THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 135

Kelly J.
Irvine J.
Edwards J.

Record No. 2015/46

Piotr Kurzyna

Plaintiff/Respondent

- and-

Taduesz Michalski

First Defendant/Appellant

- And –

The Motor Insurers Bureau of Ireland

Second Defendant/Appellant

Judgment of Ms Justice Irvine delivered (ex tempore) on the 24th day of June 2015

1. This is the defendants' appeal against the judgment of the High Court (Cregan J.) dated 12th December 2014.

2. These proceedings concern a road traffic accident that occurred on 3rd October 2010.

3. The plaintiff, then a married man of forty five years, was travelling on his motor cycle from his home in Navan in the direction of Slane, Co Louth. In the course of his journey his motor cycle was struck from the rear by the first named defendant, also a motor cyclist, who had been travelling immediately behind him. The plaintiff, who suffered serious injuries as a result of the collision, maintained that the impact had occurred as a result of negligent driving on the part of the first named defendant. He also sought a declaration that the second named defendant, The Motor Insurers Bureau of Ireland was obliged to satisfy in full any judgment obtained by him against the first named defendant pursuant to what is commonly known as the MIB agreement of 2009.

4. Full defences were delivered by both defendants following which, on 6th November 2013 the first named defendant served a Notice for Contribution and Indemnity on the second named defendant.

5. The plaintiff delivered additional particulars of personal injuries and loss of earnings by letters dated 18th February, 11th March, 14th April, 26th September and 29th October 2014.

6. The action was heard over a period of five days in the High Court in December 2014 after which Mr. Justice Cregan delivered judgment. It is noteworthy that on the second day of the trial an amended defence was delivered by the first named defendant. In that defence it was admitted that a collision had taken place between the plaintiff's motor cycle and that of the first named defendant. However, that defence went on to allege that the collision had in fact been caused by the negligent driving of an untraced motorist who had collided with the rear of the first named defendant's motor cycle thus causing him to be propelled into the rear of the plaintiff's motor cycle.

7. In his judgment of 12th December 2014 the trial judge found liability in favour of the plaintiff, rejecting the credibility of the first named defendant's account of the involvement of an untraced motorist.

8. The trial judge proceeded to award to the plaintiff a total sum of €700,500 in damages together with costs which he directed be taxed in default of agreement. The award of damages was assessed by reference to the following heads of claim:-

1.	Loss of earnings together with interest thereon including other agreed special damages	€96,500
2.	Future loss of earnings	€329,000
3.	Pain and suffering to date	€183,000
4.	Damages for pain and suffering into the future	€92,000

9. The court further ordered that, pursuant to the provisions of The Social Welfare and Pensions Act 2013, the sum of €39,970.80 be paid by the defendants to the Minister for Social Protection.

10. The court then placed a stay on the execution of the said judgment pending an appeal but on terms that the second named defendant pay to the plaintiff a sum of €250,000 and lodge its Notice of Appeal within the time provided.

11. The High Court judge found that the collision occurred in the manner alleged by the plaintiff. He rejected the first named defendant's evidence that he had been struck in the rear by an untraced motorist as a result of which he had been propelled into the plaintiff's motor cycle. In so concluding he relied upon the following:-

> 1. The plaintiff's evidence that he had not seen any car travelling behind the first named defendant's motor cycle;
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> 2. The fact that the investigating garda had found no evidence of debris from a motor car at the scene and neither had the first named defendant reported to him that a motorist had been responsible for the collision;
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> 3. The original defence filed by the first named defendant had made no such contention;
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> 4. The report of the ambulance driver, which was admitted by agreement, referred to the collision as having occurred as a result of a skid by the first named defendant, even if his hospital records noted that he had maintained that his motor

cycle had in fact been struck by a car;

5. The fact that he found the first named defendant's evidence to be contradictory insofar as he had given two different accounts of what had happened in advance of the alleged collision.

12. The judge then proceeded to rule on the second named defendant's application pursuant to s.26 of the Civil Liability and Courts Act 2004 which he stated had been based on the following three aspects of the plaintiff's claim which were allegedly fraudulent, namely:

1. That in the course of his evidence in chief he had maintained that he had advised all of the doctors whom he had attended that he had suffered from low back pain before the collision. It was alleged that this evidence was fraudulent in that he had failed to advise Dr. Egleston, consultant in emergency medicine, who had examined him for the purposes of his application for compensation to the Personal Injuries Compensation Board, of the existence of such problems.

2. That the plaintiff's own evidence that he had not worked since his accident was false. In support of that assertion the second named defendant relied inter alia upon evidence introduced by way of DVD demonstrating the plaintiff's use of a commercial van and images showing him getting off a fork lift truck.

3. Finally, it was submitted that the plaintiff had lied to the expert witnesses and in particular the vocational consultants who had been retained to advise the court as to his prospects for future employment in that he had failed tell them about the work he had undertaken since his accident.

13. The High Court judge dismissed the application under s.26 and in so doing criticised counsel for the second named defendant for what he considered had been an unfair and misleading cross examination of the plaintiff and his wife having regard to Dr Egleston's evidence to which I will later refer.

14. The judge also concluded that the DVD's evidence and that of the defendant's private investigator did not establish that the plaintiff was engaged in remunerative employment since his accident. Accordingly, he went on to conclude that the plaintiff had not given any fraudulent evidence to the court and neither had he misled the expert witnesses before advising that he considered the s.26 application as one which was utterly without foundation or merit.

15. The High Court judge then moved on to consider the quantum of general damages to be awarded to the plaintiff in respect of his pain and suffering. He set out in some detail the extent of the injuries sustained by the plaintiff to his ankle, low back and knee. He referred to the surgical intervention mandated by injuries and such surgery as might be needed by the plaintiff in the future. Taking into account the plaintiff's likely future prognosis he awarded the plaintiff an overall sum of €275,000 in respect of damages for pain and suffering and later apportioned €183,000 of that sum to pain and suffering to date with the balance being ascribed to his claim for pain and suffering into the future.

16. As to loss of earnings up to the date of trial, the High Court judge awarded the plaintiff his full net loss of earnings together with Courts Act interest. He did so principally based upon the evidence that had been given by the plaintiff's employer to the effect that he was a seriously good worker and had never missed a day's work in the ten years prior to his road traffic accident.

17. As to the plaintiff's claim for future loss of earnings the High Court Judge calculated his potential losses based upon an agreed net weekly loss of €600 per week and a retirement age of sixty eight. Then he adjusted the figures to take into account the plaintiff's invalidity pension before discounting the figure by 15% for Reddy .V. Bates contingencies and a further 15% by reason of the risk to the plaintiff's future employment capacity arising from his pre existing back problems. .

18. By notice of appeal dated 3rd February 2015 the defendants have appealed all but the liability findings of the trial judge. The complaints made are as follows:-

1. That the High Court judge failed to find the plaintiff in breach of ss.25/26 of the Civil Liability and Courts Act 2004.

2. That the trial was unsatisfactory because of repeated interruptions by the trial judge.

I will just pause here for a moment to note that in the course of the appeal today Mr. McGettigan withdrew this ground of appeal. In my view, this was a wise approach to take as while it is undoubtedly the case that the trial judge intervened on many occasions in the course of this cross examination, he did so in an impartial way and further, all of his interventions were designed to establish facts which were material to the issues which the court had to determine. Also, many of the interventions occurred due to the fact that counsel was asking the plaintiff lengthy and complex questions on issues of fine detail which were not amenable to easy translation. Further, on other occasions, the judge interrupted the proceedings following complaints made by the interpreter that the questions were being asked too quickly and were not understood by the witness. So in my view it was as well that Mr. McGettigan withdrew this ground of appeal.

3. That the trial judge misdirected himself in law in accepting the plaintiff's version of the circumstances of the accident in light of the plaintiff's credibility generally and in relation to his description of the accident.

4. That the damages, presumably general damages, were excessive having regard to the evidence.

5. That the award for loss of earnings was excessive having regard to the evidence and the state of the economy.

19. The approach to be taken by an appellate court that does not enjoy the opportunity of seeing and hearing the evidence at first instance is well known and succinctly stated by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R 210. Findings of primary fact which depend on oral evidence given and accepted by the court of trial, once supported by credible evidence, cannot be interfered with on appeal. However, in respect of inferred facts, an appeal court is not so constrained and may interfere with such findings if satisfied that it is in as good a position as the trial judge to draw its own inferences from the facts proved if satisfied that those drawn by the court of trial were incorrect.

20. As to the circumstances in which an appellate court should interfere with an assessment of general damages on the part of the trial judge, assistance is to be found in the judgment of Fennelly J. in *Rossiter v. Dun Laoghaire – Rathdown County Council* and that of Lavery J. in *Foley v. Thermocement Limited*. The overall thrust of these decisions is that an appellate court should only interfere if it considers that there is an error in the award of damages which is so serious as to amount to an error in law. This is in effect a test

concerning the proportionality of the award as was stated by Lavery J. and should be applied regardless of whether the complaint made against the trial judge is one of excessive generosity, as is the case here, or of undue parsimony.

Conclusions
21. Having considered the written and oral submissions on this appeal, I am not satisfied that the defendants have made out any valid ground of appeal referable to the findings and conclusions of the trial judge. I will now briefly set out my reasons for this conclusion by reference to the individual grounds of appeal.

22. As to the application under s. 26 of the Civil Liability and Courts Act 2004, the principal complaint made by counsel for the second named defendant was that the plaintiff in the course of his evidence had given fraudulent evidence when he stated that he had disclosed his history of prior back problems to all of the doctors who had examined him for the purposes of advancing his claim for compensation.

23. Dr. Egleston, who had carried out an examination on the plaintiff for the purposes of his application for compensation to the personal injuries assessment board, gave evidence on behalf of the defendants. In the course of so doing he referred to the first page of his medical report which indeed recorded that the plaintiff had not disclosed any relevant pre-existing injury to his back. However, he also referred to the court to page 5 of his report wherein he himself had referred to pre-existing degenerative change in the plaintiff's low back. He confirmed that it was self evident from this part of his report that he knew that the plaintiff had problems with his back albeit that the information might not have come from the plaintiff himself. He advised the court that he had had the benefit of a report on an MRI scan which had been furnished to him prior to that examination.

24. Of critical importance however to the second named defendant's contention that the plaintiff had sought to mislead the personal injuries assessment board as to the condition of his back at the time of his accident is the fact that in the course of his application for compensation he had completed the requisite application form for compensation which is described as Form A. That was completed on the 11th January 2014, prior to the date upon which he had attended with Dr. Egleston. That form, which was put to Dr Egleston in the course of his re-examination, established clearly that the plaintiff had advised the personal injuries assessment board of the fact that he suffered from pre existing degenerative disease in his spine. Further, the form also referred to Dr. Egleston as his consultant for the purposes of his application for compensation. Thus, the plaintiff could not have been involved in any fraudulent plan to mislead the personal injuries compensation board as to the seriousness of his injuries as had been the whole thrust of the plaintiff's cross-examination on behalf of the second named defendant.

25. Of some concern to me is the fact that at the time that the plaintiff was being accused of seeking to deceive the Personal Injuries Assessment Board, the second named defendant was in possession of form A. That document clearly demonstrated the falsity of the proposition being put to the plaintiff. It was also a document that was withheld from Dr Egleston who was called to support the allegation that the plaintiff had sought to deceive the Personal Injuries Compensation Board and was a document that would not have come to the courts attention was it not for the fact that the plaintiff was in a position to introduce it on Dr Egleston's re-examination.

26. It is little wonder that the trial judge referred to that part of the decision of O'Neill J. in *Dunleavy v. Swan Park Limited* where at para. 38 he cautioned that s.26 should not be seen as an opportunity to:-

> *"seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. Great care should be taken to ensure in a discriminating way that clear evidence of fraudulent conduct in a case exists before a form of defence is launched which could unduly do grave damage to the good name and reputation of a plaintiff."*

27. Giving that the purpose of s.26 is to discourage the dishonest litigant from misleading the court, it is important to note that from the outset of these proceedings the plaintiff made known to the defendant that he had experienced back symptoms prior to his road traffic accident. The existence of pre existing degenerative change was pleaded at para. 6 of the Personal Injuries *Summons "the plaintiff had some back problems in the past".* Further, in replies to particulars delivered on 21st May 2012 it was stated at para. 8 thereof that *"the plaintiff suffered from back pain a few months before the accident and that pain killing medication had been provided by his G.P., Dr. Seamus McMenamin."*

28. The second leg of the second named defendant's argument in support of its s.26 application was the allegedly false information furnished by the plaintiff to intended expert witnesses which was later repeated in the course of his own evidence to the effect that he had not worked since his accident,

29. While it was clearly open to the High Court judge on the evidence to conclude that the defendant had in fact worked, in the sense of remunerative work, since the date of the accident and had misled the court and the expert witnesses, he expressed himself satisfied as to the credibility of the plaintiff's evidence that he had not worked in such capacity. He accepted as truthful his explanation as to why he drove a commercial van, regularly attended at Mr Evan's premises where he kept specific work clothes and as to the circumstances in which he had been seen dismounting a forklift truck.

30. Having reviewed the transcripts of the plaintiff's evidence, the finding of the trial judge to the effect that the plaintiff was not working in a remunerative capacity post accident was one which was supported by the plaintiff's own evidence. As to the credibility of that evidence, in the course of his cross-examination, the plaintiff admitted that he had carried out certain work for his friend, Mr Evans, at his premises. However, he repeatedly stated that he was not paid for this work. Before the defendant produced any evidence of the plaintiff driving a commercial van or stepping off a forklift he had admitted that he went regularly to Mr. Evan's premises to give him some assistance one, two or possibly three days a week while stressing that he did not get paid for anything that he did there. Further, he advised the court that he had driven a fork lift to help Mr Evans with the job that involved lifting a gate into position and that he kept work clothes at Mr Evans's yard so that he would keep his clothes clean if helping out. In addition to these facts, the defendant's own Vocational assessor, Ms Susan Tolan, gave evidence that she would not criticise the plaintiff for the approach that he had taken given that he had stated in evidence that he did not wish to remain in the house for the rest of his life. Indeed, she advised that structured activity was important and she would advise somebody in his position with his injuries to attend what is commonly referred to as a men's shed.

31. Having accepted the credibility of the plaintiff's evidence concerning his activities at Mr Evans premises it is not open to this court to reach alternative inferences based upon its own assessment of what may or may not be contained in the DVD or from the other evidence to which I have just referred.

32. For these reasons there is no basis for this court to conclude that the action should have been dismissed under s.26 of the Civil Liability and Courts Act 2004.

33. As to the award of general damages, it was not disputed that the plaintiff was taken to our Lady of Lourdes Hospital post accident and that while there a range of investigations were carried out. The judge, having considered the medical evidence classified the plaintiff's injuries as falling into three categories. The first injury was to the plaintiff's left ankle. He sustained a displaced fracture to the distal fibula. This fracture had to be reduced under general anaesthetic and held in place by way of internal fixation. The plaintiff also sustained a fracture to the posterior aspect of his distal tibia. His ankle injury was associated with derangement of the joint, swelling and tenderness. There was damage to the articular surface of the joint and the plaintiff was at risk of requiring further surgery. The fact that his ankle would continue to deteriorate was not in dispute.

34. The second injury which the trial judge found as a matter of fact had been caused by the road traffic accident was an injury to the plaintiff's left knee. He concluded, based upon Mr Walsh's evidence, that he had sustained a tear to his anterior cruciate ligament for which knee reconstruction surgery was carried out in July 2012. Notwithstanding that surgery, the knee remained unstable, was causing pain and was showing signs of degenerative change. The trial judge, as he was entitled to do on the evidence, concluded that the plaintiff was at risk of requiring further surgery to this knee at some future time.

35. The third injury for which the judge granted compensation was in respect of an exacerbation of a pre-existing back injury. While satisfied that the plaintiff had been experiencing back pain in advance of the accident it had not affected his ability to work and hadn't caused him to miss a single day's work prior to the accident. On the basis of Mr Walsh's evidence he concluded that the plaintiff had had to undergo a spinal fusion in Poland in 2012 a fusion that involved two levels namely L4/5 and L5/S1. Regardless of this surgery the plaintiff continued to have difficulties sitting, standing and going up and down stairs. His injuries had interfered with his personal and family life apart from the fact that when taken together they had removed the possibility of his being in a position to do any type of labour intensive work.

36. It is as against that background that the defendant submits that the damages awarded were "grossly" excessive and asks the court to reduce the sums awarded for pain and suffering to date and pain and suffering into the future.

37. Having considered the findings of the trial judge as to the extent of the injuries sustained, the treatment undertaken by the plaintiff and his likely prognosis, it can at least be validly argued that the trial judge's award in respect pain and suffering to date and into the future ought to be set aside on the grounds that it is beyond what might reasonably be awarded by the court in respect of such injuries. However, as was stated by Lavery J in *Foley* the test that the court must consider is whether or not the award can be considered as one which was proportionate to the injuries sustained even if it is at the higher end of the parameters which might appropriately be awarded in respect of such injuries. In my view while the damages awarded are close to the top of the available spectrum they do not quite reach the point at which I would intervene given that, unlike the trial judge, I did not have the benefit of hearing and seeing the plaintiff and the other witnesses give their. Neither do I think that the trial judge's award offends the book of quantum insofar as the guidelines which have been set out in respect of these injuries.

38. As to the claim for loss of earnings, the defendants in their written submissions submit that the sum awarded by the trial judge was "ludicrous" and for my part I feel obliged to decry the use of such pejorative language. In my view this description of the trial judge's conclusions amounts to an abusive and gratuitous slur on a carefully considered judgment and adds nothing to the validity or substance of this ground of appeal. Either a judge's findings and conclusions are, or are not, capable of being supported by the evidence or are, or are not, correct in law.

39. Turning to the substance of this ground of appeal I am satisfied that in circumstances where the trial judge accepted the plaintiff's evidence that he had not carried out remunerative work between the date of his accident and the date of the trial he had no reason not to award him his full loss of earnings up to the date of the hearing. Apart from the plaintiff's own evidence as to his disability, there was ample medical and vocational evidence to support such an award.

40. As to the award made by the trial judge in respect of the plaintiff's future loss of earnings Mr Walsh gave evidence that the combination of the plaintiff's three injuries would militate against his ability to carry out work of a physically demanding nature.

41. As to the plaintiff's prospects of obtaining future employment, Ms Susan Tolan, on the defendant's behalf, agreed with her counterpart, Mr Leonard, to the effect that the plaintiff was not a candidate for open competitive employment. He was 49 years of age at the time, he did not speak English fluently and his work experience had been confined to physically demanding work. Further, he was carrying with him a history of injury. All of these factors would adversely influence a prospective employer, thus making him uncompetitive for even light work.

42. No evidence was adduced to counter the evidence tendered on the plaintiff's behalf that the appropriate multiplier to be used was one which assumed a retirement age of 68 years of age. The calculation of the loss of earnings was based upon a net loss of €600 per week, the plaintiff's pre-accident income excluding over time. Again, such an approach cannot be faulted on the evidence.

43. Based upon the plaintiff's pre-existing work record the judge was entitled to take a positive view of his likelihood of continuing in work notwithstanding difficulties in the economy up to age 68. In his judgment he specifically acknowledged that the number of employees in the firm in which he had worked prior to his accident had reduced from seventeen to three as of the date of trial. He nonetheless deducted 15% in respect of the exigencies which are referred to in Reddy .v. Bates and a further 15% in respect of the risk that even at percent the injuries sustained by him in the accident under consideration, his back condition may have interfered with his income generating capacity into the future.

44. Having considered all of the evidence that was before the trial judge, I am satisfied that there is no basis upon I would interfere with the award in respect of loss of earnings, or indeed any other aspect of his award.

45. For these reasons I would dismiss the appeal.

Mr Justice Edwards:

I fully agree with the judgment just delivered by Ms. Justice Irvine. I would also dismiss the appeal for all of the reasons stated by her. However, I wish to echo her criticisms of the MIBI and their counsel and join in deprecating the manner in which the plaintiff was unfairly cross examined.

Mr Justice Kelly:

I entirely agree that this appeal should be dismissed, but I also want to add a few words of my own. I do so in order to echo strongly the concern expressed by Ms. Justice Irvine at the line of cross examination of the plaintiff. He was subjected to a cross examination

which accused him of endeavouring to deceive the Personal Injuries Assessment Board. It is quite clear that there was no basis whatever for that. But worse, both the MIBI and their lawyers knew that to be the case. They had in their possession Form A which had been filled out on 11th January 2011. I find it curious that Form A was not included in the Books of Appeal and had to be furnished to the Court at the Court's request. That form demonstrates quite clearly that the plaintiff disclosed a pre existing spinal disease at the appropriate box which he filled out and that he also disclosed the identify of his medical attendant, being Dr. Egleston. In those circumstances there was no basis upon which he could have been, or ought to have been, cross examined as he was. In my view, it was quite wrong, and indeed unethical, that the plaintiff should have been cross examined as he was. Such a tactic on the part of the MIB is to be deprecated and it does little for its reputation or that of its legal advisors. This appeal is dismissed.