Neutral Citation Number: [2007] IEHC 224

THE HIGH COURT

[2002 No. 8516 P]

BETWEEN

EDWARD MARTIN

PLAINTIFF

AND
IRISH EXPRESS CARGO LIMITED

DEFENDANT

Judgment of Ms. Justice Dunne delivered on the 6th day of July 2007

1. The defendant herein by notice of motion dated the 14th February, 2005 seeks an order dismissing the plaintiff's proceedings herein pursuant to the provisions of s. 11(1)(2) of the Limitation of Actions Act, 1957 as amended by s. 3(1)(2) of the Statute to Limitations Amendment Act, 1991 or alternatively an order dismissing the proceedings by reason of the inordinate and/or inexcusable delay by the plaintiff in prosecuting the said proceedings and/or that it is in the interest of justice to dismiss the said proceedings.

Background

2. The plaintiff sought damages for personal injuries, loss and damage, occasioned by reason of the negligence and breach of duty including statutory duty on the part of the defendant, its servants and agents by plenary summons issued on the 19th June, 2002. A statement of claim was delivered on the 18th March, 2003. It appears from the statement of claim that the plaintiff was employed as a general operative by the defendant at its premises, which premises were a factory within the meaning of the provisions of the Safety in Industry Acts, 1955/1980. It is alleged that on or about the 26th/27th April, 1993 the plaintiff in the course of his employment with the defendant was assisting a driver in the loading and unloading of goods at an industrial estate at Jamestown Road, Finglas, Co. Dublin, and that in the course of lifting a machine over a small wall in order to gain access to the factory unit, he suffered injury to his back. It was expressly pleaded at para. 5 of the statement of claim as follows:-

> "The plaintiff was not aware of the significance of the injuries sustained by him in the course of the aforesaid incident until he became aware of a diagnosis of a central disc prolapse in L5/S1 area of his back in or about March 2001 in the course of other proceedings against the defendant arising out to an accident which occurred in 1995."

3. The defence expressly pleads as follows:-

> "1. The plaintiff's claim herein (if any, which is denied) is statute barred pursuant to the provisions of the Statute of Limitations Act 1957/2000.
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> 2. Further or in the alternative and without prejudice to the foregoing the defendant herein says that the plaintiff has been guilty of prolonged, unconscionable, inordinate and/or inexcusable delay in the commencement and/or prosecution of this action and/or in seeking the relief claimed herein and further has thereby caused the defendant prejudice in the defence of this action and in the circumstances the plaintiff is not entitled to recover any damages for the reliefs sought. The claim herein should be dismissed and is an abuse of process."

4. The balance of the defence is a traverse of the plaintiff's claim and an allegation in respect to negligence and contributory negligence on the part of the plaintiff.

5. A number of affidavits were sworn in respect of this application. The affidavit of Mary Condell sworn herein on the 21st December, 2005 grounded the application on behalf of the defendant. She is a solicitor in the firm of Porter Morris & Co. who act on behalf of the defendant herein. She pointed out that the proceedings herein were commenced some nine years after the date of the alleged incident. She noted that the plaintiff had commenced other proceedings against the defendant on the 26th January, 1998 in which the plaintiff claimed damages for personal injuries suffered as a result of a different accident which occurred on the 1st June, 1995. Those proceedings were compromised for the sum of £100,000 in May, 2001 together with costs. She noted that a number of medical reports and correspondence which are relevant to the injuries for which the plaintiff now claims damages were obtained by the firm of Corrigan & Corrigan, Solicitors, who then represented the defendant in those proceedings.

6. It would be useful to refer to passages from the various medical reports and letters from Doctors prepared on behalf of the plaintiff herein which were exhibited in the affidavit of Mary Condell. Mr. Padraic O'Neill, Consultant Neuro-Surgeon wrote to Dr. F.W. Murray by letter dated 26th January, 1995 as follows:-

> "For the past eighteen months he has also complained of left sided low back pain. This initially occurred after he had been lifting a heavy machine. He says that it has been more or less constant since then, but is exacerbated by standing."

7. In a letter dated the 5th July, 1995 Geraldine O'Leary, a Senior Registrar at the Pain Management Clinic, Mater Hospital, Dublin and addressed to Mr. O'Neill, Consultant Neuro-Surgeon stated of the plaintiff that he:-

> "Had an injury at work two years ago and has been complaining of low back pain since that time. He is a truck driver by trade and finds that driving for long periods of time aggravates his symptoms severely. Since last reviewed he has been using a TENS machine and has found that this has helped significantly. However he complains of a persistent soreness across his lower back."

8. A medical legal report was prepared by a Dr. John P. Stack, Consultant Radiologist dated the 21st March, 2001 which related to a CT Scan of the plaintiff's lower three lumbar discs on the 8th February, 1995. The CT Study disclosed a minor posterior disc protrusion at L5/S1. The report concluded:-

> "The cross sectional imaging finding indicate the presence of a small posterior disc protrusion, present since February, 1995 which appears to have almost resolved by November, 1997."

9. In the other personal injury proceedings issued by the plaintiff as a result of the accident that occurred on the 1st June, 1995, the particulars of personal injury contained in the statement of claim referred to injuries to the right knee and back of the plaintiff. It was further pleaded that an MRI Scan revealed a disc protrusion at the L5/S1 level.

10. Finally, Mary Condell refers to replies to particulars dated the 10th February, 1999 in which it was disclosed that the plaintiff had

sustained a prior injury arising out of an accident which occurred at work in or around May 1993 and that as a result of the injury, the plaintiff had injured his back. It was also indicated in the replies to the notice for particulars that the plaintiff had made a full recovery from the injuries sustained in that accident and that he had received no further treatment since February 1995. Ms. Condell makes the point that it is clear that the plaintiff was aware that he had sustained a significant injury as a result of the accident alleged to have occurred in April 1993, many years prior to the date of issue of these proceedings and more significantly that he was aware of that at the very least as early as 26th January, 1995 when Mr. Padraic O'Neill dealt with the plaintiff's complaints in the letter addressed to Dr. F.W. Murray.

11. In a replying affidavit the plaintiff noted Dr. Stack's report of March, 2001 which indicated a "small disc protrusion at L5/S1" but he deposed to the fact that he only became aware of the contents of that report when he attended a settlement meeting on the 16th May, 2001 in relation to the 1995 accident. This apparently had come to light in a review carried out by Professor Max Ryan who noted the same. He referred to a report of Professor Ryan dated the 1st February, 2001 in which Professor Ryan had examined CT Scans of the plaintiff's lower lumbar spine made on the 8th February, 1995, 7th July, 1997 and an MRI Scan on the 12th November, 1997. The plaintiff accepted that the examinations showed that the plaintiff's disc prolapse pre-dated the accident of the 1st June, 1995.

12. The plaintiff also referred to a report of Mr. Padraic O'Neill addressed to the plaintiff's GP on the 15th February, 1995 in which Mr. O'Neill was of the opinion that the CT Scan of the lumbar spine was "essentially unremarkable with again no evidence of disc protrusion or neuro compromise." A Dr. Breathnach also expressed a view in a medical report dated the 8th February, 1995 in respect of the same CT Scan that it did not identify a disc protrusion. Dr. Breathnach's report stated:

> "The L3/4 and L4/5 disc spaces appear normal. The L5/S1 disc is also normal. No disc protrusion is identified."

13. Given the apparent contradictions expressed by the various Doctors and Consultants who had examined the CT Scans, not surprisingly the plaintiff sought further medical advice from Dr. John P. Stack. He confirmed in his report of the 21st March, 2001 previously referred to, that there was a small posterior disc protrusion present since February, 1995. On that basis the plaintiff avers as follows:

> "Accordingly, I say and believe that I could not have appreciated the full significance and severity of the earlier injury until March 2001, in that up to that point I had to accept the conclusions of Mr. O'Neill and Dr. Breathnach in relation to the condition of my back, having been referred by my General Practitioner Dr. Fergus Murray to Mr. O'Neill for his opinion after the 1993 accident."

14. He went on to comment that:-

> "It was my impression at the time that Mr. O'Neill was dismissive of my complaint and did not accept that I had a genuine injury and the same attitude was apparent in a report from Roisin McSullivan to Mr. O'Neill dated the 29th May, 1995 where she stated:
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> > 'On examination I could find absolutely nothing …
>
> I am not terribly impressed about the severity of his symptoms. I wonder is there litigation pending? If so, as you and I well know, that is the only thing that will cure his problem.'"

15. It is the view of the plaintiff that those opinions were based on the incorrect report from Dr. Breatnach dated the 8th February, 1995 in relation to the plaintiff's back. In those circumstances the plaintiff deposed that he was in no position to form a genuine assessment as to the significance and severity of the injuries sustained by him in 1993.

16. The plaintiff accepted that the reference to the disc protrusion at L5/S1 in the pleadings in relation to the later accident was because he assumed that it was due to the 1995 accident. He reiterated that he was unaware of the fact that the disc protrusion in fact related to the 1993 accident as a result of the incorrect report furnished by Dr. Breatnach. He accepted that he had complained of back problems since the accident of 1993, but as a result of the medical advice he had obtained in respect of that injury the extent of his injury was under estimated by his then medical advisors namely Dr. Breatnach, Mr. O'Neill and Dr. McSullivan. Accordingly, it is his contention that he did not become aware of the extent and severity of the 1993 injury until 2001, and had he been in full possession of the facts prior to that date he would have issued proceedings at an earlier stage in respect of the 1993 injury.

17. Mary Condell swore a replying affidavit on the 31st October, 2006. She made the point that it was clear from the plaintiff's affidavit that he was aware that he had a significant injury in the immediate aftermath of the accident which is the subject matter of these proceedings. She noted his comments as to the complaints he expressed as to the medical advice that he had received in respect of the symptoms following the 1993 accident and that he reiterated the fact that he did not appreciate the extent and severity of his injury particularly bearing in mind the interpretation placed on the CT Scan and the views expressed by his medical advisors in relation to his complaints, but she went on to note as follows:-

> 1. "That as of the 26th January, 1995 the plaintiff was complaining of low sided low back pain which had been "more or less constant" since the time of the alleged accident in April, 1993.
>
> 2. That the reported left sided low back pain was exacerbated by standing.
>
> 3. That as of the 5th July, 1995 the plaintiff was attending the Pain Management Clinic at University College, Dublin and the plaintiff was then complaining of continuing symptoms, including low back pain, which symptoms he complained were aggravated severely by reason of the fact that the plaintiff was a truck driver by trade.
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> 4. That as of the 5th July, 1995 the plaintiff had been using a TENS machine but that, notwithstanding the assistance of same the plaintiff was complaining of persistent soreness across his lower back.
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> 5. That as of the 5th July, 1995 the plaintiff had been advised to see a physiotherapist as soon as possible and the plaintiff was prescribed Diclosenac tablets.
>
> 6. That the plaintiff attributed the symptoms referred to above to the alleged accident in 1993 which is the subject matter of the herein proceedings over nine years later.

7. That if the said accident occurred as alleged by the plaintiff then (i) he was aware of same and (ii) was aware of an injury from same."

18. She also noted that following that particular accident the plaintiff was on sick leave from work for a week and that this was stated to be by reason of a work related accident.

19. Finally an affidavit of Deirdre Giblin, the former group head of the Human Resources of the defendant herein, exhibited certain matters in relation to the plaintiff's personnel records. There were two sick leave certificates dated 23rd January, 1995 and the 30th January, 1995. They were for a total period of two weeks and they recorded that the sick leave related to the accident which is alleged to have occurred in April 1993. The reason for the sick leave certificates was because the plaintiff was required to rest for a week due to neck and back pain. The second certificate dated the 30th January, 1995 was on the basis of a requirement that the plaintiff rest for one week due to "cervical disc". Finally she exhibited a medical certificate dated the 27th April, 1993 which related to an absence from work for one week by the plaintiff due to an injured back.

The Law

20. Section 3(1) of the Statute of Limitations (Amendment) Act, 1991 provides as follows:-

> "An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

21. Section 2(1) of the Act of 1991 provides:-

> "For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
>
> (a) that the person alleged to have been injured had been injured,
>
> (b) that the injury in question was significant,
>
> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty
>
> (d) the identity of the defendant, and
>
> (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of this action against the defendant;
>
> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

22. Section 2(2) provides:-

> "For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire-
>
> (a) from facts observable or ascertainable by him, or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek."

Submissions

23. In the course of submissions, reference was made to the decision in the case *of Hegarty v. O'Loughran* [1991] I.R. 149 in which it was held by the Supreme Court that the cause of action accrued at the time when provable personal injury capable of attracting compensation occurred to the plaintiff which was the completion of the tort alleged to have been committed against her. It was further held that the tort of negligence was not complete until damage had been caused by the defendant's wrongful act.

24. Reliance was also placed on the decision in the case of *Bolger v. O'Brien* [1999] 2 I.R. 431 in which the Supreme Court considered the meaning of the term "significant injury" as used in the context of s.2 of the 1991 Act. In the course of his judgment at p. 440, Hamilton C.J. commented

> "The fact that the plaintiff did not realise the full significance of the effect of such injury is not of relevance once it is established that he knew that the injury was significant."

25. Finally reference was made to the decision in *Whitely v. Minister for Defence* [1998] 4 I.R. 442. The statement of the law contained in the judgment of Quirke J. in that decision at p. 453 was accepted as setting forth the correct test to be applied in ascertaining when the plaintiff first had knowledge of the fact that the injury sustained by him as a result of the accident "was significant". See p. 438 of the judgment of Hamilton C.J. where it was noted:-

> "That the test was primarily a subjective test but included an objective element as, by virtue of s. 2(2) of the Act of 1991, for the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire:-
>
> (a) from facts observable or ascertainable by him, or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek."

26. Counsel for the defendant and the plaintiff were both in agreement that the only issue in this case was whether or not the plaintiff knew that the injury suffered by him in 1993 was a significant injury. On behalf of the defendants it was submitted that having regard to the contents of the various medical reports that the plaintiff was aware of the fact that he had a significant injury as of the 26th January, 1995 and emphasis was placed on the affidavit of Deirdre Giblin in relation to the sick leave certificates obtained by the plaintiff prior to the second accident. Reference was also made to the fact that in the reply to particulars furnished in the proceedings related to the second accident, the plaintiff had referred to the accident the subject of these proceedings; that he had injured his back and that MRI and CAT Scans were performed in relation to that injury. It was also pointed out that an accident report form had been completed in respect of the earlier accident for and on behalf of the defendant. Finally it was noted that the plaintiff had stated in the reply to particulars that he had made a full recovery from the injuries sustained in that accident and had received no further treatment since February, 1995 in respect of that accident.

27. Counsel on behalf of the plaintiff emphasised that in considering whether or not the plaintiff knew that the injury suffered was a significant injury it had to be borne in mind that the plaintiff had been wrongly advised by one of his Doctor's namely, Dr. Breatnach, as to the issue of a disc protrusion and that to some extent this had coloured the views of his other medical advisors. It was submitted that as the plaintiff had been clearly misled as to the extent of his injury, that if it could be said that he did not know the extent of the injury he could not know the significance of the injury. Although it was accepted that the injury was a significant injury, counsel emphasised that the plaintiff was not in a position to know the full significance of his back injury. He was aware that he had a back injury but it was clearly more serious than simply a soft tissue injury. Counsel contrasted the facts of the *Whitely* and *Bolger* cases referred to above, in which the plaintiffs in those cases only appreciated the significance of their injury when they attended their medical practitioners who informed them of their injuries. In the present case the plaintiff had attended a number of medical practitioners and one of the reports wrongly advised that no disc protrusion was disclosed. Accordingly it was submitted that this is a case in which the plaintiff had sought the appropriate medical advice and was not made aware of the full significance of his injury.

Decision

28. It is clear from the facts of this case that the plaintiff suffered an injury to his back in the incident that occurred in April 1993. It is clear that he was immediately aware of the fact that he suffered such an injury. In the immediate aftermath he required a week's sick leave. Subsequently, as is clear from the various medical reports, he complained consistently for a period of time of low back pain. That led to circumstances where he was required to use a TENS machine over a period of time to assist in alleviating the symptoms arising from that injury. Nonetheless he continued to complain of persistent soreness. He completed an accident report form for the defendant in respect of his injuries. It was fairly conceded by counsel on his behalf that he had suffered a significant injury, but counsel argued as indicated above that the plaintiff did not know the full significance of the injury by virtue of the undoubted error in relation to the findings of the scan in which it had been indicated that no disc protrusion was disclosed. In all the circumstances of this case, it seems to me that the evidence has clearly established that the plaintiff suffered a significant injury. He knew he injured his back when lifting heavy machinery. It is undoubtedly the case that he had suffered significant injury and that he was aware of this because he attended a number of Doctors including a Consultant Neuro-Surgeon and a Senior Registrar in the Pain Management Clinic at the Mater Hospital. It is also clear that he was prescribed medication, had been given a TENS machine and was prescribed physiotherapy. Additionally as referred to above there were a number of periods on which he was obliged to take sick leave. I think it is helpful to repeat the words of Hamilton C.J. in the *Bolger* case referred to above where he stated at p. 439 as follows:-

> "The learned trial judge had held that the full significance of the plaintiff's injuries were not brought home to him and that he did not understand them until in or about October, 1992 but that is not the test.
>
> The test is when he knew or ought reasonably have known 'from facts observable or ascertainable by him' that he had suffered a significant injury.
>
> The learned trial judge does not in the course of her judgment appear to have had adequate regard to the evidence of the injuries sustained by the plaintiff and his knowledge thereof at the time of and immediately subsequent to the date thereof.
>
> By any standards, subjective or objective, the plaintiff had suffered a significant injury and he must have been so aware certainly from the time of his return to work and his realisation that he was not fit for manual work.
>
> The fact that the plaintiff did not realise the full significance of the effect of such injury is not of relevance once it is established that he knew that the injury was significant."

29. Even accepting as I do that there was a lack of clarity as to the nature of the plaintiff's injury in that the report of Dr. Breatnach as to disc protrusion was wrong, it cannot be gainsaid in my view that the plaintiff was aware of the fact that he suffered a sugnificant injury. He did consult a number of Doctors in relation to his injuries. It may well be the case that he was not aware of the fact that a disc protrusion had occurred until much later but as is manifestly clear from the decision of Hamilton C.J. in the *Bolger* case that fact that the plaintiff did not realise the full extent of his injury is irrelevant once it is clear that the plaintiff was aware that he had suffered a significant injury.

30. In the circumstances, I must conclude that the defendant is entitled to the relief claimed herein.