by Mr. Keith Synnott, Orthopaedic Surgeon. He was referred to Dr. Chambers in December 2007, after two unsuccessful operations on his back. The first operation consisted of disc removal and decompression and the second a laminectomy. Dr. Chambers stated that between 60 and 80% of patients, on an optimistic basis can get relief from surgery and that 20% - 30% are left with consistent back and/or leg pain. In a number of patients after operations, symptoms can get worse. This is what lay people call a "failed back" but as Dr. Chambers said the surgery is successful but the plaintiff is left with persistent pain after.

39. The plaintiff also suffered from significant mood disturbance and depression. Dr. Chambers found diminished knee reflex which, as he stated, is an objective finding. The plaintiff also was found to have clinical evidence of "foot drop" with weakness in flexion and dorsiflexion and wore an ankle brace to support his foot. Dr. Chambers described these symptoms as being "semi objective". The plaintiff was given courses of infusion which required a day case admission and Dr. Chambers considered that there is a possibility that the plaintiff will require spinal cord stimulation. The plaintiff is not happy to proceed on that basis and Dr. Chambers was in agreement that there are risks involved and the procedure is less successful with back than neck pain.

40. The system of spinal stimulation was described and requires insertion into the spine of a stimulator which requires to be electrically charged and changed from time to time and that patients for such procedure require to be psychologically assessed as to their suitability and Dr. Chambers was not of the view that the plaintiff would have been necessarily sufficiently robust to undergo that procedure. Dr. Fitzgerald is also the view that the plaintiff is not fit to return to his occupation involving physical work or any physical work.

41. The plaintiff wears two crutches, which he states are necessary in order for him to mobilise. In this necessity, he was supported by members of his family. The plaintiff was cross examined as to his need for crutches and the defendant's medical experts in their reports did not believe that the plaintiff would need crutches. No evidence was given to contradict the plaintiff or his family members that he, in fact, uses crutches fairly constantly.

42. The principle issue in relation to damages is that of causation and of seriousness. Dr. Chambers believed that the type of work that the plaintiff performed can cause the injuries that he suffered from. Dr. Chambers was of the view that the symptoms that the plaintiff displays are described as "bio psychosocial and functional" and did not accept the view of the defendant's expert, Mr. McManus, in effect, that the plaintiff was faking his symptoms. Dr. Chambers is of the view that the plaintiff will not be able to return to work and is not of the view that the plaintiff is going to improve.

43. Mr. Frank McManus, on behalf of the defendant, found that some of the findings on the plaintiff were anatomically contradictory. Mr. McManus believes that there is significant functional overlay in the plaintiff's residual symptoms and that he would improve if he would actively exercise. In essence, Mr. McManus in his various reports does not accept the plaintiff's complaints and in this regard he is strongly supported by the defendant's neurologist, Mr. Michael Hutchinson who stated:-

> "When examined on 25th March, 2015, he has evidence of some wasting of the muscles in the posterior compartment of the left lower leg; this is visible on inspection and the circumference of the left lower leg is 1.5cm less than on the right. The problem here is that as he is presenting with a presumed disability with a bizarre gait disorder which cannot be explained by any organic disorder of the nerve roots…these neurological symptoms/signs are fictitious. I would accept that he probably does have some residual sensory loss in the left foot (he mentioned an unpleasant sensation on the sole of his left foot). I would also accept that he has had an injury at some stage the L5 and/or S1 nerve roots given the mild wasting of his left calf…this is either a consciously acquired deficit, malingering or, which is highly unlikely, subconscious conversion disorder…due a mechanism whereby deep seated physiological symptomology manifests as physical symptoms unbeknownst to the patient…"

44. And as quoted earlier in this decision, Dr. Hutchinson is of the view, in fact, that the plaintiff is malingering.

45. It is noteworthy that the plaintiff undoubtedly would have been observed by private investigators by the defendant but no evidence was called to dispute the fact that the plaintiff walks with crutches. If he is malingering then he is an entirely consistent malingerer and has been since the proceedings.

46. All the evidence supports that the plaintiff had a disc injury. I accept that this injury is as a result of his employment and that the plaintiff had some back problems before January 2007, about which he made complaint but that the acute injury was caused by the accident as he described it. Mr. Synnott and Dr. Chambers have diagnosed the plaintiff as having chronic pain syndrome.

47. Mr. Synnott accepted that there was some functional overlay in the plaintiff's symptoms. I accept Mr. Synnott's view in this regard. My task is to decide whether the plaintiff is malingering or if there is a psychological basis for his presentation.

48. Dr. Seán Ó Domhnaill, Psychiatrist, on behalf of the plaintiff states that there are physical and psychological contributory factors to the plaintiff's condition and whereas psychotherapy for chronic pain would be normally suggested given the language difficulties the plaintiff does not seem to be a good candidate for this.

49. Dr. Enda Hayden, Psychiatrist, again on behalf of the plaintiff agrees with Dr. Ó Domhnaill, and has concluded that there will be a significant psychiatric morbidity including depressed mood, loss of interest, loss of enjoyment, irritability, impaired sleep and decreased social and occupational function. Dr. Hayden recorded the plaintiff as being optimistic that his mood would improve but the psychiatrist is not so optimistic. In dealing with the observations from the defendant's experts, Dr. Ó Domhnaill stated in a supplementary report and agreed that there is a small but not significant functional component, a non-organic component in the plaintiff's current presentation and that the plaintiff has an Adjustment Disorder and is a mixed, anxious and depressive type and that his worsening "functional" presentation reflects the chronic stress now associated with the case. Resolution of the case will, he hopes, eliminate much of the anxiety component and Dr. Ó Domhnaill is certain that the plaintiff is not attempting to mislead and malinger. In this regard, Dr. Ó Domhnaill states:-

> "For certain he is not attempting to mislead or malinger. He has a firm and legitimate basis for his complaint. The plaintiff's medical attendant – Mr. Keith Synnott and Dr. Frank Chambers – have certified him as suffering from chronic pain syndrome and failed back surgery syndrome. So, there is a well defined ground for him to have the difficulties he says he has. It may be, he thinks, he is worse than he actually is. Every patient reacts differently to pain. I believe that this patient genuinely believes that he suffers as he complains. This explains his ongoing use of crutches and other matters for which there may not be a precise organic explanation."
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> Dr. Ó Domhnaill urgently recommends Cognitive Behavioural Therapy.

50. I do not accept that the plaintiff is a malingerer. I find that the plaintiff's treating doctor's assessment of the plaintiff is correct. The plaintiff is a somewhat anxious type of individual who had certain back problems as he stated for some time prior to the accident. He was, on the date of the accident, put to work at the pluck station against his wishes and he suffered an acute incident which resulted in two operations which did not relieve his pain and is left with a chronic pain and significant psychiatric mood problems. He is unlikely to improve physically. He will not be able to work into the future. He will have great difficulty in benefiting from Cognitive Behavioural Therapy or counselling due to his English language difficulties. Accordingly, I accept Dr. Hayden's gloomy view as to his

psychiatric future.

51. It is, in this regard, that his damages must be assessed.

52. The plaintiff is entitled to general damages for pain and suffering to date and into the future. The plaintiff is also entitled to loss of earnings to date and into the future. The net loss of earnings calculated to date at nearly €160,000, this is before any Social Welfare or other deductions. I have not been given any submissions in relation to loss of earnings and I note disability allowances and illness benefits have been paid totalling over €94,000.

53. I will allow €65,000 loss of earnings to date.

54. I was advised that I would be furnished with a actuary's report but this was not done and I note that the net loss per week is approximately €384 and doing the best I can and allowing for Social Welfare payments, the plaintiff probably has a net loss of about €200 per week, I will allow €100,000 damages for loss of earnings into the future, taking into account the principles outlined in *Ready v. Bates*. No other special damages arise.

55. In relation to general damages, the plaintiff has been severely compromised by what occurred and his condition is essentially permanent.

56. I will allow €175,000 for general damages to date and €75,000 general damages into the future. To this should be added, the loss of earnings to date and into the future totalling together the sum of €415,000 as being the compensatory damages due to the plaintiff which I deem to be fair and reasonable.

57. I am obliged, in my determination, in relation to damages to have reference to the Personal Injury Board Book of Quantum. I do not believe it is necessary in every decision in personal injury cases to refer to this obligation. However, in this case for the avoidance of doubt, I do not find that the Book of Quantum, which is considerably out of date, is of assistance to me in my task.

Aggravated or Exemplary Damages

58. The plaintiff contends that given the nature of the defendant's defence, and the hurt that the allegations of malingering, the plaintiff is entitled and should be awarded aggravated or exemplary damages.

59. Aggravated damages are damages to compensate the plaintiff by reason of the manner in which the wrong was committed or the conduct of the wrongdoer after the commission of the wrong such as a refusal to apologise or the conduct of the wrongdoer in the defence of the action. Aggravated damages may be awarded in tort actions for negligence – see *Philips v. Ryan* [2005] 4 I.R. 241. Exemplary damages is marked the court's disapproval of the defendant's conduct and to punish the defendant for such conduct.

60. The defendant in this case has not relied upon the provisions of s. 26 of the 2004 Act which states as follows:-

> "(1) If… 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
>
> (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.
>
> …
>
> (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."

61. I do not believe that a plea under the 2004, of necessity, must always be made in the pleadings as proof of fraud or intention to mislead can arise from the nature of the evidence. Similarly, a plaintiff need not plead aggravated or exemplary damages in order to be awarded them if the entitlement arises due to the conduct of the case by the defendant. In this case, the submissions on behalf of the defendant do not refer to the 2004 Act but suggest that I should invoke the discretion of the court as pronounced by the Supreme Court in *Shelly Morris v. Bus Atha Cliath* [2003] 3 I.R. 232 and *Vesey v. Bus Éireann* [2001] I.R. 192. These cases, of course, predated the 2004 Act, and I was invited to dismiss the plaintiff's case on the basis that the plaintiff as in *Shelly Morris* and *Vesey* did not discharge the evidence in a truthful and straightforward manner. Though the word "fraud" was not used by the defendant in their submissions. The entirety of the defendant's defence in this case, as well as their submissions and the medical evidence that they adduced, is, in effect, to brand the plaintiff's claim as fraudulent and it follows that the defendant contends that the plaintiff has been engaged in a criminal act.

62. In my decision, I have rejected the defendant's submissions but the plaintiff now urges that I should include in my award an element of exemplary or aggravated damages, the defendant's case was that the plaintiff was lying when he said he was working on the pluck station, was lying when he said he complained to Mr. Daly when he was told to work on pluck station on 11th January, 2007, and is lying in relation to his injuries.

63. In my decision, in *Lackey v. Kavanagh* [2013] IEHC 341, I referred to the facts that since the introduction of the 2004 Act, which on its face impacts disproportionally on a plaintiff than on a defendant that the issue of aggravated/exemplary damages must:-

> "Always be in the mind of a court where it is alleged that the plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invoking the provisions of s. 26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent in an irresponsible or indeed an overenthusiastic invocation of such a plea. I believe the court should be, at least, as vigorous as they were of old when such a defence is maintained".

64. The fact that the defendant in this case has not invoked the provisions of the 2004 Act but rather have called on me to dismiss the plaintiff's claim on the basis of alleged deliberate falsehoods is not really relevant and the same principles should apply.

65. In this case, I have found that the defendant's pleas are wrong. I believe that the defendant's view of this case was probably inspired or confirmed by the enthusiastic medical reports of Mr. McManus and more emphatically Mr. Hutchinson. I have no doubt they had the plaintiff under observation over extensive periods of time, the defendant knew that the plaintiff was, at all times, acting in a manner consistent with the evidence he gave. Accordingly, other than their medical reports, the defendants had no other evidence to maintain their allegations of malingering and untruths. Similarly, the defendant did not call the one witness who could have directly contradicted the plaintiff in relation to the placing of the plaintiff where he was at the time of the accident and yet, notwithstanding the fact they did not call this witness, they vigorously maintained that the plaintiff was not truthful or accurate in his evidence, as to the fact of the accident, the station he was working at the date of the accident and as to the genuineness of his complaints.

66. The 2004 Act cannot be invoked against the plaintiff unless the plaintiff knows the evidence to be false or misleading and it is probable, in practice, that the section will be rarely successfully invoked. It remains to be said, however, that pleas or allegations that are in effect allegations of fraud against plaintiffs when they are made without justification should not go unpunished.

67. I fully accept that it is reasonable to give parties in civil litigation latitude to make their case in a robust manner. Indeed, such latitude is necessary to enable the parties to join issue on what is between them. But as I stated in *Lackey*, the courts must be vigilant in not allowing irresponsible or overenthusiastic invocations of such pleas. It is not new or startling to suggest that any allegation of fraud is made on peril and should not be made unless, at the very least, there is strong evidence to sustain it. The only thing that might be considered startling is that this antique rule should seemingly be forgotten. The 2004 Act and the decisions of the Supreme Court in *Shelly Morris* and *Vesey* cases are never to be taken as giving a defendant a green light to make unfounded allegations which are serious and hurtful and which cannot be sustained.

68. It is in the light of these principles that I assess the issue of aggravated or exemplary damages.

69. Mr. McManus reported that there was functional overlay in the plaintiff's symptoms. That was accepted to an extent by Mr. Synnott and I have also accepted the existence of functional overlay. Functional overlay, of itself, is not sufficient to justify the defendant's conduct in this case. Mr. Hutchinson, however, concluded that the plaintiff was "untruthful in relation to his disability" and he did not seem to accept anything that he said in relation to his "ongoing symptoms".

70. Given the medical opinions of their witness as to the plaintiff's alleged falsification of his injuries that notwithstanding that these opinions were not corroborated by any other evidence and also notwithstanding the defendants maintained allegations of falsehood in relation to the occurrence and circumstances of the accident itself, I believe that the defendant's submissions, pleas and cross examination of the plaintiff in this regard do not fall into the category of "irresponsible" or "overenthusiastic" and accordingly, the defendant's attitude was not necessarily unreasonable. However, were it not for the report of Mr. Hutchinson, and his express professional opinion, I would have concluded that the plaintiff was entitled to an element of aggravated or exemplary damages. Accordingly, I will reject the plaintiff's submission that they are entitled to aggravated or exemplary damages but he is entitled to the compensatory damages of €415,000, as set out above.