Neutral Citation Number: [2005] IEHC 144

THE HIGH COURT

[1994 No. 80 32P]

ALAN BRYAN

PLAINTIFF

AND

KILDANGAN STUD UNLIMITED LIABILITY COMPANY

DEFENDANT

Judgment of Gilligan J. delivered on 29 day of April, 2005.

1. The plaintiff's claim arises from a road accident which occurred on 18th day of May, 1993 in County Kildare as a result of which the plaintiff claims that he sustained personal injuries, loss and damage while driving a motor vehicle the property of Tom Bryan, his father, when it was in collision with a tree which had fallen across the highway and which was the property of the defendant company.

2. The defendants delivered a defence in which they claimed that the plaintiff was estopped and precluded from maintaining its claim herein that the defendant was more than 20% liable for his injuries against a background where the plaintiff's father Tom Bryan had instituted proceedings in the District Court to recover the cost of repairs to his motor vehicle. These proceedings culminated in the Circuit Court on 3rd day of May, 1996 and the court made a finding that the plaintiff was 80% responsible for the accident and the defendant 20% responsible.

3. The defendants contends that the issue herein as to liability is *res judicata* or alternatively the plaintiff's proceedings are an abuse of the process of the court and should be stayed.

4. As decided by the Supreme Court in *McCauley v. McDermott* [1997] 2 ILRM 486 for a successful plea of issue estoppel it must be established that;

> (a) the same question has been decided in earlier proceedings
>
> (b) the judicial decision which is said to create the estoppel was final and
>
> (c) the parties to that judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised or their privies. *Carl Zeiss Stiftung v. Rayner and Keeler Limited* (1967) 1 AC 853 approved.

5. It does appear in the particular circumstances of this case that the same question has been decided in the earlier proceedings as determined in the Circuit Court and that that decision was final. It is clear that the parties in the previous proceedings are not the same and thus the only remaining issue is as to whether or not the plaintiff in these proceedings is the privy of the plaintiff in the earlier set of proceedings.

6. *O'Donnell LJ in Shaw v. Sloan* (1982) NI 393 at 410 dealt with this particular issue stating

> "Privity means something more than being interested in the outcome. It must involve such interest as would enable the privy to have a voice or say in how the proceedings are or will be conducted or concluded. Any other meaning could operate to cause grave injustice to servants or agents who while not parties to the proceedings and having no voice in their conduct could be held to be bound by them."

7. Notwithstanding that Alan Bryan the plaintiff in these proceedings was a witness as to liability in the earlier District Court proceedings I am satisfied on the evidence available that he had no role to play as to how the earlier proceedings were conducted or concluded.

8. The issue as to privity was considered by the Supreme Court in *McCauley v. McDermott* [1997] 2 ILRM at p. 492 wherein Keane J. stated

> "There remains the requirement that the parties to that determination were the same persons as the parties to the proceedings now sought to be stayed or their privies. The parties to the third party proceedings are the tractor owner and the motorist. The motorist was not, however, a party to the Circuit Court proceedings. Hence, unless the motorist can be regarded as in law the privy of the car owner, the doctrine of issue estoppel, as defined in the passage cited from Lord Guest's speech and similarly explained in many other decisions, will not apply.

9. In *Shaw v. Sloan*, in a passage cited with approval by this Court recently in *Belton v. Carlow County Council* Supreme Court [1997] 2 ILRM 405 Lord Lowry LCJ, in considering these issue estoppel, said (at p. 396) that:

> A party is the privy of another by blood, title or interest when he stands in his shoes and claims throughout or under him.

10. S. 118 of the Road Traffic Act 1961 provides that:

> Where a person (in this section referred to as the user) uses a mechanically propelled vehicle with the consent of the owner of the vehicle, the user shall, for the purposes of determining the liability or non-liability of the owner for injury caused by the negligent use of the vehicle by the user, and for the purpose s of determining the liability or non-liability of any other person for injury to the vehicle or persons or property therein caused by negligence occurring while the vehicle is being used by the user, be deemed to use the vehicle as the servant of the owner, but only in so far as the user acts in accordance with the terms of such consent.

11. As a result of this provision, the owner and the driver of a car which is being driven with the consent of the owner are concurrent wrongdoers for the purpose of the Civil Liability Act 1961 in respect of any injury caused by the negligent driving of the car. It does not follow, however, that there is an identity of interest as a result of which a judgment given in proceedings against the owner is binding in proceedings against the driver or vice versa. That view of the law is borne out by the authorities.

12. It was the unanimous opinion of the High Court of Australia in *Ramsay v. Pigram* (1967) 118 CLR 271 where the court was considering the corresponding provisions of the Australian road traffic legislation. In Australia, as in Ireland, the position at common law had been that judgment against one joint tortfeasor was a bar to recovering judgment against other joint tortfeasor. Similarly, the release of one of several joint tortfeasors operated to release them all. In Ireland, as in Australia, the law was altered by the Civil

Liability Act 1961 so as to provide (in s. 18) that an action against one wrongdoer will not be a bar against other concurrent wrongdoers, subject to the rule that the plaintiff cannot recover more damages than he has suffered. Again, s. 17 provides that the release of one wrongdoer will only discharge the other wrongdoers if such a release indicates an intention that other wrongdoers are to be discharged. It was said in *Ramsay v. Pigram* that, whatever the position might have been at common law, these statutory provisions were inconsistent with treating the owner and driver as privies for the purposes of issue estoppel; see in particular the judgments of Taylor and Windeyer JJ. It was also the unanimous view of the Court of Appeal (Lowry LCJ, Gibson and O'Donnell LJJ in *Shaw v. Sloan.*

13. In that case, the pillion passenger on a motorcycle sued the motorcyclist and the owner and driver of a car with which it was in collision. In earlier proceedings, the owner of the motorcar had sued the motorcycle had sued the motorcyclist in respect of the damage to his car and the motorcyclist had been found entirely responsible for the accident. The Court of Appeal was unanimously of the view (upholding Hutton J as he then was) that, since the driver of the motor car had not been a party to the earlier proceedings and there was no privy between him and the owner. The parties were not bound by the determination of liability in the earlier proceedings."

14. In my view on the evidence simply because the plaintiff in these proceedings was the driver of the vehicle owned by the plaintiff in the earlier proceedings and gave evidence on the owners behalf in those proceedings it does not follow that there is an identity of interest as a result of which the judgment given in the earlier proceedings is binding in these proceedings against Alan Bryan. Accordingly in my view the plaintiff is not the privy of Tom Bryan and the issue as to liability is not *res judicata*.

15. The remaining issue is as to whether or not in the exercise of the court's discretion it should utilise its inherent jurisdiction to stay the proceedings on the basis that they are an abuse of the process of the court bearing in mind that such jurisdiction has to be exercised with great caution at an early stage of the proceedings.

16. In the particular circumstances of this case it does appear that the same question was decided in the earlier proceedings but as Mr. Fitzgerald on the plaintiff's behalf forcibly argues the plaintiff in these proceedings was not the litigant in the earlier proceedings and he is not trying to change the form of any proceedings to set up the same case again as was the situation as found by the Supreme Court in *McCauley v. McDermott*. Indeed the Court went as far in *McCauley's* case as to state

> "In the present case however the only reason for instituting the present proceedings is to circumvent the final and conclusive judgment of the Circuit Court so as to put the tractor owner or his insurers in a more advantageous position, in both these proceedings and the High Court proceedings brought by the motorist. It will be difficult to imagine a clearer case of an abuse of process which calls for intervention by the court."

17. Against a background where the plaintiff in these proceedings had no control over the earlier proceedings I take the view that he should not be deprived of his constitutional right of access to the courts so as to present his own case and adduce such evidence as he may consider appropriate against a background where I conclude on the evidence that there is nothing underhand in relation to this claim as brought by the plaintiff for damages for personal injuries.

18. Bearing in mind that the inherent jurisdiction of this court to strike out proceedings is only to be exercised with great caution and as I am satisfied that an injustice might result if this court was to strike out the plaintiff's proceedings obliging him to be bound by a determination against his interest in proceedings over which he had no control I decline to accede to the relief as sought by the defendant herein.