THE COURT OF APPEAL

Record No. 2014/106

[Article 64 transfer]

Kelly P.
Hogan J.
Mahon J.

BETWEEN/

ROWENA LYNCH

PLAINTIFF/APPELLANT

AND

PATRICK COONEY AND TREVOR WINCKWORTH

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 13th day of January 2016

1. This is an appeal from a decision of the High Court (Butler J.) given as far back as 15th October 2003 whereby he dismissed the plaintiff's claim against the defendants. The defendants were sued by the plaintiff in their capacity as trustees of Mullingar Rugby Club in respect of certain events which happened some six years earlier again on 30th November 1997. The intervening delay of twelve years between the decision in the High Court and the date upon which this appeal was heard by this Court (14th December 2015) has not been in the interests of the litigants or, for that matter, the proper administration of justice.

2. On the evening in question, the plaintiff, Ms. Rowena Lynch, and her brother, Mr. Damien Lynch, attended a discotheque at Mullingar Rugby Club which was supervised by three security staff. The essence of her case against the defendants is that she was assaulted within the Club premises by a Mr. Paul Jordan, when she intervened to stop him assaulting her brother. (Rather confusingly, Mr. Jordan is also known as Mr. Evans and some witnesses described him as such. To avoid any further confusion I propose in this judgment to describe him simply as Mr. Jordan). She contends that Mr. Jordan then grabbed a hold of her and violently kneed her in the face when at least two of the security guards watched and looked on as this occurred. She then says that she was forcibly frogmarched out of the club by the security guards. She claims that she was refused entry back into the club and none of the security guards were prepared to summon an ambulance.

3. There is no doubt at all but that Ms. Lynch was seriously injured as a result of this assault and that she suffered injuries to her nose and cheekbones which are likely to have life long effects. There was evidence from an investigating Garda, Garda Patrick Connolly, that Mr. Jordan was subsequently convicted in the District Court of an offence under s. 3 of the Non Fatal Offences against the Person Act 1997 in respect of this assault and received a sentence of six months imprisonment.

4. It appears to have been accepted in the High Court that the plaintiff would be entitled to succeed in her action against the defendant trustees (i.e., in effect as against the Club) if her account that these events occurred within the Club's premises were to be accepted as correct.

5. Before considering the reasons given by the trial judge for the decision to dismiss the claim, it may be convenient to summarise the evidence concerning the events on the night in question. At the outset, however, it should be said that this Court is handicapped by the fact that it has no record whatever of what happened on the first day, although it has been furnished with a transcript of the second (and final) day. It appears that the solicitors for the defendants offered to the supply this Court with their notes of the first day's evidence, but the plaintiff objected – as she was perfectly entitled to – to this course of action.

6. The Court understands, however, that on the first day of evidence the plaintiff gave evidence that she remonstrated with the security guards to come to the assistance of her brother after he was set upon and that as she tried to intervene, Mr. Jordan grabbed her and kneed her in the face. She claimed that the security guards watched this and did nothing to intervene. She further contended that she was then forcibly removed from the premises by at least one of the security guards, even though she was badly hurt as a result of this serious assault. She also claimed that they refused to allow her back into the club or summon an ambulance.

7. Against that background I can now summarise the evidence given by the relevant witnesses (*i.e.*, those who gave evidence in relation to the assault) on the second day.

The evidence of Kenneth McDermott

8. Mr. Kenneth McDermott gave evidence that he was friendly with Mr. Damien Lynch and that he had been with him earlier during the course of the evening, although he did not travel to the rugby club in his company. He said that at the rugby club he heard some people say that there was going to be a fight with Damien Lynch and that the person who "was going around the rugby club talking to people" for this purpose was Paul Jordan.

9. Mr. McDermott said that Mr. Lynch then went to the security personnel to say "that something was about to happen", but that "they did not do a lot about it." He then stated that he saw an argument break out between Mr. Lynch and a number of other young men:

> "I saw Damien and a couple of boys arguing. I am nearly sure that there was a row starting, there was pushing and that. Damien's sister went up and this guy, Jordan or whatever his name is, grabbed a hold of her and pulled her down and kneed her into the face. And the bouncers did not do anything."

10. Mr. McDermott said that he saw "blood coming out of her face" and that she appeared to be definitely hurt. He insisted that this assault had been inside the club premises. He later saw her go out and then he saw her outside lying between two cars surrounded by a group of people. An ambulance was then called.

11. In cross-examination Mr. McDermott insisted that the incident involving the plaintiff had occurred within the club premises. He stated that the reason he did not go to her assistance was that he did not want to get involved. He said that he had waited about 10 minutes after the incident before going outside and at which point he saw the plaintiff and her brother. He thought it was possible that there might have been fighting outside and that Damien Lynch had said as much. He also agreed that the plaintiff was outside the club at the time that there was (apparently) another fight involving her brother, but he did not see it.

Martin Fagan
12. Mr. Fagan said that he and two others, Mr. Oliver McCaffrey and Mr. Philip Glennan, had been engaged on security duties by Mullingar Rugby Club on the night in question. He said that at 1.15am he saw a row break out with two males (namely, Mr. Jordan and Mr. Lynch) fighting each other. Mr. Fagan said that he intervened to stop this fighting, separating one man from another. As, however, he was removing one of them - namely, Paul Jordan - from the premises, he said that he saw a person whom he now knew to be the plaintiff kick Mr. Jordan in the groin. He never had to restrain Mr. Lynch at any stage.

13. Mr. Fagan said he removed Mr. Jordan from the premises. He then came back inside where he met Mr. Lynch. Mr. Lynch said that he feared that others might gang up on him and he asked if he could stay on the premises, to which Mr. Fagan said he could.

14. Mr. Fagan rejected the suggestion that the plaintiff was injured inside the premises, as she looked "okay" when she was being escorted from the premises by two other security guards. However, when the security guards were clearing out the club, Mr. Fagan went outside again. His testimony continued thus:

> "I seen that there was a row after breaking out again in the car park. I seen the girl, which I now know to be Rowena Lynch, she was bleeding."

15. Mr. Fagan then went on to say that an ambulance had been called, but he was not aware who had called the ambulance. He stated further that he had not been made aware of any bad feeling between Mr. Lynch and Mr. Jordan, nor had he been given any advance warning of possible difficulties. Mr. Fagan did not say who the row was between or that he saw Ms. Lynch being assaulted outside the premises.

16. In cross-examination Mr. Fagan agreed that he had described the altercation within the club premises as a "slight dispute" in his examination in chief. He stood over that description in cross examination.

17. Mr. Fagan denied that he had ever spoken to the plaintiff on the night or that she had ever approached him for assistance to stop her brother being assaulted. He denied that he had ever seen the plaintiff being kneed in the face by Mr. Jordan inside the club or that she was bleeding inside the club. He said that she was escorted from the premises by the other security guards, but that was no question of her being frogmarched off the premises.

Oliver McCaffrey
18. Mr. McCaffrey gave evidence that he was a security guard on duty that evening. He said that there had been no previous intimation of any pending trouble when he saw a row break out. He identified one of the persons (a Mr. McCormack) throwing a punch and removed him from the hall and put him inside. When he returned there were still people milling around and he removed another individual whom he saw throwing a punch. In this he was assisted by one of the other security guards and, as they reached the door, they realised that this person was a girl whom he now knows to the plaintiff in this action. They put her outside the door.

19. A little while later, as he checked the car park, he was informed that a girl had been hurt. He went over and saw that she was injured and called an ambulance.

20. In cross-examination he rejected the suggestion that he had received any advance warning of the fight or that the plaintiff had complained or that he stood by as the plaintiff's brother had been set upon and knocked to the floor. He also denied that he had seen Ms. Lynch with blood on her face inside the hall.

The reasons given by Butler J.
21. I can now turn to consider the reasons actually given by Butler J. in his ex tempore judgment:

> "What is certain in this case is that the plaintiff was assaulted, and badly assaulted, and no behaviour at all could justify such an assault. What is also certain is that she suffered badly as a result of that assault, the assault took place either in or in the environs of the Rugby Club. What is slightly uncertain is what the consequences of the assault were for her because her recovery has been complicated by other matters that took place before and after. However, I do have to look at liability and it seems that there can be no doubt that there is a duty of care on the club in the circumstances such as those alleged by the plaintiff. Namely, that there was a row going on involving physical force in which her brother was being attacked. Even if she had not made the complaint, it should have been observed if it was going on, but she said that she made the complaint. Therefore, if the plaintiff is believed she has got to succeed. As against that we have the evidence of the two bouncers. I call them that because that is what they are commonly known as. We have the evidence of the two bouncers which is substantially different. It appears that a row, certainly on the evidence of the first of the two witnesses, Mr. Fagan, a row was going on which he went over to. He was bringing someone out before any injury, on his evidence, according to the plaintiff. As he went out he saw the plaintiff come and throw a kick at somebody's groin area, I think it was. That evidence is largely corroborated by the evidence of Mr. McCaffrey. I think the evidence of Mr. McDermott is significant in that I am quite satisfied he is telling the truth after a long time. It does not gel that people in whose company he was in Mullingar, okay, they travelled separately to the dance, went to the dance: a – he learned that the brother - … of the plaintiff was about to be beaten up; and b – he actually physically sees the man being kneed badly in the face by a man and does absolutely nothing by way of intervention. He does not go out to see if she is alright when she is thrown out. It does not seem to me to gel with the facts. I have to decide the matter on probabilities.
>
> While I entirely accept that she is injured, I do not think that she has gone anyway to satisfy the onus of proof as a matter of probability, I find that the incident occurred and there was an incident and a serious incident. I agree it is not a small incident, the incident described by Mr. Fagan.

> That being the case Mr. Fagan, with the protection of the club, intervened as soon as practicable and with no forewarning. It is a straight issue of fact.
>
> On that basis, I am sorry to say the plaintiff fails."

Whether this Court is bound by the trial judge's finding of fact that the incident did not occur within the hall

22. In this case the trial judge was faced with all too common – if still unenviable – task of being obliged to choose between apparently credible witnesses who gave diametrically differing accounts of what happened. There is no doubt but that the weighing of evidence in cases of this kind with a view to establishing on the balance of probabilities what actually happened is a most difficult exercise. This is especially so where (as here) witnesses are asked to recall what may be fleeting events in circumstances where even the evidence of entirely honest witnesses is liable to inaccuracies and imperfect or confused recollection.

23. The starting point in any evaluation of this issue is that it is accepted by all sides that the plaintiff was seriously assaulted that evening. It is further accepted that this assault *either* occurred *within* the club premises or that it occurred immediately *outside* the club premises. In any event, Butler J. so found in the course of his ruling and neither party takes issues with these findings of fact.

24. What is in dispute is the finding which Butler J. made to the effect that the assault did not occur within the club premises. This, of necessity, implies that he must have found that the assault occurred outside the premises.

25. In *Hay v. O'Grady* [1992] 1 I.R. 210, 217 the Supreme Court held that if "the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings." McCarthy J. also stated that ([1992] 1 I.R. 210, 218) this emphasised:

> "the importance of a clear statement….by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows."

26. The central question to this appeal is whether there was credible evidence that the assault did not occur inside the club. Butler J. apparently decided the case on the basis that he preferred the account of the events as given by Mr. Fagan, as appears from his judgment on the basis of a comparison of Mr. Fagan's evidence with that of Mr. McDermott. He certainly does not appear to deal in any detail with the evidence of the plaintiff herself.

27. In relation to the evidence of Mr. McDermott, Butler J. stated that he was satisfied that he (Mr. McDermott) "is telling the truth after a long time" and that his evidence was "significant." But what was that evidence? Mr. McDermott unequivocally stated that he saw the plaintiff being assaulted within the club premises by Mr. Jordan as the security guards looked on after she went to her brother's assistance and that she was later forcibly removed by at least one of the security guards from the premises. Mr. McDermott never wavered from that evidence in cross-examination.

28. Having stated that he accepted Mr. McDermott's evidence, the trial judge then proceeded – in effect – to reject it on the basis that he (Mr. McDermott) did not intervene when he saw the plaintiff being kneed in the face (inside the premises), nor did he go outside to see if she was alright after she was evicted from the club.

29. Mr. Fagan's own evidence raises questions. He referred to the dispute involving the plaintiff's brother as a "slight dispute", whereas in fact it was clearly anything but that, and, indeed, was so found by Butler J. There is also the fact that Mr. Fagan stated that the plaintiff had kicked Mr. Jordan in the groin, whereas Mr. McCaffrey stated that she threw a punch.

30. It is true that at times all three witnesses mentioned the possibility that there might have been fighting outside the club and that the plaintiff had received her injuries in that fashion. But only Mr. Fagan ever claimed to have seen this fighting and even then he did not say who that fighting was between or that he saw Ms. Lynch being assaulted. Both Mr. McDermott and Mr. McCaffrey said that other persons (who were not called as witnesses) told them either that there was such fighting or that there might have been such fighting. In addition, even though there were also groups of people outside the rugby club at the time, no one (with the exception of Mr. Fagan) gave direct evidence that they had witnessed such fighting or that they had seen any assault on the plaintiff outside the club premises. The plaintiff herself, of course, was emphatic that the incident occurred within the club and within sight of the security guards.

The Supreme Court's decision in *Doyle v. Banville*

31. While it is sometimes perceived that, post *Hay v. O'Grady*, a trial judge's findings of fact is, to all intents and purposes, more or less inviolable, the Supreme Court's decision in *Doyle v. Banville* [2012] IESC 25 illustrates that this is not so. That was a case involving a serious motor accident which turned on key and minute findings of fact. In his judgment, Clarke J. first noted the context in which *Hay v. O'Grady* had been decided:

> "It does need to be recalled that the context in which the issues which came to be decided in *Hay v. O'Grady* were before the Supreme Court was the then recent abolition of jury trials in most personal injury actions brought about by s.1 of the Courts Act, 1988. There was a well established jurisprudence as to the circumstances in which it was possible for an appellate court to review and, if appropriate, overturn, what amounted to factual decisions by juries. This Court, in *Hay v. O'Grady,* was concerned with whether there had been any change to that position brought about by the move to trial by judge sitting alone. As noted by McCarthy J. the established jurisprudence in respect of jury trials was that issues of fact and the inferences to be drawn from the facts as found should not be disturbed by this Court if there was evidence to support such findings and inferences. The position, in respect of a trial by a judge alone, deriving from *Hay v. O'Grady* is somewhat different in that it is clear that this Court may, at least in certain circumstances, be in a position to review an inference of fact drawn by a trial judge (at least where such inference does not depend on oral evidence or recollection of fact and where the trial judge had an opportunity to assess the relevant witness(es)). It is also important to note that McCarthy J. emphasised the importance of a clear statement by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

32. Clarke J. then continued:

> "In addition it does need to be said that there are other consequences of the move to trial by judge alone. Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost. Where a jury decides facts, an appellate court will only have the submissions and evidence of the parties,

the judge's direction and the answers given by the jury to the questions submitted to them, to go on. Where a judge decides the facts there will be a judgment or ruling whether orally given immediately after the trial, or in writing after a period. *To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred*. The obligation of the trial judge, as identified by McCarthy J. in *Hay v. O'Grady,* to set out conclusions of fact in clear terms needs to be seen against that background.

In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides.

In addition there may be cases where the court has nothing more to go on but the demeanour of the witnesses and where there will be little more to be said than that the court found one set of witnesses as being more credible than another. However where, as in a case such as this, there are factors surrounding the accident in question on which the parties lay emphasis for their argument as to which of two competing accounts should be accepted, then the court must, of course, address at least the broad drift of the argument on both sides so that the parties may know why the court came to its conclusions.

Sometimes the points made may concern reasons why a particular witness or witnesses are not to be treated as credible either because of an assertion that the witness is not being truthful or simply because it is said that the witness is mistaken. In many cases, and this again is one, there may be expert engineering evidence tendered which may, to a greater or lesser extent, dependant on the facts of the case, prove to be of assistance in attempting to reconstruct the circumstances in which the accident occurred. Sometimes there may be significant forensic findings which, when coupled with expert engineering evidence, lead to a clear picture from which the court can readily ascertain the likely sequence of events leading to the accident in question. On other occasions, and this case falls into this bracket, it is more likely that the expert evidence has to be seen in conjunction with eye witness accounts and may, in that context, be of some assistance to the court in assessing the likelihood of such eyewitness accounts being correct. The extent to which the trial court is influenced by the credibility of eye witness accounts, forensic evidence or expert engineering evidence is largely a matter for the trial judge in the assessment of that evidence. The trial judge should, however, address the main arguments put forward by the competing parties as to how the relevant accident actually occurred by reference to such evidence of the categories to which I have referred as the parties choose to place reliance on.

Finally, before moving on to the specific issues which arise in this appeal, it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this Court to seek to second guess the trial judge's view." (emphasis supplied)

33. These passages are of great assistance in the present case because they illustrate the proper scope of the decision in *Hay v. O'Grady*. Before considering how these principles might be applied to the present case, one other aspect of *Doyle* deserves attention.

34. As I have mentioned, that case was a personal injuries action arising out of a road traffic accident with very serious consequences for the plaintiff. A key issue in the case was whether the plaintiff's motorcycle had collided with a car at a time when that car was stationary or whether the car was still moving at the time of the collision, dragging back the plaintiff for some 10m. Although the trial judge stated that he accepted "in full" the evidence of two "important, independent witnesses", Clarke J. pointed out that they had each given different accounts as to whether the car was stationery or not.

35. Clarke J. held that the judge could not, accordingly, have stated that he accepted the evidence "in full" of *both* witnesses when their evidence so plainly diverged on this key point. In the circumstances, this "was not a mere tangential error, but one which related to a point of some significance in the case." The Court ruled that this error was one of two errors on the part of the trial judge which justified the Court setting aside the ruling of the trial judge and directing a fresh trial.

Applying the principles in *Doyle v. Banville* to the present case

36. So far as the present appeal is concerned, everything really turns on whether the assault took place inside or outside the club's premises. To that extent, therefore, the trial judge's credibility assessment on this point assumes a critical importance.

37. As the judge accepted, Mr. McDermott was a "significant" witness who, as I have stated, was emphatic that the assault occurred within the club premises and that Mr. Jordan had assaulted the plaintiff while the security guards did nothing to assist. Although Butler J. stated that he was "quite satisfied that [Mr. McDermott] was telling the truth after a long time", he then proceeded to reject the entirety of the evidence on the basis that, even though Mr. McDermott was a friend of the Lynchs, he had done nothing to assist her if the assault had, indeed, occurred within the club premises.

38. Even though Mr. McDermott had given an explanation for his failure to act – he said that he did not want to get involved – the trial judge would have been entitled to reject this explanation. But the rejection of that explanation also amounted to a rejection of the entirety of Mr. McDermott's evidence. In these circumstances, rather like the trial judge in *Doyle* who stated that he accepted "in full" the evidence of two independent witnesses even though they contradicted each other in material respects, the trial judge could not on the one hand say that he was satisfied with the truthful nature of the evidence of a significant witness, while proceeding to reject that evidence in its entirety on the other. To that extent, therefore, the trial judge fell into error by being inconsistent in his conclusions.

39. So far as Mr. Fagan's evidence was concerned the trial judge appeared to accept his evidence that the plaintiff had kicked Mr. Jordan in the groin just as Mr. Fagan was in the process of removing Mr. Jordan from the premises. The trial judge found that that that evidence was "largely corroborated by the evidence of Mr. McCaffrey." But Mr. McCaffrey never stated that the plaintiff had kicked Mr. Jordan in the groin as Mr. Fagan was removing him from the premises: his evidence was rather that he apprehended the plaintiff just after she had thrown a punch at Mr. Jordan and that either Mr. Glennan or Mr. Fagan then immediately "gave" him "a

hand" to escort her off the premises.

40. For his part Mr. Fagan stated he did not escort Ms. Lynch off the premises because by this stage he had already removed Mr. Jordan and he was in the process of returning inside:

> "I was coming back in after putting out Mr. Jordan and the other two bouncers, Ollie McCaffrey and Philip Glennan, were bringing [her] out and there was absolutely no hassle that I could see at all, she was brought out."

41. In this respect the evidence of Mr. Fagan and Mr. McDermott is not consistent so far as these precise details are concerned. Mr. Fagan says that as he was removing Mr. Jordan from the premises the plaintiff came up and kicked Mr. Jordan in the groin. Having removed Mr. Jordan from the premises, Mr. Fagan then came back into the club and saw Ms. Lynch being escorted off the premises by Mr. Glennan and Mr. McCaffrey.

42. On Mr. McCaffrey's account, however, he saw Ms. Lynch throw a punch at Mr. Jordan and he then escorted her "with assistance" outside. But if Mr. Fagan's account is correct, then Mr. Jordan must have been already outside when this punch is said to have been thrown by the plaintiff, because he (Mr. Fagan) had already removed Mr. Jordan from the premises. Mr. Fagan says as he returned inside he saw Ms. Lynch being removed from the premises by Messrs. Glennan and McCaffrey.

43. Quite obviously, this Court cannot resolve this controversy, but, with respect, I do not think that it can be said that Mr. McCaffrey "largely corroborated" Mr. Fagan's evidence in respect of these vital details. There are important differences in evidence between the two witnesses in terms of both the sequence of events and the events themselves and, in this context, these differences cannot be regarded as tangential.

44. It must also be recalled that in *Doyle* Clarke J. considered that it was important that the judgment "engages with the key elements of the case made by both sides and explains why one or other side is preferred" and that where – as in the present case - a case turns "on very minute questions of fact" as to the precise way in which the incident in question occurred, then clearly the "judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred."

45. In the present case the ruling of the trial judge makes little mention of the evidence given by the plaintiff. More particularly, the ruling does not explain how the plaintiff was in fact assaulted if that assault did not occur within the club premises. At the hearing of the appeal, counsel for the defendants, Mr. Ó Scannáil S.C., submitted that it was for the plaintiff to prove her case and that for this purpose the onus was on her to show that the incident occurred within the club premises. That, of course, is true. This, nevertheless, does not, with respect, quite address the point addressed by Clarke J. in *Doyle*, namely, the vital necessity for the trial judge to engage with the evidence.

46. This issue is of some importance in the context of the present appeal. It is, of course, quite possible that the assault occurred outside the club. Yet there was no direct evidence of this from any witness. With the exception of Mr. Fagan, the singular fact remained that no witness came forward to say that they had seen fighting in the car park or elsewhere outside the club, still less that they had witnessed Ms. Lynch being assaulted outside the premises, even though there was evidence that there were groups of people immediately outside the club at the relevant times. As I have already noted, Mr. Fagan did not say whom the fighting outside the club premises was between or that he actually saw Ms. Lynch being assaulted in that location.

47. The one certainty in this case is that Ms. Lynch was subjected to a serious assault. If it did not occur within the club, it must have happened outside. While, as I have just stated, this was certainly a possibility, the fact that there was no *direct* evidence at all of this happening outside the club was surely a factor which had to be weighed in the balance if the judge was to engage properly with the evidence. The fact that this exercise was not performed by the trial judge is itself an error of law which would justify this Court intervening to set aside this finding of fact.

Conclusions on the findings of fact

48. Summing up, therefore, I would conclude as follows so far as the findings of fact made by the High Court are concerned:

49. First, the trial judge faced the difficult task of evaluating the conflicting evidence of the parties as to what actually occurred on the night. He was entitled – indeed, obliged – to prefer the account of one group of witnesses over another.

50. Second, in line with the Supreme Court's analysis in *Doyle v. Banville* of the scope of review of findings of fact on appeal, I am driven to the conclusion that there are essentially three reasons why the trial judge's findings of fact to the effect that the assault did not occur within the premises must be held to be tainted by error and cannot accordingly stand.

51. Third, so far the first of these errors are concerned, the findings made in relation to a witness regarded by the trial judge as significant, namely, Mr. McDermott, were inconsistent. The trial judge found him to be a truthful and significant witness, yet in effect rejected the totality of his evidence.

52. Fourth, the trial judge found that the evidence of Mr. Fagan was credible in that it was corroborated in material particulars by that of the other security guard, Mr. McCaffrey. For the reasons already set out in some detail in this judgment, there are, however, differences between the two accounts both in terms of the events themselves and the sequence of events. In a context where, in the words of Clarke J. in *Doyle*, a case turns on "very minute questions of fact" as to the precise way in which the assault occurred, these differences must be adjudged to be material.

53. Fifth, the trial judge erred in the assessment of the evidence in that he did not, with respect, engage fully with the evidence in the manner in which he was obliged. Specifically, there was no analysis or explanation as to how the assault did occur if it did not occur within the club premises in the manner claimed by the plaintiff.

Overall conclusions

54. In the light of these conclusions, I fear that there is no course open to this Court other than one which would involves the remittal of this case to the High Court for a complete re-trial.