Neutral Citation Number: [2009] IEHC 534

THE HIGH COURT

2007 4343 P

BETWEEN

PETER WEBB

PLAINTIFF

AND

THE MINISTER FOR FINANCE

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered on the 3rd day of December 2009

The plaintiff's claim in this action arises out of a road traffic accident which occurred on the 22nd April, 2002. The plaintiff claims that he was standing in the turret of an armoured personnel carrier travelling along the public roadway when it was struck from behind by another armoured personnel carrier. An Ordinary Civil Bill was issued on behalf of the plaintiff on the 26th April, 2004. The particulars of negligence and breach of duty contained in the Indorsement of Claim relate exclusively to the manner in which the servant or agent of the defendant drove the armoured personnel carrier which collided with the one in which the plaintiff was travelling.

In the particulars of personal injuries it is pleaded that the plaintiff came under the care of the Army Medical Corps. He was found to have suffered shock, pain, general bruising and, moderate to severe soft tissue injury in the areas of his neck and low back. It was anticipated that the plaintiff would make a full recovery. However, as he continued to suffer pain and discomfort the possibility of other personal injuries had to be left open. In April, 2003, the plaintiff was passed fit for service in the army. He was allocated light duties and declared medically unfit for volunteer service overseas.

On the 14th May, 2004, the Solicitors for the defendant submitted a very extensive request for particulars. On the 11th June, 2004, a notice of further particulars of personal injuries was delivered on behalf of the plaintiff and was accepted by the defendant. It was stated that despite medical treatment the plaintiff continued to suffer low back pain with the addition of pain in his left buttock radiating into his left leg. He also suffered paraesthesia and numbness in his left leg. A consultant orthopaedic surgeon had found evidence of a lumbar disc protrusion on clinical examination. On the 2nd September, 2004, the solicitors for the plaintiff furnished replies to the defendant's request for particulars.

A defence was delivered on behalf of the defendant on the 20th December, 2004. It was denied that the plaintiff sustained the alleged or any personal injuries, loss, damage, inconvenience or expense. No admission was made with regard to the special damage claimed and the plaintiff was put on full proof thereof. It was pleaded that the plaintiff had failed to mitigate his loss. No particulars of this latter plea were furnished in this defence. On the 1st November, 2006, the solicitors for the plaintiff sought particulars of the respects in which it was alleged that the plaintiff had failed to mitigate his loss. From the papers furnished to the court, it does not appear that any reply was received from the defendant to this request.

On or about the 13th November, 2006, an application was made to the Circuit Court for an order transferring the case to the High Court. This application was grounded on an affidavit of the plaintiff. At para. 5 of this affidavit it was stated that an MRI Scan carried out in 2005 showed a disc protrusion at the L5/S1 level which Mr. J. Rice, a Consultant Orthopaedic Surgeon, advised the plaintiff in a report dated the 8th June, 2005, was probably due to the road traffic accident on the 22nd April, 2002. At para. 7 of his affidavit the plaintiff stated that he was scheduled to appear before the Army Medical Board and that this Board might recommend that he be discharged from the army. At para. 8 of this affidavit the plaintiff averred that he had been advised by Senior Counsel that the level of special damage claimed brought the case into the jurisdiction of the High Court.

This transfer application was opposed by the defendant. In an affidavit dated the 19th January, 2007, Louise Boughton, Solicitor in the State Claims Agency, stated that no particulars of special damage had been furnished. She claimed that it was just speculation on the part of the plaintiff that he would be discharged from the army. She averred that there was no medical basis to justify a transfer of the case from the jurisdiction of the Circuit Court to the High Court. She stated that the plaintiff had been examined by Dr. Michael Kelly on the 31st May, 2004, on the 8th March, 2005 and on the 10th August, 2005. He found that the plaintiff's cervical spine was normal and that he had a full range of neck movements. He considered that the disc protrusion was causing no problems, and that the plaintiff had only suffered a soft tissue type injury in the area of his low back. In his opinion the plaintiff only required a fitness programme to strengthen the muscles in his lumbar area. This deponent further stated that the plaintiff had been examined at the request of the defendant, by Mr. McQuillan, a Consultant Orthopaedic Surgeon, on the 13th September, 2009. He agreed with the opinion expressed by Mr. Rice that the disc protrusion was not compressing any nerve and surgical intervention was not required. There was no structural abnormality in the plaintiff's cervical spine. He considered that any residual effect of the accident on the 22nd April, 2002, was minor at that time. The plaintiff required controlled rehabilitation of the muscles in the region of his lumbar spine. He could return to work but should avoid factors which might provoke symptoms in his low back.

By Order of the County Registrar made on the 11th February, 2007, the case was transferred to the High Court. By Order dated the 7th June, 2007, the Master of the High Court adopted the proceedings into the High Court.

On the 12th August, 2008, a notice of further particulars of negligence was delivered on behalf of the plaintiff. This was rejected by the defendant. By a motion on notice dated the 3rd July, 2009, the plaintiff now seeks an order of this Court, pursuant to the provisions of O. 28 of the Rules of the Superior Courts, permitting the plaintiff to amend the pleadings in the action to include further particulars of negligence and breach of duty, together with such further and other Order as the Court should consider necessary. These further particulars of negligence and breach of duty are as follows:-

> "The Plaintiff was a member of the Defence Forces and was at all material times under the care of the Army Medical Corp and was entitled to a full and comprehensive medical service to include (*inter alia*) monitoring, supervision and investigation of his medical complaints, in particular injuries sustained by him in service.

1. The Defendant failed to provide full and comprehensive medical service to the Plaintiff.

2. The Defendant failed to monitor the Plaintiff's ongoing complaints of back problems, which arose from his injury in April 2002.

3. The Defendant failed to respond to the Plaintiff's requests to be forwarded for an MRI Scan and/or other appropriate investigative procedures for a period of approximately three years following the accident.

4. The Defendant failed to anticipate that the Plaintiff, who sustained a back injury in an armoured personnel carrier would and did in fact require an MRI Scan.

5. The Defendant failed to implement a policy whereby military personnel who sustain injuries when knocked about in armoured personnel carriers, in particular when struck in the back by the armour plated steel of the rim of a turret, are sent immediately for an MRI Scan and/or other comprehensive investigative procedure.

6. The Defendant failed to respond to the Plaintiff's request for comprehensive investigative procedures, to be conducted on him, at the earliest opportunity.

7. The Defendant failed to monitor the Plaintiff's condition, and to note that the Plaintiff had subsequent incidents of falls associated with back pain, some of which occurred in the course of his duties, which the Plaintiff at all material times, indicated were related back to the injury in April 2002.

8. The Defendant failed to investigate why the Plaintiff suffered such ongoing problems with his back.

9. The Defendant caused or permitted the Plaintiff to be brought before an Army Medical Board, whose purpose was to determine if he should be or could be retained in the service because of his ongoing back problem, when he had not been provided with comprehensive investigative procedures at the earliest opportunity.

10. The Defendant failed to monitor the Plaintiff's back condition and/or monitor his status on light duties, so as to avoid subsequent incidents of back pain, leading to falls or otherwise to the exacerbation of his back condition.

11. The Defendant failed to identify suitable and appropriate light duties for the Plaintiff to perform so as to avoid exposure to the risk of exacerbation of his back condition, which ultimately led to his medical discharge from the Defence Forces.

12. The Plaintiff reserves the right to plead further and other particulars of negligence and breach of duty as come to his attention, either before or at the hearing of the action."

This motion on notice is grounded on the affidavit of Evelyn McMahon, Solicitor for the plaintiff sworn on the 1st July, 2009. At para. 7 of the affidavit, this deponent states that the defendant had failed to make discovery of the plaintiff's medical records prior to early 2008, following the service of a motion for discovery. The plaintiff was not in a position to file these further particulars of negligence pending sight of his medical documentation. Voluntary discovery of these documents was sought by a letter dated the 17th January, 2008, in a Replying Affidavit sworn on the 15th October, 2009, Erica Fagan, Solicitor on behalf of the defendant and Head of the Litigation in the State Claims Agency, states at para. 4 that while the plaintiff received discovery of the documentation associated with his medical discharge from the Defence Forces in early 2008, he had been furnished on the 9th September, 2005, with the medical records relating to his medical history and the treatment received by him from the Army Medical Corps in respect of the road traffic accident on the 22nd April, 2002. Receipt of these records was acknowledged by a letter dated the 15th September, 2005, from the solicitors for the plaintiff. An Affidavit of Discovery was sworn in respect of those medical records and was furnished to the solicitors for the plaintiff on the 28th July, 2006.

At paras. 9 and 10 of her affidavit sworn on the 1st July, 2009, the solicitor for the plaintiff avers as follows:-

"9. I say and believe that the Plaintiff was not aware of the nature and significance of his injuries until such time as the defendants saw fit to discharge him from the Defence Forces as being below physical standards in 2007 and furthermore he is not in a position to outline all the particular treatment and care which was provided and/or not provided to him while a member of the Defence Forces, until such time as his medical records were made available.

10. Accordingly, I say and believe that it is appropriate for the Plaintiff to plead the various particulars outlined, in relation to his medical treatment following his accident. I say and believe that as a member of the Defence Forces he is provided with medical services by the Army Medical Corps. Accordingly, if a person sustains an injury while in service and continues to make complaints thereof and such complaints are not monitored, I believe that it is appropriate on receipt of documentation, namely his medical records, to file Further Particulars of Negligence and Breach of Duty."

In her replying affidavit sworn on the 15th October, 2009, the solicitor for the defendant avers as follows at paras. 5, 6 and 7:-

"5. I say that the decision taken to discharge the Plaintiff from the Defence Forces because he was below physical standards in 2007 has no relevance to the question as to whether or not he received appropriate medical treatment in 2002 and therefore I do not see how the Plaintiff's solicitors can place any reliance on same.

6. I say that the Defendant has located the various persons who formerly treated the Plaintiff as part of the Army Medical Corps, although three of these individuals are no longer serving with the Defence Forces. However, I say that some seven years have elapsed since the said treatment was administered and this is now the first notification which the Defendant has received that a claim in respect of medical negligence is being mooted. In all the circumstances, the Defendant has been unduly prejudiced by the Plaintiff's delay in formulating this claim as it has not previously been investigated and the personnel involved have not previously been asked to consider the allegations being made against them.

7. I say and believe that in this deponent's respectful submission, if the amendment sought by the Plaintiff herein is allowed, then it would permit the Plaintiff to defeat the statute as far as the medical negligence claim is concerned and remove the Defendant's entitlement to rely upon the statute which in all the circumstances would be improper and unjust. I say that the Plaintiff is in effect seeking to add a new cause of action to his claim arising from different facts which

pertain to the original proceedings and in all the circumstances I pray this Honourable Court to refuse the relief sought in the Notice of Motion herein."

DECISION

I am unable to accept the argument that the plaintiff by these proposed "further particulars of negligence" is in fact seeking to pursue a new cause of action in the form of a medical negligence claim against the Army Medical Corps, which would be statute barred at the date of the Order sought on this motion. The plaintiff's proceedings based on a claim of negligence were issued within the limitation period. As was pointed out by Keane J. (as he then was) in *Krops v. Irish Forestry Board Limited and Ryan* [1995] 2 I.L.R.M. 290 at 296, (confirmed on Appeal, 28th July, 1995), pleadings which initiate an action, carry with them from the time they are issued or delivered the potentiality of being amended by the Court. The wide power conferred on the Court by O. 28 of the Rules of the Superior Courts to permit an amendment of pleadings at any stage of the proceedings for the purpose of determining the real question in controversy between the parties, is to enable the court to do justice between them, (*Bell v. Pederson and Sandoz Ringaskiddy Limited* [1996] 1 I.L.R.M. 290 at 297 per. Kinlan J.). In *Rubotham (Infant) v. M and B Bakeries Limited* [1993] I.L.R.M. 219 at 221, Morris J. held that if the court is satisfied that there was no irremediable prejudice to the other party, it could permit an amendment even though it was fundamental and introduced into the action a claim for relief which had not originally been made.

In the instant case I find that the plaintiff, though seeking to introduce into the existing action a claim which was not originally made, is not attempting to add a new and distinct cause of action. It is reasonably arguable, - the determination of the issue must await the hearing of the action, - that it was a direct, foreseeable and proximate consequence of the already pleaded negligence that the plaintiff might require medical treatment and, a failure to provide proper treatment might cause him further damage, even if the nature and gravity of that damage was not reasonably foreseeable. Even though the proposed amendment must inevitably result in new facts being added to the case already pleaded, in my judgment, the new claim is germaine to, connected with and, arising out of the original cause of action and is not a new cause of action. I do not consider that granting the proposed amendment would prejudice the rights of the defendant by allowing the plaintiff to raise a claim which is statute barred. The Ordinary Civil Bill was issued within the limitation period so that a defence under the Statute of Limitations was never available to the defendant.

In the case of *Worri Bank and Hanvit LSP Finance Limited v. KDB Ireland* (Unreported, High Court, 17th May, 2006), Clarke J. applying the decision of the Supreme Court in *Croke v. Waterford Crystal Limited* [2005] 2 I.R.383, held as follows [Par. 3.2.]:-

> "In addressing the question of prejudice it is, of course, important to recollect that a party does not require any leave of the court to formulate its pleading (whether of claim or defence), in any manner it chooses in the first place. A party has a very wide discretion as to the manner in which it may plead its case or its response. Insofar as there are limitations, same stem from the rules of court which permit aspects of pleadings to be struck out in the unusual and limited circumstances where the pleadings may be found to be inappropriate by being, for example, vexatious, scandalous or disclosing no cause of action. Subject to those limitations a party is at large as to how it pleads. Where a party fails to include an appropriate plea it may be placed in a position of requiring a court order to amend. However the starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself. Such prejudice can, in principle, arise in one of two ways.
>
> Firstly a party resisting the amendment may be able to satisfy the court that, by virtue of the absence of the amended plea in the first place, steps have been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed.
>
> . . .
>
> Secondly a party may be able to persuade the court that what I might call logistical prejudice would occur if the amendment is allowed. This will particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings. In such cases it may be that an amendment which could properly have been made at an earlier stage might be refused because to permit the amendment would have the effect of so altering an imminent trial as to require a significant adjournment to the prejudice of the party against whom the amendment is sought."

I am satisfied on the affidavit evidence, that the defendant will not suffer irremediable prejudice should the proposed amendment be allowed. The medical personnel who, as members of the Army Medical Corps, treated the plaintiff following the road traffic accident have been traced and are available to give evidence should that become necessary. There is no evidence that Dr. Kelly, Mr. Rice and Mr. McQuillan are unavailable to give evidence. The plaintiff's medical records, the documents relating to his discharge from the Army and, medical reports from Dr. Kelly, Mr. Rice and Mr. McQuillan are all available. While the new claim may add to the length and to the cost of the trial I do not accept at this juncture that this would be sufficient to refuse to allow the amendment now sought.

The court will allow the amendment sought. I will hear the parties with regard to terms (if any) and costs.