

APPROVED

[2022] IEHC 713



THE HIGH COURT

2017 No. 9503 P

BETWEEN

KEVIN EARLEY

PLAINTIFF

AND

FINGAL COUNTY COUNCIL
MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 December 2022

INTRODUCTION

1. This judgment is delivered in respect of a pre-trial application for directions. The plaintiff invites this court to give directions now, in advance of the full hearing of the action, as to the sequence in which a future trial judge should determine the issues in the proceedings.
2. The application, as formulated in the notice of motion, had been for a modular trial, or, alternatively, for the trial of a preliminary issue. This has since been refined to an application to have the issue of the first defendant's liability determined first. The application is opposed by the first defendant.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

3. These proceedings take the form of a personal injuries action. The action relates to an accident on 29 May 2016 involving the plaintiff. It is pleaded that the plaintiff sustained significant personal injuries as a result of having collided with a pothole when cycling. The plaintiff is said to have been thrown over the handlebars of his bicycle, propelled into a ditch and then caused to bounce back into the middle of the road. It is alleged that the incident was caused by the negligence of Fingal County Council *qua* roads authority and the negligent driving of an untraced motorist. In particular, it is alleged that the local authority failed to maintain the roadway and caused or permitted a pothole to be present on the roadway. It is further alleged that the untraced motorist had overtaken the plaintiff in a dangerous manoeuvre which involved crossing a continuous white line on the road. It is expressly pleaded that the untraced motorist failed to allow the plaintiff sufficient room on the roadway so as to enable him to avoid colliding with the pothole.
4. Fingal County Council has been named as the first defendant in the proceedings, and the Motor Insurers Bureau of Ireland (“*MIBI*”) has been named as the second defendant. It is pleaded that MIBI is sued pursuant to the agreement entered into between MIBI and the Minister for Transport on 29 January 2009 (“*MIBI Agreement*”).
5. The pleadings in the personal injuries action are closed. Each of the defendants has served a notice of indemnity and contribution on the other.
6. It is apparent from the pleadings that MIBI objects to its having been joined to the proceedings as a co-defendant. MIBI contends that, pursuant to clause 2.4 of the MIBI Agreement, it should be cited as the sole defendant in any proceedings where the owner and user of the vehicle giving rise to the claim remains unidentified or untraced.
7. Separately, it is apparent from the fact that Fingal County Council has served a notice of indemnity and contribution on MIBI that the local authority does not accept that it would

be obliged to discharge the full of the damages payable to the plaintiff in the event that it were to be found even partially liable for the accident.

8. It follows, therefore, that the trial judge may potentially have to determine the following two issues in order to resolve the proceedings. First, the trial judge might have to rule on the meaning and effect of clause 2.4 of the MIBI Agreement. It seems that the plaintiff intends to argue that the joinder of MIBI as a co-defendant in a case involving an untraced motorist is no more than a “*procedural deficiency*” which can be disregarded by the High Court, which has full original jurisdiction, in circumstances where there is no substantive reason why the claim should not have been initiated against all relevant defendants in accordance with Order 15, rule 4 of the Rules of the Superior Courts. The plaintiff also points to the delay on the part of MIBI in raising the objection, and to the fact that MIBI is now prepared to consent to disjoinder of the liability issues. (cf. *O’Flynn v. Buckley* [2009] IESC 3, [2009] 3 I.R. 311).
9. Secondly, the trial judge might have to rule on the obligation of the respective defendants to discharge any award of damages ultimately made to the plaintiff. In particular, the trial judge might have to rule on the question of whether the convention—whereby an insured motorist co-defendant, who has been found even partially liable, is obliged to discharge the entire award of damages—extends to cases where the co-defendant is not a motorist. This convention is known colloquially as “*the one per cent rule*”.
10. The effect of the convention is summarised as follows in C. Noctor and R. Lyons, *The MIBI Agreements and the Law* (Bloomsbury Professional, 2nd ed. 2012) at §8.09:

“[...] as long as some finding of negligence is made against the insured motorist, he and the uninsured motorist are concurrent wrongdoers and the insured motorist will be bound to satisfy the total judgment obtained by the plaintiff. A judgment of this kind will be discharged by the insured motorist’s insurer. This insurer is legally obliged to be a member of the MIBI and will be only too familiar with its obligation as a concurrent wrongdoer to discharge the full amount of the judgment. Thus the judgment will be satisfied by the

insurer and the issue of the MIBI's liability to discharge an unsatisfied award will not arise."

*Footnotes omitted

11. The authors go on to describe the one per cent rule as "*more a colloquial term as opposed to a rule of law*" (§8.19).

DISCUSSION

12. The plaintiff wishes to have the question of Fingal County Council's liability, if any, for the accident to be determined as the first issue in the proceedings. The plaintiff's initial position had been that this should be achieved by way of a separate hearing. The relief sought in the plaintiff's notice of motion is for a direction that there should be a modular trial, or, alternatively, the trial of a preliminary issue.
13. The plaintiff has since refined his position, and the application is now that all issues should be heard together in a unitary trial, but that the trial judge should be directed to determine first the question of Fingal County Council's liability, if any, for the accident. Counsel for the plaintiff described this in terms of a disjoinder of the issue of liability.
14. For the reasons which follow, I have concluded that it would not be appropriate to trammel the trial judge's discretion.
15. The default position is that there should be a single trial of all issues at the same time. The rationale for this approach has been explained as follows by Clarke J., then sitting in the High Court, in *Cork Plastics v. Ineos Compound UK Ltd* [2008] IEHC 93 (at paragraphs 3.2 and 3.3):

"The perceived advantage of a modular trial is that, if the result of earlier modules goes in one way, subsequent modules may either become unnecessary or may be capable of being dealt with in a much more focussed fashion. Thus, the most common division between liability issues and quantum issues can give rise to a saving of court time and expense in the event that the Plaintiff does not succeed on liability. In those circumstances, of course, neither the parties nor the

Court are put to the time and expense of having to deal with quantum issues which do not arise. However such a result, of course, is only a possibility. If the Plaintiff succeeds, then quantum will have to be dealt with in any event. Where the litigation is straightforward and relatively concise, then there is every risk that time and expense will be added by a modular trial in the event that the Plaintiffs succeed. In simple and straightforward litigation which might be expected to last one or a small number of days at hearing, should all issues be tried together, there is a real risk that separating the issues into, for example, liability and quantum questions, could lead to more time being spent in Court and significant additional expense being incurred by the parties in having to reassemble on a second occasion. A two to three day action in any of Court lists and which involves broadly equivalent liability and quantum issues might nonetheless turn into two separate two day hearings if divided as to liability and quantum.

Therefore, in any straightforward litigation, and in the absence of some unusual feature (such as, for example, the unavailability of quantum witnesses which might otherwise lead to an adjournment), the risk that the proceedings will be longer and more costly if divided will be seen to outweigh any possible gain in Court time and expense in the event that the Plaintiff fails on liability.”

16. The application of these principles to the circumstances of the present case would lead to the refusal of a modular trial. These proceedings comprise a relatively straightforward personal injuries action. The hearing of the full case should not take more than one or two days. This is so notwithstanding that it might be necessary for the trial judge to address the two legal issues identified earlier in respect of the MIBI Agreement. Whereas these two legal issues are significant—and a ruling upon same would have implications for many other cases—they are not especially complex. They should be well capable of being argued in a short period of time. Accordingly, a modular trial would have none of the advantages, and all of the disadvantages, apprehended by Clarke J. in the passages above.
17. Of course, the revised position of the plaintiff is more nuanced. The plaintiff is not now seeking to split the trial but is, instead, seeking to dictate the sequence in which the trial judge should decide the issues, following on the conclusion of the hearing.

18. It would be most unusual for a judge, hearing an interlocutory application, to attempt to trammel the discretion of a future trial judge in this way. Such a direction would only ever be justified if it produced some tangible benefit to the parties, for example in terms of a saving of time or costs. No such benefit arises in the present case: under the procedure envisaged by the plaintiff, the parties would still be required to prepare for and participate in a hearing which would address all issues, with all the attendant costs.
19. In the absence of any countervailing benefit, it would be inappropriate to dictate the approach of the future trial judge. Instead, the default position applies: it will be a matter for the trial judge to determine the sequence in which the various issues in the case should be decided. This will turn on considerations such as the run of the evidence and the submissions made.
20. For completeness, it should be observed that it is difficult to understand how the question of the liability, if any, of the local authority could be disjoined from that of the untraced motorist. One would expect that the trial judge would have to hear all of the evidence in relation to the circumstances of the accident, and then decide whether same was caused by any or all of the following potential factors: misfeasance in the maintenance of the road, the negligent driving of the untraced motorist, or a lack of care by the injured cyclist himself. It is hard to envisage how one factor, i.e. the state of repair of the road, could be considered in isolation with a view to reaching an *a priori* finding on the liability, if any, of the local authority.
21. This observation is as an aside only: I reiterate that it is a matter for the trial judge to determine the sequence in which the various issues in the case should be decided.

CONCLUSION

22. The reliefs sought in the plaintiff's motion of 14 December 2021 are refused. As to costs, my provisional view is that the first defendant is entitled to recover its costs against the plaintiff in circumstances where it has successfully resisted the latter's motion. The costs would include the costs of the written legal submissions filed. The second defendant would not appear to be entitled to its costs in circumstances where it had indicated its consent to the motion and did not actively participate at the hearing.
23. If any party wishes to contend for a different form of costs order, then they are to file short written submissions (less than 2,500 words) by 30 January 2023.

Appearances

Michael Counihan, SC and Kevin Byrne for the plaintiff instructed by Michael A. O'Connor Solicitors

Barney Quirke, SC and Brendan Savage for the first named defendant instructed by Good & Murray Smith

Robert Ó Géibheannaigh for the second named defendant instructed by Dillon Eustace

Approved
Gareth S. Mans