

THE HIGH COURT

[2018 No. 2618 P]

BETWEEN

BARRY GRIFFIN

PLAINTIFF

AND

THE IRISH AVIATION AUTHORITY AND PAT FALVEY

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of February, 2020

1. The plaintiff's complaint arises from a so-called "team-building exercise" by his employer, the Irish Aviation Authority, which took place on 19th May, 2016 and involved climbing Carrauntoohil mountain and a second mountain known as Cnoc na Tionne. The plaintiff's position is that the CEO at the time was a mountaineering enthusiast. The plaintiff complains that the exercise was in effect compulsory and that minimal instructions or information were given to him. There was no opportunity to opt out and no assessment of his suitability. During the descent the plaintiff fell approximately 574 feet. He was unable to control his fall, according to his pleadings, thus impacting repeatedly with rocks. He complains that he suffered catastrophic injuries and is now tetraplegic, mobilises with a wheelchair, is dependent on assistance, was unable to return to the family home and suffers from ongoing pain and complications. His pleadings complain that it is predicted that he will make no further neurological recovery and that his life expectancy has been shortened by approximately ten to fourteen years.
2. The first named defendant says that the exercise was being organised and supervised by the second named defendant Mr. Pat Falvey who is a mountaineer. Discovery was sought against both defendants and fortunately the motion against the second named defendant was agreed and a consent order made by Meenan J. on 26th February, 2020. The court is also assisted by the fact that in the motion against the first named defendant, the parties have agreed some of the categories of documents, although a number remain outstanding with which I now deal.
3. I have received helpful submissions from Mr. Shane English B.L. (with Mr. Edward S. Walsh S.C.) for the plaintiff and from Mr. William Reidy B.L. (with Mr. Liam Reidy S.C.) for the first named defendant.
4. The precise wording of the categories was slightly narrowed by Mr. English during the hearing in the sense that while reference is made to documents during the previous five years, this was narrowed to documents during the period of team-building exercises which are said to have begun in 2013. So reference to those categories hereafter will be as so modified.

The general approach to discovery

5. While there is an enormous volume of case law on discovery, not all of which is entirely consistent, definitive guidance has been given by Clarke C.J. in *Tobin v. Minister for*

Defence [2019] IESC 57 (Unreported, Supreme Court, 15th July, 2019). The case law identifies three major issues:

- (i). relevance, as determined by reference to the pleadings (see para. 7.25 of *Tobin*) – in that regard I should add that *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55 remains the touchstone for relevance, as viewed through the prism of the pleadings;
- (ii). necessity, in respect of which the default position is that a document that is relevant is also necessary (see para. 7.15); and
- (iii). proportionality (see para. 7.17).

I now turn to the specific categories of documents in issue here.

Category 3

6. This category seeks communications between the first named defendant and employees in relation to restrictions that applied on taking leave during the period of the team-building exercises. The personal injuries summons alleges that the exercise was compulsory. Mr. Reidy's response is essentially that the specific element of compulsion relied on here, namely that the plaintiff was not entitled to take leave during the so-called team-building exercise, is not specifically pleaded, but that is detail. The broad point is made on the plaintiff's pleadings that the exercise was compulsory. The fact that the various ways in which that was said to have been enforced or applied is merely a matter of particularisation and evidence. Thus, communications restricting the taking of leave are clearly relevant to an issue, and presumptively necessary to the prosecution of the action. The category sought is not disproportionate and should be allowed.

Category 4

7. Here the plaintiff seeks the names and positions of all persons notified of the exercise. Even assuming for the sake of argument that this is relevant, a request for people's names and addresses as opposed to pre-existing documentation is a matter for particulars rather than discovery. Mr. English is now saying that what he really wants under this heading is details of any special accommodation for other participants with their particular requirements. It seems to me that is something beyond what was sought in the request for discovery and the request as phrased is not one that can be granted as it currently stands.

Category 5

8. This seeks the names and positions of all the actual participants in the particular exercise in question and again that runs into a similar problem. Mr. English is now saying that in effect he wants documents evidencing whether anyone who was invited to the exercise was allowed not to attend and, if so, why. It seems to me that is really a different and more specific request than what has been sought here. The request as phrased is not one that it is appropriate to grant.

Category 13

9. This seeks any documents related to the examination or evaluation of the suitability of the equipment suggested or used, but not limited to the actual footwear worn by the plaintiff. Mr. Reidy's complaint is that this is already covered by Category 11, and that may very well be so; but if so, there is nothing particularly to add under this heading. If, on the other hand, there is something covered by this heading that is not included in Category 11, it would be relevant, necessary and not disproportionate. Therefore, Category 13 should be allowed with the rider that this only covers matters, if any, not already covered by Category 11. If there are no such matters, then no discovery will be required.

Category 14

10. The objection to discovery as sought under this heading was not in the end pursued, so that should also be granted.

Category 16

11. The first named defendant is agreeable to provide an accident report form, but not the statements made by individuals in relation to that. Mr. Reidy says the statements are, or may be, privileged, and that remains to be seen, but clearly statements given by persons who witnessed the incident or anything relevant in connection with it are hugely relevant and necessary. The category is specific and not disproportionate.

Category 19

12. This category seeks any feedback provided in relation to "away days" since 2013. The plaintiff's complaint here is that feedback was not sought. The first named defendant puts the plaintiff on proof of this. It seems to me that any and all feedback would by definition include a great deal of irrelevant material, so a more limited order is appropriate, namely safety-related feedback received since 2013.

Category 20

13. This seeks all documentation in relation to subsequent "away days". This seems of limited relevance and is also phrased in an open-ended way.

Category 21

14. Under this heading the plaintiff seeks his personnel file. Mr. Reidy complains that it has not been explained why that is relevant to the actual issues. To a large extent that is a fair point, but at the same time one wonders whether it is really necessary to make an issue of that. The plaintiff will presumably be entitled to his personnel file anyway on making a request under the Data Protection Acts 1988 to 2018, and indeed, as the first named defendant is a public body, the plaintiff can also seek it under the Freedom of Information Act 2014. If the plaintiff is going to be getting his personnel file anyway, why object to it when a request for discovery is launched? Such a situation to my mind is one of the weaknesses of the approach of saying that the party can get information through interrogatories, other motions, alternative enquiries and so forth. Theoretically perhaps that may be the case, but it often saves costs and is more convenient to deal with everything in one go; a consideration that is, of course, doubly pressing where a party is suffering from medical difficulty such as here.

15. That is one of the difficulties with an approach that sets the parties off on wild goose chases in general, and indeed the unhappy decision in *Armstrong v. Moffat* [2013] IEHC 148, [2013] 1 I.R. 417 in particular. That was a case that dealt with particulars rather than discovery, but at paras. 28 and 29, Hogan J. refused to direct particulars as to the time of the incident alleged by the plaintiff, stating that "*it is again in reality a form of interrogatory*". Even if this premise was correct, which it isn't, it is hard to see what is achieved in practical terms by setting a defendant off on such an alternative route. But more fundamentally, such a request is nothing like an interrogatory and indeed it is hard to imagine what an interrogatory could conceivably look like if the defendant doesn't know the plaintiff's case as to the time of the alleged incident and is trying to find out.
16. Hogan J. also relied on the fact that the plaintiff against whom particulars were sought had not raised any issue as to time in the pleadings, other than that it was implicit in the statement of claim that the incident happened during normal hours. Hogan J. inferred from that that "*the actual time of the incident is, therefore, irrelevant to this claim*". That, with the utmost respect, does not follow at all. Merely because one party has not specified a particular detail does not make it irrelevant to the claim having due regard to the points that might be made by the other party. Most obviously, if the defendant doesn't accept that the incident happened at all or as alleged, it will be essential to the doing of justice to enable that party to pin a plaintiff down on precisely when and how the alleged cause for complaint arose. Just because the plaintiff doesn't see fit to specify a time doesn't make that issue "*irrelevant*". The notion, also advanced by Hogan J., that a notice for particulars can't demand details of special damages merely because the plaintiff says that details will be provided when they are to hand (para. 45), or that details of treatment are irrelevant because the plaintiff is claiming injury from the consequences of the incident not the subsequent treatment (para. 41), are, with respect, also clearly erroneous for a similar reason. They focus unduly on one party's position and in effect allow it to dictate what is relevant, necessary or both, without due or indeed any real regard to points that can legitimately be made by the other party.
17. While Hogan J.'s judgment concludes with homely, paternal advices to the personal injury bar to be more discriminating in requests for particulars (para. 49), the other side of the coin is that a certain interrogation of a case in advance can clarify issues and lay the ground for settlement where appropriate. It can also save costs. For example, postponing to the trial of the action a clarification as to when the plaintiff says the incident happened, or other important details, as in *Armstrong*, is not a practical approach. The time of an incident is going to come out anyway, and is a perfectly reasonable thing to seek by way of particulars. Analogous points apply in the present case in relation to a plaintiff's personnel file. Given that an issue is being made of it, I am going to limit the order to such documents in the personnel file as are relevant to the first named defendant's claims of contributory negligence and the plaintiff's pre-existing condition. It is true as Mr. Reidy says that the plaintiff knows his own medical condition, but the knowledge of the first named defendant is potentially relevant to the proceedings. However, I would encourage the parties to agree on something wider to obviate the need for the plaintiff to have to proceed with applications by way of data protection and FOI.

Category 22

18. This seeks documents showing enquiries made by the first named defendant into the qualifications and expertise of the second named defendant. This seems unnecessary because the most relevant part of it is covered by Category 23 which relates to all communications between the two defendants in relation to the incident in question.

Category 24

19. This relates to communications in relation to the choice of mountain for the incident concerned and other away days. Insofar as 2016 is concerned, this is covered by Category 23 and insofar as later years are concerned, it does not seem to be relevant.

Category 26

20. This seeks communications between the first named defendant and the Health and Safety Authority in relation to the incident concerned. That is a perfectly reasonable request and potentially relevant. It is certainly not unduly burdensome and I would allow that category.

Order

21. Accordingly, the order will be that, subject to directions as to timescale and deponent, the first-named defendant is to make discovery of:

- (i). the agreed categories of documents, which are numbers 1, 2, 6 to 12, 15, 17, 18 and 23; and
- (ii). the categories I have referred to above namely 3, 13 as amended, 14, 16, 19 as amended, 21 as amended and 26.