

THE HIGH COURT

[2012 No. 6076 P.]

BETWEEN

JAMES HOLOHAN

PLAINTIFF

AND

FRIENDS FIRST LIFE ASSURANCE COMPANY LIMITED

DEFENDANT

JUDGMENT delivered by Mr. Justice Michael White on the 1st day of May 2014

1. These are proceedings which commenced by plenary summons on 21st June, 2012 seeking a declaration that the defendant was in breach of a contract of insurance. The statement of claim was served on 21st June, 2012, and the defence on 25th January, 2013. The action was at hearing on 18th, 19th, 20th, 25th and 26th February, 2014, when judgment was reserved.
2. The court heard the following witnesses, the plaintiff, Prof. Michael D. Molloy, Consultant Rheumatologist; Dr. Patrick J. Murphy, Consultant Physician; Dr. Adrian Honan the Plaintiff's G.P. Audrey Holohan, the plaintiff's spouse, Mr. Joseph Brady, Managing Director of Brady Burns Insurance Brokers, the plaintiff's former employer; and Nigel Tennant, Consultant Actuary.
3. The Defence called Dr Deirdre Gleeson a specialist in occupational medicine and Mr David Newman an osteopath and Director and Senior Assessor for Formhealth, who has acted as a functional capacity evaluator since 1997 and who administered and reported on a chronic pain abilities determination test.
4. Written and oral legal submissions were presented by the plaintiff and defendant.
5. The plaintiff was employed by Brady Burns Insurance Brokers as an insurance broker/financial adviser engaged in the sale of life and pension policies and this was his normal occupation. The plaintiff entered into a contract of insurance with the defendant for an income protection plan, policy No. 50272096 which was effective from 20th March, 2006, and which covered the insured financially through a period of disability if totally unable to carry out his normal occupation due to a recognised illness or accident and during which the insured was not involved in carrying out any other occupation for profit, reward or remuneration.
6. The plaintiff is from a farming family in Co. Offaly. He is now 45. He worked with Irish Life Assurance as an insurance sales person from August 1990 until September 2005 and then transferred employment to Brady Burns Insurance Brokers. The plaintiff had a consistent work record and history of continuous employment for approximately 19 years before ceasing work in April 2009 due to medical difficulties.
7. The plaintiff described the onset of symptoms in or around 2007, when he started to have pain in various locations in his body. He began to find it difficult to get up in the morning due to tiredness. He continued employment and visited his general practitioner, Dr. Adrian Honan in or around September/October 2008, complaining of breathlessness, pains in his chest, arms, neck, back and legs together with dizzy spells and irritable bowel. He was referred first to Dr. Connaughton, a Cardiologist, who excluded heart disease.
8. In April 2009 he was referred to Dr. Patrick J. Murphy, a Consultant Physician in Tullamore Hospital and was diagnosed with fibromyalgia. He was certified unfit for work by his general practitioner from April 2009. The plaintiff claimed on the policy in September 2009.
9. By letter of 16th September, 2009, the defendants confirmed the claim was accepted but based on medical evidence there was an expectation that the treatment of his symptoms would result in the claim being of short duration, and that once medical investigations had been completed, the claim would be reviewed further. The scheme had a deferred period of 26 weeks so the benefit commenced from 28th October, 2009, and was paid at four weekly intervals in arrears.
10. Having carried out various investigations, the defendant wrote to the plaintiff again on 7th December, 2010, confirming that the defendant's Chief Medical Officer had considered an up to date medical report from Dr. Deirdre Gleeson, Occupational Specialist, together with all medical evidence received and had decided that based on the information contained in the reports, the defendant was unable to consider the plaintiff totally disabled by reason of sickness or accident from following the occupation of insurance broker as required by the scheme conditions and advised the plaintiff that as a definition of disability under the terms of the policy was no longer satisfied, that the benefit would be terminated after a phased payment of 50% of the benefit for a period of four weeks. This was disputed by the plaintiff.
11. The defendant in further assessment of the claim arranged a further examination with Dr Gleeson and also a chronic pain abilities determination test which was carried out over a two day period on 10th and 12th May, 2011.
12. The defendant subsequently wrote to the plaintiff on 9th June, 2011, confirming receipt of the CPAD (Chronic Pain Abilities Determination) assessment and having considered this report together with medical evidence already on file from the plaintiff's own doctors and the assessment of Dr. Gleeson, decided that the plaintiff was not suffering from a period of disability as defined in the policy and that the decision to terminate the claim remained unchanged.
13. The defendant issued a final response letter on 9th August, 2011, rejecting the claim of the plaintiff.
14. Subsequently, the plaintiff did not refer the matter to the Financial Services Ombudsman but took legal advice and the plenary summons already referred to was issued on 21st June, 2012.

15. The plaintiff gave detailed evidence about his work history, and the onset of his symptoms in 2007. He stated it started with pains in his legs, and gradually moved up his body, and if standing in one place or overdoing physical work he would seize up. He stated it began to affect him at work, he was getting tired. The symptoms began to affect him sitting at a desk or in the car. He first attended his GP in September /October 2008, and after many tests was diagnosed in June 2009 with fibromyalgia. He had never heard of it before that . He recounted the various drugs which he was prescribed, which changed from time to time. The drugs included lyrica, amitriptyline,,cymbalta, gabapentin, mirapexin, and also calcichew. He felt he did not respond well to the medication. He stated he was continuing on medication and his condition had worsened, and he still was not feeling good.

16. There was a detailed and robust cross examination of the plaintiff by counsel on behalf of the defendant. The detailed history taken by David Newman, the expert administering the CPAD testing, was put to Mr. Holohan and the tasks that he was able to undertake and those he was not capable of. He accepted that he drove a tractor but stated it was only ever in summertime, a day in May, another in June or maybe two in June or one in July but not for more than a day or two at one go.

17. He accepted when put to him about medication assisting him that it was fair to say that it was not exactly true that the medication does not help at all. He stated it is not fixing the problem and was not getting him back to work but was dulling some of the pain because it is worse if he does not take medication. He accepted that he could Hoover his car and do some cooking. He stated that he had some difficulty holding implements and indicated that he had surgery for carpal tunnel syndrome in the Beacon Hospital in or around April 2013. He insisted that his right hand improved after surgery but that he still had numbness and he put it down to his fibromyalgia.

18. He accepted that he could use a washing machine and dryer and do some dish washing and some gardening, pruning the roses and riding a lawnmower. He stated that he had difficulty helping with grocery shopping. There was detailed cross examination about the plaintiff's ability to drive and the information that he had given to Mr. Newman. Counsel for the defendant highlighted the report form prepared for the insurance company where the plaintiff stated he drove 400 – 500 miles per week but told Mr. Newman that he could only drive for a maximum of ten miles. The plaintiff disputed that he had told Mr. Newman he could only drive for a maximum of ten miles.

19. The Plaintiff was cross examined about the algometry 21 point tenderness testing. He stated that Mr. Newman had asked him where the pain was, but was not hitting the spot. He had not removed his shirt for this test. It was put to him that he was only positive on one out of the eighteen points. In reply the plaintiff pointed to the testing carried out by Dr. Murphy.

20. The results of the CPAD testing were put to him and he denied he had been exaggerating his symptoms. He accepted he made mistakes which he was not allowed to change. He stated that he felt nervous during the testing.

21. He stated he would like to go back to work but physically could not do so and was in a lot of pain sitting and could not hold a pen. He denied misrepresenting his ability. He accepted that he had only attended two or three sessions of physiotherapy and saw a psychologist on one occasion in 2009. He stated he was worried about cost.

22. The plaintiff's spouse, Audrey Holohan gave evidence that the plaintiff was always a very hard worker with a good personality and that he enjoyed his work.

23. She stated that the pains in his legs progressed and he developed headaches and fatigue and he did not sleep well. This accelerated during 2009. She stated there was always a wage coming into the house that he was a very hard worker but that he was very different now. He had been light-hearted and bubbly but because of his fatigue had become very different.

Mr Joe Barry gave evidence that he was managing director of Brady Burns since 1989. He had hunted the Plaintiff from Irish Life. The plaintiff was employed from 2005 and looked after senior sales, meeting clients, advising on their investments. It was a responsible job. He ceased work on the 29th of April 2009, and the company were sorry to lose him, as he was a loyal employee in a responsible position. He would now be out of touch with the market and his qualifications are not up- to date. The company could not take him back in his present state or condition.

On cross examination he accepted he had not seen any of the medical evidence.

24. The medical evidence adduced on behalf of the plaintiff and the defendant at the hearing of the action is in substantial conflict, on the Plaintiff's ability to carry on his normal occupation.

25. Dr. Patrick J. Murphy, Consultant Physician, to whom the plaintiff was referred by his general practitioner, in April 2009, in his evidence, was adamant that the plaintiff suffered from a recognised medical condition, fibromyalgia. While accepting that he had to rely on the history of the illness and its effects, provided by the patient, based on his experience, he formed the view that the plaintiff was genuine and had a very active disease with what he described as a full house of manifestations. A series of procedures and tests had excluded organic disease and he had also been assessed for sleep apnoea which was negative. He was of the opinion that the Plaintiff was unfit for work and would be unfit for the foreseeable future.

26. In a robust cross examination, Dr. Murphy accepted there were no objective signs and that he was reliant on the honesty of the narrative of the patient but he did rely on his own clinical experience. He accepted that it was appropriate to encourage these types of patients back to work but that it was his experience when the symptoms of fibromyalgia are so severe it is unlikely that there will be remission. He accepted that a lot of people with fibromyalgia go back to work but that it was a spectrum of illness and he had patients with even more severe symptoms who were confined to a wheelchair. He expected the Plaintiff's present condition to continue.

27. Prof. Michael Molloy, Consultant Rheumatologist provided a second opinion and gave evidence that he saw the plaintiff on 3rd September, 2013, a diagnosis of fibromyalgia having already been made by Dr. Murphy.

28. He informed the court that a diagnosis of fibromyalgia is by exclusion and the only signs you find are tender spots. There are no blood tests or radiological changes that would help one make a diagnosis, so tests are done to exclude other possibilities. Stress tests, ECGs are carried out to exclude a cardiac condition. He noted that the plaintiff had evidence of some drooping of the right side of his face and an MRI scan was carried out and he was seen by a neurologist to exclude any neurological problems. He had also undergone an electromyography which is a conduction test, to test muscles He was diagnosed with carpal tunnel syndrome which was separate from the diagnosis of fibromyalgia.

29. Prof. Molloy noted his symptoms of aches and pains, weakness of the muscles, concentration problems, and irritability,

sleeplessness, and severe fatigue. On examination he noted he had the typical tender points associated with fibromyalgia. He also noted he had been on a lot of medication, which can cause drowsiness at the therapeutic level, but there was no drug which could cure the condition. He stated that fibromyalgia was a recognised illness with symptoms similar to those of the Plaintiff. He was of the opinion that his symptoms had not changed over a period of four years and it was unlikely that he would be able to go back to the kind of work he had been doing in the past but that one could not say that with absolute certainty.

30. In cross examination, Prof. Molloy accepted that there is subjective reporting and that the only objective evidence is tenderness and to a great extent you have to rely on the accuracy of the patient but also the experience of the physician treating the patient and the exclusion of other conditions. He accepted if he could work it would be better, but the plaintiff was not capable of doing his work.

31. Dr. Adrian Honan, the plaintiff's general practitioner of Portarlington, Co. Laois stated that he had been the plaintiff's general practitioner since 1981. He had no medical history of relevance. The plaintiff first came to him in 2008 complaining of chest pain. He was referred to Portlaoise hospital and tests were clear. In early 2009, he returned complaining of fatigue, headaches and other complaints. His colleague, Dr. O'Hara referred him to Dr. Patrick Murphy who diagnosed fibromyalgia. The plaintiff was also referred to Dr. Catherine Crowe Mater hospital to check for sleep apnoea and that was clear.

32. He noted that the plaintiff has open access to the surgery and it was left to him when to come. He regarded the symptoms as severe. He had not seen any improvement. He considered him a genuine, nice man who was very frustrated by his symptoms and he has continued to certify him as unfit for work.

33. On cross examination he stated that he had not made the diagnosis and that he was happy that he had direction from Dr. Murphy. He prescribed medication, psychological support and physiotherapy. He stated that he was aware of Dr. Gleeson's view that it was helpful and rehabilitating for someone in the plaintiff's position to go back to work and to continue to work. Dr. Honan stated they have to be in a position to go back to work.

34. Dr. Deirdre Gleeson in evidence stated she was a specialist in occupational health and in rehabilitating patients who were to return to the workplace. She saw the plaintiff on two occasions on 30th October, 2009 and 24th November, 2010. She did not have a therapeutic relationship with the plaintiff but the purpose of her examination and reports were for an independent medical assessment of his ability to work and if he met the definition of disability as set out in the relevant insurance policy. She found the plaintiff pleasant and very cooperative. In her first assessment of 30th October, 2009, she noted that the physical examination of the plaintiff was normal, that he demonstrated a full normal range of movement of the neck, spine and musculoskeletal joints and that there was no trigger points for pain. She stated that she was unsure of the diagnosis of fibromyalgia but indicated that he could have obstructive sleep apnoea. Dr. Gleeson formed the view that if the sleep apnoea was addressed there was no medical reason why he should not return to full, normal employment duties and that in fact it would assist him to return to work as remaining on sick leave would lead to de-conditioning and de-motivation.

35. In her second assessment of 24th November, 2010, she again noted that the plaintiff was pleasant and cooperative in the examination. She formed the opinion that he was fit to attempt to return to his normal occupation, that modern work stations were very comfortable and she could not see any reason why he could not return to work. She noted that he could drive a tractor and if he could do that he could sit at a desk and could also drive a car. She stated that even with chronic fibromyalgia the goal is still to return to normal functioning. She stated that she had not seen the plaintiff since 24th November, 2010.

36. On cross examination, she stated that she had a very good knowledge of the workplace and that sometimes it was difficult for the treating doctor in that you become and advocate for the patient. She was adamant that the plaintiff did not meet the criteria set out in the insurance policy for disability. He was not unfit for work. She did not detect any reduction in concentration even though he reported a history of poor concentration. She found that he was not suffering from any depression or mood disorder. She accepted that she did not have a therapeutic relationship with the plaintiff and was not disputing the diagnosis of fibromyalgia, but did not agree that he was not fit for any occupation. She noted that he had not attempted to return to work since April 2009 and at the very least he should attempt to return to work and this was possible even with severe disability, she could see no reasonable impediment to a rehabilitation programme.

Specialist Testing and Results

37. The court heard evidence from Mr. David Newman on behalf of the defendant and also had the benefit of a detailed report. Mr. Newman is a director of a company called Form Health Limited and is an expert in carrying out a test called the chronic pain abilities determination test which is useful in assessing the performance of work related tasks from a physical and a cognitive position. It is not used as a medical diagnostic tool but to assess the day to day activities of an individual in the workplace. The main testing areas are range, power, strength, endurance and cognitive ability.

38. The assessment of the plaintiff took place on 10th and 12th May, 2011. Portions of the tests are self administered by a questionnaire on computer. There were also three separate questionnaires completed, an individual visual analog scale questionnaire, the McGill pain questionnaire, and the fibromyalgia impact questionnaire.

39. There were also a number of tests administered to assess the capacity of the individual. The tests were walking, carrying, scooping, reach overhead by manual handling, fine dexterity either frequent or constant, and a grip test. These together were described as functional abilities evaluation carried out in accordance with a methods time measurement.

40. The cognitive testing was described as the CNS vital signs clinical report and relied on a number of computerised tests, individual memory test, a simple digit coding test, a stroop test which measured simple and complex reaction time, inhibition/disinhibition, mental flexibility or directed attention and a shifting attention test and finally a continuous performance test.

41. There was also a standardised manual tender point survey test carried out which determined a set of tender points and control points using an algometric threshold meter. There were eighteen surveyed and three control sites tested in numerical order.

42. The conclusion in Mr. Newman's report which he repeated in his sworn evidence to the court was that a review of the results of CPAD testing over both days indicates that there were a number of inconsistencies and discrepancies from a physical perspective demonstrated by the plaintiff and which were as follows.

43. His ratings of perceived exertion on the majority of tests did not correlate with the corresponding heart rates indicating that there is evidence of symptom exaggeration present.

44. Despite reporting increased pain on day 2 of testing in addition to higher scores in the pre-test questionnaires (which would suggest a higher level of disability). His abilities to perform by a manual fine dexterity reaching out with both hands were greater on day 2 compared to day 1. Furthermore, his ability to undertake the remainder of the functional activities did not reduce on day 2.

45. His pain rating decreased at the conclusion of day 1 compared to the start which does not correlate with his reported symptomology during assessment.

46. While the plaintiff demonstrated significant reduced ranges of flexion and rotation on formal testing, these ranges were observed to be normal on distraction.

47. It was noted that the non-bell shaped curve during five position grip strength testing in both hands on both days of testing, representing invalid test results.

48. The rapid exchange grip forces in both hands were far greater than the corresponding five position grip strength forces in both hands on day 1 of testing, again representing invalid test results.

49. The palmer pinch forces did not exceed the tip pinch forces in either hand on both days of testing representing inappropriate test results.

50. His ability to reach up in the right hand increased on distraction compared to his demonstrated ability on formal testing on day 2.

51. The coefficients of variation in the rapid exchange grip test on both hands on both days, right and left sided position, 2 grip tests on day 1, left and right palmer pinch test on both days, the right tip pinch on day 2, the left tip pinch on day 1, the right key pinch on day 1, the carry test on day 1 and the reaching up test on day 1 were far greater than expected and represent a significant number of unreliable test results.

52. The results of the 21 point algometric testing did not fall under the normal convention for a diagnosis of fibromyalgia.

53. Mr. Newman found that based on the above inconsistencies and discrepancies, the functional abilities demonstrated by the plaintiff cannot represent his true capabilities and he could only conclude that his actual abilities were far greater than he was willing to demonstrate over the period of the CPAD testing.

54. With respect to the cognitive assessment tests, the plaintiff according to Mr. Newman scored very low in the cognitive percentage levels in all twelve measures completed and that these scores were comparable to individual suffering with severe brain injury, mild mental retardation and early dementia not with patients who have been diagnosed with fibromyalgia.

55. Mr. Newman further found that over the two days of testing, the plaintiff was able to converse normally and asked relevant questions regarding the chronic pain abilities determination test.

56. On cross examination, Mr. Newman defended the integrity of the test and denied that the tests were biased in favour of an employer or insurer. He accepted that someone who was on substantial medication would perform at a lower level but he would still not expect to see unreliable results. He accepted that medication could have had an affect on the test but one would still expect valid results.

57. He also disputed that mistakes which the plaintiff alleged he made in carrying out the computer tests, would have an impact on the findings of the overall test. He regarded the testing as an objective perspective on an ability of an individual to return to work.

58. The plaintiff in his evidence in respect of the dates of the testing the 10th and 12th May, 2011, stated that he had a headache and did not feel well at all and further stated that at no stage during the CPAD testing either on 10th or 12th May, 2011, did he deliberately try to perform the test in a particular way which was not compatible with his true ability nor did he try in any way to exaggerate his symptoms. He stated that he made mistakes during the testing and that he told Mr. Newman of this. He stated he read a number of questions wrongly in the computer testing. He stated that he felt poorly on the second day of testing when he was drowsy and dizzy at times.

59. The court prefers the tender points testing of Dr Murphy and Prof Molloy, over that of the CPAD test.

60. The court has considered the written submissions of the plaintiff and the defendant and the oral submissions of the parties

61. The plaintiff must prove that he is totally unable to carry out his normal occupation due to a recognised illness.

62. The court notes that there is broad agreement on the legal principles that the court has to apply with some exceptions. This is a case that must be decided on the balance of probabilities on the factual evidence.

63. Counsel for the plaintiff has put forward the case that the defendant is not entitled to rely on paras. 22 – 24 of its defence in respect of an allegation of misrepresentation because it is alleged that it is not open to the defendant having declined liability under a policy for a particular reason to later rely on one or more other reasons which even if they could have been relied on as a ground for declining payment were not relied on in making that decision.

64. The court does not accept that submission. If a misrepresentation is made by an insured person it can be taken into consideration even though it arises subsequent to the initial claim being made and its initial refusal. If during the course of a review of the claim, a misrepresentation is made which the court finds to be consciously or recklessly made to mislead the insurer, it should be taken into account.

65. The court does not accept the submission made at Para. 27 of the defendant's submission that the CPAD assessment stands on its own and that there was no evidence to challenge the accuracy of the CPAD assessment. The court does accept the CPAD assessment as a recognised and effective tool to assess someone's physical and cognitive ability.

66. The evidence of David Newman and the report on the CPAD testing is taken together with all the expert evidence in the trial of the action and considered in the context of the requirement of the plaintiff on the balance of probabilities to discharge the onus of proof upon him. The defendant is not correct when he states there has been no evidence to challenge the CPAD evidence as Prof. Molloy has called into question certain aspects of it.

67. The court distinguishes this case from that of *Haghiran v. Allied Dunbar Insurance* [2001] All E.R. as the evidence in this case goes beyond erroneous albeit genuine belief on the part of the plaintiff that he is totally unable to carry out his normal occupation due to a recognised illness or accident. Three separate medical witnesses, two of whom are experts in the field have given sworn evidence that the plaintiff is suffering from a recognised illness, fibromyalgia, and is unable to carry out his normal occupation due to that recognised illness.

68. The court is facing the difficult task of assessing the expert evidence which has been adduced on behalf of the plaintiff and the defendant.

69. There is a genuine difference of approach between the evidence of Dr. Murphy and Prof. Molloy on the one hand and Dr. Gleeson on the other as to the appropriate approach to take in the plaintiff's case.

70. All the medical experts accept that the plaintiff is suffering from a recognised illness namely fibromyalgia.

71. It is accepted that this can be a very debilitating condition and has a wide spectrum of effects from the most minor to the most severe.

72. The plaintiff had an excellent work history up to his discontinuance of work in April 2009. He had worked consistently since 1990, first of all with Irish Life Assurance for a period of fifteen years and then with Brady Burns Insurance Broker from 2005 to 29th April, 2009.

73. The plaintiff had no relevant medical history prior to his complaints to his general practitioner in September/October 2008, although he himself had been suffering symptoms since 2007.

74. Dr. Murphy, Prof. Molloy and Dr. Honan had all separately formed the opinion that the plaintiff was genuine and not exaggerating his symptoms, while at all times accepting that a vital part of the diagnosis of fibromyalgia were the subjective symptoms and medical history provided by the individual sufferer.

75. The court does accept that there are inconsistencies in the CPAD testing particularly in respect of the cognitive testing of the plaintiff.

76. The plaintiff has given sworn evidence that he was on substantial medication at the time of these tests that he made some mistakes, that he informed Mr. Newman of these mistakes. Mr. Newman has no recollection of the plaintiff informing him of any mistakes but is of the opinion that the tests are calibrated to the extent that it would take these mistakes into the calculations, I have formed the opinion based on the evidence of Mr. Holohan and his spouse, Audrey and the medical evidence that the plaintiff did not deliberately or recklessly attempt to misrepresent to the defendant that his condition was worse than it actually was.

77. The court accepts the validity of the CPAD test process and certainly has some concerns in respect of the results thereof, however, the court is faced with a cohort of medical evidence presented on behalf of the plaintiff which is very persuasive and which on the balance of probabilities, the court accepts.

78. He suffers from a recognised illness, fibromyalgia, which has arisen in the context of a man with a previous excellent health history and excellent work record, where the indications are apart from some of the tests in the CPAD testing that he is a genuine person and is not exaggerating his symptoms.

79. The medical expert called on behalf of the defendant Dr Gleeson is a credible witness and has given a genuine opinion that the plaintiff is fit for work and that many if not most sufferers from fibromyalgia can undertake and continue in their chosen profession.

80. However, Dr. Murphy has stated and has been supported by Prof. Molloy that this is a spectrum and that there are some cases of such severity that it renders an individual unable to carry out their chosen profession.

81. The court has come to the conclusion on the balance of probabilities even with the misgivings it has in respect of the CPAD testing that the plaintiff does come within the scope of the policy and that he is entitled to the relief sought.

82. The actuarial evidence is now agreed in terms of the net loss to the plaintiff since the discontinuation of the policy. The appropriate relief to grant is one of specific performance in respect of future payment of the benefits which accrue under the policy and the court will grant that order.