THE HIGH COURT

[2006 No. 6407 P]

BETWEEN

KEVIN TRACY AND KAREN TRACY

PLAINTIFF

AND

MICHAEL McDOWELL THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND IRELAND AND THE ATTORNEY GENERAL AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE CHIEF EXECUTIVE OF THE COURTS SERVICE AND BERNARD NEERY AND EDWARD FINUCANE AND JOHN KEENAN AND PATRICK FLYNN AND JOHN COSTELLO AND DERMOT O'CONNELL AND DAVID O'BRIEN

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 20th day of July, 2018

1. At the conclusion of the evidence counsel for the Defendants made applications, commonly but inaccurately referred to as an application for a non-suit, to withdraw the case from the jury and to dismiss the action. The Plaintiffs are unrepresented and oppose the applications. Submissions were made by and on behalf of the parties and have been considered by the Court.

2. At the outset, it is pertinent to observe that no issues of indemnity or contribution arise. The Defendants represented by Mr. McCarthy S.C. and Mr. Jackson have indicated an intention not to go into evidence if the application is unsuccessful. Mr. Compton, representing what I shall refer to as the Courts Services Defendants, has indicated an intention to go into evidence if his application is unsuccessful but only for the purpose of proving a document.

3. There are multiple causes of action pleaded in the statement of claim. In considering the applications the Court is required to have regard to each of the causes of action which were pursued in the course of the trial. The approach which the Court is required to adopt on an application for a direction to dismiss at the conclusion of the Plaintiff's case is well settled. See *Hetherington v. Ultra-Tyres Service Ltd & Ors* [1993] 2 I.R. 535; *O'Toole v. Heavey* [1993] 2 I.R. 544 and 1993 1 All ILRM 343; *Cranny v. Kelly* [1998] 1 I.R. 54; *O'Donovan v. Southern Health Board* [2001] 3 IR 385; *Moorview Ltd v. First Active Plc* [2009] IEHC 214 and *Moorview Ltd v. First Active Plc* at [2010] IEHC 34.

4. The first Plaintiff submitted that cases involving negligence actions tried by a judge sitting alone were not relevant to the applications. He is mistaken in his understanding. It is clear from the judgments that these cases are authority for the approach which the court is required to adopt on applications for a non-suit whether made in an action for breach of contract or in actions brought in tort. The causes of action alleged in these proceedings are torts in respect of which the Plaintiffs have a right to trial by jury, a right they have exercised.

5. The procedural requirements to be adopted by a judge sitting without a jury were exemplified in the judgment of the Chief Justice delivered in *O'Toole*. Specific reference was made by the Chief Justice to the consistency between the approaches to be taken by the trial judge in a given set of circumstances when sitting alone and when sitting with a jury. The overall test to be applied derives from the role of a judge in a trial where the facts are to be determined by a jury, a common mode of trial in High Court civil actions before the restrictions on the right to trial by jury were introduced by s. 1 of the Courts Act 1988. The right to trial by jury is of great antiquity in the common law and was continued after independence by virtue of s. 94 of the Courts of Justice Act, 1924. See also the observations of Keane C.J in *O'Donovan* and the commentaries of Clarke J. (as he then was) in the judgments he delivered in *Moorview*.

6. There are a number of unusual if not unique features in this case. The first Plaintiff chose not to give any evidence; a decision which I am satisfied was made consciously and was not founded on any physical, mental or legal disability or other incapacity. With the exception of his spouse, the witnesses called by the first Plaintiff were either personally named Defendants or persons in the employment or former employment of the State Defendants. In these circumstances it was unsurprising that several of these witnesses gave evidence which was assessed and described by the first Plaintiff as 'unhelpful' to the Plaintiffs case; an assessment on foot of which he unsuccessfully applied to have those witnesses treated as hostile.

7. With regard to the applications the law requires the Court to consider whether the Plaintiffs have made out a *prima facie* case in respect of each of the causes of action which were pursued at trial. This exercise involves a consideration of the evidence for the purposes of determining whether the proceedings should ultimately be left to the jury. The test is whether on all the evidence adduced by the Plaintiff, if no other evidence was given, it would be open to the jury if they accepted the evidence adduced to enter a verdict for the Plaintiffs.

8. Unless the evidence is such as would entitle the jury, properly directed on the law, to reasonably find and give such a verdict on the cause or causes of action in respect of which the evidence was adduced the Court should accede to the applications for a direction, withdraw the case from the jury and dismiss the action. If, however, a *prima facie* case is made out then, as the tribunal of fact, it is a matter for the jury, properly directed on the law, to determine whether on the evidence available the Plaintiff has established on the balance of probabilities the case which has been made.

9. It is manifest from the evidence led in these proceedings that a conflict exists on matters of fact material to the establishment of several causes of action between the evidence given by the second Plaintiff and the evidence given by the other witnesses called by the first Plaintiff, a conflict revealed in the starkest of terms by the differences in the accounts of what happened in the hall of the Plaintiff's home when three of the Garda Defendants came to execute what on the face of it was a lawful warrant for the arrest and detention of the first Defendant in Mountjoy Prison.

10. The second Plaintiff gave graphic evidence of an assault which involved the first Plaintiff being pushed to the ground, handcuffed and stood on. The Gardaí for their part gave equally trenchant evidence that they hadn't laid a hand on the first Plaintiff; instead he gave an explanation which they accepted and left the premises without executing the warrant.

11. At the stage of an application for a 'non-suit' the evidence has to be accepted on its face. In the ordinary way it is not for the trial judge to resolve a conflict where one exists or to form a generalised view as to the credibility of witnesses; that is the preserve

of the jury. Where, however, as a result of an internal contradiction, such as arises in the unusual circumstances of this case, inability to offer an explanation as to the inconsistency of evidence with other facts, a witness' account, although maintained under cross examination, lacks any real creditability it is open to the trial judge to discount or disregard that evidence for the purposes of assessing whether there is sufficient evidence to meet the requirement that a *prima facie* case has been made out.

12. And so it is with the account of the second Plaintiff. Inspector Keenan was appointed to investigate complaints made by the first Plaintiff in relation to the matters which are the subject of these proceedings. He came to their home and offered them an apology for the errors which had led to the prosecution and conviction of the first Plaintiff for failing to produce his driving licence and insurance when in point of fact he had done so, something which was not in issue.

13. Apart from the conversation which took place between the Plaintiffs and Inspector Keenan at their home a considerable amount of correspondence subsequently passed between the first Plaintiff and Inspector Keenan in relation to the complaints and how these were being progressed and dealt with, correspondence which was opened to the jury. There is no evidence that any mention of an assault and battery as described in the account of the second Plaintiff was made during the conversation or in the subsequent correspondence. In passing it is to be noted that although detailed and specific particulars of the assault were sought in the course of the pleadings none such were furnished until the first trial in this case which ultimately collapsed.

14. The second Plaintiff's account of the alleged assault lacks any real credibility. Had such occurred there is no explanation as to why it was not mentioned or the details discussed during the conversation with Inspector Keenan or in the subsequent correspondence with him concerning the complaints which the Plaintiffs knew he had been appointed to investigate.

15. I have had to consider the evidence which was adduced together with the ingredients of each of the causes of action which were pursued at trial, that is to say the constituent legal ingredients which must be satisfied on the evidence in order to succeed in the respective causes of action. Having given due consideration it is the finding of the Court that on the evidence the jury properly directed on the law could not reasonably give a verdict for the Plaintiffs in respect of any of the causes of action advanced, accordingly, a *prima facie* case not having been made out the Court will accede to the applications for a direction to withdraw the case from the jury and to dismiss the proceedings. And the Court will so order.