

BETWEEN**ANTONIO MATUTE****PLAINTIFF****AND****MEDTRONIC IRELAND LIMITED, MEDTRONIC PUBLIC LIMITED COMPANY AND MEDTRONIC VASCULAR GALWAY****DEFENDANTS****JUDGMENT of Mr. Justice Barr delivered on the 30th day of June, 2017****Introduction**

1. This is an appeal from a decision of the Master of the High Court, refusing the plaintiff an order directing the defendant to permit his engineer to re-inspect portion of the defendants' factory and to take his own photographs of the work process carried on thereat. The plaintiff submits that it is necessary for him to have such an order from the court, due to the fact that a prior engineering inspection of the locus, was totally inadequate, due to the fact that the defendant did not allow the plaintiff's engineer to take any photographs of the system of work carried on at the factory. The plaintiff contends that while the defendant did provide an employee of the defendant company who had a camera, to accompany the plaintiff's engineer and take such photographs as were directed by him, the resulting photographs which were furnished to the plaintiff's solicitor, some considerable time later, were totally inadequate to enable him to prepare a proper report for the trial of the action.

Background

2. In the present action, the plaintiff is seeking damages in respect of personal injury, loss and damage, which he alleges were caused by virtue of the fact that he was required to participate in an unsafe system of work, which was carried on at the defendants' factory premises, situate at Parkmore Business Park West, Galway. In essence, the plaintiff is claiming that he was caused to suffer a repetitive strain injury to the muscles and ligaments in his neck, shoulders and upper arms, due to the repetitive nature of the arm and hand movements which he was required to carry out in the course of his work with the defendant. Proceedings were instituted by a personal injury summons issued on 14th March, 2016. Notwithstanding that the summons issued prior to the carrying out of a joint engineering inspection at the factory, the plaintiff was able to plead no less than sixty particulars of negligence in the endorsement of claim.

3. It is common case between the parties that on 10th June, 2016, a joint engineering inspection was carried out of the locus, which was attended by the plaintiff, the plaintiff's engineer Mr. Michael Byrne, the defendants' engineer, Mr. Mooney and the Environmental Health and Safety Specialist in the defendant company, Ms. Eadaoin Guilfoyle. It is accepted that at that engineering inspection the plaintiff's engineer was not permitted to take any photographs. This was apparently due to a rule which had issued from the defendant's parent company in the United States that only employees of Medtronic could take photographs of any of the manufacturing processes carried on at the factory.

4. It appears that the plaintiff's engineer, Mr. Byrne, was informed in the car park by the defendants' engineer, Mr. Mooney that he would not be allowed to take photographs during the inspection. This was later confirmed by Ms. Guilfoyle in the reception area in the factory, prior to commencing the inspection. She indicated to Mr. Byrne, that she had a camera and would take whatever photographs he directed, during the course of the inspection. She further told him that he would be furnished with these photographs within a short time of completion of the inspection. It appears that during the inspection, Ms. Guilfoyle took a number of photographs, under the direction of Mr. Byrne.

5. On 13th July, 2016, the defendant furnished to Mr. Byrne 34 images, which he understood had been taken by Ms. Guilfoyle at the time of the inspection on 10th June, 2016. Mr. Byrne complained that these photographs were in an unsuitable format, being contained within a PDF document. He stated that these photographs in a PDF format were unsuitable for use by him in the context of preparing his engineering report. He requested that he be furnished with the photographs in a digital format.

6. In an affidavit sworn on 15th June, 2017, Mr. Byrne further stated that he was surprised that so few photographs had been supplied to him. He stated that in addition, these photographs were not of much benefit, firstly given the format that they were in, such that they could not be divided into individual photographs for analysis and also due to the fact that the photographs were not identified as having been taken in any particular order.

7. Mr. Byrne stated that following multiple requests, he was subsequently provided with photographs on or about 6th September, 2016, which were in a more suitable format, being an individual JPEG format. However, when he reviewed the photographs carefully with the plaintiff, he came to the conclusion that these photographs had not been taken on the date of the joint engineering inspection, but had been taken at some different time, presumably subsequent to that inspection. The defendants had not pointed out to him that the photographs supplied to him had actually been taken at a different time or date. Mr. Byrne says that he only became aware of that through his own analysis of the photographs.

8. In an affidavit sworn on 1st June, 2017, Ms. Eadaoin Guilfoyle stated that due to the confidential nature of the manufacturing processes carried out by the defendant at its factory premises, photographs were not permitted to be taken by any non-Medtronic employees. She stated that she had made this clear to the plaintiff's engineer in the reception area on the date of the inspection. She informed him that she would take all pictures requested by him. She stated that this was not questioned by Mr. Byrne at that time.

9. She stated that the engineering inspection took approximately two hours. She stated that during the course thereof, the plaintiff disrupted the employees engaged in the manufacturing process by engaging in conversation with them. She stated that she did not take sufficient care in taking the photographs to ensure that other employees were not identifiable in the photographs. It appears that subsequent to the engineering inspection some other employees, whose faces were shown in the photographs taken by Ms. Guilfoyle, complained about this fact. Accordingly, she stated that she took further photographs, where employees could not be identified and it was these photographs which were furnished to the plaintiff's engineer.

10. Mr. Byrne went on in his affidavit to state that when he made complaint about the fact that the photographs, which had been

supplied to him, appeared to have been taken on some date other than the date of the joint engineering inspection, he was furnished with a series of photographs on a memory stick on or about 30th May, 2017. He was given a total of 61 photographs.

11. In her affidavit, Ms. Guilfoyle stated that when the plaintiff's engineer objected to the original set of photographs, which had been taken by her on a different occasion, she then furnished the original photographs taken on 10th July, 2016, with the faces of the operatives obliterated. In relation to the suggestion that not all the photographs taken by her on 10th July, 2016, had been furnished to the plaintiff's engineer, she confirmed that the 61 photographs, which had been provided in both hardcopy and in JPEG digital format, constituted all the photographs which she had taken on the occasion in question at the direction of the plaintiff's engineer. She stated that each photograph was listed sequentially. She further confirmed that the only modification to the photographs, was the removal of the details showing the faces of other operatives.

The Present Application

12. By notice of motion dated 23rd September, 2016, the plaintiff sought an order pursuant to O. 50, r. 4 of the Rules of the Superior Courts, directing that the plaintiff's engineer should be allowed to re-attend at the locus and to take his own photographs of the system of work thereat. That application was initially listed before the Master of the High Court on 3rd November, 2016. In his affidavit, Mr. Paul Horan, solicitor for the defendants, stated that in advance of the motion coming on for hearing, the defendants through their counsel, made an offer to the plaintiff's counsel that the plaintiff's engineer could re-attend at the locus and that the defendants would arrange for whatever photographs were required by the plaintiff's engineer to be taken again and that the defendant's engineer would remove or obliterate the faces of the defendants' operatives from those photographs and would furnish a copy of the photographs to the plaintiff's engineer within three days. However, the plaintiff through his counsel indicated that they were refusing the offer, as the plaintiff's engineer wished to have the opportunity to take his own photographs of the locus. On 17th November, 2016, the matter was heard by the Master of the High Court, who declined to make the order sought by the plaintiff. By notice of appeal dated 25th November, 2016, the plaintiff appealed against that refusal to this Court.

13. The matter was adjourned before this Court from time to time, to enable various supplemental affidavits, as referred to herein, to be sworn by each of the parties. In particular, in view of the fact that the plaintiff's engineer had been furnished with a total of 61 photographs showing various tasks being carried out by operatives at various points along the workstation, which was the area at which the plaintiff had worked within the factory; in these circumstances, the court requested that the plaintiff's engineer should set out in an affidavit, precisely why the 61 photographs as furnished by the defendants, were not sufficient to enable him to compile his report on the system of work carried on at the factory.

14. On 15th June, 2017, Mr. Byrne swore a detailed affidavit setting out the chronology of events and the shortcomings in relation to the photographs which had been furnished to him. He stated that a key part of investigating work related neck and upper limb disorders (WRULD) was that the engineer should take a comprehensive set of photographs himself and should review them as he goes along, to ensure that he has captured all the necessary matters that will be required when compiling his report. In cases involving repetitive strain injuries, usually the most ideal form of recording would be to take a video of the system of work. Where that was not possible, the engineer would take a sequence of photographs in close succession showing the specific task being undertaken by the operative. Mr. Byrne stated that it would not be unusual for him to take between 150 – 200 photographs, when investigating a repetitive strain injury case.

15. He went on to state that it was critical that the engineer should be furnished with the photographs immediately after the inspection, so that he could draw up a comprehensive and detailed report, with the benefit of such photographs. In this case, there had been a delay of some weeks between the date of the joint inspection and the date on which he was first furnished with photographs, which he states were in an unusable format. He stated that at that time, he did not realise that the photographs which were supplied to him, had in fact been taken on an occasion other than the date of the engineering inspection. He stated that in such circumstances, those photographs would be practically useless, for use in court. He stated that the fact that he had not been able to review the photographs as they were taken in the course of the inspection, meant that he could not ensure that the photographs showed the entirety of the sequence of work, which he wished to capture.

16. Mr. Byrne went on to deal with the 61 photographs which he said were not furnished to him until 30th May, 2017. He was clearly of the view that this set of photographs, even allowing for the fact that they had been taken at the time of the original joint inspection, were not suitable or adequate to enable him to compile a comprehensive report for the trial of the action. He stated that while Ms. Guilfoyle may have done her best to capture the images which he required, she was not skilled enough to capture the precise details which he needed to compile his report. In addition, he stated that the camera which she had was inferior to his own camera. He stated that if he had been able to take his own photographs, using his own camera, he would have obtained a far superior pictorial record of the work carried out by the plaintiff at the relevant workstations. He stated that Ms. Guilfoyle was not skilled in photography, nor was she skilled in forensic engineering and the use of inferior equipment, led to a number of shortcomings to include the following:-

- Not being able to get precise close-ups of the systems of work.
- Not getting the photographs in the order in which they were taken.
- Not having a recorded number of each photograph in order to reference the system of work.
- Not being able to immediately review photographs.
- No continuous shooting photographs taken to show quick hand movements. (This was very important as only 61 photographs taken in total)

17. Mr. Byrne stated that as a result of the various shortcomings in the photographs taken at the joint inspection in June 2016, he was not in a position to prepare an adequate report for use at the trial of the action. He summarised his position in the following way:-

"28. I say as a result, the photographs are not appropriate for the task required, particularly given the unacceptable passage of twelve months since the taking of the photographs during the inspection and the provision of the photographs.

29. I say as it stands, I am not in a position to prepare a report, even with photographs provided, given the time lapse which is running close to twelve months at this stage. In my view it would be highly unfair to the plaintiff for me to attempt to prepare a report at this stage. The plaintiff has engaged a solicitor, who looked for an appropriate

professional to carry out this task in good faith. I would not be in a position to provide the plaintiff with such a service at this stage.

30. I say given the time gap and the fact I wasn't allowed to take my own photographs I would be very exposed in cross examination to having any critique of the systems of work within the defendants' premises being challenged. On any engineering inspection and most importantly this type of injury, one needs to use time within the facility very efficiently in order to accurately record what was there. I was not provided with this opportunity and as such my knowledge of the system of work within this place of work at this stage, is very limited. The delay in providing adequate or any photographs severely curtailed my ability to produce a worthwhile report for the plaintiff. Given the delay and the number of photographs available, it is fatal.

31. I say when an engineer is giving any evidence in terms of the system of work he needs to be intimately familiar with it, detailed photographic evidence and its immediate review, along with detailed notes on what the photograph shows, are probably the most critical phase of the engineer's investigation. It is this vital aspect which has been completely interfered with by the defendant in this matter. As such, given a barrister's duty to act as best he can on behalf of his client, it probably would be remiss of any barrister not to expose a weakness in this matter, if I was to attempt to prepare a report at this stage. I would not be happy with any report I could prepare in this matter at this stage. It would be unprofessional and leave myself open to rightful criticism by the plaintiff.

32. I say I am not in a position to complete a report under the present circumstances, nor do I think another engineer would be able to complete a report on behalf of the plaintiff. Engineers will differ in various ways/ methods, but all engineers that I have met in the field of forensic engineering over the years tend to be very precise, particularly at the careful task of collecting a record of the system of work in terms of notes and/or photographs. As such, I am not aware of any engineer who would be happy to proceed in the circumstances."

18. Mr. Byrne went on in the course of his affidavit, to state that never in his twenty years experience as a forensic engineer had he been denied the opportunity to take photographs at an inspection. He stated that even where he was investigating accidents within prisons, he was allowed take whatever photographs he deemed necessary, subject only to allowing the prison authorities to develop the photographs and forward them on to him. He had never encountered any difficulty in this regard.

19. He went on to state that when he made an issue of the fact that the PDF documents with which he had supplied in July 2016, were of no benefit to him, he was some months later provided with individual photographs which had not been taken on the date of the engineering inspection. He stated that this was unprecedented in his experience and was also grossly unprofessional. He stated that he had not been informed by the defendants or their representatives, that these photographs had not been taken on the date of his inspection. It was only on review of those photographs and following a discussion with the plaintiff, that they ultimately came to the view that the photographs which had been supplied had not been taken on the date of the engineering inspection. He stated that in his almost twenty years carrying out such work, he had never seen a defendant carry on in this manner previously. Indeed, he went on to state that he had never experienced anything remotely similar to the unprofessional behaviour of the defendants in their approach to every aspect of this inspection.

20. Mr. Byrne concluded by stating that in his opinion it was necessary for him to be given the opportunity to re-inspect the locus and to take his own photographs during that inspection.

21. The matters in issue between the parties on this application have become somewhat more complicated due to the fact that on 4th October, 2016, alterations were carried out to the factory and in particular to cell No. 3, where the plaintiff worked. It appears that the workstation has been changed, such that a column, which was in part of the workstation, is no longer an obstruction for the operative. In the course of argument at the bar, Mr. Keys, B.L., accepted on behalf of the defendant that alterations had been carried out to the factory. He further stated that the defendants estimated that it would cost in the region of €60,000 to have the workstation put back into the condition that it was in at the time that the plaintiff allegedly suffered his injuries and which was the condition it was in at the time of the engineering inspection on 10th June, 2016. However, no evidence was led to back up this assertion.

Conclusions

22. Under the Constitution of Ireland, citizens and others within the State have a right of access to the courts. This means that in civil litigation, a person who wishes to bring a claim against another person, claiming that they have been injured as a result of wrongdoing on the part of that other person, is entitled to institute proceedings before the courts. Included within this right, is a right to be allowed to put his case together in as full a manner as is possible, so that he can present his case fully at the trial of the action.

23. The Rules of the Superior Courts contain provisions whereby a plaintiff can apply to the High Court for an order giving him liberty to carry out an inspection by his engineer of any place or property that may be relevant to the action. Order 50, rule 4 gives effect to that right by providing that the court can make the following orders:-

"4. The Court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

24. In personal injury actions, it is the common practice, indeed the almost invariable practice, that if liability is in issue between the parties, the engineers retained by the plaintiff and the defendant will carry out an inspection of the relevant locus or piece of machinery. Usually this will be done as part of a joint engineering inspection. The usual format of such an inspection is that which has been set out in detail by Mr. Byrne in his affidavit. Usually, the plaintiff will attend with his engineer and also his solicitor. He will give instructions to the engineer as to the circumstances of the accident and in relation to what pieces of machinery or equipment he may have been using at the time of the accident. The plaintiff's engineer will then communicate this to the defendant's engineer and both engineers will take whatever photographs they feel are necessary to enable them to prepare an adequate report.

25. While the court can readily understand that the defendants' parent company, may have a legitimate commercial interest in protecting the secrecy of the manufacturing processes carried on by it at the Galway plant and in order to protect such legitimate commercial interests, they may have put in place a general rule that only employees of Medtronic would be allowed to take

photographs within the factory, it was not appropriate to apply that rule in an inflexible manner, such as to prevent the plaintiff's engineer, Mr. Byrne from taking photographs at the joint inspection carried out on 10th June, 2016.

26. The defendants' parent company in the United States, or its Board of Directors either in the United States or in Ireland, should have been told by the defendants' solicitor that it was usual in the pre-trial procedures adopted in this country, that a plaintiff would be allowed to carry out an unhindered engineering inspection, where his engineer would be allowed take whatever photographs he deemed necessary. If the defendants wished to place restrictions on this pre-trial procedure, they should have set out in writing the terms and conditions on which such an inspection would be allowed. If this was not agreed to by the plaintiff's solicitor, the defendant should have come before the court in advance of the engineering inspection, to seek the directions of the court in relation to the conditions under which such inspection would be allowed. It was not appropriate for the defendants simply to refuse the plaintiff's engineer the opportunity of taking his own photographs in the course of the joint engineering inspection.

27. The fact that the plaintiff's engineer maintains that he was furnished some weeks later with a different set of photographs, which had not actually been taken during the joint engineering inspection and that he was not told of this, only serves to make a bad situation, worse. In addition, his complaint that he was only given 34 photographs to begin with and it was only some considerable time later that the full batch of 61 photographs was furnished, is also a cause for concern.

28. The end result is that almost one year after the carrying out of the joint inspection the plaintiff's engineer was furnished with 61 photographs, which were taken at that inspection. I was cognisant of the fact that if I were to direct that the plaintiff's engineer was to be given the opportunity to re-examine the locus, this may cause the defendant some expense, in having the workstation reinstated to its original condition. With this in mind, I requested the plaintiff's engineer to submit an affidavit setting out why the 61 photographs would not be sufficient to enable him to draw up his report. Having regard to the matters set out by Mr. Byrne in his affidavit dated 15th June, 2017, which have been set out earlier in this judgment, I have to accept the criticisms and limitations which he says exist in relation to the set of photographs which he currently has. There is no evidence to contradict his assertions in this regard. Accordingly, I find as a fact that the plaintiff has been significantly prejudiced in the preparation of his case by virtue of the fact that the defendants did not allow the plaintiff's engineer to take his own photographs at the joint engineering inspection. I am further satisfied that the photographs taken by Ms. Guilfoyle, are not sufficient to enable the plaintiff's engineer to compile his report at this remove. Accordingly, I have reached the following conclusions in this matter:-

(a) As it appears that the Master of the High Court gave his decision on 17th November, 2016, and as the notice of appeal against that decision was dated 25th November, 2016, it may be that the present appeal is out of time having regard to the provisions of O. 63, r. 9. In the circumstances, I extend the time for bringing an appeal against the decision of the Master of the High Court up to and including 25th November, 2016.

(b) The defendant is to reinstate that portion of the defendants' factory in which the plaintiff worked, to the condition that it was in at the time of the joint engineering inspection carried out on 10th June, 2016.

(c) When the relevant portion of the factory has been reinstated, the plaintiff's engineer is to be given the opportunity to carry out an inspection thereof in the company of the plaintiff and his solicitor and is to be given the opportunity to take whatever photographs he deems necessary of the system of work carried on thereat.

(d) This court is cognisant of the fact that the defendants have a legitimate commercial interest in keeping the processes carried on at the factory, confidential. To protect that interest, the court directs that when the plaintiff's engineer has selected the photographs which he wants to use in his report, he must send them to the defendants' solicitor. If the defendants have a difficulty with the content of any of the photographs, they can, through their solicitor, suggest modifications to the photographs to protect the confidentiality of their manufacturing processes. If agreement cannot be reached on the necessary modifications, either party may re-enter the matter before this court for further directions, on giving the other side twenty four hours notice of such application. In addition, the plaintiff's engineer is to give an undertaking that he will destroy any photographs which he does not intend to use in his report.