THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 402

Record Numbers: 2016/406

Irvine J.
Whelan J.
Baker J.

BETWEEN/

JOHN RICE

PLAINTIFF/APPELLANT

- AND -

ALAN MUDDIMAN, TESCO IRELAND LIMITED AND JOSEPH BRENNAN BAKERIES

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 21st day of December 2018

1. This is the appeal of the appellant, Mr. John Rice, against the orders of Mr. Justice Cross made in the High Court on the 14th July 2016.

2. Following an application for a direction made on the part of the second and third named respondents ("Tesco" and "Brennans"), the High Court judge dismissed Mr. Rice's claim. In so doing he ordered that Mr. Rice pay the costs of Tesco but noted its undertaking not to execute that order in the event that Mr. Rice decided not to appeal. Brennans did not seek an order for its costs.

3. Following the conclusion of Mr. Rice's claim against Mr. Alan Muddiman, the High Court judge dismissed his action and ordered that he pay Mr. Muddiman's costs.

Background

4. Prior to identifying the issues to be considered on this appeal, it is necessary to set out very briefly the background to these proceedings.

5. By personal injuries summons dated the 28th March 2011 Mr. Rice commenced proceedings against the respondents claiming, *inter alia*, damages for assault, battery, negligence, breach of duty and breach of statutory duty.

6. In his summons he claimed that on three occasions between May 2009 and the 14th July 2009 he was viciously assaulted by Mr. Muddiman. As a result of these assaults he maintained that he had, *inter alia*, sustained permanent and significant damage to his low back and right buttock with accompanying numbness in his legs. Mr. Rice claimed that he had gone on to develop very significant psychological sequelae including depression and suicidal ideation and an addiction to benzodiazepines.

7. Mr. Rice, who is a married man, at the time of the alleged assaults was employed by Tesco as a security officer at its premises at Roselawn Shopping Centre, Blanchardstown, Dublin 15. Mr. Muddiman, at the relevant time, was a bread delivery man described by Mr. Rice as an agent for Brennans Bread, the third named respondent to the proceedings. Mr. Muddiman had been contracted by Brennans to deliver its bread to Tesco and it was while on the premises of Tesco it was alleged he had assaulted Mr. Rice.

8. In his proceedings Mr. Rice maintained that Tesco was responsible for his injuries because as his employer it had not provided him with a safe place of work as required under the relevant Health and Safety legislation. Furthermore, they had allowed a person *i.e.* Mr. Muddiman, onto its premises in circumstances where he had not been properly vetted.

9. Mr. Rice in his pleadings maintained that Brennans was liable for the wrongs perpetrated by Mr. Muddiman in circumstances where it had failed to properly supervise him as its employee and further on the basis that it had failed, *inter alia*, to carry out any adequate risk assessment on persons employed to distribute their produce.

10. Mr. Rice's claim against Mr. Muddiman was that he had wrongly and viciously assaulted him on the occasions complained of. In particular, he maintained that on the 14th July 2009 he had been struck by Mr. Muddiman in the buttocks and right hip with a closed fist and it was this action that was responsible for all of his injuries.

11. A full defence was filed by Mr. Muddiman. Apart from denying the assaults complained of, Tesco denied liability for any wrongful action on the part of Mr. Muddiman on the basis that it had no notice of any prior incident which might have rendered any potential assault to Mr. Rice foreseeable. Brennans also put Mr. Rice on proof of the assaults complained of and further maintained that Mr. Muddiman was not its employee. According to Brennans, Mr. Muddiman was an independent contractor with the result that it could not be held vicariously liable in respect of conduct of the nature complained of. Furthermore, all of the defendants put Mr. Rice on proof that he had sustained any injuries in the manner alleged in his personal injuries summons.

12. Notice of trial was served on the 27th March 2015 and the proceedings were first listed for hearing in October 2015. At that time Mr. Rice was not legally represented. However, he had previously been represented by two different firms of solicitors, namely Mallons and later Maxwells. The action was carried over from day to day due to the lack of availability of a judge to hear his case. Ultimately, the respondents ran into difficulties with their witnesses and the action was then adjourned.

13. The proceedings then came before the court for case management on the 3rd February, the 3rd May, the 31st May and the 7th June 2016. Ultimately, the proceedings were listed for hearing for a second time on the 12th July 2016.

14. When the action was called on for hearing Mr. Rice applied for an adjournment. He did so on the basis that one of his doctors, a Prof. Mulhall, was ill. Mr. Rice stated he had difficulty with Prof. Mulhall's report and he would need to examine him concerning its contents. "He had compromised himself" in his report. The judge advised Mr. Rice that in circumstances where Prof. Mulhall would be his witness he would just have to let him give his evidence. However, Mr. Rice was of the view that if called to give evidence he might "deviate from his report". The High Court judge also observed that from what had been said concerning Prof. Mulhall in another case it appeared that he might not be available until 2017, if at all.

15. Mr. Rice also maintained his application on the basis that he had "constantly sought legal aid" and had been advised by the court to get legal advice and he had not yet managed to get legal aid. His final reason for seeking an adjournment was that another of his medical experts, Mr. Timlin, would not be in a position to give evidence for two weeks.

16. Having considered the submissions made by counsel on behalf of each of the respondents and also the medical report of Mr. Muddiman's G.P., Dr. Dignam, the High Court judge refused the adjournment application. It should be said that in an effort to overcome any prejudice to Mr. Rice it was agreed that any expert reports which he wished to rely upon could be admitted without formal proof, albeit that the defendants were not accepting the reports as proof of the truth of their contents. It was also agreed that if Mr. Rice considered it necessary Mr. Timlin could be called to give evidence at a later stage in the proceedings which it was estimated were likely to run for a period of two weeks.

The hearing

17. It is not necessary to delve in any great depth into the evidence giving by Mr. Rice save to state that on the first day of the hearing he maintained that he had been assaulted by Mr. Muddiman on three occasions. He stated that on the second occasion he had told Mr. Muddiman that he was not to touch him ever again and that he reported the fact of this, the second alleged assault, to his employer, Tesco. On the second day, however, under cross examination Mr. Rice accepted that he had not reported the first or *second* alleged assaults. It was only the assault perpetrated on the 14th July 2009, that being the assault the subject matter of the proceedings, that he had reported to his employer.

18. After Mr. Rice concluded his evidence and confirmed to the trial judge that he himself was his sole liability witness, counsel for Tesco and Brennans successfully applied for a direction. The proceedings then continued and the court heard evidence from Mr. Muddiman and a Mr. Keith Partridge who had witnessed the events of the 14th July 2009.

19. Mr. Muddiman, in his evidence, maintained that he had had a good relationship with Mr. Rice and that he had known him for a couple of years. They regularly laughed and joked together, exchanged high fives, claps on the shoulders etc. Mr. Muddiman denied ever punching Mr. Rice and also gave evidence to the effect that Mr. Rice had never told him not to touch him. He had done no more than to tap Mr. Rice on the bum on the 14th July 2009. He denied lunging at Mr. Rice and he disputed Mr. Rice's evidence that the force of the punch had caused him to jolt forward. Mr. Muddiman accepted that he had given Mr. Rice a slap to the bottom with an open hand.

20. Mr. Partridge supported Mr. Muddiman's evidence as to what had happened on the morning of the 14th July 2009. Mr. Muddiman had given Mr. Rice an open handed tap which was, he said, so insignificant that he had never thought about it again. Furthermore, nothing was said after the slap was delivered; the joking and laughing continued.

21. There was CCTV footage of the exchange between the parties and it is true to say that the precise moment of contact between the parties is not captured because of the positioning of some machinery. However, the movements and demeanour of Mr. Rice and Mr. Muddiman during the minutes and seconds leading up to the point of contact and the period that immediately followed are clearly discernible. This court has had the benefit of thoroughly reviewing that footage.

Relevant rulings and judgment of the trial judge

22. In circumstances where counsel on behalf of Tesco had indicated that it intended to go into evidence if the application for the direction failed, the High Court judge made clear that the decision he was required to make was whether Mr. Rice had made out a *prima facie* case in negligence or breach of contract against Tesco and that for this purpose he had to accept Mr. Rice's account of what he maintained had happened on the 14th July 2009.

23. Prior to embarking upon a consideration of Tesco's application, the High Court judge also satisfied himself that it was not the intention of the other defendants to the proceedings to lead evidence against Tesco if it was successful in its application. Bearing these factors in mind, the High Court judge concluded that no prima facie case had been made out against Tesco, even if Mr. Rice had been assaulted by Mr. Muddiman as alleged. Even if Tesco had been under an obligation to train its employees to protect them against potential assaults, that training would not have assisted Mr. Rice in the circumstances alleged, namely, that the assault was unprovoked and one in respect of which there had been no forewarning. Furthermore, Tesco could not be liable for the conduct of an independent contractor that attended its premises to stock shelves. Tesco had no control over Mr. Muddiman and had no reason to believe his conduct could put members of its staff at risk.

24. Insofar as the application of Brennans was concerned, counsel indicated that Brennans did not intend to go into evidence. That being so the High Court judge had to determine whether liability had been established against Brennans on the balance of probabilities. Mr. Rice had accepted that Mr. Muddiman wasn't an employee of Brennans but was an independent contractor. The High Court judge concluded that Brennans could not have done anything that would have prevented the actions complained of by Mr. Rice. It had no direct or indirect liability for Mr. Muddiman's actions. That being so, Mr. Rice had failed to establish liability against Brennans.

25. Concerning Mr. Muddiman, following the conclusion of the evidence the High Court judge ultimately dismissed Mr. Rice's claim. In the course of his judgment, the High Court judge made clear that his decision was based upon his conclusions as to what had occurred on the day in question. He found as a fact that Mr. Rice was not viciously struck by Mr. Muddiman with a closed fist into the buttocks and/or right hip, as he had alleged and it is to be inferred from his judgment that he preferred the evidence of Mr. Muddiman and Mr. Partridge in this regard. The High Court judge found as a fact that the CCTV footage did not support a vicious blow with a closed fist. In particular, it didn't show Mr. Rice staggering forward as a result of the contact between himself and Mr. Muddiman, as he had maintained. Neither could Mr. Muddiman be seen to be lunging forward at him.

26. In relation to the nature of the relationship between Mr. Rice and Mr. Muddiman prior to the 14th July 2009 and the conversation which Mr. Rice maintained he had with Mr. Muddiman prior to the third assault, the High Court judge accepted the evidence of Mr. Muddiman and Mr. Partridge that the relationship between them was one which involved jokes, banter and the odd physical engagement. As to Mr. Rice's claim that he had told Mr. Muddiman, after the second alleged assault, that he was never to touch him again, the High Court judge concluded that he was not satisfied that Mr. Rice, if he had had such a conversation with Mr. Muddiman, had made it sufficiently clear to him that he wasn't to slap or touch him ever again. He believed that had he done so Mr. Muddiman

would have respected that direction.

The appeal
27. By notice of appeal dated the 9th August 2016, Mr. Rice seeks to set aside each of the aforementioned orders and asks this court to direct a re-trial.

28. The following are the principal grounds of appeal set out in Mr. Rice's notice of appeal, namely:-

> (i) he should have been granted an adjournment as he had no legal representation and his expert medical witnesses were not available;
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> (ii) he was not afforded fair procedures and in particular the proceedings were struck out before his dismissal from his employment with Tesco had been addressed;
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> (iii) he was not afforded a proper opportunity to call any witnesses;
>
> (iv) Mr. Muddiman's evidence was accepted as fact despite the fact that he had withdrawn some aspects of his defence and other parts of it had been found to be incorrect; and
>
> (v) the High Court judge should not have made the costs orders he did.

29. In the course of his written and oral submissions Mr. Rice sought to canvas grounds of appeal which were not included in his notice of appeal. He maintained that he had been disadvantaged in the course of the proceedings because Tesco had not complied with a Notice to Produce which he had served in advance of the hearing. Had he been furnished with his personnel file he would have been in a position to establish that he had been dismissed as a result of the injuries inflicted on him by Mr. Muddiman. In such circumstances, Tesco could not have continued to deny that he had been assaulted in the manner alleged. That evidence would also have assisted his liability claim in general. He understood that it was accepted by the respondents that his medical reports could be relied upon to prove the truth of their content. Mr. Rice also submitted that the High Court judge's conclusions were contradictory insofar as he had relied on the CCTV footage to conclude that the assault did not occur in the manner alleged whilst stating that his view of what occurred was obstructed by the presence of machinery. Mr. Rice also maintained that in circumstances where Mr. Muddiman had been inconsistent in his evidence and had accepted in a statement which he made to An Gárda Síochána that he knew of Mr. Rice's hip condition, that the High Court judge should have concluded that he had told Mr. Rice that he was not to touch or hit him in the future. This statement made by Mr. Muddiman was strong evidence that he had withdrawn his consent to any such physical engagement. Finally, Mr. Mulhall's evidence would have strengthened his liability claim insofar as he accepted that the assault had exacerbated his long-standing hip issues and had caused him significant pain and this had not been accepted by the High Court judge.

30. Each of the respondents, in their respective respondent's notice, maintain that the High Court judge did not err in law or in fact in making the orders which he did. He was entitled to refuse the adjournment application in the prevailing circumstances and there was nothing irregular or unfair about the hearing. He did not refuse Mr. Rice the right to introduce any evidence upon which he wished to rely. In particular, the second and third named respondents maintain that, in dismissing Mr. Rice's claim on their respective applications for a direction, the trial judge applied the correct legal test in each instance and furthermore decided the applications correctly having regard to the evidence concerning the relationship between the respective parties. According to the first name respondent, all of the findings of fact made by the High Court judge were supported by credible evidence. Furthermore, the circumstances in which Mr. Rice was dismissed from his employment had no bearing on the liability issue and in any event the High Court judge had not precluded Mr. Rice from giving evidence on that issue. The High Court judge had considered all of the medical evidence, including that submitted on behalf of Mr. Rice and his expert reports had not, as he maintained, been admitted into evidence on the basis that he could rely upon them as proof of the truth of all that was set out therein. The costs orders made by the High Court judge were consistent with the courts findings.

Discussion and decision
31. I am first of all satisfied that the High Court judge was entitled to exercise his discretion in the manner in which he did when he refused Mr. Rice's adjournment application. There was nothing unjust or unfair in his decision having regard to the prevailing circumstances. Mr. Rice needs to understand that an appellate court will only set aside what was, in this case, effectively a case management decision if the appellant can demonstrate that to fail to do so would call into question the proper administration of justice. (See, for example, the decision of Budd J. in *Vella v. Morelli* [1968] I.R. 11 and that of Lynch J. in *Martin v. Moy Contractors Ltd* [1999] IESC 26). A significant margin of appreciation must be afforded to a High Court judge, particularly the judge charged with the administration of the Personal Injuries List and the management of the Court's own scarce resources, as to how he or she may decide to exercise their discretion when faced with an application to adjourn an action on the date it is listed for hearing.

32. In the present case, the proceedings had been listed and were ready for hearing in 2015. At that stage, more than six years had elapsed since the events that would decide the liability issue in the proceedings. By July 2016, seven years had elapsed since the date of the alleged assault. As is often stated, with the passage of time memories fade and the risk of an unfair trial increases.

33. Another factor relevant to the adjournment application was that whilst Mr. Rice stated that he had "constantly been seeking legal aid" and wanted the proceedings adjourned so that he might obtain legal representation, he had been prepared to conduct the proceedings himself when they had been listed for hearing in October 2015. Furthermore, Mr. Rice had legal representation at an earlier stage of the proceedings. Mallon's solicitors had come off record on his behalf in September 2012 and Maxwells in September 2014. Thus it would appear that Mr. Rice had ample time to seek to obtain alternative legal representation, if that was what he wanted.

34. What is clear from the correspondence submitted to this court on the appeal is that at some stage fairly proximate to the proposed hearing date Mr. Rice applied for legal aid. The court was furnished with three letters from the Legal Aid Board. The first two are dated the 7th July 2016 and the third the 8th July. It is clear from the first letter that whilst Mr. Rice had been assessed as financially eligible to apply for legal aid there was no guarantee that he would be afforded legal aid. The second makes clear that Mr. Rice had advised the Legal Aid Board that he had cancelled all of his medical witnesses on the basis that the case would be adjourned and that he had been advised by the Legal Aid Board that the adjournment might not be granted and that he should have as witnesses on standby. In addition, Mr. Rice had been advised by Corrigan & Corrigan, solicitors for the third respondent, by letter dated the 8th July 2016 that they would object to the adjournment.

35. In all of the aforementioned circumstances, there was nothing unjust or unfair in the manner of the approach of the High Court

judge to the exercise of his discretion. It is also clear that Mr. Rice was not prejudiced by reason of the fact that his medical witnesses were not in attendance. The High Court judge agreed that the reports of his experts could be admitted without the necessity for formal proof. This meant that the content of those reports was available to the court for its consideration and that Mr. Rice could rely upon them, if he so wished, for the purposes of cross-examining any witnesses called by the respondents. However, if it was Mr. Rice's belief that he was prejudiced because Prof. Mulhall, had he been in attendance, might have given more favourable evidence concerning the extent of his injuries than that which was contained in his report; he misunderstands the rules of evidence. An expert witness is not entitled to give evidence which goes beyond the "substance" of what they have set out in their report allied to which a party such as Mr. Rice is not entitled to challenge the evidence of their own witness.

36. It is also very clear from the transcript that no prejudice was suffered by Mr. Rice concerning the liability issue by reason only of the fact that his medical witnesses were not in attendance. The reports of his expert medical witnesses were based upon the account which he gave them of the assault. The fact that the assault is described as having taken place in the medical reports and the view expressed that certain symptoms described by Mr. Rice might be ascribed to such an assault does not prove that the assault took place and the reports were clearly not admitted on the basis that their content was agreed. It is also clear from the transcript, that the High Court judge explained to Mr. Rice that whilst he could rely on his expert reports it remained open to the respondents to contradict and take issue with what was stated therein and Mr Rice agreed to the action proceeding on that basis. Precisely the same considerations apply in relation to the unavailability of Mr. Timlin.

37. Finally, relevant to the court's consideration was the medical report of Dr Dignam to the effect that the proceedings were having a significant adverse effect on the health of Mr Muddiman.

38. For the aforementioned reasons, I am satisfied that the High Court judge acted in a manner which was just and fair when he exercised his discretion to refuse the adjournment application notwithstanding the fact that Mr. Rice did not have legal representation and his medical witnesses were not "available". For the sake of completeness, concerning Mr. Rice's reliance upon his lack of legal representation to support his appeal, I would here observe that his purported reliance upon Article 6 of the European Convention on Human Rights is misplaced in circumstances where the Convention does not have direct effect.

39. As to Mr. Rice's contention that in some way the proceedings were irregular, that is a claim that is not borne out by the transcript. The High Court judge invited Mr. Rice to make an opening statement. All of the way through his evidence, the High Court judge intervened to assist Mr. Rice to make sure that his evidence could be clearly understood. He further gave him appropriate guidance and assisted him when it came to the cross examination of Mr. Muddiman and his witnesses. Likewise, when it came to the applications of the second and third named respondents for a direction, the High Court judge fully explained the process to Mr. Rice and gave him assistance with his argument. Furthermore, in his exchanges with counsel, the High Court judge left no stone unturned in order to satisfy himself that he had fully considered the relevant test in respect of each application and that every potential liability argument that might have been advanced by Mr. Rice had been explored.

40. For completeness, it is also important to record that at the conclusion of Mr. Rice's cross-examination, the High Court judge enquired of Mr. Rice as to whether it was his intention to call any other witness in respect of the liability issue. When Mr. Rice confirmed that his liability evidence was over the High Court judge gave him a further opportunity to say anything else he wanted to say and advised him that he should take that opportunity because it was the last chance he would have to give evidence. It is also clear from the transcript that, contrary to what was contended by Mr. Rice, the High Court judge did not refuse him the opportunity to call any evidence which he indicated he wished to call.

41. Mr. Rice's argument that he did not receive a fair trial because he was not entitled to explore fully the circumstances in which he was dismissed cannot, in my view, support an argument that he did not receive a fair trial. The High Court judge decided Mr. Rice's claim, principally on the basis that what was seen on CCTV on the 14th July 2009, was inconsistent with the type of assault which he maintained had occurred. That was a finding of fact, supported by credible evidence upon which the High Court judge was entitled to rely. (See *Hay v. O'Grady* [1992] 1. I.R. 210). Accordingly, it matters not whether there was any other evidence which might have supported the contrary view regardless of the strength of that evidence. An appellate court may not set aside a finding of fact once it is supported by credible evidence. However, I would also here observe that Mr. Rice was not precluded from giving evidence as to the circumstances in which he was dismissed and it was clear from the evidence that he had been declared unfit for work in the aftermath of the events, the subject matter of these proceedings.

42. Neither was the trial unfair because Mr. Rice did not receive a copy of his personnel file further to his service of a Notice to Produce on the second and third respondents. I fear Mr. Rice does not understand the nature and effect of a Notice to Produce. Such a notice is most often deployed when a party wishes to rely on a copy document, the original of which is in the possession of their opponent. In such circumstances they may serve a Notice to Produce requiring their opponent to produce the original on the date of the hearing and if they default they cannot be heard to object to the copy being relied on as if it were the original. Mr. Rice was not precluded from relying upon any documentation by reason of the fact that the originals which he had demanded were not produced by the second and third respondents.

43. As to Mr. Rice's submission that the liability finding of the High Court judge should be set aside because Mr. Muddiman had admitted in his statement to An Gárda Síochána that he was aware of Mr. Rice's hip problems, which statement he maintains strongly supported his evidence, that he had told Mr. Muddiman that he was never to touch him again, that is a submission which I must reject. As to whether or not such a conversation ever took place was an issue of fact to be determined by the High Court judge. He heard the evidence of Mr. Rice as to what he maintained he told Mr. Muddiman on what he claimed was the occasion of the second assault and he also heard from Mr. Muddiman who denied any such conversation. It was for the trial judge to resolve the conflict in the evidence and, if he considered it material, to take into account the statement made by Mr. Muddiman to An Gárda Síochána. However, the weight to be attached to any particular piece of evidence is a matter for the High Court judge rather than the appellate court for the reasons so cogently described in *Hay v. O'Grady*. The appellate court does not have the opportunity of seeing or hearing the witnesses and is confined to carrying out an assessment based on a cold analysis of the transcript.

44. In the present case, the High Court judge was satisfied from Mr. Muddiman's evidence that no such conversation as had been alleged by Mr. Rice had taken place or, if it had, that he had not made it sufficiently clear to Mr. Muddiman that he had withdrawn his consent to all any physical exchanges between them in the future. Even if it was clear that the statement made by Mr. Muddiman to An Gárda Síochána added weight to his evidence on the issue concerning consent, it was perfectly open to the trial judge to prefer Mr. Muddiman's evidence. It was exclusively a matter for the trial judge to decide which evidence he would prefer and what weight he considered ought to be attached to that evidence.

45. From a review of the transcript is very clear that the High Court judge did all that could have been expected of him to ensure that Mr. Rice would not be adversely affected by reason of the fact that he did not have the benefit of legal representation. I have

already referred to some aspects of the conduct of the High Court judge in this regard. Furthermore, it is evident from his exchanges with Mr. Rice that he made sure that Mr Rice had put before the court all of the evidence that he wished to rely upon in support of his claim. In particular, he clarified with Mr. Rice that he was the only liability witness giving evidence in support of his claim. He also assisted Mr. Rice in relation to his cross examination of Mr. Muddiman and Mr. Partridge. And, as already stated, the High Court judge explained that the respondents, in agreeing to admit his medical reports, were not accepting the truth of the content of those reports.

46. In relation to Mr. Rice's submissions that the High Court judge erred in law and in fact in acceding to the applications made by the second and third respondents for a direction, that is a submission that I would also reject.

47. Having considered the transcript of the evidence, I am satisfied that in respect of the applications made by the second and third named respondents for a direction that the High Court judge correctly applied the law in respect of each application. Regarding the application made on behalf of Tesco, which had indicated that it would give evidence in the event that the application was refused, the High Court judge, as *per* the decision of Finlay C.J. in *O'Toole v. Heavey* [1993] 2 I.R. 544 stated that he would only grant the application if satisfied that the plaintiff had not made out a *prima facie* case. Furthermore, in accordance with that decision, there being more than one defendant and in circumstances where notices for contribution and indemnity had been served, the High Court judge satisfied himself that it was not the intention of the remaining defendants to lead any evidence which would seek to establish that Tesco had any liability in respect of Mr. Rice's claim. This was to avoid the injustice that would arise if, having let Tesco out of the proceedings, for example, Brennans later lead evidence which whilst exculpating itself from liability suggested that liability ought to have rested with Tesco.

48. Likewise, in relation to the application of Brennans, which indicated that it did not intend to go into evidence, the High Court judge adjudicated upon its liability in respect of Mr. Rice's claim by assessing the claim made on the balance of probabilities.

49. Having considered the ruling of the High Court judge concerning Tesco's application for a direction, I am satisfied that nothing has been said by Mr. Rice in his written or oral submissions that supports his contention that the trial judge erred in law or in fact in dismissing the proceedings. In particular, he has failed to demonstrate, how, even on a *prima facie* basis having regard to the circumstances of the alleged assault, Tesco could have been liable in respect of any injuries thereby sustained. Tesco was not the employer of Mr. Muddiman. It had no knowledge of any prior misconduct on the part of Mr. Muddiman such that it was foreseeable that he might injure somebody when he came onto its premises to stack its shelves. Furthermore, even if there had been any obligation on Tesco to train Mr. Rice as to how to avoid an assault or potential confrontation in the course of his duties, it was perfectly clear that any such training would not have protected him from the type of unprovoked, unforeseen vicious blow which he maintains was delivered by Mr. Muddiman. Accordingly, any injuries sustained from such an assault could not be the result of any negligence or breach of contract on the part of Mr. Rice's employer.

50. In this regard it is important to note that Mr. Rice accepted whilst under cross examination that, contrary to what he had earlier stated in his evidence in chief, he had not reported the first or second of the three assaults mentioned in his personal injuries summons to his employer. In those circumstances, Tesco could not have obviated any risk to him of an assault as it was not on notice of Mr. Muddiman's allegedly unacceptable conduct. For these reasons I would dismiss Mr. Rice's appeal against the second named respondent.

51. Insofar as Mr. Rice appeals against the dismissal of his claim against Brennans at the conclusion of his evidence in respect of liability, once again I am satisfied that he has not demonstrated any error of law or fact on the part of the High Court judge. The High Court judge was satisfied as a matter of law that Brennans could not be rendered liable for any assault that might have been inflicted by Mr. Muddiman. It was accepted by Mr. Rice in the course of the hearing that Mr. Muddiman was an agent of Brennans and the High Court judge was satisfied that as an independent contractor he would not have been under the control of Brennans whilst stacking the shelves at the Tesco premises.

52. As was submitted on behalf of Brennans, no one can be made liable for an act or breach of duty of another unless that act can be traced to them in the course of their employment. As was stated by Williams J. in *Pickard v. Smith* (1861) 10 CB NS 470:-

> "…if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some causal act of wrong or negligence, the employer is not answerable."

Relevant also to the decision of the High Court judge was the fact that Mr. Rice never contended that he had reported either the first or second alleged by Mr. Muddiman to Brennans. Accordingly, even if the assault had occurred in the manner alleged by Mr. Rice, Brennans could not be held liable. I would accordingly dismiss Mr. Rice's appeal against the third named respondent.

53. As to the decision to dismiss Mr. Rice's claim against Mr. Muddiman, that was a decision based upon findings of fact made by the High Court judge which I am wholly satisfied were supported by credible evidence. And, as already stated, an appellate court cannot interfere with findings of fact made at first instance once they are supported by credible evidence.

54. The two principal areas of dispute concerned first, whether, prior to the 14th July 2009, Mr. Rice had had a conversation with Mr. Muddiman in which he had made it clear that he was objecting to any further physical contact emanating from Mr Muddiman. The second was the nature of the physical contact between Mr. Rice and Mr. Muddiman on the 14th July 2009. Was it a mild slap on the bottom or a vicious unprovoked blow delivered when Mr. Muddiman lunged at Mr. Rice with a clenched fist causing him to jolt forward in pain?

55. In relation to the first issue Mr. Rice maintained that he had made it clear to Mr. Muddiman on the occasion of the second alleged assault that he did not want him to make any physical contact ever again, regardless of the circumstances. He claims that his evidence concerning this conversation is supported by the fact that Mr. Muddiman accepted, when he made his statement to An Gárda Síochána, that he knew of Mr. Rice's difficulties with his hips. Mr. Muddiman, on the other hand, denied any prior assault or any conversation of the nature described by Mr. Rice. Mr. Muddiman and Mr. Partridge described an easy-going light-hearted relationship between Mr. Muddiman and Mr. Rice in which some physical exchanges such as high-fives or slaps on the back were to be expected.

56. It is clear from the judgment of the High Court judge that he was not convinced, as a matter of probability, that the conversation which Mr. Rice maintained he had with Mr. Muddiman had actually taken place. And, having regard to Mr. Muddiman's evidence he was entitled to take that view irrespective of any additional weight that may have attached to his own evidence by reason of the statement made by Mr. Muddiman to An Gárda Siochana. The weight to be attached to any evidence is a matter for the High Court judge. Furthermore, based on Mr. Muddiman's evidence he was also entitled to conclude that even if there had been a conversation of the nature described by Mr. Rice, that he had not made his position sufficiently clear to Mr. Muddiman.

57. As to the second evidential dispute, it is clear from the judgment of the High Court judge that he found as a fact that Mr. Muddiman did not lunge forward and strike Mr. Rice with a closed fist with such intensity that he was caused to jolt forward with pain. That finding of fact is clearly supported by the CCTV footage. The moments and seconds leading up to the physical contact between Mr. Muddiman and Mr. Rice are well displayed in that footage. Mr. Muddiman does not lunge forward or draw back his arm at any stage. Neither does Mr. Rice flinch in anyway at the moment of contact or thereafter. In the seconds and minutes after Mr. Muddiman made contact with Mr. Rice it is as if nothing untoward happened. Four men are seen standing relatively close together in a casual way . The CCTV evidence provides credible support for the High Court judges rejection of the vicious assault which Mr. Rice maintains was perpetrated by Mr. Muddiman. Whilst the High Court judge did not specifically state in his judgment that he preferred Mr. Muddiman and Mr. Partridge's account of events, it is clear that his conclusion concerning what had occurred was also supported by their evidence.

58. Accordingly, when faced with two entirely different accounts of what had occurred on the 14th July 2009 the trial judge was entitled to prefer the account of Mr. Muddiman. The fact that the High Court judge commented that the CCTV footage was taken from some distance away and there was machinery which impeded his view does not in any way undermine his conclusion that the footage was of great assistance to him in reaching his conclusions. What is perfectly clear from reviewing that footage is that it simply does not support Mr. Rice's account of what occurred on that day and is much more consistent with Mr. Muddiman's description of the exchange between the parties.

59. In circumstances where the High Court judge's finding concerning the nature of the physical exchange between Mr. Rice and Mr. Muddiman was supported by credible evidence such as the CCTV footage and/or other credible evidence which would include that of Mr. Muddiman and Mr. Partridge, there is no basis upon which this court could interfere with the decision of the High Court judge to dismiss Mr. Rice's claim.

60. Finally, whilst Mr. Rice has maintained that he has been prejudiced in the presentation of his appeal by reason of the fact that Ryan P. refused to make an order permitting him to take up a transcript of the Digital Audio Recording of the proceedings in circumstances where there was already a stenographer's transcript in relation to the hearing, that complaint is wholly unsustainable. In particular, insofar as Mr. Rice has sought to identify aspects of the transcript lodged with this court with which he is in disagreement, the High Court judge in reaching the decisions which are the subject matter of Mr. Rice's appeal, did not have cause to rely upon those aspects of the transcript.

Conclusion

61. For the reasons earlier set out in this judgment I am satisfied that the High Court judge was entitled, in the proper exercise of his discretion, to refuse Mr. Rice's application for an adjournment. I am also satisfied that Mr. Rice was afforded a hearing which was just and fair and that the trial judge at all stages acted so as to ensure that Mr. Rice would not be prejudiced by reason of the fact that he did not have legal representation. Furthermore, Mr. Rice was not prejudiced by reason of the fact that his medical experts were not available to give evidence on his behalf.

62. In his decision to dismiss Mr. Rice's claim against Tesco and Brennans following the conclusion of the liability evidence, I am satisfied firstly that the High Court judge applied the correct legal principles when he entertained those applications. He also correctly ascertained the intentions of the other defendants concerning their liability evidence if he were to accede to the said applications. Furthermore, having regard to the evidence concerning the relationship between the respective parties, the High Court judge did not err in law when he dismissed Mr. Rice's claim against the second and third respondents following the close of the liability evidence.

63. Finally, insofar as the High Court judge dismissed Mr. Rice's claim against the first named respondent, he did so based upon those findings of fact to which I have earlier referred. His two principle findings, which were core to the liability issue, were supported by credible evidence and in those circumstances cannot be overturned by an appellate court.

64. For all of the aforementioned reasons, I would dismiss all of Mr. Rice's appeals.