THE COURT OF APPEAL

Finlay Geoghegan J.
Irvine J.
Hogan J.

Record No. 2015/357

Liam Buckley

Plaintiff/Appellant

- and -

Eugene Mulligan, The Commissioner of An Garda Síochána, The Minister for Justice and Equality and Ireland and the Attorney General

Defendants/Respondents

Judgment of Ms. Justice Irvine delivered on the 4th day of October 2016

1. This is the appeal of the plaintiff, Mr. Liam Buckley, against the order of the High Court (De Valera J.) dated 18th December, 2013. That order was made following a six day hearing before a jury of his claim for damages for wrongful arrest, false imprisonment, assault and battery, and a further claim for damages for personal injuries allegedly sustained as a result of negligence on the part of the defendants in and about his arrest on the 24th September, 2011, at George's Street, Drogheda.

2. It is common case that Mr. Buckley failed in his claims for wrongful arrest, false imprisonment, assault and battery. He was, however, successful in his claim for negligence albeit that the jury found him guilty of contributory negligence to the extent of 69%. The jury assessed his entitlement to damages in the sum of €16,875 with the effect that, having regard to his contributory negligence, he obtained an order for judgment in the sum of €5,231.25. As to costs, the High Court judge awarded Mr. Buckley his costs on the District Court scale limited to a two day hearing, when taxed and ascertained.

The appeal
3. Whilst a relatively extensive notice of appeal was filed on Mr. Buckley's behalf, by the time the appeal came before this Court his grounds of appeal had been reduced to three in number. These may be summarised as follows:-

> (i) That the award of general damages in the sum of €16,875 was inadequate having regard to his injuries and should be set aside as an error of law;
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> (ii) that the jury's finding of 69% contributory negligence was grossly disproportionate having regard to the evidence; and
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> (iii) that the trial judge erred in law in making the costs order which he did having regard to the relevant statutory provisions.

Submissions of the parties
4. Mr. Burns, S.C., on Mr. Buckley's behalf, submitted that a gross award of €16,875 was not proportionate or just having regard to the severity of his client's injuries. He referred the Court to Mr. Buckley's own evidence and to that given by the orthopaedic surgeons retained by the respective parties. They were agreed as to the extent of his injuries and as to his likely prognosis. He had sustained an un-displaced fracture of the malleolus and his left leg was in a cast for six weeks. He had then required some physiotherapy and remained somewhat symptomatic for a period of over two years.

5. Mr. Burns relied upon the Book of Quantum, published in 2004, to demonstrate the error of the jury's award. In respect of fractures to the lower leg which were substantially recovered, the parameters advised were €15,400 - €34,600. Those values were significantly out of date and were, he submitted, approximately 50% below what a judge sitting alone would be expected to award for the equivalent injury. He relied upon the decision of this Court (Edwards J.) in *Cronin v. Stevenson and Another* [2016] IECA 186 in support of his submission that the parameters for an award for a fractured ankle at the time of the hearing ought properly to have been within the €25,125 - €52,950 range. Having regard to the severity of Mr. Buckley's symptoms, his award should have been in the mid to upper end of this range of values.

6. As to contributory negligence, Mr. Burns accepted that he bore the onus of demonstrating that the jury had made a gross error when it apportioned liability as it did. He accepted that there was evidence to support a finding of contributory negligence on the part of his client, principally by reason of his alcohol consumption. As to the extent to which such consumption likely contributed to his injuries, counsel drew the Court's attention to the fact that his client had been considered sufficiently sober to receive an adult caution thirty minutes after his arrival at the garda station. The jury's finding should have been no more than 30% - 50% given that Mr. Buckley's liability had to be assessed by reference to his blameworthiness for the injury sustained. Mr. Buckley had never previously been arrested and had not been involved in any disturbance on the night in question. His injury was sustained as a result of the fact that, in the course of his arrest, he and Gda. Mulligan had fallen to the ground. That fall occurred because they lost balance. He accepted that his client's resistance to arrest would have been a contributory factor but submitted that Gda. Mulligan also contributed to the fall insofar as he had lent in over Mr. Buckley applying weight to him in the course of a turning manoeuvre. As to the extent of Mr. Buckley's resistance, Mr. Burns relied upon his custody record which recorded the "circumstances of the offence" and which made no reference to his client having resisted arrest.

7. As to costs, Mr. Burns submitted that s. 94 of the Courts of Justice Act 1924 (the "1924 Act") applied and that, in the absence of special circumstances, having succeeded in his action Mr. Buckley should have been awarded his costs on the High Court's scale. Whatever about awarding him costs on the Circuit Court scale there were no circumstances to justify the limitations that had been imposed by the High Court judge particularly having regard to the fact that the award was low due to the manner in which the jury had apportioned liability. Mr. Buckley was entitled to pursue his action for wrongful arrest, false imprisonment, assault and battery

before a jury and likewise his claim for damages for negligence, given that that cause of action arose out of the same set of facts. He could only have a jury trial in the High Court. Regardless of the fact that he had lost his claims for wrongful arrest, false imprisonment, assault and battery, those proceedings had been reasonably pursued and he had succeeded in his claim for damages for negligence. Thus, counsel submitted, Mr. Buckley's entitlement to costs fell to be considered in the context of an action properly brought in the High Court.

Respondents' submissions
8. Mr. Callanan, S.C., on the defendants' behalf, accepted that the award made by the jury was somewhat frugal. However, it was not disproportionate to the point that it should be considered to amount to an error of law. The award came within the lower end of the range advised in the Book of Quantum. He submitted that an appellate court should afford a jury somewhat greater latitude than it would do a judge sitting alone when considering whether the award ought to be set aside on the grounds that it lacked proportionality.

9. As to the jury's apportionment of liability, Mr. Callanan submitted that the plaintiff had not established that it had made a gross error as was required to displace its finding of contributory negligence. There was evidence to support a substantial finding of contributory negligence. He relied upon Mr. Buckley's consumption of alcohol, the fact that he had resisted arrest and that he had been generally uncooperative.

10. As to the award of costs made by the High Court judge, Mr. Callanan argued that s. 17 of the Courts Act 1981 (the "1981 Act"), as amended, applied. The plaintiff had lost all of his causes of action that had entitled him to a jury trial and had only succeeded in his claim for damages for negligence. The test advised by Mr. Burns was, he submitted, one which was incapable of application. The judge's determination as to the proper order to be made in respect of costs should not be based upon a consideration of whether or not a claim which had been unsuccessful had been reasonably pursued.

Relevant legal principles
11. The relevant legal principles and authorities require that awards of damages should be:-

> (i) Fair to the plaintiff and the defendant;
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> (ii) objectively reasonable in light of the common good and social conditions in the State; and
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> (iii) proportionate with the scheme of awards for personal injuries generally.

12. Because the appellate court does not have the opportunity of hearing the evidence and assessing the credibility of witnesses, it should not readily interfere with an order made by a judge at first instance or indeed by a jury. That said, an appellate court enjoys jurisdiction to overturn an award of damages if it is satisfied that no reasonable proportion exists between the sum awarded and that which the appellate court considers appropriate in respect of the injuries sustained. In *Rossiter v. Dun Laoighaire / Rathdown County Council* [2001] 3 I.R. 578 at 583 Fennelly J. described the role of an appellate court in the following manner:-

> "The more or less unvarying test has been, therefore, whether there is any "reasonable proportion" between the actual award of damages and what the court, sitting on appeal, "would be inclined to give" *(per* Palles C.B. in *McGrath v. Bourne* (1876) I.R. 10 C.L. 160)."

13. It is generally accepted that an appellate court should not engage in what might be described as petty interference with an award of damages and should only interfere if satisfied that the error in the award is so serious as to render it unjust or lacking in proportionality having regard to the injuries sustained. The proportionality test is particularly appropriate insofar as it can readily be applied to any appeal regardless of whether the complaint made by the appellant is one of excessive generosity or undue parsimony on the part of the judge or jury.

The appeal concerning the quantum of damages
14. Having considered the submissions of the parties and the evidence given in the Court below I am quite satisfied that the award of the jury in this case was not fair to Mr. Buckley and was sufficiently disproportionate to his injuries that the same must be set aside as an error of law.

15. I reject the submission made by Mr. Callanan that an appellate court should be slower to interfere with an award made by a jury than one made by a judge sitting alone. While he may be correct when he asserts that a jury is more likely than a judge sitting alone to make an award which is either overly generous or excessively frugal, I can see no logical basis for his argument that the appellate court should overlook such excesses if authored by a jury but not if authored by a judge.

16. It has to be remembered that the principles to be applied by an appellate court when considering an appeal from an award of damages in respect of personal injuries have not changed in any substantial way from those which applied prior to the abolition of juries in 1988. Accordingly, it is difficult to see on what legal basis the Court could adopt the approach advanced by Mr. Callanan. Further, the role of the appellate court in a personal injuries claim is to correct any error in the award made by the Court of first instance which would otherwise perpetrate an injustice on one of the parties. How could it be just and fair that a plaintiff who received an insufficient award of damages from a judge sitting alone would be entitled to have that wrong rectified while a plaintiff with similar injuries whose claim was dealt with by a jury should be denied such a remedy?

17. Mr. Buckley was twenty one years of age at the time he sustained his injury, namely, an un-displaced fracture to the left lateral malleolus - that is a bone at the bottom of the leg where it joins the ankle. He also sustained a mild strain to the ankle itself. A plaster of paris cast was applied to the lower leg for a period of six weeks during which period Mr. Buckley was on crutches. Thereafter he had a number of sessions of physiotherapy. Mr. Buckley told the Court that for approximately two years post injury he experienced pain in his ankle if required to walk any significant distance. Travelling over uneven ground produced similar symptoms. His ankle was somewhat stiff first thing in the morning and occasionally he had pain at night time. Two years post injury he was still taking anti-inflammatory medication on an intermittent basis and had still not regained full use of his ankle. While he was still complaining of some modest symptoms as of the date of trial there was little by way of evidence to suggest that he was in any way curtailed in terms of his work or leisure activities.

18. Mr. Owen Barry and Mr. Brian Hurson, the orthopaedic surgeons who gave evidence on behalf of the parties, were in substantial agreement as to the nature and extent of Mr. Buckley's injuries and as to his prognosis. They accepted that his symptoms were consistent with the injury which he had sustained. On examination two years post accident he was found to have a two centimetre muscle wasting of the left calf and this, Mr. Barry considered, was consistent with the patient's ongoing complaints. However, an MRI

scan, carried out at that time was essentially normal thus allowing Mr. Barry to conclude that with further physiotherapy the plaintiff's outlook was good.

19. The starting point for this Court's assessment as to whether the award made by the jury should be considered so unsatisfactory such that it should be considered to amount to an error in law must be its own view as to the value of the plaintiff's claim. In this regard s. 22 of the Civil Liability and Courts Act 2004 is of relevance insofar as it requires the Court, when assessing damages in a personal injuries action, to have regard to the guidelines contained in the Book of Quantum.

20. While the Book of Quantum suggests parameters of €15,400 - €34,600 for a fracture to the lower leg which has substantially healed, this 2004 publication is undoubtedly out of date. It is common case that awards, particularly at the upper end of the personal injuries spectrum, regularly exceed those advised in the Book of Quantum by as much as 50%. However, it does not necessarily follow that all of these indicative values, particularly those in respect of lesser injuries, should be considered to be 50% below what might be regarded as a fair or just award.

21. In my view, Mr. Buckley's injuries must be considered to be relatively modest when assessed in the context of the entire range of personal injuries actions which come before the courts. Thus the compensation to which he is entitled must reflect that fact insofar as damages must not only be proportionate to the injury sustained but must be proportionate to those awards made in respect of other more serious or more minor injuries.

22. It is also undoubtedly the case that Mr. Buckley's injury when viewed within the spectrum of potential ankle injuries is not one which could be described as significant or severe. He did not require any operative intervention or any period as an in-patient in hospital. The fracture was un-displaced and his risk of arthritis negligible. Mr. Buckley had made a reasonable recovery two years post injury albeit that it was anticipated he would have symptoms for some further period during which he would likely undertake some further physiotherapy. That being so, while his symptoms were not particularly debilitating, their duration had to be viewed as extending to a period of perhaps three years.

23. Notwithstanding my conclusion that Mr. Buckley's injuries were relatively modest, I am quite satisfied that the award made by the jury was not one which satisfies the test of proportionality having regard to the nature of the injury, the extent of the treatment required and the duration of his symptoms. Having regard to the evidence concerning the plaintiff's injuries and the legal principles to which I have already referred, I am satisfied that the award to which the plaintiff was entitled was in the order of €35,000. Hence the award made in favour of the plaintiff in the High Court must be considered to amount to an error of law on the part of the jury. That being so I would propose that the same be set aside in favour of an award of €35,000.

Contributory negligence

24. It is well established law that an appellate court should not interfere with an apportionment of fault made by a judge or jury unless satisfied that such apportionment was grossly disproportionate having regard to the evidence, (see *Snell v. Haughton* [1971] I.R. 305).

25. The difficulty for an appellate court when asked to interfere with a finding of contributory negligence made by a jury is that it has no way of knowing the evidence which the it relied upon to reach the apportionment which it did, in this case an attribution of 69% to Mr. Buckley. Further, it is impossible to discern whether the jury correctly approached its task by reference to its assessment of Mr. Buckley's blameworthiness for his injuries. By way of contrast, in a personal injuries action tried before a judge alone, the Court will know from the judgment of the High Court judge precisely what evidence he or she relied upon to support their conclusion and will also be in a position to determine whether they correctly made their assessment, as required, based upon the moral blameworthiness of the parties for their respective causative contributions to the injury concerned.

26. Another difficulty for the appellate court in the present case is that it does not know how or when the jury concluded Mr. Buckley sustained his ankle injury. It is clear that they rejected the evidence adduced on his behalf to the effect that it was likely caused by Gda. Mulligan deliberately kneeling upon his ankle when he was lying down on the ground. It may have occurred in the course of the plaintiff's fall to the ground or while on the ground after the fall.

27. As to the circumstances of the fall, the transcript reveals that Gda. Mulligan stated that he tripped and fell to the ground having lost his balance. This happened, he said, because Mr. Buckley had brought his arms up into the air in an effort to resist arrest. He stated that whilst locked together they turned and as they did so they lost balance due to Mr. Buckley's resistance and the fact that he had to lean against him to bring his arms under control.

28. Regardless of whether this injury was sustained in the course of the fall or during the period while he was on the ground following the fall, it is difficult to find any evidence which would justify a finding on the part of the jury that Mr. Buckley was 69% blameworthy for his causative contribution to his ankle injury. While he resisted arrest thus contributing to the fall he did not do so in any type of aggressive fashion. He did no more than raise his arms up into the air to avoid being handcuffed. He did not, for example, swing a punch at Gda. Mulligan or take some other aggressive action likely to result in an engagement wherein injury might be sustained. Also, while he clearly had consumed excessive alcohol it is difficult to know from the evidence the extent to which that contributed to the fall in light of Gda. Mulligan's evidence that he leant in on top of Mr. Buckley because he was resisting being handcuffed.

29. I am satisfied that the jury could only have come to the apportionment of liability which it did by mistakenly taking into account all of Mr. Buckley's adverse conduct on the night in question rather than only that conduct which could be implicated as being causative of his injury. If I am correct in this assumption, the jury adopted an incorrect and impermissible approach to its consideration of the issue of contributory negligence with the result that it made a finding which was grossly excessive in all of the circumstances.

30. Given that the jury found the defendants guilty of negligence which was causative of Mr. Buckley's injuries but in circumstances where the causative connection between his conduct and his injury cannot clearly be established from the evidence, it appears to me that this Court should properly apply the provisions of s. 34(1)(a) of the Civil Liability Act 1961which provides that if it is not possible to establish different degrees of fault, liability should be apportioned equally. In light of my earlier conclusion that the plaintiff should be awarded a sum of €35,000 in respect of his general damages, having regard to his contributory negligence that award must now abate to a figure of €17,500.

The costs issue

31. The outcome of the plaintiff's appeal in respect of the jury's award of general damages and its finding as to the extent of his of contributory negligence has a significant impact on his appeal against the order for costs made by the trial judge and the submission made in that regard. It will be remembered that the plaintiff was awarded Circuit Court costs on the basis of a two day hearing, the

same to be taxed in default of agreement. As no argument was advanced to challenge the two day limit placed on the costs order, I will confine my consideration of this issue to the statutory provisions that apply to an award of damages in the amount of €17,500.

32. The effect of s. 94 of the 1924 Act, notwithstanding its subsequent amendment by the Courts of Justice Act 1928, the Courts Act 1971 and the Courts Act 1988, is that Mr. Buckley was entitled to bring his claims for damages for false imprisonment, wrongful arrest, assault and battery in the High Court and to have them decided by a judge sitting with a jury.

33. Regardless of the fact that jury trials were abolished for personal injuries actions by s.1 of the Courts Act 1988, Mr. Buckley retained the right to bring his negligence action alongside his other claims because that cause of action arose out of the same set of facts as those material to such claims.

34. The relevant statutory provisions are as follows:-

> Courts Act 1988
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> 1.(1) Notwithstanding section 94 of the Courts of Justice Act, 1924 , or any other provision made by or under statute, or any rule of law, an action in the High Court-
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> > (a) claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any such contract or any such provision),
> >
> > (b) under section 48 of the Civil Liability Act, 1961, or
> >
> > (c) under section 18 (inserted by the Air Navigation and Transport Act, 1965) of the Air Navigation and Transport Act, 1936,
>
> or a question of fact or an issue arising in such an action, shall not be tried with a jury.
>
> (3) Subsection (1) of this section does not apply in relation to-
>
> > (a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,
> >
> > (b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission, unless it appears to the court, on the application of any party, made not later than 7 days after the giving of notice of trial or at such later time as the court shall allow, or on its own motion at the trial, that, having regard to the evidence likely to be given at the trial in support of the claim, it is not reasonable to claim damages for false imprisonment or intentional trespass to the person or both, as the case may be, in respect of that act or omission, or
> >
> > (c) a question of fact or an issue arising in an action referred to in paragraph (a) or (b) of this subsection other than an issue arising in an action referred to in the said paragraph (b) as to whether, having regard to the evidence likely to be given at the trial in support of the claim concerned, it is reasonable to claim damages for false imprisonment, intentional trespass to the person or both, as the case may be, in respect of the act or omission concerned.

35. While Mr. Buckley was entitled to seek to have his claim tried before a jury, he was equally entitled to bring his claims before a judge sitting alone in the High Court or before a court of lesser jurisdiction. Section 94 does no more than state that there is nothing to prejudice a plaintiff's right to seek to have a jury determine various classes of claims, including those in respect of assault and false imprisonment.

36. In respect of costs payable in an action where a plaintiff has a right to a jury trial in a civil case, s. 94 of the 1924 Act, provides as follows:-

> "…[S]ubject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein, the costs of every civil action, and of every civil question and issue, tried by a jury in the High Court or the Circuit Court shall follow the event, unless, upon application made, the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct; and any order of a Judge as to such costs may be discharged or varied by the appellate tribunal."

37. Having elected to seek a jury trial I am quite satisfied that this is the section to which the High Court judge was bound to have regard when deciding what order to make in respect of the costs of the proceedings.

38. Section 94 of the 1924 Act was, however, amended by the provisions of the 1981 Act. In turn, s. 17 of the 1981 Act was substituted by s. 14 of the Courts Act 1991) so that it now provides as follows:-

> Section 17
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> (1) When an order is made by a court in favour of the plaintiff or applicant in any proceedings (other than an action specified in subsection (2) and (3) of this section) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the said lowest court.
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> (2) In any action commenced and determined in the High Court, being an action where the amount of damages recovered by the plaintiff exceeds IR£25,000 but does not exceed IR£30,000, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the Circuit Court,

unless the judge hearing the action grants a special certificate, for reasons stated in the order, that, in the opinion of such judge, it was reasonable in the interests of justice generally, owing to the exceptional nature of the proceedings or any question of law contained therein, that the proceedings should have been commenced and determined in the High Court.

(3) In any action commenced and determined in the High Court, being an action where the amount of the damages recovered by the plaintiff exceeds IR£5,000 but does not exceed IR£15,000, the plaintiff shall not be entitled to recover more costs than whichever of the following amounts is the lesser, that is to say, the amount of such damages or the amount of costs which he would have been entitled to recover if the action had been commenced and determined in the Circuit Court.

39. It is clear that s. 17(1) only applies if the plaintiff's claim does not, because of the amount of his award, fall to be considered under either subs. (2) or (3) of that section. In the present case the award which ought properly have been made by the jury was €17,500, the same having an Irish Pound equivalent of £13,772. That being so it is unnecessary to consider the effect of s. 17(1) on the award of damages erroneously made by the jury. The plaintiff's award of damages falls within the parameters advised in s. 17(3). Thus his High Court costs must be determined in the manner therein specified. He is entitled to the lesser of the following sums, namely:-

(i) €17,5000 that being the amount of his award of damages, or

(ii) such sum as may be agreed, or taxed in default of agreement, on the basis that the claim was commenced and pursued in the Circuit Court over a two day period.

Conclusion

40. For the reasons advanced earlier in this judgment, I am satisfied that the award of the general damages made by the jury in this case was not just or proportianate having regard to the evidence concerning the plaintiff's injuries and that it should be set aside in favour of an award of damages in the sum of €35,000. I am also satisfied that the jury erred in its approach to the issue of contributory negligence such that this court should apply the provisions of s. 34(1)(a) of the Civil Liability Act 1961,with the effect that liability should be apportioned equally between the parties. In such circumstances the plaintiff is entitled to an award of €17,500: an award which is governed by the provisions of s. 17(3) of the Courts Act 1981 (as substituted by s.14 of the Courts Act 1991). Accordingly I would allow the appeal and propose an award of general damages in favour of the plaintiff in the sum of €17,500, with costs to follow in the lesser of the two amounts specified in that section upon the basis of a two day hearing as decided by the trial judge and from which decision no appeal was pursued.