THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 278

Record No. 2016/232

Ryan P.
Irvine J.
Whelan J.

BETWEEN/

PAUL GORE (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND, SHARON GORE

PLAINTIFF / RESPONDENT

- AND –

JOHN WALSH AND DARREN WALSH

DEFENDANTS / APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 26th day of October 2017

1. This is an appeal against the Order and judgment of the High Court, Cross J., of the 22nd April, 2016. By his judgment and Order he awarded Paul Gore, a minor, ("Paul") a sum of €50,000 damages, comprising a sum of €25,000 for pain and suffering to date and €25,000 in respect of pain and suffering into the future, in respect of injuries which he found had been sustained by Paul on the 11th December, 2011, as a result of the defendants' negligence.

Undisputed background facts
2. Paul was born on the 28th March, 2007. In 2011, he was living with his mother and next friend, Sharon Gore ("Ms. Gore"), in a property which she had rented from the defendants at Dingle Road, Cabra West, Dublin. Some months prior to Paul's injuries, the first named defendant Mr. John Walsh, who is the father of the second named defendant Mr. Darren Walsh, had renovated the property so that Ms. Gore would be in a position to give each of her two children a bedroom of their own. This had required the installation of a partition wall and new radiators. That work had been carried out by Mr. Ken Walsh, a plumber by trade and a brother of the first named defendant.

3. Whilst there were no witnesses to the incident in question, the parties were agreed that Paul was injured when he fell from his sister's bed onto the uncovered spindle/valve of the radiator in her room which the trial judge found had been fractured and was unprotected by the standard plastic cap which is normally secured in place and which covers the valve. It is also agreed that on the night of Paul's injury or the following day Mr. John Walsh visited the rental property at which time the radiator spindle was noted to be both fractured and uncovered. It was further accepted that the radiator concerned had been installed in the course of renovation works carried out in October, 2011 and that it was a new radiator.

The claim
4. The claim advanced on Paul's behalf was that he had been injured as a result of the defendants' negligence in, *inter alia*, providing him with accommodation which was dangerous by reason of the presence thereon of an unprotected radiator valve.

The evidence
5. At the hearing Ms. Gore, gave evidence that on the day prior to Paul's injuries she had telephoned the first named defendant to complain that the radiator valve was unprotected, evidence which he contested. She later changed that evidence to say that she telephoned him a week or two before the accident to advise him that the radiator spindle constituted a danger. She also gave evidence that on the night Paul sustained his injuries she had telephoned Mr. John Walsh to complain that Paul had injured himself on the defective radiator. Concerning the radiator, Ms. Gore stated that while the spindle was uncovered she could nonetheless use the radiator which could be turned on using the mains switch.

6. Mr. Pat Culleton, the Plaintiff's engineer, when asked by the trial judge to offer his opinion as to what might have caused the spindle to be broken and left with a jagged edge, stated as follows:-

> 172. A. "I speculate that over tightening of the screw may fracture it….It would take, if you remove the cap and struck the end of it with a hammer you could achieve that effect"

7. When asked by counsel as to what type of hammer impact would be required to achieve that, he replied as follows:-

> 176. A. "It's described as being the underside of the spindle so that the hammer would have to be exerted against the exposed secure [sic]. In other words, no cap, the secure [sic] in it and a strike to the screw which would then fracture the underside of the thread. In other words knock it down through the spindle. It's simply not something that would arise in normal service or kids jumping on it. It's just not plausible."

8. On behalf of the defendants, Mr. Ken Walsh stated that the radiators were not defective or broken when unpacked. The valves were delivered in an "off" position and the radiators could not be operated until they had been turned on with the knob. He stated that he would have checked that the radiators were properly installed and were working on the completion of the renovation works. It was "ridiculous", he said, to suggest that the radiators had been left without the cap to the radiator having been fitted.

9. Under cross-examination, Mr. Ken Walsh explained that it was not necessary to unscrew the cap to do anything to the back of the radiator. It would only be unscrewed if it was necessary to work behind the cap itself. He ventured the opinion that if the valve was subjected to constant banging then that might account for the plastic top being knocked off and the spindle becoming damaged.

10. As to causation, counsel for the plaintiff put the following proposition to Mr. Ken Walsh:-

> 210. Q. "Well happily, it's not for me to have to think about it, Mr. Walsh, but if [sic]put the following to you, isn't it clear that what actually happened in this case is that you intended to come back and finish it, but you hadn't finished the job?
>
> A. No.
>
> 211. Q. You left them or they had been left in an exposed state?
>
> A. No."

11. The evidence of Mr. John Walsh was that he and his wife had painted the room concerned and the skirting boards following the completion of the renovation works at which stage he was satisfied the cap was in situ. He denied any telephone call from Ms. Gore to complain that the spindle of the radiator had been left uncovered. If she had made such a call he would have asked his brother to call up and repair it. He agreed that when he went to inspect the radiator shortly following Paul's accident that the cap was not on the spindle and that it had been damaged. Mr. Walsh agreed that he had heard Mr. Culleton's evidence as to the force required to break the spindle and accepted that it was unlikely that such damage could have been done by a four-year-old. He also agreed with counsel for the plaintiff that he considered it likely that the Gore family had broken the valve some time after the renovation works had been completed. He later clarified that statement is his answer to question 112 in the following manner:-

> 112. Q. "And the condition that you say you saw it in on that night you say is something that was done by the Gores?
>
> A. I don't know who done it. It wasn't left like that when I put it in."

12. Two final matters need to be mentioned, the first being that Mr. John Walsh denied that in the phone call made by Ms. Gore on the night of the accident she had made it clear she was holding him responsible for Paul's injuries. The second, that it was undisputed that at the time Paul was injured Ms. Gore was in arrears with her rent and had been served with a 28 day Notice advising her that her tenancy would be terminated.

Judgment of the High Court judge

13. The trial judge decided the liability issue by addressing whether the defective state of the radiator upon which Paul was injured was or was not the fault of the defendants. In support of his finding that such fault was to be attributed to the defendants he cited his conclusion that the radiator cap was likely damaged by a servant or agent of the owner. This damage to the spindle had probably been done before they left the premises, by delivering to it a heavy sharp blow when working on it with spanners or hammers or the like. Thus, causing it to fracture and that this damage had not been noted by the first named defendant or his wife when they had later painted the room. He concluded that it was fanciful to suggest that the radiator had been damaged by the movement of Paul's sister's bed as had been advanced by Mr. Ken Walsh, who had installed the radiators.

14. For the purposes of determining liability the trial judge stated that he did not find it necessary to resolve the dispute as to whether or not Ms. Gore had telephoned the first named defendant prior to Paul's injuries to advise him of the condition of the radiator stating that:-

> "The real issue in the case is whether the condition of the radiator as discovered by Mr. Walsh after the accident, namely no cap and a fractured spindle, was left in that condition by Mr. Walsh and his agents or whether it happened subsequent. That is the central issue in this case."

15. The trial judge went on to conclude that it was to be inferred from the evidence adduced by the plaintiff that as a matter of probability the central heating radiator had been left in a dangerous and exposed situation by the defendants. He expressed himself satisfied that the telephone call made by Ms. Gore to the first named defendant on the evening of Paul's injury was only consistent with her belief that she had an entitlement to complain about the condition of the radiator. As was the fact that Mr. Walsh had, according to the trial judge, hot footed it to the property to inspect it that night or the following day.

16. Having found the defendants liable the trial judge referred to the laceration sustained by Paul which had required suturing and which had left him with what the trial judge described as a significant scar of somewhere between 4.2 cm and 6 cm and proceeded to award him a sum of €25,000 for pain and suffering to date and a further sum of €25,000 for pain and suffering into the future.

The appeal

17. By notice of appeal dated the 19th May, 2016, the defendants have appealed the findings of the trial judge in respect of liability and also in respect of the quantum of damages which he awarded.

Submissions of defendants/appellants

18. The defendants submit that:

> 1. There was no credible evidence or indeed any evidential basis to support the trial judge's finding that Paul's injuries had been caused by the negligence of the defendants, their servants or agents, in damaging the radiator spindle by delivering to it a hard blow with a hammer, spanner or some other implement. This finding was pure speculation on the part of the trial judge. Neither was there any evidence which permitted the trial judge to draw the inference that the spindle and/or radiator had been damaged in this way.
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> 2. The act of negligence which formed the basis for the trial judge's liability finding had never been canvassed with the defendants' witnesses and in particular had never been put to Mr. John Walsh or Mr. Ken Walsh so that they might address or contest such alleged negligence. To that extent, the trial was unsatisfactory.
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> 3. The damages were excessive having regard to the size and position of the plaintiff's scar and the extent of the consequential pain and discomfort.

Submissions of the plaintiff/respondent

19. Counsel for the plaintiff submits:

1. That the trial judge's finding that the spindle had been damaged by a blow from a spanner, hammer or some other implement was not central to his determination. His decision was based upon his conclusion that the radiator had been left by the defendants in a damaged condition following the completion of the renovation works rather than caused by Ms. Gore and her family during the period between the completion of the renovation and the date of Paul's injury. Further, that finding was supported by his conclusion that the only reason why Ms. Gore would have phoned Mr. John Walsh on the night of Paul's injury was because she believed he was responsible for the injury.

2. The defendants had been afforded a sufficient opportunity to respond to Mr. Culleton's evidence as to the type of impact and tools that might cause a fracture to the spindle of a radiator as had occurred in this case.

3. In reaching his decision the trial judge had considered the credibility of the evidence adduced by each of the witnesses, including the evidence of Mr. Ken Walsh and that of Mr. John Walsh concerning the radiator when it had been installed and painting done, but had rejected the same in favour of the evidence adduced on behalf of the plaintiff through his mother and her engineer, Mr. Culleton.

4. As to the award of general damages, the award made was fair, just and proportionate. The scar was, according to counsel, "horrific" and was permanent.

Principles

20. As there is no real dispute concerning the principles to be applied on this appeal, it is unnecessary to refer to them in any great detail. Suffice to say that when it comes to interfering with the findings of fact made by a trial judge, the long established principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210 apply. If the findings of fact made by the trial judge are supported by credible evidence, the appellate court is bound by those findings, however voluminous and apparently weighty the testimony against them may be. As was stated by McCarthy J., the truth is not the monopoly of any majority. Further, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge to draw its own inferences.

21. As to the circumstances in which an appellate court will interfere with an award of general damages, two of the most regularly quoted decisions are those of Fennelly J. in *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 I.R. 578 and McCarthy J. in *Reddy v. Bates* [1983] I.R. 141. The former judgment advises, inter alia, that the test to be applied by the appellate court is to decide whether there is any "reasonable proportion" between the actual award of damages and what the court, sitting on appeal, would be inclined to give and that an appellate court should only interfere with an award of general damages if it considers that there is an error in the award of damages which is so serious as to amount to an error of law. The latter decision advises that a general rule of thumb would require a discrepancy of at least 25% before the appellate court could justify intervening.

22. As to the calculation of general damages, the jurisprudence in this area of law demands that damages for pain and suffering be both just and fair. The award must be (i) fair to the plaintiff and the defendant, (ii) objectively reasonable in light of the common good and social conditions in the State, and (iii) proportionate within the scheme of awards for personal injuries generally. (See for e.g. Denham J. in *M.N v. S.M* [2005] IESC 17, [2005] 4 I.R. 461 and my own judgment in *Nolan v. Wirenski* [2016] IECA 56). It is important, as I stated in *Nolan*, that minor injuries should attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level that are clearly distinguishable in terms of quantum from those that fall into the other lesser categories of injury. Further, the fact that a judge describes an injury as significant does not mean that the damages must be substantial. How significant the injury is for the purposes of assessing damages should be assessed in the context of the whole spectrum of potential injuries to which any individual might be exposed.

23. As to how a judge at first instance might make a fair and just assessment of the damages to be awarded in respect of pain and suffering in any case, commencing at para. 43 of my judgment in *Shannon v. O'Sullivan* [2016] IECA 93 I stated as follows:-

> "43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as the following:-:
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> (i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?
>
> (ii) Did the plaintiff require hospitalisation, and if so, for how long?
>
> (iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?
>
> (iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?
>
> (v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?
>
> (vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?
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> (vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?
>
> (viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?
>
> (ix) For how long was the plaintiff out of work?
>
> (x) To what extent was their relationship with their family interfered with?
>
> (xi) Finally, what was the nature and extent of any treatment, therapy or medication required?

44. As to the court's assessment as to the appropriate sum to be awarded in respect of pain and suffering into the future, the court must once again concern itself, not with the diagnoses or labels attached to a plaintiff's injuries, but rather with the extent of the pain and suffering those conditions will generate and the likely effects which the injuries will have on the plaintiff's future enjoyment of life."

Decision

Liability

24. The first thing to state is that the burden of proof in any case rests with the plaintiff to establish negligence against the defendant. It is not for the defendant to explain how a plaintiff, such as Paul, could have been injured without negligence on its part. Thus, the fact that the trial judge rejected the evidence of Mr. Ken Walsh to the effect that he believed the damage to the spindle of the radiator could have been caused by the repeated banging of the radiator valve was irrelevant to the liability issue. Neither is this a case to which the doctrine of *res ipsa loquitur* applies.

25. Mr. Culleton in his report of the 3rd June, 2015, which was admitted into evidence by agreement, stated that it was plausible that the children could have stood on the radiator valve because it had been installed horizontally but he did not think that a small child could exert sufficient force to break the spindle. He was unable to offer an explanation for what might have caused the spindle to fracture in circumstances where he was satisfied that whilst over tightening the retaining screw might bend the spindle it would not exert sufficient force to break it. In his report, which after all was obliged to contain the substance of his evidence, he made no mention of the possibility of the spindle having been damaged by a blow from an instrument such as a hammer in the course of the renovation works.

26. Those facts notwithstanding, when Mr. Culleton was asked by the trial judge how the spindle might have been damaged, he offered two possibilities. His first explanation was that it might have been caused by the over tightening of the screw used to attach the cap. His second was that if the uncovered spindle was struck a heavy blow by an instrument such as a hammer the spindle could be fractured. It was undoubtedly this evidence which led the trial judge to find as a fact, on the balance of probabilities, that the defendants, their servants or agents, had damaged the spindle by striking it with "spanners, hammers or some other implement" before they vacated the premises and which later caused the injury.

27. There are a number of significant difficulties from an evidential perspective with this finding on the part of the trial judge. The first is that this act of negligence was not pleaded and the defendants were not on notice of it from the report of Mr. Culleton. The second is that the evidence of Mr. Culleton was nothing more than supposition and speculation. He wasn't even asked which of his two theories he felt was more likely. Neither did he give any evidence that the defendants would have needed to use hammers or spanners when fitting the radiators or as to the circumstances in which a hammer might have been deployed at a time when the radiator cap had been removed. In fact, Mr. Culleton did not state that the damage to the spindle could have been caused by the use of a spanner or any other instrument as was found by the trial judge. There was no evidence from which the trial judge could have drawn the inference which he did.

28. The third major difficulty with the finding of the trial judge concerning the act of negligence which determined the liability issue is that it was never put to Mr. Ken Walsh who, together with his son, had installed the radiators. Commencing at question 193 there is an exchange between counsel for the plaintiff and Mr. Ken Walsh in the course of which oblique references were made to Mr. Culleton's evidence of the previous day concerning the force that would be needed to fracture the spindle. This led Mr. Ken Walsh to propose that the spindle might have been damaged by the bed banging off it, a proposition which was then subjected to rigorous cross-examination by counsel for the plaintiff. Following this discourse, it was suggested to Mr. Walsh was that he had left the spindle in an exposed state, a proposition which he rejected stating that he would have checked the radiators before the job was completed. It was never suggested to Mr. Walsh that he or his son had fractured the spindle by knocking it with a hammer or a spanner. Thus, the defendants were denied any possibility of answering that allegation.

29. As perhaps is evident from the extracts from the transcript already quoted, what was put to Mr. Ken Walsh was that he had left the job unfinished.

30. For my part, I am satisfied that the objection made to the finding of fact made by the High Court judge that the spindle was damaged by a blow from a hammer, spanner or some other implement is valid. It was a finding which was the result of speculation and was not supported by credible evidence such that it should be disturbed by this Court. Further, the finding can not be inferred from any circumstantial evidence properly before the Court. In addition, the finding was one which was highly prejudicial to the defendants in that they were afforded no opportunity to rebut it. Accordingly, the aforementioned finding cannot be sustained.

31. I am also satisfied that it cannot be said that the aforementioned finding was not, as was submitted by counsel for the plaintiff, core to the trial judge's finding on the liability issue. Had the defendants been afforded the opportunity to contest an allegation that they had likely fractured the spindle and left it in that condition such that Paul ultimately injured himself on it, the outcome of the proceedings might well have been different. If the possibility of the spindle having been damaged by a hammer, spanner or other instrument had been successfully rebutted, the court would have had to look for some other reason to explain how it had come to be in a fractured condition at the time Paul sustained his injury. The court would have considered the likelihood of the spindle having been damaged at installation and left uncovered at the conclusion of the defendants' work as opposed to the damage having occurred on the Gore's watch. To find for the plaintiff the court would require evidence, circumstantial or otherwise, from which it could infer that the defendants had damaged the spindle and left it in a fractured condition and uncovered at the end of the renovation process.

32. Counsel for the plaintiff may be correct in his submission that the decision to be made by the High Court judge was whether the damage to the spindle happened on the defendants' watch or after they left. But that does not mean that this Court can ignore the finding of fact supporting the trial judge's conclusion that the damage happened on the defendants' watch. In reaching his decision, the High Court judge clearly attached weight to two factors. The first being Mr. Culleton's evidence that damage from a heavy blow from a hammer could cause this type of injury. The second being the phone call made by Ms. Gore, which he considered supported her evidence that the spindle had been defective from the outset, and that she had advised Mr. John Walsh of this fact. If one removes, as one must, the finding that the damage was probably caused by a heavy blow inflicted by a hammer, spanner or something else a reassessment of the liability issue is clearly warranted.

33. For the aforementioned reasons I am satisfied that the finding of liability made by the High Court judge cannot stand. However, I am not satisfied that the consequences of the error made by the trial judge are such that the plaintiff's claim should be dismissed. That would be to do an injustice to the plaintiff in circumstances where on a proper and correct approach the plaintiff may be in a

position to adduce evidence sufficient to warrant a finding of negligence on the part of the defendants. That being so, I would favour allowing the appeal, and would propose that a retrial be directed.

Quantum
34. Paul was taken to Temple Street hospital, where his wound was stitched. He was not detained. He returned to hospital to have the sutures removed five days later. He was prescribed a course of antibiotics against the risk of infection and his mother kept the wound covered with a plaster for three weeks so as to insure the wound was kept free from contamination. There was no evidence to suggest that Paul experienced any pain or distress following the period immediately following his fall.

35. Accordingly, for the purposes of assessing damages the only other factor to be considered is the scar on Paul's back, which, in the context of cosmetic injuries that commonly come before the courts, is at the very lowest end of the cosmetic injury spectrum. Mr. Okafor, consultant in paediatric emergency medicine, in his report of the 16th May, 2012, stated that the scar, which he assessed as being 4 cm in length, would persist for a few years and gradually fade. Dr. Siúin Murphy, consultant plastic surgeon, in her report of the 8th June, 2015, described the scar as 4.2 cm in length and as a "linear, mature white scar" and "needs no intervention". Paul's scar is described by Mr. McQuillan, consultant in emergency medicine as "a 6 cm pale longitudinal scar on the right lower back" which is "a little wide".

36. I am satisfied that the amount awarded by the trial judge in respect of general damages in this case cannot be considered to be just, fair or proportionate to the injury sustained. Neither is it an award which is proportionate when viewed in the context of awards commonly made in respect of other categories of personal injury of a more significant nature. Of particular importance as far as I am concerned, is the fact that I do not consider this award objectively reasonable in light of the common good and social conditions in the State.

37. Paul was not left with a significant scar, as was determined by the trial judge. Neither can his scar be described, as it was by counsel, as horrific. This scarring injury, unaccompanied as it is by any other physical or psychological injury, is possibly if not probably the smallest scar that I have ever seen form the subject matter of High Court proceedings in more than 35 years of legal practice. The scar is somewhere between 4 and 6 cm (1.5-2.3 inches). It is not keloid or red. It is white. It does not cause any irritation and is located on a part of the body which cannot be seen when he is clothed. Even then, it could not conceivably cause him any embarrassment. If there was any such possibility I'm certain it would have been identified by his consultant plastic surgeon. It is confirmed that the scar will not impact on his activities in any way.

38. If modest lacerations such as that sustained by Paul are to attract awards of €50,000 it is difficult to see how the Court would be in a position to make a proportionate and fair award in respect of, for example, substantial third degree burns to a large area of the body including the face which would not require an award of damages far beyond the level of damages commonly reserved for those who sustain the most extreme type of catastrophic injury such as severe brain damage or quadriplegia.

39. In the aforementioned circumstances I consider the award made by the High Court judge excessive to the extent that it should be considered to be error of law as per the guidance given by Fennelly J. in *Rossiter v. Dun Laoghaire Rathdown County Council*. I would favour a reduction of the award to the sum of €25,000 and I would apportion that sum as to €15,000 to date and €10,000 into the future.

Conclusion
40. For the reasons set out earlier in this judgment I would allow the appeal both in respect of liability and quantum.

41. I am satisfied that the liability finding made against the defendants cannot be sustained and that the action should now be remitted to the High Court for a retrial on the issue of liability only.

42. For the reasons already stated I am also satisfied that the award of general damages made by the High Court judge was grossly excessive to the point that it constitutes an error of law and must be set aside. I would propose that the award made in the High Court be replaced by an award of €25,000 which I would apportion as to €15,000 in respect of pain and suffering to date and €10,000 in respect of pain and suffering into the future.