THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 82

Record No. 2017/160

McGovern J.
Baker J.
Costello J.

BETWEEN/

STEPHEN BURKE

PLAINTIFF/

APPELLANT

- AND –

STEPHEN MULLALLY, MICHAEL MCGINN, NORTH DUBLIN MOTOCROSS LIMITED AND [BY ORDER] MOTOR CYCLE UNION OF IRELAND LIMITED T/A MOTORCYCLING IRELAND

DEFENDANTS/

RESPONDENTS

JUDGMENT of the Court delivered on the 21st day of March 2019 by Mr. Justice McGovern

1. This is an appeal against an order of Hanna J. delivered on the 13th January, 2017 dismissing the appellant's claim with an order for costs in favour of the third and fourth named respondents [2017] IEHC 1.

2. The appellant was born on the 25th November, 1987 and prior to an accident which is the subject matter of these proceedings he was employed as a bricklayer. On the 19th January, 2014 he was taking part in a motor cross training or practice event at the third named respondent's racetrack at Gormanstown, County Meath. The track was laid out in a disused quarry. Motor cross was described in para. 2 of the trial judge's judgment. It is an exciting but undoubtedly dangerous sport. The event involved motorcyclists travelling at speed around a dirt track containing many hairpin bends, a number of straight sections and numerous embankments, which in the course of the trial in the High Court and during this appeal were referred to as "jumps" on account of the fact that many of the motorcycles using the track would become airborne at these points on the course. Some of the jumps were single and others were double jumps. At various vantage points alongside the track there were designated areas or boxes where flag marshals would be stationed in order to supervise events and give warnings to oncoming motorcyclists of accidents ahead of them or other dangers on the track. There were also two medical points from which ambulance crews could get access to the track.

3. Shortly before the practice session came to a close the appellant fell from his motorcycle while negotiating a double jump on the eastern side of the course. The double jump occurred where there were two banks. Here, the appellant fell off his vehicle and he was struck by a motorcycle driven by the first named respondent who was travelling behind him. The second named respondent in these proceedings is a director of the club organising the event. The third named respondent was the organiser of the event and the fourth named respondent is the governing body for the sport.

4. At the conclusion of the appellant's case, the first named respondent applied for a direction or non-suit and in an *ex tempore* judgment delivered on the 12th October, 2016 (the fifth day of the trial) the trial judge granted the application and dismissed the appellant's case against the first named respondent. The matter proceeded against the other respondents. At the conclusion of the entire case, and having heard all the evidence, the trial judge dismissed the claim against the other respondents. The first named respondent was not called as a witness and did not give evidence in the course of the trial.

5. The trial judge gave his ruling on the application for a direction on Day 5 of the trial and, unlike the judge in the High Court who did not have the benefit of a transcript, this court has had an opportunity of reading a transcript of the hearing prepared for the purpose of the appeal. In the course of his ruling, the judge regarded it as "notable and important", in the context of the application, that counsel for the second, third and fourth respondents did not seek any relief against the first respondent and did not file any notice claiming contribution or indemnity upon him. Furthermore, the other respondents did not seek to be let out of the action at the end of the plaintiff's case. Having regard to that information, the trial judge said that the mischief in letting one of a number of defendants out of the proceedings as raised in a number of cases discussed below would not arise. The trial judge concluded:-

> "…no case or complaint has been made out against Mr. Mullally either on behalf of the plaintiff or on behalf of the other defendants."

Accordingly, he granted the first named respondent's application for a non-suit.

6. This appeal is against the entire order of Hanna J. including the dismissal of the appellant's claim against the first named respondent at the close of the appellant's case. The issue of the non-suit formed the main thrust of the appeal as the appellant argues that the liability of the other respondents was to a considerable extent dependant on the evidence which the first named respondent would have given if no direction had been given by the trial judge. In particular, the appellant argues that one of the main issues touching on liability was whether or not the first named respondent was close to the appellant at the time when the appellant came off his motorcycle. It is clear that the resolution of this issue would determine the opportunity which the first named respondent had to avoid colliding with the appellant and the opportunity of the other respondents to warn the first named respondent and other participants of the danger that lay ahead. The latter point was central to the appellant's claim against the second, third and fourth named respondents.

7. At para. 71 of his judgment, Hanna J. stated:-

> "I am satisfied that even if a flag marshal were to have been present in the given circumstances of this case in MB11 [a point on a map of the motor cross track], given the close proximity of Mr. Mullally to the plaintiff at the time the plaintiff fell, no reasonable opportunity would have arisen for a flag marshal to offer anything by way of warning to Mr. Mullally of what had occurred. No action could have been taken which would have prevented the accident. I am satisfied that what occurred was an unfortunate but unavoidable occurrence and one of the unintended but unhappy consequences of involvement in this unquestionably dangerous sport…"

8. The appellant gave evidence of how he fell and was attempting to get off the track after being separated from his motorcycle, when the first named respondent came over the mound or "jump" and struck him, suggesting that the two motorcycles were not travelling together as they entered the double jump. He also gave evidence that he looked to his left when coming around a hairpin bend before entering the straight section of track where the jumps were, and he saw no one behind him. He steadfastly maintained that position under cross-examination. It was put to him that the evidence of two ambulance men at the scene established that the two motorcycles were close together just before the accident.

9. While I will deal with the evidence in more detail later in this judgment, it is clear that one of the principal conflicts of evidence to be resolved by the trial judge was whether or not the motorcycles being driven by the appellant and the first named respondent were travelling together or at least close to each other at the time when the appellant fell. This is of some significance against the background of the pleadings and the application for a non-suit.

The law

10. There was a large measure of agreement as to the relevant authorities to be considered in an application for a non-suit. The origin of the current *jurisprudence* on the topic is to be found in *Hetherington v. Ultra Tyre Service Limited & Ors.* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R. 544. In *Hetherington v. Ultra Tyre Service Limited & Ors* Finlay C.J. at pp. 541-542 stated:-

> "…it may be of assistance if I express a view with which I understand my colleagues to be in substantial agreement at present, on the position arising when applications for direction are made. If a defendant to an action being tried by a judge sitting without a jury applies for a direction on the basis that the evidence adduced by the plaintiff is not sufficient to establish a case against him, I think it is reasonable for a judge, if he sees fit, on a trial to inquire from that person as to whether he intends to stand on that application. If he indicates that he intends to give evidence in the event of the application failing, the judge may well properly defer the decision on the issue as to whether a case is being made out by the plaintiff until he has heard all the evidence."

McCarthy J. stated at p. 542:-

> "…a trial judge should ordinarily decline to make any finding on the issues of negligence unless and until all parties have been heard by way of evidence and submission on such issues. In the case of a single defendant where there is an application for a non-suit, the trial judge should decline to rule on such an application until he has heard all the evidence that either party wishes to adduce. The party seeking the dismissal of an action should be put to his election as to whether or not he will call evidence."

11. In *O'Toole v. Heavey* Egan J. at p. 549 said:-

> "Prior to ruling as he did at the end of the plaintiff's case, the learned trial judge had been informed by counsel for the defendant that he would be calling evidence if his application for a direction was unsuccessful. This meant that if he agreed with the opinion expressed by Finlay C.J. in *Hetherington v. Ultra Tyre Service Ltd.* [1993] 2 I.R. 535 it would have been open to him to defer his decision on the issue until he had heard all the evidence. During the course of the argument the learned trial judge had asked himself a question as follows:-
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> > "When it comes to an application for a non-suit have I not got to consider whether, if there is no other evidence, I would as a matter of proof be satisfied on the balance of probability that negligence had taken place?"
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> In my opinion, this is not a proper test where a judge is informed that other evidence will be available in the event of the failure of the application for a direction. All he has to decide is whether there is any evidence from which it could be inferred that there was negligence.
>
> There is an undoubted difference between the following two tests:-
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> > (a) Whether there is any evidence from which negligence may be inferred, or
> >
> > (b) Whether negligence has, in fact, been established on the balance of probabilities.
>
> I think that the learned trial judge applied the test as to whether negligence had been established as a matter of probability. In the course of his judgment he stated:-
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> > "First of all it is quite clear the onus in a case of this kind lies on the plaintiff to establish negligence on the balance of probabilities and I accept that I have to take the evidence at its most favourable to the plaintiff. I have been considering as the evidence was being given this question and I am bound to say I have come to the conclusion I think the plaintiff has not established the onus of proof."
>
> By "onus" at the end of this passage he is clearly referring to the "onus" he postulates at the beginning of the passage i.e. an onus to establish negligence on the balance of probabilities.
>
> In my opinion there was evidence from which negligence could be inferred and it was not necessary or proper to rule at the stage of the application whether or not it had been established as a matter of probability…"

12. In *Murphy v. Callanan* [2013] IESC 30, Denham C.J. at para. 24 said:-

> "In considering an application for a non-suit by a defendant, the trial judge must consider whether there was any evidence from which negligence may be inferred against the defendant or whether there was evidence, whatever its relative cogency or strength, upon which a court could conclude that a defendant was liable. In essence, this means that the trial judge must take the plaintiff's case against the defendant seeking the non-suit at its highest."

13. In *Moorview Developments Limited v. First Active plc* [2009] IEHC 214, Clarke J. adopted the principle that:-

> "…the court should exercise some care in considering an application for a non-suit in multi-party litigation, to ensure that no risk of injustice or embarrassment might arise by determining facts as a result of a non-suit application at the close of the plaintiffs' case…" (see para. 5.21).

14. These principles were endorsed by O'Donnell J. in *Schuitt v. Mylotte* [2010] IESC 56. This was a multi-party medical negligence action involving an application for a non-suit. Having referred to the particular complexities that arise in multi-party trials which may, for example, involve different theories of liabilities between defendants, he went on to describe the process as "an organic one" which may change during the course of the proceedings notwithstanding the structure provided for by pleadings. At p. 10 he said:-

> "While it is undoubtedly easier to address these matters in hindsight, it does appear to me that the complexity of this case illustrates the wisdom of the approach taken by McCarthy, J in *Hetherington v Ultra Tyres Services*, where he seemed to consider that the appropriate course for the Court to take when it had been indicated (particularly in a multi-party case) that the defendants intended to go into evidence, was simply to adjourn the application until all the evidence was heard."

Discussion

15. This appeal is advanced on two grounds. The first is a contention that there was evidence upon which the first named respondent could have been found to have been negligent and therefore the trial judge was wrong to grant a direction. The second ground is that the trial judge erred in failing to exercise his discretion to postpone his decision on the application for a non-suit until all the evidence had been heard.

16. So far as the first ground is concerned, this argument was not advanced before the trial judge. In the High Court the trial judge twice asked counsel for the appellant to identify the case being made against the first named respondent and counsel was unable to do so.

17. From reading the transcript it appears to me that there was evidence from which a judge could have concluded that the first named respondent was guilty of negligence. At the very least, it could be said that the first named respondent had a case to answer. A few examples from the transcript will suffice to illustrate the point:-

> (a) The appellant stated that when he came to the hairpin bend in the track prior to emerging onto the straight stretch where the accident took place, he looked to his left to see if there was anyone behind him. Mr. O'Keeffe, the engineer, said that this view was approximately forty metres. The appellant gave evidence that he looked from side to side as he came up the straight and on no occasion did he see any other rider including the first named respondent.
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> (b) In cross-examination the appellant stated that after he fell he was trying to get off the track and "after a lapse of time" he was struck by the first named respondent.
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> (c) Mr. O'Keeffe gave evidence that if the first named respondent's motorcycle was more than forty metres behind the appellant then the first named respondent would have had the opportunity of avoiding a collision with the appellant.
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> (d) Mr. Parrish is an engineer with extensive experience in investigating motor racing accidents and has a particular interest in motorcycle events. He gave evidence that a rider has an obligation to keep an eye on riders in front of him. If a rider was approximately half the length of the straight behind another rider, he could see the foremost rider take off at the double jump and emerge at the other side. If he did not see that rider emerge he would know that something was amiss. In those circumstances, he should slow down to prepare to take appropriate action.

18. Counsel for the first named respondent did not cross-examine either the appellant or Mr. O'Keeffe. In those circumstances, counsel for the appellant argues that, even if the first named respondent went into evidence he could not have given evidence inconsistent with the account given by the appellant and, with reference to Mr. O'Keeffe's evidence in particular, could not have given evidence suggesting he was closer to the appellant than the appellant himself contended.

19. It seems to me that this submission is correct and that there was evidence before the trial judge which satisfied the threshold required to refuse the application for a non-suit. While it is not at all satisfactory that a point, not taken at trial, is now sought to be argued on appeal, it seems to me that any injustice may, and subject to hearing further submissions on the point, be capable of remedy through costs or otherwise if the justice of the case requires it.

20. That brings me to the other ground of appeal which relates to the exercise of the trial judge's discretion in deciding whether to grant the non-suit at the end of the appellant's case or whether, in the particular circumstances and facts of this case, he should have either refused the application for a direction or adjourned it until he had heard all the evidence. There is no doubt that at the hearing of the application for a non-suit, counsel for the appellant urged the trial judge to defer his decision until he had heard all the evidence.

21. At the conclusion of the appellant's case, the first named respondent, in applying for a non-suit, informed the trial judge that if he did not accede to the application, his intention was to go into evidence. At para. 3(h) of his judgment, delivered at the end of the case, the trial judge said:-

> "An interesting feature of this case is that notwithstanding the presence of spectators, participants (who were around to [sic] twelve in number by this time), flag marshals and other officials there was a distinct absence of eyewitnesses as to what actually happened or its aftermath. We know that there was a significant number of people there, although one cannot put an exact figure on it. Further, we know that a number of people must have seen or heard the accident take place because the two ambulance men who, even though they had a panoramic view of the mound which the two riders involved had sought to clear, could not see the actual incident they nevertheless observed a number of spectators rushing towards the scene. Further, we know from the investigation carried out by Mr. McGinn and by interviews carried

> out by Mr. Parrish on behalf of the defence that a Mr. Boyle, a Mr. Mulligan and a Mr. Galvin were all identified as being persons who might have something relevant to tell us. For a variety of reasons, we heard from none of these. I make no comment one way or the other, other than to point this out. Such witnesses would have been available to both parties and it is, I find, perplexing that, apart from the plaintiff, no one gave eye-witness evidence of what occurred at the moment of impact."

22. While these sentiments were expressed at the conclusion of the trial, they do illustrate the problem that arose in granting the first named respondent's application for a non-suit without hearing all the evidence, particularly in light of the fact that the first named respondent had indicated he would go into evidence if the application for a non-suit was refused, and in the light of the fact that the appellant was not cross examined by the first named respondent.

23. By the time the appellant's case had concluded in the High Court and, taking his case at its highest, there was evidence from which it could be concluded that the first named respondent was negligent. It has to be said that the evidence included the expert evidence of Mr. Parrish who had been called by the second, third and fourth named respondents out of turn as he had travelled from the U.K. The other respondents had informed the trial judge that they were not blaming the first named respondent for the accident. In those circumstances and having regard to the fact that counsel for the appellant was unable to identify the case being made against the first named respondent, it is easy to see how the trial judge acceded to the application of the first named respondent for a non-suit. If, in fact, the first named respondent was very close to the appellant in the moments leading up to the collision, there would have been little or nothing he could have done. On the other hand, if he had been some distance behind the appellant, the issue of the first named respondent's negligence and the absence of a flag marshal would have come into play and the court would have had to consider whether the accident could have been avoided either by the first named respondent taking greater care or by having a flag marshal in position to warn other participants of a danger ahead. The issue concerning the absence of a flag marshal was an essential part of the appellant's case and was also pleaded by the first named respondent in para. 4(e) of the amended defence.

24. The first named respondent served a notice claiming contribution or indemnity on the second and third respondents on the 10th April, 2015. There was no cross-notice from the respondents claiming contribution or indemnity from the first named respondent. On the 28th September, 2016 the first named respondent filed an amended defence. Paragraph 4(e) of the amended defence states:-

> "It is admitted that the Plaintiff was taking part in a practice event controlled and organised by the Second and Third *and Fourth* Named Defendants when he was struck by a vehicle driven by the First Named Defendant. However, it is denied that the First Named Defendant caused that collision as pleaded or at all. By way of Defence it is pleaded as follows. The Plaintiff was a novice competitor and the First Named Defendant was an expert competitor. At all times the First Named Defendant exercised all due and reasonable skill, care and attention to ensure that he caused no injury to the Plaintiff or any other of his fellow competitors and furthermore at all material times the Defendant drove his vehicle in an entirely correct manner and at an appropriate speed in all the circumstances. The Plaintiff in the course of the practice event drove over a jump and fell off his vehicle such that he landed on the track on the other side of the jump and was left lying there in the path of any riders coming up behind him. The First Named Defendant was such a rider. The First Named Defendant completed the jump and through no fault of his own his vehicle landed on the Plaintiff. The First Named Defendant was injured in the collision and there was nothing the First Named Defendant could have done to avoid the collision as he had no warning that the First Named Defendant [sic] was on the other side of the jump before he made the jump and only saw the Plaintiff on the track just before he collided with him and at a stage when the collision had become unavoidable. There was no Flag-man/Marshal present at the jump to prevent accidents such as happened to the Plaintiff as there should have been and it was the responsibility of the Second and Third and *Fourth* Named Defendants to organise the practice event so as to run it safely and to ensure that there was a Flag-man/Marshal presiding over every jump." [emphasis added]

25. In the course of his judgment at the conclusion of the trial, Hanna J. discussed at some length the evidence from various witnesses including the engineer called by the appellant and the second, third and fourth named respondents.

26. He reached the conclusion that there was no flag-marshal present at a point designated as "MB11" on a map of the motor cross track. This would have been the nearest marshal position to where the accident occurred. After confessing some difficulty in reaching a conclusion as to what the marshalling arrangements were on the day of the accident, he then referred to the conflict between Mr. O'Keeffe, an engineer called on behalf of the appellant, and Mr. Tennyson, an engineer called on behalf of the respondents and also the evidence of Mr. Parrish on behalf of the respondents with regards to the necessity of a flag-marshal at that point. In the end, he concluded that it did not matter because the first named respondent was so close to the appellant that it would not have made any difference where a flag-marshal was present as there would not have been sufficient time to warn the first named respondent that the appellant had fallen and for him to have taken evasive action.

27. In the course of his evidence, the appellant firmly asserted that as he came around a hairpin bend before entering a straight section where the accident occurred, he had an opportunity to look over his shoulder and there was nobody visible behind him. He went on to describe how he would have been able to see any other motorcyclists present on the other side of the hairpin bend as he emerged from it but he saw no-one there. Under cross-examination he was pressed at some length about whether or not the first named respondent was close to him at the time he fell. It was put to him that two ambulance men would give evidence that the motor cycles driven by the appellant and first named respondent were very close to each other as they came out of the hairpin bend and proceeded along the straight stretch of track where the accident occurred. The appellant steadfastly maintained his position that the first named respondent was not close to him notwithstanding any evidence that might be given by the ambulance men.

28. This issue became critical in the determination of the proceedings because ultimately the trial judge dismissed the claim against the second, third and fourth named respondents because he accepted that the two motor cycles involved in the collision were so close to each other at the time of the accident that a presence or absence of a flag-marshal at location MB11 would have made no difference.

29. Mr. Tony O'Keeffe, consulting engineer, gave evidence that if there had been a flag marshal at MB11 he/she would have had an opportunity to give the first named respondent a warning that the appellant had fallen and the accident would not have happened. His opinion was based on an assumption that the evidence given by the appellant was correct. He observed that the appellant was not cross-examined by counsel for the first named respondent. But it cannot be inferred that the appellant's account of the first named respondent not being immediately behind him went unchallenged since counsel for the second, third and fourth named respondents cross-examined him at some length on this issue.

30. But at the time the first named respondent applied for a non-suit, the state of the appellant's evidence, taken at its height, was

that the motorcycles being driven by him and the first named respondent were not close to each other immediately prior to the accident and his engineer offered evidence that if that was the case the accident was preventable by having a marshal at MB11. Mr. Parrish gave evidence that as the accident happened on a straight stretch of track no flag marshal was needed at that point on the course as a motorcyclist would be able to see if a rider ahead of him did not emerge from the double jump and would know he had either stopped or fallen off. He said that flag marshals would be better deployed elsewhere. While he made no direct criticism of the first named respondent, he did state that if he was some distance back and did not see the appellant coming out the other side of the jump he would be incautious setting off over the jump. In my view it is irrelevant that Mr. Parrish was a witness called on behalf of some of the respondents and taken out of turn. What is important is the state of the evidence at the time when the application was made for a non-suit.

31. It has to be remembered that the test to be applied by the court in an application for a non-suit is not based on whether or not the plaintiff has established his case as a matter of probability but rather involves a consideration of whether there was any evidence from which negligence may be inferred against the defendant(s) or whether there was evidence upon which a court could conclude that a defendant was liable; (see *O'Toole v. Heavey* and *Murphy v. Callanan & Ors.*). Each case has its own dynamic which comes into play when an application for a non-suit is brought at the conclusion of the plaintiff's case. By not deferring his decision on the non-suit until all the evidence was heard, and by letting the first named respondent out of the case at the conclusion of the appellant's case, the decision of the trial judge had the collateral effect of seriously compromising his claim against the other respondents.

32. The trial judge's approach should have been informed by the observations already referred to in *Hetherington v. Ultra Tyre Service Limited & Ors.*, *Moorview Developments Limited v. First Active plc* and *Schuitt v. Mylotte*. Although the trial judge purported to do so it appears to me that, in fact, he did not sufficiently take into account the dangers of granting a direction in the particular circumstances of this case before hearing all the evidence.

Conclusions

33. Having been informed that the first named respondent would go into evidence if the application for a non-suit was refused, the trial judge should have deferred any decision on that point until all the evidence was heard. The first named respondent denied liability on a number of grounds including a plea that there was nothing he could have done to avoid the collision as he had no warning that the appellant had fallen and that the absence of a flag marshal at MB11 meant that no adequate warning could be given. It is clear that before the trial judge acceded to the application for a non-suit, the appellant had been cross-examined on the basis that there would be evidence that the two motor cycles were in very close proximity in the moments leading up to the accident while he himself claimed that this was not the case. The evidence of the first named respondent would have been important in helping the trial judge to determine this issue. While the burden of proof remains at all times on the appellant and, acknowledging that the other respondents did not serve notice claiming contribution or indemnity on the first named respondent, it seems to me that the ability of the trial judge to properly evaluate the issue of liability was compromised once the first named respondent was let out of the proceedings at the end of the appellant's case. This is particularly so in circumstances where he was not called by the other respondents. The evidence of the first named respondent had, at least, the potential to affect the liability of the other respondents.

34. This case all too clearly illustrates the reservations expressed by McCarthy J. in *Hetherington* when he stated his view that in a multi-party action the trial judge should ordinarily decline to make any finding on the issues of negligence unless and until all parties have been heard by way of evidence and submission on the issues arising in the trial.

35. As a consequence, the High Court judge's finding on the balance of probabilities that the first named respondent was travelling in close proximity behind the appellant involved the resolution of a disputed issue of fact in circumstances where one of the critical witnesses as to fact, namely the first named respondent, was not heard, having been let out of the proceedings. That gave rise to an unsatisfactory situation. Furthermore, there was evidence at the time the non-suit was granted that could have given rise to findings of negligence against not only the first named respondent but also the other respondents, and that is to be found in the testimony of the appellant, Mr. O'Keefe and Mr. Parrish.

36. In my view the trial judge was in error in acceding to the first named respondent's application for a non-suit at the conclusion of the appellant's case and in failing to exercise his discretion to defer any decision on this point until all the evidence was heard. I am also satisfied that the trial judge failed to apply the correct legal test to the application having regard to the state of the evidence at the conclusion of the appellant's case. I would therefore allow the appeal and remit the matter back to the High Court for a re-trial.