THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 10

Appeal No. 2015/563

Peart J.
Irvine J.
Hedigan J.

BETWEEN/

PATRICIA MOORE

PLAINTIFF / APPELLANT

- AND -

ADVANCED TYRE COMPANY LIMITED

TRADING AS 'ADVANCED PIT STOP'

DEFENDANT / RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 31st day of January 2017

1. This is the plaintiff's appeal against the judgment and order of the High Court (Fullam J.) of 20th October 2015 made in a personal injuries action brought in respect of injuries sustained by her in the course of a road traffic accident on 2nd May 2013. Her appeal concerns the apportionment of liability found by the trial judge, i.e. 85% as against her and 15% against the defendant and also his award of general damages in the sum of €60,000.

Background facts
2. The plaintiff ("Ms. Moore") was born on 24th September 1957 and was at the relevant time a customer services advisor with the hardware retailer B & Q. The defendant ("Advanced Tyre") is the owner and occupier of a garage premises located at Swords, Co. Dublin. Mr. Mahon, the driver of the motor vehicle implicated in these proceedings, was an employee of Advanced Tyre.

The High Court hearing
3. Ms. Moore maintained that on 2nd May 2013, immediately prior to the events the subject matter of this claim she was cycling her bicycle along a footpath proximate to the defendant's premises. She was travelling in the Dublin Swords direction. Roadworks were taking place on the adjacent roadway with the result that the roadway, which customarily accommodated one lane of traffic in either direction, was reduced to one lane for traffic travelling out of Swords in the direction of Dublin. As she approached the premises of Advanced Tyre which was to her left hand side, Mr. Mahon was exiting the car park with a view to joining the aforementioned lane of traffic. He was looking to his left and was, according to Ms. Moore, listening to music with his window open. As he emerged onto the footpath and across her proposed path of travel in one continuous slow movement, she shouted at him to alert him of her approach, but he kept going. Ms. Moore then found herself having to take last minute evasive action which she did by cycling around the bonnet of his car onto the roadway. In the course of this manoeuvre she fell heavily to the ground on her left elbow and sustained serious injuries to which I will later refer.

4. Mr. Mahon on the other hand maintained that Ms. Moore had been cycling on the roadway and that he had seen her as he brought his car to a stop well short of the kerb. He was satisfied that the reason she fell from her bicycle was that the pillows she was carrying on her back carrier had caught the front of his car as she sought to mount the footpath to get out of the way of oncoming traffic.

Judgment of Fullam J.
5. In his *ex tempore* judgment the trial judge accepted Ms. Moore's evidence that she had always been cycling on the footpath. It was illogical that she would cycle against the oncoming traffic in circumstances where she would have to escape to the safety of the footpath every time a motorist advanced in her direction. He also found that Ms. Moore had been cycling at a jogging pace as events unfolded. In his judgment, the trial judge expressed himself satisfied that Mr. Mahon had indeed seen Ms. Moore as he exited the defendant's premises but had nonetheless emerged onto the footpath without looking to his right *i.e.* in her direction.

6. As a matter of law the trial judge concluded that the "primary obligation in this case was on the plaintiff to take care" and held her guilty of contributory negligence to the extent of 85%. In doing so he relied upon the following factors:-

(i) She should not have been cycling on the footpath, something he described as a fact of life.

(ii) She had seen Mr. Mahon's car emerging and it behoved her to avoid the accident by stopping and getting off her bike.

(iii) She was cycling too quickly.

7. Insofar as Mr. Mahon's culpability was concerned, the trial judge concluded that he had been negligent in emerging without looking to his right.

Contributory negligence

The Appellant's Submissions
8. Ms. Patricia Dillon SC, of behalf of Ms. Moore, submits that the trial judge erred in law in concluding that the primary obligation rested with Ms. Moore to avoid the collision. She submits that having regard to his finding that Mr. Mahon emerged without looking to his right and consequently never saw Ms. Moore that it was perverse to find her 85% responsible for her injuries.

9. Counsel accepts that as a matter of law and in particular by reason of Regulation 13 of the Road Traffic (Traffic and Parking)

Regulations 1997 ("the Regulations"), her client was not permitted to cycle along the footpath. However, she submits that Mr. Mahon was also under an obligation pursuant to Regulation 8 to yield right-of-way to all vehicles and pedestrians proceeding in either direction when seeking to enter a public road from private premises, as was the case here. She also seeks to rely upon Regulation 5 which provides that where compliance with a Regulation is not possible as a result of an obstruction to traffic or pedestrians or because of an emergency situation, the restrictions otherwise provided may not apply.

10. In addition to his breach of Regulation 8, Ms. Dillon relies upon the clear breach on the part of Mr. Mahon of his common-law obligations to take reasonable care to ensure that he did not, by his actions, endanger Ms. Moore's safety. He ought to have anticipated, as he prepared to move out onto the footpath, the potential presence of a wide variety of persons such as joggers, pedestrians, skateboarders and indeed cyclists.

11. In terms of the Court's apportionment of liability, Ms. Dillon seeks to rely upon a number of decisions concerning the blameworthiness of those who knowingly get into a car with an intoxicated driver and later sustain injury. In those cases the courts have been reluctant to attribute more than 30% or 40% responsibility to the passenger. By that yardstick, and having regard to the findings of fact made by the trial judge, she submits that little or no liability should have been allocated to her client. This was particularly so in circumstances where the roadway which would normally have been available to her was not so available by reason of the ongoing road works. In evidence she had stated that she was reluctant to take the additional risk of cycling on a dual carriageway which was the only alternative route to her place of work.

12. As to quantum, Ms. Dillon submits that the trial judge erred in law in that he did not award any general damages in respect of pain and suffering into the future, notwithstanding his apparent acceptance of the evidence that Ms. Moore required further surgery to remove the wires in her elbow in order that she might regain full extension of the joint.

13. Counsel's second submission concerns a statement by the trial judge in the course of his judgment concerning the reluctance on the part of Ms. Moore to have the further surgery which had been recommended by her orthopaedic surgeon. In this regard, immediately prior to pronouncing his award, the trial judge referred to Ms. Moore's obligation to mitigate her losses and did so in the context of the evidence she have given concerning her reluctance to have the aforementioned surgery. That being so, Ms. Dillon invites this Court to infer that he reduced the damages which he would otherwise have awarded to reflect such failure. Assuming that this was the approach he had taken it was incorrect in law. First, he was only entitled to make such deduction if he had made a finding that her decision not to have the follow-up surgery was unreasonable and he did not make such a finding. Second, any such finding could only lawfully have been made based on evidence led by the defendant to support the unreasonableness of such a decision. As no evidence had been led by the defendant, the requisite burden of proof could not have been discharged.

14. Based on these submissions Ms. Dillon asks the court to set aside the award of damages made by the trial judge and to replace it with an award of damages to reflect the extent of likely future pain and suffering ignoring any considerations based her obligations to mitigate her loss.

The Respondent's submissions

15. Mr. Declan Buckley S.C., on behalf of Advance Tyre, submits that the trial judge did not err in law in his approach to the issue of contributory negligence. On the facts found he was entitled to apportion liability as he did. He reminded the court that it should not interfere with a finding of contributory negligence unless it was grossly disproportionate in all of the circumstances.

16. Counsel submits that Ms. Moore cannot be released from her obligation not to cycle on the footpath under Regulation 13 merely because she considered cycling on a dual carriageway too hazardous. If that were so, chaos would prevail with significant numbers of cyclists abandoning the roadway in favour of the footpath. Further, even if the court concluded that it was reasonable for her to decide not to cycle on the dual carriageway, it did not follow that she should be excused cycling on the pavement. She could have walked her bicycle along the relevant stretch of roadway. Further, he submits that if the law precludes a person from cycling on the footpath, they cannot claim to have right of way over motorists lawfully emerging from adjacent premises across that footpath.

17. Mr. Buckley reminds the court that the trial judge did not, as Ms. Dillon suggested, find as a fact that Mr. Mahon had <u>never</u> looked to his right. He found that Mr. Mahon had seen Ms. Moore approach but ultimately emerged without looking to his right. He submits that the apportionment of liability was correct given that Ms. Moore had seen Mr. Mahon and could have dismounted. He had been moving out slowing yet she had not braked or stopped. Instead, she kept cycling and had successfully circumnavigated the bonnet of Mr. Mahon's car before falling from her bike on trying to get pack up onto the footpath.

18. Counsel submits that it would be wrong in law for the court to approach the issue of contributory negligence by reference to the apportionment of liability in cases involving injuries to passengers who had agreed to allow themselves be carried in a car by a driver known to be drunk.

19. As to quantum, Mr. Buckley states that regardless of the fact that the High Court judge made no separate award in respect of damages for pain and suffering into the future it was to be inferred from his judgment that he had included an element of compensation in respect of that category of loss. In the delivery of an *ex tempore* judgment, it was not an unusual occurrence that a trial judge would make one composite award of general damages rather than assessing general damages separately under the headings of pain and suffering to date and pain and suffering into the future.

20. Mr. Buckley submits that it cannot be said with any degree of certainty that the trial judge reduced Ms. Moore's damages because of the view he took of her evidence concerning the surgery which was proposed by her own consultant and which she appeared reluctant to undertake. The quantum of damages which he had awarded was not consistent with such an approach.

21. Counsel submits that taking all of the evidence concerning the plaintiff's injuries into account, both in respect of pain and suffering to date and pain and suffering into the future, that the award of €60,000 was well within the parameters that might reasonably be awarded in respect of such injuries and that it was also within the range advised in the Book of Quantum.

Contributory negligence. How it is to be assessed by the trial judge and the role of the appellate court

22. The proper approach to the issue of contributory negligence by a judge at first instance has long been established and is not in dispute in this case. The same is governed by s. 34 of the Civil Liability Act 1961 which provides as follows:-

> (1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable

having regard to the degrees of fault of the plaintiff and defendant: provided that:-

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

(b) this subsection shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the defendant might, apart from this subsection, have the defence of voluntary assumption of risk;

(c) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages awarded to the plaintiff by virtue of this subsection shall not exceed the maximum limit so applicable.

(2) For the purpose of subsection (1) of this section damage suffered by the plaintiff may include damages paid by the plaintiff to a third person who has suffered damage owing to the concurrent wrongs of the plaintiff and the defendant, and the period of limitation for claiming such damages shall be the same as is provided by section 31 for actions for contribution;

(a) a negligent or careless failure to mitigate damage shall be deemed to be contributory negligence in respect of the amount by which such damage exceeds the damage that would otherwise have occurred;

(b) the plaintiff's failure to exercise reasonable care for his own protection shall not amount to contributory negligence in respect of damage unless that damage results from the particular risk to which his conduct has exposed him, and the plaintiff's breach of statutory duty shall not amount to contributory negligence unless the damage of which he complains is damage that the statute was designed to prevent;

(c) the plaintiff's failure to exercise reasonable care in the protection of his own property shall, except to the extent that the defendant has been unjustly enriched, be deemed to be contributory negligence in an action for conversion of the property;

(d) damage may be held to be caused by the wrong of the defendant notwithstanding any rule of law by which the scope of the defendant's duty is limited to cases where the plaintiff has not been guilty of contributory negligence: but this paragraph shall not render the defendant liable for any damage in respect of which he or a person for whose acts he is responsible has not been careless in fact;

(e) where an action is brought for negligence in respect of a thing that has caused damage, the fact that there was a reasonable possibility or probability of examination after the thing had left the hands of the defendant shall not, by itself, exclude the defendant's duty, but may be taken as evidence that he was not in the circumstances negligent in parting with the thing in its dangerous state.

23. As to how a trial judge should assess fault for the purposes of the aforementioned section, Kenny J., in *Carroll v. Clare County Council* [1975] I.R. 221 stated as follows:-

> "It is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contributions of the plaintiff and defendant to the happening of the accident which is to be the basis of the apportionment."

24. As to the circumstances in which an appellate court should interfere with a finding of contributory negligence made by a High Court judge, Walsh J. in *Snell v. Haughton* [1971] I.R. 305 stated as follows:-

> "It has been established by a series of decisions of this Court that this Court will not disturb the jury's findings on the apportionment of fault unless the apportionment is shown to be grossly disproportionate on the evidence."

Decision: contributory negligence

25. I am firstly satisfied that as a matter of law the High Court judge erred when he concluded that primary responsibility to avoid the accident which occurred in this case rested with Ms. Moore.

26. Firstly, at common law the driver of a motor vehicle intending to drive across a public footpath is obliged to take reasonable care to ensure that in doing so he / she will avoid causing injury to anyone who might foreseeably be on it. It goes without saying that it is foreseeable that a driver who emerges onto a footpath without looking in both directions immediately prior to so doing may injure or possibly kill someone.

27. While cycling on a footpath is prohibited as per the Regulations already referred to, as the trial judge observed in the course of his judgment, it is a fact of life that people, for a wide range of reasons, end up cycling on the footpath. Young children regularly ride their bicycles or scooters along footpaths and the motorist intending to drive across a footpath must protect against the possibility that someone might be cycling towards them.

28. For those members of the public who use footpaths the motor vehicle is a dangerous machine. Its capacity to inflict gross or even fatal injuries while travelling at even modest speed is known and understood by all adults. The pedestrian, the jogger, the child in the buggy and the cyclist do not have the protection enjoyed by the motorist sitting inside the body of the car. That is not to say that cyclists cannot cause serious or even fatal injuries to pedestrians. They can and do, and it is for this reason they are burdened with precisely the same common law duty of care that which is owed by the motorist. They must cycle mindful of avoiding all accidents which are foreseeable. Thus regardless of where they decide to ride their bicycle they must take reasonable care for those who might foreseeably be injured by their actions as well as for their own safety. Cyclists who choose to cycle on a footpath risk causing foreseeable injuries to others using the same footpath and also have the capacity to cause injury to those emerging from adjacent premises. The child exiting the schoolyard and the elderly member of the community who, not hearing a cyclist approaching from behind, may unexpectedly turn into their path of travel, are but two such examples. However, in the present case, Ms. Moore by the manner of her cycling did not injure anybody.

29. When looking at the apportionment of liability made by the trial judge it is important to consider the facts found by him material to his decision. These include the fact that Ms. Moore was cycling her bicycle on a footpath which ran alongside a significant number of commercial premises each of which had available parking. Thus it was to be expected that there would be movement of traffic in and out of the car park onto the adjacent roadway. She was familiar with the area as she travelled along that road each day going to and from her place of work. In such circumstances she was obliged to keep an eye out for motorists who might wish to exit the premises particularly as she was in a position to see into the area concerned through the railings of the low wall which separated the footpath from the forecourt of those premises.

30. Ms. Moore in her evidence stated that she had seen Mr. Mahon preparing to emerge and she assumed he would stop. She should not have made that assumption as she stated he was looking the other way as he emerged. Unless satisfied that Mr. Mahon was obviously aware of her presence and appeared intent on giving way, she should have stopped or tried to stop. It is to be inferred from the judgment of the High Court judge that he was satisfied that she would have been able to do so had she made the appropriate decision. That being so, it seems to me that she should not have been further penalised for the fact that she was cycling at jogging speed. It was not her speed that was causative of what occurred but rather her somewhat "in the heat of the moment" decision to swerve around Mr. Mahon's car rather than try to stop.

31. Based on the findings of fact made by the High Court judge Mr. Mahon was clearly in breach of his duty of care to Ms. Moore. He works in the premises outside of which the accident occurred. He knows the footpath is in a busy commercial area. He was obliged to satisfy himself that the path was clear either side of his car at the point at which he pulled out and he did not do so. The High Court judge held that Mr. Mahon had seen Ms. Moore as she approached the entrance and that she had at all times been cycling on the footpath. The fact that he did not check to his right at the moment he drove forward across the path was to put her safety at risk, as in fact occurred. Mr. Mahon should have seen her and waited for her to pass before entering onto the path. His actions were not reasonable, having regard to the prevailing circumstances.

32. As to the Regulations, it is clear that Ms. Moore was in breach of Regulation 13 and Mr. Mahon in breach of Regulation 8. I am satisfied that Regulation 8 obliged Mr. Mahon to yield right-of-way to anybody actually using the footpath at the time he intended to cross it. He is not to be relieved of that obligation just because the approaching cyclist was cycling on the footpath contrary to Regulation 13.

33. Having considered all of the aforementioned matters, it is for this court to consider whether the finding of 85% responsibility on the part of Ms. Moore for her injuries was so disproportionate that it should be set aside. Assessing, as I must, the blameworthiness of the parties, as was the obligation of the High Court judge, I am satisfied that the order of the High Court judge apportioning liability must be set aside, as being perverse in all of the circumstances. That said, I do not believe that Mrs Moore's blameworthiness for cycling on the footpath should be reduced by reason of the existence of the road works on the adjacent roadway. It does not necessarily follow that because she couldn't cycle on the roadway she had to cycle on the footpath. She could have walked her bicycle down that section of the footpath until she got beyond the road works or she could have used an alternative route which involved cycling on a dual carriageway. The fact that she felt at greater risk cycling along a dual carriageway does not justify her conduct in deciding to cycle on the footpath. However, when it comes to blameworthiness, the greater portion of the blame must rest with Mr. Mahon, who saw Ms. Moore on approach. He was obliged to yield right-of-way to her even though she should not have been cycling on the footpath. He emerged without taking action to ensure her safety. In these circumstances I would propose that this court would substitute a finding of 60% negligence on the part of the defendant and 40% on the part of Ms. Moore.

Decision: quantum appeal

34. As a result of the fall from her bicycle, Ms. Moore was taken to Our Lady of Lourdes hospital in Drogheda where x-rays revealed the presence of a severely comminuted fracture to her left elbow. Under a general anaesthetic the fracture was reduced and stabilised with the assistance of the insertion of two pins and a tension band wire. Following her discharge from hospital her forearm was in a plaster cast for several weeks. She had difficulty with sleeping. She suffered a lot of pain and required to take pain killing medication. She undertook rehabilitation by way of physiotherapy. As a result of the surgery she was left with a 12cm scar over the left elbow. She also had difficulties with the tension band wire insofar as the same could be felt to be protruding somewhat beneath the skin.

35. From his judgment it is clear that the trial judge was satisfied that Ms. Moore was still somewhat symptomatic as of the date of the hearing. He found that she had a modest limitation of extension of the left elbow and that a further surgical procedure would be required before she might expect to regain full function.

36. Having considered the submissions of the parties and the judgment of the High Court judge I am satisfied that the trial judge did not impermissibly exclude from his consideration, when he made his award of damages in the sum of €60,000, the fact that Ms. Moore would suffer pain and discomfort into the future. He refers specifically to the fact that she would require a further surgical procedure to improve her residual restriction of movement and in these circumstances the only reasonable inference to draw is he took into account some degree of relatively modest pain and suffering when he made his award in the sum of €60,000.

37. It is of course important that a trial judge should make a separate award for damages for pain and suffering to date and for pain and suffering into the future should the evidence warrant such an approach. Nonetheless, in cases where he/she is satisfied that the pain and suffering which a plaintiff is likely to endure in the future is very modest it is acceptable, in my view, for the trial judge not to make a separate award in respect of pain and suffering into the future. However, in such circumstances it behoves the judge to record in the course of his/her judgment that they have taken such an approach and to identify those future sequelae which are to be met by the single award in respect of general damages.

38. As to whether the trial judge made any impermissible deduction in Ms. Moore's damages based on an unsustainable finding that she had failed to mitigate her loss, this is not at all clear from the *ex tempore* decision of the High Court judge. This difficulty can however be overcome by a consideration by this Court as to whether, having regard to all of the findings that he made in respect of Ms. Moore's injuries and having regard to the application of the appropriate legal principles, the award of €60,000 made by the trial judge is disproportionately low to the point that it ought to be set aside.

39. It is common case that an appellate court should not disturb an award of damages made by the trial judge unless it is satisfied that there is no reasonable proportion between the actual award of damages and what the court, sitting on appeal, would be inclined to give itself. See *Rossiter v. Dun Laoire Rathdown County Council* [2001] 3 I.R. 578.

40. It is undoubtedly the case that Ms. Moore sustained a significant injury which required surgical intervention and that she had not made a fully recovery as of the date of the trial. It was clear from the evidence that her capacity to fully extend her elbow would remain impaired if she decided not to undertake the surgery advised by her surgeon or would make a relatively full recovery if she

were to do so. While the trial judge did not decide, on the balance of probabilities, whether Ms. Moore would or would not undertake that surgery, either way her claim for damages for pain and suffering into the future, was one which was relatively modest, albeit that she has a 12 cm scar to the elbow. Having inspected that scar in the course of the appeal, I believe it is fair to say that the scar is not particularly noticeable and certainly could not be described as disfiguring in any way.

41. Taking all of the plaintiff's injuries into account the award of €60,000 by way of general damages was by no means generous. In my view, it is just about within the parameters of damages that might reasonably be awarded for injuries of this nature such that it is to be protected from any interference by an appellate court. In this regard it is to be noted that the sum so awarded also falls within the parameters advised in the then current Book of Quantum in relation to fractured elbows even if it be the case that the values therein specified were somewhat out of date at the time of the making of the award under consideration. However, even allowing for that, the award made by the trial judge was not in my view sufficiently disproportionate such that it ought to be set aside and replaced by a greater reward.

Conclusion

42. For the reasons earlier advised in this judgment I am satisfied that the trial judge erred in law in the manner of his approach to the issue of contributory negligence. On the basis of the facts found by the High Court judge I am satisfied that his apportionment of liability as to 85% negligence on the part of the plaintiff and 15% negligence on the part of the defendant was disproportionate to the point that his finding must be set aside. I would propose that liability should be apportioned such that the defendant should be found 60% liable in respect of Ms. Moore's injuries.

43. As to general damages I am not satisfied that Ms. Moore has discharged the burden of proof to demonstrate that the award of €60,000 in respect of general damages should be set aside in favour of any greater sum.

44. I would accordingly allow the appeal insofar as the liability issue is concerned.