COURT OF APPEAL

[APPROVED]

Record No. 2023/50

High Court Record No. 2021/1283P

Noonan J. **Neutral Citation Number [2023] IECA 188**

Binchy J.

Butler J.

Between/

EVAN RAFTER

PLAINTIFF/RESPONDENT

-AND-

EDMUND RICE SCHOOLS TRUST COMPANY LTD

DEFENDANT/APPELLANT

Judgment of Mr.. Justice Noonan delivered on the 26th of July, 2023.

1. The plaintiff was at the relevant time a schoolboy at the defendant's school when he injured his finger using a mechanical saw during woodworking class. The High Court (Murphy J.) found that the school was liable and awarded general damages of €35,000 to the plaintiff. As this fell within the jurisdiction of the Circuit Court, the

judge made a differential costs order. The defendant has appealed the finding on liability and the plaintiff has cross-appealed the differential costs order.

Background

2. The accident occurred on 8th March 2019, four days after the plaintiff's 16th birthday. He was a Junior Cert student at the defendant's school in Tramore, County Waterford, and had taken technology, which included woodwork, as one of his chosen subjects for the Junior Cert. His woodworking teacher was Mr. Mansfield, but on the day of the accident the bandsaw in Mr. Mansfield's classroom was not working so he was sent across the way to the classroom of another woodworking teacher, Mr. Cahill, where the bandsaw was working.

3. A bandsaw is a powered saw with a fixed narrow vertical blade, which as the name implies, comprises a continuously rotating band. The workpiece is fed towards the blade which can cut complex shapes such as a jigsaw piece. On the date of the accident, the plaintiff had used a bandsaw on at most two previous occasions when he was supervised by Mr. Mansfield. The evidence of Mr. Mansfield, which the judge accepted, was that the plaintiff had received theoretical instruction on the use of the bandsaw and observed a demonstration by the teacher. The plaintiff's woodworking project required him to cut small pieces of wood to shape using the bandsaw and in the course of doing so, his right index finger came in contact with the blade, and he suffered an injury.

4. In his personal injuries summons, issued on 1st of March 2021, the plaintiff pleads that "*he was not supervised at the time and was not accompanied by the woodwork teacher.*". There is also a plea that the guard on the machine was set at an excessively high level for the piece of wood being cut by the plaintiff. There are further complaints

given in the particulars of negligence that the defendant failed to provide the plaintiff with appropriate protective wear or to give him adequate instruction on how to operate the machine. There is also a specific plea that the defendant was negligent in "*failing to properly supervise the students while using dangerous machinery*.".

5. In its defence, the defendant specifically traverses the allegation of lack of supervision and pleads that Mr. Cahill instructed the plaintiff on how to set up and operate the bandsaw for the piece of wood in question and while the plaintiff was carrying out this operation, Mr. Cahill at all times stood within six feet of him.

6. In opening the case to the court, counsel for the plaintiff stated that his evidence would be that he came into Mr. Cahill's class where there were 20 to 25 students and Mr. Cahill, who was at the top of the class, directed the plaintiff to use the bandsaw which was at the bottom of the class. As flagged by counsel for the plaintiff in opening the case, the facts pleaded in the defence were very significantly at variance with the plaintiff's instructions as to how the accident happened.

7. The plaintiff gave his evidence in accordance with the opening by his counsel saying that he was sent down to the back of the room by Mr. Cahill to use the bandsaw unaccompanied and unsupervised. He also said that Mr. Cahill gave him no instruction on the use of the fence or guard rail and that he had no prior training in the use of the machine beyond using it once or twice before.

8. As recorded in the judge's *ex tempore* judgment, the plaintiff's version of events was entirely contradicted by Mr. Cahill. He said that he went down to the bandsaw with the plaintiff, examined the piece of wood that he was proposing to cut and set up the guard rail or fence for the plaintiff. Mr. Cahill said he proceeded to start the first cut to demonstrate the correct holding technique to the plaintiff so that his fingers would not

come in line with the blade. The plaintiff finished the first cut with Mr. Cahill watching and Mr. Cahill said that he saw the plaintiff start the second cut with his hands correctly positioned.

9. At that point Mr. Cahill moved to the far side of the bandsaw to be able to better observe the class while also observing the plaintiff and his evidence was that he was about five feet away from the plaintiff and looking back at him through the bandsaw. His evidence was that the plaintiff's hand was perfectly positioned on the second cut all the way through but, as the judge pointed out, if that had been so the accident could not have occurred. Under cross-examination, Mr. Cahill agreed that he did not see the plaintiff's hand run into the blade. Mr. Cahill said that his role was to be observe and supervise the student rather than breathing down his neck so that he would learn the skill independently. The plaintiff's teacher, Mr. Mansfield, gave evidence as to the extensive instruction that the plaintiff had in relation to the use of the bandsaw prior to the accident.

10. Commenting on this conflict of evidence between the plaintiff and the two teachers, the judge said that she preferred the evidence of the teachers. She was satisfied that the plaintiff was trained thoroughly in the use of the bandsaw. The judgeaccepted Mr. Cahill's evidence that he did not leave the plaintiff to his own devices butrather set up the machine for him including the guard rail/fence. The judge then expressed her conclusions on the liability issue in the following terms:-

> *"Moving on then to a consideration of liability. The Court finds that while many of the allegations made by the plaintiff relating to training and supervision had not been made out, the core of his case is and has always been that he was not being properly supervised when the injury occurred.*

On the evidence the Court is satisfied that Mr. Cahill was at the far side of the bandsaw approximately five feet away when the injury was sustained."

11. The judge then went on to find as a fact that the evidence, including photographs, demonstrated that when the accident happened, Mr. Cahill could not have had a clear view of the position of the plaintiff's fingers on the work piece nor would he be able to see the level of force being exerted on it by the plaintiff. The judge noted that the task necessitated the plaintiff having his finger less than two inches from the blade and consequently any misstep by the plaintiff was likely to, and did in fact, result in injury:-

"This was a young man of 16, who had only physically used a bandsaw on two previous occasions and then under the direct supervision of Mr. Mansfield. The situation as illustrated in the photo of Mr. Mansfield called for direct close supervision. Mr. Cahill or another competent person should have been looking over his shoulder, or as he said breathing down his neck as he performed this task.

It seems to the Court that because Mr. Rafter was one of the best students who, as I have already stated had that morning received an A grade in his mock Junior Cert, Mr. Cahill trusted him beyond his actual level of competence. That was a mistake, had he been supervised to the appropriate level for the task which he was undertaking, which was a complex task that placed his fingers in close proximity to the blade, this accident would not have happened."

12. The court went on to emphasise that the finding of negligence was limited to the very specific facts of the case and not every task carried out by students usingmachinery required the level of scrutiny and supervision that was warranted in this case.The judge went on to assess damages, and as already noted there is no appeal in that

regard. It is also relevant to note that no plea of contributory negligence was raised by the defendant in its defence.

13. Following the Court's judgment, the defendant applied for a differential costs order pursuant to s. 17(5)(a) of the Courts Act 1981 as substituted by s. 14 of the Courts Act 1991. The Court heard further argument and submissions on this issue. One of the points raised on behalf of the plaintiff in response to the application was that the defendant had sought to treat the case as a form of test case in relation to the duties of schools to pupils in the position of the plaintiff and accordingly, it was appropriate that the case should have been heard by the High Court. The judge rejected that proposition stating that the case was simply one of negligence and breach of duty and there was nothing certainly on the face of the pleadings that indicated anything broader.

14. The judge was of the view that the decision in the case did not have any particular ramifications for the teaching of woodwork and metal work classes in schools generally. She was of the view that it was a simple personal injuries case that could and should have been litigated in the Circuit Court. She also pointed to the fact that a warning letter had been written by the defendant's solicitors that such an application would be made in the event that the plaintiff succeeded and obtained damages within the Circuit Court jurisdiction. The judge accordingly made the order sought by the defendant.

The Appeal and Cross-Appeal

15. I think it fair to say that the primary ground of appeal advanced by the defendant is that it was found liable to the plaintiff on the basis of a case that was never either pleaded nor advanced in the opening of the case, nor in the plaintiff's own evidence. In that regard, reliance is placed on a number of recent judgments of this Court. The

defendant further complains that the judge found it liable on the basis of findings of fact not supported by credible evidence, and that the High Court's conclusions on the standard of care did not find support in any admissible or competent expert evidence that was led in the case.

16. In his cross-appeal, the plaintiff complains that the judge erred in making the differential costs order by relying only on cases that were concerned with assessments of damage, whereas here, the case was defended on the basis of being a test case on liability, with potential consequences for all schools teaching similar courses. The plaintiff also argues that the medical evidence was such as to warrant instituting proceedings in the High Court when the plaintiff was a minor, and that is the essential issue that the judge should have considered. The defendant did not apply to remit the action to the Circuit Court.

Pleadings

17. As already indicated, the defendant places strong emphasis on several recent judgments of this Court, in particular, in the context of the pleading requirements for personal injuries actions introduced by Part 2 of the Civil Liability and Courts Act 2004. Judgments such as *Crean v Harty* [2020] IECA 364, *Morgan v ESB* [2021] IECA 29, and *McGeoghan v Kelly & Ors* [2021] IECA 123, all draw attention to the new regime introduced by the 2004 Act and the need for a much greater level of clarity and specificity in pleadings.

18. The legislation is intended to ensure a level of transparency in the pleaded case of both sides and is to a significant degree at odds with the practices of the past, when vagueness and generality were perceived as virtues which would keep all options open until the last possible moment. As Collins J pointed out in *Morgan*, the 2004 Act

requires plaintiffs and defendants alike to state clearly and specifically what their claim or defence is and identify the basis for it in their pleadings. This requirement operates coherently with the obligation under s. 14 to verify on affidavit assertions or allegations in pleadings and the intended effect of that obligation would be undermined if parties were permitted to continue to plead claims in wholly generic terms (see *Morgan* at paras. 6 - 8).

19. These principles were again reiterated recently in *O'Sullivan (A Minor) v O'Riordan & Anor* [2023] IECA 165, where the defendants delivered a defence consisting of a blanket denial which was criticised as not being in compliance with the Act. In contrast, the defence in the instant case sets out clearly and specifically the defendant's position and complies with the spirit and letter of the 2004 Act.

20. Although the defendant places reliance upon these authorities, the complaint here is not that the plaintiff failed to plead with particularity, but rather, that the plaintiff pleaded and made one case, but succeeded on another. The defendant complains that the plaintiff's case was pleaded on the basis that there was no supervision, the case was opened on the basis that there was no supervision and the plaintiff's evidence was that there was no supervision. The defendant says that this case was rejected by the trial judge who preferred the evidence of the plaintiff's teachers, Messrs. Mansfield and Cahill, to that of the plaintiff on this crucial issue.

21. In this respect, the defendant seeks to draw parallels with the decision of this Court in *McGeoghan.* There, the plaintiff was exiting the defendant's licensed premises after hours. She was directed to do so via a corridor, which she claimed was dark, (although the trial judge held otherwise), leading to a door onto the street. As she opened the lock with her right hand, the door opened slightly and she placed her left

hand around the leading edge, when the door suddenly slammed shut, catching the little finger of her left hand and causing her injury. Ultimately, the trial judge found in favour of the plaintiff on the basis that the defendants had been negligent in failing to ensure that a door closer that was fitted to the door was functioning correctly, and if it had been, the door would not have slammed shut.

22. The plaintiff's summons had originally pleaded, as one of the particulars of negligence, that there had been a failure to ensure that there was an appropriate mechanism on the door to prevent sudden and violent slamming, but that plea was raised prior to a joint inspection between the parties' respective engineers. When the plaintiff's report was disclosed in advance of the trial, a new complaint emerged, this being an alleged failure to accompany the plaintiff off the premises.

23. This became the focus of the plaintiff's case, both in opening and in evidence, and no evidence was led to suggest that the defendants were obliged to have a closing device on the door. Accordingly, the finding of the trial judge that the defendants were negligent in failing to maintain the door closer was unsupported by any evidence which established that a door closer was required in the first place.

24. In the course of a judgment with which the other members of the Court agreed, I noted (para 29):

> *"The essential basis upon which the trial judge held the defendants to benegligent was not one that was ever pleaded or made by the plaintiff, but simply one that fortuitously emerged in the course of the evidence. The provisions of the2004 to which I have referred, and more generally, the requirement for pleadingsto define issues, would be robbed of any meaningful effect if courts were at large to determine the outcome of litigation on such a basis. Far from the parties being*

confined to the issues defined by the pleadings, claims would fall to be decided on an inquisitorial rather than adversarial basis."

25. The defendant seeks to draw an analogy with this finding and the present case on the basis that the case pleaded, opened and made in evidence by the plaintiff here was that there was no supervision. However, the court found in favour of the plaintiff on the basis that there was supervision, but it was inadequate.

26. It is certainly true to say that the trial judge preferred the evidence of the teachers to that of the plaintiff. There was however no suggestion of dishonesty on the part of the plaintiff, rather the position appears to be that the court considered his recollection to be inaccurate. The plaintiff was a teenage child when the event happened which was clearly a very traumatic one for him, so it is not perhaps too surprising that the court regarded his memory of events as not as reliable as that of his teachers.

27. However, this case appears to me to be significantly different on its facts from those in *McGeoghan*. In *McGeoghan,* the case was never about the door closer, and the defendants did not come to Court to meet a case about its duty, first, to have a door closer and second, to maintain it. The case was in fact run on an entirely different basis being a failure to escort the plaintiff off the premises.

28. The instant case was always about supervision. That was always the main event, albeit that complaints are also made about the position of the guard/fence and adequate training. I do not therefore accept the defendant's contention that the original case made by the plaintiff was abandoned entirely at trial or that it became a radically different case as between a claim of no supervision at all and supervision which was merely deficient. The defendants extrapolate from this that once the Court found that the plaintiff was supervised, it was duty bound to dismiss the claim.

29. The defendant suggests that there is a chasm between no supervision and inadequate supervision. I disagree. Even had the plaintiff's version of events been accepted by the judge, it could not be said that he was at all times entirely unsupervised. He was in a school class in which the teacher was present and it could not be said therefore that there was no supervision of any description. What was really in issue was the degree of the supervision required as between the teacher standing at the top ofthe class while the plaintiff was at the other end, (which was what the plaintiff allegedand the judge rejected), or the teacher standing at the plaintiff's shoulder "breathing down his neck".

30. The case concerned the extent of the supervision required as against that actually provided. The plaintiff said there was no supervision and the judge clearly rejected that assertion. On the judge's findings of fact, there undoubtedly was supervision with the teacher standing within five feet or so of the plaintiff while keeping him under observation. Notably however, Mr.. Cahill went to the far side of the bandsaw table so that he could keep both the plaintiff and the rest of the class under observation at the same time.

31. What distinguishes this case from *McGeoghan* is that here, the central issue was supervision, whether it be described as no supervision or inadequate supervision, whereas in *McGeoghan*, the question concerning the door closer, which the High Court found decisive, was never in the case.

32. I am therefore of the view that there is no true analogy between this case and *McGeoghan*.

The Expert Evidence

33. Much has been written and said about experts in the context of litigation in recent times. There is virtually no area of law untouched by the influence of the expert. Their ubiquity is now such in personal injuries litigation that it is difficult to conceive of a case being litigated without some expert involvement. Some recent authorities have commented upon the fact that experts are commonly deployed in relation to matters which, in reality, call for no particular expertise. Trial courts are often encouraged by appellate courts to bring their own common sense to bear on ordinary everyday matters which are frequently the subject of expert evidence.

34. I think it is true to say that in the context of personal injuries litigation, forensic engineers are probably the experts most commonly encountered. Very often, their role is not in fact to give expert evidence as such but rather to assist the Court in understanding the factual matrix of the case in hand. Thus, in road traffic accidents, experts frequently give evidence which includes matters such as the preparation of a map and photograph of the locus of the accidents and the taking of relevant measurements. One does not have to be an expert to use a measuring tape and it is probably more accurate to characterise such evidence as being in the nature of expert assistance, rather than true expert evidence in the sense of opinion evidence by a person skilled in the discipline under consideration.

35. This is not in any way to diminish the value of such expert assistance which is often not just helpful to the court, but frequently decisive in terms of the facts disclosed by such evidence. The comment is often made that expert evidence exists to assist the court, not to decide the case, and the court must always remain free to accept or reject

any opinion evidence given by an expert, even if uncontradicted. (See *Duffy v McGee* [2022] IECA 254 at para. 80).

36. While experts are almost always retained in cases for example involving machinery, such as the present, industrial accidents and road traffic accidents, it should not be assumed that an expert must be regarded as an indispensable proof in every such case. Professional negligence cases are of course different and it is by now well settled that it is impermissible to institute such proceedings without the benefit of supportive expert evidence, in most cases at least.

37. The instant case however is not a claim in professional negligence. It is a claim made by a school child who suffered an injury using a highly dangerous machine at school. The standard of care required of the school in such circumstances is one to take reasonable care for the safety of the pupil in all the circumstances. Those circumstances include many factors such as the age of the student, the level of danger inherent in the activity concerned and the experience of the particular student in relation to the activity.

38. There are many other factors to be taken into account but all of them appear to me to be likely to be readily understandable by a judge who is called upon to bring experience and common sense to bear on what the appropriate standard should be. That is a matter for the court alone. There are of course other areas where the court may genuinely feel unable to arrive at a conclusion in that regard in relation to more esoteric matters without the benefit of an expert to express his or her opinion as to the standard of care that would or should normally apply in the relevant sphere.

39. In the present case, professional forensic engineers prepared the usual report and photographs of the locus of the accident and in particular the band saw concerned which were undoubtedly of great assistance to the court in understanding how the accident

actually happened. Neither expert however had particular expertise in teaching methods or indeed in relation to specialised woodworking machinery beyond having encountered such machines in previous law cases in which they were retained.

40. Mr. O'Hara on behalf of the plaintiff did not purport to offer any view on the issue of liability beyond pointing to the fact that relevant regulations, being the Safety Health and Welfare at Work Act (General Application) Regulations 2016, stipulate thatpersons between the age of 16 and 18 must be directly supervised when using a dangerous machine of this kind in an industrial setting. Here again, this is not a matter of engineering expertise but is a question of law.

41. Nonetheless it is undoubtedly of assistance for an engineer or similar expert to draw the court's attention to relevant statutory provisions in relation to the facts of the particular case. It was not suggested that these regulations had specific application in a school setting but the point was, not unreasonably, made by counsel for the plaintiff that one would have expected at least as high, if not a higher, standard to be applied where school children as opposed to factory workers are concerned.

Conclusions on Liability

42. One of the defendant's grounds of appeal is that the judge reached a conclusion on the standard of care required of the defendant school which was not supported by either credible evidence or expert evidence. I believe this is to misconstrue the function of the expert as I have explained it. The question of the relevant standard of care is solely and exclusively a matter for the court. In the present case, I see no reason whatsoever why the court was not in a position to come to its own view as to what that standard should be independent of the views of any expert.

43. In particular, I reject the suggestion that the court was not free to form a conclusion on this question in the absence of evidence from an expert on woodwork teaching. The defendant seeks to elevate the issue here beyond something that might be regarded as a common life experience and thus something requiring the skills and knowledge of an expert. I cannot accept that proposition. The judge heard evidence from two specialised teachers, Mr. Mansfield and Mr. Cahill, on the level of training and supervision they would regard as appropriate in any given case. Although they were not called as expert witnesses per se but rather as witnesses as to fact, there is nothing to suggest that the judge did not take their evidence fully on board and indeed as already pointed out, she preferred their evidence to that of the plaintiff concerning the facts of the accident.

44. I can see nothing objectionable in the judge's conclusion that the work being carried out by the plaintiff which brought his hands into very close contact with a metal blade moving at high speed called for particularly close supervision. Indeed, the defendant was at some pains to point out that precisely such supervision had been provided, presumably on the basis that his teachers regarded this as essential. The question then became whether that supervision was, in all the circumstances, actually sufficient. The judge fully took on board the proposition that the teacher cannot do the work for the student, otherwise how is the student ever to learn.

45. The judge placed particular reliance on what she described as a very helpful photograph of the aftermath of the incident taken by Mr. Mansfield, rather than any of the engineers. She found as a fact that having regard to this photograph and the evidence of Mr. Cahill as to where he was standing when the accident occurred, he couldnot have had a clear view of the position of the plaintiff's fingers immediately before

the accident nor could he have seen the level of force being exerted by the plaintiff on the workpiece being fed towards the blade. The defendant complains that this finding was unsupported by the evidence and I tend to agree. No witness gave evidence to this effect and it seems impossible to avoid the conclusion that this was a somewhat speculative leap made by the judge on her own interpretation of what the photograph showed.

46. The defendant submits that this error by the judge is fatal to her finding of liability against the school. However, it is common case between the parties that Mr.. Cahill did not see the accident happen. That can only be because either his view of the plaintiff's hands was obscured by the guard, which is what the judge found, or he was not looking at the plaintiff at the critical moment. Either way, it seems to me to amount to the same thing, namely a want of proper supervision. The defendant complains that this is to impose a requirement on the teacher of 100% supervision of one student in a class of many, an impossible and unreasonable standard. I do not accept that proposition.

47. It is not disputed by the school that there is a need for supervision in this situation. Such supervision can only have as its purpose ensuring the safety of the student in addition to correct technical execution. The point of maximum danger in this exercise arose when the plaintiff reached the end of the cut, because whatever pressure was being exerted by his hand on the workpiece would suddenly release when the wood separated, which could potentially, and did in this case, cause his hand to move forward suddenly towards the blade if his hand was in the wrong position or too much force was being applied. This was the very point of greatest danger when the greatest level of supervision was required and unfortunately, it was absent because Mr.. Cahill was looking elsewhere at that moment.

48. Counsel for the school emphasised the fact that the evidence established that all this occurred in a matter of 2 – 3 seconds and the teacher could not be blamed for diverting his attention for such a minimal period. Again, this submission is to misunderstand the fundamental requirement of proper supervision. Accidents commonly, if not mostly, happen in a matter of seconds if not split seconds. A fleeting moment of inattention is enough for a catastrophe. It could never be a defence to say that the negligence complained of was of very short duration. Sight cannot be lost of the fact that this was a child using a highly dangerous machine for, at most, the third time.

49. The judge made the important observation that while Mr. Cahill's evidence was that the plaintiff's hand was at all times in perfect position throughout, were this the case, the accident could not have happened, a proposition with which Mr.. Cahill agreed in his evidence. It followed ineluctably from the foregoing that Mr. Cahill's evidence in this regard could not have been correct and had he fully observed the plaintiff's hands at all material times, it would immediately be apparent to him that the plaintiff'shands were not in fact in the correct position and/or that he was likely using excessiveforce to push the workpiece toward the blade.

50. In my judgment, the trial judge was entitled to conclude that a proper level of supervision of this particular plaintiff, undertaking this particular task, required that the teacher kept his hands under observation at the relevant time. The judge concluded that the failure to take this step amounted to a want of a proper supervision and as I have explained, I can see no reason why the judge was not entitled to reach such conclusion on the facts as she found them. The defendant complains that the judge failed to identify the appropriate standard of care which was said to undermine her conclusion on liability

but here again, it is in my view readily inferred from her judgment. In my experience it would be unusual in most negligence cases for the judge to first recite a notional standard of care before concluding that there was a want of adequate care on the part of the defendant. The requirement is to take such care as is reasonable in the circumstances, whether it be described as equivalent to the care a prudent parent would take for their child or otherwise.

51. I also agree with the judge's view that there is no reason to consider that this decision has any particular implications beyond the very specific facts of this case.

52. For the foregoing reasons therefore, I would dismiss this appeal.

Differential Costs Order

53. It cannot be disputed that the award in this case falls foursquare within the jurisdiction of the Circuit Court by a very comfortable margin. The court's discretion under s. 17(5)(a) is therefore clearly engaged. How the court should exercise its discretion under the section has most recently been considered in the judgment of this Court in *McKeown v Crosby & Anor* [2021] IECA 139. In that case, which was an assessment of damages, the plaintiff recovered the sum of €70,000 for general damages in the High Court together with agreed special damages of €6,000 resulting in a decree of €76,000. On appeal, the plaintiff's general damages were reduced to €35,000 which, together with the special damages, resulted in a reduced decree of €41,000, well within the jurisdiction of the Circuit Court.

54. In delivering the costs ruling of the court with which the other members agreed, I noted that shortly after the issue of the personal injuries summons, the defendant's solicitors wrote to the plaintiff's solicitors warning them that an application for a

differential costs order would be made if damages within the High Court jurisdiction were not achieved. A similar letter was written in this case.

55. In reviewing the relevant authorities, I noted that the starting point was the judgment of the Supreme Court in *O'Connor v Bus Átha Cliath* [2003] 4 IR 459 where Murray J. said (at p. 493 – 494):

> *"In my view, when the order made by a court in favour of a plaintiff falls well within the jurisdiction of a court lower than that making the award, it is incumbent on the trial judge to have specific regard to the nature of the claim and all the reasons for which the plaintiff's claim fell within the lower jurisdiction or as the section puts it, all the circumstances of the case. An unsuccessful defendant should not be wantonly burdened with the costs of defending a claim in the higher court when it could reasonably have been brought in the lower court."*

56. In his judgment, Hardiman J. observed that the fact that the award is within the jurisdiction of the lower court does not require the court to make an order under s. 17(5) noting (at p. 506):

> *"For example, where the award is very close to the limit of the jurisdiction of the lower court or where there has been some unpredictable development during the trial which has the effect in reduction of the ostensible value of the claim, there may be good reason for exercising the discretion in favour of the plaintiff."*

57. However, in making the differential costs order, Hardiman J. commented on the fact that no reasonable person could have thought that the injuries would have required proceedings in the High Court. He said (at p. 508):

"Unless the court, by the exercise of its discretion, imposes a price on those who thoughtlessly, or in pursuit of tactical advantage, embark on litigation which is elaborate and expensive when it could have been simpler and cheaper, the intention of the legislature will in my view be frustrated. Litigation which is unduly elaborate and expensive imposes a cost on others: most directly on the defendant but on wider groups and on society as a whole in the form of a social cost. The legislative intent in section 17(5) is, in an appropriate case, to impose the cost of overblown litigation, or part of it at least, on those who make it so."

58. In the joined cases of *Moin v Sicika and O'Malley v McEvoy* [2018] IECA 240, Peart J., speaking for this Court, said (at para. 21):

"In my view it is incumbent upon a trial judge in circumstances where an award is significantly within the jurisdiction of the lower court to make a differential costs order unless there are good reasons for not doing so. The trial judge must have regard to the clear legislative purpose, and having regard to all the circumstances of the case at hand which are relevant to the exercise of his/her discretion…"

59. In *McKeown*, the court was of the view that the outcome was predictable given that the injury fell readily within a category specified in the Book of Quantum and was also in keeping with other relevant recent decisions of the Court of Appeal. In that regard I said *"No realistic assessment of this case could ever had led to the conclusion that it was other than a Circuit Court case and comfortably so"* – at para. 19.

60. In the present case, the plaintiff resists the defence application for a differential costs order on essentially three bases. First, the plaintiff submits that the defendant sought to treat the this claim as a form of test case with widespread implications for all

schools teaching similar woodworking courses and on that basis, it was reasonable for the plaintiff to pursue the case in the High Court.

61. However, the High Court found, and I agree, that there was nothing to indicate from the pleadings or otherwise that this ought to have been regarded somehow as in the nature of a test case. Indeed I cannot see any basis upon which it ought to be so regarded in circumstances where it was made abundantly clear by the trial judge that the decision was entirely specific to the individual facts of the case as she had found them.

62. Second, the plaintiff contends that there was an element of uncertainty about the course of the plaintiff's injury and it was thus reasonable to institute the proceedings in the High Court and maintain them in that jurisdiction. The summons was issued on the 1st March, 2021 at which point a medical report was available from the plaintiff's treating consultant orthopaedic surgeon, Mr.. Padinjarathala. That report was based on an examination on the 5th December, 2019, over a year earlier.

63. In his report, the surgeon was of the view that the plaintiff had by then, at nine months post-accident, made a full functional recovery without any neurovascular deficit and any residual symptoms the plaintiff had should clear up within three or fourmonths. He had a small scar of some five centimetres in length at the base of his rightindex finger. Having regard to that report, I cannot see any basis upon which it could realistically be said that there was any significant degree of uncertainty about the plaintiff's prognosis or the severity of his injuries and it is impossible to resist the conclusion that it was clearly and patently a case well within the jurisdiction of the Circuit Court at that time and throughout.

64. Third, the plaintiff argues that if the defendant was serious in its application, it ought to have applied to remit the case to the Circuit Court and cannot now be heard to complain given that it did not do so. A similar argument was rejected in *McKeown* at para. 21:

> *"In her submissions on costs, the plaintiff suggests that this court should take account of the fact that the defendant did not apply to remit the matter. With respect, that is to entirely reverse the proper onus that lay on the plaintiff to ensure that her claim was brought and continued in the appropriate jurisdiction, a choice made by her in the teeth of the defendant's correspondence. The plaintiff cannot escape the consequences of her choice, freely made, by the contention that the defendants ought to have attempted to override that choice."*

65. At para. 23 of the judgment, I pointed to the fact that there are a wide range of circumstances in which the court might properly consider exercising its discretion against making a differential costs order and I gave some examples. Those all refer to cases where, for one reason or another, it was reasonable to pursue the case in the High Court but due to some untoward or unexpected event, the plaintiff ended up with an award within the Circuit Court jurisdiction. As in *McKeown*, none of those factors arise in the present case which appears to me to have been clearly and patently a Circuit Court case at all relevant times.

66. I am therefore satisfied that the trial judge was correct in making the costs order she did and that she exercised her discretion in that regard properly and appropriately.

67. I would accordingly dismiss the cross-appeal.

68. As regards costs, my provisional view is that as the plaintiff has been entirely successful in the appeal, he should be entitled to his costs. Similarly, as the defendant has been entirely successful in the cross-appeal, it too should get its costs. If either party wishes to contend for an alternative form of order, they will have 14 days from the date of this judgment to provide submissions in writing, not exceeding 1,000 words,and the other party will have a similar period to respond likewise. In default of such submissions being received, an order in the terms proposed will be made.

69. As this judgment is delivered electronically, Binchy and Butler JJ. have authorised me to record their agreement.

26/07/2023