

## THE HIGH COURT

[2009 No. 11261 P.]

BETWEEN

BRIAN NOLAN

PLAINTIFF

AND

KERRY FOODS LIMITED

DEFENDANT

**JUDGMENT of Ms. Justice Irvine delivered on the 30th day of March, 2012****Background**

1. The plaintiff in these proceedings was born on 28th November, 1967. He is a separated father of two children who are now aged 12 and 6 years of age. The plaintiff resides in Sandymount in Dublin and has been caring for his children on a full time basis since his separation in 2007.

2. The within proceedings arise out of a road traffic accident which took place on 10th April, 2006, when the plaintiff's Land Rover was rear ended on the Naas dual carriage way when in a stationary position. The plaintiff contends that as a result of that impact, he sustained injuries to his back which have affected him in all areas of his life. In particular, he maintains that his injuries have interfered with his ability to work and participate in sporting activity in respect of which he had enjoyed substantial success.

3. After he left school, the plaintiff spent a lot of time pursuing his sporting interests. He played senior county football for twelve years and senior rugby for ten years. It appears to me that he sought out employment compatible with those talents and in this regard worked both in the United States and Australia. He worked in a number of different jobs including life insurance, mortgage broking and auctioneering. In 2003, he started to try to earn a living as a gardener and through word of mouth had reached a point in 2005 when he maintains he had a turnover of approximately €19,000 per annum. He hoped that in good health that he could have ended up earning a reasonable living from this type of work.

**Past Medical History**

4. It is common case that the plaintiff developed what can simply be described as a bad back at a very young age. Records show that he was referred to Mr. John McElwaine, Consultant Orthopaedic Surgeon, in 1995 for recurring back pain as a result of a rugby injury. Further, in January 2004, he underwent a CT scan, the indication for which investigation was chronic back pain and left side sciatica. The scan showed the presence of spinal stenosis and significant degeneration at the levels of L5/S1 and L3/4. Dr. Stafford, Consultant Radiologist, described this scan as demonstrating a severely compromised back. However, as of early 2006, the plaintiff maintains that his back was not giving him much trouble and that he was able to train a number of rugby teams during the week and a couple more at weekends.

**The Claim**

5. The plaintiff contends that in the aftermath of the collision his back became extremely symptomatic. Initially, he stated that these symptoms commenced within a period of two weeks. Under cross examination, he later capitulated and said that the pain set in within days. He maintains that he got immediate treatment from a Mr. Michael Monaghan, the Physiotherapist/Osteopath attached to Bective Rugby Club and that he had this twice a week in the period directly following the collision. When that treatment did not sort out his problems he went to Dr. O'Flanagan, his general practitioner about two months later. During that period of time, he continued to coach a number of rugby teams but his condition got progressively worse. Because his back pain and symptoms became increasingly acute, Dr. O'Flanagan arranged for him to have an MRI scan and this took place on 18th January, 2007. He was later referred by Dr. O'Flanagan to the Back Triage Clinic in the Blackrock Clinic. There, he received physiotherapy and was given a home exercise programme before being referred by the clinic to Mr. Bolger, Consultant Neurosurgeon.

6. Mr. Bolger saw the plaintiff on 14th March, 2007. In his first medical report, he referred to the plaintiff having given him a history of five years of pain radiating into his legs. Mr. Bolger carried out a decompression microdiscectomy on 31st May, 2007, to relieve the nerve pain in the back of the plaintiff's left leg. The surgery improved the plaintiff's leg pain but did little to deal with his ongoing back pain. Accordingly, he was referred by Mr. Bolger to Dr. Pollard, Consultant Anaesthetist, in the hope that she might be in a position to provide him with pain relieving treatment for his back pain. She carried out facet joint injections but these gave the plaintiff little relief. In July 2009, the plaintiff developed a new type of pain down the front of the left leg and this caused him great difficulty with a range of everyday activity. Accordingly, in July 2010, Mr. Bolger performed a focal decompression on the L4 left sided nerve root.

7. It is the plaintiff's contention that the road traffic accident, the subject matter of these proceedings, caused his back to become significantly symptomatic. The effect of the impact, according to Mr. Bolger's evidence, was to bring forward the surgical intervention just referred to by about five years.

8. The plaintiff continues to have ongoing back pain. He walks with a limp most days and takes Zydol and Nurofen on a regular basis to control his back symptoms. The plaintiff accepts that he had both good days and bad days. However, he is unable to participate in sporting activities and in particular he is not in a position to coach any rugby teams. He has difficulty playing golf, a sport which he formerly enjoyed and he is unable to carry out any physically strenuous activities.

9. Mr. McDonnell, S.C., on the plaintiff's behalf made it clear on his opening of the case that his client was not pursuing a loss of earnings claim calculated by reference to any actuarial report but submitted that the court should, in its calculation of general damages, compensate the plaintiff for the fact that he is no longer in a position to engage in any type of work which involves significant physical activity. He urged the court to take into account the fact that the plaintiff's potential earning capacity as a landscape gardener had prematurely ended by reason of the road traffic accident, the subject matter of these proceedings. In this regard, the court was also advised that the plaintiff had been in receipt of social welfare from the time he gained sole custody of his

children in 2007 and that as of the date of the hearing he was in receipt of a disability allowance of approximately €250 per week in addition to a financial supplement which he receives towards his heating costs.

### **The Defendant's Defence**

10. The defendant maintains that the plaintiff's claim is founded on what Mr. Lannigan O'Keeffe, S.C., described as a small lie that got out of control. He submitted that the plaintiff's claim is in fact a fraud and he relied upon a wide range of evidential circumstances to support that proposition. The following are a number of the matters which he relied upon.

(i) In the initial aftermath of the collision the plaintiff made no claim in respect of personal injuries but merely maintained a claim for car damage.

(ii) When the plaintiff swore an affidavit for the purposes of seeking to transfer his proceedings to the High Court, he never mentioned his prior history of back pain.

(iii) The plaintiff changed his evidence as to when he first experienced back pain following the road traffic accident. In the Civil Bill initially issued, he had asserted that his pain had commenced within 24 hours of the collision. In the course of his examination in chief, the plaintiff stated the pain first emerged approximately thirteen days after the accident, a period which he foreshortened to seven days under cross examination.

(iv) The plaintiff did not attend Dr. O'Flanagan, his General Practitioner for at least two months after the collision. Dr. O'Flanagan had no note that he had complained about having been involved in a road traffic accident. Further, in his referral letter requesting an MRI for the plaintiff, Dr. O'Flanagan stated that the indication for the investigation was "acute low back pain, this has been a problem on and off for a number of years". Accordingly, it was submitted that it was probable that the injury presented to Dr. O'Flanagan was not referable to the car accident.

(v) The evidence of Michael Monaghan, the plaintiff's physiotherapist/osteopath, was committed to a formal report approximately five years after the events complained of. In such circumstances, it was submitted that it would be unsafe to rely upon the contents of that report in support of the plaintiff's contention that his symptoms commenced immediately following the collision. Counsel for the defendant referred to the fact that there was information, such as the plaintiff's date of birth, in his report which much have been fed to Mr. Monaghan on the plaintiff's behalf. Given that he had kept no notes of any treatment which he had administered to the plaintiff, he was accordingly relying purely upon his memory as to the date upon which he saw the plaintiff, the extent of his injuries and what the plaintiff had told him had caused the injury.

(vi) The report from the Back Triage Clinic sent to Dr. Bolger in February 2007, referred to:-

"A gradual worsening of the central low back pain radiating to the left leg over a three to four years history. He recalls initial injury in 1994, a football injury, this is resolve, however; he has had back pain on and off since then. His symptoms have gradually worsened over the last three to four years and he has had more difficulty with activities i.e. golf, jogging and participating with football coaching."

(vii) In his initial medical report of 18th June, 2008, Mr. Bolger stated that there had been a two and half month delay between the collision and the onset of Mr. Nolan's symptoms and that he had not started to suffer from significant symptoms until October/November 2002. He went on to conclude that the index accident had not materially contributed to the plaintiff's back condition.

(viii) The plaintiff, when he attended Dr. Pollard in 2008 did not advise her of the fact that he had suffered from significant back pain prior to the road traffic accident.

11. In light of the foregoing, the defendant submits that I should accept the evidence of Mr. O'Neill, Consultant Neurosurgeon, that whatever problems the plaintiff developed with his back in 2006, I should not ascribe them to the road traffic accident. In addition, the defendant submitted that the plaintiff's claim is one which should be dismissed pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004 ("the Act"). In support of this submission, the court was furnished by the defendant with what can only be described as a most thorough written submission containing an exposition of the court's jurisdiction under this provision and setting out the evidence in the present proceedings which would warrant its invocation. The court also received an equally detailed submission in reply on the plaintiff's behalf in which the court was urged to conclude that the defendant had not discharged the onus of proof required to support its application to dismiss the claim.

12. The submissions of the parties set out very clearly the law in relation to s. 26 of the Act. In particular both parties refer to the decision of Quirke J. in *Farrell v. Dublin Bus* [2010] IEHC 327, the decision of Peart J. in *Carmello v. Casey and Feeney J. in Ahern v. Bus Eireann* [2006] IEHC 207. Indeed, the parties were agreed as the circumstances in which the section should be invoked. However, each case has to be considered on its own merits and whether or not the court should decide to dismiss a claim based on the provisions of s. 26 must inevitably depends upon the court's finding of fact made in the proceedings.

13. The defendant, in its submissions, focused upon an alleged failure on the part of the plaintiff to fully disclose his problems with pre-existing back pain in the course of the present proceedings. It also relied upon what it described as an inflated loss of earnings claim put forward on the plaintiff's behalf and irregularities in his evidence regarding the onset of pain following the collision to convince the court that it should dismiss the claim.

14. Having considered in significant detail the pleadings in the action and the evidence in the course of the hearing, I am not satisfied that I should invoke the provisions of s. 26 in the present proceedings. I am not satisfied on the balance of probabilities that I can conclude that the plaintiff has given evidence which he knew to be false or misleading or that he has sworn an affidavit of verification under s. 14 in like circumstances.

### **Conclusions**

15. In reaching my findings of fact, I have relied significantly upon the plaintiff's demeanour when giving his evidence in chief and while under cross examination. It is undoubtedly the case that his evidence was what I would describe as somewhat fragile particularly in relation to the onset of his symptoms and the account that he gave of these to those whom he attended in the nine months following the collision. However, the plaintiff's evidence was substantially corroborated by that of Michael Monaghan, Physiotherapist/Osteopath. He told the court that he remembered meeting the plaintiff at a training session in the summer of 2006 and that he was in severe pain. He said that he remembered the plaintiff ascribing his symptoms to a road traffic accident which had occurred a few days earlier. Accordingly, to dismiss the plaintiff's claim based upon the provisions of s. 26, I would also effectively

have to conclude that the evidence given by Mr. Monaghan was unreliable or false.

16. I have given serious consideration to the defendant's challenge to the truth and accuracy of Mr. Monaghan's evidence. It is undoubtedly the case that that Mr. Monaghan prepared a formal report for the court approximately five years after the events in question and that he did so in circumstances where he had no clinical notes to assist him in refreshing his memory. I also accept that his report contains information, such as the plaintiff's date of birth, which he could not have known had it not, so to speak, been fed to him in some way the plaintiff or his solicitor. This, of course, casts doubt on the reliability of other details in his report and the question I had to ask myself was whether I should discard such details on the basis that they were likely to be nothing more than the repetition by him of information furnished to him by or on behalf of the plaintiff. However, having seen and heard Mr. Monaghan give his evidence, I have reached the conclusion that while his evidence may not have been an absolutely accurate and precise account of what had occurred in April 2006, that on the balance of probabilities, I can rely upon his recollection that when he first attended the plaintiff he was in severe pain which he stated had come on in the aftermath of a recent road traffic accident. Further, I do not accept that any inconsistency in the plaintiff's evidence as to precisely the when he experienced the onset of pain in his back was such as to convince me that he was not truthful in his evidence that it set in within a very short period post the collision.

17. I reject the defendant's assertion, made principally through the evidence of Mr. O'Neill, that I should rely upon the plaintiff's failure to seek formal medical intervention for his injuries in the immediate aftermath of the collision as evidence in support of the submission that the plaintiff's claim is false. I am not prepared to distinguish between treatment sought from a physiotherapist/osteopath and that sought from a general practitioner or consultant orthopaedic surgeon in circumstances where, on the facts of this case, the plaintiff was intensively involved in rugby coaching and Mr. Monaghan was deemed to be a person with suitable qualifications to assist in the rehabilitation in those who might have been injured when playing rugby with Bective Rugby Club. Further, I accept as a matter of fact that the delay in the plaintiff's presentation for formal medical opinion can in part, be ascribed to the plaintiff's hope that his injury would resolve following intervention with his physiotherapist/osteopath. I also accept Prof. Bolger's evidence that in his opinion, the plaintiff because of his past sporting career, was a man used to taking knocks and that he probably assumed that whatever pain he had developed would pass with some treatment.

18. I have also considered the defendant's reliance upon the absence of mention of a road traffic accident in Dr. O'Flanagan's records and correspondence up to and including the time of his referral of the plaintiff for MRI examination in January 2007. Even if the plaintiff did not mention the road traffic accident to Dr. O'Flanagan when he first attended him in the summer of 2006 and he may well have done, it does not automatically follow that he was not injured in the road traffic accident in which he was involved. I got the impression from Prof. Bolger that the degenerative changes in the plaintiff's back rendered him a very precarious candidate indeed for this type of collision. Indeed, Mr. O'Neill in the course of his evidence on behalf of the defendant stated that the degenerative changes in the plaintiff's back were such that his threshold for injury in such a collision was extremely low. Having heard all of the medical evidence and being mindful of the fact that the plaintiff's vehicle was hit by an articulated truck and pushed some distance from the point of impact, I am inclined to the view that on the balance of probabilities, the plaintiff sustained some soft tissue injuries to his back as a result of his collision. Dr. O'Flanagan, who has been the doctor to Bective Rugby Club for many years confirmed that as far as he was concerned, the plaintiff seemed to have been in the whole of his health prior to 2006 and he was not aware of him being significantly incapacitated by back problems prior to the summer of 2006.

19. In terms of the genuineness or otherwise of the plaintiff's symptoms, I have taken to heart the evidence of Prof. Bolger that after each operation, the plaintiff expressed himself much improved in terms of the leg pain for which the surgery was performed. I think it fair to say that those with experience of personal injuries litigation and in particular of plaintiffs who seek to "milk the system" are not prone to admitting significant improvement following any surgical procedure. Accordingly, overall, I am prepared to accept that the plaintiff has a genuine claim for compensation and that he has not adduced false or misleading evidence either in respect of his claim for general or special damages.

20. Insofar as the defendant asks the court to exercise its discretion to dismiss these proceedings based upon the very substantial claim for loss of earnings, supported by verifying affidavit, it is clear that the defendant's solicitors were advised on 9th September, 2011, of the limited nature of the loss of earnings claim to be advanced at the hearing of the action. It was made clear that the future loss of earnings claim insofar as the same was being pursued was one which would be generally limited to his inability to continue with landscape gardening. Further, Mr. McDonnell, S.C., on the opening of the case again made it clear that because of the plaintiff's past employment history he was only advancing a claim wherein he would seek augmented general damages having regard to Prof. Bolger's evidence which would be to the effect that the collision brought forward by approximately five years surgery that would have been required by the plaintiff in any event because of his pre-existing degenerative changes in his back. That surgery would have removed any possibility of the plaintiff continuing with work such as landscape gardening.

21. In all of the circumstances, I do not believe that on the facts of the present case, I could conclude that the defendant has established, on the balance of probabilities, the facts that would warrant the court to exercise its jurisdiction under s. 26 of the Act.

### **Assessment of Damages**

22. Having carefully considered the evidence of all of the witnesses, I am satisfied that the plaintiff had significant degenerative changes in his back at the time of his road traffic accident in April 2006. However his difficulties were intermittent and did not preclude him from engaging in what I consider to be relatively demanding physical activity, such as rugby coaching. I have no doubt that he had previously suffered from considerable bouts of intermittent back pain but that he was able to keep going with the benefit of analgesia and occasional physiotherapy.

23. It is difficult to assess having regard to the plaintiff's past history and also having regard to the fact that he was in position to continue with some degree of rugby coaching for a short period after the collision, the extent to which his injuries have impacted upon the frequency and severity of his back pain, his ability to participate in sporting and leisure activities and on his capacity to work. Mr. Bolger confirmed that the soft tissue injuries sustained would have significantly increased the plaintiff's symptoms and he was satisfied that his complaints were genuine and without functional overlay. He also stated in evidence that he believed that the collision had brought forward, by approximately five years, the surgical procedures referred to earlier in this judgment. He told the court that the plaintiff was very young for requiring this type of intervention and that patients normally presented for that type of surgery between 45 and 50 years of age.

24. It is clear from the evidence that I cannot attribute either of the surgical procedures carried out by Dr. Bolger to the road traffic accident and indeed the plaintiff does not make that case. Further, I cannot accept the evidence of Dr. Bolger that the collision brought forward these surgical procedures by approximately five years. That evidence was based upon the usual age at which such surgery is carried out on a patient. In this regard, I preferred the evidence of Mr. O'Neill which was that each patient is fundamentally different. He told the court that the plaintiff had a back with extensive degenerative changes and that he could not be compared to any average group of patients. The plaintiff was also engaged in very significant physical activity. He might have needed that

surgery, in any event, within a year or two of the collision regardless of any accident. Nonetheless, I am happy to conclude that the plaintiff genuinely sustained soft tissue injuries to his low back which rendered it much more symptomatic than it had been prior to the collision and that it brought forward to some degree, his need for the surgical procedures ultimately carried out by Mr. Bolger. I am also satisfied that not only has the plaintiff experienced a great deal more discomfort and pain earlier in life than would otherwise have occurred but that the collision brought to an end his career as a rugby coach which he might have hoped to have enjoyed for a further period had he not had his road traffic accident.

25. In all of these circumstances, I believe that I should view the plaintiff's injuries as a seriously debilitating soft tissue injury of approximately two to three years duration.

26. As to the effect of the plaintiff's injuries on his capacity to work, I am not satisfied that the plaintiff has adduced any concrete evidence from which the court could award any specific sums in respect of past or future loss of earnings. Firstly, the court received no satisfactory evidence as to the plaintiff's net income in the years immediately prior to the collision. A bald statement that the plaintiff had a turnover in one year of €19,000 from landscape gardening cannot be the basis upon which a loss of earnings claim can be promulgated.

27. Even if the plaintiff had been in a position to produce satisfactory evidence of his net income from landscape gardening in the years prior to this collision, the findings of fact that I have made in relation to his pre-existing back condition would militate against the possibility of him making a loss of earnings claim based upon this type of career. I have already concluded that he may have required significant back surgery within two to three years of 2006 were it not for the collision, the subject matter of these proceedings.

Given that the plaintiff's back would have been deteriorating over that time, it seems unlikely that he would have been in a position to enjoy any significant earnings from that line of work.

28. The plaintiff's difficulties in respect of any loss of earnings claim are enhanced by the fact that he told the court he started drawing social welfare in 2007 when he was granted sole custody of his children. This evidence suggests that he also may have had some difficulty in pursuing a business such as landscape gardening, while meeting his domestic commitments to the family. Further, the plaintiff has been in receipt of a disability benefit of approximately €250 per week which would have to be deducted for five years from the date when the cause of action accrued from any loss of earnings claim by reason of the provisions of s. under s. 286 of the Social Welfare Consolidation Act 2005. Having regard to all of these circumstances, I simply cannot accept that the plaintiff suffered anything other than a most modest reduction in his income because of the collision the subject matter of this claim.

29. Taking all of the aforementioned matters into account, I will award the plaintiff a sum of €45,000 in respect of general damages which sum includes a modest uplift to cover any minor loss of income referable to the collision the subject matter of these proceedings. There are agreed special damages of €1,125 and accordingly, the overall award in favour of the plaintiff will be for a sum of €46,125.