

THE HIGH COURT

[2021] IEHC 180

[Record No. 2017/7230 P]

BETWEEN

LADISLAV KUNZO

PLAINTIFF

AND

KEPAK LONGFORD UNLIMITED COMPANY

DEFENDANT

JUDGMENT of Mr Justice Barr delivered on the 12th day of March, 2021

1. This application concerns a dispute between the parties as to whether the defendant is entitled to claim privilege over an accident report form and associated witness statements and photographs, which were compiled by servants or agents of the defendant, in relation to the accident the subject matter of these proceedings.
2. The background to this application can be briefly summarised in the following terms: at the material time the plaintiff was employed as a boner by the defendant at its meat processing plant at Ballymahon in Co. Longford. On the morning of 14th September, 2016, while the plaintiff was engaged in the course of his employment with the defendant and while working with large pieces of meat, he felt a sudden onset of severe lower back pain. He collapsed to the ground. He had to be assisted up by colleagues.
3. The plaintiff was seen by the company doctor and a pain relieving injection was administered. The plaintiff was rendered unfit for work and it has been stated that he remained so disabled for a period of approximately 72 weeks. It is not necessary to further outline the injury suffered by the plaintiff; save to note that it has been pleaded on his behalf that he has suffered a very significant injury to his back.
4. The plaintiff consulted with his solicitor on 14th October, 2016 and an initial letter of claim was sent to the defendant on 19th October 2016. The plaintiff obtained PIAB authorisation to proceed with this action on 2nd August, 2017. A personal injury summons was issued on his behalf on 4th August, 2017. An appearance thereto was entered on behalf of the defendant. A full defence was filed on behalf of the defendant on 4th May, 2018.
5. In summary, the plaintiff alleged in his personal injury summons, that the defendant had been negligent in the following respects: requiring him to lift excessive weights; failing to ensure that the task was carried out in a safe and proper manner; failing to train the plaintiff adequately or at all; failing to provide adequate assistance and/or equipment to enable the plaintiff to carry out the task safely and requiring the plaintiff to work excessively long hours and to carry out his work under excessive time constraints.
6. On 18th November, 2019, an order for discovery was made on consent of the parties, directing the defendant to make discovery of the following categories of documents: (a) all safety statements and risk assessments in being at the time and time of the accident; (b) all documents relevant to job rotation and rest periods for three months prior to the

date and time of the accident; (c) all relevant training and instruction documentation; (d) the accident report form, and (e) all relevant CCTV footage.

7. In compliance with that order, Ms. Kate Robak, Head of Health and Safety in the defendant group of companies, swore an affidavit of discovery on 24th September, 2020. In that affidavit the defendant asserted a claim of privilege over the documents set out in category (d) which were described as "*14-10-16 Kepak accident report form, statements and documents*".
8. On 18th November, 2020 the plaintiff, through his solicitor, filed the present application seeking an order from the court compelling production of the documents over which privilege had been claimed. The basis of the claim to privilege had been set out in the affidavit of discovery sworn on behalf of the defendant, as being based on the fact that the documents were alleged to be covered by legal professional privilege.
9. The plaintiff's application herein was grounded on an affidavit sworn by his solicitor on 10th November, 2020. In that affidavit he essentially set out two arguments why the documentation identified in the defendant's affidavit of discovery was not in fact covered by legal professional privilege and ought to be produced to the plaintiff. Firstly, it was argued that the accident report form was dated 14th October 2016, which meant that the documents were prepared and came into existence shortly after the accident, which had occurred one month earlier on 14th September, 2016. It was further asserted that there was no basis to the claim to legal professional privilege, as the plaintiff had not instructed his solicitor until 14th October, 2016 and the initial letter of claim had only been sent to the defendant on 19th October, 2016. Therefore, it was submitted that it could not be argued that the documentation had come into existence in relation to an existing or threatened legal action.
10. Secondly, it was submitted that the documentation had come into existence in compliance with the defendant's reporting obligations under the applicable health and safety legislation. In this regard, the plaintiff solicitor exhibited a sample accident report form that had been issued by the Health and Safety Authority. That clearly showed that in addition to the form itself, which should set out relevant details in relation to the accident; there should be attached thereto a list of witnesses, any witness statements taken and any photographs taken of the scene of the accident.
11. It was submitted on behalf of the plaintiff that it was evident from the sample accident report form issued by the Health and Safety Authority, that the very documents over which a claim of privilege had been made by the defendant, were documents which ought to be submitted to the authority in compliance with their reporting obligations under the legislation. Accordingly, it was submitted that it could not be argued that the only purpose, or the dominant purpose, of the documents was the defence of threatened or anticipated legal proceedings; rather the documents had been compiled for the dominant purpose of enabling the defendant to comply with its statutory reporting obligations.

12. In argument before the court, counsel for the plaintiff submitted that the case came within the principles set down in *Artisan Glass Studio Ltd v. The Liffey Trust Ltd* [2018] IEHC 278, and the decision of the Court of Appeal in *Colston v. Dunnes Stores* [2019] IECA 59. It was submitted that for the reasons set out in the affidavit sworn by the plaintiff's solicitor, it was clear that the documents over which legal professional privilege had been claimed by the defendant, were not in fact so privileged and ought to be produced to the plaintiff on the basis that such documentation was clearly relevant and necessary to enable the plaintiff to properly mount his action before the High Court.
13. The defendant's position was set out in the affidavit sworn by Ms. Kate Robak on 1st March, 2021. In that affidavit, Ms. Robak stated that, as Head of the Health and Safety department in the defendant group of companies, it was her responsibility to direct how investigations in relation to accidents should be carried out. She stated that it was an unfortunate reality of commercial activity that an extremely high proportion of workplace accidents, gave rise to litigation; whether or not the accident had been due to any negligence on the part of the employer. In these circumstances, it was necessary for the defendant to treat all accidents as being likely to give rise to litigation.
14. For that reason, it was submitted that it was reasonable for the defendant to investigate each and every accident in light of the fact that it would probably give rise to a claim against the defendant at the suit of the injured party. Ms. Robak stated that in order to enable the defendant to properly defend itself at any ensuing trial, it was necessary that a thorough investigation was carried out by investigators on behalf of the defendant as soon as possible after the accident had occurred. She pointed out that it was clearly stated on the top of the accident report form which had been filled out by the investigator in this case, that such investigations were carried out in contemplation of litigation.
15. She stated that the health and safety personnel were aware when investigating such incidents, that the defendant would rely heavily on the facts, matters and circumstances noted and reported in the accident investigation report, in order to assess possible exposure to legal consequences and when dealing with any ensuing litigation. Ms. Robak stated that the standard operating procedure was that when an accident investigation report had been completed by the investigator, which will include an interview with the injured party and with any relevant witnesses, together with photographs of the scene of the accident; she would forward that documentation to the defendant's solicitor. She would then arrange a meeting between her, the defendant's senior management personnel and the defendant's solicitor. The purpose of the meeting was to enable the defendant to assess any potential liability that there may be on the part of the defendant; to assess what further steps may be necessary to take in order to properly defend any ensuing litigation and to assess the likely cost of any such claim.
16. This last matter was of particular relevance to the defendant, as it carried a high excess on its policies of insurance. This meant that the defendant had to evaluate the potential cost of the claim and decide what amount of money should be put on reserve to meet any exposure that the defendant may have to satisfy any award of damages that may be

made in favour of an injured party, or to cover its excess liability under the policy of insurance.

17. Ms. Robak stated that in these circumstances, it was clear that the dominant purpose of the investigation carried out by representatives from the health and safety department, was to enable legal advice to be taken in relation to any possible exposure that the defendant may have arising out of a claim in respect of the accident. She accepted that the documentation did have an ancillary purpose in relation to health and safety reviews within the company, in that the health and safety department would have regard to the documentation when carrying out its periodic review of health and safety issues in the plant. However, she stated that the main component of such reviews, were the risk assessments that were carried out periodically by the Health and Safety Department of the defendant. The documentation compiled for the investigation of the accident, would only have a minor input into that health and safety review.
18. In relation to the issue of the defendant's obligation under health and safety legislation to report accidents and, in particular, the sample form that had been exhibited by the plaintiff's solicitor, Ms. Robak stated that there was no requirement under the relevant health and safety legislation to submit a list of witnesses, or witness statements, or photographs of the scene, with an accident report sent to the Health and Safety Authority. The report form that had been exhibited, was merely a sample furnished by the authority for guidance purposes only.
19. In summary therefore, it was submitted on behalf of the defendant that it was not obliged to produce the documentation sought by the plaintiff in its notice of motion, as that documentation was clearly covered by privilege, as having been prepared in anticipation of legal proceedings.

Decision of the court

20. The privilege claimed by the defendant in these proceedings is a subset of the general privilege known as legal professional privilege, which encompasses both documents that are produced for the purpose of obtaining and receiving legal advice and secondly, documents that are produced in the course of existing or anticipated legal proceedings. The second category is frequently called litigation privilege, or privilege in aid of litigation. Hereafter, it will be referred to as litigation privilege.
21. In reaching its decision in this matter, the court has had regard to the principles laid down in *Artisan Glass Studio Ltd v. The Liffey Trust Ltd* and in particular, to the principles laid down by Irvine J. at paragraph 43 in the Colston case, which were in the following terms:-
 - "(1) *Every application for inspection of documents in respect of which litigation privilege is claimed, must be decided on its own facts.*
 - (2) *The Court must be satisfied, on the evidence, that the party claiming privilege has demonstrated that they reasonably apprehended litigation when the documents*

were created. This is an objective test and is one to be decided on the basis of the evidence.

(3) *If the documents in respect of which principle [sic] is claimed were created for more than one purpose, the Court must be satisfied that the evidence demonstrates that apprehended litigation was the dominant purpose for the creation of the documents."*

22. In order for litigation privilege to arise, it is not necessary that proceedings be in being prior to the documents coming into existence, nor is it necessary that proceedings have been formally threatened against the party claiming the privilege. It will suffice if the documents were produced because proceedings were reasonably anticipated by the defendant. This was clearly established by the Court of Appeal in the *Colston* case, where Irvine J. stated as follows at paragraph. 48:-

"Lastly, what is also of some relevance in this case is that the averred apprehension of litigation or the contemplation of the purpose predates a notification of a claim. Although Mr. Leonard S.C. is right when he says that Rhatigan is good authority for the contention that litigation privilege may in principle be claimed over documents which come into existence prior to the 'actual commencements of litigation', where that is the case, the party claiming privilege must still prove that even in the absence of actual litigation there had been a reasonable basis on which to apprehend litigation. An applicant must show that he or she contemplated litigation without being actually confronted with a claim or having lodged a claim."

23. In reaching its decision herein, the court was provided by the defendant with a copy of the Accident Investigation Report Form and the other relevant documents contained therein, being the report by the company doctor Dr. McGarvey dated 29th September, 2016; a copy of the SOP number 3 headed "De-boning and trimming including SRM removal" issued on 24th July, 2015; notes of an interview with the plaintiff held on 29th September, 2016; statements from four witnesses taken on 16th and 29th September, 2016, and two statements taken on 14th October, 2016 and a set of photos of the work being carried on at the relevant work station.

24. The first point to note is that the order for discovery made by the High Court on 18th November 2019, only specified at para (d), the accident report form. There was no reference to witness statements, medical reports or photographs. Accordingly, the court is of the view that the documents sought, other than the accident investigation report form, are not covered by the order for discovery.

25. To deal firstly with the accident investigation report form, the court is satisfied that this document is covered by litigation privilege. The court accepts the matters stated by Ms. Robak in her affidavit, to the effect that the experience of the defendant has been, that in most, if not all, instances where employees suffer injuries at work, a claim almost invariably follows. In these circumstances, it is both prudent and reasonable for the defendant to carry out a thorough investigation, even before any legal proceedings are

intimated or threatened, so as to ensure that the defendant will be in the best possible position to mount whatever defence may be open to it, in the event that a claim is brought against it by the injured employee.

26. In order for litigation privilege to arise, it is not necessary that legal proceedings be threatened, or instituted by the opposing party. As long as the person who creates the documents can satisfy the court that the dominant purpose in carrying out the investigation and obtaining the various supporting documents, such as witness statements, was a desire on their part to obtain legal advice in respect of any proceedings that may reasonably be anticipated in respect of the accident, that will suffice to support the invocation of litigation privilege in respect of that documentation.
27. While the accident investigation report form before me does not appear to be dated, I note that in the affidavit sworn by the plaintiff's solicitor, it is alleged that the accident report form was dated 14th October, 2016. That may well be correct, given the fact that references were made therein to various witness statements, the latest of which were taken on 14th October, 2016.
28. This would mean that the accident investigation report form was drawn up a considerable time after the accident. It refers to various steps that were taken in the interim, such as the viewing of CCTV footage, an interview with the plaintiff on 29th September, 2016 and various statements from witnesses down to 14th October, 2016. I am satisfied that in these circumstances, the accident investigation report form is not a report of the accident that was merely drawn up on the day of the accident itself or shortly thereafter, but was the culmination of a fairly detailed investigation carried out by personnel on behalf of the defendant. I am satisfied that it was produced for the purpose of obtaining legal advice in relation to a claim, which the defendant anticipated that it would receive in due course from the plaintiff, in respect of his injuries suffered on 14th September, 2016.
29. In argument at the bar, it was submitted that the accident investigation report form in question, had been compiled by the defendant pursuant to its statutory obligation to report accidents to the Health and Safety Authority. Having looked at the extensive nature of the matters dealt with in the accident investigation report form, I am satisfied that it was not a form that was created for submission to the Health and Safety Authority, but was in fact a report of a comprehensive investigation into the circumstances of the accident, in preparation for anticipated litigation.
30. While Ms. Robak very fairly stated that the accident investigation report form and the accompanying documentation would also be used by the company in the course of carrying out periodic health and safety reviews of activities at the plant, the court is satisfied that the use of such documentation for that purpose was entirely subsidiary to its main purpose, which was to enable the company and its solicitor to consider what defence may be open to the defendant in respect of liability for the accident and what exposure the company may have in the event that the plaintiff is successful at the trial of the action.

31. Accordingly the court is satisfied that the accident investigation report form is covered by litigation privilege and need not be produced to the plaintiff.
32. While it is unnecessary to deal with the ancillary documents, as these were not encompassed in the terms of the order for discovery; even if they were held to be encompassed within the terms of the order, I am satisfied that the witness statements, the medical report and the photographs of the scene, are likewise covered by litigation privilege. Therefore, their production would not be ordered.
33. For the reasons set out herein, the court refuses the orders sought by the plaintiff in his notice of motion.