Neutral Citation: [2015] IEHC 221

THE HIGH COURT

[Record No.2006/5828 P]

BETWEEN

PATRICK VESEY

PLAINTIFF

AND

KENT CARTY SOLICITORS AND FABIAN CADDEN & CO. SOLICITORS

DEFENDANTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 14thday of April 2015.

Introduction

1. In these proceedings the plaintiff makes a claim of professional negligence and breach of contract against the solicitors who acted for him in a personal injuries action entitled *Vesey v Bus Eireann* (Record No. 1996/ 10787 P). The first named firm acted for him up to May, 1999. The second named defendant took over the file and was the solicitor on record when the case came to hearing in the High Court and when it was heard on appeal in the Supreme Court. In those circumstances the claim against the first named defendant has been discontinued. The second named defendant is hereafter referred to as the defendant.

2. The plaintiff succeeded in obtaining an award of damages in his case against Bus Eireann but was the subject of very critical remarks by both the trial judge and, on appeal, by the Supreme Court. He says that this was due to the failure of the defendant to properly advise him, instruct his counsel and follow his instructions. He also claims that he has not received the damages or any part thereof and has not been informed about what happened to the money.

3. It is relevant to note that the defendant brought an application to have the proceedings dismissed as being frivolous, vexatious and bound to fail. This was refused by O'Neill J. on the 20th August, 2013. This court is not aware of the basis on which the application was made, or the reasoning of O'Neill J. in refusing it.

Background Facts

4. On the 9thSeptember, 1996, the plaintiff was involved in an accident when his vehicle was struck from behind by a Bus Eireann coach. Bus Eireann admitted liability and the matter proceeded to an assessment of damages for personal injuries, loss of earnings and certain items of special damages.

5. The plaintiff engaged the first named defendant as his solicitor to pursue his legal claims for damages as a result of that accident.

6. That firm ceased acting as the plaintiff's solicitor on or about May, 1999. The plaintiff engaged the defendant as his solicitor thereafter. However, it is important to note that senior counsel instructed by Kent Carty had written a letter in relation to the matter, indicating that his then legal team considered that they had an ethical problem with the instructions that he had given. The letter referred to his dual history of working and claiming the dole, and directed that he should write out a full statement of his background, education, work, unemployment and injuries. It was stressed that he must tell his advisers the full unvarnished truth.

7. The plaintiff's case proceeded to trial in the High Court in November, 2000. Evidence was heard over the course of three days and Johnson J. gave his ruling on the fourth day, the morning of the 10thNovember, 2000. In giving judgment Johnson J. was highly critical of the plaintiff's evidence in relation to two central matters – the extent of his injuries and his work history. He made the following observations:

> *"It should be a very simple case and the facts of it are very simple indeed. The Plaintiff was hit from behind by a bus. Let me say that the only fact in this case about which I am absolutely certain is that the accident took place and I am only certain of that because the Defendants have admitted it. Had the Defendants not admitted it, I would possibly have the gravest difficulty in coming to that conclusion but the Defendants have admitted that an accident took place.*
>
> *It is an assessment and the Plaintiff suffered a whiplash injury. It was a fairly severe impact. The seat in which he was sitting broke and I have no hesitation whatever in saying that he suffered an exacerbation of a pre-existing, chronic back complaint which he had had since 1985 at the least.*
>
> *I think that it is necessary to notice that that is the end of the simplicity in the case. This is the third set of pleadings, the third case that the Plaintiff has had. Two sets of pleadings, one concluded in 1994, another in 1997, with a Statement of Claim and two cases were settled, apparently.*
>
> *The difficulty, as I see it, is that having regard to the condition from which the Plaintiff was suffering in 1997, two months prior to the accident when he was working, it is very hard to say that his present condition is any worse than this but I am happy to accept the evidence of Mr. Browne, Mr. Harold Browne when he says that his pre-existing condition was shaken up but the difficulty in the case arises from the fact, and I am now going to say something that I have never said about any Plaintiff in the last thirteen and a half years on the bench. The Plaintiff has lied to me, has lied to his own doctors, has lied to the Defendant's doctors in a manner which has rendered the opinions of the doctors almost useless because they admit themselves, they depend on the veracity of the history given to them by the Plaintiff to form their opinions. The Plaintiff did not tell the doctors the truth regarding his history.*
>
> *Dr. O'Flaherty, who was extremely enthusiastic and spoke with feeling about the heavy doses of sedation which the Plaintiff was suffering, appears to ignore the fact that the Plaintiff was on exactly the same, codeine phosphate, 8 pills a*

day in June of 1996, prior to the accident and the Plaintiff managed to work at that time.

The history of work in the case is one of the great mysteries because the only time we have any details of the Plaintiff's work was in the six months prior to the accident and, undoubtedly, he was working then but…I accept that only because of [the evidence of a former employer]…

I accept that he suffered some damage but as to what the damage was I can only speculate."

8. The learned trial judge awarded special damages in the sum of IR£7,500, loss of earnings to date and into the future in the sum of IR£35,000 and damages for pain and suffering to date and into the future in the sum of IR£30,000.

9. The plaintiff did not appeal any finding of the learned judge but Bus Eireann appealed the award of damages. The Supreme Court gave a written judgment on 13thNovember, 2001 (*Vesey v Bus Eireann* [2001] IESC 93).

10. Giving the judgment of the Court, Hardiman J. referred to the trial judge's observations set out above and determined that these observations were "fully justified" and were not "unduly harsh".

11. Hardiman J. went on:

"He replaced one untrue account with another equally untrue.

It also became perfectly clear that the Plaintiff had made only a very partial disclosure of his history to certain of his own medical advisers. In particular, Dr. Lorna Browne, a pain specialist, stated in cross-examination that she was

unaware of the history set out in the statement of claim in the Plaintiff's prior proceedings. She conceded that she would have expected to have been told about these symptoms….

…On a careful review of the evidence I am quite satisfied the learned trial judge's observations quoted above were fully justified."

12. Dealing with the award of damages, the Court observed that it is not the responsibility of a trial judge to "disentangle" the plaintiff's case when it has become entangled as a result of lies and misrepresentations systematically made by the plaintiff himself.

13. The Supreme Court also made clear that the court was not reducing the plaintiff's damages in order to mark the court's disapproval of the conduct and sustained dishonesty of the plaintiff, finding that the court had no such inherent power. The plaintiff's damages were reduced to €38,360.00 on the basis that the figure awarded by Johnson J. was, as the judge himself had said, largely speculative.

14. On the 27thNovember, 2006, the plaintiff issued the plenary summons in these proceedings. He was not legally represented at the time, and he served the plenary summons by registered post. The defendant decided to contest the issue of service. In 2012 the Supreme Court deemed service good.

15. The statement of claim, dated 28thJanuary, 2009, is signed by a person who was at the time a practising solicitor. The particulars of alleged negligence and breach of duty of the defendant, insofar as they were pursued at the hearing of the action, are as follows:

a. Failing to prepare and process the plaintiff's claim with reasonable care and diligence

b. Failing to ensure that at all times suitably qualified professionals dealt with the processing of the plaintiff's claim

c. Failing to review, advise and disclose all the plaintiff's previous injuries, and medical history

d. Failing to adequately evaluate, prepare and present the plaintiff's position with regard to his medical condition, his employment records and his Social Welfare entitlements and claims prior to the High Court hearing on the 8th, 9th and 10th November, 2000.

e. Failing to consult and advise the plaintiff with regard to the appeal to the Supreme Court and the aspects thereto, together with alternative aspects thereto.

f. Failing to submit a full account to the plaintiff of the outcome of the Supreme Court together with the settlement figure thereto.

g. Failure to respond to the plaintiff's communications and correspondence.

h. Failure to provide details of all the monies due to the plaintiff.

i. Failure to provide the monies as due to the plaintiff

j. Failure and continuing to provide to the plaintiff the due amounts.

16. On the 20th December, 2013, the plaintiff delivered further particulars of negligence, alleging in summary that:

i. The defendant failed to call Dr. Austin Darragh, who could have clarified the full extent of the plaintiff's injuries and could have confirmed that the plaintiff had been fully honest about them.

ii. The defendant failed to instruct counsel to object when it became apparent that Dr. Harold Browne was misleading the court.

iii. The defendant caused the trial judge to form the incorrect conclusion that the plaintiff had lied to doctors.

iv. The defendant failed to carry out the plaintiff's instructions to appeal the incorrect findings of the trial judge.

v. The defendant failed to carry out the plaintiff's instructions to appeal the quantum of the award.

vi. The defendant failed, despite the plaintiff's instructions, to present to the trial court a clear and coherent picture of the plaintiff's work history.

vii. The defendant failed, despite the plaintiff's instructions, to present to the trial court a clear and coherent picture of the injuries sustained by him.

viii. The defendant failed to have a pre-trial consultation with the plaintiff to prepare properly for the hearing and go through the pleadings and replies to particulars.

ix. The defendant failed to furnish basic information to two [sic] of the plaintiff's witnesses, Dr. Sinnanan, Dr. Lorna Browne and Ms. Logan, which resulted in them being taken by surprise when cross-examined.

At the hearing, the fifth particular above was withdrawn and it was clarified that the plaintiff's case is not that he should have obtained a higher level of damages. No criticism is made of the decision of Johnson J. or that of the Supreme Court, as the plaintiff accepts that they could only determine the case on the basis of the evidence before them. His claim rests on the allegation that the evidence was not properly put before them.

17. The plaintiff claims that he has suffered serious loss and damage. He says that he has not received any of his awards for damages and costs. Furthermore, he says that he has suffered serious loss to his reputation and good name due to the various comments by the trial judge and the Supreme Court about his "dishonesty". He says that as a result he has suffered serious distress and psychological damage, which has been ongoing and continuing.

18. The plaintiff claims special damages, and general damages to include aggravated damages and interest.

19. The defence, dated 6thSeptember, 2013, denies liability in respect of every allegation in the above particulars of negligence and breach of duty.

20. The transcripts, medical reports, correspondence and various other documents in relation to the Bus Eireann proceedings have been admitted by both parties.

The evidence in the Bus Eireann case

21. As is apparent from the foregoing, there was no dispute about liability for the accident and no allegation of contributory negligence. However, the extent and cause of the plaintiff's injuries were very much in issue. His credibility was also attacked in relation to his employment history.

22. In opening the case, the plaintiff's senior counsel gave the court a history of previous injuries suffered by his client. It is clear that nothing was said in the opening that was inconsistent with that document.

23. Johnson J. was told that the plaintiff had "what could loosely be described as a history of injury, a history of back complaints" and that the case being made was that "the disabilities that he was suffering from beforehand or the injuries that he was suffering beforehand or the back condition that he was suffering beforehand" was aggravated to the extent that he was now unable to work. He had also suffered from depression and post-traumatic stress disorder.

24. Counsel referred to an accident in 1984, in which the plaintiff's ankle was fractured; an accident in June 1995, in which the plaintiff was electrocuted; an incident in July 1995 involving exposure to asbestos, which caused him a rash; and an accident in January 1996 in which some timber fell on him, causing injuries to his chest and left arm. Each of these incidents had been the subject of legal proceedings.

25. In his evidence the plaintiff described his history of employment from the time he left school. He was from Achill and had spent some time in the fishing industry. He had also gone potato-picking in Scotland. He then went into the building industry and, having learned the trade of steel fixing, worked firstly in the UK and then, after 1978, in Ireland. He said that he worked in Jersey in 1992 and 1993.

26. The plaintiff described the circumstances of each of the four occupational injuries referred to above. He said that after the 1984 accident he was out of work on and off for a few years. He worked for small builders as a general labourer but not as a steel fixer.

27. The three accidents in the mid-90s, which all involved the same employer, were all settled in 1997.

28. The plaintiff said that apart from these injuries, he had had a problem with his back since the mid-80s arising from the nature of his work as a steel fixer. He had consulted Mr. Kieran O'Rourke in relation to this and at one point (in 1995) had almost undergone spinal decompression surgery. However, on the morning of the scheduled operation Mr. O'Rourke had decided against this intervention.

29. He then described the work he was doing at the time of the Bus Eireann accident. He said that he was working a fourteen or fifteen-hour day as a general labourer.

30. The plaintiff was also asked by his counsel about an incident in October, 1997, when he was arrested by Gardaí after a dispute about a credit card with the management of a restaurant. He alleged that he was badly beaten up by the Gardaí, resulting in bruising and a cut to his leg.

31. The plaintiff was asked by his counsel whether there had been times when he drew the dole. He replied that in those days it was hard to get work in Dublin. One might get a few days work a week, and employers would permit workers to sign on for the dole because they might be sacked the next day. He was under financial pressure and he did draw the dole. In particular, he drew the dole for a couple of weeks when he started with the employer he was working with at the time of the bus accident, because it was two weeks before he got paid.

32. In cross-examination, the plaintiff was asked about his employment history. (Bus Eireann's solicitors had requested the names and addresses of his employers for a period of five years prior to the accident.) Counsel for Bus Eireann asked him what the regularity of his employment was from 1987 to 1991/1992 and he said that he was doing labouring or whatever he could get. He accepted that during this time he was continuing with his case about the 1984 accident, but said that he had not hurt his back in that incident. His

back had not really started to give him trouble until 1985. He said that he had not made a claim in those proceedings in relation to his back.

33. It was put to him that in replies to particulars (in relation to the 1984 accident) given in 1993 he had said that he was physically incapable of pre-accident work and that medical opinion was that his incapacity was such that he would be unable to compete with others with a realistic hope of obtaining even lighter work. The plaintiff said that he was not sure about that, that his ankle had given a lot of problems for quite a few years but that he had been able to go back to labouring work.

34. He accepted that from 1985 on, his back gave him intermittent trouble. He also accepted that in 1993 he had slipped in a supermarket and gone to hospital. He had been referred for x-rays some months later. However he maintained that he had not fallen to the ground. He had gone to hospital and had been x-rayed because he "got a sudden jerk".

35. It was put to the plaintiff that in 1994 he had a CT scan of his back and he agreed. He said that this was because of the intermittent pain he had been having since the 1980's.

36. The plaintiff was asked whether, when he met Mr. Harold Browne (who examined him on behalf of Bus Eireann) he had told him all these things. He replied that he presumed he had. It was put to him that he had not told Mr. Browne about the examinations in 1993 and 1994, nor about the planned surgery in 1995. He said that if he didn't, he was not hiding anything and that Mr. Browne might not have asked him those questions.

37. It was put to him that Mr. Browne asked him about his past history of injury or illness, and that all the plaintiff had told him was in relation to the electrocution incident and the accident with the timber, and that he had not mentioned that he had had trouble with his back since 1985. The plaintiff replied:

> *"That is correct, but I am not sure if I –I cannot absolutely say I didn't tell him, either. I don't know why I wouldn't have told him, I have nothing to hide, and if I told him about the other two accidents I am sure I would have mentioned about the exposure to asbestos."*

38. Returning to the plaintiff's work history, the plaintiff was asked about the dates for the period when he worked in Jersey. He was very uncertain in relation to this but said it could be 1992 or 1993. It was put to him that his unemployment benefit records showed that he had been signing on at Nutgrove Shopping Centre from May 1986 up to October 1990, and at the Dun Laoghaire social welfare office from January 1991 up to May 1993 without a break.

39. At this point the learned trial judge warned the plaintiff to be very careful. The plaintiff then said that he had worked in Jersey in 1994 for a few weeks, and had worked there for a year a couple of years earlier. It was put to him that in January, 1995 he had told persons treating him in Cappagh hospital that he had been out of work for two years. He said that he could not explain why he said that, since he had been in Jersey in 1994.

40. The plaintiff was asked again about the 1993 replies to particulars and the suggestion made in them that he would be unable to obtain even light work in the future. He accepted that he had in fact worked "on different little jobs for sub-contractors and things like that" as a general labourer.

41. In relation to the proposed surgery in 1995, the plaintiff said that his surgeon, Mr.O'Rouke, had decided on the morning of the operation not to go ahead because the pain had eased and an operation was not warranted. He accepted that he had been told that he had a natural condition that was causing trouble, and that he should lose weight.

42. Asked again about Jersey, the plaintiff said that he had worked there in 1991 and 1992 and did not draw the dole at the same time.

43. In re-examination, after a lunch-break, he said that he had worked in Jersey and the Isle of Man in 1988 and 1989. In total he had spent about nine or ten months in Jersey during that period. He was able to fix the time because he had saved enough money to be able to put down a deposit on a house at the end of 1989. He had gone to Jersey again in 1994 for about three weeks.

44. Not surprisingly, the plaintiff was cross-examined again on this issue. It was put to him that he had been signing on continually in Dublin from July 1987 to January 1989. He said that he had done his best on the dates but must be wrong.

45. It was also put to him that in the 1993 replies to particulars he had said that his periods of employment since the 1984 accident had been of such short duration that his earnings were of no significance. The plaintiff said that that was the overall picture but that he had worked. Asked by the trial judge whether the reply in 1993 had been a truth or a lie he said that he could not recall giving that information.

46. The plaintiff's GP gave evidence that was strongly supportive of the plaintiff in terms of the serious effect of the bus accident. In cross-examination he said that he had been treating the plaintiff since 1988 and that the only employment he was aware of was the employment in the mid-90s, when the three incidents occurred. There had been other "bits and pieces" but he had been broadly unemployed all the years. He dealt with the medication he had prescribed for pain over the years, including significant dosages of codeine.

47. Mr. O'Rourke gave evidence of seeing the plaintiff in April, 1994, at which time the complaint was of intermittent lower back pain for approximately ten years. In relation to the cancelled operation, he said that the reason for planning the surgery had been that the plaintiff's symptoms were consistent with a condition that could be improved by spinal decompression. However, when he presented for surgery the pattern of the symptoms had changed quite dramatically and was no longer consistent with the earlier diagnosis. It was now more consistent with pain due to degeneration in his facet joints and discs. Mr. O'Rourke felt that the planned operation would not be of benefit in that context. The plaintiff was referred for pain management.

48. Mr. O'Rourke did not say that the operation had been cancelled because the plaintiff was no longer in pain.

49. Mr. O'Rourke said that he saw the plaintiff again in 1998 and 2000. He confirmed that the plaintiff had told him about the various accidents going back to 1984. It was his opinion that the bus accident had aggravated a pre-existing condition.

50. Dr. Lorna Browne, the plaintiff's pain consultant, first saw him in 1999. According to her records, he told her that he had broken his ankle in 1984 and had returned to work in 1990. He did not work during 1992 and 1993 because he was taking care of a friend. In

1993 he returned to work as a general labourer. In 1995, he had had what she considered to be three minor accidents. She explained the course of injection treatment that she provided to the plaintiff and gave it as her opinion that he would not recover sufficiently to work as a manual labourer.

51. The details of the legal claims made in respect of the three mid-90s accidents were put to Dr. Browne. The electric shock had been alleged to have caused physical and psychological shock; anxiety; panic attacks; poor sleep; severe headaches; eyesight problems; a bad shake in the arms and legs; severe pain in the chest and difficulty breathing. In relation to the accident with the timber, he had claimed to be very tender over the chest; barely able to lift his arm; waking with pain at night and suffering from increasing anxiety and depression. Dr. Browne said that she was not aware of these injuries and it was not the impression she had been given by him. She was also not aware that the plaintiff's GP had been prescribing him significant quantities of codeine for a considerable period of time. She was also not aware that he had been in hospital in 1992 because of chest pains which were potentially due to angina.

52. Dr. Kenneth Sinanan, consultant psychiatrist, said that he first saw the plaintiff in March, 1998. He had formed the view that the plaintiff suffered either a mild post-traumatic stress disorder or a mild adjustment disorder reaction. The plaintiff had been prescribed anti-depressants by his GP but was not taking them regularly. Dr.Sinanan prescribed medication to be taken for a minimum of six to nine months. He saw him again in January, 1999, at which time he felt that the plaintiff was quite depressed. He improved to some extent in 2000.

53. Dr.Sinanan described the plaintiff as pleasant and co-operative. He did not have any reason to doubt anything he had been told by him.

54. In cross-examination Dr.Sinanan said that the plaintiff had told him that he had no previous psychiatric problems. It was put to him that in his previous claims, the plaintiff had said that he suffered from depression and anxiety as a result of the 1984 accident, and anxiety, depression and panic attacks as a result of the electric shock. Dr.Sinanan accepted that this was not compatible with the history he had taken. He also said

> *"One has difficulty in standing over one's reports if one has an inaccurate history".*

55. The plaintiff's employment at the time of the bus accident was confirmed by a witness from the relevant company.

56. A vocational assessor, Ms. Logan, said that in March, 2000 the plaintiff gave her a detailed work history. He had told her that in 1988 he worked in the Isle of Man; that he was unemployed in 1989; and that he had worked as a general labourer from July 1990 to July 1991. He said that he then worked in Jersey until July of 1992. He was then unemployed until May 1993, caring for his partner. After that he was employed more or less consistently until the bus accident.

57. It was put to Ms. Logan that the picture she had was rather different to that given by the plaintiff's GP, who had described him as "broadly unemployed" from 1988 to the mid-90s. She was surprised to hear that he had been claiming social welfare during much of this time. She also said that the history given to her was "emphatically different" to that indicated in the 1993 replies to particulars. She had understood that he was working and able to work.

58. Two witnesses were called on behalf of Bus Eireann. The first was Mr. Harold Browne, who saw the plaintiff nine months after the accident. Initially he appeared to say that the plaintiff had not given him a history of the bus accident. That this was a misunderstanding became abundantly clear very shortly thereafter, when he gave a detailed account of what the plaintiff had said about the accident and his post-accident complaints.

59. Mr. Browne said that he had asked about pre-accident history and had been told about the electric shock and the falling timber.

60. He said that his own view, after examining the plaintiff, was that he had soft tissue injuries to his neck, shoulder and back. He felt that there was no serious injury to the back but that he should see him again in six to nine months. Before that second examination, Mr. Browne was furnished with the plaintiff's medical records. He said that he found a letter from the GP, from 1994, referring the plaintiff to St. Vincent's in relation to chronic back pain resulting from an accident at work in 1984. He said that there was also another accident when the plaintiff fell in a supermarket in 1993, injuring his back.

61. Mr. Browne concluded that there were three injuries to the plaintiff's back, in 1984, 1993 and the 1996 bus accident. There was also the pre-existing back condition. All of these factors dovetailed into each other. He felt that the pain experienced by the plaintiff after the bus accident was an exacerbation of the two previous incidents.

62. In cross-examination Mr. Browne accepted that it was reasonable for the plaintiff to have been out of work when he first saw him. It was put to him that the plaintiff had a pre-existing back condition. He agreed but added that there had been two previous injuries. It was put to him that the incident in the supermarket had not involved a fall, and had caused only a mild soft tissue injury rather than anything serious. Mr. Browne queried why, if that was the case, the GP had sent him for x-rays six months later.

63. Mr. Browne agreed that as a person with a pre-existing degenerative condition the plaintiff was more vulnerable to back injury and his recovery could be compromised. He also agreed that he would not be able to go back to a construction industry job, but thought that he was fit for light to moderate work. It was possible that his back would improve.

64. Dr. Desmond McGrath, psychiatrist, said that he had seen the plaintiff in November, 1998. Asked whether the plaintiff had told him about the psychiatric injury he attributed to the bus injury, Dr. McGrath said that he did not really speak of any psychiatric injury. He had said that he had been "shaken up" in the accident and described the pain he had suffered since. However, he had described a change in personality in that he had become unsociable. Dr. McGrath also referred to what he perceived as a dependency on codeine.

65. Dr. McGrath's conclusion was that the plaintiff had been in a relatively minor accident in which he sustained soft tissue injuries. He exhibited no symptoms of any specific psychiatric disorder and did not appear to be depressed or under particular stress.

Evidence in the current proceedings

The plaintiff's evidence in chief

66. The plaintiff's evidence in this case is not easy to summarise. He consistently failed to listen to and answer questions put to him by his own counsel, counsel for the defendant or the court. When it came to cross-examination, matters were not assisted by the evident personal antipathy between himself and counsel for the defendant. It appears that they know each other for a long time, due

to the plaintiff's relationship with counsel's late sister. When the case was opened, the court was expressly told by the plaintiff's counsel, on instructions, that the plaintiff did not object to counsel appearing in the case. However, in the view of the court it led to an undesirable level of distraction.

67. It is clear that the plaintiff makes the following complaints about the defendant.

68. He said that he had only one consultation in the defendant's office, just a day or two before the trial. The defendant was not present for the consultation and it was handled by Ms. Imelda Brophy. All that they discussed was the expenses.

69. He was cross-examined about his work history as far back as 1984. He was unprepared for this, having been told that the furthest back he would be asked about would be five or six years. He had written out his work history and this could have been given to the judge.

70. The witnesses for Bus Eireann said that he had not disclosed to them that he had been in Cappagh and were not challenged on this, despite the fact that he had signed consent forms releasing his medical reports.

71. He had disclosed the Cappagh episode to Dr. Lorna Browne but she was badgered into saying that she knew nothing about his back problem. The plaintiff appears to believe that she and the other witnesses called on his behalf should have been cross-examined on his behalf.

72. Dr.Sinanan had said that he was exaggerating but the evidence in his report contradicted this.

73. The defendant did not provide Dr.Sinanan or Dr. Lorna Browne with sufficient information about his history.

74. Counsel for Bus Eireann had put it to him several times that named doctors would say that he only told them about two accidents. This was never challenged or stricken from the record.

75. Mr. Harold Browne had said that he never told him about the bus accident. He and Dr. McGrath "misled the court".

76. Dr. Austin Darragh should have been called to give evidence. It appears that senior counsel had advised that he not be called.

77. He instructed the defendant to lodge a cross-appeal of the finding that he had misled the court. The defendant promised him that he had done so. He did not find out until the Supreme Court hearing that there was no cross appeal.

78. When the case was over he never received any of the money awarded and it was not explained to him why that was so, or what was happening about the costs in the matter.

Cross-examination of the plaintiff

79. In cross-examination it was put to the plaintiff that the damages awarded to him had been paid over to the Bank of Ireland, on foot of an undertaking given by Kent Carty in respect of a loan. He said, firstly, that he was not a hundred per cent sure. He then said that he was not denying that the money was paid to the bank but was unhappy with the length of time involved. He then questioned whether he had been charged interest by the bank because of this. He said that the defendant had never explained it. It was put to him that this issue had been the subject of separate proceedings and the High Court had ruled on how the money was to be paid out. This ruling appears to relate only to the costs, but the destination of the damages was explained in correspondence exhibited to affidavits opened to the court. The plaintiff objected to reference to those proceedings because the matter was under appeal. Finally, it was put to him that the money had accrued interest, all of which had been paid to the bank on his behalf. He said that he should have been given it himself because he might have gotten a better deal from the bank.

80. It appears from an intervention by his counsel that the plaintiff did not tell his current legal team about these other proceedings, in which he is the defendant and Mr. Cadden is the plaintiff. He now says that the proceedings weren't properly served on him, but does not deny receipt of the affidavits.

81. A signed note of a telephone attendance between counsel briefed in the Bus Eireann case and a potential medical witness was put to the plaintiff. It records the witness as saying that if called he would have to say that the plaintiff had not given his medical history frankly, particularly in that he had omitted to mention to him the proposed surgery in 1995. The plaintiff denied being told about this conversation.

82. It was put to the plaintiff that he had been happy with the High Court award and had not wanted to appeal. The defendant and counsel had in fact advised him to negotiate and accept a lower sum in settlement of the appeal by Bus Eireann. He denied this and said he had thought, based on the actuarial figures, that he should get over IR£200,000. However, he then said that three offers had been made on his behalf to accept a lower figure because he had been told that the award could be reduced. He said "I took his instructions by him making a lower offer." Then he said that even if he never asked for it to be appealed it should have been. He then said that the defendant had never discussed the pros and cons of an appeal with him, but had advised him to try and settle.

Other evidence on behalf of the plaintiff

83. The only witness, other than the plaintiff, was a gentleman who said that he had been a practicing solicitor for twenty-four years. He has since left the profession to become a part-time actor.

84. If this gentleman was called in order to fulfil the requirement that professional negligence actions should be supported by expert opinion, it has to be pointed out that he did not lay any claim to expertise other than having been in practice. In any event, his evidence was entirely uncontroversial and related to the normal manner in which personal injury actions are run.

85. There was no medical evidence to support the claim that the plaintiff has suffered serious stress and psychological injury as a result of the defendant's conduct.

Conclusion

86. In my view the foregoing evidence demonstrates ample grounds for dismissing this case, without the necessity of going on to deal with the evidence given by the defendant and his assistant.

87. It is abundantly clear from the transcript of the Bus Eireann proceedings that the plaintiff's difficulty with credibility in the eyes of

Johnson J. stemmed almost entirely from the evidence relating to the fact that he was signing on while claiming, for the purposes of his legal proceedings, to have been employed; from the replies to the 1993 particulars to the effect that he would in future be unable even for light work and from the fact that he had given differing accounts of his medical history to different witnesses who were called on his behalf. The credibility issue was not whether or not he had a pre-existing back condition – that was never in doubt. Nor was it whether previous accidents might or might not have affected his back. That is a matter on which medical witnesses might disagree. The problem was that for different purposes he had given different accounts of his physical and psychological health at relevant times. All of these accounts were created by the plaintiff himself. It was not his solicitor's obligation to provide the professional witnesses with a fuller picture. That was the plaintiff's obligation.

88. It is completely misconceived to suggest that either counsel, or an instructing solicitor, could challenge the evidence given by their own witnesses in these circumstances.

89. There is no substance in the claim that he was not properly advised as to how to deal with his employment history. The original senior counsel instructed by Kent Carty had raised an issue as to his truthfulness in that regard and had directed him to write down a full account. Counsel for Bus Eireann did not trawl through 20 years of employment – most of his questions were directed to the six or seven years before the bus accident. The plaintiff's answers were hopelessly inconsistent, both with each other and with the social welfare records. There is no basis upon which it can be asserted that the written record of his employment, prepared by him at the request of his legal team, could have been handed in to the judge, either in lieu of his being subjected to cross-examination or to support his evidence – that is not how an adversarial witness action proceeds.

90. I find that the claim that the plaintiff was not properly informed as to what happened to his award was not made in good faith. The fact that the plaintiff does not appear to have informed his current legal representatives about the litigation regarding the costs, in which the issue about the damages was ventilated, tells its own story. It is quite clear that the defendant honoured a solicitor's undertaking, given by his predecessor in the case, to repay money owed to the bank out of the award.

91. The claim that the defendant did not advise the plaintiff as to an appeal and did not follow instructions to lodge a cross-appeal is manifestly unfounded on the basis of the plaintiff's own evidence.

92. Finally, the court again notes that O'Neill J. refused an application to dismiss this action as being frivolous, vexatious and bound to fail. The jurisdiction to grant such an order is, of course, to be exercised sparingly and there were at least some elements of the pleadings that were not, on the face of things, incapable of grounding a viable action. I am also conscious of the fact that the defendant chose not to make a non-suit application at the end of the plaintiff's case and may have wished the matter to be dealt with on the full merits. However, having heard the plaintiff's evidence it is impossible to avoid the conclusion that he was attempting, in reality, to re-litigate the issues in the Bus Eireann case and obtain damages from the defendant on the basis that he should have achieved a better result than he did. This is not a permissible course of action and is an abuse of the process of the court.