THE COURT OF APPEAL

[2019] IECA 273
Record Number: 2017/548

Whelan J.
McCarthy J.
Costello J.

BETWEEN/

EOGHAN GOUGH

PLAINTIFF/
FIRST NAMED RESPONDENT

- AND -
DARREN HURNEY

FIRST NAMED DEFENDANT/
SECOND NAMED RESPONDENT

- AND –
JOHN BRIGGS

SECOND NAMED DEFENDANT/
APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of October 2019

Introduction

1. This is an appeal against a judgment delivered in the High Court on the 24th July, 2017 and orders made on the 2nd November, 2017 (perfected on the 3rd November, 2017) wherein the High Court judge, having heard evidence over five days arising from a road traffic accident which occurred on the 14th January, 2012 on the Monivea to Galway road, determined that the defendants (being the appellant and second respondent to this appeal) were concurrent tortfeasors.

2. The defendants cross-claimed *inter se* seeking a contribution and/or indemnity. The High Court found, for the purposes of section 21 of the Civil Liability Act, 1961, that they were equally blameworthy and equally liable in respect of the sums ultimately recoverable by way of damages by the plaintiff (the first respondent).

3. The first respondent, at the time of the accident a back-seat passenger in the vehicle driven by the second named respondent, suffered significant head injuries. He had not been wearing a seat belt. It was conceded by the first respondent that he had been contributorily negligent to the extent of twenty-five percent and the hearing proceeded on that basis. No issue arises as to contributory negligence in this appeal.

4. The appellant appeals the determination of the trial judge contending, *inter alia*, that an objective assessment of the witnesses and the evidence should have led to a finding that the second named respondent was solely liable for the accident. It is argued that the trial judge failed to engage with significant elements of the evidence adduced and made material and

significant errors in the assessment of the evidence and her determination that the appellant was equally liable with the second named respondent for the accident was against the weight of the evidence and unjust. The trial judge's conclusions as to the credibility of the second named respondent as a witness is contested as are inferences drawn by her which are asserted to be erroneous and unsupported by the evidence.

5. The appellant contends that the trial judge failed to engage fully with all aspects of the evidence adduced at the hearing and as a result erred in reaching a conclusion that he had either caused or contributed to the accident to any extent. It was contended that the sole cause of the accident and ensuing injuries suffered by the first named respondent derived from the speed at which the second named respondent's vehicle was travelling when overtaking the appellant's Ford Transit van on the public highway.

6. Key grounds of appeal include:

   (i) that the trial judge erred in finding that the appellant did not have his right indicator on prior to or at the time the accident occurred;

   (ii) the trial judge erred in determining that the appellant's brake lights were not on at and immediately prior to the accident;

   (iii) she erred in concluding that the appellant's Transit van had, shortly prior to the accident, crossed the continuous white line on the highway at the locus in quo;

   (iv) she attached insufficient weight to the fact that there was no contact or collision at all between the appellant's white Ford Transit Van and the second named respondent's Honda Civic in which the injured party was a back-seat passenger;

   (v) the trial judge erred in attaching weight to matters or events which occurred subsequent to the accident which the appellant contends were immaterial and irrelevant to the question of liability;

   (vi) she erred in impugning the credibility of the appellant;

   (vii) she further erred in preferring the testimony of the second named respondent whom, the appellant contends, lacked credibility in relation to crucial aspects of his evidence central to the issue of liability;

   (viii) it was argued that observations made by a Circuit Court judge when sentencing the second named respondent after he pleaded guilty to a charge of careless driving at Galway Circuit Criminal Court on the 7th July, 2015 and who had commented that the accident could be "put down to youth, inexperience and speed or maybe all three" ought to have led to the trial judge concluding that the second named respondent was solely responsible for the accident.

The accident

7. On the afternoon of the 14th January, 2012 at or about 15.45 the second named respondent, then aged eighteen years and three months, was driving a black Honda Civic motor vehicle on the public highway being the Monivea to Galway Road heading in the direction of Galway City. There were four individuals in the motor vehicle. The driver and front seat passenger wore seat belts. Seat belts were not worn by either of the back-seat passengers. The second named respondent was driving on a provisional licence. The vehicle had a defective exhaust which resulted in a very loud noise being emitted when it was being driven. This defect did not contribute in any material manner to the accident. The highway on which the accident occurred was a secondary road with a width of between three and three and a half metres on either side of the continuous white line. The speed limit at the *locus* was 80 km/h. At a location known locally as Raftery's Cross, the second named respondent's vehicle was noted to be travelling at speed. The second named respondent's statement to the gardaí twenty-four hours following the accident suggested that he was probably travelling "at 75 miles per hour" at that junction. The second named respondent had earlier overtaken another vehicle in which witness Gabriel Ryan was a passenger at a junction about 500 metres before the *locus* of the accident. In the distance ahead the appellant's Transit van was visible.

8. The appellant at the time of the accident was making a short journey along the public highway between the nearby residence of his brother whom he had been visiting to his own residence at a mobile home, which was situated 200 to 220 metres further along the public highway in the direction of Galway city. The vehicles accordingly were travelling in the same direction prior to the accident. There was a continuous white line on the highway. The appellant's vehicle was noted to have been travelling slowly. The second named respondent remained behind the appellant's vehicle for some seconds and then using his indicators signalled an intention to overtake and thereafter began to overtake it. The second named respondent's evidence was that he was doing a speed of about 60 miles per hour when he commenced the manoeuvre of overtaking the appellant's vehicle. The evidence of the engineer Mr. William O'Keeffe on the issue of the likely pre-accident speed of the second named respondent's vehicle was an estimate: "..the best I can make it is sixty to seventy miles per hour". (Transcript of the 20th July, 2017, p. 103, line 21).

9. The evidence of the second named respondent and Darren Duggan, a passenger in his vehicle at the time of the accident, was that the appellant had not used his right-hand indicators and had not deployed the brake lights of his Transit van at any time or prior to the point when the second named respondent's vehicle commenced to overtake the Ford Transit van. The second named respondent and Darren Duggan gave evidence that while in the process of overtaking it, the appellant's van commenced without warning to cross the continuous white line on the roadway onto the path of the second named respondent's Honda Civic. The appellant's vehicle proceeded to cross the white line for the purpose of effecting entrance to a mobile home where the appellant resided at the time. This unexpected manoeuvre caused the second named respondent to take evasive action. He swerved to avoid colliding with the appellant's vehicle and while doing so the Honda Civic entered the grass margin/gravel area and went out of control colliding with the dry-stone walls at two different locations causing the first named respondent to be ejected through the windscreen of the vehicle into a nearby field. At the time

he was eighteen years and six months. He suffered significant injuries, particularly head injuries.

The decision of the High Court judge

10. The trial judge delivered a reserved judgment on the 24th July, 2017 which runs to twenty-eight pages. She noted the admissions of the second named respondent that while driving towards Carnmore Cross, about one mile from the scene of the crash, he was travelling at 75 miles per hour and he admitted to driving at 60 miles per hour at the point when he caught up with the appellant's van. This equates with a speed of 96km/h in an 80km/h zone. Thus, the second named respondent was driving in excess of the speed limit. He had overtaken the appellant on a continuous white line. He was driving on a provisional licence without a fully licenced driver in the vehicle.

11. Issues to be determined were identified by her in the judgment to include: -

(a) Whether the appellant had veered onto the incorrect side of the road in his manoeuvre to turn right into his mobile home thereby causing the second named respondent to swerve, resulting in loss of control of the vehicle which led to the two violent impacts with the stone walls.

(b) Whether the appellant had indicated an intention to turn right. She noted that the appellant did not recall having ever looked in his mirror before commencing the process of turning right. She noted inconsistencies in a statement made one year later to his own engineer Mr. Corrigan.

(c) She noted his statement to the gardaí two days following the accident admitted having commenced the process of turning right and then turning his steering wheel back to the left. In her judgment the trial judge reviewed the evidence of the witnesses including Garda Crowe. She identified certain key elements of the said Garda's evidence as important including his view that for the manoeuvre of turning right by the appellant to be rendered safe, he was required to check the mirrors to see whether any vehicle was approaching. Further, that the defective exhaust in the second named respondent's vehicle was so loud that a person in the position of the appellant would have heard it as it approached since it was broken and was making "a very loud noise". She noted the garda's evidence that the second respondent had pleaded guilty to careless driving causing injury at the Circuit Criminal Court in Galway and that the road at the accident *locus* was narrow, being three and a half to four metres each side of the continuous white line. The Court noted that the appellant had made a statement on the 16th January, 2012 and the terms of same, and that he subsequently revised his recollections and asserted that he had checked his mirror. The judge noted, "The garda confirmed that a safe manoeuvre would involve looking in the mirror first to see if there was a vehicle coming." She further noted the evidence of the garda that "If the car was overtaking on the right turning right it would impinge on the overtaking lane and a collision would be inevitable."

12. The Court noted that the investigating garda had not seen the appellant's van at the scene. The Court reviewed the evidence of Mr. Ronald Greene, forensic engineer, called on behalf of the first named respondent and the testimony of Mr. William O'Keeffe, the engineer called on behalf of the second named respondent. She noted that Mr. O'Keeffe had agreed that "One would have to look in the mirror before crossing." He agreed that "If the second named defendant had checked the …. Honda Civic, the first named defendant's motor vehicle would have been visible even though approaching at high speed." The Court noted there was a primary obligation on the part of the second named respondent not to overtake on a continuous white line. The Court considered in detail the witness evidence regarding the correct and safe manoeuvres required on the part of the appellant to traverse the road for the purposes of gaining entry to the site of his mobile home: -

> "He set out the steps for a 90 degree turn for a van of the size of the second named defendant's … first of all there would be signalling showing an intention to turn right. Secondly, there would be looking in the mirrors. … Thirdly, there would be a possibility of movement to the centre line. Fourthly, the van should be using the side mirrors. Fifthly, a view of a car might be obscured and Photograph 11 showed that there was no view through the back window of the car."

The Court noted that the second respondent's Honda Civic would be visible to the appellant from a good while back if using his side mirrors.

The Court noted that had the appellant's van stopped his brake lights would have come on if they were working.

13. The trial judge considered the evidence of Mr. Eamonn Barrett who had a watching brief at the hearing at the Circuit Criminal Court in Galway and likewise reviewed the testimony of the second named respondent Darren Hurney. The Court noted in detail the evidence of the second named respondent relating to the seconds leading up to the accident:

> "… The van was going slowly and he indicated to pass the van and the van swerved to the right. He said he was about three seconds behind the van and he put on his indicator, dropped his gear, continued to go forward, and he thought that the van was just driving straight, that if he had seen an indicator he would have hit the brakes but the van was moving left to right when he had him half overtaken. And he said he came pretty close to him. He said that the van had crossed the line where he was driving. And he said, 'I pulled pretty hard to the right, there was loose gravel and I tried to straighten the car up and lost control…'"
>
> "He had also said that between a mile back and the actual *locus* that he had taken his foot off the brake and that he had slowed considerably to in or about 60 miles per hour. He denied that the second named defendant had his indicator on from a hundred yards back; which is what the second named defendant put in his second statement to his own engineer one year after the accident. He denies seeing brake lights. He said that the second defendant crossed the line to turn right. He saw the van from the distance, he said, for about 15 to 20 seconds maybe… He said that the second named defendant says

that he did indicate but Mr. Hurney disputes this. He admits he didn't know whether he could have stopped or not had he wanted."

14. The Court noted the candour of the second named respondent: -

> "… He agreed that he was going at too fast a speed, in excess of the speed limit. And that's in line with the admissions he made at the start, he admitted freely that he was driving on a provisional [licence] with no [licenced] driver in the car and that he was driving too fast on the occasion of the accident…"

15. The Court noted the position of the second named respondent being that the appellant was partly responsible for the accident. The Court observed the evidence of Mr. Hurney: -

> "He said he told the gardaí two or three times that the second named defendant had no indicator on but the gardaí did not put that in his statement. It was put to him that at no stage did he make that claim. And he said he had no need to tell lies in court because he had pleaded guilty to driving too fast and to overtaking on the continuous white line when he shouldn't have done this. And to not [having] a full [licence] without a full [licenced] driver in the motor vehicle."

16. The expert witness William O'Keeffe, engineer, had given evidence and the trial judge reviewed that testimony at page 11 of the judgment onward. She noted his evidence given on the 20th July, 2017: -

> "If the second named defendant had checked the wing mirrors he would have had a good sight distance going back 200 metres."

She reviewed the evidence of Mr. O'Keeffe at p. 93 of the transcript of 20th of July, 2017 that the appellant should have complied with the relevant rules of the road as follows: -

> "One: To check the wing mirrors before signalling to take a right-hand turn.
>
> Two: The necessity of taking up a position in the centre of the road.
>
> And Three: The necessity to check the wing mirror again before turning.
>
> Mr. O'Keeffe's firm evidence was that in his opinion nothing would obscure an approach over the 200 yards."

The Court noted that this expert witness had disagreed with the evidence of Mr. Greene, engineer "and he said that the impact was consistent with a 60 miles per hour pre-impact." It will be recalled that in his cross-examination of the engineer Mr. Greene, counsel for the appellant on the 19th July, 2017 at page 98 in considering the statement made by the second named respondent states: -

> "First of all, it depends on the speed and it's a matter for the Court – we will have evidence from others. But the [first defendant] said he was back at 60 miles per hour as

> he caught up with him he was doing 70 miles an hour… he says he was behind the van for three to four seconds and then began his overtaking manoeuvre in his statement."

The Court considered the evidence of Mr. Greene regarding braking distances and the attenuation of speed and the variations depending on the speed of the vehicle in question at the time braking commences. The Court noted that the engineer William O'Keeffe:

> "…puts the mile per hour pre-braking speed at either 60 or 70 miles an hour. He says it's a crude assessment, he refers to it as an educated guess…
>
> Under re-examination objectively this witness says it was certainly 60 to 70 miles per hour but he wouldn't venture higher because he said 'It's a complex collision with a sort of frontal and a sort of glancing.'" (page 14 of the judgment)
>
> "… But he also says that the first named defendant's evidence was to the effect that he took his foot off the gas and dropped his speed to 60 miles per hour. And he said that with the distances there was ample scope for a reduction from 75 miles an hour to 60 miles an hour. He was asked how many seconds would it take a car at 60 miles an hour to cover the 200 yards between the two entrances. And he said at 60 miles an hour it's twenty-seven metres per second. And that time period is seven and a half seconds." (page 15 of the judgment)

17. The Court noted the evidence of Garda Eamon Donohue of Athenry Garda Station who had agreed under cross-examination that nobody had invited the second named respondent Mr. Hurney to come back into the station to comment on the assertions made by the appellant that he was in fact using an indicator, "and perhaps not being sure whether he used his mirror, and perhaps about seeing a glimpse of the car. He agreed he could see where [counsel on behalf of the first defendant] was coming from." The Court noted the evidence of Mr. O'Keeffe to the effect that, "The exhaust noise of the Honda Civic would be very loud because of the defect."

18. It is clear that the evidence of the witness Darren Duggan was considered significant by the trial judge. He was a back-seat passenger seated beside the first named respondent in the second named respondent's Honda Civic at the time of the accident. It appears from the transcript that difficulties had been encountered in tracing his whereabouts by the time the case came to trial some five and a half years after the accident in the month of July 2017. The judge noted in her judgment several salient factors in the evidence of Darren Duggan whom it will be recalled had made a statement two days following the accident on the 16th January, 2012 at Athenry Garda Station. At the time he was doing a training course in motor mechanics. The evidence of Mr. Duggan was clear that prior to the accident the appellant had no indicator on and there were no brake lights in use; "His evidence was that there were no lights and no indicator on the van and no brake lights showing." The Court noted that: -

> "He denies absolutely the claim by the second defendant that he had his indicator on 100 yards from where he was going to take a right-hand turn. He said that the only option his friend, the first named defendant, had was to swerve to the right. He thought that the first named defendant was driving at 60 miles an hour… He said that the first named

defendant was slowing down… He claimed he could see from his position in the vehicle. While his friend, the first named defendant, was concentrating on driving he had a clear view."

19. The Court also considered the evidence of Gabriel Ryan and his daughter Amanda Ryan whose vehicle had been overtaken by the second named respondent some 500 metres or so prior to the accident occurring. The Court noted that when Mr Ryan came upon the scene of the accident "He said he wasn't sure where the white van was on the road, but he didn't recall seeing an indicator." With regard to the evidence of the appellant the Court noted at page 21 of the judgment: -

> "He said he was slowing down almost to a stop. He said that he glimpsed in his mirror before he took the actual turn when he saw a car on the right-hand side overtaking him and that he had turned back again. He said that meant that he was moving out to the centre of the road so he turned back in to give the other car room."

Referring to his statement made on the 16th January, 2012 to the gardaí: -

> "He agreed that at that stage in his statement he couldn't remember whether he looked in his mirror earlier or not and he confirmed that it was correct. He said that he usually checked the mirror halfway. This is halfway between his brother's house… and his own house. He said that he saw a car on the right-hand side overtaking."

20. In her judgment O'Hanlon J. notes that under cross-examination the appellant confirmed "That he hadn't heard the Honda Civic behind him." The Court noted: -

> "He thought that he had nothing to do with the accident and that it was all down to speed. He couldn't answer why it was that nobody at the scene ever saw an indicator on his vehicle or why he hadn't put his hazard lights on despite his 30 years driving experience."

The Court went on to note: -

> "He agreed he seemed to have a little bit of restored memory between his first statement on the 16th January, 2012 and his meeting with… his own engineer… Mr. Corrigan on …11th January 2013.
>
> He said he was going with his statement to the gardaí."

The Court noted from his evidence as follows: -

> "It was put to him 'I was in the process of turning right, I had the steering wheel turned when I got a glimpse of the car in the middle.' He agreed that it wasn't that he looked in the mirror, he said he just happened to catch out of the corner of his eye – …. – a glimpse of the car. And he agreed that that's what happened as he was turning and before that he knew nothing about the car and never knew it was there. He said he probably would have continued turning but for that glimpse. He said it was probably likely. He agreed

that if he used his mirrors he could have seen 200 yards and maybe a lot more back on the road. He agreed that he had a good view of the road behind with each mirror."

21. The Court noted the appellant's response to cross-examination, particularly by counsel on behalf of the second named respondent: -

> "While this man persisted in saying that he couldn't recollect whether he looked beforehand in terms of his manoeuvre but that he knew that he glimpsed the other car when he was turning in. It was put to him he couldn't have used the mirrors before he began the manoeuvre and he said maybe it was because he didn't use his mirror and he agreed that there was no other explanation."

22. The trial judge observed at p. 25 of the judgment: -

> "What is significant about this accident is that there appeared to be a view on the part of many of those giving evidence that this was an accident simply and solely caused by excessive speed on the part of the first named defendant. In that regard not only does the first named defendant freely admit he was driving at an excessive speed in relation to his own evidence and that of his engineer, but to my mind there is great logic in the description of the speed and the pre-accident speed."

She concluded that the second named respondent drove at sixty miles per hour pre-accident, "...in accordance with the evidence of Mr. William O'Keeffe, engineer". The judge concluded that: -

> "The first named defendant's evidence is quite logical and he is quite consistent as to how the accident happened. He says the second named defendant veered onto the incorrect side of the road in a movement to turn onto his home place and that caused him to swerve and caused him to have a loss of control. I believe he would never have attempted to turn right had there been an indicator on in the van indicating a right hand turn or had there been brake lights. So, in all the circumstances I prefer the evidence of the first named defendant to that of the second named defendant."

23. The trial judge proceeded to distil the evidence gleaned from the cross-examination of the appellant, concluding that: -

> "As a matter of probability … I think he accepted… he did not look in his mirrors before attempting his manoeuvre, which he should have done. I don't believe he ever indicated. And I do believe he was over the continuous white line."

She concluded in regard to concurrent fault for the accident that: - "it's a fifty-fifty on liability."

Consideration of the judgment and findings in light of authorities

24. The appellant contends that the judgment of the trial judge failed to apply common sense and logic to the assessment of the evidence, failed to engage with a significant element of same and made a finding on liability clearly so against the weight of the evidence as to be unjust. It is also contended that she erred in her assessment of the credibility and quality of the evidence of

the appellant through inferences from his evidence which are erroneous, unsupported by evidence and fail to correctly and objectively assess the evidence of the witnesses which if correctly approached could only have led to a conclusion that the second named respondent alone was liable for the accident.

The applicable legal principles

25. It is clear from the authorities such as *Hay v. O'Grady* [1992] 1 I.R. 210 that findings of primary fact by the trial judge, if supported by evidence, will not be revisited by this Court and neither will this Court readily substitute its own inferences for those of the trial judge where such inferences have been derived from facts or from oral evidence.

26. O'Donnell J. observed in *Schuit v. Mylotte* [2010] I.E.S.C. 56 at p. 41: -

> "The test in *Hay v O'Grady*, is derived from the fact that an appeal Court which does not hear the evidence must give considerable deference to a trial Court's assessment of the cogency and credibility of evidence given to it. This follows from the different functions of a trial Court and the appeal Court. As a result, the question for a Court on appeal is essentially a matter of logic: was there evidence, whatever its apparent credibility or cogency, upon which the trial judge could come to the conclusion he or she did."

27. It is clear from the dictum of McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 at p. 217 that if "the findings of fact made by the trial Judge are supported by credible evidence…" an appeal court should take the findings of fact as decided by the trial judge "…however voluminous and, apparently, weighty the testimony against them" because the "truth is not the monopoly of any majority". There is a material distinction between a trial judge making an erroneous finding of fact and making an election between competing evidence of witnesses.

28. Before proceeding to consider the central disputed facts and the trial judge's assessment of the evidence before her it is appropriate to recall the observations of Clarke J. (as he then was) concerning the principle settled in *Hay v. O'Grady* in the Supreme Court decision *Doyle v. Banville* [2012] I.E.S.C. 25 where he stated: -

> "Finally, before moving on to the specific issues which arise in this appeal, it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this Court to seek to second guess the trial judge's view."

29. A finding as to credibility of a witness is a finding of fact and the role of an appellate court in assessing same is accordingly subject to the principles set forth in *Hay v. O'Grady* and the later decision of *Doyle v. Banville*. In the latter judgment it will be recalled that Clarke J. had observed: -

> "…it is no function of an appellate court such as this to re-weigh the balancing exercise which any trial judge is required to do when sitting without a jury for the purposes of determining the facts".

30. In assessing the appellant's arguments it is necessary to have regard to the dicta in *Doyle v. Banville* where Clarke J. held that the decision of a trial judge must demonstrate a consideration of the key elements advanced by both parties and carry out an analysis of the case arising from the competing version of facts and events and ought to come to a reasoned conclusion as to why one version of events is preferred from the other. Clarke J. placed certain limitations on the parameters of the exercise to be undertaken stating at para. 2.4 of the judgment: -

> "… it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made out 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 evidence tendered or arguments made in the trial Court to find some tangential piece of evidence or agreement 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 on the issues of the case in question, the competing arguments of both sides."

31. In the instant case it has been necessary to consider the transcript to evaluate whether there was evidence upon which the trial judge could reasonably have relied in reaching the conclusions which she did regarding the circumstances leading up to the accident and particularly including pertaining to: -

(a) Whether the appellant's vehicle had deployed the brake lights.

(b) Whether the appellant had checked the vehicle mirrors as he testified to.

(c) Whether the indicators signaling for a right turn had been deployed by the appellant prior to the second respondent commencing to overtake his transit van just before the occurrence of the accident.

(d) Whether the appellant's vehicle had traversed the unbroken white centre line of the highway and if so, whether this manoeuvre was a significant precipitating factor which caused the second named respondent to swerve his vehicle to avert a collision with ensuing loss of control and multiple collisions with the dry-stone walls adjacent to the highway.

Did the appellant check his mirror?

32. The appellant takes issue with the trial judge's findings on the issue of whether the appellant checked his mirror. Within 48 hours of the accident the appellant made a statement to the gardaí "I cannot remember whether I checked my mirror before I turned or not". A year later, on the 11th of January, 2013, at a time when the within proceedings had been instituted wherein the appellant was named as a defendant and detailed particulars of negligence and breach of duty were pleaded against him, he made a materially different statement to a consulting engineer retained by his solicitors on his behalf, Mr. Corrigan. This time he stated

that he had checked his mirror when he was about halfway between his brother's property and the entrance to his home.

33. As Primo Levi observes in his master work "*The Drowned and The Saved*": "Human memory is a marvellous but fallacious instrument. This is a threadbare truth known not only to psychologists but also to anyone who has paid attention to the behaviour of those who surround him, or even to his own behaviour."

34. The trial judge was entitled to treat with a degree of circumspection the veracity and the reliability of the memory recall of the appellant in circumstances where two inconsistent statements as to recollection on a matter of crucial importance had been made by him at different times. She was entitled to balance his later statement against the evidence of William O'Keeffe, engineer, outlined above that given the straightness of the road for the extensive distance behind him, had the appellant checked either mirror at any point from the moment the Honda Civic came into sight, it would have been apparent to him. No explanation was forthcoming for the fact that he did not hear the vehicle approach notwithstanding that it had a defective exhaust. All witnesses agreed as to its loudness.

35. The trial judge clearly expressed a reasoned preference for the evidence of the second named respondent, Mr. Darren Duggan and Mr. William O'Keeffe over that of the appellant pertaining directly to the circumstances of the accident and the conduct of the appellant in the seconds leading up to the accident. She had ample opportunity to observe the appellant's demeanour in Court and the fact that his changing recollections contrasted materially with the steadfast recollections of Mr. Darren Duggan and the second named respondent regarding the issue of the brake lights and the indicators and the non-use of same by the appellant. No valid basis to interfere with her findings in this regard have been established.

Did the trial judge err in finding that the appellant's van had commenced to cross the continuous white line?

36. The appellant conceded that he had commenced to turn at the time of the accident and probably would have seen the second named respondent's Honda Civic had he used his side mirrors. (See transcript of 21st of July 2017, p. 102, lines 14 to 21). In the appellant's statement to the gardaí he stated, "I was in the process of turning right. I had the steering wheel turned when I got a glimpse of the car in the mirror." There was thus clear evidence before the trial judge from the second named respondent, the engineer Mr. O'Keeffe, and Mr. Duggan that this accident was caused by a combination of two key elements: the speed at which the second named respondent was driving coupled with the need to take sudden evasive action to avoid colliding with the appellant's vehicle at a point when, without warning, it swerved right and commenced crossing over the continuous white line. The statement of Darren Duggan which accorded entirely with his evidence will be recalled "… we had nearly passed the van out when it swerved to the right onto our car. Darren Hurney swerved to the right to avoid him and lost control of the car." There was ample evidence before the trial judge on which she was entitled to rely to reach a conclusion that it was in taking this evasive action precipitated by the negligent conduct of the appellant that the second named respondent's vehicle entered the grass verge/gravel area and went out of control.

The absence of a collision between the Ford Transit and the Honda Civic as proof of absence of liability on the part of the appellant.

37. The appellant contends that it is material to the issue of liability that there was no collision between the vehicles. This submission is misconceived. No collision occurred on the evidence before the High Court because the second named respondent took evasive actions swerving the Honda Civic onto the grass margin/gravel area precipitating the vehicle going out of control. It appears clear, as set out in the judgment, that the appellant first became aware of the presence and position of the Honda Civic on the highway when he physically glimpsed the vehicle in the process of overtaking him at a time when he was in the process of turning right and had moved across the white line, manoeuvring the Transit van to turn into the site of his mobile home. On observing the Honda Civic, by then almost alongside him, he turned back to his left. His conduct contributed to and precipitated the accident in the manner as found by the judge.

It is noteworthy that the appellant in his evidence admitted that the reason he did not see the Honda Civic before he commenced his manoeuvre to the right is because he did not use the side mirrors. (Transcript of 21st July, 2017, p. 104, line 14 to 21).

Was the trial judge erroneous in concluding that the Honda Civic was travelling at 60 miles per hour?

38. The evidence of Amanda Ryan and Gabriel Ryan is of limited value as to the relative blameworthiness of the two drivers insofar as their vehicle had been overtaken by the Honda Civic some 500 metres prior to the *locus* of the accident. Neither Ms. Ryan nor Mr. Ryan was in a position to give evidence as to the actual speed at which the Honda Civic was travelling at the point when the accident occurred, the second named respondent having slowed down as he approached the rear of the appellant's Transit van. The second named respondent was consistent in his evidence, which reflects his statement of January 2012 to the gardaí that his immediate pre-accident speed was 60 miles per hour. This is also reflected in the evidence of Mr. Duggan which was consistent with his garda statement. It is within the ambit of the best estimate made by the engineer Mr. William O'Keeffe whose evidence the trial judge preferred who had placed the ambit of speed at between sixty and seventy miles an hour. The judge had the opportunity the observe the demeanour of the key witnesses particularly under cross-examination. I am satisfied that there was evidence upon which the trial judge was entitled to rely, which supported her conclusions on each material aspect and her judgment identifies them adequately.

Credibility of the Appellant and Second Named Respondent

39. Did the trial judge appropriately assess the credibility of the second named respondent, Mr. Hurney, regarding key elements of the case pertaining to the determination of liability? I am satisfied that there was evidence before the trial judge as identified in her judgment on which she was entitled to rely in support of her conclusion that the recollections of the second named respondent and his witnesses regarding the pre-accident speed of the Honda Civic were to be preferred to that of the appellant and his witnesses.

40. The appellant attaches significant weight to the fact that there was a dispute between the second named respondent's evidence and that of Garda Eamon Donohue of Athenry Garda Station who took a statement from the second named respondent on the day following the accident. That statement contains no reference to the fact which the second named respondent

contended in his evidence that the appellant's right indicator and brake lights were not in operation and not in use. Garda Donohue in his evidence relied on the fact that he had read back the statement to Mr. Hurney prior to the latter signing it and had asked whether the second named respondent wished to make any amendments and the respondent indicated that he did not. The appellant had contended that the second named respondent had effectively changed his account of his evidence to the Court. However, the trial judge also had the evidence of Darren Duggan regarding the non-use of the brake lights and indicators on the part of the appellant in his Ford Transit, "The van didn't have an indicator or brake light on." This potentially undermined the appellant's credibility.

41. In evaluating the evidence of the second named respondent context is all. At the date of making of the statement the second named respondent was eighteen years and three months old. Although his father was present in the Garda Station he was not with him at the time when he made the statement. It was clearly a traumatic time for all the parties and the trial judge was entitled to decline to impute mendacity to the second named respondent or draw any adverse inferences from the fact that he (a teenager at the time) failed to advert to these two elements when the statement was being read over to him. The judge had a first-hand opportunity to observe his demeanour in the course of giving testimony and the stance and demeanour of Garda Eamon Donohue. She preferred the evidence of the second named respondent – which as to its substance was entirely corroborated by the statement given by Darren Duggan on the 16th January, 2012 and by the latter's evidence at trial.

42. The absence of reference to the indicator and brake lights not being on in the statement of the second named respondent is not evidence *per se* that the second named respondent did not state as much to the investigating Garda Eamon Donohue on the 15th January, 2012.

43. I am of the view that the learned trial judge was correct in the manner in which she identified the issues before her. In the course of her judgment, O'Hanlon J. sets out her findings clearly. Her findings are supported by credible evidence and in that regard the testimony of the second named respondent and Mr. Darren Duggan as well as the engineer William O'Keeffe are of particular importance.

44. I am satisfied the trial judge engaged with the key elements of the case advanced by both sides and carried out an analysis of the facts and arguments advanced for each competing version of the accident. Ultimately, she reached a reasoned conclusion and identifies in her judgment why she prefers the second named respondent's version of events over that of the appellant. I am satisfied that her determination ought not to be interfered with.

Civil Liability Act 1961

45. With regard to the issue of apportionment of liability on a 50:50 basis it is clear from the jurisprudence, including the decision of the Supreme Court in *O'Sullivan v. Dwyer* [1971] I.R. 275 and the Supreme Court decision in *Carroll v. Clare County Council* [1975] I.R. 221 that in determining what is "just and equitable" having regard to the degree of the concurrent wrongdoers' fault, the key factor is the respective blameworthiness of the concurrent wrongdoers rather than the extent of the causative link between their actions and the loss or injury. As was observed by Walsh J. in *O'Sullivan v. Dwyer* at p. 286: -

> "… A judge, in directing a jury, must direct their minds to the distinction between causation and fault and that they should be instructed that degrees of fault between the parties are not to be apportioned on the basis of the relative causative potency of their respective causative contributions to the damage, but rather on the basis of the moral blameworthiness of their respective causative contributions."

46. Section 21 of the Civil Liability Act, 1961 at subs. 2 provides: -

> "In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to …. direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

47. Clarke J. in *ACC Bank Plc. v. Johnston (t/a Brian Johnston and Company Solicitors)* and Ors. [2011] I.E.H.C. 501 at para. 5.3.4 stated that: -

> "… in Irish law, the court does not attempt to disentangle the causal effect of the wrongdoing of two concurrent wrongdoers."

It follows that in the instant case it is not the causative effect of the actions of the appellant and the second named respondent that is relevant so much as the question of their relative blameworthiness.

48. The determination of the High Court judge was based on clear evidence that the appellant and the second named respondent were both blameworthy for the accident which caused injury to the first named respondent. The appellant was a concurrent tortfeasor. A road-user may not proceed on the assumption that other road users will not act negligently without at the same time keeping a reasonable look-out to see if they are so acting (*O'Connell v. Shield Insurance Co. Limited* [1954] I.R. 286). The fact that the second named respondent was driving at a speed exceeding the limit and attempting to overtake on a continuous white line does not absolve the appellant of his own duty to take reasonable care and appreciate the risk whereby his own omissions and acts contributed to the ensuing accident as found by the trial judge that they demonstrably did. Had the appellant used his mirrors appropriately he would have observed the second named respondent's vehicle approaching. Had the appellant been listening there was some evidence which appeared to suggest that he would have heard the loud noise of the broken exhaust on the second named respondent's vehicle. Had the appellant indicated that he was turning right and used his brake lights, the second named respondent would have been put on notice of his intended manoeuvre to traverse the public highway for the purpose of entering into the field where his mobile home was situated. Had these steps been taken by the appellant the second named respondent, according to his evidence, would in all probability not have attempted to overtake him and the accident and subsequent injury to the first named respondent would not have occurred.

49. Blameworthiness for this accident as the trial judge correctly concluded flowed from a combination of the excessive speed of the second named respondent coupled with his attempt

to overtake the appellant at a point where overtaking was not permissible together with the appellant's failure to check his mirrors competently, to use his indicators and brake lights and his conduct in proceeding to traverse without warning the continuous white line towards the path of the overtaking Honda Civic. The appellant failed to have proper regard to the potential presence and position of the vehicle in which the first named respondent was a passenger thus creating an emergency which precipitated the accident.

50. The statement by Clarke J. in *ACC Bank Plc. v. Johnston* that it is not necessary "… to disentangle the causal effect of the wrongdoing of two concurrent wrongdoers…" is particularly apposite in the instant case where the appellant and the second named respondent each possess significant levels of blameworthiness for the ensuing accident. An immediate precipitating cause of the accident, as the trial judge found – and was entitled to find – was that the second named respondent was forced to take a measure – a sudden swerve to the right onto the gravel – to avert colliding with the appellant's van.

51. It is of course true that the second named respondent's vehicle ought not to have been in the place where it was, namely across the white line and overtaking. However, had the appellant checked his mirrors at all, or in the manner which he alleged to his engineer in January 2013, the presence and position of the Honda Civic would have been manifest. In such circumstances the appellant would have refrained from proceeding to cross the white line. Had the appellant been using his indicators or brake lights it is reasonable to conclude that the second named respondent would have not commenced the overtaking manoeuvre in the first place. Therefore, they were both at fault. Whilst I might have reached a different conclusion on the proportions of fault it would not have been so radically different from what the trial judge did as to cause any intervention at this stage. I agree with the observations of Flaherty J. in *Grace v. Fitzsimons and O'Halloran*, 14th June, 1996, Supreme Court (*Ex Tempore*) affirming the order of Barr J. that unless the apportionment would be radically different there is no basis to interfere.

Conclusions

52. I am satisfied that the trial judge fulfilled the criteria set out by Clarke J. in *Doyle v. Banville* [2012] I.E.S.C. 25. She did enter into a consideration of the key elements of the case and the arguments advanced by both parties and analysed the competing versions of facts and events advanced by the parties and their witnesses.

53. She identified cogent reasons for preferring the evidence of the second named respondent, including the consistency of the evidence given by him and his witnesses.

54. It must be borne in mind that the decision in *Doyle v. Banville* itself limits the obligation of the trial judge in the process of evaluation. Evaluation of evidence is not required to extend beyond "… the broad case made out on both sides". It will be borne in mind that in general "trial judges do not make a practice of elaborate explanations for their apportionment" as was observed by Fleming in the leading text "*The Law of Torts*" 10th ed. at p. 312.

55. I am satisfied that on any fair assessment of the decision delivered by the trial judge she did engage with the key elements of the case made by both sides and considered the evidence of

the witnesses and then explained why she preferred the evidence of the second named respondent and Mr. Duggan to that of the appellant. She engaged with the contentions advanced by both sides and did analyse the case advanced by each broadly before coming down on the side of the second named respondent with regard to the likely sequence of events leading up to the crash. At para. 20 of the written legal submissions filed on behalf of the appellant 20 different facts are advanced as "facts not in dispute on the evidence". Even if each "fact" is correctly stated, same cannot be considered probative of relative blameworthiness as between the second named respondent and the appellant. They appear to be predicated on a proposition that the admitted fact that the second named respondent was driving his vehicle at an excessive speed at or above 60 miles per hour immediately prior to the accident is determinative in and of itself of his sole liability and should exonerate the appellant from any liability whatsoever precluding any concurrent liability for the accident. This is manifestly an unsound argument.

56. It is not material that the vehicles did not come into contact with one another. There was clear evidence before the trial judge, which she accepted, that this was averted only by the emergency evasive actions of the second named respondent in swerving to avoid the appellant's Transit van. Neither is it probative of liability that no damage was caused to the appellant's own Transit van. At issue is whether the trial judge had before her probative evidence on which she was entitled to rely to satisfy herself on the balance of probabilities that the appellant in the process of turning right without checking his mirror, moved without indication across the white line onto the path of the second named respondent's highly audible vehicle at a time when it was being driven at around 60 miles per hour having crossed a continuous white line and was engaged in the manoeuvre of overtaking the appellant's vehicle. I am satisfied that there was.

57. The appellant attaches significant weight to the fact that the second named respondent is not recorded in his statement to the gardaí made on the day following the accident that the appellant's right indicator light and brake lights were not on. A perusal of the statement shows that there is no reference whatsoever in it to the appellant's right indicator light or brake lights. It was the evidence of the second named respondent that he had stated to Garda Donohue who took the statement that the indicator light and brake lights of the appellant's vehicle were not in use.

58. This contention appears to be based on the fallacious proposition that absence of evidence is evidence of absence. The trial judge had the opportunity to consider the witness and his evidence in its totality and to evaluate his veracity and integrity which she carefully did. She did not have to rely on the evidence of the second named respondent alone in this issue or at least as to whether either brake lights or indicators were deployed by the appellant. There was clear evidence from Mr. Darren Duggan, the trainee mechanic who was seated in the rear of the vehicle and who was cross examined regarding the speed at which the Honda Civic was travelling, the non-use of indicators by the appellant and the non-use of brake lights by the appellant in the seconds leading up to the crash occurring. This witness also gave evidence regarding the appellant's Transit van veering across the centre white line of the highway. Thus, I am satisfied that the trial judge had cogent evidence on which she was entitled to rely in reaching her conclusions in regard to these specific matters. The witnesses whose evidence she

preferred were cross examined in detail by highly experienced counsel and they maintained their position notwithstanding rigorous cross-examination.

59. A review of the judgment makes it clear that the trial judge was satisfied on the evidence that both the appellant and the second named respondent respectively were equally to blame for the accident. She clearly states that whilst the second named respondent was speeding in attempting to overtake on a continuous white line and was also driving on a provisional licence she was satisfied that he would not have attempted to overtake the appellant had the appellant used his indicators or used his brake lights and thus, but for the failures on the part of the appellant to use his mirrors appropriately, to deploy his brake lights and use his indicator, the accident causing serious injury to the first named respondent would never have occurred in the first place. (See page 25, lines 27-30, page 26 lines 1-30 of the transcript of the judgment).

60. It is arguable that further reasons might be expected were a trial judge to apportion liability differently as between concurrent wrongdoers whose relative blameworthiness differs, with a more detailed assessment of same being necessitated as is clear from the decision of Clarke J. in *ACC Bank Plc. v. Johnston* [2011] I.E.H.C. 501 where he observed: -

> "I view [the first named third party's] breach of undertaking as being at the higher end of the relevant range while viewing [the defendant's] negligence as being at the middle level of the range, it seems to me that it is appropriate, as and between them, to apportion blame as to seventy percent to [the first named third party] and thirty percent [to the defendant]."

However, the approach adopted in ACC is reflective of the fact that it pertained to a professional negligence suit and involved an evaluation of the issue as to whether a breach of an undertaking by a solicitor constituted a more serious matter than a merely negligent act, with Clarke J. finding that it did. This is materially different from the current scenario where the second named respondent and the appellant had engaged in negligent driving to a substantially equivalent extent and where the trial judge was satisfied that they were joint tortfeasors possessing equivalent levels of blameworthiness for the accident.

61. In conclusion, I am satisfied that neither the trial judge's reasoned determinations regarding liability nor her findings with regard to apportionment of damages as between the appellant and the second named respondent as joint tortfeasors were such as ought reasonably to be interfered with on appeal. I am satisfied that the trial judge had cogent evidence on which she was entitled to rely in reaching her conclusions in regard to these specific matters. The trial judge identified a reasoned basis for her conclusions and no valid grounds for interfering with same have been established.

62. I would dismiss this appeal.