



THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 302

**Irvine J.
Hogan J.
Mahon J.**

Appeal No.: 268/2015

Patrick Vesey

Plaintiff / Appellant

- and -

Kent Carty

First Defendant / Respondent

- and -

Fabian Cadden & Co.

Second Defendant / Respondent

Judgment of Mr. Justice Mahon delivered on the 26th day of October 2016

1. This is an appeal from the judgment of O'Malley J. delivered on 14th April 2015 and the related Order of the High Court dated 24th April 2015, which was perfected on 29th April 2015. Proceedings as against the first named defendant, Kent Carty Solicitors, were discontinued and that party is not concerned with this appeal.

Background facts

2. Following upon the appellant's involvement in a road traffic accident on 9th September 1996, the appellant instituted proceedings seeking compensation for personal injury sustained in that accident. The defendant in that action, Bus Éireann, admitted liability and the matter was heard in the High Court as an assessment of damages for personal injury, loss of earnings and special damages. The appellant was represented by the first named solicitors in those proceedings until approximately May 1999, when the respondent firm of solicitors came on record.

3. The High Court personal injury action was heard and determined in November 2000. In giving judgment on 10th November 2000, Johnson P. expressed severe criticism of the appellant's evidence in relation to the extent of his injuries and his work history. Johnson P. awarded total damages of IR£72,500, being IR£7,500 for loss of earnings to date and into the future, IR£35,000 for damages for pain and suffering to date and IR£30,000 for damages for pain and suffering into the future. The decision of the High Court was not appealed by the appellant, but Bus Éireann appealed the award of damages to the Supreme Court. Judgment was given by the Supreme Court in relation thereto on 13th November 2001. In the course of his judgment, Hardiman J. determined that the observations of Johnson P. which severely criticised the appellant were "fully justified" and were not "unduly harsh". He remarked "He replaced one untrue account with another equally untrue". The Supreme Court reduced the appellant's total damages to €38,360.

4. The criticisms levelled at the appellant by Johnson P. when giving his decision on 10th November 2000 included the following observation:-

"...I am now going to say something that I have never said about any plaintiff in the last thirteen and a half years on the bench. The plaintiff has lied to me, has lied to his own doctors, has lied to the defendant's doctors in a manner which has rendered the opinions of the doctors almost useless because they admit themselves, they depend on the veracity of the history given to them by the plaintiff to form their opinions. The plaintiff did not tell the doctors the truth regarding his history... The history of work in the case is one of the great mysteries because the only time we have any details of the plaintiff's work was in the last six months prior to the accident and, undoubtedly, he was working then but.. I accept that only because of [the evidence of a former employer]... I accept that he suffered some damage but as to what the damage was I can only speculate."

5. On 27th November 2006 the appellant issued fresh proceedings in the High Court in which he claimed damages for, in effect, the professional negligence of the respondent in and about the manner it prepared and processed his personal injury action against Bus Éireann. In these proceedings, the appellant claimed that the respondent:-

- Failed to prepare and process the plaintiff's claim with reasonable care and diligence.
- Failed to ensure that at all times suitably qualified professionals dealt with the processing of the plaintiff's claim.
- Failing to review, advise and disclose all the plaintiff's previous injuries and medical history.
- Failing to adequately evaluate, prepare and present the plaintiff's position with regard to his medical condition, his employment records and his social welfare entitlements and claims prior to the High Court hearing on 8th, 9th and 10th November 2000.
- Failed to consult and advise the plaintiff with regard to the appeal to the Supreme Court and the aspects thereto, together with alternative aspects thereto.
- Failed to submit a full account to the plaintiff of the outcome of the Supreme Court together with the settlement figure thereto.
- Failed to respond to the plaintiff's communications and correspondence.
- Failed to provide details of all the monies due to the plaintiff.

- Failed to provide the monies as due to the plaintiff.
- Failed and continued to provide to the plaintiff the due amounts.

6. In the course of these proceedings, the appellant introduced additional particulars of negligence as follows:-

- (i) The defendant failed to call Dr. Austin Darragh who could have clarified the full extent of the plaintiff's injuries and could have confirmed that the plaintiff had been fully honest about them.
- (ii) The defendant failed to instruct counsel to object when it became apparent that Dr. Harold Brown was misleading the court.
- (iii) The defendant caused the trial judge to form the incorrect conclusion that the plaintiff had lied to doctors.
- (iv) The defendant failed to carry out the plaintiff's instructions to appeal the incorrect findings of the trial judge.
- (v) The defendant failed to carry out the plaintiff's instructions to appeal the quantum of the award.
- (vi) The defendant failed, despite the plaintiff's instructions, to present to the trial court a clear and coherent picture of the plaintiff's work history.
- (vii) The defendant failed, despite the plaintiff's instructions, to present to the trial court a clear and coherent picture of the injuries sustained by him.
- (viii) The defendant failed to have a pre trial consultation with the plaintiff to prepare properly for the hearing and to go through the pleadings and replies to particulars.
- (ix) The defendant failed to furnish basic information to two of the plaintiff's witnesses, Dr. Sinnanan, Dr. Lorna Brown and Ms. Logan, which resulted in them being taken by surprise when cross examined.

7. Particular (v) (the allegation that the defendant failed to carry out the plaintiff's instructions to appeal the quantum of the award) was withdrawn by the appellant. It was accepted by him that the award of damages made by Johnson P., and the reduction of that award in the subsequent appeal to the Supreme Court, were reasonable outcomes having regard to the evidence presented. The allegation of professional negligence as against the respondent is, essentially, that it failed to properly put the appellant's case to the High Court. The appellant maintained in his High Court proceedings (before O'Malley J.) that he had not received any of his award of damages and costs, that he had suffered serious loss and damage, that he had suffered serious loss to his reputation and his good name because of the comments of Johnson P. and Hardiman J. concerning his honesty and that he has suffered serious distress and psychological damage which is ongoing and continuing. The appellant claimed special damages and general damages to include aggravated damages and interest. A full defence, dated 6th September 2013, denying liability in respect of every allegation against it was delivered on behalf of the respondent.

The judgment of O'Malley J.

8. In the course of her detailed judgment delivered 14th April 2015 the learned trial judge reviewed in considerable detail the evidence in the damages claim against Bus Éireann. In her review of the evidence heard by her she identified the following complaints made by the appellant as against the respondent:-

- The appellant had only one consultation in the respondent's office shortly before the trial, and all that was discussed were expenses.
- The appellant was cross-examined about his work history as far back as 1984, although he was unprepared for same, having been advised that he would only have to go back five or six years. His full work history had been written out by him, but was not given to the judge.
- The evidence that he had not disclosed to Bus Éireann that he had been a patient in Cappagh Hospital was not challenged.
- Dr. Lorna Browne had been "badgered" into saying that she knew nothing about his back problem, and she and other witnesses ought to have been cross-examined in relation to this issue.
- Dr. Sinanan had maintained that the appellant was exaggerating although the content of his report contradicted this view.
- The respondent did not provide Dr. Sinanan or Dr. Browne with sufficient information relating to his medical history.
- Counsel for Bus Éireann had put it to him on several occasions that named doctors would say that he had only told them about two accidents. This was never challenged or stricken from the record.
- Mr. Harold Browne had said that the appellant never told him about the bus accident, and he and Dr. McGrath had misled the court.
- Dr. Austin Darragh should have been called to give evidence. Senior counsel had advised that he not be called.
- He instructed the respondent to lodge a cross-appeal of the finding that he had misled the court and was assured that he had done so. He was not aware until the Supreme Court hearing that there was, in fact, no cross appeal lodged.
- After the conclusion of the case he did not receive any of the money awarded and it was not explained to him why he had not been paid, or about anything relating to costs. (Subsequently the appellant accepted that the damages recovered had been paid over to Bank of Ireland on foot of an undertaking to do so given by Kent Carty Solicitors in relation to a loan).

9. The only witness called on behalf of the appellant in the High Court (besides the appellant himself) was a former practicing solicitor

who had left the profession to become a part time actor. In relation to his evidence, the learned trial judge commented as follows:-

"If this gentleman was called in order to fulfil the requirement that professional negligence actions should be supported by expert opinion, it has to be pointed out that he did not lay any claim to expertise other than having been in practice. In any event, his evidence was entirely uncontroversial and related to the normal manner in which personal injury actions are run."

10. She also said:-

"There was no medical evidence to support the claim that the plaintiff has suffered serious stress and psychological injury as a result of the defendant's conduct."

11. The learned trial judge concluded her judgment in the following terms:-

"(i) It is abundantly clear from the transcript of the Bus Éireann proceedings that the plaintiff's difficulty with credibility in the eyes of Johnson J. stemmed almost entirely from the evidence relating to the fact that he was signing on while claiming, for the purposes of his legal proceedings, to have been employed; from the replies to the 1993 particulars to the effect that he would in future be unable even for light work and from the fact that he had given differing accounts of his medical history to different witnesses who were called on his behalf. The credibility issue was not whether or not he had a pre-existing back condition – that was never in doubt. Nor was it whether previous accidents might or might not have affected his back. That is a matter on which medical witnesses might disagree. The problem was that for different purposes he had given different accounts of his physical and psychological health at relevant times. All of these accounts were created by the plaintiff himself. It was not his solicitor's obligation to provide the professional witnesses with a fuller picture. That was the plaintiff's obligation."

"(ii) It is completely misconceived to suggest that either counsel, or an instructing solicitor, could challenge the evidence given by their own witnesses in these circumstances."

"(iii) There is no substance in the claim that he was not properly advised as to how to deal with his employment history. The original senior counsel instructed by Kent Carty had raised an issue as to his truthfulness in that regard and had directed him to write down a full account. Counsel for Bus Éireann did not trawl through 20 years of employment – most of his questions were directed to the six or seven years before the bus accident. The plaintiff's answers were hopelessly inconsistent, both with each other and with the social welfare records. There is no basis upon which it can be asserted that the written record of his employment, prepared by him at the request of his legal team, could have been handed in to the judge, either in lieu of his being subjected to cross-examination or to support his evidence – that is not how an adversarial witness action proceeds."

"(iv) I find that the claim that the plaintiff was not properly informed as to what happened to his award was not made in good faith. The fact that the plaintiff does not appear to have informed his current legal representatives about the litigation regarding the costs, in which the issue about the damages was ventilated, tells its own story. It is quite clear that the defendant honoured a solicitor's undertaking, given by his predecessor in the case, to repay money owed to the bank out of the award."

"(v) The claim that the defendant did not advise the plaintiff as to an appeal and did not follow instructions to lodge a cross-appeal is manifestly unfounded on the basis of the plaintiff's own evidence."

"(vi) Finally, the court again notes that O'Neill J. refused an application to dismiss this action as being frivolous, vexatious and bound to fail. The jurisdiction to grant such an order is, of course, to be exercised sparingly and there were at least some elements of the pleadings that were not, on the face of things, incapable of grounding a viable action. I am also conscious of the fact that the defendant chose not to make a non-suit application at the end of the plaintiff's case and may have wished the matter to be dealt with on the full merits. However, having heard the plaintiff's evidence it is impossible to avoid the conclusion that he was attempting, in reality, to re-litigate the issues in the Bus Éireann case and obtain damages from the defendant on the basis that he should have achieved a better result than he did. This is not a permissible course of action and is an abuse of the process of the court."

The order of Finlay Geoghegan J.

12. On 18th December 2015, a directions hearing was heard in this Court (Finlay Geoghegan J.). It was directed that any correspondence or documents which post dated the hearing before the High Court in October 2014 and which were contained in a book of documents lodged by the appellant dated 3rd December 2015 under the headings (Nos. 2, 6 and 12), were not to be admitted into evidence in the hearing of the appeal.

13. The appellant sought leave to appeal this aspect of the directions ruling to the Supreme Court. That application was determined by the Supreme Court on 26th February 2016, when it refused leave to appeal under Art. 34.5.3 of the Constitution. It found that the directions ruling of Finlay Geoghegan J. did not mark a departure from well established principles as to the introduction of new material on an appeal. It noted that all of the material sought to be introduced by the appellant was correspondence entered into by him with three named individuals subsequent to the trial of his action in the High Court. The Supreme Court also reiterated its position, as previously pointed out in *Dowling and Others v. The Minister for Finance* [2015] IESC DET 13 that leave will not ordinarily be granted in respect of procedural or case management matters. In that case it was determined:-

"Thus, it would only be in exceptional circumstances that a listing (or case management) decision of the Court of Appeal could be said to qualify as a matter to which leave to appeal should be granted."

14. In the course of the appellant's oral submissions to this Court the appellant reiterated many of the complaints as noted by O'Malley J. in her judgment. He was particularly critical of the evidence given in his High Court personal injury action by Mr. Harold Brown, an orthopaedic surgeon, whom he said had not been properly challenged. He was also critical that the solicitor that attended in court on his behalf was "a young female solicitor who knew nothing and failed to intervene when appropriate in the face of the court being misled by Mr. Brown". He also maintained that O'Malley J. had the "appearance of bias" against him because she had disclosed that her father and Mr. Brown had been personal friends. He maintained that he had instructed his solicitor and counsel to object to O'Malley J. for this reason, and that it had been wrongly indicated to the learned trial judge that he did not object to her

hearing the case. The appellant also maintained that the respondent, Mr. Caden, had perjured himself and had sworn false affidavits. At this juncture I would emphasise that there is nothing in the documentation before this Court or in any of the submissions made to this Court which could in anyway justify such serious allegations against Mr. Caden.

Discussion and conclusion

15. It is undoubtedly the case that the appellant is seriously critical of the manner in which his personal injuries action against Bus Éireann was processed on his behalf by the respondent and by his counsel, all of whom were experienced legal practitioners. He was unhappy with the amount of damages awarded and was particularly upset by comments made by the learned trial judge in that court, and which comments and observations were effectively confirmed by Hardiman J. in the course of his judgment in the appeal of the decision in that case to the Supreme Court.

16. It is often the case, and understandably so, that persons who fail to succeed in litigation or who do less well than expected in litigation are critical of the manner in which their case was run, or of advice given to them. On occasion such criticisms are well founded but equally many such criticisms are not. Litigation carries with it significant risks as to the outcome and, of course, the risk of being rendered liable for costs.

17. The onus of establishing that the respondent was professionally negligent in the manner in which the appellant's personal injury claim processed and more particularly, how the manner was dealt with in court by his legal representatives, rests squarely with the appellant. The burden of proof is on the appellant to establish that the respondent failed to meet the relevant professional standard in the circumstances. It is unnecessary for the purposes of this appeal to explore the extent to which (if at all) advocates enjoy any immunity from suit in respect of their own conduct of the actual court hearing.

18. *Arthur J.S. Hall & Co. v. Symons* [2000] 3 All E.R. 673, Lord Hobhouse, said (at p. 123):-

"The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made."

19. That standard required the respondent to ensure, in as far as possible, that the appellant's claim (both relating to the extent of his injuries and his consequential loss of earnings) be advocated in court, that the appropriate witnesses be called to give evidence, that witnesses called on behalf of Bus Éireann be cross-examined and / or challenged in order to ensure that the appellant's claim is vindicated as far as possible, and, in general terms, that the appellant's instructions be complied with.

20. Neither the evidence adduced before O'Malley J. or the submissions made to this Court support the contention that any breach of the appropriate professional standard occurred. Furthermore, if, in fact, the appellant (as he maintains he did) expressly instructed the respondent and / or his counsel to object to the case being heard by O'Malley J. in the light of the disclosure of a friendship between her father and Mr. Browne, and such instruction was ignored, or, (again as the appellant maintains) an opposite position was indicated in open court, such would amount to, at a minimum, professional misconduct. However, the fact that there is no evidence that the appellant sought to object or otherwise attempted to, halt the hearing of the case by O'Malley J after the appellant's counsel indicated that he had no objection to her doing so, is, at least, strongly suggestive of the fact that he did not so instruct his legal team.

21. It might also be observed that the appellant led no expert evidence to ground his serious criticisms of the respondents. While it is true that, as the decision of Peart J. in *Murray v. Budds* [2015] IECA 269 indicates, there is no *ex ante* rule which requires the existence of such an expert report before proceedings are commenced, the absence - as here - of detailed and rigorous testimony from an expert in the relevant area is likely to prove a serious handicap to any plaintiff in a professional negligence action.

Conclusion

22. The appellant failed to establish that, as a matter of probability, the outcome of his personal injuries action against Bus Éireann was undermined or rendered unsatisfactory because of any professional failure on the respondent's part, or, indeed, his entire legal team. I am also satisfied that the hearing of the case by O'Malley J. was conducted in an exemplary fashion, as is evident by her detailed judgment.

23. I would therefore dismiss the appeal.