

## THE HIGH COURT

[2016 No. 4176 P.]

BETWEEN

BERNARD CRONIN

PLAINTIFF

AND

PETROGAS GROUP LIMITED

DEFENDANT

**JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 17th day of May, 2019****The plaintiff's evidence**

1. The plaintiff's date of birth is 7th March, 1959 and is now aged 60 years of age and is interested in deer hunting and that season occurs from 1st September to 1st March each year. His case is that on 6th March, 2015 he called to the defendant's service station at Dungarvan Road, Clonmel, Co. Tipperary.
2. His case is that he parked at the middle pump, got ten euros worth of fuel and that while he walking towards the pay hatch to pay for the petrol he noticed that the door of the station was ajar and that he was motioned to go in the door and that at that point he turned and fell. His claim is that he skidded on whatever what was on the ground, oil or diesel.
3. This happened he alleged, at a wheelchair bay and he alleges that the person on duty who came to his aid suggested to him that "it was everywhere really" with reference to the spill. His claim with reference to photographic evidence was that the spill extended to the entire width of the wheelchair bay and he further claimed that he paid for the petrol while on his hands and knees on the ground and that he was helped to his motor vehicle.
4. He claims personal injuries loss and damage in relation to what he says was an injury to the right knee, and right elbow.
5. A number of features of this case have caused concern to the court. It is hotly disputed that the accident occurred at all. While no incident report book could be produced, it was put to this witness that there was no incident concerning him noted by anyone working in the store.
6. Great confusion arose around a subsequent accident which occurred involving the plaintiff on 17th February, 2017. This witness claimed to have telephoned his solicitor in this case asking him to take the case but was advised to attend a local solicitor in his own town. This had implications for the affidavit of discovery sworn by him which did not reference this subsequent accident. This plaintiff was paid compensation in respect of the subsequent accident but failed to disclose this until late in the day when he had to swear further documentation to verify that it had occurred.
7. In addition, two addresses were used Dale Farm Glenegad, Clonmel, Co. Tipperary in his PIAB application form and another address of 19A Glenegad Road, Clonmel, Co. Tipperary was used by this witness. His explanation for this was that there were two buildings in there, a mobile home and a prefab house and that they were actually two different addresses. This witness explained under cross-examination that he used the name Ben Cronin as well as the name Bernard Cronin on another form and of course he used two different solicitors for these two incidents.
8. This witness said that at the inspection on the 17th January, 2017 he said he may have had a stick on that occasion and that sometimes he did need same. As against this evidence reference is made to an MRI reading in relation to the present case from Aut Even Hospital of the 18th April, 2015 "there was very little surrounding bone marrow oedema which would indicate that this injury is of some duration". This witness denied this concept and said that there was nothing wrong with his knee until after this particular incident. The medical reports were handed in on an agreed basis and the court has noted same. The plaintiff claimed that sawdust was used in relation to the spill but later evidence was to the effect that sawdust was not used by this company at any of their premises but rather a flaky chemical known as Adsorb green in colour was used.

**The plaintiff's engineer Mr. Michael Fogarty**

9. Mr. Fogarty's evidence in essence was that a spillage of oil or diesel would make the surface very slippery. He agreed however that he had not been told anything about sawdust which the plaintiff had claimed was thrown on the oil at the locus, but the plaintiff had drawn a circle in the wheelchair bay and he said that the bay was 3.05 meters wide and that on the instructions this engineer had he said the plaintiff indicated that the spill was roughly the expanse of the bay, in other words a three metre size spillage and he said that something less than ten litres is considered a small spill and that the area ought to be cornered off with cones and then absorbent material placed in the spill to soak it up and that he aware that there was a special type of flaky material which is put down to soak up oil so that one can keep brushing into the centre and then it soaks off the surface and that the name of this was "Adsorb".

**The evidence of Mr. Adamus**

10. Mr. Adamus confirmed that he worked nights mostly and that while he recognised the plaintiff he had seen him less than ten times in the shop and he had not witnessed any fall or slipping incident inside or outside the shop and he had worked with this company and will be with them for nine years in August, 2019. This witness came across as a very conscientious decent person who was absolutely adamant that no incident occurred concerning this plaintiff on his watch. He clarified that there was no sawdust at the forecourt and he recognised the plaintiff from footage of a joint inspection which he himself was not able to attend due to work commitments. Spillage would happen near the pump area in his view and "Adsorb" was used to clean same not sawdust. This witness denied that he every spoke to the plaintiff at another shop in the town and denied him meeting him in Lidl. This witness confirmed that there was never just one person in the shop and that door was normally opened in the mornings when the second person arrives on duty, the hatch being used otherwise. This witness's evidence was to the effect the they had a good system in place and they were well trained as to what to do if an incident or difficulty arose. He knew that there was a procedure for filling out a form if an accident occurred but he had never before heard of any accidents so he had never had the experience of using such a procedure.

11. He agreed that a statement was prepared in his name dated 6th March, 2015, confirming that nobody have fallen or slipped on the forecourt or that any injuries had occurred. His belief was that Mr. Ray Doheny typed up the first statement and that the second

time it was Patricia McCabe who typed same but he couldn't remember exactly when he made the statement and he agreed that it was undated. He confirmed that in 2015 the CCTV screen was in the office only and that through it he could see everything happening outside on the forecourt.

#### **Mr. Ray Doheny**

12. At the time of this incident this witness worked under Lorna Duggan who owned the franchise for this premises and he was a trainee manager. He questioned Mr. Adamus as to whether the accident happened or not and his response was that it didn't happen. He described this worker as a very punctual person who was unaware of any incident of anyone slipping or falling at all on the forecourt and he gave evidence to this Court that the regime was very very strict at this premises. He confirmed that the CCTV footage was working fine at the time of this accident.

#### **Evidence of Ms. Anne O'Brien**

13. This witness was called as a general operative of the premises, this witness explained the rules concerning cleaning up spills and said that one has to close off the pump outside, put the substance Adsorb on the spill and leave it for a certain amount of time, clean it and then reopen the pump. The Adsorb material breaks down the spill material and it is then capable of being swept up that is part of the duties of a person on the rota between 2-10pm. Since 2013 this witness had never seen a spillage of fuel near the shop and had never seen sawdust at the premises, as they don't use that product and she said she found it hard to believe that there would be a spillage as described across the expanse of the wheelchair access bay. Had there been a spillage of that size had it ever occurred.

#### **Evidence of Ms. Lorna Duggan**

14. She had manager in this shop until December, 2015 she was never aware of a complaint of any slip and fall of any sort and had same occurred she would have been so aware. While she did note a few spillages at the pump area in her time she had never seen a spillage in the parking bay designed for wheelchair access.

15. This witness confirmed that Mr. Adamus was a meticulous worker and that he would have called her at any stage for any reason and that he knew the protocol and procedures. She said he was never reprimanded and he was impeccable in relation to how he worked and his attitude to work and his capacity to work with other people and she went so far to say that he was a fantastic employee.

16. This witness didn't have any CCTV footage to back up anything she said but did show head office documentary proof of problems with the CCTV which was only holding roughly fourteen days material. She confirmed that eighteen days after the alleged incident she received a registered letter concerning same. She assumed that the statement signed by Mr. Adamus came from head office and they had the expertise to deal with this aspect of the matter. In relation to the affidavit of discovery sworn by her on 27th March, 2019 she confirmed that the matters listed in the second schedule of that affidavit could no longer be located searches having been made and that she couldn't find the incident report book and she had gone to an alternative role with the defendant company.

17. To her knowledge there was no accident and had one occurred it would have been reported and she had no idea why the report books had disappeared and why there was no CCTV.

#### **Evidence of Mr. Vincent O'Hara engineer called on behalf of the defendant**

18. The engineering inspection was carried out on 17th January, 2017 and the plaintiff appeared at same on a walking stick. This witness confirmed that there was a good system of work in place perfectly adequate in terms of a person being left overnight on the premises and it was probably the system in all their stores. He agreed that had there been a spillage in the particular area as asserted same would have presented a hazard to people walking in and out.

#### **Submissions on behalf of the plaintiff**

19. The submissions were to the effect that as a matter of probability a fraudulent plaintiff would not give an inaccurate or wrong account of an incident on a premises where there were CCTV cameras.

20. The court is asked to draw inferences citing *Cosgrave v. ESB* and *Doyle v. Banville* to draw the inference that where a party does not call witnesses who should give evidence and don't give evidence that the court can therefore draw an inference on that and this was in relation to two members of staff who were on duty that day but who were not called.

21. Reliance is made on the point that the evidence suggested that in or about 19th February, 2015 there was no difficulty with the CCTV footage.

22. Great emphasis is put on the fact that the defendant elected not to respond to correspondence in relation to this litigation the defendants it is noted, have conceded that if the plaintiff's account is correct he is entitled to succeed because that would mean there was a significant hazard on the forecourt.

23. It is further pointed out that there was an agreement to hand in medical reports but the plaintiff did not then expect that the MRI report would be used against the plaintiff and the court is asked to disregard the defence submissions in that regard.

24. It is further pointed out replies to particulars in this case were furnished before the subsequent accident occurred and that the affidavit of verification relates to the replies as furnished.

25. The plaintiff's claim is that he disclosed the subsequent accident to his present solicitor who advised him to go locally to a solicitor in Clonmel, Co. Tipperary. The plaintiff seeks aggravated damages and the authority in the Supreme Court *Conway v. INTO* where Mr. Justice Finlay (as he then was) indicated that the court is entitled to give compensation by way of aggravated damages for the nature in which the trial had been conducted. Special damages are agreed at €2,400.

#### **Findings of fact**

26. The defence had asked the court to look at video evidence of a subsequent matter in which the plaintiff is featured and although the court did view such video evidence, following submissions the court found this was not relevant to this case and that it was excluded same.

#### **Submissions on behalf of the defence**

27. The defence say that there were eight or nine incidents referred to in terms of disclosure but the plaintiff had not gone back to this solicitor about a subsequent accident in which he had involvement in 2017 and it was not mentioned until he later had to swear a correcting document. He claimed that his present solicitor urged him to go to another solicitor about that accident because it was a

minor one.

28. Submissions on behalf of the defence are to the effect that this witness is not a credible one and that this is simply a lie and that the plaintiff simply blames his solicitor for this omission.

29. Reference is made to category B2 of the Discovery dated 8th December, 2017 and he quotes "the plaintiff will address this category in his affidavit of Discovery" and further "suffice to say the defendant is aware of the plaintiff's Replies to Particulars that he had not initiated any litigation or injury report application other than the current proceedings". It is submitted that his answer does not sit with the above stated reply and the plaintiff's excuse continued to be "ah sure my solicitor knows all about it".

30. The defence rely on one piece of independent objective evidence in the radiological report from Aut Even Hospital and he was asked by the plaintiff to take that as it is but that the plaintiff denied everything and stonewalled in his responses in that regard and that it was dated the 18th April, 2015 and that the incident happened 6th March, 2015, six weeks later and the MRI says, "there is very little surrounding bone marrow oedema which would indicate that this injury is of some duration".

31. On the facts that the defendant say that the plaintiff's contention that there was oil in the wheelchair bay and the defence evidence of Mr. Adamus and the evidence generally point to a false claim.

#### **Findings of fact**

32. This Court ruled out his evidence that which was produced by the defence concerning an entirely different accident, as not relevant at all to this case. It is hereby disregarded entirely.

33. The court notes that the defendant produced no incident report book, failed to reply to solicitor's correspondence and failed to call relevant witnesses and finds that this amounts to poor litigation behaviour to a fairly reprehensible degree.

34. Ms. Duggan who had been the manager until December, 2015 in the particular outlet was unable to assist the court in any material way.

35. Balancing the above as against the evidence of Mr. Adamus who was compelling and who did not appear in the view of the court fearful of losing his job if he told the truth, rather the court found him to be utterly convincing and adamant that no incident had occurred as described by the plaintiff on the occasion of the alleged accident.

36. The evidence of Ms. Anne O'Brien who worked as a general operative is accepted by the court in full also and her evidence was that sawdust was not used on this premises to deal with oil spills but that a product named "Adsorb" had been used and she said that since 2013 most spills occurred near the pump and not in the bays as described by the plaintiff.

37. In addition, the court notes the independent objective evidence in the form of a MRI report suggesting that any difficulty with this joint the knee was an old injury yet the court notes that at the joint inspection the plaintiff arrived on a stick.

38. The sawdust issue is important and this was mentioned by the plaintiff in his evidence but it is clear that sawdust was not used on this premises to clear up oil spills or such like rather a particular chemical which was described as green and flaky and which could be brushed up having absorbed the oil or petrol etc.

39. The court notes as important the fact that the plaintiff did not properly inform his solicitor about the subsequent accident and it is not recorded as it should have been in early course to the other side in relation to his 2017 subsequent accident. This was corrected pre-trial but late in the day.

40. The court also notes that the plaintiff uses two different addresses and two different forms of his name and did this on two different sets of proceedings. The plaintiff did not have any evidence of an oil spillage in terms of the fact that he didn't have the clothing which he was wearing on the date of the alleged incident and these items were not available.

41. The clear evidence of Mr. Adamus and Ms. Anne O'Brien is compelling and is fully accepted and the reliability and credibility could not be doubted.

42. On the other hand, the court did not find the plaintiff at all convincing in relation to his claim and finds that he failed to reach the bar in terms of proving his case on the balance of probabilities. The court therefore dismisses his claim.