Neutral Citation Number: [2011] IEHC 449

THE HIGH COURT

2009 8910 P

BETWEEN

CATHERINE BURKE

PLAINTIFF

AND

CIARAN McKENNA

DEFENDANT

JUDGMENT of Mr. Justice Ryan delivered the 5th December 2011

1. This is a motion brought by the defendant to separate the hearings of liability and quantum. The application is made pursuant to O. 36, r. 9 of the Rules of the Superior Courts. The defendant contends that an order in terms of the notice of motion will save time and cost and will also be just and convenient. The case is listed for hearing on the 18th April, 2012.

2. The action is for damages for personal injury arising out of a road traffic accident that happened on the 9th September, 2007. The plaintiff was born on the 22nd November, 1976. It is pleaded that he suffered very severe injuries including head injuries that have left him with severely disabling organic brain damage. He was made a Ward of this Court by order of the 30th June, 2009.

3. Counsel have made it clear that there is a major liability issue in the case. The plaintiff's injuries particularly the head injuries and their *sequelae* are also a matter of some considerable complexity. In addition to the evidence that one would usually expect in such a case – and here I have the benefit of the plaintiff's schedule of experts – there is an added complication because of a previous road traffic accident on the 23rd September, 2000, in which the plaintiff appears to have suffered serious injuries. He recovered general damages of €257,000 and it appears from a discovery request letter in this case that reports relating to the September 2000 accident reveal that the plaintiff suffered *inter alia*, a major head injury on that occasion.

4. Ms. Adrianne Fields B.L for the defendant submits that the two issues of liability and quantum are quite discrete and that it is reasonable, convenient and just to separate them. If the plaintiff fails to establish negligence, that is the end of the matter and there will not have to be a second hearing. In those circumstances, in other words on the assumption that the plaintiff loses the action, then having all the medical witnesses scheduled to appear will have been completely unnecessary. If the result is otherwise and the plaintiff succeeds in whole or as to some apportionment of liability, the second hearing can focus entirely on the extent of the plaintiff's injuries and continuing disability and the degree to which they were caused by the accident in question as compared with the *sequelae* of the 2000 accident.

5. Mr. Niall Fitzgibbon B.L. for the plaintiff argues that the usual procedure should apply and both issues should be heard together. He says that it is not fair on the plaintiff to have to wait for a second hearing in the event that he succeeds in establishing liability in whole or in part. Mr. Fitzgibbon cited Prof. Delaney's book on the procedure in the High Court to the effect that the Order envisages cases involving particular complexity, especially where there are numerous defendants.

6. Order 36, r. 9 is as follows:-

> "Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and in all cases may order that one or more issues of fact be tried before any other or others."

7. There is nothing in the rule requiring special complexity or numerous defendants. The matter therefore, is one of discretion. The surprising thing is that there have not been many other applications of this kind brought by way of separate motion rather than by application in the personal injury list.

8. On the face of it, this application makes good sense. It is very likely that there will be issues of considerable complexity in regard to the plaintiff's head injuries and their consequences and causes. The relevance of that evidence is entirely contingent on the outcome of the liability issue. If that is known it may be possible for the parties to reach agreement on quantum, subject to the approval of the court. Since liability is very much in issue, if it happens that the plaintiff fails in the action, then there would be a substantial saving of costs and inconvenience and time in scheduling the quantum issue separately.

9. What is the argument to the contrary? There really is no legitimate argument against this application. As to the point that the plaintiff is put to another hearing and has to wait for then to get any award, the court can deal with that in a number of ways. If the plaintiff succeeds, the trial judge can be asked to make an interim payment on the basis of agreed medical facts or even on the basis of the defendant's medical reports. The court can fix an expedited hearing of the medical issues and, as I have said above, the fact that the liability is determined makes it easier for the parties to address the possibility of compromising the issue of quantum subject to approval. Mr Fitzgibbon suggested that the medical evidence might have some impact on the liability issue but that is not an argument against separating the two questions. It simply means that if there is a medical witness who has some relevant evidence to give on the question of the causation of the accident or any other aspect of the liability issue, there is no reason why that witness cannot be called for that specific purpose in the liability hearing.

10. In the circumstances, it seems to me that this application is a proper one and that I should exercise my discretion under O. 36, r. 9 in favour of ordering separate trials of the liability and damages issues in this case.

11. I have no doubt that in most cases it is more convenient to have all the issues determined at the same hearing. However, anybody with experience of personal injury litigation knows that complex brain injury cases, especially when they give rise to causation issues as well as *sequelae* questions, very often involve detailed technical evidence by busy experts who may have travelled far to testify. Such witnesses find it difficult to understand how their evidence cannot be scheduled for a precise time. The Court can have difficulty accommodating them. It is not very professional to lump all the witnesses whether they are lay or technical together in the hope that somehow the arrangements will work out. It seems to me to make sense to direct separate trials of liability and damages in cases involving complex or lengthy technical, scientific or medical questions. In fact, the difficulty is to explain or

justify why any other arrangement should be made.