

THE HIGH COURT

BETWEEN/

HENRY CASSIDY

PLAINTIFF

AND

CHARLES NOEL O'ROURKE

DEFENDANT

Judgment delivered the 18th day of May, 1983, by Miss Justice Carroll.

On the 24th day of April, 1979 Mr. Cassidy, on his motor cycle, was involved in an accident with Mr. O'Rourke in his car. Mr. O'Rourke sued in the Circuit Court for damage to his car. The Civil Bill issued on the 28th of September 1979. Mr. Cassidy initiated these proceedings in the High Court for personal injuries arising from the accident. The Plenary Summons was issued on the 9th of July, 1980.

The Circuit Court action came on for hearing before Judge Sheehy sitting in Cavan on the 5th of November, 1980. He found that Mr. Cassidy was 100% negligent and awarded £422.72p damages to Mr. O'Rourke in respect of his car. Mr. Cassidy's solicitor, Mr. Moloney, mindful of the effect of a judgment against his client, (i.e. res judicata), entered an appeal. The Norwich Union, who were Mr. Cassidy's insurers, were not disposed to back the appeal. Negotiations took place directly between Mr. Kilrane,

the solicitor for Mr. O'Rourke, and the Norwich Union (in the person of Mr. Grist).

Taking up the correspondence on the 30th of June 1981 at which stage no agreement had been reached, Mr. Kilrane wrote to the Norwich Union on that date setting out details of the costs and saying if they were not discharged the matter would proceed to the High Court on Circuit and, if successful, Mr. O'Rourke would apply to them for an indemnity for all costs and the amount of the decree.

By letter dated the 20th of July, 1981 the Norwich Union sent a cheque for £422.72p. The letter states as follows:

"We have received your letter of the 30th of June, and we now attach cheque for £422.72p in favour of Mr. O'Rourke being the amount of the decree".

The next two paragraphs deal with costs and the letter finishes with the following paragraph:-

"We await hearing from you and in the meantime we draw your attention to the fact that our payment of £422.72p is made without admission of liability."

Mr. Kilrane replied to this letter on the 26th of July, 1981 saying:

"We note the contents of your letter of the 20th of July last."

The rest of the letter deals with the costs.

Subsequently by letter dated the 15th of September, 1981 the Norwich Union agreed to Mr. Kilrane's profit costs and awaited the vouching of expenses.

When the Circuit Appeal came on for hearing before Mr. Justice Gannon on the 22nd of October, 1981, Mr. Kilrane refused to allow the matter to be adjourned by consent. Counsel for Mr. Cassidy applied for an adjournment pending the hearing of the forthcoming High Court Action on the grounds that payment of the Circuit Court decree was in fact made without prejudice to the High Court Action; that in any case the Norwich Union would not have had authority to compromise Mr. Cassidy's High Court proceedings; and that Mr. Grist of the Norwich Union could not be present to give evidence.

Mr. Justice Gannon heard evidence from Mr. Kilrane and also from Mr. Moloney. In evidence before me, Mr. Moloney said that at that hearing he only produced correspondence and was asked one question. He was unable to secure the attendance of Mr. Grist at that sitting of the High Court and therefore no representative of Norwich Union was present.

The learned trial judge gave an extempore judgment, a note of which has been adopted by him. In that he says that he was asked to consider

the effect of a payment made and whether it was with or without prejudice to the related High Court proceedings which had been taken. He held that the satisfaction of the Circuit Court judgment as agreed by the defendants insurers and the plaintiff was not intended to and did not relate to the High Court proceedings.

He said "The position is that the plaintiff has a good award as regards the Circuit Court proceedings. The Circuit judge has determined the issue and evaluated the damage. Satisfaction of this judgment was offered. Therefore my decision is that the plaintiff has a judgment in the Circuit Court which has been satisfied. I therefore dismiss his appeal and as no costs are looked for by the Plaintiff, I make no order in this respect."

The matter comes before me by order of the President dated the 8th of February 1982 on a preliminary issue whether, in the light of what has transpired in the Circuit Court and in the High Court on Circuit concerning the Circuit Court proceedings, Mr. Cassidy's claim in the High Court proceedings is res judicata.

It was proved before me that nobody on behalf of the insurers, Norwich Union, gave evidence before the learned trial judge. It is true that in writing to Mr. Moloney about the payment, the Norwich Union did

not state in the letter that the payment had been made without admission of liability. But it is the correspondence between the Norwich Union and Mr. Kilrane which was relevant to the issue, and not the correspondence between the Norwich Union and Mr. Moloney. I am satisfied that the letter of the 20th of July, 1981 from the Norwich Union to Mr. Kilrane expressly drawing his attention to the fact that their payment was made without admission of liability, and his reply thereto dated the 26th of July, 1981, were not before the High Court on Circuit. Neither of these letters would then have been in Mr. Moloney's possession.

Also Mr. Grist of the Norwich Union gave evidence before me that he had a telephone conversation at the end of May or beginning of June, 1981 with Mr. Kilrane in which he told him that the Norwich Union were prepared to pay but it was without admission of liability and was not to prejudice the High Court proceedings against Mr. O'Rourke.

No evidence was adduced before me on behalf of Mr. O'Rourke and he relied on the orders of the Court.

The order of the High Court in the Circuit Appeal as drawn up by the Registrar and dated the 22nd of October, 1981 states:-

"that the appeal do stand dismissed and the Court doth affirm

the Circuit Court order and makes no order as to the costs of

the said appeal."

In my opinion this order is incorrectly drawn. In his judgment the learned trial judge found there was satisfaction of the Circuit Court judgment and he dismissed the appeal. He did not affirm the Circuit Court judgment. To do so would be to decree Mr. Cassidy by a High Court order for the sum of £422.72p in respect of a judgment already satisfied. Therefore the only order which could be made in the circumstances was just to dismiss the appeal.

This means that it is only the order of the Circuit Court which is left standing. It is only in respect of the Circuit Court order that Mr. O'Rourke could base a claim on res judicata.

In view of the clear words of the letter sending the cheque which I repeat:-

"We draw your attention to the fact that our payment of £422.72p is made without admission of liability".

and the acknowledgement of Mr. Kilrane replying thereto, it is my opinion that Mr. O'Rourke is estopped from relying on the Circuit Court order to base a claim on res judicata. It would be unconscionable for Mr. O'Rourke to rely on a plea of res judicata, in the light of those two letters alone.

If Mr. Kilrane did not want to accept the cheque on behalf of his client without admission of liability, a number of courses were open to him. He could have returned the cheque stating he could not accept it without admission of liability. Alternatively, he could have held the cheque and written to the Norwich Union stating he could not accept it without admission of liability and asking them should he return the cheque or were they willing that he should keep it without condition. He did neither. It seems to me that in all the circumstances of this case his client Mr. O'Rourke cannot now be heard to say that the payment of the money is a bar to the High Court Action.

This application of the principle of estoppel is similar to that applied by the Supreme Court in Doran -v- Thompson Limited (1978 Irish Reports 223).

Accordingly I find that the High Court Order is only a dismissal of the Circuit Appeal without further order thus leaving the Circuit Court order as the only order on which there is a finding on the issues. In the circumstances of this case, Mr. O'Rourke is estopped from relying on the Circuit Court order and therefore is not entitled to enter a plea of res judicata to the High Court proceedings.

Approved Mella Gull

Counsel for the Plaintiff: Fergus Flood S.C.
Dermot Fitzpatrick

Counsel for the Defendant: John Sweetman S.C.
David Butler S.C.
Ian McGonagle