THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 333

APPEAL RECORD NUMBER: 2017/592

HIGH COURT NUMBER: 2015/2017 P

Baker J.
Noonan J.
Power J.

BETWEEN/

TREASA KILGANNON

PLAINTIFF/RESPONDENT

- AND –

SLIGO COUNTY COUNCIL, ANNE CONNOLLY, BLAIR FEENEY, THE BOARD OF MANAGEMENT DROMORE WEST CENTRAL NATIONAL SCHOOL AND NOMINEE OF DROMORE WEST CENTRAL NATIONAL SCHOOL

DEFENDANTS/APPELLANTS

- AND –

BRENDAN KILREHILL AND AIDEN KILREHILL TRADING AS KILREHILL BROTHERS

THIRD PARTIES

JUDGMENT of Mr. Justice Noonan delivered on the 18th day of December, 2019

1. This is an appeal from the judgment of Eagar J. given on the 9th December, 2017 at the High Court sitting in Sligo. The plaintiff (Mrs. Kilgannon) brought these personal injuries proceedings claiming damages for injuries she suffered in a trip and fall accident on 19th February, 2013 outside Dromore National School in Sligo. At the commencement of the trial, the proceedings were withdrawn against the first defendant, Sligo County Council, disposing of the third party issue also. The sole continuing defendant was therefore in effect the school.

2. The facts of this matter are very simple and straightforward, albeit in some respects highly controversial.

3. Mrs. Kilgannon's daughter, M, was a pupil in the senior infants' class and during the course of the morning, had become upset, apparently because she lost an earring. As a result, the school decided to contact Mrs. Kilgannon to bring M home early. The school secretary, Mrs. Ruane, telephoned Mrs. Kilgannon in or around lunch time and asked her to collect M. Mrs. Kilgannon drove to the school, arriving at about 1.50 pm, and parked on the opposite side of the road from the school, behind another car. The owner of the other car, Mrs. Carroll, was sitting in her car waiting to collect her granddaughter from the school.

4. Mrs. Kilgannon had brought her younger daughter, C, aged three, with her and she got out of the car, took C from the back seat and carried her across the road, intending to enter the school and collect M. The plaintiff's evidence was that she walked across the road and as she was stepping up

on to the footpath, lost her footing as a result of one of the kerb stones in the footpath being missing and this caused her to fall. She put out her right arm to break the fall, while holding on to C in her left arm and in doing so, suffered a nasty fracture of her right wrist. Mrs. Carroll was, at the time, reading in her car wearing her reading glasses. She does not appear to have directly witnessed the occurrence of the accident, but her attention was drawn by the sound of the plaintiff falling and she immediately went to her aid.

5. The real dispute in this case centres around where the plaintiff fell. Mrs. Kilgannon's evidence was that she fell at the point on the footpath where the kerb stone was missing. This would appear to have been some 30 feet or so from the gate into the school. The defendants' case throughout however, was that she did not in fact fall at this point, but rather immediately beside the school gate itself, where there was no similar defect.

6. Before the trial commenced, the parties sensibly agreed that this was the primary issue in the case and if the plaintiff was found to have fallen at the missing kerb stone, the school would be liable, but if she was found to have fallen immediately beside the gate, the school would not. The battle lines were thus clearly drawn and the evidence on liability was almost entirely focused on this issue. As it emerged, the photographs and engineering evidence and all the medical reports were agreed, as were the special damages and accordingly, the only witness to give evidence for the plaintiff was Mrs. Kilgannon herself.

7. Three witnesses gave evidence on behalf of the school, Mrs. Carroll, Mrs. Ruane and the school principal, Mrs. Langan. Mrs. Carroll's evidence was that when she went to assist the plaintiff, she found her just outside the school gates and not where the plaintiff says she fell. Mrs. Carroll went with Mrs. Kilgannon and C into the school, where they went into Mrs. Ruane's office. Mrs. Ruane had been working at her desk facing the window of her office at the front of the school looking out across the road to where Mrs. Carroll and Mrs. Kilgannon were parked, but she did not witness the accident.

8. Mrs. Ruane's evidence was that the plaintiff told her that she was coming across the road and fell and protected C's head from the school gate. The plaintiff disputed this. Mrs. Langan arrived into the office shortly thereafter. Mrs. Langan's evidence was that she asked the plaintiff what had happened and the plaintiff gave her a similar account to the effect that she fell just before the gate. Mrs. Kilgannon denied that this conversation occurred or that there was any discussion about the circumstances of the accident.

9. Mrs. Ruane offered to drive the plaintiff and her daughters home and they proceeded to leave the school. There was another significant conflict in the evidence at this point, because Mrs. Langan said she accompanied the plaintiff and Mrs. Ruane out of the school and asked the plaintiff to show her where the accident had happened and she did so. This was flatly denied by the plaintiff who said that Mrs. Langan did not come outside with them. Mrs. Langan said that she retrieved the plaintiff's handbag from her car, which was again disputed by the plaintiff and she said that Mrs. Ruane had done so.

10. Two significant documents were introduced in evidence by the defendants. The first was Mrs. Langan's diary entry, which she said was completed by her on the day of the accident. The second was an accident report form completed for the school's indemnifiers two days later on 21st February, 2013. In the diary entry, Mrs. Langan wrote: -

> "She parked across opposite the school. On her way into the school, just before she entered the gate she fell."

In the same entry, Mrs. Langan has noted that she asked the plaintiff what had happened. Mrs. Langan also records that: -

> "We brought Treasa out to [Mrs. Ruane's] car and I locked up Treasa's car after I got her handbag for her."

The diary entry makes no reference to Mrs. Langan asking the plaintiff to show her where the accident had happened, nor does it record if the plaintiff did so, or what she indicated.

11. The accident report form completed two days later is somewhat different. Under the title "full description of accident", Mrs. Langan wrote the following: -

> "Treasa was carrying her three year old daughter and tripped on the step of the footpath outside the gate. She fell forward and her hand took the impact."

12. A rudimentary sketch map was provided by Mrs. Langan, which is obviously not to scale and although it purports to mark with the letter "X" the locus of the accident it does not really assist matters.

Judgment of the High Court

13. Eagar J. delivered an ex tempore judgment in which he set out in some detail the evidence which I have summarised above. He refers to Mrs. Kilgannon's evidence and the fact that she was cross examined at considerable length and in considerable detail. She was asked about the Personal Injuries Assessment Board form which stated that she: -

> "stepped on the footpath whereupon she was caused to misstep and fell to the ground."

It was put to her that there was no mention in the PIAB form of the missing kerb stone, the suggestion being that this was inconsistent with the plaintiff's direct evidence. In dealing with this issue, the trial judge referred to the plaintiff's medical reports which were at odds with this suggestion. The PIAB form was completed by the plaintiff's solicitor on the 6th June, 2014. The plaintiff was seen by her GP on the 5th February, 2014 when she told her doctor that: -

> "she tripped on the footpath where there was a section missing."

She was seen by Mr William Quinlan, consultant orthopaedic surgeon, on the 6th March, 2014 when she told Mr Quinlan that: -

"she tripped over an uneven disrupted footpath."

14. Clearly this was inconsistent with the suggestion that the plaintiff concocted the missing kerb stone at a date subsequent to the PIAB application form. The trial judge noted in this respect (at p. 7): -

> "In relation to each of the medical reports she remained clear of the cause of the fall, an uneven disrupted footpath."

In relation to the PIAB form, the court said (at p. 7): -

> "She was asked about the absence of the broken footpath in the PIAB form. It is likely that the form was completed by her solicitor and signed by her."

15. In so far, therefore, as it was suggested that the plaintiff's evidence was untruthful on the basis that it was contradicted by the PIAB form, the trial judge considered this and appears to have discounted it for the reasons I have identified.

16. In reaching his conclusion, the trial judge noted that (at p. 15): -

> "The plaintiff was very clear as to what caused the accident."

He also observed: -

> "She did not yield in anyway as a result of searching cross examination."

17. As regards the events post accident, the trial judge noted (at p. 15-16): -

> "She clearly sustained an injury, which must have been extremely painful and, while she tried to act as contained as possible, she was clearly suffering from shock and as an example of that, she got sick in the toilet."

18. It is evident therefore that the trial judge considered the plaintiff to be a truthful witness whose evidence he found to be credible. The court went on to deal with the evidence of each of the three defence witnesses in turn. With regard to Mrs. Carroll, he said (at p. 15): -

> "The court is satisfied that Mrs. Carroll was wearing reading glasses and was reading a book. She was quite insistent as to where the plaintiff fell. She described it but she also described the fall as a loud bang, which is unlikely to be a fall in front of a school gate but much more likely to be a fall on the pavement."

Dealing with Mrs. Ruane, he said (at p. 15): -

> "The defence case has been limited by which Mrs. Ruane could see. She says she could see the accident. She initially suggested that she could see the accident, then said she did not see the accident."

19. Finally, he turned to the evidence of Mrs. Langan. He cited the accident report form entry made by Mrs. Langan verbatim and went on to say (at p. 17): -

> "It is a matter for the court to decide whether or not, and the court does suggest that that is very much as the plaintiff has given her evidence because the step is close enough to the school gate and there has been no evidence as to how far it is, other than there seems to be a number of bicycles. It is clear that the plaintiff was confused about who got her handbag and probably as a result of the shock.
>
> The principal could and should have waited until the plaintiff came back with her daughter a number of days later and then set up a meeting to find out how she was recovering, what had caused her to fall and where she had fallen. Her rush to judgment was not appropriate but perhaps understandable for a busy teaching principal.
>
> The Balance of Probabilities:
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> The court finds that the balance of probabilities is in the favour of the plaintiff. The court finds for the plaintiff having regard to the serious injuries and the ongoing pain and the effect on her life in circumstances where Mr Quinlan says she has an arthritis change in her right wrist."

The Grounds of Appeal

20. The original Notice of Appeal runs to some 18 pages, which is somewhat surprising given the simple nature of the case and the issues arising. It seems that this court may have come to a similar conclusion at the directions hearing because an amended Notice of Appeal has been filed "pursuant to a request by the court" which is somewhat shorter. Five grounds of appeal are identified:

(1) The primary finding of fact is not supported by credible evidence.

The basis for this contention is that the plaintiff's evidence showed that her memory was not reliable. In this regard, the defendants rely on the fact that the trial judge accepted the defence evidence that Mrs. Langan walked out with the plaintiff after the accident, a fact which the plaintiff denies, and it follows therefore that the plaintiff's evidence was found by the court not to be credible.

(2) Secondary or inferred facts derived from incorrect inferences drawn by the trial judge.

The defendants' principle complaint under this heading is that the court rejected the documentary evidence contained in Mrs. Langan's diary and the accident report form on the basis that Mrs. Langan had rushed to judgment. This is said to be an incorrect inference by the judge.

(3) The specific finding of fact is so clearly against the weight of the testimony as to amount to manifest defeat of justice.

The fundamental basis for this assertion is that the evidence of the three defence witnesses and the documents produced in evidence all contradicted the plaintiff and the trial judge failed to properly evaluate this evidence.

(4) Incontrovertible facts and uncontested testimony and the importance thereof.

This ground is largely concerned with Mrs. Langan's diary entry which the defendants say was undisputed. The defendants therefore reason that the trial judge's conclusion was erroneous. The defendants contend further that the trial judge's conclusion is not in accordance with the accident report form and the trial judge was wrong to conclude otherwise.

(5) Additional points arising and inadequacy of and absence of reasons.

Under this heading, the defendants submit that the trial judge misdirected himself in holding that the medical records and what the plaintiff told her husband after the event could corroborate her evidence of where she fell. Adequate reasons were not given by the court for preferring the plaintiff's evidence over that of the defendants' witnesses and the documentary evidence. The gist of this ground of appeal is that the defendants were left in a position after the judgment that they did not know why they lost the case.

21. It should be noted that while the defendants appealed against every aspect of the judgment of the trial judge, including his assessment of damages and the fact that he made no finding of contributory negligence against the plaintiff, these issues where abandoned by the defendants at the hearing of this appeal.

Legal Principles

22. The principles to be applied by an appellate court in the hearing of an appeal such as the present one are set out in the seminal judgment of McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210. These principles are so well known and so frequently cited that it is unnecessary to set them out in any detail. I will refer only to one: -

> "2. If the findings of fact made by the trial Judge are supported by credible evidence, this court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority."

23. Many of the cases, both before and since *Hay v. O'Grady*, emphasise the need for the trial court to engage with the evidence in a meaningful way, so that both the parties and the appeal court can understand the trial judge's reasoning and the rationale for the conclusions that he or she reached. This is a matter of basic justice. Parties are entitled to know why they have won or lost. This is particularly important in cases where there is a significant conflict of evidence, the resolution of which is essential to the determination. The Court must explain, at least in broad terms, why one party's evidence is preferred over that of another. That does not mean that the trial judge is required to forensically analyse the entirety of the evidence in minute detail before coming to his or

her conclusion. As Clarke J. (as he then was) put it, in Doyle v. Banville [2018] 1 I.R. 505, (at p. 510): -

> "… it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence it is no function of this court (nor is it appropriate for parties appealing to this court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides.
>
> [12] In addition there may be cases where the court has nothing more to go on but the demeanor of the witnesses and where there will be little more to be said than that the court found one set of witnesses as being more credible than another. However where, as in a case such as this, there are factors surrounding the accident in question on which the parties lay emphasis for their argument as to which of two competing accounts should be accepted, then the court must, of course, address at least the broad drift of the argument on both sides so that the parties may know why the court came to its conclusions."

24. The defendants placed reliance in argument on the decision of this court in *Nolan v. Wirenski* [2016] IECA 56. Delivering the court's judgment, Irvine J. again emphasised the need for the trial court to state its reasoning for reaching a conclusion, since otherwise, the appeal court may be in darkness as to the rationale for an award. It is important, however, to note the context in which these observations were made in that case. The plaintiff suffered an injury to her right shoulder in a road traffic accident. She advanced a very significant claim for the cost of past and future care which was abandoned without explanation on the morning of the trial.

25. She claimed that she was unable to raise her arm above the horizontal as a result of the injury. The defendant adduced video evidence which showed the plaintiff fully extending her right arm over her head and waving enthusiastically on three separate occasions, without apparent difficulty. They further produced video evidence of the plaintiff ironing for upwards of 25 minutes and other photographic evidence of her resting on a beach on her right shoulder for in excess of ten minutes in circumstances where she had told the court that each of these activities caused her significant pain and discomfort.

26. Despite this evidence the trial judge found as a fact that the plaintiff could not lift her right arm over the horizontal. Irvine J. concluded that this finding could not be supported by the evidence. Another finding made by the trial judge was that the plaintiff was still taking medication in respect of the injury suffered in the accident at the date of trial. However, when cross examined, she conceded that she was taking the same medication at the date of the accident as a result of a pre-existing condition. This finding was clearly erroneous. One can therefore readily understand how the appeal was allowed.

27. These views were recently reiterated by this court in *Keegan v. Sligo County Council* [2019] IECA 245, where McGovern J., delivering the Court's judgment, found that there was a failure by the trial judge to analyse in any meaningful way the discrepancies in the evidence given by the plaintiff.

Discussion

28. A curious feature of this case is the fact that the evidence of the defendants' witnesses was entirely focused on where the plaintiff, but not why she fell. This was a very significant point, which was explored in some depth in the cross examination of the defendants' witnesses. Mrs. Langan was insistent that she asked the plaintiff to show her where she fell and that the plaintiff did so. One would have expected thereafter Mrs. Langan to have looked closely at the locus to ascertain the cause of the fall, if that could be ascertained, or if there was nothing found, to record that fact, both in her diary and in the accident report form. She did neither.

29. It was suggested to her in cross examination that this omission was all the more surprising, having regard to the fact that, if the accident had happened immediately at the school gate as alleged by the defendants, a very short time after the accident a large group of young children was about to emerge from the school over the area where the plaintiff fell and thus identifying the cause of the fall became all the more important. Mrs. Langan was also cross examined about the apparent inconsistency between what was noted in the diary entry and the accident report form.

30. It will be recalled that in the accident report form, Mrs. Langan notes that the plaintiff had "tripped on the step of the footpath outside the gate". This is not referred to in her diary entry. She appeared not to agree that this was a materially different description, although it plainly is. However, at the conclusion of her cross examination, Mrs. Langan agreed that there is no footpath and thus no kerb in the area directly in front of the gate where she alleged that the plaintiff told her she fell.

31. The trial judge expressly referred to the contents of the accident report form in his judgment, noting that it was "very much as the plaintiff has given her evidence". It seems clear therefore that the trial judge concluded that the description of the accident recorded by Mrs. Langan in the accident report from was consistent with the plaintiff's evidence. I cannot see how that conclusion could be faulted. The accident report form referred to the plaintiff tripping on the step of a footpath which the evidence established did not exist where the defendants say she fell. The trial judge was therefore entitled to treat the accident report form as evidence that significantly undermined the defendants' case and supported that of the plaintiff.

32. Further, it is clear that the trial judge found the plaintiff's evidence to be credible and cogent. Although not expressly referred to by the trial judge, a factor which he would undoubtedly have been entitled to take into account was that the plaintiff's evidence provided a clear explanation for why the accident occurred whereas the defendants provided none. I cannot therefore see any basis upon which it could be seriously contended that there was no credible evidence before the court on foot of which it reached its conclusion.

33. The defendants further complain that the trial judge did not explain why he did not accept the defendants' evidence regarding the locus of the accident, when he did accept their evidence of some of the post-accident events and rejected that of the plaintiff on the basis that she was not credible. This particularly related to the fact that Mrs. Langan came out with the plaintiff and the others after the accident and Mrs. Langan retrieved the plaintiff's handbag from her car.

34. The trial judge concluded that there was a difference between the evidence of the plaintiff leading up to the accident and that of post-accident events. He pointed to the fact that the plaintiff was in shock and also in severe pain and neither of these findings could be open to serious doubt. He concluded that this explained the plaintiff's confusion about post-accident events and this appears to me to be a finding that was open on the evidence.

35. The defendants complain that the court failed to have regard to Mrs. Langan's diary entry, which, in their written submissions, they assert "wholly supported the oral testimony of all the defendants' witnesses." It is I think important to recognise the status of this evidence. The diary entry and accident report form were admitted into evidence without objection. They are however, clearly hearsay insofar as the defendants' witnesses are concerned. A person cannot corroborate his own evidence by the simple expedient of subsequently writing a statement.

36. The diary entry and accident report form cannot therefore be regarded as corroboration of Mrs. Langan's evidence any more than the plaintiff's evidence could be corroborated by her subsequent statement to her husband or her doctors. However, the evidential significance of such documents is of course from the perspective of the opposing parties, insofar as they can be said to be inconsistent with the evidence of the party who created them. It is in this context that the documents in the case should be understood and it appears to me that this is in fact how they were treated by the trial judge. His finding that the accident report form was consistent with the plaintiff's account necessarily implied that it was inconsistent with the defendants' version of the accident.

37. With regard to Mrs. Carroll's evidence, I accept the defendant's contention that insofar as the trial judge rejected her evidence based on the likely sound of the impact, there was no evidential basis for such conclusion. However, that was not the only reason for rejecting her evidence because insofar as he found that she was wearing reading glasses and was reading a book at the material time, the clear inference to be drawn is that he considered that she either did not or could not see the accident occurring, although in fairness it should be said that she did not claim to have actually witnessed the fall. Although it is perhaps somewhat unsatisfactory that the trial judge did not expressly deal with why he did not accept Mrs. Carroll's evidence about the locus of the fall, I think it is reasonably clear from his overall conclusion that he must have been of the view that she was mistaken.

38. I accept the defendants' submission that the judge's comments about Mrs. Langan rushing to judgment may have been somewhat wide of the mark, but I think this was something of an aside not directly relevant to his primary finding of fact. However, with respect to the complaint about the judge saying he was finding for the plaintiff having regard to the serious injuries, it must be

remembered that this is a live transcript where sometimes the stenographer's punctuation may not always equate to what the judge might have written. The passage in question in my view makes sense if one puts a full stop after "The court finds for the plaintiff" because what follows is clearly relevant to the quantum which the judge then goes on to assess.

Conclusion

39. As Clarke J. observed in *Doyle v. Banville*, there may be cases where there is a simple conflict of evidence, the resolution of which requires little more from the trial court than finding one side more credible than the other. This is such a case. The judge was entitled to take the view in assessing where the probabilities lay that the version of events given by the plaintiff provided a readily understandable explanation for why the accident happened, whereas on the defendants' evidence, it remained an unexplained mystery despite all three defence witnesses having had a clear opportunity to inspect the locus.

40. Viewing the judgment as a whole, I am satisfied that there was credible evidence which supports the conclusion of the trial judge and I can find no basis for the suggestion that such finding was so clearly against the weight of the evidence as to amount to a manifest defeat of justice. It is also to my mind apparent from the judgment itself why the trial judge came to his conclusions and I do not think the defendants can reasonably contend that they do not know why they lost the case.

41. For these reasons therefore, I propose to dismiss this appeal.