

**APPROVED**



THE HIGH COURT  
GALWAY

[2021 3862 P]

BETWEEN

MOHAMMAD ALDASOUQI

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

**JUDGMENT of Mr. Justice Tony O'Connor delivered on 11 February 2021 at Galway  
Courthouse.**

**Introduction**

1. The following headings outline the course of this judgment for what may be categorised as an accident at work claim:

1. Admission of direction given to replace the camera?
2. Established facts.
3. The undertaking of the task.

4. The breach of duty or breach of statutory duty.
5. Extent of injuries.

### **Admission of direction?**

2. Counsel for the plaintiff following the exchange of written submissions after the conclusion of evidence last week, characterised the situation facing the plaintiff at trial as "the perfect ambush". The plaintiff contends that the defendant by not specifically denying the alleged direction to the plaintiff (a security manager in the defendant's store at Briarhill, Galway) to fix a security camera ("**the camera**"), is deemed to have admitted the direction. The defendant at trial adduced evidence from the relevant store manager ("**Mr. McGrath**") to the effect that the alleged direction was not given.

### **Background**

3. The personal injuries summons issued on 31 August 2016 pleaded that:

"The plaintiff during his employment with the defendant on 18th January 2014 'was caused, permitted, and required to replace the defective security camera...', following which the plaintiff owing to the breach of duty of the defendant, its servant or agents, fell off a ladder which "broke and collapsed underneath".

4. Out of the 23 subparagraphs giving particulars of negligence the plaintiff concentrated on paragraph 5(f) at trial which read:

"Caused, permitted, and required the plaintiff to use a ladder which was defective and exposed the plaintiff to risk of damage or injury of which they knew or ought to have known".

5. The defendant then asked the plaintiff to identify who directed the plaintiff. By reply dated 8 December 2016 the plaintiff's solicitor identified Mr. McGrath. The defence delivered on 27 February 2017 pleaded that:

"The plaintiff is on full proof of each and every such allegation of fact", under the heading "Grounds upon which the defendant claims that it is not liable...". The defence then in the following numbered paragraphs denied that:

8. The accident occurred in the manner alleged.
9. The ladder broke.
10. The particulars of negligence and;
11. The injuries and loss."

The particulars of contributory negligence were then pleaded. That defence was verified by Mr. McGrath on behalf of the defendant.

### **Status of pleading**

6. Section 2 the Civil Liability Act 2004 ("**the 2014 Act**"), provides:

"Pleading" means, in relation to a personal injuries action, a personal injury summons, a defence, a defence and counterclaim or any other document (other than an affidavit or a report prepared by a person who is not a party to that action) that, under rules of court, is required to be, or may be, served (within such period as is prescribed by those rules) by a party to the action or another party to that action".

As it becomes relevant later it is worth stating that this definition in the context of the discrete issue arising before this Court, is the relevant definition and supersedes the definition of "pleading" in Order 125 of the Rules of the Superior Courts ("**RSC**"). It is a specific statutory provision and comes later in time to the RSC which are comprised within statutory instruments made pursuant to other statutes enabling the Superior Courts Rules committee, with the concurrence of the relevant minister, to make the RSC.

### **Reference to deemed admission in report of expert**

7. In a letter of 24 January 2019 Mr. Gallagher, engineer called by counsel for the plaintiff (which was only disclosed during the trial and not during the exchange pursuant to Order 39 (46) of the RSC) noted that the plaintiff:

"...was allowed or encouraged by his superior, Mr. Paul McGrath, to carry out the work".

Nothing now turns on how that comment by the expert was made or disclosed. Counsel for both parties with an admirable sense of having justice administered efficiently make no point about that non-binding interpretation or late disclosure.

### **Effect of disputed deemed omission to deny the direction**

8. Counsel for the plaintiff submits that the failure to deny the alleged direction to fix the camera and to only challenge the deemed admission at trial has resulted in the plaintiff and his advisors not investigating and adducing evidence in support of the plaintiff's assertion of a direction having been given by Mr McGrath. The plaintiff's solicitors by letter of 4 April 2014 had requested, in the absence of an admission of liability, an undertaking from the defendant to preserve property relevant to the accident pending an examination. CCTV of the actual fall from the ladder was shown to the Court and counsel for the plaintiff submits that similar CCTV may have existed for the area in the store where the plaintiff was given directions by Mr. McGrath. Counsel for the defendant concedes that any such CCTV would have been erased unless requested within six months. The absence of CCTV for the area in the store where the alleged direction was given is only one example of the effect of the alleged "ambush" for the preparation and preparation for trial.

### **Submissions for plaintiff**

9. Counsel for the plaintiff submits that Collins J., in *Morgan v. ESB* [2021] IECA 29 (Unreported, Court of Appeal, 5 February 2021) ("**Morgan**") reiterated the necessity for greater precision in pleadings before trial since the 2004 Act. Counsel contends that the Court ought to take "the abuse of process" or what this Court might describe more benignly as an omission in the pleading for the defence, as a ground to strike out the defence and to take the facts as pleaded "However unlikely that they might appear" in the words of Simons

J., in *Carey v. Paul Sweeney and Cantor Fitzgerald* [2021] IEHC 620 (Unreported, High Court, 27 October 2021).

### **Submissions for defendant**

**10.** Counsel for the defendant submits that the reply dated 8 December 2016 which identified Mr. McGrath as having given the direction to fix the camera is not a “pleading” within the meaning of Order 125(1) of the RSC. Counsel refers to a practice which has developed (entirely outside the provisions of the RSC) where plaintiffs purport to update particulars of negligence without amending a statement of claim (or a personal injury summons) in accordance with Order 28 of the RSC.

**11.** Counsel for the defendant highlights how the plaintiff in updating particulars on 27 July 2017, 21 February 2019 and 25 March 2020, has not prompted the plaintiff to seek an amended defence to deny those particulars. Counsel seeks to distinguish:

- a) *Crean v. Harty & Ors* [2020] IECA 364 (Unreported, Court of Appeal, 22 December 2020) (“**Crean**”) by explaining that that judgment only addresses the obligation to comply with a request for particulars;
- b) *Morgan* by identifying that further particulars must be verified by an affidavit of the plaintiff.

Counsel for the defendant also submits that striking out a pleading should only occur where the pleading may be prejudicial and prolix. He refers to the term "scattergun" used by McGovern J., at para. 14 of *Doherty v. Minister for Justice Equality and Law Reform* [2009] IEHC 246 (Unreported, high Court, 15 May 2009) as relevant when striking out a pleading and that such a scenario does not present here.

**12.** The final opportunity to serve an amended statement of claim as adopted by Kelly J., in *IBB Internet Services v. Motorola Limited* [2011] IEHC 253, [2011] 2 I.L.R.M. 321 at 326, ought to have been availed of by the plaintiff to clarify any confusion, appears to be the thrust

of the defendant's argument that it is the plaintiff who is remiss in pleading as opposed to the defendant.

13. Counsel for the defendant finally urges the Court to accept that the contest of liability in every respect is clear from the defence and that I should proceed to decide whether the evidence of the plaintiff will be preferred over the testimony of Mr. McGrath who denies that he had the alleged discussion with the plaintiff which lead to the attempt of the plaintiff to fix the camera.

### **Decision on deemed admission**

14. Section 13(1) of the 2004 Act, increased the obligations for all parties in personal injury litigation to plead more precisely. Paragraphs 18 and 19 of the judgment in *Crean* which quoted McDonald J, in *Allied Irish Banks PLC v. AIG Europe Limited* [2018] IEHC 677, [2019] 3 I.R. 650 at para. 38 (h) which in turn referred to Delany and McGrath on Civil Procedure (4th Edition Round Hall, 2018) are apposite to this application:

If “the negative is pregnant with an affirmative, in which case particulars of the affirmative ought to be given”.

Reference was also made by Collins J., to the knowledge of a party about the onus of proof at trial. While the plaintiff, or at least his legal advisors, knew that the plaintiff would have to give evidence at trial of the direction or request to fix the camera, the defendant did not alert the plaintiff prior to trial that there would be controversy at trial about whether a conversation about the camera between Mr McGrath and the plaintiff took place at all.

15. *Crean* was indeed only concerned with an application seeking particulars of the denial of a consent for a hip replacement. The denial was considered by Collins J., to be a positive plea that there was informed consent for the procedure which merited the defendant doctor giving particulars of the consent for the surgical procedure. The situation at the trial before this Court is different. The terms of a consent to a medical procedure are unlike a direction

from an employer and I am not concerned with an interlocutory application for an order directing particulars to be given. The plaintiff had notified the defendant of a direction to fix the camera and knew that he had to give evidence of same. He gave evidence of the conversation during which the so-called direction was given. The plaintiff was not aware until his cross examination last week that Mr. McGrath has apparently denied since the plaintiff's fall from the ladder in 2014 that he had had any conversation with the plaintiff about fixing the camera.

**16.** I asked counsel for the plaintiff why a request for particulars was not made of the defendant about the circumstances of the direction given which is now denied specifically. Counsel submitted that there is no reason to ask for particulars of an admission of fact. Counsel for the defendant in reply to my question along the same lines suggested that the plaintiff could have asked of the defendant, following the delivery of the defence "on what basis is it alleged that the plaintiff was not directed to do the task"? The latter would probably not have been ordered in a motion to give particulars. The terms of a consent by a patient for a medical procedure to be alleged by a defendant doctor is indeed different to a simple direction to have a camera fixed by the security manager. In the former a professional is positively asserting a consent without giving particulars of the consent. In the plaintiff's situation he has advised the defendant that he was directed to have the camera fixed while no notice is given that Mr McGrath would deny having any conversation with the plaintiff about the camera.

**17.** In the circumstances as have evolved in these proceedings, I favour the attitude adopted by counsel for the plaintiff. Where and how does one stop or limit requests for particulars if an admission is deemed to have occurred. The defence specifically denied that the accident occurred and that the ladder broke. Given the requirement for pleading in a defence under

Section 13 (1) (b) of the 2004 Act, I cannot condone the omission in the defence to plead that the defendant did not require the plaintiff to replace the camera.

18. My determination follows on from my reliance on the approach adopted by Collins J. in *Crean and Morgan*. Paragraph 12 of Morgan which, incidentally, concerned the failure of the plaintiff to make a specific plea about a leaking roof that allegedly allowed water onto a floor causing the plaintiff to fall, explains the need for precision in drafting:

"It is difficult to avoid the impression that despite that Part 2 of the 2004 Act has been in force for more than 15 years, the extent of the changes that it makes in the area of personal injuries pleading has not always been fully recognised or effected in practice..., the reflective instinct of practitioners to plead broadly and generally has to be curbed."

19. The precision for the plaintiff to plead applies equally to the defendant. The plaintiff ought to have been put on notice that Mr. McGrath has maintained for the last eight years that he did not have any conversation with the plaintiff relevant to the replacement of the camera.

### **Remedy**

20. All of this leads me to assess how best to do justice between the parties. The height of the plaintiff's grievance, as submitted by his counsel, is that the plaintiff may have been able to view CCTV showing the plaintiff and Mr. McGrath having a conversation prior to the ladder incident. If the defendant failed to preserve relevant evidence as requested in the letter from the plaintiff's solicitor of 4 April 2014, the onus of establishing that no direction was given shifts to the defendant.

21. At trial the plaintiff gave evidence of having had a conversation and Mr. McGrath was the only witness for the defendant to dispute the plaintiff's assertion of a conversation between them about replacing the camera. Having considered everything, I find that the fairest and most just approach is to exclude from my consideration of the liability issue



arising, the evidence of Mr. McGrath that he did not speak with the plaintiff about replacing the camera.

### **Established facts**

22. The plaintiff testified that he told Mr. McGrath that a camera "was hanging by the wire" and that it was the plaintiff's belief that "we need to fix it". The camera was covering the entrance to the "good inwards area!". The exact words of the plaintiff in his direct examination were:

"Mr. McGrath said, if we can't fix the camera I have to do that, and he advised me to wait until one of the guys come to work from security so I can communicate with him through the walkie talkie that the camera is in the correct position. So, I waited until one guy come, then I go to fix the camera".

In reply to his counsel about whether Mr. McGrath gave any instructions as to how to go about fixing the camera he said "none".

23. The plaintiff candidly explained then that in the normal course of events defective equipment had to be reported to the head office which would send out a contractor. The plaintiff believed that there was an "emergency to fix it". Significantly, the plaintiff only imputed to Mr. McGrath a knowledge that the camera position was important. He could not remember whether he or Mr. McGrath said that it was important on that Saturday.

### **Credibility and reliability**

24. I observed the plaintiff doing his best to recall events which occurred over eight years ago. I do not doubt his honesty and willingness to honour his oath to tell the truth. He is a credible witness. However, I cannot rely on his evidence in some respects because his unsupported attribution of many of his physical complaints to the fall do not match the evidence of the independent medical practitioners who furnished reports and gave evidence.

### **Undertaking the task**

25. As for undertaking the task to replace a camera, there is no doubt that the plaintiff did not communicate with anyone through a radio before the ladder fell. The plaintiff fairly conceded that he could not remember the presence of Mr. James Cummins who was on the mezzanine floor when the plaintiff placed the “A” style ladder against the wall. Mr. Cummins was not on the management team as was the plaintiff. Mr. Cummins reported to Mr. McGrath. Mr. Cummins had started at around 7:30 a.m. and may have said hello to the plaintiff at some stage in the morning. Most significantly, Mr. Cummins spotted the plaintiff when the plaintiff's head popped up as he climbed the ladder. On being told by the plaintiff that he was going up to fix the camera, Mr. Cummins commented that he could do that. As Mr. Cummins was going to replace the camera, the plaintiff fell off the ladder.

### **Original position of the camera deficient?**

26. Counsel for the plaintiff submitted following the conclusion of evidence that there must have been something deficient in the original positioning of the camera because an operative or third party with access could knock it out of position and thereby render the camera ineffective for its purpose of surveillance. That submission which sought to link the plaintiff's fall with the original position of the camera raises serious issue of remoteness. In any event, I have no evidence to support the underlying proposition that the defendant was negligent in positioning the camera at any stage.

### **Alleged breach of duty of the defendant**

27. Ultimately, as I summarised following my exchange with the engineer called by Counsel for the plaintiff, there is only one ground for alleging breach of duty on the part of the defendant which is supported by evidence adduced at trial. That relates to the form of instruction from the store manager, Mr. McGrath, to the plaintiff who was a security

manager. My own impression after hearing the evidence of the plaintiff and now having reviewed the transcript (specifically the direct evidence on day 1, line 50 on page 16, to line 85 on page 20, and line 202, page 38 to line 208 on page 39 and cross examination on day 2 from line 446 page 69, to line 1 on page 76) is that Mr. McGrath merely told the plaintiff to fix the camera. That does not necessarily convey to me that the plaintiff had to do it himself or to adopt any means to do it and, particularly, without regard to his own safety. The plaintiff tried to recall events which occurred eight years ago and after a traumatic event at that time. There was no evidence that Mr. McGrath exerted undue pressure or intimated that the safety of the plaintiff should be ignored.

**28.** It was also apparent during the trial that the plaintiff was and remains quite exercised about not having had his contract of employment made permanent in 2014. That affected his objectivity in recalling events. There is an element of inconsistency in the plaintiff's recall which may be attributable to having to rely on his account of two very brief encounters, one with Mr. McGrath and the other with Mr. Pete Murray. Although I accept that Mr. McGrath asked the plaintiff to replace or fix the camera, the plaintiff's account of his conversation with Mr. McGrath and Mr. Pete Murray (the person who held a walkie talkie) failed to persuade me that he was instructed expressly or implicitly to bypass the safety standards of the defendant. The plaintiff acknowledged that he could not remember whether Mr. McGrath thought that fixing the camera was urgent on that Saturday. Therefore, I cannot find that the plaintiff was in some way pressed to adopt an unsafe means. The plaintiff's vagueness about who got and gave the walkie talkies does not add to some sense of urgency which trumped safety obligations of which he ought to have had regard.

**29.** The plaintiff was and is very accomplished in many fields. He was engaged as a security manager, albeit on probation. On the day of the fall it was solely his choice to grab a most unsuitable ladder and not to investigate other ways of replacing the camera. He did not

explain why he did not go up onto the mezzanine floor and try the method successfully used by Mr. Cummins. The plaintiff was a manager and Mr. Cummins was an operative who could see how to undertake the task safely.

**30.** Even, I, with limited experience of ladders realise that reaching for something overhead from a ladder which is not footed or held securely poses a real risk of falling. The glaring distance between the top of the ladder, the mezzanine floor, and then the position of the camera is all too clear to notice from the photographs and the CCTV.

### **Employer's duty**

**31.** The concise statement of Henchy J, in *Bradley v. CIE* [1976] I.R. 217 at 233 is so apt for this claim:

"The law does not require an employer to ensure in all circumstances the safety of its workmen. He would have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances".

As Irvine J, said at paragraph 19 of *Martin v. Dunnes Stores Dundalk* [2016] IECA 85 (Unreported, Court of Appeal, 14 March 2016):

"The duty owed by an employer of course varies depending upon the knowledge and experience of the employee. Further, the more hazardous the work in which the employee is involved, the more stringent the duty of the employer to protect the worker. However, their duty is met once they take reasonable and practicable steps to avoid accident injury. As others have stated, it is not possible to eradicate all risks and accidents."

### **Employee's statutory duty**

**32.** The honest view of Mr. Gallagher, engineer, and the acceptance by counsel for the plaintiff after the conclusion of evidence that the plaintiff wilfully breached his own duty of

care in the method which he adopted and in failing to comply with Section 13 of the Safety Health and Welfare at Work Act 2005, to consult with the defendant, also feed into my conclusion that the plaintiff has not established a breach of duty of care on the part of the defendant which contributed to his undoubted injuries following the fall.

### **Extent of injuries**

**33.** In an effort to assist an understanding of my earlier remark about the plaintiff's injuries, I comment that the plaintiff has established on the balance of probabilities that he suffered soft tissue injuries to his right lower chest, right abdomen, right arm, right wrist, and left knee, with some pain to his right hip. The evidence of Mr. Gilmore, consultant orthopaedic surgeon, was clear. The plaintiff's continuing problems with his knees are not linked to his fall from the ladder over eight years now.

### **Conclusion**

**34.** The plaintiff has failed to establish a breach of duty of care on the part of the defendant to him and I dismiss the proceedings.

Solicitors for the plaintiff: MG Ryan & Co. Solicitors

Solicitors for the defendant: Sheehan & Co. Solicitors

Counsel for the plaintiff: John Kiely SC, Bernard Madden SC, John O'Donnell BL

Counsel for the defendant: Marcus Daly SC, Paul McGettigan BL