THE HIGH COURT

[2021] IEHC 464

RECORD NO. 2018 4307 P

BETWEEN

JAMES IRISH

PLAINTIFF

AND

DANIEL IRISH

DEFENDANT

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 15 June 2021

Introduction

1. This decision relates to an application by counsel for the defendant to dismiss the plaintiff's case mid-way through the plaintiff's case, on the basis that the only case now sought to be made by the plaintiff has not been pleaded. The jurisdictional basis for the application is the inherent jurisdiction of the court.

2. Counsel for the plaintiff says the application should be treated as one to restrain the plaintiff's engineer, the only remaining witness, from giving evidence on the new matters that the plaintiff now seeks to advance.

3. Irrespective of whether the application is one to dismiss the case, or simply to restrain the giving of certain evidence, objection is taken to either course by counsel for the plaintiff.

Facts

4. The defendant is the plaintiff's brother and is a farmer. The plaintiff is a part time farmer and a publican. They live within 5km of each other but have separate farms.

5. This dispute arises out of an injury to the plaintiff's arm when he was worming cattle on his brother's farm and the bullock, in the plaintiff's own words during cross-examination, "went cracked" when he put the injection into him, thus knocking the plaintiff's wrist against a fence, which resulted in a broken wrist. The bullock behind him then jogged the bullock being injected but that was after the knock to the plaintiff's wrist.

6. This account of events differed from that which had been set out in the report of the plaintiff's engineer, which criticised the defendant for having too many animals in the crush and not having the bullock in a gate to restrict movement by the bullocks while each bullock was being injected. On that approach, the cause of the accident was that a bullock in the crush moved forward and jogged the bullock being injected, thus causing the plaintiff's hand to be impacted. (For those not familiar with farming, I should explain that a crush is a long narrow passage which the animals are put into one in front of the other, which prevents them from moving around in any significant way while procedures are being carried out).

7. The defendant's engineer report responded that the plaintiff had taken a risk by putting his arm between the top and middle rail and that persons should go over the top rail rather than under it. He noted that given the experience of the plaintiff, the plaintiff ought to have known how to do this correctly.

Pleadings

8. The plaintiff's case was pleaded in a very generic way – very much the type of boilerplate pleading criticised in *Morgan v. ESB* [2021] IECA 29, which as Collins J. observed, was intended to be consigned to history. It is very difficult to know what the real complaint was from the Personal Injury Summons.

9. Paragraph 9 of the Personal Injuries summons reads:

> *"9. In the course of his part-time employment with the Defendant, on or about 28th December 2016 the Plaintiff was assisted (sic) the Defendant in administering worm medication to the Defendant's cattle and bullocks by means of a syringe when suddenly and without warning owing to the negligence and breach of duty (including breach of Statutory Duty) and/or breach of contract by the Defendant, the Plaintiff was struck by the Defendant's bullock and sustained a fracture to his wrist".*

10. This plea is followed by 25 separate particulars of negligence, breach of duty and breach of contract, some of which are utterly general in nature.

11. In the Defence dated 17 January 2019, the defendant refutes all allegations that he is liable for any injuries suffered by the plaintiff and pleads at paragraph 3C of the defence that the plaintiff was not an employee of the defendant, but was a volunteer under an arrangement between the two brothers that they would mutually assist one another on their farms from time to time, and that the applicability of the Safety Health and Welfare at Work legislation is denied. The defendant also pleads contributory negligence on the part of the plaintiff, including that he placed his hand in a position of danger.

Cross examination of the plaintiff

12. When being cross-examined, the plaintiff agreed the correct way to work animals was over the top of the rail. He was asked whether it was the case that you get as many cattle as possible in the crush and whether you work over the top of the bars and he answered yes to that composite question. However, on further questioning, he said he always did it through the bars as he was not able to reach in over the bar because the bar was too high for him. He gave as a further reason that the animal wouldn't stand still, and that you have to go through the bar. He also said there was a difficulty reaching the bullocks as they were not all the same height and were not fully grown.

13. On that evidence being given in the afternoon of the first day of the trial, when the court sat this morning, counsel for the plaintiff recalibrated his case (as he described it), withdrawing the claim that there ought to have only been one animal in the crush at a time, or that the bullock being injected was pushed forward by another bullock behind him. In other words, the core complaint i.e. that the operation was being carried out in a hazardous manner because animals were being injected in over-close proximity to other unrestrained animals, was gone from the case.

14. In its place was a new case i.e. that the defendant was negligent in permitting his brother to inject cattle through the bars in circumstances where the size of his brother, the

measurements of the crush and the height of the platform on which a person stood to access the crush, all meant that his brother had to inject the animals by going under the top bar adjoining the crush, because he could not reach over the top bar. I should say that I am formulating the plea in this way, but it was not identified as such by counsel.

15. Rather what he said was that there was no safe system of work and there was a lack of supervision. These headings do not convey the reformulated case sought to be made against the defendant. If the case had been properly pleaded from the start, it would have identified at least the components I have set out above and probably much more besides.

16. Counsel also made concessions in relation to employer's liability and s. 12 of the Safety, Health and Welfare at Work Act 2005, accepting they were no longer relevant to the case.

Plaintiff's arguments

17. Counsel for the plaintiff says he should be permitted to advance the new case for the following reasons:

    i. The existing pleadings encompass the case now sought to be made;

    ii. The new evidence here arose from cross examination. Because the defendant elicited that evidence, he is stuck with it and counsel for the plaintiff must be entitled to proceed on that basis, even if it was not pleaded;

    iii. Judgments from the Court of Appeal about cases being required to be pleaded fully, specifically *Morgan v. ESB* and *McGeoghan v. Kelly & Ors* [2021] IECA 123 should be treated as referable only to their own facts and that ultimately the High Court decisions in those cases were overturned because of a paucity of evidence and not because of pleading issues;

    iv. There is already uncontroverted evidence about measurements and such evidence forms the core of the factual matters he wishes to advance;

    v. No prejudice to the defendant has been identified and therefore the concerns about trial by ambush do not arise.

Findings

18. I am satisfied that the existing pleadings do not, contrary to the ingenious submissions of counsel, identify the cause of action now sought to be made. The defendant did not and could not have had any idea of the nature of this allegation. Indeed, the plaintiff's counsel had no idea of this allegation until the plaintiff was cross examined. It is therefore an utterly new allegation that was never part of the case and which is not contained within the pleadings.

19. One can test that proposition simply by asking the question whether, having read the pleadings, a person would know that it was alleged that the accident happened because the defendant failed to prevent him injecting through the bars rather than over the bars, while knowing the plaintiff could not reach over the bars due to his small stature. Even

the most careful reader of the Summons could not have deduced this was the case against the defendant.

20. Next, counsel for the plaintiff argues that although it was not part of the case, the new argument ought to be permitted because it arose out of cross examination. I do not accept that this means that the rules in relation to the requirement to fully plead and particularise a case may be dispensed with. At paragraph 25 of the judgement *McGeoghan,* Noonan J.observed:

> *"It seems to me therefore inescapable that the trial judge found the defendants liable on a case never actually either pleaded or made by the plaintiff. It was instead something that, almost incidentally, arose from the evidence. It is of course trite to say that the pleadings define the issues between the parties but in a case such as the present, it is important that sight not be lost of that fundamental tenet of our law. Although this remains true for all classes of litigation, it is particularly important in the context of personal injuries litigation since the passing of the Civil Liability and Courts Act, 2004 and in particular sections 10-13 of that Act."*

21. The mere fact that in that case the new claim arose out of evidence given in the case did not alter the approach of the Court of Appeal.

22. The purpose of pleadings is so that each side knows the nature of the case being made against them. It is the duty of the solicitor to elicit the facts from the client, to instruct counsel and for the pleadings to be based on those instructions. If a client chooses not to give proper and full instructions, he or she must bear the responsibility for that if the case pleaded does not reflect the evidence they give. This remains the case whether that evidence is given in direct or cross-examination.

23. A further argument was made by counsel for the plaintiff that the Court of Appeal decisions referred to above ought only be applied if I find the facts are analogous or similar in the instant case. I consider that to be an erroneous submission. There is a clear identification in those decisions of the applicable principles in relation to pleadings, and the necessity of clarity in respect of same. Those principles apply irrespective of the particular nature of the factual dispute between the parties.

24. On the other hand, I accept counsel's submission that the ultimate decisions of the Court of Appeal were based on the lack of evidence in the High Court. It may be that the comments on pleadings are *obiter.* Nonetheless they are *obiter* comments from the Court of Appeal that have been repeated in at least two judgments and it seems to me that I ought to proceed upon that basis.

25. Finally, in relation to the point that there is no dispute about the measurements, the case sought to be made is not simply one about measurements. First, the question of the measurement of the plaintiff's height is entirely new and the defendant has not had a chance to consider those, or other, measurements yet. Second, the issue now sought to

be raised by the plaintiff is not one that can be determined exclusively by looking at measurements. A court would have to consider matters such as the extent to which the plaintiff would have difficulty going over the top of the bar, what other measures he could have taken to address such a difficulty (if it existed) and whether the defendant was aware of the plaintiff's practice in this respect, either generally or at the relevant time.

26. In this respect, the evidence given by the plaintiff that he did not know what the defendant's own practice was when vaccinating is potentially relevant. It would also have to be considered whether the plaintiff's own practice when vaccinating cattle at home on his farm is relevant. There, on his own evidence, he also goes through the bars, even though he does not have the same height difficulty because his platform is higher. This is potentially relevant to the question of contributory negligence. These are the kind of questions that require to be teased out in pleadings and particulars.

27. Nor do I accept there is no prejudice to the defendant, although it is true none was identified by counsel for the defendant. Being required to meet an entirely different case at trial, in circumstances where an engineer's report has been prepared on the basis of allegations no longer being advanced, with no notice of the new case, cannot but cause some prejudice, even if it is potentially remediable with an adjournment and application to amend.

Conclusion

28. In all the circumstances I am satisfied:

(a) that the plaintiff seeks to make a new case;

(b) that case was not previously pleaded in any way;

(c) that the case would require to be pleaded out in the normal way; and

(d) the Court of Appeal has made it clear that cases may not be advanced at trial that were not pleaded, even if the new facts underlying the new case arise through the giving of evidence.

29. However, I agree with counsel for the plaintiff that the correct course flowing from my conclusions is that the plaintiff ought not be permitted to adduce any evidence that relates to the case not pleaded. Counsel for the defendant has asked that I strike out the case pursuant to the inherent jurisdiction of the court. That is indeed a draconian measure and given that I do not need to impose such a measure, but rather can meet the justice of the situation by restricting the plaintiff's evidence as indicated above, that seems to me the appropriate order.

30. Therefore, I will direct that the plaintiff's witnesses not yet heard may not give evidence relevant to matters not arising on the pleadings.