THE HIGH COURT

[2024] IEHC 445

Appeal No. 1

BETWEEN **[Record No. 2023/157 CA]**

DANIEL KAZMIERCZAK

PLAINTIFF

AND

VIDIMANTAS GAIZAUSKAS

DEFENDANT

Appeal No. 2

[Record No. 2023/158 CA]

BETWEEN

DANIEL KAZMIERZAK

PLAINTIFF

AND

MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Mícheál P. O'Higgins delivered on the 11th day of July, 2024

Background

1. These two appeals proceeded before me on Friday last, 5th July, 2024. I gave an *ex tempore* judgment in which I found for the plaintiff/appellant on a two thirds/one third liability basis. I concluded that the accident was primarily caused by the actions of the untraced driver of the silver car who had impermissibly cut across the middle lane of traffic and created the emergency that caused the collision, resulting in the plaintiff's injuries. I adjudged the plaintiff to be partly responsible for the accident on account of his failure to drive at a speed, and in a manner that enabled him to react sufficiently to the emergency that had been created up ahead. For the reasons given in that *ex tempore* ruling, I decided the plaintiff was one third responsible for the accident. Earlier in the proceedings, I had determined that no case had been made out by any party against the defendant in the first set of proceedings, Mr. Gaizauskas, and I acceded to Mr. Clarke's application for that defendant to be let out of the proceedings.

2. I then assessed damages and awarded the appellant, Mr. Kazmierczak €16,305 in damages which included the agreed special damages of €2,305. That figure was based on a liability basis of 100%. Therefore, applying the two thirds/one third liability finding, the net decree for the plaintiff was €10,870.

Issues on costs.

3. Broadly speaking, this judgment is concerned with three issues on costs:

1. The question of whether the appellant is entitled to costs in both the Circuit Court and High Court.
2. The question of who should pay the costs of the successful defendant, Mr. Gaizauskas.
3. The question of whether the MIBI is entitled to a differential costs order as against the appellant.

Issue 1: The costs of both hearings

4. This issue was not the subject of major dispute by the parties. Sections 168 and 169 of the Legal Services Regulation Act 2015 deal with the jurisdiction to award costs in civil proceedings. Section 169 of the Act embodies the common law presumption that costs follow the event. The section also identifies certain factors relevant to the exercise of the court's discretion. The section provides as follows:

> *"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*
>
> *(d) whether a successful party exaggerated his or her claim,*
>
> *(e) whether a party made a payment into court and the date of that payment,*
>
> *(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*
>
> *(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.*
>
> *(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."*

5. In the present case, the clear outcome of this appeal, which costs presumptively ought follow, is the success of the appellant in having the order of the Circuit Court set aside. I take the view that the appellant has been "entirely successful" in the proceedings within the meaning of the section because he has succeeded in recovering an award of damages, albeit with a finding of contributory negligence being made against him. That being so, the section creates a strong default position that costs be awarded to the successful party unless the court orders otherwise, having regard to the nature and circumstances of the case, and the statutory criteria set out within s.169(1)(a) to (g) above.

6. Counsel for the MIBI, correctly in my view, has made no substantive submission against the appellant being entitled, as a matter of principle, to an order in both the Circuit Court and the High Court to reflect the outcome of the proceedings. Instead, Ms. Flahive SC's submissions focussed on the question as to the appellant's entitlement to an "order over" in respect of the successful defendant's costs, and secondly on a separate matter concerning her application for a differential costs order to reflect the fact that the ultimate shake-out of the case was an award within the jurisdiction of the District Court.

7. In the circumstances, therefore, it appears to be unopposed that the appellant is entitled to his costs order against the Motor Insurers' Bureau in respect of both hearings to reflect the outcome of this appeal.

8. Mr. O'Donnell SC for the appellant submits that a reasonable outcome would be the appellant recovering <u>one</u> set of District Court costs for the hearing in the Circuit Court and <u>one</u> set of Circuit Court costs for the hearing of this appeal in the High Court, together with a certificate for senior counsel.

9. No argument has been made, at a level of principle, against that suggested approach, save that the Bureau is firmly resisting the "order over" application and also seeks a differential costs order and set-off order.

10. It seems to me that the appellant is correct to acknowledge that no more than District Court costs can be awarded in respect of the Circuit Court hearing, because the governing finding is the *net* damages award, not the damages valuation based on 100% liability. Since the net decree of €10,870 is within the jurisdiction of the District Court, it follows from s.17 of the Courts Act 1981, as amended by s.14 of the Courts Act 1991, that the appellant shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the lowest court that had jurisdiction to make such an award, being the District Court in this case. Therefore, with respect to the hearing in the Circuit Court, I award the appellant District Court costs only.

11. Having regard to the nature and complexities of the case, I am satisfied it would be appropriate to grant a certificate for junior counsel in the Circuit Court. A case involving an untraced or uninsured motorist always carries a degree of procedural complexity and this case is no exception.

12. Order 53 r.29 of the District Court Rules (Statutory Instrument No. 17 of 2014) provides as follows:

> "*In the award of costs in any civil proceedings in the [District] Court to which rule 28 does not apply, a fee for counsel may not be included unless the Court certifies that, in its opinion, the employment of counsel was necessary for the attainment of justice or for enforcing or defending the rights of the party concerned."*

13. In this case, I am satisfied that the employment of counsel in the Circuit Court was necessary for the obtainment of justice and for defending the rights of the appellant. Accordingly, in respect of the hearing in the Circuit Court, I will grant the plaintiff District Court costs together with a certificate for one counsel.

14. In respect of the hearing in this court, I am also satisfied at a level of principle that it would be appropriate to grant a certificate for two counsel. While the case concerned a

reasonably straightforward road traffic accident, there were in fact two sets of proceedings, one of which involved the Motor Insurers' Bureau of Ireland. The involvement of the Bureau gave rise to considerable complexity, including judgment calls as to how many parties to sue, which jurisdiction to proceed in, issues as to the 1% rule under the MIBI Agreements (which I will come back to later), procedurally difficult issues as to summoning witnesses, evidential sequencing calls and, as this judgment indicates, reasonable complex costs issues.

15. While not a decisive matter, I note that the Bureau quite understandably retained the services of a senior counsel to deal with the two cases.

16. I take the view that it was reasonable in the interests of justice generally, owing to the exceptional nature of the proceedings and also the questions of law that were likely to arise, for the appellant's solicitor to retain two counsel for the hearing in this court. Accordingly, in respect of the hearing in this court I will grant the plaintiff a certificate for second counsel.

Issue 2: "Order Over" application

17. Moving then to the areas where there was undoubted dispute, I will firstly deal with the question concerning the appellant's application for an "order over" against the Bureau, in respect of the costs incurred by Ms. Gaizauskas in defending both hearings.

18. The legal position is governed by s.78 of the Courts of Justice Act 1936 which provides as follows:

> *"Where, in a civil proceeding in any court, there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the Court, if having regard to all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed."*

19. This provision gives the court a discretion to be exercised judicially, having regard to all the circumstances of the case. The appellant here is invoking s.78 of the 1936 Act and also points to correspondence which was sent on his behalf regarding this issue, which I will return to presently.

20. In defence of her client's position, Ms. Flahive has made a number of points as to why, in her submission, an "order over" should not be granted. Firstly, she submits that the involvement of the Bureau does not take from the fact that the onus is always on a litigant to choose what parties to sue, or not to sue, and that consequences will flow from any decision by a plaintiff to bring a case against a party whom the court ultimately concludes has no case to answer. Counsel submits it was the appellant's call whether to sue Mr. Gaizauskas and the appellant must ordinarily bear responsibility for the consequences of any such judgment call where that decision doesn't come off.

21. Secondly, counsel calls in aid the fact that both in the Circuit Court and the High Court the appellant himself ultimately gave evidence exonerating Mr. Gauzauskas of any wrongdoing. It follows therefore, as a matter of reasonable inference from the appellant's own evidence in both courts, that it was incorrect and simply not warranted to issue proceedings against Mr. Gauzauskas *at all.*

22. Ms. Flahive further submits that, particularly after the outcome of the hearing in the Circuit Court, the appellant should have taken stock and realised that it simply was not appropriate to continue as against Mr. Gaizauskas. If there was to be an appeal after the Circuit Court hearing, it should only ever have involved the Bureau, particularly in circumstances where the plaintiff had said in evidence on the DAR that Mr. Gaizauskas was not to blame, and ultimately confirmed this position in the course of his evidence in this court.

23. Counsel submits that it was not up to the Bureau to decide whether to let the other defendant out of the proceedings; this was, by definition, a matter for the party bringing the case, particularly after the run of the hearing in the Circuit Court.

24. Moreover, counsel points to the fact that the case pleaded against Mr. Gaizauskas was different to the case pleaded against the untraced driver, into whose shoes the Bureau steps. This factor also, says counsel, is a relevant matter for the court's discretion.

25. Finally, Ms. Flahive makes an interesting argument that the Bureau should not be regarded in the same way as an ordinary litigant, in that the Bureau is the "insurer of last resort", and secondly faces some real and practical difficulties in defending an action. Counsel submits that the Bureau faces inevitable difficulties in investigating accidents and taking instructions which renders it reasonable for the Bureau, more than ordinary litigants, to adopt a "wait and see" approach on issues such as the concurrent liability of other defendants. Unlike other parties, the Bureau "has no client" from whom it can take instructions as to the circumstances of an accident. All these factors, it is urged, place the Bureau in a more difficult position than ordinary litigants. Counsel submits that in these particular circumstances it was more than reasonable for the Bureau to adopt something of a wait-and-see approach. The alternative approach – that of letting out Mr. Gaizauskas from the outset - would have meant the Bureau was automatically conceding whatever legitimate advantage it had under the 1% rule.

26. I have considered these points, which have been skilfully conveyed, and I feel that I should at a minimum take these points into account in exercising my statutory discretion in this matter. I think there is some force to the arguments that have been made, particularly the argument that at Circuit Court stage the appellant should have, prior to continuing as against Mr. Gaizauskas, "taken stock" and assessed whether, even on his own evidence, there was a

sufficient case to warrant pressing on against Mr. Gaizauskas. In my view this is quite a strong factor tending in favour of declining the appellant's application for an "order over".

27. However, given that the court is effectively carrying out a balancing exercise, I have to consider whether there are other factors that have a bearing on this issue which might tilt the scales one way or the other. Having considered all of the facts of the case, it seems to me there are three stand-out features that outweigh the points made on behalf of the Bureau, and which cumulatively, just about tilt the scales in favour of the appellant's application.

28. These are firstly, the fact that on the 15th January 2020, the appellant's solicitors sent what is known as an *O'Beirne* letter to the Motor Insurers' Bureau, warning it that if an admission of liability was not forthcoming, the appellant would be obliged to institute proceedings against both the Bureau and against the driver of the other car involved, Mr. Gaizauskas.

29. The final paragraph of the letter cautions as follows:

> "*Finally, please note that in circumstances where an admission of liability is not forthcoming from you or the other party, we will be obliged to institute proceedings against both you and the other party. In the event of this matter ultimately proceeding to court and one defendant only being held liable and other defendant being exonerated an application will be made to court for an Order pursuant to Section 78 of the Courts of Justice Act 1936, as amended, that such unsuccessful defendant would be held liable for such successful defendant's costs and a copy of this letter will be produced in court in support of such application."*

30. It seems to me that the very eventuality cautioned in the letter has now come to pass. I am told by counsel, without demur, that there was no substantive response to the appellant's *O'Beirne* letter.

31. The second feature that in my view is significant concerns the workings and applicability of what is known as the "1% rule".

32. In Noctor and Lyons, *MIBI Agreements and the Law*, 3rd Ed., (Bloomsbury Professional) the authors reference the decision of Murphy J. in *Bowes v. MIBI* [2000] 2 IR 79:

> *"Moreover, the procedure ensured that the [MIBI] would be the payer of last resort. Any persons whose negligence contributed to the injuries could be made a defendant by the victim, either at his election or at the direction of the [MIBI], and no matter how small a part the negligence of that defendant played in causing the accident, the fact that the judgment could be recovered against him for the entire amount relieved the [MIBI] of any liability whatever."*

33. The authors say that the 1% rule is more a colloquial term as opposed to a rule of law. It has entered the legal lexicon as it is of obvious importance when a plaintiff is suing a number of defendants, one of whom is the MIBI. According to the authors, where the MIBI is dealing with a claim on behalf of an uninsured or untraced driver, then, in circumstances where there are other defendants, the MIBI will often fight tooth and nail in anticipation of some finding of negligence being made against one of the other defendants. If that happens, and if the plaintiff can proceed to enforce the judgment against one of the other defendants, the MIBI is relieved of any obligation to satisfy the plaintiff's judgment, notwithstanding any finding of liability having been made against the uninsured motorist or, in separate proceedings, against the untraced driver.

34. Speaking at a level of generality, the workings of the 1% rule will operate on the minds of any lawyer who is tasked with representing the interests of any litigant who has been injured in an accident involving an uninsured or untraced driver. The prospect that the Bureau may escape liability under the rule if any percentage liability is found against a

named defendant, may well render it appropriate for a solicitor acting for such a plaintiff to adopt a cautious "belts and braces" approach and sue both the Bureau and the named plaintiff. While each case will of course fall to be assessed under its own individual facts, it seems to me that the workings of the MIBI agreements, and in particular the 1% rule, creates a situation where, all things being equal, it may be professionally prudent for a solicitor in such circumstances to err on the side of caution and, at the very least, give consideration to suing the other driver as well.

35. The other point to bear in mind under this heading is that litigation is an uncertain business and things don't always go to plan during a hearing from an evidential point of view. Depending on the run of a hearing, a witness' testimony may turn out slightly different from their initial statement, or their evidence may undergo revision in the white heat of cross examination. In these circumstances, it may be difficult to criticise a solicitor for erring on the side of caution.

36. The third issue that in my view has particular significance in the balancing exercise that I have to perform here is the fact that, following the hearing in the Circuit Court, the appellant's solicitors took the prudent and Supreme Court-endorsed decision to issue a "without prejudice save as to costs" letter on the Bureau. By letter dated 20th July 2023 and marked "without prejudice save as to costs" E.M. O'Hanrahan Solicitors wrote to the Bureau and also the solicitors for Mr. Gaizauskas in the following (material) terms:

> *"In court it was accepted that the event was caused by a silver car which abruptly changed lane and left the scene. We acknowledge that there will likely be a finding of contributory negligence on our client's part, but in the context of the circumstances in which the accident took place, our expectation is that there will be liability on the part of the MIBI in respect of the actions of the untraced driver who caused a dangerous situation which resulted in injury to our client.*

The plaintiff is willing to settle his proceedings for a sum of €5,000 and his District Court costs in respect of both sets of proceedings along with any outlay in relation to filing the Notices of Appeal. The plaintiff would also require to be indemnified in respect of any costs order in favour of Vidimantas Gaizauskas in 3885/2020.

A similar offer has been sent to [the Bureau solicitors] in respect of record number 3885/2020.

The offer will remain open for a period of fourteen days.

Should the matter proceed to trial in the High Court on appeal, it will be our intention to bring this letter to the attention of the Court in respect of any costs orders which may be made at that time."

37. Again, that eventuality has played out and it seems to me that the letter written by the appellant's solicitors was a well-judged letter which the court should take into account in exercising its discretion in this matter. I am told by counsel that the letter did not prompt a substantive response.

38. In *M.N. v. S.M. (Damages)* [2005] 4 IR 461 the Supreme Court (Geoghegan J.) recommended the use of such correspondence as being in the interests of justice, albeit that that was in a situation of a defendant successfully appealing the size of a damages award made by a jury in the High Court in a sexual abuse case. Geoghegan J. endorsed the utility and practice of sending a "without prejudice save as to costs" letter as being something that should be encouraged.

39. In circumstances where the Supreme Court has endorsed the sending of such correspondence and where a well worded letter was sent here, cautioning the very outcome that has in fact arisen, I think I should attach considerable weight to this particular factor. After all, had the offer outlined in the correspondence been taken up, all issues in the proceedings would have been resolved.

40. Since the ultimate decision of this court on appeal has resulted in an award for the appellant that is, in fact, greater than the sum mentioned in the "without prejudice" letter, and since the letter also fairly acknowledged the issue as to the appellant's own contributory negligence, I think fairness requires that I should give effect to the letter.

41. Weighing all these factors in the scales, and notwithstanding the able submissions made on behalf of the Bureau, I find that on the particular facts of this case, it would be fair and reasonable to grant the appellant an "order over" in respect of the successful defendant's costs in both courts.

Issue 3: Application for differential costs order.

42. Moving then to the third issue, Ms. Flahive for the Bureau submits that since the decree in favour of the appellant of €10,870 was well within the jurisdiction of the District Court, the Bureau should be entitled to a cost differential order pursuant to s. 17(5) of the Courts Act 1981 as amended by substitution by s.14 of the Courts Act, 1991. Counsel submits that this was "always a District Court case" and that the plaintiff's own medical report makes this clear. Counsel relies on the plaintiff's own evidence which confirmed that the injuries were soft tissue in nature and cleared up within a relatively short period of time.

43. The principles to be applied in an application for a costs differential order are discussed at length in the judgment of Peart J. for the Court of Appeal in *Moin v. Sicika* [2018] IECA 240. The case in fact concerned two separate personal injury cases brought in the High Court where the plaintiff had achieved an award well within the jurisdiction of the Circuit Court. Each award was based on full liability with no element of contributory negligence. In each case the trial judge awarded the plaintiff costs on the Circuit Court scale and a certificate for senior counsel but declined the defendant's application for a differential costs order under s.17(5) of the Courts Act,1981 as amended by substitution by s.14 of the Courts Act 1991. The defendant successfully appealed those costs decisions.

Section 17(5) provides that a trial judge who has awarded damages to a plaintiff which are within the jurisdiction of a lower court may order the plaintiff to pay the difference between the costs actually incurred by the defendant and those which would have been incurred had the proceedings been commenced and determined in the appropriate court (a differential costs order). The judge can measure these costs in certain cases or direct that they be taxed. Section 17(5)(b) provides for a set-off against the plaintiff's costs.

44. In *Moin v. Sicika*, the Court of Appeal emphasised that the clear legislative intent of s. 17 was to limit the amount of costs to be awarded in a case commenced in a higher court than was appropriate. The onus was on the plaintiff to ensure that the proceedings are conducted in the lowest court that has jurisdiction to make an award in the amount that is reasonable to expect.

45. While s. 17 gives the trial judge discretion, the Court of Appeal held that it is incumbent upon a trial judge in circumstances where an award is significantly within the jurisdiction of a lower court to make a differential costs order unless there are good reasons for not doing so. The trial judge must have regard to the clear legislative purposes of s.17 and all the relevant circumstances of the case.

46. In awarding differential costs orders in those two appeals, the Court of Appeal observed that the two cases were not borderline cases. Moreover, the defendants had given written notice months before trial of their view that the claims were within the Circuit Court jurisdiction and that they would seek a differential costs order at the conclusion of the appeal.

47. In the present case, the award of damages, based on a 100% finding of liability, was €16,305. The net award, deducting one third for contributory negligence, was €10,870. The defendant may disagree with the court's finding, but respectfully that is not the point. The court has found that, but for the deduction of contributory negligence, the appellant's injuries were such that it was appropriate for the appellant to issue proceedings in the Circuit Court.

48. Unlike *Moin v. Sicika*, this is not a case where the judgment call on jurisdiction was clearcut.

49. In my view, there are 5 factors in play here which dictate that I should exercise my discretion against granting a differential costs order.

50. These are:

1. But for the finding of contributory negligence, the damages would have exceeded the jurisdiction of the District Court.
2. It was reasonable in the circumstances for the appellant's solicitor to issue proceedings in the Circuit Court.
3. There is no evidence before me that the defendant's solicitor issued a warning letter, calling on the appellant to remit the proceedings to the lower court (as occurred in *Moin v. Sicika*).
4. On the contrary, a well worded and reasonable "without prejudice save as to costs" letter was issued by the appellant's solicitors which offered a reasonable compromise. This compromise was not accepted. The appellant has secured a better outcome in this appeal than was sought in the "without prejudice" correspondence.
5. Were the court to grant the costs order as sought by the defendant here, that would undermine and effectively set at nought the valid purpose and utility of the appellant's unanswered letter.

51. For all these reasons, I conclude it would not be fair or reasonable to grant a differential costs order against the appellant.

Signed:

Mícheál P. O'Higgins

Appearances:

For the Plaintiff: John O'Donnell SC and Dermot Francis Sheehan BL instructed by E.M. O'Hanrahan Solicitors

For the Defendant in the First Appeal: Tom Clarke BL instructed by O'Riada Solicitors

For the Defendant in the Second Appeal: Moira Flahive SC and Conor Kearney BL instructed by Stephen Mac Kenzie & Co. Solicitors