Neutral Citation [2012] IEHC 441

THE HIGH COURT

[2009 No. 7296 P]

BETWEEN

SEAN MEEHAN

PLAINTIFF

AND

BKNS CURTAIN WALLING SYSTEMS LIMITED AND MICHAEL McNAMARA AND COMPANY

DEFENDANTS

JUDGMENT of Mr Justice Ryan delivered the 26th October 2012

Two major questions arise in this case. The first concerns liability for the work accident that gives rise to the proceedings. The second is the defendants' application under s. 26 of the Civil Liability and Courts Act 2004, for the dismissal of the action, notwithstanding that the plaintiff might otherwise succeed in some part of his claim, on the grounds (a) that he gave false or misleading evidence in a material respect which he knew to be false or misleading; (b) that he swore an affidavit under s. 14 of the 2004 Act containing knowingly false or misleading information in a material respect. These alleged material mis-statements relate to the circumstances of the accident and to the very substantial claim made by the plaintiff for past and future loss of earnings.

The plaintiff is 48 years of age and single. He was working as a glazier for the first defendant, BKNS, on the 29th September, 2008 when the accident happened. He fell from scaffolding at first floor level at a building site at Abercorn Road, near Sheriff Street. Dublin 1. The plaintiff sustained a comminuted fracture of the left calcaneus, his heel bone. He also damaged his subtalar joint quite severely. He has had considerable trouble with the injury and is likely to do so in the future. Prof. Michael Stephens, his orthopaedic consultant, said that there was a 50/50 chance that the plaintiff would have to have the ankle fused in the course of the next ten years or thereafter. In the meantime he has a degree of pain, discomfort and limitation of movement. Prof. Stephens said that it was his opinion that the plaintiff would be unable for a return to his work as a glazier and indeed for any heavy manual work or work that involved walking on rough or uneven surfaces.

One of the unusual features is that the case as pleaded was abandoned and replaced by a quite different one. This case was originally listed for hearing in November 2011 but did not go on. It emerged at that stage that the second defendant was in possession of CCTV footage showing the accident happening, and that is indeed the case. The video was - perhaps after some delay - furnished to the plaintiff and it was also made available to the first defendant. The film revealed that the account given by the plaintiff in his pleadings and particulars was wrong in important matters.

Mr. Meehans's case as pleaded was that he tumbled out through the scaffolding. In particulars, it was alleged that the scaffolding was defective because there was no intermediate bar on the scaffolding and neither was there was a toe board where he was located. He was crouched on the scaffolding as he received aluminium bars being handed up from ground level and passing them on to a colleague inside the building. Because of the two particular defects he was caused and/or permitted to fall through the gap between the top bar and the bottom of the scaffolding. The CCTV footage contradicted this.

The CCTV had a decisive impact on the case but it was not actually shown in court. Mr. Fitzgerald SC, for the plaintiff, made adverse comment about this and implied that the defendants were seeking to keep it from me. In fact, the plaintiff's engineer Mr. Watson had viewed the video and taken stills from it that he used in his evidence. Mr. Nolan SC pointed out that Mr. Fitzgerald could have had the video played at any time since he was in possession of it and that seems to me to be a reasonable point. Therefore, I do not place any importance on the fact that defendants did not show me the video, any more than I do on the fact that the plaintiff did not do so.

The video shows that the scaffolding did indeed have an intermediate bar. It also appears, but it may not be possible to be entirely certain about this from the stills, to demonstrate that there was a toe board or toe boards in position. It is clear at any rate that the plaintiff is quite unable to demonstrate that there was any absence of toe boards. In fact, in his evidence, the plaintiff actually said that he stood up on the toe board so it is beyond dispute that the plaintiff cannot make a case of absence of a toe board. Therefore, the plaintiff’s two specific complaints about the scaffolding were invalidated.

In circumstances where the CCTV proved definitively what had happened and that the version contained in the pleadings and particulars was fundamentally wrong, that meant that the plaintiffs engineer's report which was based on his account of the accident was irrelevant to what had actually happened. So the engineer Mr. Watson gave evidence, not on the basis of his report which had been exchanged under SI 391, but on the basis of the stills from the CCTV. The plaintiff’s evidence as to how the accident happened was also based on the CCTV and the photographs. He said that he put his foot on the toe board and reached for one of the bars and the toe board collapsed and he went over the scaffolding. He said that when he was thinking back to how he fell, he knew he had been taking in the bars and in a split second he was on the ground. He did not know whether he had gone through or over the scaffold. It was now clear that he had gone over the top rail.

The defendants dismissed as an unlikely explanation the suggestion that the plaintiff got the facts wrong because of confusion. He did not suffer a head injury of any kind and there was no reason proposed as to why his recollection might have been so faulty.

The plaintiffs engineer. Mr. Watson, said that in his opinion the plaintiff stood up on the toe board to get extra height to enable him to grab the end of a pole and toppled out over the top bar of the protective rail. His hypothesis was that the toe board had shifted inwards causing Mr. Meehan to topple over. He condemned the scaffolding because he said the toe board was capable of being moved. The point was made to him that it is designed to stop things from falling from the floor of the platform or indeed people from toppling over and it was never designed to resist inward pressure. It was also suggested that it was fixed in a mode that was approved and was effectively standard or one of standards modes of doing so. Mr. Watson maintained that there was some breach of statutory duty under the scaffolding regulations, but I am extremely sceptical about that. I think that if, as Mr. Watson conceded,

this mode of fixing was an approved way, and there is no evidence that the mode of fixing and operation was not this, approved way, then this criticism falls. The case based on defective scaffolding must fail. There was no breach of statutory duty. Neither was there negligence.

There does remain, however, one basis of claim based on the defendants' obligation to provide a safe system of work. It is as follows. A delivery of rods to be used in the work being done on the windows by BKNS was made to the site. These units were steel rods some 6m in length and they were thin enough to permit considerable flexion along the length. When the lorry arrived on site, the crane was busy which would normally be used to take the delivery up to the proper level, in this case the first floor level. The BKNS men on site included Brian, the son of the owner of the company, and they thought of bringing them through the front door of the building, but the foreman told them not to do that because they would be in the way. Brian and another BKNS man were on the ground, the plaintiff was on the scaffolding platform on first floor level and another colleague Simon was inside a window at first floor level. The two at ground level took the rods from the lorry and handed them up to the plaintiff, who in turn passed them in through the window to Simon. Mr. Watson was initially critical of this system because it was not the safest way of doing it; that was to use the crane. But in my view there was nothing wrong with this method of handing up poles- they were not too heavy or awkward and did not present any particular difficulty and the system worked for a time. The accident happened when one of the poles was not fully handed up to the plaintiff at first floor level, but instead was rested against the outside hoarding that was protecting the site from the public and giving the public access along the footpath during the course of the building work. There was a gap of a number of feet between the plaintiff's platform and where the end of the pole was now resting. It needed somebody to lift up the pole and push it up to the requisite height where it would be closer to the plaintiff and close enough for him simply to take it in his hands draw it up the rest of the way and pass it to Simon.

The plaintiff had a number of choices at this point, when he could not reach the pole. But he did not take any safe option. He stood on the toe board- as it appears from the photographs - and leaned out over the top rail of the protective barrier. He toppled out and would have fallen head first but he was able to save himself to some extent by catching a rail. He still fell heavily on his left foot and suffered the fracture of the heel and damage to the sub-talar joint. This was a heavy fall in every sense - Mr. Meehan fell some 8 feet or so to the ground and he was at the time around 16 stone in weight. His weight has now gone up to 20 stone.

Mr. Culleton, consulting engineer for BKNS, testified that what the plaintiff did was totally unwarranted and dangerous and he exposed himself to the very thing that the protective rail was intended to prevent. Obviously by standing up on the toe board he reduced the safety element of the rail. And in any case, there was no emergency and there was no need for him to do what he did. Mr. Culleton produced documents showing standard modes of fixing toe boards on scaffolding which would or could allow the toe board to be flexed and indeed shifted inwards if pressure were applied in a particular way. In this case, if the plaintiff was leaning out away from the scaffolding and his weight was thus coming on the top of the toe board, but vectoring inwards so the force would or could be sufficient to displace the board from its fixing. And given that the fixing was never intended to prevent inward pressure, that was not a failure of the toe board fixing mechanism. Since there is no evidence to suggest that the mechanism that was in operation was in any way defective, for reasons mentioned above, I do not think that any complaint can arise out of the toe board fixing. And in any case, I am far from convinced that the toe board actually moved.

Another point that should be mentioned is that the plaintiff was an experienced glazier and used to working on building sites. Not only that- a document was produced entitled Appendix 3 -Induction and produced by the main contractor Michael McNamara and Co. and this appears to have been signed by Mr. Meehan. It is a site safety document and it says that if there is doubt, a worker should always ask and it specifically says that he should never climb scaffolding.

It is obvious therefore that if the plaintiff succeeds in establishing negligence on the part of the defendants, there will be very substantial contributory negligence because what he did defies all logic and sense and safe practice. Was there any negligence? My view is that the plaintiff cannot complain that the system was dangerous because I do not think there was anything dangerous about handing up the rods in the way that happened. Neither can he say that there was no system, because having two men on the ground and one on the scaffolding platform and one inside was indeed a system.

But I think he can say that the system did not work, in that it was operated for the previous rods that were handed up to him and what was required was for this particular one to be put in position just like the previous items where he was able to grasp it and haul it upwards but that did not happen. So the real case is that the system was not actually operated. He was then left with a situation where the metal rod was too far away from him. He apparently made a mistake in thinking that he could reach it, even if that required him to lean out across the rail. Perhaps he was lazy and did so instead of going down one storey to the ground. He was certainly very foolish but he did so in the course of his work and in response to a failure of the operation of the system.

The obligation is on the plaintiff's employer to have a safe system of work in operation. That applies to the work generally and to each part of the work. The main contractor has overall responsibility on site for ensuring that there is in force a safe system of work for each employee under its overall or general command and working on the building site. That is not just the common law, but also the statutory duty in the building regulations. In the circumstances, even though the plaintiff was more than foolhardy in what he did, there was a breakdown in the operation of the system that should have worked safely and that failed in this respect.

There was very heavy contributory negligence. It would be very unusual to have an apportionment of fault in excess of 50% but this case calls for that. A simple problem arose for an experienced employee engaged in work while he was on scaffolding. Safety measures were in place. He found a way to endanger himself by standing on the toe board and thus rising to a position where the safety rail would not restrain him. I hold that fault is to be apportioned as to two-thirds on the plaintiff and one-third on the defendants.

The plaintiff claimed that he could not go back to his pre-accident work and he is permanently disabled from doing so. As a result, his employment options and earning capacity are severely limited. He claimed loss of earnings to date and also for that loss calculated actuarially into the future. Mr. Roger Leonard, Vocational Assessor, and Mr. Nigel Tennent, Consulting Actuary, gave evidence of this part of the claim. The claim is for €95,000 past loss of earnings and €385,470 into the future.

The matter of major significance about the earnings claim is that the plaintiff testified repeatedly and insistently that he had not worked in any way since the accident and that social welfare payments were his only source of income. However, in cross-examination he was eventually forced to concede that he was and had been engaged in a substantial business of ticket selling as a professional ticket tout. He attends between 100 and 120 events a year, meaning concerts and other such. He also goes to all the big sports events for which tickets are needed and where there is a market for them, including Croke Park, Aviva and other venues. If there is a big occasion, the plaintiff will be touting tickets at it. He is a busy man and has a significant income from his work. It is impossible to believe that somebody in as big a way of business as the plaintiff would only make €20 or €30 a time.

One inference from this evidence is that his physical incapacity is a lot less than he described in court or to Mr. Leonard or to Prof. Stephens. Secondly, he has been able to reduce his post accident income loss by ticket sales. There can be no doubt that the plaintiff has engaged in this business in a big way because of the number of events and sporting occasions that he attends for the purpose of buying and selling tickets. It is impossible to know how much the plaintiff earns or has earned since the accident. He was not forthcoming about it, quite the contrary. He was also engaged in this work before the accident, when he was employed by the first defendant. He has had more time to engage in the ticket business since the accident but it is impossible to know how much the business has increased as a result. The actuary Mr Tennent struggled with this question in cross-examination but he was unable to help with calculation of losses without having basic information and figures.

The defendants have applied for the dismissal of the plaintiff's claim under s.26 of the Civil Liability and Courts Act, 2004.

The first defendant argues in written submissions that:--

> (1) The account of the accident as given in the personal injury summons and particulars, including amended particulars, was untrue and accepted as such by the plaintiff.
>
> (2) The suggestion that he might have been confused is groundless; and there is no evidence as to why or whether he was confused any relevant time. There is therefore no explanation for the changing versions of the story.
>
> (3) His evidence on the claim for loss of earnings past and future was untrue as to his disability, this history of work since the accident and his income since the accident.
>
> (4) These matters are material to the case.
>
> (5) No basis exists for applying the injustice exemption.

The second defendant cites the different accounts of the accident given by the plaintiff, conceding that "this may possibly be excusable" but arguing that in the circumstances of the case they are significant in undermining the plaintiffs overall credibility. This defendant highlights the plaintiffs answer is in cross-examination as to his work history and income since the accident, relying on this as being false or misleading material evidence that was knowingly given by the plaintiff.

Each of the defendants alleges that the plaintiff knowingly gave false or misleading evidence in a material respect in his answer is in cross-examination about his work and income following the accident. The second defendant includes in its written submissions a passage from the transcript in which the plaintiff testified repeatedly that he had not worked in any way since the accident and that social welfare payments were his only source of income.

The plaintiff’s submissions in response may be summarised as follows:-

> (1) The plaintiff did not mislead knowingly.
>
> (2) The defendants were not actually misled as to the facts of the accident because they had the CCTV.
>
> (3) The plaintiff’s evidence as to his condition was not false or misleading.
>
> (4) The plaintiff did not exaggerate his loss of earnings.
>
> (5) The plaintiffs answer is were not false or misleading because he did not class selling tickets as work: "I just went to try and get a few tickets for the price of a drink".
>
> (6) The plaintiff accounted for the changes in his description of the accident.

The plaintiff does have a serious injury in the form of a left calcaneus fracture and damage to the sub-talar joint. He has ongoing significant pain discomfort and disability. It follows therefore that if the case is dismissed, Mr. Meehan will suffer very significantly.

The relevant parts of s.26 are as follows.

> (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-(a) is false or misleading, in any material respect, and
>
> (b) he or she knows to be false or misleading, the court shall dismiss the plaintiffs action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under *section 14* that-
>
> (a) is false or misleading in any material respect, and
>
> (b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiffs action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

The section has been considered in recent cases. It is clear that the burden of proof rests on the defendant seeking dismissal: Ahern v Bus Eireann [2011] IESC 44.

In Dunleavy v Swan Park Ltd 2011 IEHC 232, O'Neill J said that section 26" is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability."

In Carmello v Casey [2008] 3 IR 524, Peart J said that s.26 ", but it is deliberately so in the public interest, and is mandatory in its terms, once the court is so satisfied on the balance of probability, unless to dismiss the action would result in iJ1iustice being done."

In Farrell v Dublin Bus [201o] IEHC 327 Quirke J dismissed the plaintiff's claim because of misleading evidence in respect of future loss of earnings. The court was satisfied that the plaintiff had knowingly given or caused to be given misleading evidence in a material

respect in support of her claim and the judge said: --"That finding, on its own, requires that the court must dismiss the plaintiffs claim unless the dismissal of her action would result in an injustice being done." The same judge considered the question of injustice in a subsequent case, Higgins v Caldark Ltd [2010] IEHC 527 when he said that "the court's discretion is limited. It may not be exercised simply because the statutory sanction required will have very severe consequences for a hard-working and likeable man who has suffered a serious injury."

The judge went on to deal with the situation that arose in relation to the part of the claim that was not affected by the false or misleading evidence:

> "The imposition of the sanction has the effect of depriving the claimant of damages to which he or she would otherwise be entitled. The court must disallow both that part of the claim which has been based upon materially false and misleading averments handle so that part of the claim which would otherwise have been valid and would have resulted in an award of damages."

The same point arose in *Nolan v. Mitchell* [2012] I.E.H.C. 151, when the court again dismissed the claim because of false or misleading evidence. Although the plaintiff had been successful in proving part of his claim, that did not survive the application of this section by reason of the court's findings as to the plaintiffs falsehoods.

Section 26 is mandatory. If it applies to the case, the legitimate parts of the claim cannot survive with only the false or misleading elements dismissed. It is possible in this case to decide liability without relying on the plaintiff's evidence. The CCTV evidence is sufficient to do that. One can also endeavour to assess general damages by reference to the evidence of Prof Stephens, relying on his objective findings. On that basis, my assessment of general damages is €75,000 for the past and €60,000 in the future, subject of course to reduction for contributory negligence.

It is, however, clear on the authorities that is not open to this court to separate out the good from the bad. That is what the court might have done before section 26 but the situation is different now and the cases make it clear that the sanction is to be applied, unless there are quite specific features that would lead to injustice.

The defendants' case is that the plaintiff has so materially misled the court in the pleadings and particulars and information given prior to the hearing and in the evidence at the hearing itself that he is shown to be endeavouring to mislead at every opportunity. There is considerable weight in this proposition. Mr. Meehan was unreliable from the first moment of his cross-examination, when he was asked about his address. It was somewhat frustrating to listen to him fencing with counsel rather than giving any straight answer if he could avoid it. In fact, it was quite impossible to believe that the plaintiff was actually trying to answer the questions he was being asked.

The information about the plaintiffs earnings since the accident and his present income are within his knowledge and exclusively so. He did not give that information to the court. I found the plaintiff to be an unreliable and evasive witness on this part of the case. With regard to loss of earnings in the past and in the future, it seems clear to me that Mr. Meehan was caught in a dilemma in that he could not disclose his earnings from ticket touting, especially if they were substantial as I believe they were, because that would expose him to liability to pay tax and possibly other even more serious sanctions. So he found himself then with this difficulty and made no attempt to deal with it except by endeavouring to conceal or minimise it.

The plaintiff's evidence in relation to his claim for loss of earnings in the past and the future was knowingly false and misleading in a material respect. This applies particularly to his evidence as to his income and as to his work history after the accident. In doing so, he knowingly gave false or misleading evidence in a material respect.

The fact that in relation to liability the defendants were in possession of the CCTV film and therefore knew the correct position is not material to whether the plaintiff gave false or misleading evidence. It is the plaintiffs conduct of the litigation that is in issue, not whether he actually succeeded in misleading or deceiving another party or the court.

The plaintiff's abandonment of his original account of the accident is unexplained in the sense that his purported explanation that he was confused has no basis in fact and is improbable. It was obviously material and the inference is that it was knowingly false and misleading.

On these findings, the action must be dismissed in accordance with section 26 unless that would result in injustice. The court is required to state in its decision the reasons for deciding that the dismissal of the action would result in injustice being done. What constitutes injustice in this context? One of the examples given in the cases is if a plaintiff who told a relatively trivial lie had catastrophic injuries then it would be wholly disproportionate in that situation and accordingly unjust to dismiss the whole action because of a relatively unimportant or peripheral or trivial untruth. It cannot be said that the matters that arose in this case were in any way trivial or insignificant.

Having regard to the terms of the section and to the decided cases, there is no basis on which the exemption to dismissal might be applied in this case.