2005 IEHC 405

THE HIGH COURT

2003/6746P

DAMIEN MURRIN

PLAINTIFF

AND
SLIGO COUNTY COUNCIL
AND
WASTE DISPOSAL SLIGO LIMITED

DEFENDANTS

Judgment delivered by Finnegan P. on the 5th day of December 2005.

1. In an action entitled The High Court 2002 No. 5955P between Paul Rooney, Plaintiff and Sligo County Council and Waste Disposal Sligo Limited the Plaintiff's claim was as follows. On the 12th September 2000 the Plaintiff an employee of the second named Defendant was driving a motor lorry the property of the second named Defendant when, it was alleged, the same went out of control skidded and struck a telegraph pole and as a result the Plaintiff sustained personal injury. He alleged inter alia negligence on the part of each Defendant. In relation to the first named Defendant it was alleged that the accident was caused by the dangerous condition of the road by reason of there being loose chippings thereon. In relation to the second named Defendant it was alleged that he had been provided with a dangerously defective motor lorry. In its defence the first named Defendant pleaded that the accident was caused or contributed to by the negligence of the Plaintiff in driving the motor lorry and/or was caused or contributed to by the negligence of the second named Defendant. In its defence the second named Defendants pleaded that the accident was caused or contributed to by the negligence of the Plaintiff and/or caused by the negligence of the first named Defendant. Each of the Defendants served a notice of Contribution and Indemnity. The action came on for hearing on the 25th April 2005. The Order made reads as follows –

> "This action having been at hearing on the 21st, 22nd and 25th days of April 2005 and on this day in the presence of Counsel for the Plaintiff and Counsel for the first named Defendant
>
> And on hearing Counsel for the Plaintiff on the 21st day of April 2005
>
> It is ordered that the proceedings against the second named Defendant be struck out
>
> On the application of Counsel for the first named Defendant it was ordered that the proceedings herein be reported by a shorthand writer
>
> Whereupon and on reading the Plenary Summons and Pleadings herein and the documents adduced in evidence and upon hearing the oral evidence of the witnesses whose names are set forth in the Schedule hereto and on hearing said Counsel respectively
>
> The Court doth
>
> (a) find that the Defendant was negligent
>
> (b) find that there was contributory negligence on the part of the Plaintiff
>
> (c) apportion the degrees of fault
>
> (i) to the Defendant: 40%
>
> (ii) to the Plaintiff: 60%"

2. The Order went on to record the assessment of damages as against the first named Defendant.

3. On the face of the Order the Plaintiff's claim against the second named Defendant was struck out and was not dismissed. There was accordingly no determination on the merits: *Sweeney v Bus Atha Cliath* Unreported High Court O'Neill J. 30th January 2004. The withdrawal of a claim not leading to an adverse adjudication does not operate as an estoppel: Land v Land 1949 P 405. Again on the face of the Order there was no determination on the issues raised by the notices of Contribution and Indemnity served by each Defendant on the other.

4. The Plaintiff in the present action was a passenger in the motor lorry and he too sustained personal injury. His claim against the Defendants for present purposes is identical to that of the Plaintiff in the earlier action 2002 No. 5955P. The second named Defendant herein now claims that the issue of liability as between itself and the first named Defendant was determined in the earlier action: in short issue estoppel is claimed.

5. As the issues between the Defendants raised on their notices of Contribution and Indemnity were not decided in the earlier action on the face of the Order it accordingly remains open for the first named Defendant to set the same down for hearing and determination. While the Plaintiff did not seek to maintain his claim against the second named Defendant the first named Defendant on the face of the Order did not waive or abandon its claim against the second named Defendant to be entitled to contribution or indemnity.

6. In the earlier action there was an apportionment of liability as between the Plaintiff therein and the first named Defendant. While the effect of section 118 of the Road Traffic Act 1961 is that the Plaintiff therein was the servant or agent of the second named Defendant the Plaintiff was not the privy of the second named Defendant: *McCauley (A Minor) v McDermot & Anor* 1997 2 IIRM 487. At page 493 Keane J. said in relation to section 118 –

> "As a result of this provision, the owner and the driver of a car which is being driven with the consent of the owner are concurrent wrongdoers for the purpose of the Civil Liability Act 1961 in respect of any injury caused by the negligent driving of the car. It does not follow, however, that there is an identity of interest as a result of which a judgment given in proceedings against the owner is binding in proceedings against the driver or vice versa. That view of the law is borne out by the authorities."

7. Keane J. referred to *Shaw v Sloan* 1982 NI 393. In that case, the pillion passenger on a motor cycle sued the motor cyclist and the owner and driver of a car with which it was in collision. In earlier proceedings, the owner of the motor car had sued the motor cyclist in respect of the damage to his car and the motor cyclist had been found entirely responsible for the accident. The Court of Appeal was unanimously of the view that since the driver of the motor car had not been a party to the earlier proceedings and there was no privity between him and the owner the parties were not bound by the determination of liability in the earlier proceedings.

8. In *Reamsbottom v Rafferty* 1991 1 IR 531 there was a collision between two motor cars one of which was being driven by the Plaintiff but owned by her husband. The Defendant was the owner and driver of the other car. The Defendant had previously taken proceedings naming the Plaintiff's husband as the Defendant and the Defendant was found fully liable. The Plaintiff was not a party to the Circuit Court proceedings and did not give evidence at the hearing of the same. Johnson J. applied the decision in Shaw v Sloan holding that there was no privity between the Plaintiff as driver and her husband as owner. At pp 534 -535 he said –

> "Were I to hold that the facts in this case were identical to the facts in *Reamsbottom v Rafferty* 1991 1 IR 531 a situation could arise whereby the Plaintiff could be prohibited from bringing her case to court because of the result of an action to which she was not a party and over which she had no control and in which she might not have offered evidence. Quite clearly an injustice could be done if the Plaintiff had (a) wished to give evidence or (b) was dissatisfied with the manner in which the Circuit Court case was conducted or wanted to call evidence which was not called before."

9. A similar approach was adopted in *Lawless v Bus Eireann* 1994 1 IR 474.

10. However in *McAuley v McDermott* the factor present in *Reamsbottom v Rafferty* and *Lawless v Bus Eireann* was not present in that the owner of the vehicle sought to be joined as a third party was a Defendant in the earlier District Court and Circuit Court proceedings. However Keane J. held that the driver of the car involved in the collision who was the Plaintiff in the District Court action could not be regarded in law the privy of the car owner. He set aside the Order of the High Court joining the owner of the car as a third party on the grounds that in seeking to join the same the Plaintiff was in abuse of process.

11. In the present case while the first named Defendant and the second named Defendant were both parties to the earlier action the issue between them was not dealt with and remains to be dealt with. The second named Defendant took no part in the hearing. The issues arising between the Defendants on their respective defences and notices of Contribution and Indemnity were not determined. In these circumstances the driver, the Plaintiff in the earlier action, not being the privy of the second named Defendant the apportionment of liability in that action is not determinative of the apportionment between the Defendants in this action on the basis of issue estoppel. As the issue in the earlier action between the Defendants remains to be dealt with no question of abuse of process arises.

12. In summary then I find that the issue of liability as between the first named Defendant and the second named Defendant remains to be determined in the action 2002 No. 5955P and accordingly issue estoppel does not arise in the present proceedings. No question of abuse of process arises in seeking to have the issue determined in the present proceedings.