

THE HIGH COURT**[2012 No. 1770 P]****BETWEEN****MOHAMMED SAMEUR RAHMAN****PLAINTIFF****AND****CRAIGFORT TAVERNS LIMITED****DEFENDANT****JUDGMENT of O'Neill J. delivered on the 11th day of October, 2012**

1. The plaintiff in this case is a native of Bangladesh and was born in 1975. He came to this country in the middle of the last decade and secured employment with the defendant in the Killashee Hotel, County Kildare. He was employed there as a banqueting waiter and he also had other additional miscellaneous duties.

2. On 27th November 2006, while in the course of his duties as a waiter in the morning, he was assisting in the kitchen area and while carrying some toast, he came in contact with some trays which, it is accepted, were negligently misplaced. He bumped into the trays, as a result of which they ended up on the floor. He stood on one of them with his right foot, which caused him to slip, and according to his evidence to me, his left foot then came down on another tray. The upshot of all of this was that he had a slip and fell heavily backwards.

3. The plaintiff was very shaken by the experience and his evidence was that he had a period of loss of consciousness. He was helped to his feet and supported himself against the wall. He then went off duty and walked back to his accommodation which was approximately 200 metres away. He was out of work for a few days. He then went to Naas General Hospital where he was attended to and was X-rayed. The plaintiff then returned to work but felt he was not getting better. He returned again to Naas General Hospital and about two weeks after the incident, he attended his General Practitioner.

4. Since that time, the plaintiff has had complaints of a variety of injuries and sequelae which can be summarised as follows.

5. The plaintiff complains of constant pain, at times severe, in his lumbar back, left knee area, sometimes in his right leg, and in the earlier phases around his chest area.

6. The evidence which he has given to me is that since this accident happened, these complaints have been constantly present and at times worse than at others, but always there. When these complaints are bad, he estimated his pain levels at 8 out of a scale of 10 and when in the constant mode, 5 or 6 out of 10.

7. In due course, the plaintiff attended Dr. Shearer on several occasions when he returned to work. The plaintiff was certified out of work on sick leave until June 2007. When he returned to work initially, he was briefly put to gardening duties which he did not like and felt he could not do. He resumed his normal duties as a banqueting waiter but not working a full 40-hour week. He continued with this until April 2008 when he gave up work again because he felt, because of his injuries, unable to continue working.

8. The plaintiff has not had formal employment since then. In 2009, he went twice to India and Bangladesh where he sought some medical attention. He had MRI scanning done and he returned to Ireland. His evidence to me was that since returning to Ireland, he was unable to work because of the continuance of his complex of complaints. He lost his accommodation and ended up dependent upon the charity of the Islamic community, as a result of which he was living in the Islamic Cultural Centre in Naas, sleeping on the floor there, indeed, a very pitiable plight, as depicted in his evidence.

9. As a result of his complaints, the plaintiff's evidence to me is that he is incapacitated or disabled, not just for work, but in many aspects of daily living. He has difficulty walking, lifting and coping with the normal activities of daily life and has constant pain.

10. The application which I have to deal with is an application under s. 26 of the Civil Liability Act 2004, and it is an application to dismiss the plaintiff's claim under s. 26, sub-section (i) on the grounds that the plaintiff has given false and misleading evidence in regard to his case. Therefore, if the section applies, and unless the court is satisfied for stateable reasons that an injustice would be done, I must dismiss the claim.

11. The first thing that needs to be done in dealing with an application of this kind is to concentrate on what has been identified by the defendant as the false and misleading evidence.

12. It should first be observed that in an application of this kind, the onus of proof rests on the defendant. It has been observed in several cases that s. 26 is draconian in its effect when applied, in the sense that a claim for damages which would otherwise be processed in the normal way must be dismissed because of the giving of false or misleading evidence on a material aspect of the case. I would take the view that because of the penal nature of the section, the court must be satisfied to a high degree of probability that the defendant has discharged the onus on it.

13. What is said to be the false and misleading evidence is the description by the plaintiff in his evidence of his symptoms since this accident happened, namely, that entire depiction of constant, at times severe, pain, with associated continual disability in all of the normal activities of daily living, and specifically, his non-disclosure to this court and to various doctors of the fact that he was working from 2010 onwards.

14. In embarking upon a consideration of whether or not the plaintiff's evidence has been false or misleading, I must begin with the accident itself.

15. This was a relatively minor incident. The plaintiff was a healthy 31-year old and he fell backwards onto his buttocks. There was no evidence of any physical injury such as bruising or cuts. It is quite surprising that a low velocity incident of this nature in somebody of his age and state of health would produce any significant injury at all, let alone the degree to which the plaintiff claims he has been injured.

16. The plaintiff has attended a considerable number of doctors. Evidence has been given to me by five of these doctors: Doctors Shearer, Sharif and Ahuja for the plaintiff and Professor McElwain and Mr. Fenelon for the defendant.

17. What is quite clear, and not in contest, from all of this evidence is that there is no physical explanation for the plaintiff's complaints. He has been clinically examined many times by all of these doctors, and indeed, more who did not give evidence. He has every radiological and technological scan or examination that could be applied, including 3-D MRI scanning or CT scanning. None of these procedures have shown up anything. What did show up was that there was some minor degeneration in discs in his spine but that does not appear to me to significantly impact on the situation or offer any kind of convincing explanation of the plaintiff's symptoms, nor does the evidence of the doctors so suggest. Also shown up was a Grade 1 strain of the medial ligament of the left leg. Again, not anything of any great significance.

18. One is left searching for an explanation of why it is that this plaintiff presents to all the doctors and to this court, this picture of a person in constant pain and suffering a high level of disability, including rendering him unfit to work.

19. Into the picture comes a Private Investigator. On three occasions in October 2010, November 2011 and February 2012, the plaintiff was put under surveillance. What did this reveal? Over the days on which the plaintiff was surveyed, he was shown getting into his motorcar, a Jeep which he purchased in 2010; doing deliveries for a number of takeaway Indian restaurants in Naas; getting into and out of his vehicle many times; walking to his vehicle - on one occasion, jogging between it and another vehicle. He was shown going into a supermarket; going upstairs; coming out of another shop carrying large packages, shifting these from one hand to the other in order to get the keys out of his pocket. He was shown carrying bags and going down a steep slope. He was shown hoovering in Islamic Centre in Naas.

20. I am satisfied from these pictures that they show that the plaintiff had absolutely no disability whatsoever. He moved with the kind of mobility and lack of inhibition that one would expect in a relatively young person. He did not display the slightest inhibition or difficulty when lifting up and carrying large bags or when transferring large parcels from one hand to the other. He did not show the slightest difficulty going upstairs and did not use the handrail, or any difficulty while hoovering.

21. What you saw on the videos was a youngish man in the whole of health going about his normal business without any evidence whatsoever of any discomfort, distress, disability or anything of that nature.

22. This was wholly inconsistent with the evidence presented to me, verbally, by the plaintiff in court, but also my observation of him in court, where, for the duration of the trial, I witnessed a variety of presentations of postural discomfort, facial grimaces as if to display pain, and laboured movements when moving about. All, I am satisfied, designed to persuade me that he was in pain or discomfort. It would appear that some of the doctors who examined him had a similar experience, in particular, Dr Ahuja. Dr. Ahuja gave evidence of observing the plaintiff who, when he knew he was under observation, displayed difficult or laboured movements. When not under observation, the plaintiff's movements were normal. In cross-examination, Dr. Ahuja accepted that he thought the plaintiff was putting on an act.

23. I am quite satisfied that the evidence which the plaintiff gave was grossly exaggerated. The complaints that he makes are out of all proportion to any injury he could possibly have suffered in this minor incident. I think his evidence has to be regarded as false and misleading. In my view, it was a false presentation of the true state of his injuries and the sequelae thereto. In particular, he undoubtedly told untruths to the doctors and to this court about whether or not he was working. When he was challenged about that in cross-examination, his response was to become argumentative concerning his need to earn money. I have no issue with that; of course he was entitled to make money. He did not address or explain the real issue which was the discrepancy between the fact that he was engaged in working activity and the lack of difficulty in so doing, and the picture which he sought to portray to this court of being a person who was disabled entirely in that respect.

24. Mr. Fox urges upon the court that I should look upon the plaintiff as someone who gave his evidence in a hysterical way out of anxiety to get across the extent of his problems. One could say that his presentation had about it an element of hysteria, although I think hysteria is going too far. There was clear overstatement. Could it be said that plaintiff's exaggeration was excused by some kind of mental health disorder or paranoid belief that he was injured? The first thing to be observed is that there is no evidence to support this theory. Notwithstanding the fact that the plaintiff was referred to a psychiatrist, there is no evidence to support any kind of mental health disorder or condition which would suggest that the plaintiff had a genuine belief that the picture he was giving the court was a truthful one and that he was compelled to it by some kind of mental health abnormality. There is no evidence at all to suggest that.

25. Any such picture is entirely inconsistent with how the plaintiff has presented himself throughout the process. Through his encounters with the various doctors, he has consistently withheld certain vital information. Since 2009, he has maintained the presentation to all of the doctors that he was incapable of work and was not working. This was untrue and was material non-disclosure.

26. Secondly, in his encounters with the various doctors, his responses to physical examinations have been consistently exaggerated. When reflex examinations were carried out, his responses were grossly exaggerated. I do not think that the material non-disclosure and contrived, exaggerated responses is at all consistent with someone who has a genuine belief in their condition, albeit misconceived, driven by a deviation from normal mental health.

27. In my view, what seems obvious in all of this is that from the outset, the plaintiff has systematically mis-described his symptoms to the various doctors he has encountered. In his presentation to this court, he has continued with that process. Apart from mis-describing his symptoms, he has then engaged in material non-disclosure with regard to his activities and his capacity to earn a livelihood.

28. It seems to me that all of this is entirely inconsistent with some kind of innocent state of mind. I am satisfied that his gross exaggeration of his injuries has to do with a conscious desire to enhance the value of his claim. What we have here is an attempt to transform what should be very small damages for very minor injuries resulting from a minor incident into what I am sure the plaintiff hoped would be very large damages for serious and ongoing sequelae which now, he claims, have lasted for nearly six years and which are continuing.

29. In my view, the misleading was quite material, notwithstanding the fact that the loss of earnings claim was quite low. What is at issue here is not the loss of earnings or the special damages but the general damages.

30. I have come to the conclusion that the plaintiff set out to grossly exaggerate his claim and systematically set about doing that from the outset and has continued it all the way through, including the evidence he has given to me in this court.

31. In those circumstances, I am quite satisfied that I should apply s. 26(1) and I will dismiss the plaintiff's claim.