

THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 00085 C.A.]

BETWEEN

DESMOND MCDONAGH

PLAINTIFF

AND

JAMES DOMINICK DENT

AND

SFT TRANSPORT LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 21st day of February, 2019

SUMMARY

1. This is a Circuit Court appeal, involving a claim by the plaintiff/appellant ("Mr. McDonagh") of Headford Road, Galway, that he suffered personal injuries when an articulated truck driven by the defendant/respondent ("Mr. Dent") allegedly reversed into his car, when Mr. McDonagh was stationary. The incident occurred on 9th November, 2013 while Mr. Dent was in the process of making deliveries in the service area at the back of Galway Shopping Centre on the Headford Road.

Complete conflict of witness evidence

2. There is a complete conflict of evidence between Mr. McDonagh and Mr. Dent as to how the accident occurred. Mr. McDonagh states that his car was stationary and that the truck reversed into him. Mr. Dent alleges that his truck was stationary and that Mr McDonagh's car drove by him causing the damage to the car.

Complete conflict of expert opinion

3. As well as the conflict of evidence between the eye witnesses to the accident, there is also a complete conflict of evidence between the expert witnesses. The car assessor expert for Mr. McDonagh opined that the damage to Mr. McDonagh's car was such that it was clearly done by the reversing action of the truck in a swinging motion making contact with the middle of the stationary car first and moving towards the front of the car as it reversed. Mr. McDonagh's expert did not countenance the accident happening in any other way. This is in conflict with the opinion of the car assessor expert for Mr. Dent that the damage to the car was clearly done by the car driving against the stationary truck, as the damage was inflicted from the front of the car towards the back of the car as the car moved against the truck as it attempted to pass through a narrow gap. Mr. Dent's expert did not countenance the accident happening in any other way.

4. The comments of Irvine J. in *Byrne v. Ardenheath* [2017] IECA 293 regarding the value of expert evidence seem particularly relevant to this case. Irvine J. stressed the importance of this Court exercising caution in dealing with expert evidence from experts who are retained by the parties to litigation, particularly since their views will be informed by the facts which are provided to them by the party that is retaining them.

5. At para. 31 of *Byrne v. Ardenheath*, Irvine J. stated:

"It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for trial judge."

6. This is a case where the opinions of both experts both manage to '*correspond favourably with the interests of the parties that retained them*', albeit in reaching completely contrary conclusions. It follows from Irvine J.'s statement that considerable caution needs to be exercised by the Court in relying on opinions from experts that have been retained by one of the parties to litigation. There is a risk of expert evidence being devalued in litigation, when experts, who owe an overriding duty to the court to give objective and unbiased evidence (*R. v. O'Connell* (1844) 7 ILR 261), align with the party that is paying them so wholeheartedly and without any room for doubt.

A finding in favour of plaintiff's or defendant's version of events?

7. In order to find for Mr. McDonagh, this Court has to conclude, on the balance of probabilities, that the accident occurred in the manner described by the plaintiff. Similarly, if the damages are to be awarded for personal injuries, this Court has to be convinced, on the balance of probabilities, that the alleged injuries occurred as a result of the accident. In this regard, Mr. McDonagh's credibility as a witness is important, since he is the one who has instigated this litigation and the onus is on him to establish that the accident occurred as he has claimed, and that he has suffered the injuries claimed as a result of the accident.

Appeal from Circuit Court

8. This is an appeal from the Circuit Court, where Mr. McDonagh's claim was dismissed under s. 26 (fraudulent actions) of the Civil Liability and Courts Act 2004 ("the 2004 Act") with costs in favour of the defendant. However, it is worth noting that this appeal is heard not only as a *de novo* hearing, but also that certain evidence was heard in the High Court that was not before the Circuit Court. In the absence of such evidence, it is likely that this Court would have affirmed the decision of the Circuit Court. With the benefit of this evidence, the decision of this Court is similar, but not identical, to the Circuit Court.

FACTUAL BACKGROUND

9. First, it is to be noted that the plaintiff had no reason to be in the service area behind the shopping centre. It is an area which is

used for the delivery of goods to the shopping centre. He took a very narrow passage, of some 4.5 metres wide, down the side of the shopping centre in order to take what he describes as a short cut and by doing so he had the potential to disturb or distract delivery trucks going about their work.

10. Secondly, it is common case that there was contact between the two vehicles and immediately after it, Mr. McDonagh sought, and received from, Mr. Dent his contact details, and it seems, his insurance details.

11. Thirdly, the damage to Mr. McDonagh's car, in financial terms, amounted to a sum of €1,990 (excl. VAT). As is perhaps obvious from the amount of money spent on repairs, this is not a very significant repair job to the car. This is also evident from the photographic evidence, which shows that the damage to Mr. McDonagh's car amounted to scraping to the driver door, damage to the right-wing mirror and denting to the front wing. However, the scraping to the driver door was not such as to prevent it from being opened after the accident, since Mr. McDonagh got out of the car through the driver door after the contact between the two vehicles. In addition, the dents to the front wing, although more significant than the scrapes to the door, were also not such as to prevent the car from being driven after the accident, which Mr. McDonagh duly did.

12. Fourthly, according to Mr. McDonagh's version of events, Mr. McDonagh's car was stationary when the truck came into contact with his car so as to cause the scrapes and dents. There was no direct evidence given by Mr. McDonagh to the Court that his car was moved by the contact (although there was some reference by counsel to a suggestion that the car may have moved slightly as a result of the contact, perhaps a few feet at most). Nonetheless, Mr. McDonagh's claim is for, *inter alia*, whiplash type injuries to his neck and back resulting from the contact between the truck and the car.

13. Fifthly, just over a week after the accident, Mr. McDonagh went to his GP, where he had, regarding his neck, 'a good range of movements' and in relation to his back had a 'good range of movement' and 'a normal straight leg raise and hip exam'. Yet four years later his Medical Report compiled for this litigation states that he experienced pain at 60 degrees straight leg raising.

14. Sixthly and most significant of all, Mr. McDonagh met Dr. Mary McInerney, who was the medical expert appointed by the defendant. She outlines in her Report dated 18th May, 2017 how he described to her the personal injury resulting from the incident:

"Mr. McDonagh said his life changed after the accident as before he was able to socialise and play with his children. He thrust forward again that the accident ruined his life and he got a heart attack, depression, anxiety, nightmares and suicidal ideation. He said he is angry all the time 'because all this happened to me and the injury ruined my life.'"

15. Consistent with this, his Personal Injury Summons claims that he suffered neck and back pain, psychological distress, anxiety, low mood and sleep interruption and panic attacks arising from the incident which it must be remembered caused €1,990 in damages to his stationary car.

16. All of this evidence regarding the contact between the two vehicles ruining his life was put to Mr. McDonagh during his cross examination and he did not seek to resile from any of it.

17. Based on the content of the evidence provided by Mr. McDonagh and the manner in which he provided it to the Court, this Court cannot accept that Mr. McDonagh suffered the personal injuries that he claims to have suffered as a result of the alleged scraping and denting of his stationary car by Mr. Dent's truck, such that the injury 'ruined [his] life'.

18. In truth, this Court has difficulty in believing that Mr. Dent suffered personal injuries of any significance, let alone the life changing personal injuries he alleges. Accordingly, this Court is not surprised that the Circuit Court would have dismissed Mr. McDonagh's claim in its entirety and awarded costs against Mr. McDonagh pursuant to s. 26 of the 2004 Act. However, because of evidence which was produced before this Court (which does not appear to have been before the Circuit Court) and because of the history of mental illness which Mr. McDonagh had before the incident which may have led him to believe that his life was ruined by this accident, this Court does not propose to dismiss Mr. McDonagh's claim pursuant to s. 26 of the 2004 Act, since such a dismissal would lead to the dismissal of his claim for damages to his car, as well as the personal injury claim.

Different evidence before the Circuit Court

19. While this Court has concluded that it does not accept the evidence of Mr. McDonagh regarding his personal injuries, it is also the case that there was evidence before this Court, that does not appear to have been before the Circuit Court, which leads this Court to cast doubt on Mr. Dent's recollection of events and, in particular, whether his denial that his truck reversed into Mr. McDonagh's car is in fact correct.

20. As regards the different evidence before this Court, first it is to be noted that there was no evidence from a car assessor on behalf of Mr. McDonagh in the Circuit Court. There was only evidence from Mr. Dent's car assessor regarding how the contact between the cars came about. This new evidence of Mr. McDonagh's car assessor is in complete contradiction to Mr. Dent's assessor. More significantly, during the cross examination of Mr. Dent's car assessor, it came to light that his letter of instruction from the insurance company stated that Mr. Dent had reversed into Mr. McDonagh, which is completely contrary to the position of Mr. Dent before this Court.

CONCLUSION

21. While it is impossible for this Court to ever be certain about which version of events, regarding the contact between the two vehicles, is correct, this Court concludes on the balance of probabilities that, in light of, *inter alia*, the letter of instruction from Mr. Dent's insurance company (to the effect that Mr. Dent's truck reversed into Mr. McDonagh's car), that this is what happened.

22. This means that this Court is left in the situation where it finds, on the balance of probabilities, that the defendant's recollection of the incident cannot be relied upon, but on the balance of probabilities, that Mr. McDonagh's claims that his alleged extensive personal injuries were caused by the contact between the two vehicles also cannot be relied upon.

23. In all the circumstances therefore, what this Court proposes to do is to make no award regarding the alleged personal injuries suffered by Mr. McDonagh, but to make an award of €2,124.21 (including VAT) in respect of the repairs to his car.

24. This Court also concludes that this is an appropriate case where there should be no order as to costs, since the Court has found against both the plaintiff and the defendant in certain respects.

25. Accordingly, the plaintiff, although he receives an award of €2,124.21 (incl. VAT), will have to pay out of his own funds both his Circuit Court costs and his High Court costs, which are likely to be much greater than the award of €2,124.21. This is because,

although Mr. McDonagh's car was scraped and dented by Mr. Dent's truck, the life changing personal injuries, Mr. McDonagh says he has suffered, were not caused by this incident.

26. Similarly, Mr. Dent's insurance company will have to pay its own Circuit Court costs and High Court costs, even though this Court has found against Mr. McDonagh regarding his claim that the incident caused life changing personal injuries. This is because this Court has not accepted the recollection of events provided by Mr. Dent. Instead this Court has found that Mr. Dent's insurance company's instruction to its car assessor, to the effect that Mr. Dent reversed into Mr. McDonagh, accurately reflects what occurred. Yet in these proceedings Mr. Dent's insurance company claimed that Mr. McDonagh drove into Mr. Dent.

27. This case is an example of a relatively common, yet perhaps underappreciated, occurrence in litigation, where it is possible for both parties to litigation to effectively lose - primarily because of the considerable costs involved in litigation. Claims, such as this, seeking damages for alleged life changing injuries resulting from minor accidents bring the whole system of personal injuries' litigation into disrepute. It is likely that this was the reason for the Circuit Court's dismissal of Mr. McDonagh's entire claim. This Court did not make the same order in light of the additional evidence before it. However, Mr. McDonagh would no doubt be in a much better financial position than he is in now if he had not brought this extensive personal injury claim, since this may have prevented the early settlement of the claim for the damage to his car. Similarly Mr. Dent's insurance company would be in a better financial position if it had disclosed to the Court its written instruction to its car assessor that Mr. Dent had reversed into Mr. McDonagh.