THE HIGH COURT
CIRCUIT APPEALS

[2021] IEHC 514
[RECORD NO. 2016/00471]

BETWEEN

KELLY HANNON

PLAINTIFF

AND
TIPPERARY COUNTY COUNCIL

DEFENDANT

THE HIGH COURT
CIRCUIT APPEALS

[RECORD NO. 2017/00039]

BETWEEN

SARAH HANNON

PLAINTIFF

AND
TIPPERARY COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 24th day of June, 2021

SUMMARY

1. This is a trip and fall case by a lady, who is the sixth member of the same family to make a trip and fall claim against the defendant ("Tipperary County Council") over a short period of time. It was claimed on behalf of Tipperary County Council during the course of the hearing that there was a 1 in 26 million chance of so many members of the same family entitled to compensation for injury as a result of a slip and fall in such a short period of time. This case raises three issues that may be of more general application to personal injuries claims and which could therefore potentially assist in easing the current and future backlog in personal injuries claims.

(i) Was the plaintiff looking where she was going when she fell?

While the evidence referenced above from the actuary, who is an expert in probability, was relevant, it is clear, as noted below, that it was not determinative in the claims in this case being dismissed by this Court (as they were in the Circuit Court by His Honour Judge Teehan). This is because it is this Court's view that trip and fall claims such as this one, might not be taken if the first question a lawyer was to ask their clients is:

- were you looking where you were going when you fell, and,
- if so, should you not have seen the alleged hazard?

(ii) Has 'appropriate scepticism' been applied to the claim for compensation?

The second issue this case considers is the importance of the direction by the Supreme Court to all other courts (in *Rosbeg Partners v. LK Shields Solicitors*) that '*Courts must … bring appropriate scepticism'* (emphasis added) to all stages of litigation and thus to, inter alia, personal injury claims for damages. In this regard, the credibility of plaintiffs is an important factor in many personal injury claims, since there is often no independent evidence of what occurred and in many cases the claim is for soft tissue injuries (as in

this case), where there is an almost total reliance on the plaintiff having given an honest account of their injuries to the doctors involved.

(iii) Litigating, rather than settling unmeritorious claims may ease court backlog

The third issue is the fact that this case is an example of an unmeritorious claim which appears to have been brought by impecunious plaintiffs, and thus it is likely to have cost Tipperary County Council much more to win the case than to settle or 'buy-off' the claim, not just once but on the double, i.e. in the Circuit Court and the High Court. Nonetheless, it seems clear that such an approach is likely to discourage such claims (and thereby ease the backlog in the courts), since such plaintiffs will find it more difficult to persuade lawyers to spend their valuable time on 'nuisance claims' with little chance of success, if there is little prospect of a 'buy-off' of the claim.

BACKGROUND

2. This judgment deals with two separate cases, as two separate trip and fall claims by two sisters were instituted, in which they claim to have fallen over two separate shores in the same council estate in Tipperary Town, although as noted below, this Court decided to hear the two cases together, despite objections from counsel for the two plaintiffs.

3. The first case is a trip and fall claim where the plaintiff, Ms. Kelly Hannon, claims that on 17th August, 2015 she suffered soft tissue injuries when she got her right foot caught in an uncovered shore when she was walking on the footpath in the council estate in which she has lived for her entire life, namely Greenane Drive, Tipperary Town.

4. It was heard at the same time as an almost identical claim by her sister, Ms. Sarah Hannon, in relation to a trip and fall claim, where Ms. Sarah Hannon claims she suffered soft tissue injuries when she caught her right foot on a uncovered shore on 7th June, 2016, which appears to be about 30 metres from the shore in which her sister tripped, in the same council estate, where Ms. Sarah Hannon also lives.

Resistance by plaintiffs to having the cases heard together

5. The defendant was represented in the two cases by the same legal team and it did not provide any engineering evidence. The two plaintiffs were represented by the same solicitors firm and evidence for both plaintiffs was provided by the same engineer. However, that firm instructed two different barristers for each of the plaintiffs.

6. As there was a similarity between these two trip and falls and as the same legal teams were involved (save that there was a different barrister engaged for each of the plaintiffs), and since the accidents occurred in the same location, and as the same engineer was giving evidence in relation to the uncovered shores in the estate and since the two plaintiffs are sisters, the defendant sought to have the two cases heard together.

7. In addition, in the context of that application, the Court was informed that the sisters were part of a family that had made six claims against Tipperary County Council relating to trip and falls in Tipperary Town most of which were around the Greenane estate.

8. However, counsel for Ms. Kelly Hannon and counsel for Ms. Sarah Hannon both objected to the application to have the cases heard together as they claimed they were two completely separate accidents and there was no basis to link the two claims.

9. This Court rejected this application as it felt, *inter alia*, that court resources would be saved by dealing with both cases together.

1 in 26 million chance of so many family members having trip and falls

10. A much more forceful objection was made by counsel for Ms. Kelly Hannon and by counsel for Ms. Sarah Hannon to the use of expert actuarial evidence by Tipperary County Council which indicated that there was a 1 in 26 million chance of so many members of the same family making trip and fall claims in a short space of time.

11. Both counsel claimed that permitting this evidence amounted, in effect, to an allegation of fraud against the two plaintiffs, and as fraud had not been pleaded in this case by Tipperary County Council, it was not open to the defendant to introduce this evidence.

12. This application was rejected by this Court on the grounds that the task of this Court in every civil case, including personal injuries claims, is to decide what happened on a particular date in the past, on the balance of probabilities.

13. It follows that anything which may be of assistance to the Court in this task, including statistics regarding probabilities, is perfectly admissible as evidence. Furthermore, the fact that a defendant claims that a plaintiff's recollection of an accident is incorrect, or to put the matter another way, that on the balance of probabilities the incident did not occur as claimed by the plaintiff, does not, *per se*, amount to an allegation of fraud.

ANALYSIS

14. The shore in which Ms. Kelly Hannon allegedly tripped was without a cover and has dimensions of 250 mm x 250 mm. It is positioned between the exterior of the pathway and the road. It does not have a cover as it appears to have been removed, which the engineer advised is a common occurrence in this estate.

15. It is clear that two people can comfortably walk on the footpath without coming close to the shore which should be obvious to anybody keeping a lookout. More to the point, for Ms. Kelly Hannon to have caught her right foot in the shore, considering the direction in which she was travelling, she would have to have been walking, not on the footpath, but with her left foot on the road and with her right foot on the footpath, a most unusual way in which to walk, when there is plenty of room on the footpath for two people.

16. This manner of walking would require extra care and, in her evidence, Ms. Kelly Hannon stated that she was not looking in front of her as she walked, as she was talking to her sister who was accompanying her at the time.

Was the client looking where he/she was going?

17. The law regarding looking where one is going is clear - a person who is walking in this country, whether on private property or property owned by a State body, such as a local authority, has a duty to look where they are going - see the judgment of Binchy J. in the

Court of Appeal decision in *Power v. Waterford City and County Council* [2020] IECA 196 at para. 33 *et seq*. Indeed, this is also obvious from the similar legal principle that a person is expected to take reasonable care for her own safety - see the judgment of Peart J. in the Court of Appeal decision in *Lavin v. Dublin Airport Authority* [2016] IECA 268 at para. 52.

18. If a person falls, as a result of not looking where they are going or not taking reasonable care for their own safety, they have only themselves to blame and not the local authority or some other defendant.

19. It is this Court's view therefore that trip and fall claims such as the claims in this case would not be taken if the first question a lawyer was to ask her client is: were you looking where you were going, and if so, should you not have seen the alleged hazard?

No criticism of the lawyers

20. It is always important to remember that when a court is expressly or implicitly critical of the fact that a claim has been made in litigation, the criticism is directed at the parties, whether a plaintiff or a defendant. No criticism is being made of the solicitors or barristers since they are only acting on the instructions of their clients who decided to pursue the claims or allegations in questions.

21. Just as it is not the role of the lawyer to determine whether their client is guilty in criminal matters, so too it is not for a lawyer in a civil action to decide whether she believes her client who is making a personal injury claim. That is the function of the court, and as noted hereunder, when exercising that function, the courts must apply '*appropriate scepticism'* to claims made by litigants (through their lawyers).

22. However, just as lawyers have no responsibility if their instructions are false in a criminal or a civil matter, it follows that a court cannot simply accept the word of a lawyer regarding the facts of the case, whether in submissions or during evidence - for the same reason, i.e. that they are only acting on instructions. If a court could simply accept the statements of a litigant made through his lawyer, there would be no need for trials and no need for evidence to be tested by cross examination.

23. The situation is of course different regarding submissions by lawyers on the law, as distinct from on the facts, since the courts rely on lawyers to open the relevant law to them.

Direction by Supreme Court to apply appropriate scepticism and common sense

24. It is because a court cannot simply accept the submissions on the facts or the evidence of a litigant, whether given directly or through their lawyers, that there is an onus on the courts to carefully assess those submissions and the evidence. This is because of the financial incentives that exist for litigants regarding the content of the instructions they give their lawyers. This is clear from the Supreme Court case of *Rosbeg Partners v. LK Shields Solicitors* [2018] 2 I.R. 811 at 822 – 823, where O'Donnell J. stated, in the context of a claim for damages, that:

> "It is important to remind ourselves that courts should approach claims such as this not simply on the basis of the genuineness or plausibility of witnesses, but by applying common sense and some degree of scepticism. […] *Courts must*, and do, try to *bring an appropriate scepticism* therefore to their task at each stage of litigation." (Emphasis added)

The reason the High Court (and other courts) have been directed by the Supreme Court to bring '*appropriate scepticism*' to considering the alleged 'facts' is because, as O'Donnell J. explained, litigation is '*a distorting process'* and '*memories and consequently accounts'* end up becoming '*subtly and unwittingly adjusted'* in light of the '*consequences of failure'*, including financial consequences, for the parties. It is important to emphasise that O'Donnell J. was referring to the accounts of clients becoming distorted due to the financial consequences of the litigation. It is not of course being suggested that the lawyers, who at all times are expected to act without regard to their financial interest (e.g. of being paid if the claim is unsuccessful), would ever have their accounts to the court unwittingly adjusted. Rather it is the instructions of their clients regarding the alleged 'facts' of the case, upon which the lawyers are obliged to act, which may become '*unwittingly adjusted'*.

As required by the Supreme Court, this Court will now apply '*appropriate scepticism'* to the claims of the litigants in this case.

MS. KELLY HANNON'S CLAIM

25. If Ms. Kelly Hannon was walking solely on the footpath (and not straddling the footpath and road, which for some reason she chose to do) and if she was looking where she was going, she could not have failed to see this shore (in view of its size and location). In those circumstances it is clear to this Court that she would not have fallen as she would have avoided the shore. Indeed, Ms. Kelly Hannon accepted that there was room on the footpath for two people and admitted that she was talking at the time of her fall and '*wasn't taking heed of [the shore*]'. There can be no doubt therefore that the cause of the trip and fall was Ms. Kelly Hannon's own carelessness and lack of attention.

26. Therefore, the cause of the fall is not any negligence or breach of duty by the local authority, but Ms. Kelly Hannon's own inadvertence in not taking appropriate care as she walked along the footpath and this fault lies with her. This is not only common sense, but it is also clear from the foregoing caselaw regarding the duty to look where one is going and the duty to take reasonable care of oneself.

27. In this regard, this Court would also conclude that the application of common sense also leads to the conclusion that Ms. Kelly Hannon's fall (and, as noted below, Ms. Sarah Hannon's fall) was her own fault. In this regard, it should always be borne in mind that common sense plays a significant role in these trip and fall claims, as noted in *Byrne v. Ardenheath* [2017] IECA 293, in which the Court of Appeal dismissed a claim for damages for a fall, in that case on grassy hill, and Irvine J., as she then was, noted at para. 32 that it was important to highlight:

> "[…] the need, particularly in cases where the court is not dealing with a complex specialist field of activity, for the trial judge, not only to consider the expert evidence tendered by the parties *but to bring ordinary common sense to bear* on their assessment of what should amount to reasonable care." (Emphasis added)

28. Furthermore, as noted by Keane J. in *Turner v. The Curragh Racecourse* [2020] IEHC 76, which was a case for personal injuries which was dismissed because the cause of the accident was not the negligence of a jockey riding a horse on the Curragh, as alleged, but rather the failure of the plaintiff to keep a proper look-out while out jogging. As noted by Keane J. at para. 55 (in the course of quoting from the judgment of Geoghegan J. in *Weir-Rodgers v. S.F. Trust Ltd* [2005] 1 I.R. 47):

> "the common law is just the formal statement of results and conclusions of the common sense of mankind." (per Lord M'Laren in *Stevenson v. Corporation of Glasgow* (1908) SC 1034 at 1039)

29. That therefore is the end of the plaintiff's claim.

Importance of credibility of plaintiffs in personal injury claims

30. However, even if this were not the case, this Court does not believe that it can rely on Ms. Kelly Hannon's recollection of the events because of the inconsistencies in her claim and in particular the evidence given by her in support of her claim for damages.

31. In this regard, the credibility of plaintiffs is an important factor in certain personal injury claims, since there is often no independent evidence of what occurred and in many cases the claim is for soft tissue injuries where there is an almost total reliance on an honest account by the plaintiffs regarding the extent and seriousness of the injuries which they provide to a medical practitioner who provides his/her records and/or a report to the Court.

32. Accordingly, when considering whether the plaintiffs have discharged the onus upon them to prove that the accident occurred, at all, or in the manner suggested, one must consider how reliable is their account of the accident and their alleged injuries for which they are seeking compensation.

33. In this regard, Ms. Kelly Hannon was not a very credible witness because of the inconsistencies in her evidence.

34. It is not proposed to go into that evidence in detail, but simply to give a few examples.

35. She claimed in her evidence to this Court that the accident occurred in the afternoon, yet in her replies to particulars, she claims that it occurred at 8:30 PM.

36. Similarly, she claimed to this Court that she went to her GP the day after the accident, but she told the defendant's doctor that she went to see him on the day of the accident (this was also the response given in her Replies to Particulars).

37. Significantly however, she claimed in her evidence to the Court that she took the route that went by this shore on the footpath perhaps once a month as a shortcut and that she had lived on that estate her entire life. Despite this, in her Replies to Particulars she claimed that she '*rarely traversed the accident location'*. It is difficult to reconcile these two versions of events given by the plaintiff.

38. When giving evidence in this Court about her injuries resulting from the accident, for which she is seeking damages, she gave evidence that her only pain now is her back pain. She claimed in court that her current back pain is sufficiently serious that she takes painkillers to this day for that pain as a result of this trip and fall which it must be remembered occurred six years ago.

False information to doctors

39. In addition, she provided evidence to this Court that she had a problem with her back arising from a road traffic accident in 2008, for which she had received compensation.

40. Against this background, it is difficult to understand how, when she was seen by the doctor on behalf of the defendant, she claimed that she had no past history of similar injuries and perhaps most significantly she denied any involvement in any other accidents.

41. This statement to the defendant's doctor is both false and patently inconsistent with her evidence to this Court. Ms. Kelly Hannon knew, or should have known, that the information she was giving to the defendant's doctor was for the purpose of her personal injury claim before this Court (i.e. to support her claim for compensation), which claim she has told this Court is related primarily to her back. For the purposes of making this claim therefore, she falsely claimed to the defendant's doctor that she had not had any previous accidents when this was patently not the case. Since there were significant financial consequences for her in giving the impression that her current back injury was *solely* caused by this fall (rather than previous accidents), this evidence to the defendant's doctor leads this Court to conclude that her evidence in this and other respects (e.g. that she rarely traversed the accident location) has become '*unwittingly adjusted'* to support her claim for compensation.

42. More generally, her claim in this Court regarding the seriousness of her back injury is also inconsistent with her report to her GP on the day after the accident which makes no reference to any back injury or back pain.

43. Her oral evidence to this Court is also inconsistent with her personal injury summons in which she makes no reference to back pain, for which she now seeks compensation.

44. For all of these reasons, this Court concludes that (even if Ms. Kelly Hannon was looking where she was going and nonetheless did not see the hazard) Ms. Kelly Hannon's recollection of events is not reliable and that she has not therefore convinced this Court that the accident occurred at all or in the manner she claims.

MS. SARAH HANNON'S CLAIM

45. As regards Ms. Sarah Hannon's case, the position is similar.

46. She claims that she fell and suffered soft tissue injuries when she caught her foot in a shore without a cover when she was running on the footpath. The shore is of similar size to the one in which her sister allegedly tripped and is located on the outer edge of the footpath.

47. In Ms. Sarah Hannon's case she claims that her two-year-old child ran out the open gate of her property along the footpath and that she ran after him and in doing so caught her right foot in the shore. This, she claims, caused her to fall and led to soft tissue injuries to her finger and damage to her back. However, this reason for the fall, that she was running after her child, was not mentioned by Ms. Sarah Hannon in the personal injuries summons nor was it set out in the replies to particulars when she was asked to provide particulars of where she was '*going to and coming from'* at the time of the accident.

48. Ms. Sarah Hannon had lived in the house at 21 Greenane Drive for two years prior to the accident and the uncovered shore is just a few feet away from the entrance gate to her house. She must therefore have been aware of the uncovered shore, and she did not seek to claim otherwise. However, she claimed that her main focus was on retrieving her child, so she was not looking where she was going and hence tripped over the shore.

Ms. Sarah Hannon leaves gate open resulting in 2 year old running out onto road

49. Ms. Sarah Hannon explained that she left the gate open on the day in question, as she was allowing her eight-year-old child to run in and out of the front garden/house at the same time as she was in the front garden with her two-year-old child.

50. Applying the same principles as apply in Ms. Kelly Hannon's case (namely the duty to look where you are going and the duty to take reasonable care of oneself, and, in this case, of children under your care and applying common sense), it seems clear to this Court that the proximate or legal cause of this accident was not the existence of the shore or the absence of a cover, but rather the failure by Ms. Sarah Hannon to take reasonable care of herself and her two year old child by allowing him to play in the front garden with the gate open.

51. In legal terms, this is what caused the accident since it was her child running out the gateway, which caused her to run after him, without looking where she was going, and hence this is what caused her inattention to the existence of the shore and thus her trip and fall. Hence the legal cause of the accident is Ms. Sarah Hannon's decision to allow her two year old child play in the front garden with the gate open and this then caused her to run recklessly after him without looking where she was going.

Ms. Sarah Hannon's credibility

52. However even if this were not the case, due to the inconsistencies in Ms. Sarah Hannon's evidence, this Court concludes that she is not a reliable witness regarding whether the accident occurred at all or in the manner claimed and hence she has failed to discharge the onus upon her to establish same on the balance of probabilities.

53. In particular, Ms. Sarah Hannon in her evidence to this Court in respect of injuries for which she claims damages, states that her back injury is sufficiently serious that she is still receiving treatment for her back and was on painkillers to this day, some five years after the accident.

False information to doctors

54. However yet again, like her sister, she was involved in a road traffic accident prior to this alleged accident and sustained a back injury therein. Like her sister, when she was examined by the doctor for the defendants, she gave false evidence since she claimed to have had no past history of any back complaints. Subsequently when that doctor reviewed the particulars of injury, he noted that she had indeed suffered lumbosacral injuries in that accident.

55. This statement to the defendant's doctor was false and Ms. Sarah Hannon knew or should have known that the false information she was giving to the defendant's doctor was for the purposes of her claim before this court. For the purpose of making this claim therefore, she falsely claimed to the defendant's doctor that she had no previous back complaints. Similar to her sister, since there were financial consequences for her in giving the impression that her current back injury was solely caused by this fall, this evidence to the defendant's doctor leads this Court to conclude that her evidence in this and other respects has become '*unwittingly adjusted'* to support her claim for compensation.

56. It is also the case that her claim for injuries to her back in these proceedings is inconsistent with the evidence, since when she attended the Emergency Department for her finger sprain, she did not complain about any back pain.

57. Ms. Sarah Hannon was also an evasive witness, when she was being cross examined about her road traffic accident, as she sought to imply that it was her neck rather than her back which was injured in that crash, when this was clearly not the case.

58. Similarly, in Limerick Hospital, where she attended after the accident outside her house, she again gave false information regarding her previous back injury, since she accepted that she did not tell the treating doctor about any previous back problems.

59. For all these reasons, this Court did not find her a credible witness and thus she has failed to discharge the onus on her of proving that the accident occurred at all, or in the manner claimed.

SIX SEPARATE TRIP AND FALL CLAIMS BY SIX MEMBERS OF SAME FAMILY

60. Although not determinative of this issue, in considering the balance of probabilities of accidents occurring, it is a factor that Ms. Sarah Hannon is the sixth member of the same family to have made slip and fall claims against Tipperary County Council in Tipperary town, most of them on holes in and around the Greenane Drive area. They are as follows:

- 21 February 2013 - Her brother, John Price, (they have the same mother) made a claim for a trip and fall in Tipperary town

- 17 August 2015 – Ms. Kelly Hannon's alleged trip and fall, the subject of these proceedings, took place in Greenane Drive

- 12 October 2015 - Her brother Billy Price (they have the same mother) made a claim for a trip and fall in Tipperary town

- 27 September 2015 - Her mother Geraldine Hannon made a trip and fall claim on a pothole in the vicinity of the Greenane Estate

- 13 April 2016 - Her sister Keisha Hannon made a trip and fall claim on a pothole in the vicinity of the Greenane Estate

- 29 May 2016 - Her sister Sarah Hannon made a trip and fall claim on a shore in the Greenane Estate, which claim has been heard as part of these proceedings.

61. In considering whether Ms. Sarah Hannon's version of events (or indeed Ms. Kelly Hannon's version of events) is correct on the balance of probabilities, it is, in this Court's view, open to it to take into account the likelihood of so many trip and falls occurring to six members of the one family on the one hand, or as implied by counsel on behalf of the plaintiffs, on the other hand the likelihood of it being just pure coincidence that six members of the same family would be so unlucky as to have six separate trip and falls claims against Tipperary County Council.

62. It is this Court's view that account can be taken of this factor by weighing the likelihood of this happening, whether on the basis of common sense or statistical evidence, in the balance, in determining what this Court has to determine, namely whether on the balance of probabilities the accident occurred as alleged or at all.

63. For the reasons aforesaid, this factor was not determinative in this case for Ms. Kelly Hannon or Ms. Sarah Hannon, but it is however relevant to note that evidence was provided by an actuary in this regard.

64. This evidence was that in relation to a very short period of just 10 months between August 2015 and May 2016, the chances of four members of the one family firstly having trip and falls and secondly for those falls to lead to injuries, was exceptionally high. Having discounted young children and older people and also having discounted wintertime accidents, the actuary calculated that the chances of this occurring was 1 in 26 million. This was based on 2 out of 100 people having an accident and then there being a 70% chance of that trip and fall resulting in injury such as to justify a claim.

65. However, the court noted that it is also the case that if one was to take a midpoint on the options provided by the actuary, i.e. 5 in every 100 people (rather than 1, 2, 5, or 10 out of 100 people) having a trip and fall and then 70% of those falls leading to injuries (rather than 50%, 70% or 90%), then the chances of this occurring to four people in the same family over a 10 month period was 1 in 666,000.

66. While this Court should never of course eliminate the possibility that the Hannons are a very unlucky family, it is the case that a 1 in 26 million chance or even a 1 in 666,000 chance of four separate trip and falls from four members of the same family in a 10 month period, leading to injury, raises the distinct possibility, to say the least, that some of these claims are not legally sustainable. (It is of course the case that, for the reasons aforesaid, this Court has concluded in relation to Ms. Kelly Hannon and Ms. Sarah Hannon that they do not have claims against the defendant.)

67. However, nonetheless, since counsel for the plaintiffs objected to the introduction of this evidence, it is relevant for this Court to point out that, this Court is involved in deciding matters on the balance of probabilities. Accordingly, it seems clear to this Court that a factor in that exercise can be determining whether matters, directly and indirectly related to the claim at issue (in this case so many members of the same family having trip and falls), arise by pure coincidence or whether there is a more probable explanation. Thus, this Court can see no reason why such statistical evidence should not be used to aid a court in reaching its conclusions on the balance of probabilities.

68. This Court would therefore dismiss the appeals of both plaintiffs in these actions and affirm the order of His Honour Judge Teehan of the Circuit Court.

69. This Court would also award costs of this action against both plaintiffs (to include High Court and Circuit Court costs).

Lose-lose on the double for the 'winning' defendant - at first instance and on appeal

70. As both plaintiffs do not appear to be a mark for damages, it may well be that Tipperary County Council/the taxpayer will end up having to pay its own legal costs even though it has won the litigation.

71. If so, this may be an example of what the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42 has described as the '*inevitable injustice'* for defendants who refuse to '*buy off'* what they believe to be unmeritorious claims (and thus amount to '*little short, at least in some cases, of blackmail'*). Such defendants thereby end up 'losing' financially, when they have to pay their own legal costs of 'winning' proceedings brought by an impecunious plaintiff.

72. As noted in more detail in *Dempsey v. Foran* [2021] IEHC 39, in the absence of financial disincentives for such plaintiffs, this '*inevitable injustice'* means that there is an unlevel playing field since, in terms of legal costs, it is 'win and no lose' for impecunious plaintiffs but 'lose/lose' for defendants (whether the State, insurance companies or individuals with at least modest means).

73. Indeed, this case is an example of a case where it is 'win and no lose' for the plaintiffs and 'lose-lose' for the defendants/the taxpayer *on the double*. This is because the plaintiffs lost at first instance in the Circuit Court (and so it is likely to have cost the defendant money to have 'won' the case). Yet this case is an example of how impecunious plaintiffs with unmeritorious claims can inflict further costs on the defendant

(at no apparent cost to the themselves in terms of legal costs), by appealing that decision. If the defendant refuses to buy off that appeal (just as it refused to buy off the first instance proceedings) and if the defendant wins the appeal, which has happened, the legal costs of the appeal, as well as the legal costs of the first instance decision, are unlikely to be recovered.

74. In the absence of there being a sufficient financial disincentive for such plaintiffs (whether regarding the initial Circuit Court claim, the appeal to the High Court or both), the only way to discourage unmeritorious claims being brought by impecunious plaintiffs is by defendants being willing to pay more to win the litigation than to settle it. Such an approach is likely to lead to impecunious plaintiffs with unmeritorious claim finding it more difficult to persuade lawyers to spend their valuable time pursuing such claims.