Neutral Citation: [2013] IEHC 558

THE HIGH COURT

[2010 No. 7259 P]

BETWEEN

MICHAEL O'DONOVAN

PLAINTIFF

AND

GERARD LORDAN AND AGRIBAN LIMITED TRADING AS MICHAEL HURLEY FARM MACHINERY AND LAURENCE QUINN AND KILMOSS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 5th day of December, 2013

1. On 12th January, 2010 the plaintiff to these proceedings was driving his motor vehicle on the public highway near Ballinhassig in County Cork when he suffered severe personal injuries due to an accident involving the first and third named defendants. In the general endorsement of claim appended to the personal injury summons served in these proceedings, the plaintiff claimed damages for his injuries caused by the negligence and breach of duty of the defendants.

2. On 20th April, 2011, the first and second named defendants entered an amended defence. Paragraph 3(a) of that defence claims that "the actions of the first named defendant were at all material times wholly beyond his control so as to amount to automatism in law/or inevitable accident". This defence was particularised as follows:-

> "The first named defendant was suffering from a major hypoglycaemic episode of which he had no warning. This episode occurred against a background of hypothyroidism."

3. In a reply of 10th May, 2011, the solicitors for the defendants replied to a variety of queries that were raised by the plaintiff's solicitors in a letter of 25th February, 2011. The relevant queries are listed at (a) to (l) in the letter and deal with aspects such as the first named defendant suffering from diabetes mellitus and that he also suffers from an underactive thyroid gland and a variety of other related matters.

4. The plaintiff's legal advisers were anxious that the first named defendant would agree to a medical examination, and as agreement could not be reached a motion was issued which came before this Court on 14th January, 2013, as a result of which a specific order was made by this Court in the following terms:-

> "IT IS ORDERED that the First Named Defendant, within such period as may be agreed between the parties submit to a medical examination or examinations (in relation to the matters arising from the plea at paragraph 3(a) of the Personal Injuries Defence and the Particulars arising therefrom in the letter of 10th May, 2011, from the First Named Defendant's solicitor to the Plaintiff's solicitor) which examination in the first instance is to be conducted by a General Practitioner nominated on behalf of the Plaintiff and thereafter a further examination should the said General Practitioner so advise by a Consultant to be nominated by the Plaintiff both such examinations to take place in the presence of the said Defendant's relevant Medical Practitioner.
>
> Liberty to apply
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> And the Court Doth Reserve the costs of this Motion and Order."

5. By way of notice of motion dated 22nd July, 2013, the plaintiff to these proceedings now comes before the court seeking an order "striking out paragraph 3 of the defence of the first and second named defendants delivered on 23rd February, 2011, for failure to comply with the order of this Honourable Court of 14th January, 2013". This notice of motion is grounded on the affidavit of Mr. Ernest J. Cantillon, solicitor for the plaintiff, sworn on 19th June, 2013, in which the deponent avers that a medical examination of the defendant as scheduled to take place on 23rd April, 2013, at the surgery of Dr. Kenefick, the medical practitioner nominated by the defendant. The examination was to be carried out by Dr. Dillon, the plaintiff's medical practitioner in the presence of Dr. Kenefick. The latter is not the defendant's general practitioner but was specifically nominated to attend the examination by the solicitors for the defendant to monitor the proceedings. Mr. Cantillon avers that Dr. Dillon, by letter of 17th May, 2013, to him, informed him that he had been substantially obstructed in his examination of the defendant as Dr. Kenefick instructed the first named defendant not to answer some of the questions asked. Dr. Dillon's letter states that he was not permitted to ask questions regarding the first named defendant's food intake, whether his bloods had been checked on the day of the accident prior to driving, whether he had had any hypoglycaemic episode since the accident, whether he had ever had such an episode prior to the accident, whether he checks his blood sugar levels prior to driving, what food and drink he had consumed on the day of the accident and what his level of exercise had been on the day of the accident or the evening prior to the accident, all of which would have been relevant to the defence pleaded.

6. At the hearing of this motion counsel for the plaintiff made clear that he was seeking clarification of the order of this Court made on 14th January, 2013, to the effect that the defendant was required to answer the questions posed to him by Dr. Dillon on the date of the medical examination. In the event that the clarification was in the terms sought by the plaintiff and if the defendant did not comply with that clarification, then counsel for the plaintiff stated that he would pursue the main relief sought on the notice of motion; the striking out of the defence of automatism contained in para. 3(a). Counsel for the plaintiff submitted that it was clear that on 14th January, 2013, when the order was made the court had intended that the order not be rendered nugatory by the defendant's failure to answer the questions asked of him by the medical representative of the plaintiff. Counsel for the plaintiff also submits that the defendant is essentially, by objecting to this application, attempting to reargue issues which have already been decided by this Court.

7. Counsel for the defendant submits that the court referred, on the date of the making of the order, to a medical examination conducted in "the old way". Counsel submitted that this precluded a medical examination which would in fact amount to a cross examination of the defendant by the plaintiff's medical practitioner without the beneficial protection of normal court procedure which the defendant would normally receive. It was the fear of the defendant, and this had been expressed at the hearing of the original motion on 14th January, 2013, that this examination would amount to little more than a form of interrogatories without the normal protections which normally follow that aspect of civil procedure. The defendant feared that permitting such an approach would lead to a trial within a trial.

8. I have a distinct memory of this motion coming on before me in the first instance and I have the benefit of having reconsidered the documentation and the order of the court.

9. I also have had the benefit of considering the digital audio recording in respect of the motion, and I am quite satisfied that the order of the court as perfected accurately encompasses the decision I arrived at on the hearing of the motion, which was to the effect that the plaintiff's relevant medical adviser was entitled to carry out a medical examination of the first named defendant in the presence of the first named defendant's medical practitioner and that the plaintiff's medical adviser was entitled to ask medical questions of the plaintiff, particularly with regard to the amended plea at para. 3(a) of the personal injuries defence and the particulars arising therefrom in the letter of 10th May, 2011. Mr. Nolan, on behalf of the first named defendant, specifically raised a question as to whether or not the court would put into the order a reference that it was to be a medical examination only and the court replied that it would not be disposed to doing so, but that it would be put in the order that it was to be a medical examination. It is clearly envisaged that a doctor carrying out a medical examination is entitled to ask questions and the questions in this instance specifically relate to the amended defence raising the defence of automatism in law or inevitable accident and the replies to particulars as contained in the letter of 10th May, 2011. Quite clearly the medical adviser to the plaintiff is not entitled to ask any questions relating to the particular factual circumstances of the accident. Mr. Nolan on the first named defendant's behalf emphasises that the court indicated that the medical examination was to be in line with what would have been the old procedure many years ago, but what was meant by the court in this regard was that the medical examination would take place with both the plaintiff's and the defendant's medical adviser being present and those examinations "in the old way" were never carried out on the basis that no questions could be asked.

10. Further, the court is disposed to indicating that it was never intended that there would be any invasive procedure carried out by the plaintiff's medical adviser on the first named defendant.

11. Accordingly, having clarified the matter I will hear the submissions of counsel as to the form of the order to be drawn up on foot of this application.