

THE HIGH COURT**2009 9118 P****BETWEEN:****KEVIN BOLAND****PLAINTIFF****AND****DUBLIN CITY COUNCIL****BORD GAIS EIREANN****ENTERPRISED MANAGED SERVICES LIMITED****DEFENDANTS****Judgment of Mr Justice Michael Peart delivered on the 5th day of April 2011:**

The plaintiff is now aged 20, but when he was aged 17 years he sustained a serious injury to his right arm on the 14th May 2008 when he fell on Lower Sheriff Street, Dublin at a location where certain road works were being undertaken by the defendants. The plaintiff says that he fell while walking through an area where there were some heavy plastic barriers lying on the ground. These are a type of heavy barrier frequently erected in order to cordon off the area in which works are being carried out, so that members of the public are prevented from entering upon the area. They are designed so that they can be attached together in order to form a fence around the area. The plaintiff has stated that the barrier he caught his foot in as he walked through the area was not attached to any other but was one of a few such barriers which were simply lying on the ground and which he had to negotiate his way through, there being no way round them.

The circumstances in which this injury occurred are hotly disputed by the defendants. The defendants have pleaded that the plaintiff was the author of his own misfortune, and, contrary to how he has pleaded that this injury occurred, that he had on the occasion in question attempted to jump over a barrier which was erected and attached to another barrier at the time, and that in so attempting to jump over the barrier he caught his foot on the barrier, causing him to fall heavily, thereby causing this injury.

The defendants called a witness who, unknown to the plaintiff, actually saw this incident occur. He was seated in a JCB which he was operating at the site that day. In response the plaintiff has stated that the incident witnessed by this witness must be a different one which must have occurred earlier on the same day. The plaintiff states that his injury was sustained at about 3.30pm, whereas the witness has stated that what he saw happen occurred during lunch hour and he puts sometime between 1pm and 2pm but probably about 1.30pm. He cannot be certain of the precise time, except that it was during the break for lunch.

Given the complete conflict in the evidence, I will set it out in some detail.

The plaintiff's evidence:

The plaintiff has stated that a few days before this incident his brother had given him a job as a window fitter at a wage of €500 per week, expected to last for at least one year. This accounts for the fact that on this date he was walking down Lower Sheriff Street at about 3.30pm on his way home from work, having first been dropped in O'Connell Street and from where he walked via Talbot Street in the company of a friend of his, Gerard Meehan, who was also so employed.

He says that having walked down Talbot Street he crossed over from the North Star Hotel to the small traffic island in Amiens Street at the entrance to Lower Sheriff Street and then walked down diagonally from the island to the pavement running down Lower Sheriff Street and to the left of an area where works were being carried out by the defendants. He says that this was the way indicated for pedestrians to walk. He says that having walked under a bridge and exited from beneath it, he came to some of these plastic barriers which were lying on the pavement, and that in order to get by them he had no choice but to walk over them, and that in doing so he caught his foot, causing him to fall heavily.

He states that this occurred at about 3.30pm, and he says that it must have been that time since he had knocked off work at about 2.45 pm, and was driven back to O'Connell Street by a Gerard Cashin, arriving there at about 3.15pm.

He said that as he passed under the bridge there was a JCB parked to his left and which he went by. He then got to his feet, but his arm was badly injured, and he described his elbow as being "like jelly". He also said that he looked about the location to see if there was anybody who could help him, but saw nobody either at the works site itself or in a security box there. He and his friend who was with him, Gerard Meehan, walked on to his home, and he states that his friend rang his girlfriend who had a car and Gerard Meehan drove him to the Mater Hospital. Hospital records show that he arrived at Accident and Emergency at 16.10hrs that same day.

There is no doubt that he sustained a serious fracture to his elbow. He required surgery so that a metal plate could be inserted, and a cast applied. His recovery was not uneventful as his arm became infected at Christmas 2008, and further hospitalisation was required. There are further sequelae pleaded, namely that this incident has caused him to suffer from depression and that it exacerbated an addiction to alcohol and to drugs, and that his arm is under-strength now to the extent that he can no longer do work that requires heavy lifting and he can no longer work as a window fitter.

Prior to the days prior to this injury he had been drawing unemployment benefit, and at the present time he receives disability benefit on the grounds of depression. There is no prospect of him gaining employment in the short-term at least.

He completely denies that he was the person who the defendant's witness, Thomas Carroll, had observed during lunch-hour attempting to jump over one of these barriers, and falling heavily to the ground and holding his right arm in the immediate aftermath thereof. He says that he could not have attempted to jump this barrier given the sort of boots he was wearing for his work that day.

He also denied that he was wrong in his description of the route he took down Lower Sheriff Street and the point at which he crossed over to the other side of the road before attempting to jump this barrier.

The plaintiff's friend, Gerard Meehan gave evidence also. He is a neighbour and friend of the plaintiff, and says that he was working with the plaintiff on this day and came back into O'Connell Street with him after work ended. He confirmed that they knocked off work at 2.30-2.45pm and got a lift back to O'Connell Street with Derek Cashin, and that they crossed over to Lower Sheriff Street and proceeded to walk down the pavement on the left hand side of the road to the left of the area where works were being carried out.

He says also that they walked under the arch shown in the photographs and that he saw a number of barriers lying on the ground ahead of them. He managed to get through them by stepping over them, but that having done so he suddenly heard a scream behind him and saw that the plaintiff had fallen to the ground. He denied that this area had been blocked off by barriers and stated that the pavement down which they walked was open and had not been closed off by barriers.

He denied that the plaintiff had tried to jump over the barriers because they were on the ground and not erected, though when cross-examined he confirmed that he had not actually seen the plaintiff fall as he was ahead of him. He helped the plaintiff to his feet, and stated that they had looked around to see if there was anybody at the site but found nobody, and stated that there was nobody in the security hut at the location. He stated that they walked home as they could not go to the hospital "looking like this". I presume that he referred to the fact they must have been in working clothes.

When they got home, he says that he rang his girlfriend who has a car, and drove the plaintiff to hospital. He thinks that they arrived at the hospital about 45 minutes after this incident. It will be recalled that the hospital notes indicate that the plaintiff was seen at 16.10hrs. Mr Meehan denied that this incident occurred at lunch hour. He denied also that the pavement area where they had walked was in fact fenced off, as the defendants state. He also denied that they had in fact opened some barriers in order to cross an excavated area before the plaintiff ran and jumped over another erected barrier.

Darren Boland, an older brother of the plaintiff also gave evidence. Relevant for the moment is that he stated that he has a window fitting business, and that a few days before the date of this incident he had given the plaintiff a job as a window fitter because he had a few contracts at that time and needed help as he was very busy in 2008, and that the plaintiff had been 'on the dole' prior to that. He said that the plaintiff's gross pay for that employment was €513 per week. He was also able to confirm that before the plaintiff, Gerard Meehan and Derek Cashin knocked off work they had phoned him for permission to leave the work site as their work was done. He stated that he had said that they could leave work at 2.30pm, and no earlier. This ties in with the time that the plaintiff states that he was dropped off at O'Connell Street and would, if true, confirm that either Mr Carroll is wrong about the time he observed a man injuring himself as he jumped one of the barriers, or that there were two almost identical incidents on that same day, and that Mr Carroll did not in fact observe the incident in which the plaintiff injured himself – the other one being one which was not noticed or reported by anybody.

Darren Boland said that he had no written confirmation that he had employed the plaintiff a few days prior to this incident. When asked if he had actually paid the plaintiff for the few days work which he did before this accident he stated "I suppose I did". But there is no evidence in that regard, though he said that he kept records and says that he kept tax returns and so forth. But none were produced to the Court. He said that his accountant would have these records.

Evidence of Tom Carroll:

Mr Carroll was employed on this date by Breffni Plant Hire, a company contracted by the third named defendant in relation to ground-works at this location on this date. He recalled the 14th May 2008, and that between 1pm and 1.30pm as far as he could recall, but at all events between 1pm and 2pm during the lunch break while he was seated in the cab of the JCB he was operating on that date, he was facing towards the archway through which the plaintiff passed on foot. He saw two men approaching from his right and crossing the road towards where he was situated. He saw them pull aside a barrier which was standing in position and passing through an area which had been excavated, and he saw one of these men start to run towards another barrier and attempt to jump over it, and falling to the ground. The barrier was also knocked over by the man who jumped it. He says that when this man got up, he looked back in his direction, and was talking to his companion. They moved on and looked back again and proceeded on down Lower Sheriff Street beyond the arch before turning to their left. He did not see them again.

He said that he saw the whole incident happen, and confirmed that the barrier over which the man jumped was erected at the time and not lying on the ground as described by the plaintiff and Mr Meehan. He states that the pavement area leading down Lower Sheriff Street to the archway was blocked off by barriers on this date. He also stated that after the man fell his companion went to him and helped him to his feet. The injured man was holding his right arm as they were talking and as they walked on and turned left. He said also that as the plaintiff walked away after his fall he presumed that he was okay, but that if he had remained on the ground he would of course have gone over to him in order to help him. He did not see them come back up Lower Sheriff Street in search of any person who might have been working there. He stated also that after lunch hour ended and when others returned to the site he reported what had happened and remained at work for the rest of that day, and did not observe any further incident of this kind during the rest of the day. He thinks that those others returned to the work site 15-30 minutes after this incident occurred and when lunch hour was over.

Gareth Byrne also gave evidence for the defendants. He was the foreman and in charge of ensuring that the site was safe while the works were being undertaken. This involved ensuring that fencing was put in place in order to prevent danger to the public, and placing appropriate signage in place in order to direct pedestrians where to walk while the works were in progress. He confirmed that the footpath along which the plaintiff says he and his companion walked was blocked off by plastic barriers, and that bridge/archway was similarly cordoned off with barriers. He is absolutely certain that these barriers were in place during the morning and at the time that he left the site for a short period at about 2.45pm – 3pm in order to get some materials from a depot nearby. He was absent for about 20 minutes and was not present at the time when Mr Carroll says he saw the plaintiff fall, but that as soon as he returned Mr Carroll reported the incident to him. He inspected the area where Mr Carroll said that the fall had occurred and he found a barrier lying on the ground, and he re-erected it.

Conclusions on liability:

There is no doubt that the plaintiff suffered a serious injury to his right arm when he fell on Lower Sheriff Street on the 14th May 2008. However, the onus rests upon the plaintiff to satisfy the Court that as a matter of probability he fell and injured himself in the manner in which he has stated by falling over a barrier or barriers lying on the ground. A difficulty which he now faces is that if Mr Carroll is a reliable witness and if the incident which he observed during his lunch-hour was that in which the plaintiff fell and injured himself, the plaintiff's account of this incident is false and deliberately so, and his claim must be dismissed.

The first thing to be said is that I am completely satisfied that Tom Carroll is a truthful and reliable witness. There is no room for any

other conclusion as to his credibility. There is no doubt that he saw two men during lunch time on the 14th May 2008 one of whom attempted to jump over a barrier which was erect at the time, and who fell in the process, falling to the ground and injuring his right arm before walking off holding his right arm. It is also clear from both Mr Carroll's evidence and that of Gareth Byrne that no other similar incident was reported or observed on that afternoon or even at any later stage.

The nature of the injury which the plaintiff sustained to his arm is relevant also. The injury was described by his Counsel as one of the most serious injuries which can be sustained to the arm, and I note that a report from Mr Peter O'Connor, Consultant in Emergency Medicine that he states:

"This patient has suffered a nasty fracture of his elbow. This type of fracture is the worst that can be suffered around the elbow joint as the internal elbow joint mechanism itself is always disrupted by the process".

That report notes also that "this patient was first seen at 16.10hrs on the 14/05/2008. A short time previously he had suffered an injury when he fell over a barrier and landed heavily on his right elbow".

It is described in the medical report of Darragh Hynes, Consultant Orthopaedic Surgeon as an "olecranon fracture". This is a fracture of the articular surface of the elbow joint – in other words the bony point of the outer aspect of the elbow which is easily observed when the arm is flexed. It required surgery and the insertion of k-wires in order to close the fracture. It is an injury which requires significant direct force to the surface of the elbow, such as in a heavy fall onto the point of the elbow. It is certainly an injury which would be consistent with a fall onto the elbow from a height. It is therefore one which would be consistent with the plaintiff attempting to jump this barrier and falling in the process, as opposed to simply tripping over a barrier while it lay on the ground. The latter type of trip or even fall over the barrier while it lay on the ground would inevitably involve a lesser impact to the elbow than a fall from a height.

It is therefore an injury which would be consistent with a fall such as was observed by Tom Carroll on this date.

Another matter which reinforces the conclusion that Tom Carroll saw this plaintiff fall on this date is that the plaintiff has stated that in the immediate aftermath of his fall he looked around the site for somebody to assist him, but that there was nobody at the site. This is consistent with the fact that the plaintiff's fall in fact occurred during lunch hour, as the men on the site would not be working at that time. If it happened at around 3.30pm, lunch hour was well over at that time, and men would have been at work.

Another matter which militates strongly against the plaintiff's overall credibility is the claim which he has made as part of these proceedings for future loss of earnings. He has claimed that while he had had little or no employment prior to the date of this incident, he had been engaged by his brother for a window fitting job just three days before the 14th May 2008 and that this incident has deprived him of one year's earnings at the rate of €500 per week. There is no record of his having been so employed. While his brother has said that he has records for his business no such records were produced to corroborate this. The best that the plaintiff can say is that up to this incident he had been drawing unemployment benefit, and that not having 'signed on' during the week of this incident that benefit ceased and he was employed by his brother. There is no evidence that his brother paid him for the three days up to this incident other than his brother's evidence in that regard that he would have paid the plaintiff for those days. Since the incident the plaintiff has been in receipt of disability benefit but this is not because of this injury but rather because of depression. The plaintiff has lifestyle issues also, which militate against his credibility as far as ongoing employment for a year is concerned. There is no doubt, and the plaintiff has admitted this, that he was a heavy drinker and in addition was a regular smoker of 'hash'. The hospital records which have been discovered in this action are also relevant in this regard. The notes for 15th May 2008 show that the plaintiff stated that he smokes hash every day and consumes alcohol ++. It appears from the hospital notes also that the surgery intended to be performed on the 15th May 2008 was postponed because the plaintiff had not complied with fasting obligations. Those notes show also that at 6.15am on the 16th May 2008 the plaintiff was verbally abusive to nursing staff and was complaining of delay in his surgery being carried out. Having had his surgery carried out later on the 16th May 2008 he was returned to his ward, and the notes show that soon thereafter the plaintiff asked if he could leave the ward "for fresh air" but was told that he could not do so since "he was not long post op". However the plaintiff nevertheless left the ward. It appears that the plaintiff attended again at the Mater Hospital for a procedure to remove the k-wires from his arm on 15th December 2008, but the notes show that this had to be postponed because on arrival at the hospital he had a strong smell of alcohol and he stated that he had had "6-7 cans" the previous night and had also smoked cannabis. A new date was given for the 19th January 2009 as he was considered unfit for surgery. However it appears that these wires were in fact removed on the 5th January 2009, having had to attend again on the 25th December 2008 because his arm was causing him a lot of difficulty. It appears that his arm had become infected. The nursing notes for this time show that the plaintiff reported not only that he smokes 'hash' but also "cocaine at weekends". A note for the 29th December 2008 records that a security guard had informed him or her that he found patient Kevin Boland smoking hash in a toilet at St. Agnes Ward. The plaintiff was spoken to about this but he stated that he did not smoke hash and smoked cigarettes and that he had smoked at the window of the toilet.

These matters do not affect in any way the credibility of the plaintiff in relation to whether or not the incident on the 14th May 2008 occurred in the way he has described. But they do affect his overall credibility in relation to the claim that he would have had one year's uninterrupted employment with his brother as a window fitter, thereby giving rise to his claim for €25,000 loss of earnings, even if I accept that he was taken on by his brother three days before the date of this incident. I am satisfied that even if he had been so engaged by his brother, it is more probable than not that he would not have worked consistently during the following twelve months. His lifestyle was clearly such that as a matter of probability he could not be regarded as a person who could have continued in that employment for such a period of time.

As it happens, I believe that this claim for loss of earnings is a fabricated claim, particularly as it is completely unsupported by any evidence other than his own evidence and that of his brother.

The fact that he has so fabricated this aspect of his claim must infect also his overall credibility in relation to his truthfulness as to how this injury was sustained.

As a matter of probability I am satisfied that the incident so clearly observed by Tom Carroll on the 14th May 2008 was that in which the plaintiff sustained his injury. I have no basis for doubting the credibility of Mr Carroll. He struck me as a completely honest and impartial observer with no reason to give a false or misleading account of what he saw. I am satisfied that he saw the plaintiff fall.

It follows that I am satisfied that not only has the plaintiff fabricated a claim for loss of earnings, but also that he has given a false account of the incident. I am satisfied that he attempted to jump the erected barrier and fell in so doing, thereby sustaining this serious injury to his arm. It would be a monstrous injustice to the defendants to find in the plaintiff's favour and I dismiss his claim.

