Approved
No redactions needed

THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 29

Record Number: 2018/340

High Court Record Number: 2015/5925P

Noonan J.

Collins J.

Binchy J.

BETWEEN

TERENCE (OTHERWISE TERRY) MORGAN

Plaintiff/Respondent

AND

ELECTRICITY SUPPLY BOARD

Defendant/Appellant

JUDGMENT of Mr. Justice Maurice Collins delivered on 5 February 2021

1. I fully agree with the judgment given by Noonan J and with the order that he proposes.

2. In my view, this appeal raises a number of significant issues and for that reason I would like to add some observations of my own. For that purpose, I gratefully adopt Noonan J's detailed account of the circumstances giving rise to the claim here and of the course of the proceedings in the High Court.

The Civil Liability and Courts Act 2004

3. The Plaintiff's action here was a "*personal injuries action*" within the meaning of the Civil Liability and Courts Act 2004 (*"the 2004 Act*") and was therefore subject to the provisions of Part 2 of that Act.

4. Part 2 contains important provisions regarding pleadings in personal injuries actions. Focusing on those applicable to pleadings by a plaintiff, section 10(2) sets out various matters which a personal injuries summons shall specify, including:

> "*(f) full particulars of the acts of the defendant constituting the .. wrong and the circumstances relating to the commission of the said wrong*"
>
> *"(g) full particulars of each instance of negligence by the defendant."*

5. The need for clarity and specificity is further reinforced by section 13(1)(a), which provides as follows:

> *"(1) All pleadings in a personal injuries action shall—*
>
> *(a) in the case of a pleading served by the plaintiff, contain full and detailed particulars of the claim of which the action consists and of each allegation, assertion or plea comprising that claim"*

6. Corresponding obligations are imposed on defendants by sections 12 and 13(1)(b) of the 2004 Act. I considered the effect of those sections in *Crean v Harty* [2020] IECA 364 and in the course of my judgment noted that *"the provisions of sections 10-13 of the Act are clearly intended to ensure that parties (including defendants) plead with greater precision and particularity so that, in advance of trial, the actual issues between the parties will be clearly identified"* (at para 23).

7. A "*very significant innovation*" in Part 2 (so I characterised it in *Crean v Harty*) is the requirement in section 14 that pleadings be verified on affidavit. A plaintiff is required to verify "*any pleading containing assertions or allegations"* or any "*further information*" provided to the defendant: section 14(1). A corresponding obligation is imposed on defendants by section 14(2). The importance of the requirement for verification was highlighted by Noonan J in his recent judgment in *Naghten (A minor) v Cool Running Events Ltd* [2021] IECA 17, with which I agreed. As Noonan J states at para 52 of that judgment, "*..the days of making allegations in pleadings without a factual or evidential basis, if they ever existed, have long since passed."* That certainly *ought* to be the case having regard to the requirements of section 14.

8. The intended effect of section 14 would be greatly undermined if parties were permitted to continue to plead claims in wholly generic terms. Thus – unsurprisingly – the provisions of Part 2 relating to pleadings, and the requirement for verification introduced by section 14, operate coherently. Plaintiffs (and defendants) are required to state clearly and specifically what their claim (or defence) is and identify the basis

for it in their pleadings and must then verify *that* claim (or *that* defence) on affidavit. Where further particulars are furnished, such must also be verified on affidavit. Unless pleadings are clear and meaningful, the value of section 14 verifying affidavits will be significantly diluted.

The Pleadings here

9. The Personal Injuries Summons here might, in many respects, be held up as an *exemplum* of the form of pleading that Part 2 of the 2004 Act intended to consign to history. The majority of the particulars of wrongdoing are in boilerplate form, expressed in such generic terms as to be utterly uninformative. Thus, for instance, it is said, without more, that the ESB failed to provide a safe place of work for the Plaintiff. It is also said the ESB was in breach of the Safety, Health and Welfare at Work Act, 2005. No clue is given as to what provision of that Act the ESB was said to be in breach of or what act or omission on its part constituted such breach. The position is the same as regards the plea that the ESB was in breach of the Safety, Health and Welfare and Work (General Application Regulations) 2007.[1] The Summons is wholly silent as to which of the 175 Regulations and 10 Schedules contained in those Regulations is said to have been breached by the ESB. The plea that the ESB was in breach of section 3 of the Occupiers Liability Act 1995 might, on its face, appear more concrete. However, the "*common duty of care*" imposed by section 3 (which concerns the duty of care of occupiers to visitors to their premises, including employees) is necessarily expressed in very general terms and recourse to

[1] SI 299 of 2007.

its terms provides no enlightenment whatever as to the nature of Mr Morgan's actual complaint against the ESB here.

10. The only claim that is pleaded with tolerable clarity and specificity in the Summons is that to be gathered from a reading of paragraph 9, in conjunction with the particulars (i) and (j), which are referred to by Noonan J at para 18 of his judgment. The net effect of those pleas (which could readily have been stated more clearly and simply) is that the Plaintiff was alleging that he had slipped and fallen while going down the stairway because of the presence of water on the steps, which had leaked in through the skylight over the stairs and "*contaminated*" it. That is the only claim disclosed by the Personal Injuries Summons that is pleaded in a form resembling that mandated by the 2004 Act.

11. I do not mean to be unduly harsh on the pleader here. From a practical point of view, one can readily understand why a pleader might wish to avoid committing themselves unduly to any particular theory of liability and instead seek to plead in a manner that covers all the bases lest something further should emerge at trial. Indeed, that was conventionally seen as part of the art of pleading. However, that mode of pleading is not, in my view, permissible since the enactment of the 2004 Act. A plaintiff is required to plead specifically and cannot properly rely on the pleading equivalent of the Trojan Horse, which can as needed be sprung open at trial to disgorge a host of new and/or reformulated claims.

12. It is difficult to avoid the impression that, despite the fact that Part 2 of the 2004 Act has been in force for more than 15 years, the extent of the changes that it makes in the area of personal injuries pleading has not always be fully recognised or reflected in practice. Personal injuries claims are required to be pleaded in a manner which states clearly and precisely what act or omission of the defendant is alleged to have caused injury and why it is said that such act or omission was wrongful. The reflexive instinct of practitioners to plead broadly and generally has to be curbed.

13. In any event, as Noonan J notes, shortly before hearing of the action the Plaintiff delivered a further particular of negligence alleging a failure to maintain the staircase *"thereby permitting the nosing on the steps of same to become worn and disintegrating so as to constitute a danger to persons using the said staircase."*

14. Thus, on the Plaintiff's pleaded case, he was alleging that he slipped on the stairs due (1) to the presence of water resulting from a leak in the skylight overhead (due, it was said, to the ESB's failure to maintain the skylight) and/or (2) the condition of the nosing on the steps of the stair (arising from the ESB's failure to maintain the stairs). That was the only case being made by the Plaintiff and, unless permitted to amend his pleadings and/or to deliver further particulars of negligence, that was the only case that he could properly advance at trial and the only case that the ESB was required to meet.

15. This is consistent with the terms of the report of Mr Osborne (the Plaintiff's Engineer) which was provided to the ESB in advance of the trial. That report stated

that "*the factors contributing to and causing this accident were the leaking skylight and the worn and disintegrating nosings."* While Mr Osborne took the trouble to note a possible breach of fire regulations by the ESB which could not on any view have any bearing on Mr Morgan's claim (an allegation unfortunately repeated at trial and recorded in the Judgment), his report made no complaint about the training afforded to his client and did not suggest any alternative cause that might account for the alleged presence of "*copious amount of wet*" on the stairs at the time of the accident or address any question of the ESB's liability if any "*wet*" on the stairs was from a source other than the skylight.[2]

The Judgment of the High Court

16. The Judge's findings are set out at para 81 and following of her Judgment. Noonan J has referred in detail to these findings.

17. The claim here was vigorously disputed by the ESB. The Judge heard evidence and argument over a number of days. There were significant conflicts in that evidence, not least as to the circumstances and cause of Mr Morgan's accident and whether it was attributable to a leak from the skylight. Mr Morgan had, of course, given evidence. Mr Osborne also gave evidence on his behalf. A number of employees of

[2] In the course of the hearing in the High Court, Senior Counsel who then appeared for the Plaintiff objected to Counsel for the ESB making reference to "*water*" in the course of cross-examining Mr Osborne and insisted that Counsel should instead use the term "*wet*" as used in Mr Osborne's report.

the ESB gave evidence, as well as a consultant engineer, Mr Duggan, and a flooring specialist, Mr Wafer.

18. The Judge had to assess this evidence and make relevant findings of fact. The Judge's findings here are fully set out by Noonan J in his judgment. The key passage is the following:

> *"85 ... while this Court is not able to resolve the conflicts on the evidence as to exactly how wetness came to be on the surface of the area where the plaintiff slipped and fell, nonetheless the court views the plaintiff in the overall scheme of things to have been both consistent and credible. On the balance of probabilities, wetness caused the plaintiff to slip and fall. It is not possible for the Court to resolve the conflict as to whether it was wetness which came from a skylight or whether it was someone who had spilled something or caused the wetness at the locus of the accident."*

The reference in this passage to the Judge's view of the credibility of the Plaintiff is not the only such reference in the Judgment. At para 81, the Judge states that the Plaintiff "*came across as a very credible witness*" and at para 88 and 89 she stated as follows:

> *"88. The Court prefers the evidence of the plaintiff, and of his engineer Mr. Osborne, to the evidence adduced by the defendant. He was a very credible witness.*

89. As a result of the difficulties the plaintiff has suffered it appears to this Court he continues to receive treatment in respect of this injury and has ongoing pain. He came across as completely reasonable and I prefer his evidence to that adduced by, or on behalf of the defendant."

19. The decision of the Supreme Court in *Hay v O' Grady* [1992] 1 IR 210 was, naturally, relied on by Mr Morgan to submit that these findings, as well as the further findings made by the Judge regarding the condition of the nosing on the stairs and the ESB's failure to provide appropriate training to Mr Morgan as to how to carry packages safely down a stair, were effectively beyond the review of this Court.

20. In my view, there are a number of fundamental difficulties about this submission. A key aspect of *Hay v O' Grady* is its emphasis on "*the importance of a clear statement .... by the trial judge of his findings of fact, the inferences to be drawn, and the conclusion that follows."* (per McCarthy J, at 218). This aspect of *Hay v O' Grady* was further developed by the Supreme Court in *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505. The Supreme Court's decision in *Donegal Investment Group plc v Danbywiske* [2017] IESC 14, [2017] 2 ILRM 1 is also relevant in this context addressing as it does the application of the principles in *Hay v O' Grady* and *Doyle v Banville* to expert evidence and to findings made by a trial judge on the basis of such evidence. My judgment in *McDonald v Conroy* [2020] IECA 239 contains a detailed discussion of these authorities. In brief summary, however, it is clear that:

"*Any party to any litigation is entitled to a sufficient ruling or judgment so as*

> *to enable that party to know why the party concerned won or lost. ……. To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred."* (*per* Clarke J in *Doyle v Banville*, at para 10)

In cases where there is conflict in the expert evidence heard by the trial court, the trial judge should at least "*indicate in brief terms the reason why the views of one expert was preferred": per* Clarke J *in Donegal Investment Group plc v Danbywiske,* at para 7.4.

21. Here, the Judgment makes it clear that the Judge found the Plaintiff to be a credible witness and preferred his evidence (and, it seems, the evidence of Mr Osborne) "*to the evidence adduced by the defendant"* but provides no reasons for such findings. The credibility of a witness is a matter of fact – a point made by Hardiman J for the Supreme Court in *McCaughey v Anglo Irish Bank Resolution Corporation* [2013] IESC 17, at page 49 and subsequently emphasised by that Court in *Leopardstown Club Limited v Templeville Developments Limited* [2017] IESC 50, [2017] 3 IR 707, *per* Denham CJ at paras 39 and 80 and *per* McMenamin J at para 105. Nonetheless, where there is a material conflict of evidence, it can hardly be "*sufficient for the [trial] court simply to declare that it accepts the evidence of the plaintiff"* - or, I would add, the evidence of any other witness - "*or that it is satisfied that he is a truthful witness without saying why that is the case":* per Irvine J (as she then was) in *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461, at para 48. Such an approach would be wholly at odds with *Doyle v Banville* and indeed with *Hay v O' Grady*

itself. A finding of credibility, whether in respect of a witness's evidence generally, or some specific evidence given by them, ought generally to be the product of analysis and reasoning that is capable of explanation in a judgment. That does not mean that a lengthy or discursive analysis is necessary. The degree of explanation appropriate will depend on the nature, extent and significance of the relevant evidential conflict. Furthermore, there may be circumstances where a court must make its assessment based only on impression and demeanour but such circumstances will be rare. As regards expert evidence, it is difficult to conceive of any circumstance in which it might be sufficient to resolve conflicts of evidence on the basis of a bare statement that the court "*preferred*" the evidence of expert A to the evidence of expert B. Of course, as Clarke CJ emphasised in *Danbywiske*, the choice "*may not require a great deal of explanation in a judgment"*. Again, the context will be key.

22. Here, the Judgment simply fails to give *any* indication as to why the Judge preferred the evidence of the Plaintiff to the evidence of the ESB's witnesses. Equally, it does not explain – even in the briefest of terms – why the Judge preferred the evidence of Mr Osborne to the evidence of Mr Duggan, Mr Wafer and the other witnesses who gave evidence for the ESB (whose evidence is set out in detail by Noonan J). As Noonan J explains, there were significant conflicts between these witnesses which were critical to the proper determination of the Plaintiff's claim. In these circumstances, the absence of any explanation for the Judge's stated preference for the evidence of the Plaintiff and Mr Osborne is, in my view, a fundamental difficulty with the Judgment.

23. However, that is not by any means the only difficulty that this aspect of the Judgment presents. As the Court observed in argument, there appears to be a stark conflict or contradiction between the Judge's apparently unqualified acceptance of the evidence of the Plaintiff and his engineer on the one hand and, on the other, her conclusion that there were conflicts of evidence as to the source of the "*wetness*" on the stairs that could not be resolved by the High Court. If accepted, the evidence of Mr Morgan and Mr Osborne appeared to point inexorably to the conclusion that the Plaintiff had slipped on "*wet*" the source of which was the skylight overhead. Indeed Mr Osborne had been so sure that this was the case that he had not considered it necessary to undertake what might be regarded as fairly basic investigatory steps. Unlike Mr Duggan, he had not conducted any slip resistance testing. He also had not run a plumb line down from the skylight to the stairs to identify where any "*wet*" entering through the skylight might land. He had not gone on to the roof and poured water on the skylight to see whether it penetrated into the stairwell. Mr Osborne had "*immediately connected the wetness with the stains*" that were visible around the skylight (and which the evidence established had resulted from a leak that had occurred in 1995 or earlier) and that was, it seems, an adequate foundation for his evidence as far as he was concerned.[3]

24. If the Judge accepted Mr Osborne's evidence, as her Judgment suggests she did, it is very difficult indeed to understand why she felt unable to conclude that any "*wet*" on the stairs had come from the skylight. In reality, it seems clear that the Plaintiff's

[3] Day 3, pages 40-47.

evidence (including that of Mr Osborne) did not, in fact, persuade the Judge that the accident happened in the manner, and for the reasons, alleged by him.

25. There is a third, and even more significant, difficulty with the Judge's analysis. Though it does not say so in terms, the inescapable inference from para 85 of the Judgment is that the Judge considered that the issue of "*exactly how wetness came to be on the surface of the area where the plaintiff slipped and fell"* was not one which it was necessary for her to resolve because the liability of the ESB was not dependent on its resolution. That, in my respectful opinion, was plainly not the case.

26. In the first place, as I have explained, the claim made by the Plaintiff was based on an assertion that he had slipped on "*wet*" which was on the stairs as a result of a leaking skylight. That was the case that the Plaintiff was making and in order to determine whether he was entitled to succeed on liability, the Court had to resolve that issue. If the Plaintiff failed to establish that case – as fail he did – his claim failed.

27. Second, the Judge's analysis assumes that, regardless of how any "*wet*" came to be on the stairs, its presence there *ipso facto* established negligence and/or breach of duty on the part of the ESB. Before this Court, Mr Kilfeather SC for Mr Morgan suggested that the *"supermarket cases*" provided support for the approach taken in the High Court. He submitted that, if there was water or other liquid on the stairs – as the Judge found there had been there was effectively an onus on the ESB to establish that it was not due to any negligence on its part and the Judge was entitled to conclude on the evidence that it had failed to establish that. Attractively as this

argument was put, it cannot be accepted. In the first place, if that was the basis for the Judge's conclusion, it was incumbent on her to articulate it. The Judgment is, however, entirely silent on the issue of negligence. In any event, the Plaintiff had not made that case. If he had wanted to do so, it had to be pleaded so as to give the ESB a reasonable opportunity to meet it at trial. Not alone was it not pleaded (or addressed in Mr Osborne's report) no such case was agitated during the High Court hearing, as Mr Kilfeather fairly acknowledged. In any event, I would not accept that the so-called *"supermarket cases"* necessarily have any application in the circumstances here. The factors that, in *Mullen v Quinnsworth Ltd* [1990] 1 IR 59, led the Supreme Court to apply the doctrine of *res ipsa loquitur* in the context of a slip and fall in a supermarket, do not necessarily apply here. Given that that was not and is not an issue in the proceedings, it is neither necessary nor appropriate to say anything more about that issue here.

28. In his judgment, Noonan J discusses in detail the evidence given in the High Court regarding the issues of the condition of the nosing and the Plaintiff's training and the findings made by the Judge on those issues. I agree entirely with his analysis and have nothing to add to it.

29. It follows that, in agreement with Noonan J, I am of the view that the Judge's finding of liability here is unsustainable and cannot be allowed to stand and this appeal must therefore be allowed.

As this judgment is being delivered remotely, Binchy J has authorised me to record his agreement with it.