



THE COURT OF APPEAL

Neutral Citation Number: [2022] IECA 110

Record Number: 2021/216

High Court Record Number: 2017/8614P

**Noonan J.
Ni Raifeartaigh J.
Binchy J.**

BETWEEN/

KELLIE QUINLIVAN

PLAINTIFF/APPELLANT

-AND-

MOTOR INSURERS BUREAU OF IRELAND

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 13th day of May, 2022

1. This appeal is concerned with the liability of the respondent/defendant ("the MIBI" or "the Bureau") under the MIBI Agreement of 2009 for personal injuries suffered by the appellant/plaintiff (Ms. Quinlivan) as a result of the alleged negligent use of a vehicle in a public place, where the owner or user of the vehicle remains unidentified or untraced. Ms. Quinlivan's case is that her car skidded on a spillage of diesel oil negligently deposited on the road by the untraced motorist, causing her to collide with a bridge. Her claim was dismissed by the High Court (Twomey J.) on foot of a written judgment delivered on the 6th July, 2021, against which she appeals.

The Evidence before the High Court

2. The accident occurred on the 6th July, 2015 at about 9.30am on the road from Rathdowney to Borris-in-Ossory in County Laois. Ms. Quinlivan was at the time 23 years of age and a

care assistant. Although she had been driving for a few years and had some driving lessons, she had never taken a driving test and consequently had a provisional driving licence. On the day of the accident, she was driving her own car unaccompanied by a fully licenced driver, which she accepted was unlawful. As she approached a humpback railway bridge, the road surface was wet. The parties accepted that this was a dangerous bridge which constituted an s-bend on the road.

3. Ms. Quinlivan was driving from the Rathdowney direction to visit a client in the course of her employment, and this necessitated her negotiating a fairly sharp right hand bend into the bridge which was inclined on both sides although the centre or apex of the bridge was flat. As she approached the bridge, she described her car going out of control in a "snake like motion" which appears to have caused the car to commence a spin and strike the right hand wall of the bridge head on, before coming to rest sideways across the road. It is important to note that the plaintiff's evidence was that she lost control on the approach to the bridge rather than on the apex or flat part of the bridge. She made a statement to the Gardaí on the 30th July, 2015 in which she said she lost control "around the middle of the bridge". She made a further statement to the Bureau investigator, Mr. Ganly, on 29th September, 2015 in which she suggested that the loss of control occurred as she "was coming close to a little bend to a railway bridge."
4. She was clearly injured and quite shocked in the immediate aftermath of the accident, getting out of the car and collapsing onto the ground. Other people arrived at the scene, who gave evidence, and Ms. Quinlivan, in oral evidence, said that as she was assisted by one of the witnesses after the accident, she "could see all rainbows on the road". She was unable to state where this rainbow effect was on the road, other than she saw it.
5. Three witnesses who were driving their own vehicles arrived at the scene of the accident shortly thereafter and gave evidence in the High Court. These were John Kirwan, Martin Daly and Adrian Deegan. The first to arrive was Mr. Kirwan who was travelling in the same direction as the plaintiff. His evidence was that when he got out of his car, he noticed oil on the road but he was unable to say how big the oil patch was because he did not remember, nor did he identify where precisely it was located. This evidence is noted by the judge in his judgment.
6. Mr. Martin Daly, a truck driver and mechanic, also gave evidence. He was coming from Borris-in-Ossory, in the opposite direction to Ms. Quinlivan, and when he arrived at the scene and saw the condition of the road, he said to himself "no need to ask what happened to that poor unfortunate". He described a bad spill of diesel which was on both sides of the road but more on the plaintiff's side of the road and the middle of the road. He said that there was diesel on the slope up to the bridge on the plaintiff's side. It was put to him that this was inconsistent with a statement he made to the Gardaí in which he said there was diesel on the top of the bridge. He agreed he had said this. The trial judge noted this conflict in his judgment.
7. Evidence was also given by Mr. Adrian Deegan, who was a member of Laois Fire Brigade but off duty at the time. He said that as he approached the bridge in the same direction as

the plaintiff, he saw a big spill of oil or diesel. It was across the road. Mr. Deegan, unlike the other witnesses, appeared to suggest that there were two separate patches of oil spill on the road, one on the upward slope to the bridge on the plaintiff's side where there was a visible change of road surface. He was the only witness to suggest that there were two separate patches of spillage. The judge observed that Mr. Deegan did not make a statement to the Gardaí and his evidence was given six years after the accident.

8. The last liability witness called on behalf of the plaintiff was Mr. Michael Fogarty, a consulting engineer, who subsequently carried out the usual survey of the locus of the accident. Mr. Fogarty gave evidence that the likely cause of the spillage was that it came from a reasonably large diesel fuel tank with a short neck which would allow the fuel to spill or splash out on movement, in the absence of a cap. This would likely be a lorry, a tractor or a bowser, the latter being a diesel tanker brought from place to place to fuel principally agricultural vehicles. A car was unlikely to be the source of the spillage because car diesel tanks typically are located under the rear seat and have a long neck which would be unlikely to account for such a spillage.
9. In cross-examination, it was put to Mr. Fogarty that the evidence of the investigating garda would be that the diesel was located not in the plaintiff's lane but on the opposite lane and if that was correct, the presence of diesel could be discounted as having any involvement in the circumstances of the accident. Mr. Fogarty agreed with that proposition and further with the suggestion that if that were correct, the obvious explanation for the accident was driver error.
10. Garda Aidan Greene, the investigating officer, was called to give evidence by the MIBI, although listed on the plaintiff's disclosure schedule also. Garda Greene was called to the scene of the accident, arriving at approximately 10.30am, an hour or so after it had occurred. He made some notes in his official notebook and took some photographs on his mobile phone. The first note in his notebook was "diesel on opposite lane" being the lane opposite the plaintiff's direction of travel. He described the diesel as being at the apex of the bridge and said he got down on his hands and knees to smell it to confirm that it was what he recognised as diesel. He said it was several feet in length and predominantly on the oncoming lane from Borris-in-Ossory, the opposite lane to that in which Ms. Quinlivan had been travelling. The vast majority was on that side of the road.
11. He supported his conclusion in that regard by a photograph of the spillage and confirmed that the photograph represented the only location where he saw possible diesel on the road. The Fire Brigade was present when Garda Greene arrived at the scene and it was put to him in cross-examination that it was possible that they were involved in cleaning up the road before he arrived. The garda disagreed with that proposition saying he did not see any work of that nature happening when he arrived. He did not see the Fire Brigade carrying out any cleaning work on any portion of the road. No witness from the Fire Brigade was called.

Judgment of the High Court

12. In his introduction, the trial judge referred to there being a high onus on the plaintiff in an untraced motorist case to prove on the balance of probabilities that the accident occurred as she claimed. He said that an appropriate scepticism must be applied to the plaintiff's claim because of the financial incentive for her to establish that the accident occurred as she alleged. He noted that the plaintiff claimed, *inter alia*, for soft tissue injuries to her back and that the plaintiff had also advanced similar injury claims in two other road traffic accidents in 2010 and 2018. For the reasons which he subsequently set out, he was of the view that Ms. Quinlivan had not discharged the high onus on her to prove that the accident occurred as she claimed.
13. However even if it had, the judge said that there was no evidence to support a finding that the alleged diesel spill was caused by the negligent use of a vehicle. He summarised the evidence of some of the witnesses including Mr. Daly, Mr. Deegan and Mr. Kirwan, as I have noted above.
14. The court referred to a number of authorities to which I will come shortly, which he considered supported the court's approach of vigilant scrutiny of and appropriate scepticism towards the claim. He said that this approach was required, not because of any dishonesty on the part of a plaintiff, but rather human nature being such that accounts tend to become unwittingly adjusted, citing the views of O'Donnell J. (as he then was) in that regard in *Rosbeg Partners v LK Shields Solicitors* [2018] 2 IR 811 at 822 – 823.
15. The judge then turned to a consideration of the cause of the accident. He noted that the plaintiff claimed in court that the accident was caused by her losing control of the car as she approached the corner into the bridge, rather than on the flat part of the bridge itself. She relied in that regard on the evidence of Messrs. Kirwan, Deegan and Daly. The judge said that he placed particular reliance on the evidence of Garda Greene for reasons he outlined, whilst emphasising that he was not dismissing the evidence of the other witnesses. Essentially, it is fair to say that the judge preferred the evidence of Garda Greene to that of the three lay witnesses, insofar as they were in conflict.
16. He gave a number of reasons for that preference. He said the garda was somebody with experience and training in the investigation of road accidents and he found him to be a compelling witness. He noted that the garda had walked up and down the stretch of road approaching the flat part of the bridge, upon which the plaintiff claims her car skidded, but he did not make any reference to diesel on this part of the road and did not see any until he reached the apex of the bridge. He photographed matters of evidential value and in that regard, he photographed only the top of the bridge where he observed an area of diesel several feet in length along the flat part or apex of the bridge.
17. The photographs indicated that this section of diesel was a foot or two in width and the garda's evidence was that the vast majority was on the opposite side to Ms. Quinlivan's lane. For these reasons, he preferred the garda's evidence to that of Mr. Daly and Mr. Deegan who suggested that there was diesel on the approach to the bridge. He believed the garda's photographs were consistent with his evidence. He also preferred it to Ms. Quinlivan's evidence because he felt her evidence contained certain inconsistencies with

her statement to the Gardaí when she originally suggested that the back of her car kicked out around the middle of the bridge rather than on the approach as she said in evidence.

18. He also expressed certain misgivings about the reliability of the plaintiff's evidence and in particular, he identified three reasons for that conclusion, in addition to the inconsistency with her written statement. The first was that she failed to inform the MIBI investigator that she had a prior accident in 2010 for which she received €20,000 compensation for similar injuries. This was corrected subsequently by her solicitor. Secondly, she gave an entirely inconsistent account of the accident to her own psychiatrist suggesting that her car had burst through the wall of the bridge which had a thirty foot drop underneath onto the railway tracks, which was untrue. Thirdly, she saw a medical expert on behalf of the MIBI in 2019 but did not disclose that in 2018, she had suffered another similar back injury to that arising from the 2015 accident. He also noted Mr. Daly's evidence and the content of his statement to the Gardaí.
19. For these reasons, the trial judge considered that Garda Greene's evidence was to be preferred and that the correct version of the accident was to be found in Ms. Quinlivan's original statement to the Gardaí rather than her evidence to the court. He preferred those accounts to the evidence of the other witnesses. On this basis, the judge reached the conclusion that on the balance of probabilities, if the plaintiff skidded on the apex of the bridge as she had originally claimed, and which the judge appears to have accepted as correct, the alleged existence of diesel on the road leading into the bridge was irrelevant. On the basis of the garda's evidence, the judge accepted that there was no diesel leading into the bend.
20. At para. 38 of his judgment, the judge said that uncontroverted engineering evidence was also provided that if the diesel was on the flat part of the road, as he concluded, and if the vast majority was on the opposite carriageway to the one in which the plaintiff was travelling, it could not have been the cause of the plaintiff's crash. This appears to be a direct reference to the evidence of Mr. Fogarty to which I have referred above.
21. Having thus summarised his views on the evidence, the court concluded on the balance of probabilities that the cause of the crash was not the diesel on the road. Accordingly, he said the claim must fail but if he was wrong about that, he proposed to deal with the second issue being whether the diesel spill was caused by the negligent use of a vehicle. He again referred to relevant authority, in particular *Rothwell v MIBI* [2003] 1 IR 268 where a similar issue arose. He analysed that authority in a little detail and was of the view that, despite *Rothwell* dealing with an earlier iteration of the MIBI Agreement which referred to "negligent driving" rather than "negligent use" of the untraced vehicle, this was not material to whether negligence was or was not established and in the present case, there was no evidence to support a finding of negligence, so for that additional reason, the case fell to be dismissed.

The Appeal

22. Although 18 grounds are advanced in the plaintiff's notice of appeal, I think these can be broadly summarised into four categories:

- (a) The trial judge failed to take the evidence of Mr. Fogarty into account which established a *prima facie* case of negligent use of the untraced vehicle;
- (b) The judge failed to give proper weight to the evidence of the three witnesses called by the plaintiff regarding the location of the diesel spillage;
- (c) The judge applied the wrong standard to his assessment of the plaintiff's evidence and was unfairly sceptical of that evidence; and
- (d) He failed to distinguish the judgment in *Rothwell* which was concerned with negligent driving rather than negligent use.

The Standard of Proof

23. The standard of proof to be applied in untraced motorist cases was considered by the High Court (Baker J.) in *Gervin v MIBI* [2017] IEHC 286. There, a number of passengers in a minibus claimed to have suffered injuries as a result of being struck from the rear by a motorist who left the scene of the accident. The contention of the plaintiffs that an untraced car had been involved at all in the accident was strongly contested by the defendant. Baker J. summarised the authorities on the standard of proof in such cases commencing with *Bennett v MIBI* (Unreported, High Court, 22nd April 1994) where Morris J. (as he then was) suggested that a plaintiff making a claim against an untraced driver has a "very high onus to discharge... that everything he said in relation to the claim is true".

24. Morris J. suggested that this onus was required because of the ease with which a plaintiff could come before the court and tell a story which could not be contradicted. However, rejecting the suggestion that the onus of proof in untraced motorist cases was in any sense different from that normally applying, Baker J. said (at para. 33): -

"The suggestion that a plaintiff must prove a claim in a civil action other than on the balance of probabilities is not borne out by the authorities, but the judgment of Morris J. does identify a need for vigilance in the scrutiny of evidence given by a plaintiff when rebutting evidence cannot be called by or behalf of the driver of an untraced vehicle. In those circumstances, a court would take particular note of objectively ascertained facts, or evidence given by an independent person."

25. She cited with approval the observations of Geoghegan J., sitting in the High Court, in *Walsh v MIBI* (Unreported, High Court, 15th May, 1996) where he said that it was "important that a court should be extra careful in assessing the truth, accuracy or otherwise of the evidence of the plaintiff because no opposing story will be heard".

26. She then referred to the judgment of Finnegan J. in the Supreme Court in *Rogers* (at p. 8): -

"36. The Supreme Court considered the nature of a claim against the MIBI in *Rogers v. MIBI* [2009] IESC 30 and made the following observation:

'The legal burden of proof in all civil cases lies upon the person who asserts the affirmative on each issue in the case. If at the completion of the evidence the burden has not been discharged the decision must go against the party on whom the burden lay. To find for the plaintiff in an action such as the present the judge must be satisfied on the evidence that a particular fact or state of affairs is more likely to have occurred than not. If he is not so satisfied, then he must find that the burden has not been discharged.'

37. Finnegan J. accepted that the standard of proof was the civil standard but explained that this meant:

'If at the conclusion of the evidence the probabilities are equal then the required standard of proof has not been achieved. There is no burden on the defendant to prove a negative: an exception is where *res ipsa loquitur* applies and the proper inference to draw from the proven facts is that the defendant (in this case the unidentified or untraced owner or user) was negligent.'

38. I adopt that statement of the law, that the test to be applied is the civil standard, that the burden of proof lies on the plaintiff to establish the case on the evidence. The exercise engaged therefore is to examine the evidence to test its credibility, and whether the evidence taken as a whole establishes the facts asserted ..."

Discussion

27. There was surprisingly little dispute about the facts in this case. While there were certain inconsistencies in the plaintiff's evidence with her previous statements both to the Gardaí and her medical advisers, it was not in dispute that she lost control of her vehicle and collided with the bridge in circumstances where she could not explain why that happened.
28. This was not a case, for example, of a plaintiff alleging an injury by a hit and run driver or of crashing as a result of having to take evasive action to avoid an oncoming driver on the wrong side of the road who subsequently disappeared. In the latter type of case, where the facts may be equally consistent with the accident having been caused by the plaintiff's own negligence, it is readily understandable that the court should adopt a robust scepticism towards the analysis of the plaintiff's evidence to reach a conclusion on the balance of probabilities. The authorities do not suggest that the onus of proof to the civil standard is altered in untraced motorist cases but rather that the evidence of a plaintiff will be carefully scrutinised in circumstances where the Bureau will not normally be in a position to directly contradict it.
29. Similar considerations do not really arise on the facts of this case, the core elements of which are not in dispute *i.e.* that the plaintiff lost control of her car on a wet road at a dangerous bridge and struck the bridge without the involvement of any other vehicle. Of course the central issue in that regard was whether the cause of the plaintiff's loss of control was driver error, or the presence of diesel on the road. The accident was equally consistent with both possibilities and the onus undoubtedly lay upon the plaintiff to establish the latter.

30. While it is true to say that the judge did advert to the need to treat the plaintiff's evidence with care on the basis of the authorities to which I have referred, it is not clear to me that he in fact applied any different standard to the assessment of Ms. Quinlivan's evidence than would apply in a normal negligence action. He was perfectly entitled to assess the reliability of her evidence by reference to previous inconsistent statements to which he referred. In that assessment of her credibility, he was, in my view, equally entitled to have regard to her failure to make full disclosure of her medical history, both to the Bureau's investigator and its independent medical assessor, which clearly went to her credit in the overall assessment of the reliability of her evidence. I am therefore not satisfied that Ms. Quinlivan has established that the judge assessed her evidence incorrectly or by reference to an inappropriate standard.
31. In any event, it is clear that the plaintiff's claim fell at the first hurdle for reasons largely unconnected with the judge's assessment of her own evidence. In this case, unlike for example the facts in *Rothwell*, there was a real controversy concerning whether the diesel spill actually caused the plaintiff's accident. The onus of proving that was squarely on the plaintiff and she failed to do so. In essence, the reason for that failure was that the judge preferred the evidence of Garda Greene to that of the three witnesses called by the plaintiff. It was fairly accepted by Mr. Fogarty, the plaintiff's engineer, that if the court accepted the garda's evidence about the location of the spillage, then it was not the cause of the accident.
32. As I have pointed out, the trial judge is criticised for failing to give proper weight to the evidence of the plaintiff's witnesses. However, it seems to me that the real complaint is that the judge failed to prefer their evidence to that of Garda Greene. The evidence of Mr. Daly and Mr. Deegan suggested that the diesel spill was across the road including on the plaintiff's side and on the approach to the bridge. Garda Greene's evidence was to the contrary. It was incumbent on the trial judge to resolve that conflict and he did so. He did not suggest that Mr. Daly and Mr. Deegan were being in any way untruthful but there was a clear divergence of recollection between them and Garda Greene as to the location of the spillage.
33. In preferring Garda Greene's evidence, the judge described him as a compelling witness. The contemporaneous notes made in his notebook at the scene of the location of the spillage were entirely consistent with his evidence. He walked up and down the road, clearly with a view to ascertaining the extent of the spillage and any other relevant evidence. He even got down on his hands and knees to smell to spillage to confirm it was diesel. He photographed the area of spillage as being relevant evidence, and the judge held that the photographs were consistent with his oral evidence regarding the location of the spillage. It was never suggested to the garda that he failed to photograph a relevant area of spillage, obviously a very unlikely proposition. The most that was put to him was that the Fire Brigade may have cleaned up part of the road, but not all of it (itself an obviously unlikely scenario), to explain why he only found this one area of spillage, but he firmly disagreed with that suggestion and no Fire Brigade witness was called to contradict him.

34. It seems to me that the trial judge carefully considered the evidence of all of these witnesses and gave clear and cogent reasons for preferring the evidence of Garda Greene. That was quintessentially the function of the trial judge having heard all the witnesses. It is of course trite to say that an appellate court will not interfere with findings of fact made by a trial court which are supported by credible evidence. In that regard, both parties relied on the judgment of the Supreme Court in *Doyle v Banville* [2018] 1 IR 505. Speaking for the court, Clarke J. (as he then was) considered the function of an appellate court, recognising that the starting point for that consideration was the seminal judgment in *Hay v O'Grady* [1992] 1 IR 210, and noted (at 509) the view of McCarthy J. that: -

"...if findings of fact made by a trial judge were supported by credible evidence, this court was bound by them however voluminous and weighty any contrary evidence might seem. It is clear, therefore, that it is no function of an appellate court such as this to re-weigh the balancing exercise which any trial judge is required to do when sitting without a jury for the purposes of determining the facts."

35. Clarke J. discussed the duty of a trial judge to explain his or her reasoning so that a party might know why they won or lost the case. In that regard, he said (at 510): -

"...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 fact 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.

[11] 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."

36. In another passage relevant to this appeal in the context of the plaintiff's contention that her evidence was erroneously analysed by the High Court, Clarke J. said (at 511): -

"...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 once 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."

37. In my judgment, it cannot reasonably be suggested that there was no credible evidence before the trial judge to support his conclusion that the diesel spill was not on the plaintiff's side of the road, or that the plaintiff was left in any doubt as to why she lost. The plaintiff complains that at no stage did the trial judge reject the evidence of her witnesses and if he purported to do so, he was obliged to say why. It was said that he merely left that evidence hanging. I think that criticism is somewhat academic. The judge said in the clearest possible terms that he preferred the evidence of Garda Greene to that of Mr. Daly and Mr. Deegan and he said why he came to that conclusion.
38. There is no suggestion that the reasons he gave for that preference were erroneous. Rather, it is said that he was obliged to take the further step of saying why exactly he did not accept the evidence tendered by the plaintiff. He neither rejected that evidence nor suggested it was unreliable. I cannot accept the contention that the judge's conclusions are robbed of validity because he failed to state that Mr. Daly and Mr. Deegan were simply mistaken in their recollections. That is manifestly implicit in his preference for Garda Greene's evidence and also from the comments he made concerning the evidence of those witnesses. In Mr. Daly's case, his evidence was undermined by his previous inconsistent statement and Mr. Deegan, who made no statement, gave evidence for the first time six years after the event. In contrast, Garda Greene's evidence was supported by contemporaneous notes and photographs.
39. Nor can I accept the proposition advanced by the appellant that the judgment was flawed because the judge never explained what he considered to be the cause of the accident. I agree with the Bureau's submission on this issue that it was not part of the trial judge's function, having declined to accept the plaintiff's evidence as to the circumstances of the accident, to go on to hypothesise on what caused it. The litigation process is adversarial, not inquisitorial, and absent some presumption of law which relieves the plaintiff of that obligation, the onus is at all times on her to prove facts on the balance of probabilities which establish the negligence alleged. If she fails to do so, as in this case, the claim must be dismissed.
40. In those circumstances, having assessed the evidence and explained his reasoning for that assessment, in my view, the judge was not merely entitled but obliged to conclude that the plaintiff had not established on the balance of probabilities that the cause of her accident was the spillage. That conclusion was perfectly sound and cannot be interfered with by this court.

Conclusion

41. That being so, I would dismiss this appeal. In the result, it is unnecessary and inappropriate for this court to separately consider the second issue concerning the alleged negligent use of the untraced vehicle.

42. With regard to costs, my provisional view is that as the Bureau has been entirely successful in this appeal, it should be entitled to its costs. Should Ms. Quinlivan contend that a different order should be made, she will have a period of 14 days from the date of this judgment to make application to the Court of Appeal Office for a short supplemental hearing on the issue of costs. If such hearing is requested but nevertheless results in the order proposed, Ms. Quinlivan may additionally be liable for the costs of the supplemental hearing.
43. As this judgment is delivered electronically, Ní Raifertaigh and Binchy JJ. have indicated their agreement with it.