

**THE HIGH COURT  
CIRCUIT APPEAL**

**2019 No. 130 CA**

**BETWEEN**

**MICHAEL DOYLE**

**PLAINTIFF**

**AND**

**MARIE DONOVAN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 28 February 2020**

**INTRODUCTION**

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The proceedings are personal injuries proceedings in which the plaintiff seeks damages in respect of injuries said to have been received in a road traffic accident on 1 August 2017.
2. This is the second of two judgments delivered in the matter by the High Court. The principal judgment, *Doyle v. Donovan* [2020] IEHC 11 addressed (i) the assessment of damages, and (ii) the question of whether the plaintiff was entitled to aggravated damages. This second judgment is addressed to the costs of the proceedings.
3. For the reasons set out in detail in the principal judgment, the plaintiff has been awarded €25,000 in general damages, but has not been awarded aggravated damages. In circumstances where the plaintiff succeeded in obtaining an award of damages in excess of the jurisdiction of the District Court, the general rule, i.e. that costs follow the event, applies and the plaintiff is entitled to his costs before the Circuit Court and of the appeal before the High Court.
4. The dispute between the parties centres on the appropriate *measure* of costs. In particular, the plaintiff seeks costs on the higher scale of "legal practitioner and own client" basis, rather than the normal "party and party" basis. It is said that costs should be awarded on the higher scale so as to mark the High Court's disapproval of the manner in which the defence of the proceedings has been conducted.
5. The response of the defendant is to say that in deciding whether to make an award of costs on this higher basis, the court must have regard to the plaintiff's conduct. It is alleged that the plaintiff exaggerated his claim by including receipts for medication which was not intended for his use. When pressed on this, leading counsel for the defendant conceded that the value of the alleged exaggeration is in the order of thirty euros.
6. For the reasons set out herein, I propose to make an order directing that the costs be paid on the "legal practitioner and client" basis.

**THE CONDUCT OF THE DEFENCE**

7. To assist the reader in understanding the dispute which has now arisen in respect of costs, it is necessary to rehearse briefly the manner in which the defence of the proceedings was conducted. Before turning to this task, however, it should be noted that the appeal from the Circuit Court comes before the High Court pursuant to the provisions

of section 38 of the Courts of Justice Act 1936 (as amended). Such an appeal is heard by way of a rehearing of the action. It is unusual, therefore, for the High Court to refer in any detail to the proceedings before the Circuit Court. It should be emphasised that this is only being done in the present case in circumstances where it is relevant to the overall conduct of the litigation, and, in particular, to the question of what order should be made in respect of the costs of the Circuit Court.

8. The proceedings were instituted before the Circuit Court, and sought damages for personal injuries said to have arisen out of a road traffic accident on 1 August 2017. The accident was said to have occurred in circumstances where the defendant's motor vehicle "rear ended" the plaintiff's motor vehicle.
9. The Personal Injuries Defence delivered in the proceedings contains a plea to the effect that the plaintiff had deliberately caused the collision. As required under the Courts and Civil Liability Act 2004, the defendant, Marie Donovan, swore an affidavit verifying the assertions or allegations pleaded.
10. The relevant part of the Personal Injuries Defence reads as follows.

"4. PARTICULARS OF NEGLIGENCE/CONTRIBUTORY NEGLIGENCE

If the Plaintiff sustained the alleged or any personal injuries, loss and damage, which is denied by the Defendant, the same was solely caused by the Plaintiff's own negligence; alternatively, the Plaintiff was guilty of contributory negligence as follows:-

- (a) Violently braking his vehicle on the public highway and thereby causing an emergency situation resulting in the Defendant colliding into the rear of the Plaintiff's vehicle.
- (b) Failing to indicate his intention.
- (c) Deliberately causing the collision complained of."

11. The solicitors acting on behalf of the plaintiff had sought clarification of this plea by way of letter dated 29 November 2018.

"We note the Defence as filed by you herein. Could you please let us know whether the Defendant contends that the collision was set up by the Plaintiff for the purpose of defrauding the Defendant and/or her insurer of compensation."

12. The solicitors acting on behalf of the defendant responded as follows by letter dated 28 December 2018.

"Further to your letter of the 29th of November 2018, the Defence as delivered speaks for itself and the evidence of the Defendant will be given at the trial of the action in respect of the Defence delivered."

13. In the event, the defendant did not adduce any evidence in support of the plea that the collision had been deliberately caused. Whereas liability had been in issue before the

Circuit Court, there was no suggestion in the defendant's evidence-in-chief to the Circuit Court that the collision had been other than an accident. On cross-examination, the defendant declined to stand over the plea that the collision had been deliberately caused. The most that was suggested in evidence is that the plaintiff had braked suddenly, and that this may have been negligent.

14. The transcript of the relevant part of the cross-examination of the defendant reads as follows. (The transcript has been obtained by the defendant pursuant to an order of the Circuit Court).

Q. But the last line of the defence says: 'The plaintiff deliberately caused the collision complained of.' There is a vast difference between sudden and deliberate [braking], so I'm asking you at what point you changed your mind in relation to the circumstances of this accident?

A. I have never suggested to anybody that the person in front of me stopped deliberately.

Q. You have sworn an affidavit verifying the content of your defence?

A. No.

Q. That affidavit was sworn by you on the 24th of October 2018 and specifically refers to the defence. I take it you read the defence before you swore that affidavit?

A. Yes.

Q. But you didn't refer to the fact that the last line of the defence says that the plaintiff deliberately caused this accident?

A. I suppose I read it but I didn't note that line in particular. All I know is that he stopped very suddenly.

Q. Well, do you want to withdraw that now? Or do you want to stand over it? If you do want to stand over it, I want to ask you then why is it you [say] this was deliberate as opposed to a sudden braking?

A. I can't say that Mr Doyle stopped on purpose. I do know he stopped suddenly and that's all I can say.

Q. When were you interviewed by – who are your insurers?

A. Aviva.

Q. Yes. How many times were you interviewed by Aviva in relation to this accident?

A. Once.

Q. Right. Who interviewed you in relation to the accident?

A. A gentleman called David, an insurance investigator.

Q. Did you at any stage say to David – whoever his name is – at Aviva that this accident was deliberately caused by the plaintiff?

A. No, I did not.

Q. No?

A. No.

Q. Have you at any stage since you had that interview had any other contact with either your insurers or the solicitors that they've retained to act for you in this case?

A. They just got in touch with me to say that this case was being taken to court and could I attend.

Q. You have no idea how the word 'deliberate' got into that defence and you are not suggesting that the plaintiff deliberately caused this collision?

A. I don't know how it got into – yes.

Q. But you're not stating it?

A. I'm not stating that, no."

15. The position since adopted by the defendant before the High Court on appeal has been to concede liability. The defendant was not called to give evidence. The hearing before this court on 12 December 2019 thus proceeded as an assessment of damages only. For the reasons set out in the principal judgment, an award of €25,000 by way of general damages was made in favour of the plaintiff.

#### **THE CIRCUIT COURT'S APPROACH TO COSTS**

16. Subject always to the caveat that the appeal comes before the High Court by way of a *rehearing* of the action, it may nevertheless be instructive to have some regard to the manner in which the Circuit Court addressed the issue of costs. If nothing else, it indicates that the defendant had been put on notice that the conduct of the defence was unsatisfactory.

17. The Circuit Court had determined the action on the basis that, whereas the defendant was liable for the accident, the plaintiff had failed to prove that he had suffered any personal injuries as a result of the accident. The "event" thus went in favour of the defendant, and in the ordinary course the defendant would have been entitled to an order for costs in her favour. However, the Circuit Court refused an application for costs on the part of the defendant because of the plea that the accident had been deliberately caused (see pages 99 and 100 of the transcript of the Circuit Court hearing). The Circuit Court had earlier criticised the conduct of the defence as follows (see pages 96 and 97 of the transcript).

"[...] as far as responsibility for the collision goes, the car that hit from behind in this case does bear responsibility for the collision. And I do note that the allegation – well, it was sworn to and it was sworn to by the defendant – is that the plaintiff deliberately caused and staged this accident.

The affidavits of verification work both ways, when a defendant or a defendant's version of events swear to the truth of an assertion in the defence and it isn't borne out in – and they don't actually believe it, that is a reasonably serious matter. *And the defence really should not have conducted this case on the basis that this was a deliberately staged accident, when that wasn't going to be evidence that was ever going to be offered.\** And an affidavit of verification indicating that was the evidence that was going to be offered should not have been sworn. So, as far as the responsibility of the accident goes, although I've a higher degree of sympathy with the defendant perhaps than the plaintiff because I think the plaintiff didn't drive in an ideal manner but didn't create a situation which was difficult for the defendant. I think the primary responsibility in law to avoid this accident did rest upon the defendant. So, as far as the accident goes, I'm satisfied that the defendant was responsible for the accident."

\*Emphasis (italics) added.

18. The reference to an affidavit of verification is to the obligation imposed upon a defendant, by section 14 of the Courts and Civil Liability Act 2004, to swear an affidavit verifying any assertions or allegations contained in their pleadings.

## **DISCUSSION**

19. The approach adopted by the defendant for the purposes of the appeal to the High Court was to concede the issue of liability. The appeal proceeded as an assessment of damages only. In the event, a sum of €25,000 was awarded to the plaintiff by way of general damages.
20. For the reasons set out in the principal judgment, I concluded that this was not an appropriate case in which to make an award of aggravated damages. My conclusion in this regard was informed primarily by a consideration of the statutory scheme under the Civil Liability and Courts Act 2004, and, in particular, the penalties prescribed under the legislation for the giving of false evidence. The parties were, however, invited to make submissions as to whether any award of costs should be on a "legal practitioner and client" basis. The matter was adjourned for a number of weeks until Friday, 14 February 2020. The parties each delivered very helpful written legal submissions in advance of the adjourned date.
21. Leading counsel on behalf of the plaintiff had been sharply critical of the manner in which the defendant had conducted the litigation. It was submitted that the plea that the plaintiff had deliberately caused the collision was tantamount to an allegation of fraud and criminality on the part of the plaintiff. The implication of the plea is that the plaintiff had deliberately caused a road traffic accident with a view to his making a fraudulent claim for

damages against the defendant. This plea was unsubstantiated. The High Court was invited to make an award of costs on a “legal practitioner and client” basis to mark the court’s disapproval of the manner in which the defence had been conducted.

22. The parties were both agreed that the legal principles governing the award of costs on a higher scale are as set out in the judgment of the High Court (Barniville J.) in *Trafalgar Developments Ltd. v. Mazepin* [2020] IEHC 13. This magisterial judgment reviews all of the relevant authorities, and then formulates the following statement of the legal principles.

- “(1) The normal position is that where costs are awarded against one party in favour of on other, those costs will be taxed or adjudicated on the party and party basis.
- (2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.
- (3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).
- (4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.
- (5) The conduct in question can include:–
- (a) A particularly serious breach of the party’s discovery obligations;
  - (b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;
  - (c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a *prima facie* case in relation to such claims;
  - (d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court’s displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.
- (6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should:–
- (a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

- (b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;
  - (c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;
  - (d) In light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).
- (7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis)."
23. I respectfully adopt the foregoing summary from *Trafalgar Developments Ltd. v. Mazepin* as a correct and comprehensive statement of the legal principles governing the award of costs on the higher basis, i.e. on what is now known as the "legal practitioner and client" basis.
24. As appears, one of the circumstances which might trigger an award of costs on the higher basis is where a party makes a claim of fraud or dishonesty against the other side without ensuring there exists clear evidence supporting a *prima facie* case in relation to such claim. This is the complaint which the plaintiff makes against the defendant in the present case. The defendant had put forward a plea in her defence to the effect that the collision had been deliberately caused by the plaintiff. Notwithstanding that she had been asked to clarify the plea in subsequent correspondence, the defendant, through her solicitors, declined to do so. The plea was only resiled from for the first time during the cross-examination of the defendant before the Circuit Court. (The relevant extract from the transcript has been set out at paragraph 14 above).
25. Notwithstanding that the defendant has been on notice, from at the very latest the date of the *ex tempore* ruling of the Circuit Court, that the plea should not have been made, no attempt has been made to amend the pleadings nor to correct the verifying affidavit filed by the defendant in support of her Personal Injuries Defence. No explanation has ever been offered by the defendant, or her insurer, Aviva, as to how the plea that the collision had been deliberately caused came to be included in the Defence. The absence of an explanation is very concerning in circumstances where the defendant's own evidence before the Circuit Court strongly suggests that the plea had been included on the initiative of the insurance company, and not of the defendant herself. It will be recalled that Ms Donovan's sworn testimony to the Circuit Court had been to the effect that she had never said that the accident had been caused deliberately.

26. As explained earlier, the parties had a number of weeks within which to prepare their submissions on the question of whether costs should be awarded on the higher basis. Rather than take this opportunity to provide an explanation or apology for the unsubstantiated plea that the accident had been caused deliberately, the defendant instead decided to make a new allegation against the plaintiff. Specifically, it was alleged that the plaintiff had attempted to promote an “unmeritorious claim for special damages” by having included a number of receipts for an over-the-counter medicine (solpadeine) amongst the documents vouching his claim for special damages. It was alleged that this medicine had been purchased not for his own use, but for the use of a family member. When pressed on the extent of the alleged exaggeration of the claim for special damages, leading counsel for the defendant conceded that it was less than thirty euros.
27. This attempt to introduce a new allegation against the plaintiff post-judgment was ill-advised. It had formed no part of the defendant’s case at the hearing on 12 December 2019 to say that the plaintiff had deliberately exaggerated his claim for special damages. The pharmacy receipts now sought to be relied upon had not been put into evidence. No submission was made to me to the effect that there was a dispute as to the measure of the special damages. Rather, as appears from page 19 of the principal judgment, I had been left with the impression that the special damages had been agreed. It was never put to the plaintiff in cross-examination that he had deliberately exaggerated his claim for special damages. It follows, by analogy with the approach taken to section 26 of the Courts and Civil Liability Act 2004 by the Court of Appeal in *Nolan v. O’Neill* [2016] IECA 298, that if a party wishes to rely on the alleged dishonesty of the other party, then the allegation must be put to the other side and they must be afforded an opportunity to respond to same.

#### **DECISION**

28. The plea that the plaintiff deliberately caused the collision between the two vehicles is one which imputed fraud and dishonesty to the plaintiff. Unless there was evidence to substantiate same, this plea should not have been included in the Personal Injuries Defence, and certainly should not have been verified on affidavit by Ms Donovan. In the event, no evidence was ever adduced in support of the plea.
29. The defendant and her insurer, Aviva, have declined to offer any explanation to the High Court as to how the plea came to be made. The absence of an explanation is very concerning in circumstances where the defendant’s own evidence before the Circuit Court strongly suggests that the plea had been included on the initiative of the insurer and not of the defendant herself. It will be recalled that Ms Donovan’s sworn testimony to the Circuit Court had been to the effect that she had never said that the accident had been caused deliberately.
30. The fact that the defendant did not seek to stand over the allegation before the Circuit Court, and ultimately conceded liability before the High Court, has taken much of the sting out of the allegation. However, it remains the case that the defendant has never sought to amend the Personal Injuries Defence nor to correct her verifying affidavit. Rather than take the opportunity afforded by the adjournment of the proceedings



following the principal judgment to attend to these matters, the defendant sought instead to ambush the plaintiff with a further unsubstantiated allegation, i.e. that he had exaggerated his claim by a sum in the order of thirty euros.

31. Applying the principles stated by the High Court (Barniville J.) in *Trafalgar Developments Ltd. v. Mazepin* [2020] IEHC 13, I am satisfied that the defendant and her insurer have engaged in precisely the type of litigation misconduct which justifies the making of an award of costs on the higher basis ("legal practitioner and client" basis). A party should not make a claim of fraud or dishonesty against the other party without ensuring that there exists clear evidence supporting a *prima facie* case in relation to such claim. The plea that the plaintiff had deliberately caused the collision was one which imputed fraud and dishonesty to him. The making of this allegation had potentially serious consequences for the plaintiff in terms of his reputation and good name. Moreover, even if not calculated to do so, the existence of the plea might well have dissuaded the plaintiff from pursuing his personal injuries claim for fear that he would be exposed to penalties under the Court and Civil Liability Act 2004. No explanation, still less a justification, has ever been offered for the defendant's conduct.

#### CONCLUSION AND FORM OF ORDER

32. In all the circumstances, I propose to make an order pursuant to Order 99, rule 10(3) of the Rules of the Superior Courts (as amended by Rules of the Superior Courts (Costs) 2019) directing that the costs shall be adjudicated on a legal practitioner and client basis. For the avoidance of any doubt, the intention of this order is that the plaintiff will recover costs at a higher level than the usual "party and party" basis, and that the adjudication will allow all reasonable costs (even if such costs are not strictly speaking "necessary" in the sense that the term is understood for the purposes of adjudication). For example, the costs are to include the costs of both senior and junior counsel before the High Court, and to include the costs of the written legal submissions filed.
33. The plaintiff will not be entitled to recover any costs in respect of the making of discovery of documents in circumstances where, as discussed in the principal judgment at paragraph 24 *et seq.*, the affidavit of discovery failed to identify or list the individual documents.

#### *Appearances*

Barney Quirke, SC and Ivan Daly for the Plaintiff instructed by Ferrys Solicitors

Murray Johnson, SC and Noel Cosgrove for the Defendant instructed by BLM Solicitors