[2019] IEHC 719

THE HIGH COURT

[2017 No. 3298P]

BETWEEN

PAT MCCARTHY

PLAINTIFF

AND

GERRY TWOMEY

DEFENDANT

JUDGMENT of Mr Justice David Keane delivered on the 25th October 2019

Introduction

1. On the afternoon of 19 February 2015, Pat McCarthy, the plaintiff in this personal injuries action, suffered a significant injury while working as a plumber on the construction of a kitchen extension at the home of Gerry Twomey, the defendant, when a steel nail that he struck with a hammer, while attempting to secure a water pipe to a concrete blockwork wall with a plastic clip, flew backwards, striking him in the right eye.

2. In the personal injuries summons that issued on his behalf on 10 April 2017, Mr McCarthy claims that his injury was caused by the negligence, breach of duty, or breach of contract of Mr Twomey, so that Mr Twomey is liable to him in damages for it. Mr McCarthy pleads that Mr Twomey breached either the general duty of care that he owed to him or one or more of the statutory duties created by the Safety, Health and Welfare at Work Act 2005 (and both the Safety, Health and Welfare at Work (General Application) Regulations 2007 and the Safety, Health and Welfare at Work (Construction) Regulations 2013 made under that Act).

3. More specifically, Mr McCarthy pleads that Mr Twomey: failed to provide him with a safe system of work; obliged him to work in an unsuitable environment; failed to appoint a project supervisor for the construction of the kitchen extension; failed to carry out a risk assessment or to develop a health and safety plan for that construction work; failed to provide him with appropriate safety equipment in the form of safety goggles or other appropriate eye protection; and exposed him to an unnecessary risk of injury of which Mr Twomey should have been aware.

4. In his defence delivered on 28 July 2017, having first raised certain preliminary objections, Mr Twomey puts Mr McCarthy on strict proof of every aspect of his claim, before specifically pleading that Mr McCarthy was working on the renovation and extension of his home as an independent contractor, who held himself out as an experienced plumber with the appropriate expertise to carry out the work unsupervised, and who was responsible for his own system of work; his own work equipment; and his own personal protection equipment. Mr Twomey further pleads that the accident was caused, in whole or in part, by Mr McCarthy's own negligence, in failing to adopt a safe system of work; failing to take reasonable care for his own safety; and failing to wear safety goggles.

5. In a reply delivered on 22 January 2018, Mr McCarthy denies that he was an independent contractor and introduces the plea that, while carrying on the relevant work, he was a 'de facto employee' of Mr Twomey.

The accident and the injury

6. There was no real controversy at trial concerning either the immediate circumstances of the accident or the nature and extent of the injury caused to Mr McCarthy.

7. Mr McCarthy, who was born on 28 February 1957, is a married man with four adult children. He lives in Ballymacarby, County Waterford. Mr McCarthy left school after his intermediate certificate examination to commence a plumbing apprenticeship with a heating and plumbing firm in Clonmel, County Tipperary. After completing that apprenticeship in 1978, he worked for a few different contractors in Waterford City, before applying successfully in 1982 for a position as a plumber with what was then South Tipperary County Council. In 2003, he took up the position of water services manager with that authority, which involves responsibility for the operation of a water treatment plant. At the time of the accident that is the subject of these proceedings, Mr McCarthy was – as he remains - a full time employee with what is now Tipperary County Council ('the Council').

8. In addition to his full-time employment with the Council, Mr McCarthy continued to do plumbing work on a registered, self-employed basis, largely consisting of small, domestic maintenance and repair jobs. This was possible because he was on a flexible working-hours ('flexi-time') employment contract with the Council. He earned, on average, an additional income of between €5,000 and €7,000 a year from that work.

9. Mr McCarthy first met Mr Twomey in 2013 when, on the recommendation of Tom Condon, a builder and lifelong family friend of Mr McCarthy, Mr Twomey engaged him to work on two jobs in his home; first, the installation of a heating boiler, and second, that of a solid fuel stove. Mr Twomey directly paid Mr McCarthy at a rate of €25 per hour in cash for that work.

10. In January 2015, Mr Condon telephoned Mr McCarthy to ask if he would be interested in carrying out some plumbing work at Mr Twomey's home where Mr Condon had been engaged to renovate the property and to build an extension to the kitchen. On 26 January, Mr McCarthy met with Mr and Mrs Twomey and Mr Condon at the Twomeys' home, a bungalow, at Shanbally, near Lemybrien, County Waterford. Mr McCarthy agreed to install a new plumbing and heating system throughout the house and extension, for which he was to be paid on completion directly in cash for his hours worked at an agreed hourly rate. Mr McCarthy's own estimate was that the work would take 80 hours. He started on 29 January. There were no plans or drawings.

11. On 19 February, Mr McCarthy arrived at the house after midday to resume the work. By his estimate, he had already done 60 hours labour and his job was 85% complete. When the accident happened, Mr McCarthy was fixing a water pipe to a concrete block wall with a plastic clip and steel nail, beneath a worktop in the utility room. He was not wearing

safety goggles, although he had a pair in his van outside. Mr McCarthy had never worn goggles to fix a pipe to a wall with a clip and nail. He was accustomed to wearing goggles when drilling a hole, punching a hole in a ceiling, or performing similar tasks.

12. Mr McCarthy struck the steel nail with a hammer and it sprang back from the concrete wall, hitting him in the right eye. The sensation was one of severe pain. His vision in that eye disappeared instantly. Part of his iris came out in his hand. He went immediately to the living room where the only other person in the house at that time, John Curtis, a carpenter, was working, and told him what had happened. Mr McCarthy decided to go directly to the nearby town of Dungarvan to have his eye examined by an optician he knew there.

13. Mr McCarthy drove to Dungarvan, though he has no recollection of the journey as he believes he was in shock. The optician told him to go to hospital immediately. He phoned his wife, and his son collected him and brought him to University Hospital Waterford ('UHW').

14. There, he was operated on under general anaesthetic and 10 sutures were inserted to repair the laceration to his right eyeball. After the operation, Mr McCarthy remained in pain and was given morphine. He was discharged from hospital two days later but was referred to Mr Doris, a consultant ophthalmic surgeon in UHW, who, on examining him on 25 February, found a deterioration in the limited vision in his right eye, together with extremely high intraocular pressure, an unrepaired central corneal laceration, and a leakage of lens content into the anterior chamber in that eye. Mr Doris brought Mr McCarthy directly to theatre and performed a right vitrectomy (removal of the vitreous humour) and removal of the right lens.

15. Mr McCarthy was later referred to Professor Michael O'Keefe, consultant ophthalmic surgeon, who examined him on 22 January 2016 and, on 15 March, performed a scleral-fixated toric intraocular lens implant. That brought about some improvement in the vision in Mr McCarthy's right eye, although there was still some astigmatism that Professor O'Keefe felt might benefit from an excimer laser procedure, which was scheduled to take place on 14 September. However, that procedure could not proceed on that date because the controlling software of the excimer laser system was unable to recognise Mr McCarthy's right eye in the absence of its pupil. Professor O'Keefe is hopeful that it may yet be possible to carry out the procedure by modifying that software.

16. For the present, Mr McCarthy has less than 6/60 visual acuity in his right eye, as measured using a Snellen chart. That is a common type of ophthalmologist's eye chart, comprising rows of apparently random letters that decrease in size as the rows descend. A measurement of 6/60 represents the ability to read only the single large letter on the top row of the chart from a distance of 6 metres, whereas standard vision measures at 6/6, which denotes the ability to read the letters of the eighth rows down from that distance or, differently put, the ability to identify the single letter on the top row from 60 metres away. Professor O'Keefe has expressed the view that, if the proposed laser procedure can be successfully carried out, the Snellen acuity in Mr McCarthy's right eye

might improve to 6/36 or 6/24. Mr McCarthy's vision is 6/6 on the Snellen chart in his uninjured left eye.

17. Mr McCarthy did not return to part-time plumbing work until nineteen months after the accident and did not resume his full-time job until April 2017, following a medical assessment directed by the Council.

18. Mr McCarthy complains that, because of his injury, both his reading and his use of computers have become slower, and night-time driving has become difficult. He wears sunglasses because his right eye is now sensitive to light, and he finds driving in bright sunlight particularly difficult due to the glare or halo effect it creates for the vision in that eye.

The claim in negligence and breach of duty

19. At the time of the accident, Mr McCarthy was a qualified plumber with over thirty-five years' experience. Under cross-examination, he accepted that he conducts his trade unsupervised and has the expertise to do so, and that he takes responsibility for his own work. He also acknowledged that, at the time of the accident, he had safety goggles in his van; that there was nothing to prevent him from retrieving and using them; and that, had he been wearing them when he struck a steel nail with a hammer against a concrete blockwork wall, the injury to his eye would not have occurred.

20. What, then, is the basis for Mr McCarthy's claim that his accident was caused by the negligence and breach of duty, including statutory duty, of Mr Twomey?

21. Mr McCarthy argues that Mr Twomey owed him various statutory duties in two separate capacities: first, as a person or client who had commissioned or procured a project for construction work, namely, the renovation and extension of Mr Twomey's family home; and second, as Mr McCarthy's employer. For ease of reference, I will refer to the two broad categories of statutory duty thus invoked as 'the construction work client duties' and the 'employer duties' respectively.

i. construction work client duties

22. The relevant construction work client duties arise in the following way. Under s. 17(1)(b) of the Safety, Health and Welfare at Work Act 2005 ('the Act of 2005'), a person who commissions or procures a project for construction work must appoint in writing a competent person to ensure, so far as is reasonably practicable, that the project is constructed to be safe and without risk to health.

23. That duty is more clearly defined in Part 2 of the Safety, Health and Welfare at Work (Construction) Regulations 2013 ('the 2013 Regulations'). Under Reg. 6(1)(b) of those Regulations, a client is required to appoint in writing for every project a competent project supervisor for the construction stage. The project supervisor for the construction stage is required, among other things, to develop a safety and health plan for the construction site (Reg. 16(a)); to include in the plan, rules for the execution of the construction work for the purposes of the safety, health and welfare of persons at work

(Reg. 16(e)); and to ensure that the plan and any rules contained in it are in writing and that they are brought to the attention of all contractors and other relevant persons who may be affected by them (Reg. 16(f)).

24. Under s. 58(6) of the Act of 2005, regulations made under that Act may exempt from all or any of its provisions any specified class of work activity, or any specified class of person or place of work, where the Minister is satisfied that the application of those provisions is unnecessary or impracticable and that adequate protective measures are in place. Regulation 6(6) of the Safety, Health and Welfare at Work (Construction) Regulations 2006 provided just such an exemption in respect of a construction work project commissioned by a person in relation to that person's domestic dwelling. That exemption was removed by Reg. 3(b)(ii) of the Safety, Health and Welfare at Work (Construction) (Amendment) Regulations 2012.

25. A different type of exemption is created by the 2013 Regulations. Under Reg. 6(5) of those Regulations, the requirements imposed upon a client under Reg. 6(1), including the requirement to appoint a project supervisor for the construction stage, do not apply unless more than one contractor is involved, or Reg. 10 applies. Regulation 10 applies '[i]f construction work is planned to last longer than 30 working days or the volume of work is scheduled to exceed 500 person days.'

26. In his evidence to the court, Mr McCarthy stated that the renovation and extension work on Mr Twomey's home involved building, carpentry and electrical work, in addition to his plumbing work. There were a lot of alterations, including the installation or replacement of floors, doors and fireplaces. By Mr McCarthy's estimate, there would have been six persons working on the project in total and the construction work would have lasted approximately four or five months.

27. Michael Fogarty, a chartered engineer, gave independent expert evidence on behalf of Mr McCarthy. Mr Fogarty expressed the view that the construction of the extension would have involved digging the foundations; laying the new blocks; taking off the old roof and realigning it with the new structure; and then replacing the roof. In Mr Fogarty's opinion, the project would have taken a couple of months.

28. No evidence was adduced at trial on behalf of Mr Twomey.

29. Thus, on the balance of probabilities, I am satisfied that the construction work involved in the renovation and extension of Mr Twomey's home would have been planned to last longer than 30 working days, bringing the project within the scope of the 2013 Regulations.

30. Interestingly, in his written legal submission, Mr McCarthy advances the alternative argument that the construction work at issue comes within the scope of the 2013 Regulations because more than one contractor was involved, instancing the involvement of both Mr Condon, the builder, and Mr Curtis, the carpenter, as that of separate 'contractors'. A contractor is defined under Reg. 1 to mean '(a) a contractor or an

employer whose employees undertake, carry out or manage construction work, or (b) a person who – (i) carries out or manages construction work for a fixed or other sum, and (ii) supplies materials, labour or both, whether the contractor's own labour or that of another, to carry out the work.' If Mr Curtis, the carpenter, falls within that definition, it is difficult to see how Mr McCarthy, the plumber, does not.

31. In any event, having concluded that the construction work on Mr Twomey's bungalow fell within the scope of the 2013 Regulations, I am further satisfied that whether or not Mr Twomey, as client, had appointed in writing a project supervisor for the construction stage (although there is no reason to believe that he had), and whether or not that person had, in turn, prepared the required health and safety plan including the appropriate safety rules (which seems unlikely), there is no doubt that no such plan and rules were brought to the attention of Mr McCarthy.

32. I am prepared to accept, on the balance of probabilities, that the said failure was the result of Mr Twomey's failure, in breach of his statutory duty under Reg. 6(1) of the 2013 Regulations, to appoint a project supervisor for the construction stage, whose statutory duty it would have been under Reg. 16 to develop a health and safety plan; to include in it appropriate safety rules; and to bring it to the attention of Mr Twomey.

33. The key question, then, is whether that breach of duty caused Mr McCarthy's accident. Simply put, Mr McCarthy must still establish that, on the balance of probabilities, his accident would not have occurred 'but for' the failure to bring to his attention a health and safety plan, containing the appropriate safety rules, that had been developed by a project supervisor for the construction stage, duly appointed in writing by Mr Twomey.

34. In his written legal submissions, Mr McCarthy asserts that, had Mr Twomey appointed a project supervisor at any stage of the process, Mr McCarthy 'would have been properly instructed as to the appropriate safety equipment and process that should have been implemented and the injury would have been avoided.' Mr Fogarty expressed the view that the appointment of a project supervisor would have raised 'the overall safety culture on site', giving as an example the contractor who has it in the back of his head that he should probably be wearing safety goggles for a particular task that he does not see as a big risk, and who might be more likely to do so if aware that there is a project supervisor with overall responsibility for site safety. In his written report, Mr Fogarty went further, expressing the view that:

> 'If a project supervisor had been appointed to this site and the plaintiff was then inducted by the project supervisor in relation to the level of safety expected on the site before he commenced work and he was provided with the health and safety plan and the project supervisor was providing a certain level of supervision then, in my opinion, it is highly likely that the plaintiff, at the time of the accident, would have been wearing safety glasses and this accident would not have occurred.'

35. However, in giving evidence to the court on behalf of Mr McCarthy, Mr Fogarty referred to, and produced a copy of, a 2013 publication of the Health and Safety Authority ('HSA')

entitled *Guide for Contractors and Project Supervisors Carrying Out Construction Work on Private Domestic Dwellings; Safety, Health and Welfare at Work (Construction) Regulations 2013*. An appendix to that publication provides a template of a Safety and Health Plan for a domestic project. Part 4 of that short template document deals with 'Site Rules', which are to be inserted by the project supervisor for the construction stage of the relevant domestic construction works. That part of the template contains a box captioned 'safety rules for the execution of the construction work'. In that box, the HSA provides, among several examples of site safety rules, the following: 'Appropriate PPE to be worn.' PPE is the common acronym, or abbreviation, for personal protective equipment. The term is defined under Reg. 2(1) of the Safety, Health and Welfare at Work (General Application Regulations 2007 to 2012.

36. Thus, it seems reasonable to conclude that, if Mr Twomey had appointed a project supervisor; if that project supervisor had prepared a health and safety plan, including safety rules; and if that plan and those rules had been brought to the attention of Mr McCarthy, a careful and thorough reading of that document by him (had that occurred) would have disclosed no more (and no less) than that he was to wear appropriate personal protective equipment while working on site.

37. In his evidence, Mr Fogarty also referred to, and produced, a copy of another 2013 publication of the HSA entitled *Guide for Homeowners – Getting Construction Work Done Safely: New responsibilities for homeowners under the Safety, Health and Welfare at Work (Construction) Regulations 2013.* That publication suggests that a homeowner who has engaged a builder or main contractor to carry out construction work that falls within the 2013 Regulations would probably appoint the builder as the project supervisor for the construction stage. In the case at hand, that person would thus have been Mr Condon.

38. Beyond the obligation to bring the health and safety plan, including safety rules, to the attention of persons on site, I can find nothing in the Act of 2005 or the 2013 Regulations that requires the project supervisor to conduct any more extensive safety induction process for those persons.

39. It must be remembered that, as Mr McCarthy candidly admitted in his evidence, he did not consider that safety goggles were appropriate personal protection equipment when hammering a nail and had never worn them when doing so. He did accept that it was appropriate to wear safety goggles when 'drilling a hole or punching a hole in the ceiling.'

40. While, perhaps understandably, Mr McCarthy was anxious to stress that there was very little safety training during his apprenticeship as a plumber between 1973 and 1978, he was obliged to acknowledge that he continued working throughout the following decades, and that in consequence he had completed two or three Safe Pass courses prior to the accident. Part 3 of the 2013 Regulations deals with the general duties of contractors and others. Regulation 25(1) provides that every contractor shall ensure that every person who works under his direct control: (a) is in possession of a valid safety awareness registration card (issued on completion of the FÁS (now SOLAS) Safe Pass training

programme, or equivalent); (b) is in possession of an appropriate valid construction skills registration card and (c) has received site specific safety induction instructions.

41. I pause here to note that, in an affidavit of discovery sworn on 28 November 2018, Mr McCarthy averred that he once had in his possession a Safe Pass registration card that expired in or about July 2014 and that was not renewed until October 2017. Hence, the case might have been made that the failure to appoint a project supervisor for the construction stage, led to a failure to comply with the duty of that project supervisor under Reg. 19(1)(a) of the 2013 Regulations to ensure that Mr McCarthy, as a person at work on the site, was in possession of a valid safety awareness card (or, it might have been asserted, to prevent him from working on the site otherwise, in which case the accident could not have happened). However, Mr McCarthy did not plead or argue any such case.

42. Hence, whether Mr McCarthy had been made aware during each of the two or three Safe Pass training courses he had attended that safety goggles are appropriate PPE when hammering a nail but had chosen never to wear such goggles for that purpose prior to the accident, or had not been made aware on those courses that such goggles were appropriate PPE when hammering a nail, I cannot be satisfied in either case that, had a safety statement including a rule that 'appropriate PPE must be worn' been brought to his attention at the commencement of the plumbing work on the renovation and extension of Mr Twomey's home, it is more probable than not that he would have read that rule and taken it as his cue to wear safety goggles whenever hammering a nail in the course of that work.

43. The facts and circumstances of this case are quite different from those that were at issue in *Mulligan v Laurence Mechanical Services Ltd & Anor*. (Unreported, High Court, 23 July 2003). In that case, de Valera J concluded that the failure of the relevant defendant to appoint a project supervisor for certain construction works had led to its failure to identify the inadequacies in the use of a forklift truck, which – in turn – led to the plaintiff's accident. Mr McCarthy urges the same analysis and the same conclusion here. But there are two significant differences between that case and this one. The first is that, in *Mulligan*, de Valera J was solely concerned with the issue of blameworthiness between the defendants and not with the issue of causation between the plaintiff and defendants. The second and more significant difference is that, in *Mulligan*, the court was satisfied that the failure to appoint a project supervisor had caused the accident, whereas I cannot be satisfied of that on the evidence in this case.

ii. employer duties

44. In his defence, Mr Twomey pleads that Mr McCarthy was an independent contractor at the material time. In the reply that he delivered to that defence, Mr McCarthy has pleaded that he was a de facto employee of Mr Twomey.

45. The significance of the issue is this. The most extensive statutory duties identified under the Act of 2005 are those of employers. Section 8(1) of that Act provides that 'every

employer shall ensure, so far as is reasonably practicable, the safety, health and welfare of his or her employees.' Without prejudice to the generality of that obligation, s. 8(2) provides that an employer's duties extend to, among other matters: providing a safe place of work; providing a safe system of work; providing the information, instruction, training and supervision necessary to ensure employee safety; and providing the suitable protective clothing and equipment necessary to ensure employee safety.

46. Section 2(1) of the Act of 2005 provides the following relevant definitions:

> '"employee" means a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and includes a fixed-term employee and a temporary employee and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer;
>
> "employer", in relation to an employee - (*a*) means the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment,
>
> *(b*) includes a person (other than an employee of that person) under whose control and direction an employee works, and (*c*) includes where appropriate, the successor of the employer or an associated employer of the employer;
>
> and "self-employed person" means a person who works for profit or gain otherwise than under a contract of employment, whether or not the person employs other persons.'

47. Byrne, *Safety, Health and Welfare at Work Law in* Ireland (2nd ed. 2008) states (at p. 60):

> 'The key element of these definitions is that an employee is an individual who has entered into a contract of employment with an employer. A contract of employment is the equivalent of a "contract of service", as opposed to the arrangement which would be made by a self-employed person, or independent contractor, who enters into a "contract for services" with an organisation.'

48. As Edwards J pointed out in *Minister for Agriculture and Food v Barry* [2009] 1 IR 215 at 239, there is no single overarching test for determining whether a contract is one 'of service' or 'for services'. Various principles have been identified to assist in the proper characterisation of such contracts but, as Edwards J observed, none of those principles constitutes a 'test' in the generally understood sense of that term, namely, 'that it constitutes a measure or yardstick of universal application that can be relied upon to deliver a definitive result.'

49. One significant aspect of the question is whether the person concerned was in business on his own account. Mr McCarthy described himself in his evidence to the court as a plumber who worked as an independent contractor, and who was registered as self-employed. In

that capacity, he did small domestic work for many different customers. By way of example, he had done two separate jobs for Mr Twomey in his home in 2013; the installation of a new heating boiler and that of a solid fuel stove. All such work was quite separate from his full-time permanent employment as a water services manager with the Council.

50. The work for Mr Twomey that Mr McCarthy had largely completed at Mr Twomey's home between 29 January 2015 and the 19 February 2015 (when the accident occurred) involved the installation of a new hot and cold water plumbing system and a new central heating system throughout the bungalow, including the new kitchen extension. Mr McCarthy provided his own tools and equipment for the job, including safety goggles. Mr McCarthy sourced the necessary materials on Mr Twomey's account at a builders providers or hardware merchant in nearby Dungarvan, including the plastic clips and steel nails one of which he was using when the accident occurred. In evidence, Mr McCarthy acknowledged that he was responsible for his own system of work in that he took responsibility himself for what he did on site. He did not require supervision and dealt directly with the homeowner without any intervening control.

51. In carrying out the job, Mr McCarthy worked directly for Mr Twomey, meaning only that, although Mr Condon, the builder, had introduced the two men, Mr McCarthy did not report to Mr Condon. Mr Twomey works in Dungarvan and he left the house early each morning. When he returned home at lunchtime and in the evening, the two men discussed the plumbing work, in so far as was necessary. When more immediate issues arose, they communicated by phone or text. Their agreement was that Mr Twomey would pay Mr McCarthy directly in cash on the completion of the work. Such arrangements are just as consistent with the relationship of tradesman and householder as they are with that of employee and employer, if not very much more so.

52. In my judgment, on the preponderance of the evidence I have just summarised, the contract between Mr McCarthy and Mr Twomey for the plumbing work on Mr Twomey's home was a contract for services and not a contract of service. It follows that Mr Twomey was not Mr McCarthy's employer and did not, in consequence, owe him any of the statutory duties that an employer owes to an employee under the Act of 2005. On the contrary, by operation of s. 7 of the Act of 2005, the relevant statutory provisions of that Act applied to Mr McCarthy, as a self-employed person as they apply to an employer, as if Mr McCarthy was both an employer and his own employee.

53. It is, thus, superfluous to add that, if there had been a contract of service between Mr McCarthy and Mr Twomey (and I have found that there was not), Mr McCarthy would then have to contend with the far-reaching consequences in contributory negligence of his own clear and fundamental breach of the statutory duty on an employee, under s. 13 of the Act of 2005, to take reasonable care to protect his own safety, health and welfare at work.

Technical and procedural arguments

54. In view of the findings I have reached on the merits of the claim, it is not strictly necessary to consider the various technical arguments that Mr Twomey has raised in his defence. Nonetheless, I propose to address each briefly in turn.

55. First, Mr Twomey pleads that Mr McCarthy delayed inordinately and inexcusably in bringing these proceedings, causing Mr Twomey prejudice as a result, since the accident was not reported to him when it happened and, by the time he was formally notified of Mr McCarthy's claim, the locus of the accident had been altered by the completion of the renovation and extension works. The accident occurred on 19 February 2015; the suggestion in evidence was that Mr McCarthy had been formally notified of the claim in December 2016; the Personal Injuries Assessment Board authorised Mr McCarthy to bring proceedings on 15 February 2017; and proceedings issued on 10 April 2017. The unchallenged evidence of Mr McCarthy was that he had received a text message from Mr Twomey commiserating with him on the accident, while in hospital on 27 February 2015. More significantly, the negligence alleged by Mr McCarthy does not relate to any specific feature of the *locus in quo* at the material time, the nature or condition of which is in dispute. Accordingly, Mr Twomey has failed to persuade me either that there was inordinate and inexcusable delay in the institution or prosecution of these proceedings, or that he has suffered any prejudice in the defence of them.

56. Second, Mr Twomey asserts that Mr McCarthy failed to comply with the requirement under s. 8(1) of the Civil Liability and Courts Act 2004 to serve a letter of claim upon him within one month from the date of the cause of the action and that it is proper to draw an inference adverse to Mr McCarthy from that failure. Having heard the evidence and explanation of Mr McCarthy that he did not immediately seek legal advice, I am satisfied that it would not be appropriate to draw any such adverse inference. I would add that I found Mr McCarthy to be a credible and honest witness, who has endured a traumatic accident that has left him with a permanent disability in his right eye.

57. Finally, Mr Twomey seeks to rely on the alternative plea that, if he has any liability to Mr McCarthy in negligence, Mr Condon is a concurrent wrongdoer whose negligence contributed to Mr McCarthy's damage. Mr Twomey then seeks to rely on s. 35(1)(i) of the Civil Liability Act 1961, in asserting that, since Mr McCarthy's claim against Mr Condon is now statute-barred, Mr McCarthy is deemed by that provision to be responsible for the acts and omissions of Mr Condon. However, the evidence before the court does not support the plea that Mr Condon is a concurrent wrongdoer, since no tortious conduct is alleged – much less, established – against him. Hence, I reject that submission.

Conclusion

58. In summary, I have reached the following conclusions:

    (a) Mr Twomey did breach the statutory duty incumbent on him as a construction work client to appoint a project supervisor, but that breach of duty did not cause Mr McCarthy's accident.

(b) Mr Twomey was not Mr McCarthy's employer and did not owe him any statutory duty as such.

(c) For those reasons, Mr McCarthy's claim against Mr Twomey cannot succeed and the proceedings must be dismissed.