THE HIGH COURT

[2022] IEHC 539

Record No. 2021/171 CA

BETWEEN

GRAHAM HYNES

APPELLANT

AND

THE GOVERNOR OF MIDLANDS PRISON,

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 30th day of September, 2022

Introduction

1. By order made on 27 October 2021 in Dublin Circuit Court, His Honour Judge Quinn ordered that the plaintiff's claim be dismissed with costs to the defendants to be taxed in default of agreement and a stay in the event of an appeal. A notice of appeal was lodged dated 4 November 2021 and on 21 July 2022 the matter came before this court by way of a hearing *de novo.*

2. Before proceeding further, I want to express the court's genuine thanks to Mr Quirke SC for the plaintiff and to Mr Lyons SC for the defendants. Both Counsel conducted their respective clients' cases with professionalism and skill and this was of great assistance to the court.

3. The plaintiff was someone who has had a difficult and troubled life which includes poly-substance abuse and contact with the criminal justice system. It is not in dispute that, at the time of the alleged accident giving rise to these proceedings, the plaintiff was an inmate in the Midlands prison. The plaintiff seeks damages in respect of personal injuries allegedly sustained as a result of a fall on an internal-stairs which, on the plaintiff's account, occurred on 12 August 2014.

Prior accident (2012)

4. It is not in dispute that, approximately 15 months earlier, the plaintiff was involved in a very significant road traffic accident in which he sustained serious injuries to his right lower limb (the "first accident"). This involved fractures to the plaintiff's right femur, tibia and fibula, requiring surgical treatment. What was described during the hearing as "metal work", fixed with "screws" had to be inserted and this ran the length of the plaintiff's right leg, above and below the knee, which had also been injured. That metalwork remains in the plaintiff's right leg to this day.

The 12 August alleged accident - a summary

5. The plaintiff's claim relates to an accident which allegedly occurred in Midlands Prison on 12 August 2014 (the "accident"; or "12 August 2014 accident"; or the "second accident"). In brief, the plaintiff's claim is that on 12 August 2014, instead of walking across the landing to receive his lunch, he was ascending a stairway, with the intention of accessing the floor or landing above. This was in order to deliver a small amount of tobacco to a weekly 'pool'

or lottery, which was being organised by a prisoner in a cell located on that floor. He maintains that, whilst on the right-hand side of the first flight of stairs, holding the handrail with his right hand and holding his tray and plate in his left hand, he placed his right foot on the 3rd step from the top of the first flight and slipped on an individual portion, or 'pat', of butter. He asserts that this caused him to fall and that his right knee impacted with the step below (i.e. the 4th step from the top). His claim is that the butter which caused him to slip was an individual portion wrapped in gold foil of the sort typically served "*with a scone"*. He claims to have removed this foil from the sole of his shoe immediately after the fall.

6. He claims that, such was his pain and incapacity to move, two fellow-prisoners had to help him back to his cell where he remained in significant pain. He asserts that immediately on return to his cell, he informed the "Class Officer" (i.e. a member of prison staff) of the fall and the reason for it (i.e. his evidence is that he stated there was butter on the stairs which had caused him to fall).

7. The plaintiff acknowledges that there is typically a regime of cleaning carried out daily by prisoners who have such a privilege, but he contends that, due to a dispute by prisoners who would otherwise have carried out cleaning, there was no cleaning regime on 12 of August 2014. The plaintiff made the following very clear in his testimony: (1) that the accident of which he complains occurred on 12 August 2014 and not otherwise; (2) that he did not fall on any other date; and (3) that the accident on 12 August 2014 occurred in precisely the manner he described in his sworn evidence.

8. Engineers were retained, and booklet of photographs taken of the accident locus were provided to the court. I will presently refer to certain of these.

Injuries – a brief summary

9. The claim in the present proceedings primarily concerns the alleged exacerbation of his previous injuries sustained in the first accident, in particular, concerning the plaintiff's right leg and knee. The plaintiff also asserts that there was an exacerbation of back pain, although it is acknowledged that there were pre-existing degenerative changes. The court was also provided with a book of agreed medical reports and, in due course, I will also refer to their contents.

CCTV

10. Early in the hearing, Counsel for the plaintiff made a range of submissions concerning the absence of CCTV for 12 August 2014. I will return to that issue later in this judgement but for present purposes it is sufficient to say the following. According to the plaintiff's case, the sole reason for his fall was the presence on the 3rd step of a pat of butter. Thus, if there was CCTV footage of the 3rd step which would show whether or not there was a pat of butter present, such CCTV footage would be highly relevant. However, counsel for the plaintiff readily accepted that, even if CCTV footage for 12 August 2014 was available to this court, it was "*highly improbable*" that it would have shown the butter pat. Thus, this is not a situation where, for whatever reason, *crucial* evidence is missing.

11. An affidavit of discovery was sworn by a Fran Baker, assistant governor of Midlands prison on 26th February 2019. In that affidavit the deponent refers, at para. 3, to three categories of documentation which had been sought by the plaintiff on a voluntary basis. The first of those is described in the following terms: "*[a]. CCTV footage of the stairway where the plaintiff alleges he fell, being the staircase in the wing of the prison between B1 and B2, for 12 August 2014."*

12. The deponent goes on to aver at paragraph 4 that their affidavit is made pursuant to the request for voluntary discovery of the categories sought and that there is, as the relevant schedule to the affidavit states: *"No documentation".* Thus, the state of the evidence, as of 26 February 2019 and at all times since, is that there is no CCTV footage of the stairway

where the plaintiff alleges he fell, for the date upon which the plaintiff says the accident occurred, namely, 12 August 2014.

13. Moreover, and regardless of the criticisms of the adequacy of the affidavit of discovery in question, the plaintiff chose not to bring any motion (be that to seek 'further and better discovery'; or to seek that the Defence be struck out by reason of an alleged failure to make discovery; or otherwise) in the wake of receipt of the 26 February 2019.

14. To say the foregoing is not at all to criticise the plaintiff's legal advisers for not bringing such a motion. It is certainly not to say that any such motion would have been successful, still less that the ultimate outcome of such a motion would have been the production of CCTV footage for 12 August 2014 (as and from 26 February 2019, none exists). It is simply to say that, had the plaintiff adopted the position, following receipt of the defendant's affidavit of 26th Feb 2019, that discovery was deficient, the appropriate route was by way of motion at that stage. Instead, the matter proceeded to a full trial in the Circuit Court leading to the order of 26 October 2021.

15. When opening the case to this court, Counsel for the plaintiff made clear that the plaintiff was *not* seeking to move any motion with respect to discovery. On the contrary, Counsel made clear that the plaintiff was anxious to progress with the hearing. He did, however, make submissions, with reliance on *O'Mahony v. Tyndale* [2002] 4 I.R. 101 (Keane C.J.). In *O'Mahony,* proceedings were brought against a hospital and a consultant in respect of allegedly negligent care. The plaintiff's claim was dismissed by this court which found the plaintiff had not established a causative link between the alleged want of care and the then condition of the plaintiff whose case against the hospital was also based on what was claimed to be an absence of records which should have been kept, but which were either not kept or were subsequently destroyed. In the appeal to the Supreme Court, the plaintiff argued that the trial judge should have applied the maxim *omnia praesumuntur contra spoliatorem,* which shifted the onus of proof, from the plaintiff to the defendants, as a necessary consequence of the defendant alleged suppression of evidence. The Supreme Court dismissed the appeal and affirmed the judgement and order of the High Court. The Irish Reports headnote makes the following clear:

> "*Held* by the Supreme Court (Keane C.J., Murphy J and Hardiman JJ.), in dismissing the appeal, 1, that the maxim *omnia praesumuntur contra spoliatorem,* was intended to ensure that no party to litigation, be they plaintiff or defendant would be subjected to a disadvantage in the presentation of his or her case because his or her opponent had acted wrongly by destroying or suppressing evidence ."

16. In submissions on behalf of the plaintiff, the defendants were characterised as having despoiled evidence, specifically, CCTV footage from 12 August 2014 and it was submitted that all matters should, for this reason, be "*presumed against the despoiler*". The thrust of the submissions on behalf of the plaintiff were that (i) any challenge to the fact the accident happened must fail or, in the alternative, (ii) a presumption arose in favour of the accident having occurred and the burden lay on the defendant to disprove same; (iii) it must also be presumed that there was no adequate cleaning, and (iv) instead of the burden being on the plaintiff, the burden lay on the defendants because, contended Counsel for the plaintiff, "*You couldn't get a clearer case for the operation of the presumption in O'Mahony".* I disagree.

17. Had the plaintiff wished to cross-examine the deponent in respect of the defendant's affidavit of discovery, such a motion could have been brought, but it was not. Again, this is not a criticism, but it is a fact. Had the plaintiff asserted an entitlement to have the Defence struck out by reason of an alleged failure to make discovery, such a motion could have been issued, but it was not. More importantly, the evidence before this court certainly does *not* allow for any finding that there was any (i) *culpable* loss of, or (ii) *deliberate* destruction of, or for that matter (iii) *any* loss or destruction of, CCTV footage for the 12 August 2014 (if there ever was such footage) with a view to putting it beyond this court's reach, or otherwise.

Thus, the plaintiff has not established that this court can fairly regard the defendants as a 'despoiler' for the purposes of the *O'Mahony* principles. The state of the evidence allows, indeed compels, this court to hold that, as and from 26 February 2019, no CCTV footage for 12 August 2014 existed. Whether such CCTV footage *ever* existed is not something which this court can determine on the basis of the evidence before it. Nor, is that determination at all necessary, for the reasons which are set out in this judgment.

18. Furthermore, and wholly unlike *O'Mahony*, any CCTV footage dating from 12 August 2014 which might have existed simply cannot not be considered to be *crucial,* in circumstances where (even if it had been in existence at some point prior to 26 February 2019) it would *not* show whether or not there was a pat of butter on the step. This is because there is no clear view and, to illustrate this fact, one need only look to photograph number 3 in the booklet prepared by Mr Romeril, forensic engineer and expert witness for the plaintiff, who re-created the view of the relevant CCTV camera. As that photograph illustrates, it is simply impossible to see the relevant steps with clarity, never mind what might or might not have been on those steps on 12 August 2014.

19. To further illustrate the limited utility of CCTV footage (even if same was available) it is appropriate to quote from the 16 April 2018 letter which was sent by the plaintiff's solicitors, in the context of the correspondence which preceded the issuing, by the plaintiff, of a motion for discovery. Indeed, apart from an 11 September 2018 'warning letter', the 16 April 2018 correspondence, which I will not quote, comprises the last letter sent by the plaintiff prior to the discovery motion issuing:

> "*Dear Sirs*
>
> *We refer again to the matter of CCTV coverage of the locus of the accident. Our client's engineer has stated in his report that there is a CCTV camera which he thought might cover the accident.* ***We note your client's comments that there is no CCTV coverage****. We have raised that issue with the engineer. He tells us that there is a CCTV camera which he had assumed pointed in the direction of the stairs.* ***He says that he does not know what the camera itself could actually see and how much of the view is [a]ffected by the different angle of the mesh. He says that the CCTV camera would likely show Graham Hynes entering the stairwell and might show an outline of him falling on the stairs as he describes in his instructions to us.*** *He cannot however say definitively how much of this could be covered by the CCTV camera without seeing some stills from the camera. In the circumstances please let us know if your client would be prepared to forward some stills from that particular camera so that we can satisfy ourselves as to whether or not there is in fact CCTV footage of the locus of the accident.*
>
> *Many thanks"* (emphasis added)

20. Leaving aside the important factor that the sworn evidence is to the effect that there is no CCTV coverage of the accident locus for 12 August 2014, it is clear from the foregoing that, at best, CCTV "*might show an outline of* [the plaintiff] *falling on the stairs".* There is, however, no question of that footage showing what the plaintiff says was the *cause* of his fall, namely, a pat of butter on a step.

21. In short, even if the Plaintiff were to establish on the balance of probabilities that an accident occurred on the 12 August 2014 (something I will presently return to) I am satisfied that the absence of CCTV footage would not be of material significance to the outcome of this case, because it would throw no light on the cause of the fall. I now turn to the account given by the plaintiff during his evidence-in-chief, which can be summarised as follows.

The Plaintiff's evidence-in-chief

Background

22. The plaintiff is a gentleman aged 45 currently living in Kildare, who previously resided in Newbridge. He described his early life as "*a mess".* He explained that he grew up in Clondalkin and has two sisters and one brother. His father was "*away at sea a lot".* He described his father as a very hard-working man who worked for Irish ferries. On his own account the plaintiff was a bit "*wild*" and got involved in drugs at an early age, from 1992/1993 onwards. On his account, there was "*no structure*" to his life during the year after his junior cert and he told his mother he was not interested in school anymore and he left. He got involved in drugs and started off using heroin. His evidence was that "*it destroyed me; destroyed relationships with my siblings*" and he described how friends of his died as a result of drug use. His father brought him away to sea for a period of 2 years, to work with Irish ferries, when he was 18. This was to try and keep the plaintiff "*out of trouble*". On returning to Ireland, the plaintiff did "*odd bits*" for a certain furnishings company; deliveries for another company in the same industry; and had work as a motorbike - courier, but kept falling back into drugs and was involved in petty crime. He gave evidence of how his involvement in crime became "*more serious stuff*, in particular, robberies.

23. On 14 March 2014 he was committed to prison. He was sent to prison for a robbery offence and was also awaiting sentencing in respect of a further offence. By that stage, he had served 2 previous prison sentences (of 2 years and 10 ½ months, respectively). He described himself as being on methadone at that time and also "*coming off benzodiazepines when I went to prison*". He explained that "*there was no detox for benzos".* The plaintiff had a son who was born in 2006 and his evidence was that he started to realise that he could not have his son seeing him that way and he "*wanted to break the chain*" of addiction. His evidence was that his plan, as of March 2014, was to try and tackle his addiction to drugs during his prison sentence.

The plaintiff's first accident in 2012

24. With regard to the plaintiff's road traffic accident in 2012, he confirmed that he broke his femur, tibia and fibula in this first accident. He also damaged his patella. He underwent surgery on 9 May 2012. He had "*bars and screws"* inserted. He described lengthy rods held in place with screws extending right down his entire leg and the plaintiff stood up, during the course of his evidence, to indicate this. He still has scarring. He was off his feet for 7 months. His evidence was that "*the metalwork is still in place and will be there forever".* His testimony was that he could not leave the relevant hospital until he achieved a certain range of movement via physiotherapy and that he also did a follow-up course of physiotherapy. He was advised to cycle and swim. He loves swimming.

The plaintiff's evidence as to his state of health *prior* to the 12 August 2014 accident

25. With respect to how he was prior to going into prison, (i.e. after the first and before the second accident) the plaintiff's evidence was that "*I could run, jog, everything, no problem*" and he added that *"everything was okay with my legs. I could cycle swim and play with my son."* He acknowledged that he was taking tramadol which the court understands to be an opiate-based painkiller. It was clear in his evidence that he was still taking tramadol when he went into prison and that he continued to take it up to and including the date of the alleged accident. His evidence was that, rather than taking tramadol for any pain in relation to his right knee or leg "*it was more for my back as I had pain in my back*" and he immediately went on to refer to "*the mattresses in prison*" being "*like sleeping on a credit card*". The plaintiff repeated again that, although he was on the painkiller tramadol at the time of his accident "*it was for my back; and it helped me sleep*". He also confirmed "*I was on a sleeping tablet also*". The foregoing testimony was given with respect to the period leading up to the accident itself. The plaintiff went on to describe the layout of relevant areas in the prison with respect to photographs taken by his engineer.

Class officer's room

26. With regard to Mr Romeril's photo 1, the plaintiff indicated that the prison officers' (or "class officers") room is located beyond the blue bin which can be seen on the right-hand side of the photograph.

Cell doors

27. The doors which can be seen on the right hand sided of the photograph, closer to the photographer's vantage-point, beginning with the first door visible the photographer's side of the blue bin, are cell doors and these are numbered in sequence. Cell number one is closest to the blue bin, and to the right of it, closer to the photographer's vantage point, is cell number 2. To its right is cell number 3 etc. According to the plaintiff there were 26 or 27 cells on each level.

Cell 5 or 6

28. With regard to what cell he occupied at the time, the plaintiff's evidence was to the effect that he was certain it was either cell 5 or cell 6, saying: "*I'm 99% sure I was in 5, but it could have been 6*".

Servery

29. The plaintiff explained that prisoners who work in the kitchen wheel the food over in sealed containers and these are placed in hot water. The food is distributed from the servery which is located directly opposite the class office.

30. The plaintiff's evidence was that, at mealtimes, an "NCO" (whom he described as an "*officer with a stripe"*) would shout "*open up*", whereupon Class Officers on each level (i.e. B1, B2 and B3) would start opening the cells in sequence (i.e. cell 1 would be opened, followed by cell 2, etc).

31. The plaintiff's evidence was that once his cell is opened, he would normally grab his tray and plate and leave his cell to walk over to the servery. Typically, he would go back into his cell to eat his food and the door would be closed. Cutlery is kept in the cell.

32. The plaintiff confirmed that, on the day of the accident, the foregoing procedure was followed with respect to his breakfast which he ate, in his cell, at 8:30 a.m.

33. As to what occurred after breakfast on 12 August 2014 the plaintiff's evidence was to the effect that, whether they had been in the library, or school, or yard, prisoners are put back into their cells before lunch. A 'count' then takes place. Food is brought over to the servery and the cells are then opened, in the manner previously described, so that inmates can then go across to the servery to get lunch.

Lunch

34. The plaintiff confirmed that lunch is at 12 noon. His direct evidence was that he could be "*waiting 10 or 15 minutes*" in his cell. He gave evidence that on the 12 August 2014 "*before the cell door was opened, I estimate that I was in my cell 15 minutes"*. The plaintiff's evidence was that the reason for this was some prisoners "*getting in late*" and this would "*slow us all up".*

Stair enclosure

35. The plaintiff's evidence was that he exited his cell with his tray and plate. Instead of going to the servery, the plaintiff took a left turn, in order to walk towards the stair enclosure which is visible in Mr Romeril's photograph number 2.

36. His evidence was that he was heading towards this, but with an Officer in front of him, because the plaintiff had to wait for the officer to open the door (or mesh gate) which can be seen in photograph 3, in order that he could ascend the stairs going to the floor above, namely, level B2.

Lotto

37. The plaintiff explained the reason why he did this, namely, he wanted to give his tobacco into a *'lotto'*, explaining that "*whoever picks the bonus number gets all the half ounces of tobacco*". He explained that and that if he had made it up the stairs, the prisoner organising the tobacco lottery on the day in question would have been "*3 or 4 doors away*" from the top of the stairs which leads to the floor above.

Cleaning

38. The plaintiff's evidence was that normally there are prisoners who carry out cleaning "*sometimes there's one and sometimes two*". His evidence was that "*usually, when we are locked up after our dinner, they're out cleaning*". He explained that the two people usually involved in cleaning would only do one level (i.e. those involved in cleaning B1, would have no access to B2; other prisoners on B2 would be responsible for cleaning on that level).

"nobody was appointed to clean"

39. The plaintiff's evidence was that on 12 August 2014 "*nobody was appointed to clean".* As to why this was so, his testimony was to say that there had been an "*argument about cleaning and the two people gave it up".* It is fair to say that other than this assertion, there was no evidence given to support the plaintiff's claim that cleaning was not done on 12 August 2014.

"always rubbish around"

40. In relation to cleanliness generally, the plaintiff's evidence was that "*there's always rubbish around*". His evidence was to the effect that his fellow-prisoners did not keep the environment clean and that they dropped things on the ground. He went on to that "*people expect someone else to pick it up*". On this topic, the Plaintiff made clear that "*it's not nice when there's all stuff on the ground*".

"worse than usual"

41. The Plaintiff made clear in his evidence that, not only was there always rubbish around, he specifically stated that, on the day of the accident, i.e. on 12 August 2014 *"it was worse than usual".* I pause briefly at this juncture to say that, even on the case made by the plaintiff, he was very well aware that he might encounter "*rubbish"* or "*stuff"* on the ground. If, as he has sworn, "*it was worse unusual*", it seems uncontroversial to suggest that on 12 August 2014 the Plaintiff was someone under a heightened obligation to look out for things on the ground when making his way around.

Tray and plate in left hand

42. The plaintiff's evidence was that he was walking up the stairs. His tray and plate were held in his left hand. He indicated how his plate was held with his left thumb. His testimony is that he was holding the handrail with his right hand. Prisoners going up the stairs must stay to the right. Prisoners going down the stairs come in the opposite direction (i.e. to the left of someone ascending the stairs).

Step number 3

43. With reference to Mr Romerill's photograph number 4, the plaintiff numbered the very top of the flight of stairs visible in that photograph (i.e. the level of the 'return') as step number 1. He described the step immediately below it as step number 2; and below that, step number 3, etc.

44. The plaintiff gave direct evidence on 3 separate occasions to the effect that he was holding the rail with his right hand, stating, variously: "*I was holding the handrail*"; "*my right hand was on the rail*"; "*I'm holding the rail".*

Butter

45. According to the plaintiff, he stood on step number 3, slipped on a pat of butter, and because it was "*on the edge*" he "*went down, and 'bang'*" impacted with step number 4. With regard to the mechanics of the accident, he also stated that "*I bent forward and went*". His evidence was "*I banged my knee on the step below the butter"* also describing the impact as "*I cracked my leg on the step underneath".*

46. The plaintiff was very clear in his testimony that "*standing on greasy butter caused me to fall*". He was equally clear that this was a small pat of butter (i.e. an individual "*kerrygold"* portion, or the like, wrapped in gold foil). The plaintiff was also clear in his evidence that "*I peeled the thing off my shoe"* - the "*thing*" being a reference to the now-squashed gold foil wrapping of the butter - also saying that the "*squashed remnants of the butter was on my shoe"* or words to that effect.

Carried back to his cell

47. According to the plaintiff, there was a prisoner (since deceased) "*stretching*" at the door of his cell, who saw the plaintiff and asked if he was all right. The plaintiff described this man as "Carl", but could not recall his surname. According to the plaintiff, Carl tried to help the plaintiff to get up but could not lift him, whereupon he got someone else to help. This was another prisoner "*next door to his cell"*. According to the Plaintiff, it took both of these prisoners to carry the plaintiff to his cell. The plaintiff's evidence was that his own cell-mate came out, but that Carl and the other individual had already gotten him to his cell. This second individual who is said to have assisted the Plaintiff back to his cell was not identified by name and did not appear as a witness. The same is true in relation to the plaintiff's cell-mate. If the plaintiff's account is correct, both would have had the opportunity to see butter on the sole of his shoe (it could not have been rubbed off by the act of walking, given that the plaintiff's evidence is that he could not and did not walk and was, instead, carried back to his cell by two individuals). Furthermore, the individual who assisted Carl to carry the Plaintiff back to his cell would have been in a position to see the gold foil wrapper which, on the plaintiff's evidence, he peeled off his shoe. No witness was called by the plaintiff to give evidence that they saw the butter. The plaintiff was the sole witness as to fact in respect of his claim.

Pain

48. The plaintiff's evidence was that he was immediately "*in a lot of pain*". His evidence was that the pain was where the previous operation had taken place, in the knee and both above and below same. His evidence was that his "*back was twinging a bit too".* The plaintiff's testimony was that *"I'm in a hell of a lot of pain by the time I got to my cell".*

Immediate complaint

49. According to the plaintiff: "*About 2 minutes after the accident, I told the class officer I'm after slipping on the stairs. There's butter all over."* It will be recalled that the Plaintiff's evidence was that he peeled the butter wrapper off his shoe. He did not suggest in his testimony that he ever showed this wrapper, or even mentioned it, to (i) any member of prison staff; (ii) the two individuals who carried him back to his cell or (iii) to his cell-mate. Nor did he give evidence of ever making any attempt to retain the butter wrapper. Given that he now attributes the sole cause of his accident to slipping on the butter which it contained, the foregoing is surprising.

12 August – 15 August

50. The plaintiff's evidence was that he was given tramadol on the day of the accident but "*it didn't control the pain".* His account of what occurred in the aftermath of the accident was as follows. That night, he "*put the light on to see the doctor*" but was told he would not see the doctor until the following day. He saw the prison doctor the next day, being 13 August.

Later in his evidence the plaintiff claimed that the prison doctor "*stuck his head in*" to the plaintiff's cell on the day of the accident, i.e. on 12 August 2014.

51. With regard to seeing the prison doctor on 13 August, the plaintiff's evidence was that he had "*severe pain*" in his right knee. "*I tried to explain that the pain was getting worse. He was a foreign doctor. He wasn't really getting what I was trying to say*." There was bruising around his near area, both above and below and the plaintiff's evidence was also to say that "*there was a bit of a mark on my back".* The treatment plan was painkillers and the doctor also wanted to "*check the metalwork in relation to the alignment*", both above and below the knee. The plaintiff was sent to hospital on 15 August. X-rays were taken which detected no new bony injury or fractures. *"Soft tissue"* damage was diagnosed as well as *"stress regarding muscles in my back".* The plaintiff's evidence was that the doctor in the A&E department noted the pain he described and that the plaintiff was given pain relief and crutches.

Crutches

52. It was clear from the plaintiff's evidence that, even before the alleged accident, he relied on a crutch. His evidence was that when he went to see the doctor he had to use one crutch *"so I was given two*". His evidence was that he had to use both crutches for 2 weeks.

Further treatment

53. The plaintiff gave evidence of attending physiotherapy once in Portlaoise Hospital. He requested a *"tubular pad*" on 18 August and this was, according to the plaintiff, because "*I needed support to go around my leg".* He gave his evidence in the context of saying that his *"sleep wasn't good. The mattresses are very bad"* and his testimony was that "*I asked to get an extra pillow to elevate my leg*". According to the plaintiff, the request for an extra pillow was denied and he was told that he would have to sleep like any other prisoner. On his account "*every time I turned in the bed I was awake".*

54. The plaintiff's evidence is that on 27 August 2014 he was given an ice pack which, he says, was to help with swelling. The plaintiff was unclear as to how long the swelling lasted. His evidence was that he continued with tramadol. He described these as *"strong"* and "*dangerous*" and on his account *"they weren't doing the job"*

55. With reference to the latter part of 2014, moving into autumn, the plaintiff's evidence was that *"everything was really the same; nothing was moving*". According to the plaintiff *"I asked to see the doctor again and kept being told that he'll see you when he's ready".*

Transfer

56. The plaintiff put in for a transfer to Portlaoise prison. That went through and he went to 'C block'. According to the plaintiff, the doctor there was "*much better".* He described her as "*brilliant"* although could not recall her name.

2015

57. By the spring of 2015, the plaintiff described herself as being in "*continuous pain*" as a result of which he was sent for x-ray. He confirmed that he was on tramadol throughout. He also gave evidence that he requested the dose to be reduced in circumstances where he had "*managed to get off methadone*". According to the plaintiff: "*I asked the Chief to put me in the block, which is a 23-hour lock-up, so as to be kept away from other prisoners. I was there for 17 weeks coming down slowly off methadone."* The plaintiff's evidence was that he also "*wanted to get off tramadol; I was still on tramadol when I was released; they said they'd give me a lower script but they never did."*

After the Plaintiff's release from prison

58. The plaintiff was released on 13 September 2016, having served his 2 ½ year sentence. His evidence was that it was 6 weeks after leaving prison before he was able to wean himself off tramadol.

59. The plaintiff confirmed during his examination in chief, that he had been provided with a copy of a report prepared by Dr. Hugh Brady (being the Plaintiff's G.P) and that he agreed with its contents. According to the plaintiff, after he came off tramadol, the pain in his back got "*very bad".* He stated that "*Dr Brady tried a few different things*". This included a particular painkiller.

60. The plaintiff also described himself as going through "*depression*" and being prescribed an "*anti-depressant*", the suggestion being that this was also attributable to the 12 August 2014 accident.

61. He also confirmed that a report by Mr. Brendan Daly, consultant trauma and orthopaedic surgeon, had been furnished to him and that he agreed with Dr Daly's opinion. According to the plaintiff, after seeing Mr Daly in 2017 he did not have "*too many sessions of physiotherapy"* explaining that "*I'd one or two for my knee, but I couldn't put up with the pain so I stopped."*

62. The plaintiff's evidence was that he had approximately 18 injections over the years, each of which worked for *"a month or two"* in the context of pain-management and that *"Mr Daly's injections for my hip worked for a while but was very painful getting it in".*

63. According to the plaintiff, "*Every so often, I'd end up in Naas hospital due to my leg*". He described himself as receiving "*injections in my knee and in my stomach*". This was in circumstances where according to the plaintiff "*I get infections around my knee; I got cellulitis around my knee; it's like an infection".* The plaintiff also confirmed that he saw Dr Michael Leonard consultant orthopaedic surgeon in October 2020.

64. It was very clear from his evidence that the plaintiff attributed a range of adverse consequences to the 12 August 2014 accident. In the context of what he called an inability "*to move much*", the plaintiff described himself as having "*put on 2 ½ stone*" which (although gained when Covid-19 restrictions was a feature) was said to relate to the restriction of his movement as a consequence of the pain flowing from his accident in prison. The plaintiff described himself as being *"like a recluse during lockdown",* the suggestion being that his pain and restricted movement, as a consequence of the 12 August 2014 accident, contributed to this.

65. He also described himself as "*on 2 different sorts of inhalers",* going on to say that "*I'm 45 and I have a fold-up bed*", something he characterised as personally very embarrassing. He made clear in his evidence that the reason for the fold-up bed was because *"going up and downstairs, the side of my leg is too painful".* Thus, the indignity and inconvenience of having to sleep downstairs in a fold-up bed was said to be directly related to the accident.

<u>Right leg 'locks'</u>

66. The plaintiff made clear in his evidence that he continues to have serious difficulties: "*My leg 'locks'. That's what happens nearly every night. it's my right leg the whole time."* When asked about the consequences of the accident, the plaintiff's evidence included to say "*I'm not living. I should be out doing things."* He went on to make clear that the accident prevented him from working saying "*I can tile, but I can't kneel down to tile*". It was clear from his evidence that that plaintiff regards his accident in prison as having had a devastating effect on his life both in practical terms and as regards relationships with others. As to the former he gave the following example "*I can walk from where I live and get milk and walked back*", but after doing this *"I'm in pain for hours*". As to the latter, the plaintiff referred to his son turning 16 last month and wanting to climb in Howth and Bray Head, but

the plaintiff couldn't go, and it was clear that he'd attributed his inability to participate fully in his teenage son's life as due to the accident.

Evidence given under cross-examination

Horrendous injury in first accident

67. During the course of cross-examination the plaintiff confirmed that is accident in May 2012 ("the first accident") was a serious one, leaving extensive scars. He acknowledged sustaining horrendous injury in the first accident.

Tramadol – for back pain

68. With regard to his use of tramadol up to the 12 August 2014 accident, the plaintiff's evidence was to say that this was not for leg pain (stemming from the first accident), but for back pain (caused by the poor quality of the prison mattress, which was "*like sleeping on a credit card"*). The plaintiff said of tramadol that "*it was more for my back as I had pain in my back*"; and "*it was for my back; and it helped me sleep".*

Serious pain up to August 2014

69. Despite the foregoing, the plaintiff acknowledged under cross-examination that the injury sustained in the *first* accident was, in fact, causing him an awful lot of pain prior to, and all the way up to, August 2014.

70. He was questioned closely on this issue and ultimately confirmed that he was, in fact, in serious pain in August 2014 immediately *before* the accident for which he sues these defendants.

71. He acknowledged that the situation could be summarised as follows: (i) the plaintiff was in pain *before* 14 August; (ii) the plaintiff was in pain *after* 14 August 2014; (iii) in between was a diagnosis of soft-tissue injury in respect of which x-rays did not reveal anything untoward.

Medical Records

72. Contemporaneous evidence in the form of medical records also confirms that the plaintiff was experiencing severe pain due to the *first* accident in the weeks prior to the accident, the subject of these proceedings. The plaintiff's medical records were admitted without formal proof and certain of these were put to the plaintiff during cross-examination, including the following.

15 June 2014

73. A record entered by the prison doctor (identified on same as Dr Ribana Constantin) on 15 June 2014 records inter-alia the following:

> *"15-JUN-2014 12:28 -rlconsta-*
>
> *c/o sore throat since 3 days ago…*
>
> *Also he c/o of* ***not sleeping because of the pain in the rt lower limb*** *as he did have a rt tibia & fibula fracture previously, now the pt is confronted with algic and functional sequelae in rt lower limb, he stated that his* ***rt knee locked*** *from time to time, during* ***at night time*** *when he turns into his bed, this wakes him up and then he found almost impossible to resume the sleep*" (emphasis added)

Symptomatic prior to 12 August accident

74. The impression conveyed by the plaintiff in his evidence in-chief was that, prior to the 12 August 2014 accident, he was not experiencing leg pain or other symptoms related to his first accident. It will be recalled that, with respect to his state of health post the first accident and prior to entering prison, the plaintiff claimed "*I could run, jog, everything, no problem*" and *"everything was okay with my legs. I could cycle swim and play with my son".*

75. Furthermore, although the plaintiff acknowledged that he was taking tramadol in prison both up to and beyond the August 2014 accident, he asserted that "*it was more for my back as I had pain in my back*" repeating that "*it was for my back; and it helped me sleep*". The June 2014 medical record wholly undermines that evidence, making it clear that it was pain in the plaintiff's right leg – so severe that it prevented him from sleeping - that prompted him to seek painkillers from the prison doctor.

76. In short, there is contemporaneous medical evidence that, in the weeks prior to the August 2014 accident, the plaintiff was undoubtedly symptomatic as a consequence of the *first* accident, despite the materially different account given by him under oath in the course of his evidence-in-chief. Not only that, those symptoms which the plaintiff was experiencing prior to the accident for which he seeks compensation in the present claim included (i) pain of such severity that it interfered with his sleep; and (ii) the 'locking' of his right leg, both of which he blamed on the fall in prison.

77. This is not a trivial matter. It is one of fundamental importance. Leaving aside, for present purposes, the first two crucial elements of the tort of negligence (i.e. *duty* of care; and *breach* of such a duty) the plaintiff's evidence speaks directly to the third element (i.e the *damage* which is said to result from the breach). Until he was subjected to cross-examination, the plaintiff would have this court believe that he was essentially symptom-free, in relation to difficulties with and pain in his right leg, prior to the index accident occurring, when this was not the case, as he must have known.

78. When questioned with reference to the 15 June 2014 medical record, the plaintiff ultimately acknowledged that he had a "*very painful"* right leg and knee *prior* to the second accident. This is utterly different to the account he first gave to the court. Memory lapse cannot explain the failure to give a true and complete account, nor was it offered as an excuse. I am forced to the conclusion that the plaintiff initially gave an account under oath which was materially incorrect, and he only acknowledged the true position when confronted with contemporaneous medical records which undermined his sworn testimony. This is very troubling. Unfortunately, this was by no means the only example of this and to see another I now turn to the report prepared by the plaintiff's GP Dr Brady.

Report by the Plaintiff's GP, Dr. Hugh Brady

79. The 2nd page of Dr Brady's report contains inter-alia the following:-

> *"Relevant Medical History (including previous and subsequent accidents)*
>
> *Graham reports a previous road traffic accident in 2012 after which he underwent intramedullary nail insertion into his tibia and femur*
>
> *Aggravation of pre-existing condition?*
>
> *Yes*
>
> *If yes, please give the nature of pre-existing condition?*
>
> *Previous knee injury with intra-medullary nails in the tibia and femur due to previous RTA.*

Was pre-existing condition symptomatic before accident?

No" (emphasis added)

80. All medical reports and records were admitted without formal proof and there is no suggestion whatsoever that Dr Brady inaccurately recorded what he was told by the plaintiff. Lest it was not already entirely obvious, the use by Dr Brady of the words "*Graham reports…"* puts beyond doubt that what is set out in Dr Brady's report represents what the plaintiff told him. In other words, the plaintiff told his GP that before the accident for which he sues these defendants he was not symptomatic in respect of the 2012 RTA in which he suffered serious injuries. However, what the plaintiff told Dr Brady was untrue. It was to materially misrepresent the position to his GP, just as the plaintiff materially misrepresented the position when giving his evidence-in-chief to this court. When cross-examined about the foregoing entry in Dr Brady's report, the plaintiff made several points, which can be summarised as follows:

(a) He acknowledged that this is what he told Dr Brady;

(b) He confirmed that what he told Dr Brady was not true;

(c) However, according to the plaintiff, the way in which it was untrue is as follows: *"I was asking for help with back pain"* (as opposed to leg, or any other pain) before the second accident;

(d) The reason why plaintiff told his doctor that he was not symptomatic, despite the fact that he was symptomatic, was "*because it would have wasted his time"* (i.e. the Doctor's time) for the plaintiff to have given fuller information.

81. In my view, this testimony is utterly lacking in credibility. Again, it speaks to a core aspect of the plaintiff's claim, namely, the damage he attributes to an accident which he says occurred on the 12 of August 2014. The foregoing comprises evidence by someone who took the oath. In my view it is testimony which was deliberately given other than in accordance with the oath taken. I say *deliberately* given because, in constructing a wholly incredible explanation as to why he informed his own GP that he was *not* symptomatic at a time when - as confirmed by the plaintiff under cross-examination - he *was* symptomatic, the plaintiff deliberately confined those symptoms to "*back pain*" omitting any reference to right leg or knee pain, or to the issues with his sleep, or to the locking of his right leg, all of which were also then symptoms of the first accident. Indeed, the plaintiff admitted under cross-examination that, at the time in question, he had a *very painful* right leg and knee, which also 'locked' (quite apart from any back pain).

82. I am forced to the view that the plaintiff is someone who has given sworn testimony which he knew to be false or misleading. There are other examples of this and, having looked at a report prepared by his own Doctor, who examined him in October 2021, I now turn to a medical report prepared by Mr Stefan Byrne, a consultant orthopaedic surgeon who examined the plaintiff, at the behest of the defendants, on 4 February 2020. As I mentioned earlier, all medical reports were agreed and, thus, it was not necessary to have the authors of each report present in court. However, it is appropriate to note that these agreed medical reports have the status of evidence.

Report by Mr Stefan Byrne

83. The first page of Mr Byrne's report begins in the following terms:

> *"Brief details of Accident / Incident: Mr Hynes tells me he was a prisoner in Portlaoise prison. On 12 August 2014 while walking up some metal stairs in the prison he slipped. He tells me he hit his right knee off the stairs. He was unable to walk afterwards. He tells me he was brought back to his cell by other inmates.* ***He was left in the cell for 3 days without any medical attention…***" (emphasis added)

84. Again, the contents of this report were admitted without formal proof. Again, the plaintiff claimed in his testimony that its contents were *"wrong".* The plaintiff asserts that he did not tell Mr Hynes what the latter records the plaintiff as having told him. The plaintiff makes the same assertion in relation to the second page of Mr Byrne's report which includes *inter-alia* the following:

> *"Assessment of Care Given: There are contemporaneous notes from the Irish prison services Medical Centre on multiple occasions after Mr Hynes injured his right knee. He was seen on the 13th, 14th and 15th August in the medical centre and on the 15th August in the A & E department of Portlaoise Gen Hospital.*
>
> ***It is Mr Hynes contention that he was left for 3 days in his cell without medical attention and subsequently waiting 3 days to be brought to the A&E department****. This is not supported by review of the notes. It is clear in the notes that Mr Ines was seen on multiple occasions and received appropriate care…"* (emphasis added)

85. I am entitled to take the view that what appears in Mr Byrne's report reflects what the plaintiff said to him during the examination which took place on the 4th of Feb 2020. In my view, this is put beyond doubt by the use of the words *"Mr Hynes tells me…"* and *"He tells me…".* Indeed, the latter phrase appears repeatedly in this 2-page report.

Left in his cell for 3 days without medical attention

86. What the plaintiff told Mr Byrne included that he was left in his cell for 3 days without any medical attention. This comprises part of the evidence before the court, in that the contents of all medical reports have been admitted without formal proof. This is utterly different to the account given under oath by the plaintiff (who says both that the prison doctor *stuck his head in* to the plaintiff's cell on 12 August 2014 i.e. day of his alleged fall; who refers to painkillers; and who also says that he saw the prison doctor on 13 August 2014).

87. The plaintiff's testimony to this court was to say, in the most emphatic of terms, that he did *not* tell Mr Byrne what the latter records him as having said. In his attempt to try and explain - away the contents of Mr Byrne's report, the Plaintiff's sworn evidence included the following:

> *"I didn't have any conversation with this gentleman"*
>
> *"I only told him my name";*
>
> *"I didn't tell him any of this detail";*
>
> *"this Doctor did not have any conversation with me"*

"I wouldn't place any credence in this report";

88. It was very clear from his testimony that the plaintiff urged this Court to disbelieve the contents of Mr Byrne's report. The following comprise further v*erbatim* extracts from the report by Mr Byrne:

> "*Date of **Examination**: 4th February 2020.* (emphasis added)
>
> *Clinical Findings on **Examination** Mr Hynes right lower limb is well aligned with multiple surgical scars over the anterior and lateral aspect of the right thigh over the anterior and medical aspect of the right knee and ankle. There is no significant swelling he has a normal range of motion of his hip, knee and ankle. He walks well with very minimal limp.* (emphasis added)
>
> *Assessment: in my view, after meeting Mr Heinz and reviewing his medical notes, there was no breach in the duty of care by the prison medical services. Their treatment of him was appropriate of him at all times. The fact that Mr Heinz has ongoing pain in relation to his severe right lower limb injury is not surprising. He did have a significant injury to it back in 2012 as a result of a road traffic accident and ongoing pain following this type of injury is extremely common.* ***It is my opinion the pain he has is directly related to his initial trauma rather than the injury he sustained on 12 August 2014*** *when he slipped on the stairs in Portlaoise prison."* (emphasis added)

"didn't examine me in any way"; "treated me like filth"

89. The plaintiff claimed under oath *"I did not tell him that I was in the cell for 3 days without medical attention"* and *"I didn't have one conversation with this man".* What the plaintiff would have this court believe is that Mr. Byrne made this up. That proposition is utterly lacking in credibility. I have no doubt about the fact that the Plaintiff did have a conversation with Mr Byrne and the plaintiff did tell the latter that he was in a prison cell for 3 days without medical attention (being a materially different account of what the plaintiff told this court). When Mr Byrne's opinion was put to the plaintiff, the plaintiff went even further, claiming that "*This Doctor didn't examine me in any way".* The plaintiff then went further still, asserting under oath with respect to Mr Byrne that: *"He treated me like filth when I was there".* Thus, the plaintiff's sworn testimony is that:-

(a) he did not tell Mr Byrne what the latter records, not once but twice, as the account which the plaintiff gave him on the day of the examination;

(b) he had no conversation whatsoever with Mr Byrne, other than to give the doctor his name, despite repeated use in Mr Byrne's report of the words "*Mr Hynes tells me*…" and "*He tells me*…";

(c) despite Mr Byrne stating in explicit terms that he *examined* the plaintiff and setting out what he *found on examination* of the plaintiff, the latter would have the court believe that the doctor did *not* conduct any examination; and

(d) this consultant orthopaedic surgeon treated a patient "*like filth".*

90. It seems to me that if it was truly the case that, on 4 February 2020, a consultant orthopaedic surgeon (i) did not even *examine* the plaintiff and, (ii) without having asked any questions of the plaintiff or conducting any examination, set out *findings* in a medical report, and also (iii) treated the plaintiff *like filth,* the plaintiff would have informed his solicitors of these most serious matters and the latter would have taken up these grave allegations in correspondence. This did not occur. There was no mention of these allegations at the time or at any time until the plaintiff was cross-examined. Not only that, the relevant medical report was admitted without formal proof and compriseS part of the evidence before this court, despite the plaintiff now asserting that its contents are, in essence, a complete fiction.

91. In my view, this aspect of the plaintiff's testimony is also utterly lacking in credibility. I am forced to the conclusion that it is misleading testimony which was knowingly given to this court. It is equally clear to me that the *reason* why the plaintiff gave this misleading testimony is because of Mr Byrne's opinion, namely, that "*…the pain he has is directly related to his initial trauma rather than the injury he sustained on 12 August 2014…"* (to quote the plaintiff: *"I wouldn't place any credence in this report"*). Weighing all matters, I regard the plaintiff's testimony as wholly unreliable and accept Mr Byrne's opinion.

Impugning the reputation of someone not in court

92. It must also be said that in his attempt, when under cross-examination, to try and explain-away that which he regarded as unhelpful to his case, the plaintiff appeared willing, without a moment's thought, to call into question the professionalism and integrity of a medical practitioner who was not in court to defend himself. This, too, is very troubling. Nor does the passage of time or a lapse in memory explain the giving by the plaintiff of testimony wholly lacking in credibility, but potentially damaging to the reputation of a third party.

93. On that issue, I want to say in the clearest terms possible that there is not a scintilla of evidence to support the proposition that Mr Byrne failed to examine the plaintiff; set out findings based on an examination which was never undertaken or treated the plaintiff in the manner the latter asserted under oath.

94. Carefully considering all matters, including the plaintiff's demeanour in the witness box, I am forced to the conclusion that the plaintiff was knowingly expressing a falsehood when claimed that no examination at all took place; he was knowingly expressing a falsehood when he claimed not to have told Mr Byrne anything, apart from his name; and he was knowingly expressing a falsehood when he described Mr Byrne as having treated him "*like filth*". These falsehoods were uttered by a witness confronted with uncomfortable truths who knowingly gave them under oath in an illegitimate attempt to try and persuade this court not to "*place any credence*" in Mr Byrne's report. To say that this is troubling is an understatement. It has an obvious and adverse effect on the reliability of the plaintiff's testimony.

15 August 2014 - letter of claim

95. During the course of cross-examination, the plaintiff's evidence included to say that following the accident "*I was on to my solicitor in a matter of days… I told him what happened… I told him the truth, that I slipped on butter".* Despite this testimony, when the plaintiff's solicitor wrote the very first letter on behalf of the plaintiff, dated 15 August 2014, there was no mention of *butter* being the cause of the alleged accident. This seems curious to say the least. To make this observation is not for a moment to suggest that the plaintiff's solicitors did not record carefully and accurately the instructions given by the plaintiff. It is to say that, had the plaintiff instructed his solicitors, at the outset, that slipping on a pat of butter caused him to fall, one would expect to see a reference made to same from the outset. There was no such reference.

PIAB Form A - 15 December 2014

96. The next step in terms of making a formal claim for personal injuries comprises an application to the Personal Injuries Assessment Board ("PIAB"). The Court was furnished with a copy of the plaintiff's PIAB "Form A". It is dated 15 December 2014. Although the Form A specifically asks for a *"Brief description of how the accident occurred"*, no mention is made of the very thing which the plaintiff claims to have slipped on, namely, a pat of butter allegedly left on the stairway. Rather, the following entry is made on the plaintiff's behalf:

> *"Brief description of how the accident occurred: I fell on an* ***unsafe stairs*** *in Milands Prison"* (emphasis added)

Unsafe stairs

97. It seems to me that there is a material difference between claiming that an accident occurred because (i) a *stairs* is unsafe, and (ii) the stairs are acknowledged to be safe but a *substance*, i.e. butter was left on the stairs. At this juncture it should be emphasised that in the case before this court the plaintiff makes no complaint in relation to the stairs itself, which the plaintiff and his engineer acknowledge to be safe. Solicitors can only act on the instructions given to them and the contents of the PIAB Form A seem to me to suggest that the instructions given by the plaintiff, up to that point, related to a claim in the nature of (i) as opposed to (ii). I am fortified in this view by the following entry in the PIAB Form A:

> *"Brief details of the injury: Fell on a* ***dangerous stairs****…"* (emphasis added)

Dangerous stairs

98. Again, there is a material difference between, on the one hand, alleging that a *dangerous stairs* or *unsafe stairs* caused an accident, and, on the other hand, claiming that the accident resulted from the presence of butter on safe stairs. It seems to me that, up to at least 15 December 2014 (the date of the PIAB Form A), the plaintiff was giving his solicitors instructions to make a materially different claim (unsafe/dangerous stairs) than the one made before this court (butter on safe stairs).

99. To put it another way, had the plaintiff instructed his solicitors at any point prior to 15 December 2014 that the cause of his alleged accident was a pat of butter on the stairs, it seems to me that his solicitors (a) would have referred to butter in correspondence; (b) would have referred to the presence of butter on the stairs in the PIAB Form A and (b) would not have described the stairs as unsafe and dangerous (being a materially different thing to the presence of a slip hazard on safe stairs).

100. In short, if the plaintiff was giving accurate evidence as regards informing his solicitors from the outset that he slipped on butter, it is impossible to understand the omission from the PIAB Form of the very cause of the alleged fall, according to the plaintiff's evidence to this court. When this omission was put to him, all the plaintiff had to say was: *"I don't know why it wasn't added in".* The more obvious explanation seems to me to be that his solicitors did not know to add in the reference to butter because he had not told them, and the reason he had not told them is that he had not slipped on butter.

101. Under cross-examination the plaintiff was asked when he first told his solicitor about the presence of butter on the stairs and his response was to say: *"The 2nd or 3rd phone call".* Later in his testimony (re-direct) the plaintiff gave a different account, in that he claimed to have told his solicitor about the butter "*when he came down to visit me"*. Weighing up all the evidence, I am satisfied that the plaintiff's testimony about when he told his solicitor that butter was, according to him, the cause of his accident is not reliable.

102. There is no suggestion of the plaintiff's solicitors being other than diligent, professional, and progressing the plaintiff's claim at all material times in accordance with his instructions to them. Had the cause of the plaintiff's fall truly been the presence of a pat of butter on the stairs, it seems inconceivable to me that the plaintiff would not have mentioned this to his

solicitors, if not during his very first conversation with them, then at a very early stage and certainly at some point during the 4 months leading up to the submission of the PIAB Form A on 15 December 2014.

103. I do not accept as reliable the claim that the plaintiff told his solicitor that he slipped on butter during one of the initial phone calls or at an initial visit. I take this view because, had the plaintiff told his solicitor that butter caused him to fall, it seems to me that this would have been made clear by the plaintiff's solicitors both in correspondence, and in the PIAB Form A. It seems to me that the reason the PIAB Form A made no reference to the specific cause of the alleged fall (a pat of butter on the stairs) is because the plaintiff gave no such instructions to his solicitors up to that point. The most obvious explanation for that is that the plaintiff had not genuinely slipped on butter. Had butter truly been the cause of the fall, I am at a loss to understand why the plaintiff would not have said this to his solicitor from the very outset, yet did not do so.

104. On the topic of the PIAB Form A, it is useful to note that it was accompanied by a medical report prepared by Dr Sean O'Rourke, a consultant in emergency medicine, dated 6th February 15, which report was based on the emergency department records (the plaintiff having attended the emergency department of the Midlands regional Hospital Portlaoise on 15 August 2014). The final paragraph of that report states inter-alia the following*: "From the available records it can be stated that Mr Heinz sustained soft tissue injury to the right knee and leg.* ***This would be expected to heal over a 2 – 3 week period.*** *If he remains symptomatic I would need to reassess Mr Heinz to give a more accurate diagnosis and prognosis."* (emphasis added)

105. It is also noteworthy that, although the PIAB Form A indicated a claim with respect to defective or unsafe stairs (without any mention of butter on the stairs) by the time the personal injuries summons was issued, on 4 May 2016, the claim based on the plaintiff's instructions was that *"… the plaintiff was caused or permitted to slip and fall on a* ***deleterious substance*** *which had been left on the stairs…"* (emphasis added) yet still no mention of butter was made. It seems that the first mention of butter did not appear until 18 November 2016, well over 2 years after the alleged accident, when the plaintiff's replies to particulars stated *"A butter pat"* in response to the request to give details of the deleterious substance.

Complaint / no complaint at the time of the accident

106. In his sworn testimony that plaintiff stated *inter-alia* that "*I did make a complaint to a class officer*" on 12 August 2014. He went on to say that this complaint was made "*within 2 minutes of being in my cell*". He estimated that "*It would have taken 2 minutes to get to my cell*" in circumstances where he alleges that two fellow-prisoners carried him and, in that context, his evidence was that "*Within 5 minutes of the accident I made a complaint* ". As to the complaint itself, the plaintiff's sworn testimony was to say: *"What I told the class officer was : ' I slipped on the stairs . I slipped on butter. Go down and have a look at it'."* The plaintiff was asked to say who the class officer was, and his response was "*I don't know*".

107. Despite the foregoing, at paragraph 5 of the personal injuries summons it is specifically pleaded inter-alia that "*… the plaintiff did not initially want to make any complaint given the nature of life in prison. Ultimately the plaintiff had little option in this regard because the pain, particularly over his right knee, became too severe and he required medical attention."* This plea (which the court is entitled to believe reflects the instructions given by the plaintiff) is impossible to reconcile with the plaintiff's evidence that, immediately after the alleged accident which he says occurred on 12 August 2014, he did make a complaint by means of notifying the prison Class Officer. No satisfactory explanation for this obvious inconsistency was given to the court by the plaintiff. These materially different versions of events further call into question the reliability of the plaintiff's testimony. During the course of cross-examination, the plaintiff was invited to provide an explanation for the difference between

the pleas in the personal injuries summons and his sworn testimony, and the only one he proffered was that "*something got mixed up in the summons*". I do not accept that anything got mixed up in the summons. The very obvious explanation is that the account given by the plaintiff to his solicitors was that he did not make an immediate complaint. These instructions are reflected in the personal injuries summons. However, the plaintiff subsequently changed his story in a very material manner and I cannot accept that the account which he has given under oath to this court is reliable testimony. I take the view that his purported explanation that "*something got mixed up in the summons*" is wholly lacking in credibility. The former obvious explanation is that the plaintiff gave one account to his solicitors to issue proceedings on that basis, but gave a materially different account to this court and did so knowingly.

Mr Romeril

108. The court heard evidence from Mr Paul Romeril, who is a very experienced consulting engineer. Mr. Romeril was retained on behalf of the plaintiff and helpfully provided the court with a book of photographs which were taken when he visited the prison. The first of those photographs shows Mr Romeril holding a file with *both* of his hands, to represent the holding of a tray.

Holding the handrail

109. In his evidence Mr Romeril confirmed that a joint-inspection took place which was also attended by Mr Hayes, the engineer retained by the defendant. Mr Romeril confirmed that he interviewed the plaintiff outside the prison, explaining that the plaintiff remained outside during the joint-inspection in circumstances where a former prisoner is not permitted back into prison after serving their sentence. Mr Romeril was very clear in giving the following evidence:

(a) he asked the plaintiff how he was carrying his tray;

(b) the plaintiff demonstrated this to Mr Romeril;

(c) Mr Romeril demonstrated the same thing by means of photograph No. 1; namely, *both* hands holding the tray; and

(d) if the plaintiff was holding his tray with both hands, he could *not* have been holding the handrail.

110. In addition to giving the foregoing oral testimony, Mr Romeril's 27 July 2017 report was before the court. With regard to the details of the incident which are set out in his written report, Mr Romeril's evidence was that "*All I'm doing is recording what he* [the plaintiff] *told me*". Mr Romeril was retained to act as forensic engineer for the plaintiff and I accept his evidence. What the plaintiff told Mr Romeril includes the following (which can be seen at section 3 of the latter's report under the heading "*Details of Incident*"):

> "*Graham Hynes was in cell 6 or 7 which is on the right side of the landing as viewed from the incident stairs and came out with* ***his tray in his two hands with his bowl and plate held by his thumbs…***
>
> *Graham Hynes entered the stair by the enclosure door which was open and unmanned and* ***proceeded to ascend the first flight carrying the tray with his plate and bowl in the manner described****."* (emphasis added)

111. At the risk of stating the obvious, there is a fundamental difference between (a) holding a tray with the left hand whilst also holding the handrail of a stairs with the right-hand, and (b) holding a tray with both hands and *not* holding the handrail at all.

112. Having regard to Mr Romeril's testimony and the contents of his report, I am entirely satisfied that photograph no. 1 accurately reflects the instructions given by the plaintiff to him at the time of the joint-inspection.

113. It was put to the plaintiff in cross-examination that photograph no.1 reflected the plaintiff's instructions to his own engineer as to how he was holding the tray at the time of the alleged accident (i.e. not holding the handrail). The plaintiff denied this. This denial is wholly lacking in credibility

114. When asked to explain why Mr Romeril provided the court with a photograph illustrating the holding of a tray with two hands, the plaintiff had no answer. His evidence was "*I don't know why this picture was taken like that".*

115. In my view, there is a very straightforward answer, namely, the reason his engineer took photograph no. 1 (to illustrate a tray being held in *both* hands) is because these were the instructions the plaintiff gave to Mr Romeril, also reflecting the details of the incident, in narrative form, which appears in Mr Romeril's report.

116. The plaintiff's denial that he instructed his own engineer that he was holding the tray in both hands is unreliable testimony which was knowingly given by the plaintiff in an attempt to try and explain away another uncomfortable truth, i.e. that the account given by him of the accident has changed in material ways over time.

117. It is very clear that at two different points the plaintiff gave two different accounts to his engineer and to this court, respectively, with regard to a very significant aspect of his alleged accident (i.e. whether the plaintiff was holding the handrail or not). It is also clear that the earlier account given by the plaintiff to his engineer *shifted* in a very material manner insofar as the plaintiff's testimony given to this court. It is equally clear that these two accounts are mutually inconsistent (i.e. it is simply impossible for both accounts to be correct). At least one is untrue, and this very obviously calls into question the credibility of the plaintiff's testimony, in circumstances where the difference between both accounts cannot be explained by poor memory or the passage of time (again, it should be noted that the plaintiff did not suggest that his memory was unclear in any respect).

118. It was also suggested to Mr Romeril that if the plaintiff was looking, he would have seen a gold coloured pat of butter on the stairs. Mr Romeril agreed that this was so but went on to say that the plaintiff's instructions to him were that the plaintiff was carrying his tray with both hands (the clear suggestion being that a tray carried in front of the plaintiff with both hands would have impeded the plaintiff's view).

119. I have no doubt about the fact that the plaintiff did instruct his engineer that he was holding the tray in both hands (i.e. not holding the handrail at all) and that his denial of this constitutes false testimony. Given the unreliability of the plaintiff's testimony and the fact that he now swears that he was holding the tray in one hand whilst also holding the handrail, this court cannot accept, on the balance of probabilities, that the plaintiff was carrying his tray on the day of the alleged accident in the manner he now contends. In short, the Court cannot accept the plaintiff's account of the alleged accident as being reliable. What the plaintiff told Mr Romeril in July 2017 also included the following:

> *"As Graham placed his right foot on about the third tread from the top his right foot suddenly slipped from under him and he fell heavily* ***landing on his right knee on the second or first tread from the top****."* (emphasis added)

120. The foregoing is materially different from the account given by the plaintiff to this court under oath. He was consistent in his testimony as regards the account of placing his foot

on the third thread from the top of the stairs, but made very clear in his evidence to this court that he impacted, *not* with the step above (be that the *first* or *second* step from the top) but with the step below (the *fourth* step). His sworn evidence was that he stood on the third step from the top, slipped on a pat of butter which was "*on the edge*", as a result of which he *"went down"* impacting with the fourth step. His evidence was "*I banged my knee on* ***the step below*** *the butter"* also describing the impact as "*I cracked my leg on* ***the step underneath****"* (emphasis added).

121. There is an obvious difference between impacting with the step above (what the plaintiff told his engineer in 2017) as opposed to the step below (what the plaintiff told this court). This difference between the account given in 2017 to his engineer, and the account given to this court at the hearing, is another reason why the court cannot accept the plaintiff's evidence as reliable. I say this in circumstances where the plaintiff never suggested that the passage of time had adversely affected his memory of the incident.

122. Mr Romeril's report also records the following account given by the plaintiff:

> *"Graham Hynes was unable to get up and when he looked down so that he had trodden on a* ***Flora or butter*** *portion pack and the contents had squirted out onto the sole of his right shoe leading to him slipping"* (emphasis added)

123. It is fair to say that in his evidence to the court, the plaintiff insisted that he slipped on a pat of butter as opposed to Flora. His testimony was that "*standing on greasy butter caused me to fall*". He also stated that it was wrapped in gold foil and that, immediately after falling: "*I peeled the thing off my shoe".* Although not, of itself, a very significant issue, it forms part of a picture which emerges from a careful analysis of all the evidence, namely, a shifting narrative given by someone who's account of the alleged accident is, I am satisfied, not reliable testimony. It might also be added that if it were genuinely the case that the plaintiff had slipped on a pat of butter which he peeled off his shoe immediately after the fall, it is curious to say the least that, on his account, he simply discarded the wrapping (he gave no evidence that he showed it to anyone – be that prison staff or his solicitor – or even kept it, despite the obvious significance of it for the alleged accident).

<u>No shortage of cleaners in prison</u>

124. It will also be recalled that a material element of the plaintiff's evidence to this court was to claim that cleaners were not working on 12 August 2014, being when the plaintiff says he fell. According to the plaintiff *"It was common knowledge on the landing that there were no cleaners"* on the day he fell, also saying that "*rubbish in bags was overflowing that shouldn't have been overflowing".*

125. I will presently come to the date of the alleged accident, but on the question of cleaners, the evidence of Mr Romeril included: *"I've always taken the view that there is no shortage of cleaners in prison*". Mr Romeril made clear that he has acted for prisons since the mid-1990s and, insofar as his knowledge is concerned "*cleaning is almost universal".* He also confirmed that cleaning represents *"a privilege*" for which prisoners are paid a nominal fee or income.

<u>Didn't say anything to me about there being no cleaners</u>

126. Furthermore, Mr Romeril confirmed that he was never told by the plaintiff or by the plaintiff's solicitors that there were no cleaners working on 12 August 2014, the day of the alleged accident. Mr Romeril went on to state that the plaintiff "… *didn't say anything to me about there being no cleaning*". It was also clear from Mr Romeril's testimony that he had reviewed his own notes and he confirmed that he had "*no note"* of any such allegation.

127. The obvious time for the plaintiff to tell his engineer that no cleaning of the stairs had taken place on the day of his alleged accident was immediately prior to the joint-inspection of the prison stairs in question by both engineers. The plaintiff did not tell his engineer this on the day of the joint inspection, or at any time.

128. Mr Romeril's view that there is no shortage of cleaners in prison chimes precisely with the evidence given by Ms Clark, chief officer in the Midlands prison, to which I now turn.

Ms Clarke

129. Among the evidence given by Ms Clark was to confirm that she was responsible for training prisoners in cleaning and certifying them to a particular British standard. She explained that the prison uses a regime of incentives and inmates have the potential to become what she described as "*enhanced prisoners*" i.e. those with the privilege of engaging in work within the prison with which comes added benefits for the prisoner which Ms Clarke referred to as *"added phone calls, visits, and a payment".*

130. Although, a prisoner did not have to have enhanced status to begin cleaning work, Ms Clarke was very clear that work as a cleaner is "a *privilege*" and highly sought after. After spending 10 or 11 weeks in prison, prisoners are reviewed in the context of whether the prisoner in question was, for example, attending school or the prison workshop. She went on to say that "*We'd look at the prisoner and their interest. Generally, we'd give them one or 2 little jobs…"* before they could become a cleaner. Ms Clark explained the wide-ranging of jobs potentially available to prisoners including cleaning; painting; working in the laundry; waste-management; printing; sign-making; and involvement in other work parties.

131. As well as outlining the daily prison routine in terms of meals, activities and time back in cells, Ms Clarke made clear that when others are locked in their cells, "*…the only persons left on the landings are cleaners".* Her evidence was to say of prisoners that "*they're always queueing up for jobs",* and she was very clear that this included cleaning jobs. She explained that she interviews prisoners on a daily basis and that, on an average day, she would have up to 10 referrals to her of prisoners looking for jobs, such as cleaning.

Cleaning 3-times daily

132. Ms Clarke also gave uncontested evidence as to both the daily and weekly schedule of cleaning within the prison. From her evidence, the court is entitled to hold that there is a system in operation for cleaning within the relevant prison. In terms of the daily cleaning regime, she confirmed that each stairs and each landing is "*swept and mopped 3-times daily i.e. after breakfast, dinner, and tea*". Her evidence was that "*there is cleaning after each serving*" of food. She gave details with respect to the training of prisoners to clean stairwells and landings. She also explained that 20-hour cleaning courses are given to prisoners by the party she described as the "*WTO industrial cleaner*". With regard to the stairs, her uncontested evidence was that prisoners are taught to "*... start at the top and sweep down the stairs, then get a damp mop and mop down…".* Ms Clark testimony was that there are "*a minimum of 5 cleaners per landing".*

133. Ms Clarke was not working in the Midlands prison on the day of the alleged accident and, therefore, could not give first-hand evidence based on her personal knowledge that on 12 August 2014 the normal cleaning regime was followed. However, the following can be said having regard to her testimony and considering all other evidence before the court:

(1) The plaintiff's claim that no cleaning was done on 12 August 2014 can fairly be characterised as a 'bald' assertion to the effect that prisoners refused to carry out the cleaning, due to some dispute, details of which were not given;

(2) There was no other evidence, be that documentary or from a witness, which would support the proposition that prisoners with the privilege of cleaning decided for unknown reasons not to clean on 12 August 2014;

(3) By contrast, Ms Clark gave evidence to the effect that, if it was necessary to replace a cleaner, this could be done "*immediately*" due to the constant flow of prisoners being trained;

(4) Her uncontroverted testimony was to the effect that there are more prisoners who are keen to do jobs, including cleaning, than there are jobs within the prison;

(5) Her evidence was also to the effect that, if the prison needed cleaners immediately, the WTO could go over to the landing in question and give training to prisoners there and then if there were no suitable prisoners already available, i.e. already trained;

(6) It is fair to say that Ms Clarke's uncontroverted evidence was to the effect that there would never be a situation where the prison did not have sufficient numbers of prisoners ready and willing to carry out the privilege of cleaning duties.

134. The plaintiff would have this court believe that whether or not the Midlands prison was adequately cleaned on 12 August 2014 depended on a system so fragile that an alleged refusal by a small number of prisoners to carry out these duties resulted in no cleaning at all of the relevant stairs and landing. That proposition is wholly undermined by the evidence of Ms Clark and, indeed, the views expressed by the plaintiff's own engineer. There is a consistency between Mr Romerill's evidence and that of Ms Clarke to the effect that there is no shortage of cleaners in prison. Weighing up all the evidence, I have reached the following findings in respect of this aspect of the plaintiff's testimony:

(a) the Plaintiff - who never informed his own engineer that no cleaning took place on 12 August 2014 - has not established that there was no or no adequate cleaning on that date;

(b) the plaintiff has not established that prisoners with the privilege of cleaning failed or refused to carry out cleaning duties on 12 August 2014, whether due to some form of dispute, or for any other reason;

(c) had there been a refusal by any prisoners to carry out cleaning on that or on any other date, I am satisfied the defendant could and would have replaced them immediately with prisoners willing to carry out cleaning, be they prisoners already trained to clean, or prisoners who could immediately be trained 'on the job';

(d) I accept the uncontested evidence that the prison stairs and landing is cleaned 3 times daily;

(e) on the balance of probabilities, I find that the specific stairs in question was cleaned in the normal manner on the 12 of August 2014, in particular after breakfast/before lunch;

(f) had there been a pat of butter left on the relevant stairs as a result of the breakfast serving on 12 August 2014, I am satisfied that it would have been removed prior to the lunch serving.

135. Ms Clarke also gave evidence in relation to what occurs if a prisoner is involved in an accident, stating that: *"If the person is on the ground, you leave them on the ground; ensure they are comfortable; call the prison nurses; and the nurses will come and tend to them".* That did not occur. Ms Clarke also gave evidence to the effect that accidents should be reported to the class officer. She explained that if an accident occurs, the "*Class officer"* must complete an accident report form, which must be submitted to the *"Chief officer".* No such report exists. She went on to explain that the *"nurses will fill in their form and submit it to the Chief's office".* That did not occur as no nurses attended the scene in circumstances where the Plaintiff claims that he was aided exclusively by fellow prisoners. Ms Clarke also explained that, even if an accident is reported to a class officer a day or two after it occurs, as opposed to on the date of the accident "*it would be documented*". No such document exists. Ms Clarke also gave details as to what an 'Accident Report Form' contains, making clear that "*if someone complains that they fell due to slipping on butter, it would be recorded*". There was no such form and no reference to butter in any prison documentation. Ms Clarke - who is currently Chief officer in Midlands prison and was previously a Class Officer – also gave evidence that *"if you saw the butter there, you'd document it in your own report".*

No accident on 12 August 2014

136. I pause at this juncture to observe that (i) no class officer's report was made in relation to any alleged accident on 12 August 2014; (ii) no nurses' report was made in relation to any alleged accident on 12 August 2014; (iii) no document whatsoever refers to an alleged accident on 12 August 2014. It is the obvious that a plea to the effect that the plaintiff did not make a complaint on 12 August 2014 is entirely consistent with their being no record of such a complaint. The reality that the plaintiff gave instructions to his solicitors that he did *not* immediately make any complaint after the accident, being instructions reflected in the plea at paragraph 5 of the personal injuries summons, to which I have referred earlier in this judgement.

137. It will be recalled that the plaintiff's claim is for alleged injuries in an alleged accident on 12 August 2014 and not otherwise. During cross-examination the plaintiff was asked if he was "*sure*" that he fell on 12 August 2014, and his response was "yes". This is not a situation where the plaintiff was in any way vague about when he claims the accident occurred. On the contrary, he was adamant that it occurred on 12 August 2014, in the manner he outlined, and not otherwise. Carefully considering the entirety of the evidence I am satisfied that no accident took place on 12 August 2014. My finding that no accident whatsoever occurred on 12 August is fatal to the plaintiff's claim. It is a finding reached based on a careful consideration of the entirety of the evidence, including the following contemporaneous medical records.

14 August 2014 Medical Record (15:20)

138. Among the plaintiff's medical records admitted without formal proof is a document recording entries by the prison doctor (Dr. Sohail Rasool) on 14 August 2014. These include the following:

> ***"14-AUG-2014*** *15:20 -sxrasool –*
>
> ***fell yesterday****, O/E; bruised RT Knee and infrapatellar area*

Hx of Orthopaedic intervention on the same

Plan;

AnalgesiaXRays to check the alignment tomorrow" (emphasis added)

139. The foregoing records an entry made at 3:20pm on 14 August 2014 by a medical professional who states very clearly that the plaintiff "*Fell yesterday"* (being 13 of August 2014). When confronted with this, the plaintiff's testimony was to say "*I have no idea why that was written"* and *"I fell on the 12th so he's incorrect".* Again, the response of the plaintiff to facts which do not suit the narrative which he gave in his examination-in-chief is to say that others are wrong (in this instance, another doctor).

140. I am entitled to hold, as a matter-of-fact, that the doctor made this entry because this is what the plaintiff told him on 14 of August 2014. It must be borne in mind that this is a contemporaneous record. In other words, the prison doctor was not relying on his memory about what the plaintiff had told him some days, weeks or months before. The fact that the plaintiff, on 14 August, informed the prison doctor that he fell on 13 August is fatal to the plaintiff's claim.

141. A feature of this case was a range of submissions made on behalf of the plaintiff to the effect that records of the 12 August 2014 accident must exist but have not been disclosed. The fact that no fall took place on 12 August 2014 explains why there are no *records* of a fall on 12 August 2014. It also renders entirely moot the plaintiff's criticisms of the defendant's discovery.

142. I have no doubt that the plaintiff instructed his solicitors that he fell on 12 August 2014, even though this was not the case. The submissions made with such skill by the plaintiff's counsel were premised on the instructions given by the plaintiff that he fell on 12 August 2014, when this was not the case. In short, the reality is that no accident occurred on 12 August 2014 and this is also fatal to the assertion made by the plaintiff in evidence: *"There is records but the prison is holding them back*".

13 August 2014 Medical Record (17:02)

143. The medical record of 14 August 2014 is not the only contemporaneous medical record of relevance. A prison nurse officer (identified in the record as Rachel N Clooney) made the following entry on 13 August 2014:

"***13-AUG-2014*** *17:02 -rmclooney-*

Graham c/o pain++ in r knee*, was S/B Dr, prescribed difene 75mg IM same administered."* (emphasis added)

144. This is a record (entered at 2 minutes past 5 on the evening of 13 August) of the plaintiff complaining of pain in his right knee; being seen by the doctor; and being given "difene" which is entirely consistent with (i) the plaintiff having complained of pain, having fallen that day and (ii) the record which was made the following day, 14 August, referring to the plaintiff having fallen the previous day. It is also entirely consistent with the other medical records which were made *earlier* on 13 August, to which I now turn.

13 August 2014 Medical Record (16:07)

145. The following entry was made by a prison doctor (identified as Ulrich X. Fick) at 4:07 PM on 13 August:

> "***13-AUG-2014*** *16:07 – uxfick-*
>
> ***Injured R. knee in fall.*** *O/E. R. knee very tender., Able to straight leg riase"* (emphasis added)

146. Once again, this contemporaneous record is consistent with, and only consistent with, a fall having occurred on 13 August 2014. The plaintiff insists that he fell on 12 August. I am entitled to take the view that he is adamant that the fall occurred on 12 August because this is the day he claims that the prisoners with the privilege of cleaning refused to engage in those duties. I do not accept that the plaintiff has established that there was no cleaning on 12 August. Even if I am wrong in that view, I am entirely satisfied that no accident occurred on 12 August. The contemporaneous medical records make clear that the alleged fall occurred on 13 August and there is no reference whatsoever to the plaintiff having sought medical treatment on, or having claimed to have fallen on, 12 August 2014. There is a record of both in respect of the 13 August 2014. A medical record from earlier on 13 August 2014 is also relevant. When it was put to him that the contemporaneous medical records demonstrate that no fall took place on 12 August his evidence was to the effect that the records were wrong. He had no explanation for why that might be so. It is fair to say that this was a theme of the plaintiff's evidence i.e. that he alone was giving an accurate account, whereas medical records and medical reports were wrong. I do not accept that this is so.

13 August 2014 Medical Record (12:07)

147. At 12:07 on 13 August prison nurse officer (Sheila Leonard McEnery) made the following entry:

> "***13-AUG-2014*** *12:07 – slmchenry –*
>
> ***Graham appeared under the influence this morning*** *when he presented for methadone. He attempted to provide your iron sample when requested but was unable to do same."* (emphasis added)

148. It does not appear to be in dispute that those who receive methadone in prison are given it shortly after 8 am. The plaintiff's testimony included *inter-alia* the following: "*You get your methadone about 8:10 in the morning. The nurse gives out the methadone. When the cells are opened, each person on methadone goes around to the nurse and lines up to get it."* The foregoing entry which was made shortly after noon on 13 August appears to me to be significant for two reasons. First, it contains no reference to any fall and the plaintiff is not said to be complaining of any pain in his right knee due to an alleged fall. Rather, the first reference to the fall and to injury to the plaintiff's right knee appears in the entry made later on 13 August, at 16:07. This entitles me to hold that the fall occurred sometime *after* the plaintiff presented for methadone on 13 August (approximately 10 minutes past 8 am) and *before* 16:07 (when the entry was made recording the fall).

149. The second aspect of significance is that it is a matter of fact that medical staff considered the plaintiff to be "*under the influence*" when he attended for methadone on the morning of 13 August. It does not seem controversial to suggest that being *"under the influence"* could well cause a fall. Leaving that observation aside, the plaintiff has not established that any accident occurred on 12 August. Although the plaintiff denies that he fell at all on 13 August, the evidence is to that effect. How that fall occurred is entirely unknown. It is known that the plaintiff appeared to be under the influence of drugs on the very morning of the fall. There is no case made against the Defendant that any act or omission on its part resulted

in a fall on 13 August 2014 but I want to make clear that the plaintiff has certainly not established that, to the extent he fell on 13 August 1014, it was due to any breach of duty on the defendant's part.

Drug Screening Results

150. The evidence before this court included the results of drug screening tests which were carried out with respect to the plaintiff some weeks *before*, as well some weeks *after*, mid-August 2014. These found that the plaintiff tested 'positive' for a range of drugs. It is fair to say that the observations noted by the prison nurse officer who saw the plaintiff on the morning of 13 August are consistent with those drug-screening results and I will presently look at those results.

151. During the course of cross-examination, the plaintiff confirmed that he was on certain drugs immediately prior to the alleged accident, namely "*Methadone*" and "*Benzos*", adding that "*I don't smoke cannabis".* With respect to the latter claim, the plaintiff was asked why cannaboids were found in his urine both before *and* after August 2014. The plaintiff's response was to say that: "*if someone gives you a drag of a cigarette*" containing cannabis "*it will be in your system"* for a period of days.

25th July 2014 "Drugs of abuse" test results

152. Among the medical records admitted without formal proof were the results of drug screening tests performed at the request of the defendant by company entitled "Biomnis". The author of the first of the relevant reports is identified as: "Sean Gallaher Senior Lab Scientist Date: 25.07.2104". These results, which identify the plaintiff as the patient, concern: "Collection date 22.07.14". Under the heading of "Drugs of Abuse", the results are "Positive" in respect of the following: "Cannabinoids Screen"; "Amphetamine/Methamphetamine Screen"; "Benzodiazepine screen"; "Opiates screen"; "Methadone Metabolite (EDDP) Screen"; "6-AM Screen".

29 August 2014 "Drugs of abuse" test results

153. A second report from Biomnis identifies the author as: "Barry O'Dea Lab Scientist Date: 29.08.2014" and relates to "Collection date: 26.08.14". Under the heading of "Drugs of Abuse" the results are "Positive" in relation to the following: "Cannabinoids Screen"; "Benzodiazepine screen"; "Opiates screen"; "Methadone Metabolite (EDDP) Screen"; "6-AM Screen". The foregoing comprises uncontroverted contemporaneous evidence that 3 weeks before the alleged accident and 2 weeks after the alleged accident, the plaintiff was testing "Positive" in relation to named "Drugs of Abuse".

Smoking heroin in August 2014

154. During cross-examination the plaintiff gave evidence that "*I was smoking heroin a couple of weeks after the accident".* When he was asked whether he was smoking heroin in August 2014, the plaintiff's evidence was to say: *"I'm not sure".* It was then put to the plaintiff that smoking heroin would explain why he was reported to be "*under the influence*" on 13 August 2014. The plaintiff made no response to this proposition. Given (i) the fact that the plaintiff tested positive for drugs, including opiates, in respect of samples taken on 25 July 2014 *and* on 29 August 2014; (ii) the fact that the plaintiff was noted to be "*under the influence*" of drugs on 13 August 2014; (iii) the plaintiff's evidence that he "*was smoking heroin a couple of weeks after the accident*" (which he says occurred on 12 August 2014); and (iv) the fact that the plaintiff was "*not sure*" if he was smoking heroin at other times in August 2014, I have come to the view on the balance of probabilities that the plaintiff was, in fact, under the influence of drugs when he fell on 13 August 2014. Insofar as that fall is concerned, no liability attaches to the defendants (leaving aside the crucial point that no such case is pleaded).

5 August 2014 Medical Record (10:54)

155. Other medical records also deserve comment. On 5 August 2014 at 10:54 AM the prison doctor (identified as James P Richter) made the following entry:

> *"05- AUG-2014 10:54 -jprichter-*
>
> *Says wants sleepers for pain at night. If clean urine, we can reduce further.*
>
> *He has long story about not sleeping, and how no one listens to him."*

156. This medical record was made a week *before* the alleged accident. It evidences that prior to any fall, the plaintiff had long been complaining about (i) difficulty sleeping at night and was complaining of (ii) pain at night. It will be recalled that difficulty sleeping and pain at night were said by the plaintiff to relate, not to his very significant first accident, but to the fall for which he sues the defendant. The foregoing record undermines that proposition.

157. With respect to this entry, the plaintiff's testimony was to say *"I don't know why that was written".* The very obvious explanation is that it is a record of what the plaintiff told the prison doctor on the 5 August 2014. What the plaintiff told the prison doctor then does not suit the narrative which the plaintiff has attempted to give to this court. The plaintiff's response to this inconvenience was to suggest that the doctor was wrong. He also asserted that the reference to *"pain"* in the 5 August 2014 record did not relate in any way to his leg - the plaintiff's suggestion being that leg pain was not an issue and did not interfere with his sleep prior to the accident which gave rise to the present proceedings. In the manner dealt with earlier in this judgment, it is a fact that the plaintiff was complaining of leg pain prior to the second accident. I find the plaintiff's evidence to be lacking in credibility and although it involves repetition, it is appropriate at this juncture to recall what is contained in the plaintiff's medical records dating from June 2014. At 12:28 on 15 June 2014, the prison doctor (identified as Ribina I. Constantine) made inter alia the following entry:

> *"c/o sore throat since three days ago…*
>
> *…also he c/o of not sleeping because of the pain in the rt lower limb as he did have a right tibia & fibula fracture previously, now the pt is confronted with algic and functional sequelae in rt lower limb, he stated he has his rt knee locked from time to time, during at night time when he turns into his bed, this wakes him up and then he found almost impossible to resume the sleep…*
>
> *…note in my opinion the plaintiff requested to be seen more for having sleeping taps prescribed than for his throat…",*

158. As I observed earlier, (i) difficulty sleeping; (ii) the 'locking' of the right knee; and (iii) pain in the right leg all comprise complaints which the plaintiff attributes to the (second) accident, the subject of the present proceedings, not the (first) accident in which he sustained very serious injuries. In reality, all such complaints stem from the first accident as the plaintiff knew when he gave evidence to this court which materially misrepresented the position.

159. Given the unreliability of the plaintiff's testimony, it is impossible for this court to have any sense of the adverse consequences for the plaintiff of the fall which occurred on 13 August 2014, in terms of severity or duration. All that can be said is that the consequences of same cannot be laid at the door of the defendants in this case. Weighting up all the evidence, I am satisfied that everything the plaintiff complains of *"is directly related to his initial trauma"* i.e. his very serious accident in 2012, not any fall in prison, just as Mr. Byrne opined in the

medical report which the plaintiff encouraged this court to place no credence in. To the extent that the plaintiff suffered a soft tissue injury to the right knee and leg in August 2014, the evidence before this court does not allow for a finding that it occurred either on the date or in the manner the plaintiff claims. It will also be recalled that the initial medical report which accompanied the plaintiff's PIAB application was one in which Dr Sean O'Rourke expressed the view based on the available records that the said soft tissue injury would be expected to heal over a 2-3 week period. I mention the foregoing in circumstances where it seems to this court that the plaintiff has exaggerated his injuries, leaving aside the crucial failure on the plaintiff's part to prove on the balance of probabilities that any accident occurred on the date in the manner he asserted. The reality is that any pain the plaintiff may continue to suffer from, stems not from any fall in prison but from a very serious accident he was unfortunate enough to sustain previously. Even the plaintiff's own consultant orthopaedic surgeon, Mr Michael Leonard, refers to the previous accident in the context of the opinion he proffered in his 5 October 2020 report, wherein he stated inter-alia that *"His situation is somewhat complex due to previous retrograde nailing of the femur and anti-grade nailing of the tibia."*

160. At this point, I want to return briefly to the question of discovery. The evidence which is before the court does not allow it to hold that there *must* have been CCTV footage of the plaintiff's accident which he insists occurred on 12 August. Whether there ever was such CCTV footage is unknown, based on the evidence before this court. What *is* known is that there certainly was no such CCTV, as of the 26th of 2019, and the defendant has averred this on affidavit. With reliance on O'Mahony, Counsel for the plaintiff submits, inter alia, inferences must be drawn by the court to the effect that the accident occurred in precisely the manner the plaintiff contends; that no cleaning took place on 12 August 2014 just as the plaintiff asserts; that there was no safe system of cleaning in place; that the accident on 12 August 2014 was reported by the plaintiff and that, in short, his case must succeed.

161. These and similar submissions made by counsel for the plaintiff cannot avail the plaintiff. The facts in the present case are entirely different to those in O'Mahony, the single most important fact being that no accident occurred on 12 August 2014. That being so, any dispute in relation to documentation relating to 12 August 2014 is entirely redundant. Furthermore, the plaintiff has not established that the defendant could fairly be regarded as a 'despoiler' in the sense used in O'Mahony.

162. The outcome of this case is not determined by the skill with which legal submissions are made. Even if the plaintiff had chosen (i) to issue a motion seeking further and better discovery of documents relating to 12 August 2014; or (ii) to issue a motion seeking to strike out the defence for failure to make discovery, no benefit would have accrued to him because no accident occurred on 12 August 2014. Nor is there any evidence that anything was destroyed by the defendant. Carefully considering all matters in the context of the maxim *omnia praesumuntur contra spoliatorem,* I am satisfied that the plaintiff in these proceedings has not been subjected to any disadvantage in the presentation of this case because of any wrongful act on the part of the defendants, or either of them. In particular, the evidence before the court does not allow for a finding that the defendants or either of them destroyed or suppressed evidence.

163. On behalf of the plaintiff it was submitted, inter alia, that there was *"a wholesale failure to call all available evidence"* and that "*the failure to produce all documents and multiple relevant witnesses must tell against the defendant*" including by way of "*aggravated damages*". Although the foregoing submissions reflect the commitment of the plaintiff's legal team to his case and the instructions given (i.e. that the plaintiff fell on 12 August 2014), they simply cannot assist the plaintiff, who has not established that any accident occurred on that date. To put it most kindly, the plaintiff has shown himself to be a most unreliable historian. Unfortunately, the court has also been compelled to take the view that the plaintiff is someone who has knowingly given evidence utterly lacking in credibility and who has also materially exaggerated his injuries.

164. It is important to make the obvious point that it is not for a defendant to make the plaintiff's case. That onus rests on the plaintiff and it is an onus which the plaintiff has not discharged. In my view it would be inimical to justice to make a finding in favour of the plaintiff because (i) he has not established that any accident occurred on 12 August ; (ii) leaving aside the crucial point that the pleaded case does not relate to an accident other than one claimed to have arisen on 12 August 2014, the plaintiff has not established that there was any breach of duty on the part of the defendant which gave rise to any fall, regardless of when it may have occurred; and (iii) the plaintiff has given materially misleading evidence with regard to the damage he claims to have sustained as a result of a fall.

165. The plaintiff is someone who has had significant difficulties in his life. These difficulties play no part in the present claim. Regardless of how difficult, or how privileged, their life has been up to the point at which they take the oath, the court expects from a witness the truth, the whole truth, and nothing but the truth. Society demands this, because a fair and functioning system for the administration of justice, in furtherance of the common good, depends on witnesses giving evidence in accordance with their oath. Unfortunately, this court has been forced to find that, with regard to material matters, the plaintiff gave evidence other than in accordance with the oath taken.

Conclusion

166. In conclusion, it should be said that insofar as the plaintiff has paid his debt to society and has sought to tackle substance-abuse problems, he can feel justifiably proud. His wish to offer his son a positive example and to participate in his son's life is also something to his very great credit. The court wishes the plaintiff well in relation to the foregoing but, for the reasons detailed in this judgement, the plaintiff's claim must be dismissed. By way of a preliminary view on the question of costs, I can see no basis which would justify a departure from the 'normal rule' that costs should 'follow the event'. Should either party take a different view, short written submissions should be filed within 14 days of this judgment.