THE COURT OF APPEAL

Peart J.
Irvine J.
McDermott J.

Appeal No.: 2015/2011

[Article 64 Transfer]

Blaine Murphy

Plaintiff/Appellant

- and -

County Galway Motor Club Limited, Irish Motor Sport Federation Limited (Motor Sport Limited), Motor Sport Safety Team, and Brian Melia

Defendant/Respondent

Judgment of Ms. Justice Irvine delivered on the 14th day of April 2016

1. This is the plaintiff's appeal against the judgment and order of the High Court (McGovern J.) of the 6th April 2011 made in the context of a personal injuries action. The proceedings concern injuries, loss and other damage sustained by Mr Blaine Murphy on 5th February 2005 when he was struck by a motor vehicle when attending the Galway International Motor Rally at Loughrea, Co. Galway. Following a four day hearing, wherein both liability and quantum were in dispute, the trial judge awarded the following sums to the plaintiff by way of damages:-

- General damages for pain and suffering to date: €100,000
- General damages for pain and suffering into the future : €100,000
- Loss of earnings to date: € 40,000
- Loss of earnings into the future: €175,000
- Costs of anticipated prosthesis: €170,000
- Agreed special damages: € 12,498

Total: €597,498

2. As to liability, the trial judge dismissed the proceedings against the fourth named defendant, the driver of the motor vehicle that struck the plaintiff, at the conclusion of the plaintiff's evidence. At the conclusion of the trial, he apportioned liability as to 33.33% to the first, second and third named defendants and 66.66% to the plaintiff. Accordingly, he granted judgment against the defendants for €199,166 together with costs, to be taxed in default of agreement.

3. On this appeal the plaintiff maintains:-

(i) that the finding of 66.66% contributory negligence on the part of the plaintiff was perverse having regard to the evidence;

(ii) that the sums awarded in respect of both categories of general damages were unjust and lacking in proportionality;

(iii) that the trial judge incorrectly concluded that the plaintiff's potential net earnings from 5th February 2005 to the 8th February 2011 were €115,000 as opposed to €159,800. Accordingly, the figure which he arrived at in respect of past losses i.e. €40,000, having taken into account actual earnings, social welfare payments and other expenditure on the part of the plaintiff, was not supported by the evidence;

(iv) Insofar as the award of €229,602 in respect of future loss of earnings is concerned, the principal complaint is that the approach adopted by the trial judge was not supported by the evidence. The plaintiff submits that he ought to have calculated the claim for future loss of earnings on the basis that the plaintiff would likely have worked as a self- employed plumber but for his injuries and would have had an earning capacity of €200 per day. Instead, he had done so on the basis that he would likely have worked in paid employment 39 hours a week at the minimum hourly rate applicable to the construction industry. Had damages been calculated on that basis, prior to any deduction in respect of the considerations advised in *Reddy v. Bates*, the sum awarded would have been €307,000 as opposed to €229,602 in respect of this category of loss.

Background facts

4. The plaintiff was born on 23rd June 1985 and was nineteen years of age at the date of the unfortunate and tragic events that form the subject matter of these proceedings.

5. On 5th February 2005 the plaintiff and three of his friends decided to attend the Galway International Motor Rally. The rally was organised and managed by the first named defendant under the auspices of the second named defendant and the third named defendant provided the safety services for the rally.

6. Having parked their car, the plaintiff and his friends walked in excess of three kilometres over boggy ground to get to a good viewing area. The plaintiff had a video camera with him and wanted to shoot some footage and take some still photographs of the cars as they were put through their paces.

7. Having stopped for approximately 20 minutes to take some footage at a location where there was a bend in the road ("location 1"), the plaintiff and his friends moved further down the same roadway to an area where the road travelled over the crest of a hill. This was a point at which the wheels of cars were seen to leave the road as they went over the crest, or alternatively were seen to lighten up on their suspension while remaining in contact with the road.

8. The plaintiff and his colleagues took up a viewing position, somewhat beyond this crest ("location 2"). The trial judge found as a fact that location 2 was 52 metres or so beyond the crest of the hill. There was some dispute as to whether the plaintiff sat down on a rock to the left of the roadway from the oncoming driver's perspective or whether he was, as he maintained, a couple of metres further away from the crest sitting on a tuft of grass at a slightly more elevated level. However, because of the proximity of the two positions, the trial judge said it made no difference to his findings.

9. As the plaintiff and his friends wandered from location 1, where a significant number of people including a marshal were gathered, neither the marshal nor anyone else attempted to stop them moving down towards location 2 beyond the crest of the hill. Further, there was no warning or indication of any type that they should not locate themselves in this area.

10. For the purposes of this appeal the court viewed the video footage taken by the plaintiff at location 1 following their arrival, and also the video footage taken after the group had settled at location 2. This latter segment was very short indeed. It showed no more than six cars coming over the crest of the hill before it was cut short by reason of the collision between a car that left the roadway at this point and the plaintiff. The sound track however continued, and to say that the same is harrowing is perhaps an understatement. The plaintiff is to be heard screaming in pain as a result of the horrendous injuries which he sustained. His terror and pain are palpable.

11. It is common case that the plaintiff sustained a severe compound fracture to his left lower tibia with disruption of the tibiofibular joint, a dislocation of the left knee with rupture of all of the ligaments around the joint and severe skin loss of the lower left leg. He also sustained a number of small lacerations to his left upper forearm and left hand. Because of the severity of the injury to his leg the plaintiff required an amputation initially at knee level and then later above the knee. He was wheelchair bound for a significant period prior to being fitted with a prosthesis.

12. The trial judge, having heard and considered all of the evidence, concluded that the plaintiff would suffer a lifelong disability associated with the amputation of his leg. He accepted that after ten or fifteen minutes of walking that the stump often became sore and at times broke down to the point that it oozed blood. He accepted that the plaintiff could not stand for long periods, that he had difficulties managing any steep incline or walking over uneven ground, that he had difficulty with steps and stairs and could no longer play any sport that involved running. The trial judge accepted the medical evidence that the plaintiff was at significant risk of developing arthritis. The medical evidence in this regard anticipated that the plaintiff would develop arthritis on the non amputated side in his remaining knee and in his spine.

13. I will deal with the trial judge's findings in respect of the plaintiff's special damage claim later in the course of this judgment.

General damages

14. An appellate court enjoys jurisdiction to overturn an award of damages if it is satisfied that no reasonable proportion exists between the sum awarded by the trial judge and what the appellate court itself considers appropriate in respect of the injuries sustained. In *Foley v. Thermos Cement Products Limited* [1954] 90 ILGR 92 Lavery J. stated that the task of the judge in an appellate court was:-

> "To make its own estimate of the damages he would award and then compare this with the verdict and say whether there is any reasonable proportion between the sums or whether the verdict is an entirely erroneous estimate of the damage or is plainly unreasonable. In making its estimate the judge must adopt all points most favourable to the plaintiff and must keep in mind that the jury had the advantage, which he has not had, of hearing the evidence and of seeing the witness and in particular hearing and seeing the plaintiff.
>
> No one will deny that this is a most difficult task. It is especially difficult in a case where personal injuries are the subject of the claim. There is no standard by which pain and suffering, facial disfigurement or indeed any continuing disability can be measured in terms of money. All that can be said is that the estimate must be reasonable and different minds will inevitably arrive at wildly differing conclusions as to what is reasonable. The task must, however, be undertaken."

15. This approach has been adopted in many subsequent cases. In *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 I.R. 547, Fennelly J. described the role of the 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*)."

16. It is generally accepted that an appellate court should not engage in what might be considered to be petty interference with an award of damages and should only interfere when it considers that there is an error in the award which is so serious as to render it unjust or lacking in proportionality. The test of proportionality seems to me to be an appropriate one, regardless of whether the complaint be one of excessive generosity or undue parsimony.

17. It is certainly the case that an appellate court does not enjoy the opportunity of seeing and hearing witnesses in the same manner as a judge at first instance and, as was advised by McCarthy J in *Hay v. O'Grady* [1992] ILRM, the "arid pages of a transcript seldom reflect the atmosphere of a trial". For this reason an appellate court should be slow to interfere with or second guess a trial judge's determination as to what constitutes appropriate damages in any given case.

18. Principle and authority require that awards of damages should be:-

> (i) fair to the plaintiff and the defendant;
>
> (ii) objectively reasonable in light of the common good and social conditions in the State; and

(iii) proportionate within the scheme of awards for personal injuries generally.

(See MacMenamin J. in *Kearney v. McQuillan and North Eastern Health Board* [2012] IESC 43 and Denham J. in *M.N. v. S.M.* [2005] IESC 17).

19. To achieve proportionality the judge ought to have regard to the entire spectrum of personal injury claims which includes everything from the most modest type of injury, such as soft tissue injuries, to those which can only be described as extreme or catastrophic and which tend to attract damages of in or about €450,000. It is helpful for a trial judge to endeavour to locate where, within that spectrum, the injuries of any particular plaintiff would appear to lie: see, e.g., *Nolan .v. Wirenski*, judgment of Irvine J. 25th February 2015. After all, damages are only fair and just if they are proportionate, not only to the injury sustained by an individual plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. There must be a rational relationship between awards in personal injury cases. That said each case must turn on its own facts.

20. Applying these principles to the present case, it is undoubtedly the case that the plaintiff's injury must be viewed as a very serious and significant one when considered in the context of the overall spectrum of personal injuries claims. Any amputation, and particularly the amputation of a leg at a young age, will have permanent and irremediable consequences for the victim. It is an injury destined to adversely influence every area of his life.

21. The trial judge awarded the plaintiff €100,000 in respect of pain and suffering for the five year period between the date of the injury and the date of trial. Having considered the evidence as to the plaintiff's injuries and what he suffered over that period, I am satisfied that, while the award was certainly not on the generous side, it was within the range that may be considered proportionate and fair. Where I disagree with the trial judge is in his assessment of the general damages for pain and suffering into the future.

22. One of the factors which to my mind should sound heavily in damages is the age at which a plaintiff sustains a devastating injury. This plaintiff was only nineteen and was entering what ought to have been the most dynamic and thrilling period of his life in terms of work, leisure and social activity. The evidence demonstrated that in respect of each of these areas, the plaintiff's life would likely be permanently and irreparably changed by reason of his injuries. He was not in a position to continue with his chosen trade i.e. that of a plumber. He is unable to participate in most sporting activities. He suffers ongoing discomfort and disability and will do so for the rest of his life. He will have decades of embarrassment and upset because of the disfigurement of his body. Further, he runs the risk of future complications in terms of his mobility due to the natural ageing process. In addition, he is at risk of developing significant arthritis in a number of joints as a result of his amputation.

23. As to the type of activities which a young man of nineteen years of age might expect to enjoy, the plaintiff cannot cycle, play soccer or engage in any activity which requires mobility. He is grossly affected in his social and leisure activities, although he drives a modified car. He will not be in a position to enjoy many or the activities, holidays and leisure pursuits that able bodied people take for granted because he is unable to deal with uneven ground or rough terrain. I cannot but think of those fathers I see kicking a ball with their young children or teaching them to swim or perhaps strolling with toddlers on their shoulders. The plaintiff will likely be denied all of this and so much more.

24. Of even greater significance is the fact that he plaintiff will start every day of his life with the task of attaching a prosthetic limb and will end each day with the reverse process. Regardless of the plaintiff's optimism as to the future, this will be an enormous burden to bear for the rest of his life.

25. When I think of the entries that might be made by this plaintiff in a diary to be kept by him over the next 50 years or so concerning his pain, distress, disadvantage, embarrassment and upset deriving from his injuries, I am quite satisfied that the sum awarded by the trial judge in respect of future pain and suffering was wholly inadequate by way of compensation and that it must be set aside. It does not fall within what I consider to be the acceptable parameters for future pain and suffering for this particularly significant injury. I would propose a sum of €175,000 be substituted to replace the sum awarded in respect of this category of loss.

Loss of earnings to date

26. Mr. McGovern S.C. on behalf of the defendant does not contest that the trial judge, in his judgment, incorrectly concluded that the evidence given by the plaintiff's actuary, Mr. John Byrne, was to the effect the plaintiff's total net loss of earnings from February 2005 to February 2011 amounted to €159,800 as opposed to the €115,000. However, he was not in a position to agree that the court should rectify this error by simply adding the difference between those two figures namely €44,800 to the award which the trial judge made under this heading i.e. €40,000.

27. Mr. McGovern submitted that the trial judge intended to reduce the net loss of earnings claim by reference to the plaintiff's actual earnings up to the date of trial and any deductible social welfare benefits received between 5th February 2005 and 5th February 2010, subject to some adjustment to allow for the fact that the plaintiff had bought into a taxi business in 2008 at an approximate cost of €50,000. However, other than the plaintiff's actual earnings, which amounted to €44,000 over the said period, it was not clear how the judge had arrived at the additional figure of €31,000 to make up the €75,000 which he deducted from what he mistakenly believed were the plaintiff's potential net earnings of €115,000. He submitted that the trial judge was entitled to deduct five years social welfare payments and that he probably had not done so.

28. I am quite satisfied, and the parties agree, that the starting figure adopted by the trial judge in respect of his past loss of earnings calculation was incorrect. It ought to have been €159,800 as opposed to €115,000. It is also clear that he intended to deduct €75,000 in respect of the plaintiff's actual earnings over the relevant period as well as deductible social welfare payments. It would further appear that he had intended adjusting the claim for past loss of earnings to take into account some part of the losses sustained by the plaintiff in investing in a taxi driving business which proved unsuccessful.

29. Of the sum deducted i.e. €75,000, €44,000 is accounted for in actual earnings. The balance of €31,000 was deducted, as the trial judge stated, on a somewhat "unscientific" basis to take into account deductible social welfare payments under the Social Welfare (Consolidation) Act 1993. The only evidence as to deductible social welfare payments related to the plaintiff's receipt of disability benefit which he received for a period of one year. There was no evidence that he received any other deductible social welfare payments.

30. Based upon the evidence, it would appear that the defendant got a very favourable result when the trial judge decided to deduct €75,000 from this aspect of the plaintiff's claim. A deduction of that size is hard to justify in circumstances where the trial judge seemed sympathetic to the fact that the plaintiff had spent substantial money trying to gain entry into the taxi business. If he had intended to compensate the plaintiff for any of the €50,000 which he maintained he had spent in that regard, that sum should have

been added to the sum award. That expenditure could never have operated to the defendant's benefit by way of deduction.

31. In these circumstances, there is no basis upon which this court should interfere with the trial judge's calculation as to the amount to be deducted from the plaintiff's anticipated earnings up to the date of trial. However, given that it was his clear intention to start his calculations based on expected earnings of €159,800 as opposed to €115,000 it would be unjust not to substitute the correct figure into the trial judge's calculations. That done, taking the correct staring figure of €159,800 and deducting the sum of €75,000, the appropriate award in respect of past loss of earnings is €84,800.

Future loss of earnings
32. At the time of his accident the plaintiff had completed his leaving certificate and in 2004 had commenced working with his father in his plumbing business. He was still an apprentice as of the date of his accident.

33. The evidence established that while the plaintiff obtained a modest leaving certificate his I.Q was within the top 10% of the population and when measured against students of university level he was within average range. He had hoped eventually to take over his father's business but this obviously was denied him insofar as a career in plumbing became impossible due to his mobility restrictions.

34. In assessing the plaintiff's claim for future loss of earnings, the High Court judge had evidence from Ms Ann Doherty, employment consultant, that a self employed plumber would expect to earn a minimum of €200 gross per day or a net weekly sum of €620. Assuming that the plaintiff could retrain within three years from the date of the trial and would then be capable of earning €27,000 gross per annum or €440 net per week, his net loss from that point on would be €180 net per week. Allowing the plaintiff full losses (€620 net) for the three years of retraining and the €180 net differential thereafter placed a capital value €307,380 on the plaintiff's future loss of earnings.

35. The court was also given figures to demonstrate what the plaintiff's loss would have been if he had worked as a plumber in paid employment working a 39 hour week and receiving what was then the minimum rate of pay for a qualified construction craftsman, namely €18.60 per hour gross.

36. The trial judge found as a fact that were it not for his injuries, the plaintiff would have continued to work as a plumber. That finding was based upon credible evidence. However, it is difficult to see how the trial judge decided, having regard to the evidence, to calculate the plaintiff's future loss on the basis that he would have continued, for life in paid employment working 39 hours a week on minimum wage. Adopting that scenario, allowing the plaintiff full losses at the rate of €562 net per week for the first three years and thereafter a differential of €122 net per week, the trial judge concluded that the plaintiff's future loss of earnings, before any consideration of the contingencies provided for in *Reddy v. Bates* was €229,602.

37. Counsel on behalf of Mr. Murphy submits that the trial judge was perverse in adopting the latter of the two models advised by Mr Byrne as the basis for calculating the plaintiff's future loss of earnings. He submits that all of the evidence favoured the judge concluding that the plaintiff, were it not for his accident, would have been a self employed plumber and would have continued to work as such for the rest of his working life.

38. I have carefully re-read the transcript of the plaintiff's evidence and that of his employment consultant, Ms. Ann Doherty. Having done so, I cannot conclude that the trial judge was perverse in his failure to adopt in its entirety the self- employed model urged upon by the court by Mr. Kiely. It is clear that the plaintiff would have had a preference for self employment, that he was highly industrious and extremely smart. Nevertheless, there was some evidence to suggest that, depending upon the state of the economy in this country, he might have had to go abroad to obtain work and in this regard Ms. Doherty gave evidence concerning the availability of work in Australia, London and Canada.

39. However, I am equally satisfied that it was perverse for the High Court judge to calculate the loss of earnings into the future on the basis which he did. There was no dispute but that the plaintiff would have qualified as a plumber. The conclusion of the trial judge that the plaintiff would have been confined to the minimum wage in the construction industry and would only have worked a 39 hour week was not supported by the evidence. The evidence was that the plaintiff was in the top ten per cent of the population in terms of his I.Q.. He had demonstrated, by reference to the work he had undertaken since the date of his accident, that he was a seriously industrious and capable young man. For the judge to have cast him into the lowest category of construction worker and consigned him to that role for life was in the teeth of the evidence. Why would the plaintiff not have moved up beyond minimum wage with experience and future training? Would he never have worked beyond 39 hours a week?

40. As to how to rectify the trial judge's error, it cannot be done in the manner proposed by Mr Kiely as the judge rejected the evidence that favoured self-employment. The trial judge was entitled, in my view, to adopt a paid employment model for the purposes of calculating the plaintiff's losses. Further, having adopted that approach, it is difficult to criticise the trial judge for adopting the minimum wage in the construction industry for the purpose of calculating the plaintiff's first three years loss of earnings as at that time the plaintiff would have been quite in-experienced. Thus the figure of €84,300 in respect of that period should stand. Insofar as his calculation of the plaintiff's losses commencing three years post accident, I would propose uplifting the differential of €122 per week which was selected by the trial judge and would replace it with €165 net to allow for the fact that the plaintiff would as his career advanced move somewhat beyond the minimum wage in the construction industry. Using this differential and applying it to the multiplier used by the trial judge i.e. €1191 gives a value of €196,515 to the plaintiff's claim for future loss of earnings commencing three years post trial. Thus, I would propose an award of €280,815 (€84,300 + € 195,515) to replace the sum of €229,602 awarded by the trial judge.

41. The trial judge applied a discount of close to 25% to allow for the factors in *Reddy v. Bates* and that would appear to be appropriate. Accordingly, applying a 25% reduction to the figure of €280,815 the plaintiff's total future loss of earnings would come to €210,611. Accordingly, I would propose that this sum is substituted for the sum of €170,000 which was allowed by the High Court judge.

42. Having regard to the aforementioned findings the total award before any consideration of contributory negligence should be as follows:-

- General damages to date: €100,000
- General damages into the future : €175,000
- Loss of earnings to date: € 84,800

- Loss of earnings into the future: €210,611

- Future costs associated with the prosthesis: €170,000

- Other agreed special damages: € 12,498

€752,909

Liability/contributory negligence

43. Mr. Kiely, submits that the trial judge, in apportioning 66.66% of liability to the plaintiff erred in his application of the relevant principles having regard to the evidence. In particular he submitted that fault, in the context of contributory negligence, has to be equated to blameworthiness and not to the potency of the causative factors moving from the respective parties. He relied in particular on the decision of Walsh J. in *O'Sullivan v. Dwyer* [1971] IR 275 where at p. 286 he stated as follows:-

> "Degrees of fault between the parties are not to be apportioned on the basis of relative causative potency of their respective causative contributions to the damages …. Fault or blame is to be managed against the standard of conduct required of the ordinary reasonable man in the class or category to which the party whose part is to be measured belongs."

44. Relying upon this statement, Mr. Kiely submits that the trial judge's finding that the defendants were blameworthy to a lesser degree than the plaintiff was perverse.

45. In order to assess the validity of that submission it is necessary to rehearse the findings of fact made by the trial judge insofar as the same bind this court in line with the principles advised in *Hay v. O'Grady*. These are well known and I do not intend to repeat them in the course of this judgment.

46. The following findings were made by the trial judge:-

> (i) The plaintiff probably had seen and considered the programme for the Galway International Rally for February 2005. The location of the plaintiff's accident was not mentioned in the safety plan nor designated an area of special risk.
>
> (ii) The programme contained a 'spectator safety' warning sheet which included drawings of acute bends, a fork in the road, junctions and other features which might pose a hazard to spectators. These diagrams included, at the bottom right hand corner an image of a "crest jump".
>
> (iii) The plaintiff had attended a number of motor rallies with his father as a child. The event in question was the third he had attended as an adult. He was somewhat familiar with the procedures at a motor rally and would have had a general appreciation of the risks and dangers associated with such an event.
>
> (iv) The plaintiff and his friends spent approximately 20 minutes at location 1. There was a marshal at this location.
>
> (v) As the plaintiff and his friends made their way to location 2, where the accident took place, they would have been temporarily out of the view of the marshal for part of the journey, because of the contour of the land, but otherwise would have been visible to him as they made their way to the crest.
>
> (vi) When they reached their ultimate destination the plaintiff sat down on a rock in a drain approximately 50 metres beyond the crest. The plaintiff was 2.5 metres from the edge of the road.
>
> (vii) There was no tape, markers, barriers or any other warning signs at location 2 to advise spectators that they should not be there or needed to take any particular care for their safety.
>
> (viii) The plaintiff and his friends were not alerted in any way to the fact that they should not have been viewing the event from location 2.
>
> (ix) The area should have been cordoned off or marked as it was an obvious place of danger, as per Mr. O'Keeffe's evidence.
>
> (x) The plaintiff, when seated, would not have been visible to the marshal at location 1.
>
> (xi) The plaintiff's reaction time was impaired by the fact that he was sitting down.

47. In terms of the negligence on the part of the organisers of this rally, the trial judge in apportioning liability found them negligent in:-

> (i) failing to identify location 2 as a hazard,
>
> (ii) in failing to identify location 2 as a prohibited area,
>
> (iii) in failing to give any warnings to persons attending the event to stay away from location 2, and
>
> (iv) in failing to properly supervise this dangerous area.

48. When it came to his consideration of the plaintiff's own culpability, three factors were emphasised by the trial judge. First, he concluded that common sense would suggest to anyone attending an event such as this that they should not position themselves close to the road just beyond a "blind crest". The crest constituted a danger that should have been obvious to the plaintiff in circumstances where he had earlier seen cars going over that crest with all four wheels in the air. Thus, regardless of the conclusions he had reached in respect of the defendants' negligence, when dealing with the issue of contributory negligence he concluded that the plaintiff should not have needed a warning from a marshal or any other official to warn him of the potential danger of locating himself where he did. Second, he had the benefit of the programme for the event which contained the safety statement. Third, by

sitting down, the trial judge concluded that the plaintiff had allowed himself less time to react in an emergency than he would have had had he remained standing.

49. For my part, I agree wholeheartedly with the trial judge in his conclusion that those who attend motor rallies must take reasonable care for their own safety. Spectators ought to know that competitors will be driving at speeds on narrow country roads negotiating junctions, bends and crests of hills where the skill of the driver will be severely tested. They must, I believe, be vigilant and must comply with all such guidance and instructions as they may receive or encounter concerning their own safety. I also agree with the trial judge that those who are responsible for organising events of this nature know that spectators are likely to gather in places where drivers will be tested to their full capability and that they need to have an effective safety plan in place to ensure that spectators will be safe lest drivers lose control of their vehicles under such conditions.

50. It is not disputed that contributory negligence should be assessed in the manner advised by Walsh J. in *O'Sullivan v. Dwyer* and that an appellate court should only interfere with an apportionment of fault where it is satisfied that the trial judge has made a gross error in making that apportionment.

Conclusions

51. In reviewing the conclusions of the High Court judge it is necessary to firstly consider the class or category to which the plaintiff and the first, second and third named defendants belong. Simply stated, the plaintiff was a young amateur and a relatively new motocross enthusiast. He was not, however, a complete novice. The defendants, on the other hand, were experienced professionals involved in motocross on a national and international basis. They are well versed in the management of events such as that which was taking place on the date of the plaintiff's injuries. They are the parties with the expertise to know where spectators are likely to be at risk. This, after all, is why the third named defendant was involved with the rally. While the promoters and organisers of sporting events ought not to be considered to be the insurers of the welfare of spectators, they must seek to protect them from dangers of which they are aware, or ought to be aware.

52. In this regard, the trial judge was satisfied that the area in question (location 2) was one which was dangerous, needed to be identified and spectators kept at a distance. To default from these obligations in circumstances where it was foreseeable that a car might leave the roadway with the result that a spectator might be badly injured or even killed, is to act in an manner which is blameworthy indeed. This, of course, was not their intention and it was very clear from the evidence that the defendants each took their obligations in terms of health and safety very seriously. They would appear to have planned this event carefully.

53. When compared to the knowledge, experience and expertise of the defendants, the plaintiff's knowledge and experience of the risks to which he was exposed pale significantly. Yes, he had attended a couple of car rallies as a child with his father and as an adult had previously attended two other motor rallies. Thus, while it has to be accepted that he had some experience of what happens at a motor rally and how he might potentially put himself at risk, he can hardly be described as somebody who did not need to be warned about areas which the court concluded were hazardous and which ought to have been identified and supervised.

54. It is reasonable nonetheless to conclude that in circumstances where the plaintiff had noted the tyres of cars leaving the roadway at the crest of the hill, he should probably have anticipated the possibility of danger regardless of any warning and should have positioned himself further back from the road to take sure that he would not be within striking distance of a car, should it lose control. However, his blameworthiness for failing to do so cannot be equated to the failure of the defendants to identify this hazardous area for the purposes of ensuring that spectators did not gather at that point. In addition, there was no evidence to suggest that the plaintiff was somebody who would have failed to heed any warning that he might have been given either by a marshal or by way of signage indicating that he should not stand at any particular location.

55. Insofar as the plaintiff was to be assessed as being blameworthy by reference to the fact that he had purchased a programme which contained a safety sheet outlining the risks of standing near the crest of a hill, I would observe the following concerning the programme. First, it runs to approximately one hundred pages. Second, inclusion of a safety sheet is not obvious. It is to be found approximately twenty pages into the programme amidst pages of advertising and motor related articles. Third, while the safety sheet does indeed advise those attending the event that motor sport is dangerous this, however, is what it says at para 2:-

> "However, we take our task responsibly, and have put in place a team of training marshals and their assistants to guide you in relation to places where it is considered unsafe for you to be."

As we know, the plaintiff was not guided or warned not to stand at 'location 2', an area which the trial judge concluded was hazardous. Fourth, while there is a diagram which depicts a flat image of a crest or jump it gives no guidance to the reader as to how far away from the roadway or the crest they would have to stay to avoid any potential risk.

56. It is true to say that on a thorough reading of the programme, the plaintiff would have seen the safety statement. If he did, having regard to what is referred to in the last preceding paragraph; it would not have been blindingly obvious to him that he shouldn't have been standing where he was when he was struck. He might have considered that it was safe to be there because he hadn't been advised to the contrary by the trained marshals and assistants who, according to the safety sheet were to be deployed to advise spectators where it was considered unsafe to go. Of course it is possible that he might, if he had studied the diagram, have taken the view that location 2 was an unsafe place to be. However, there was no evidence to the effect that it was obvious from the diagram that for the plaintiff to have positioned himself more than 50 metres from the crest of the hill was likely to put him at risk.

57. Regardless of what is contained in this safety statement, I am quite satisfied that by far the greater degree of responsibility in terms of the plaintiff's safety rested with the experts *i.e.* the first second and third named defendants, and the inclusion of this one sheet in the brochure which contains information that was lacking in clarity and was contradictory in respect to the safety of the location which the plaintiff adopted cannot afford the defendant much comfort in terms of it's blameworthiness for what occurred on the day of the plaintiff's accident.

58. The final matter which weighed against the plaintiff in terms of the trial judge's assessment of contributory negligence was his finding that the plaintiff, by sitting on the rock in question, had put himself at particular risk insofar as he had given himself less time to react to an emergency than if he had been standing up.

59. In relation to his finding I accept the submissions made on the plaintiff's behalf that this was a finding which the trial judge was not entitled to take into account when it came to the apportionment of liability. The uncontested evidence from Mr. O'Keeffe was that regardless of whether the plaintiff had been standing up or sitting down he would not have been in a position to get out of the way of the oncoming car travelling at the speed and the manner in which it did. Average reaction time was one second and a car travelling at 60 miles per hour would travel the relevant distance in 2 seconds and at 75 miles per hour in 1.6 seconds. The plaintiff

would not “have had a hope” of getting out of the position in the timeframe concerned.

60. For the aforementioned reasons I believe that the apportionment of liability by the trial judge was indeed perverse. Of course I use that word in the legal sense only. For the reasons I have earlier outlined, I would apportion liability as to 75% against the first, second and third named defendants and 25% as against the plaintiff.

61. Accordingly, I would set aside the order of the High Court and in its place I would make an award of €564,682 (€752,909-€188,227).