



THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 127

Record Number: 2019/320

**Donnelly J.
Haughton J.
Power J.**

BETWEEN/

HELENA O'CARROLL

**PLAINTIFF/
RESPONDENT**

- AND -

**ARAS SLAINTE LIMITED, VHI INVESTMENTS DESIGNATED ACTIVITY COMPANY T/A
VHI SWIFTCARE CLINICS, STEFAN BYRNE AND ST. JAMES'S HOSPITAL**

DEFENDANTS/APPELLANT

**EX TEMPORE JUDGMENT of Ms. Justice Power delivered on the 20th day of January
2020**

1. This is an appeal of an order of the High Court (Cross J.) dated 28 May 2019. Following the dismissal of the claim of the plaintiff/respondent (hereinafter 'the respondent'), Cross J. refused to make an order for the costs of the proceedings in favour of the third named defendant/appellant (hereinafter 'the appellant').
2. The appellant has appealed the High Court's order on costs on the grounds that the trial judge erred and misdirected himself in law in a number of respects, including, in failing to award the costs of the proceedings to the appellant, in departing from the principle that 'costs follow the event', in failing to provide any or any adequate basis for departing from that principle and in holding that aspects of the cross-examination of the respondent by counsel for the appellant amounted to an allegation of fraud.
3. The appellant also claims that the trial judge erred in finding that certain aspects of the cross-examination of the respondent were such as to warrant the disapprobation of the court and that such disapprobation could only be marked by making no order as to costs in respect of the totality of the proceedings.
4. Even if the conduct of the defence was such as to warrant the disapprobation of the court, the appellant also alleges that the learned trial judge erred in law and in fact in making no order as to costs or in failing to attach any or any adequate weight to a pre-trial offer made by the appellant to the respondent on 9 May 2019.

5. This Court has heard and considered the submissions of the appellant and of the respondent.
6. The appellant is an orthopaedic surgeon who afforded care to the respondent in the aftermath of an injury she sustained to her right hand when it was crushed under a heavy mirror.
7. In a judgment delivered *ex tempore*, the High Court judge dismissed the respondent's claim primarily on the grounds that she had failed to establish that the appellant had breached his duty of care towards her. However, Cross J. indicated that, in his opinion, an allegation of fraud had been made against the respondent during the course of proceedings. In his view, this allegation was without basis. He considered that the court should mark its disapprobation of this unfounded allegation in some way.

Decision

8. As observed by the High Court judge, the general rule in relation to costs is that, 'costs follow the event'. Order 99, r. 1(3) of the Rules of the Superior Courts articulates this general principle, applicable both in the High Court and on appeal. Essentially, costs follow the event unless the court, for special reason, directs otherwise. This principle was confirmed by Clarke J. (as he then was) in *Veolia Water U.K. plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81. In that judgment, Clarke J. stated that the overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are entitled to the reasonable costs of maintaining proceedings. Parties who successfully defend proceedings taken against them are prima facie entitled to the costs which they have expended in defending the action.
9. That said, the question of costs is, of course, a matter that ultimately comes within the discretion of a trial judge. That he or she has a discretion to depart from the general principle was confirmed in the case of *Child and Family Agency v. O.A.* [2015] 2 I.R. 718. Having confirmed the long-established principle that costs are a discretionary matter, MacMenamin J. went on to point out that a judge is not '*at large*' in considering a costs application. A judge must exercise his or her discretion in each case within jurisdictional criteria established by law.
10. Counsel for the appellant in this case cited various examples of cases in which the general rule was not followed. The Court was referred to a number of examples of such cases which are set out in *Delany and McGrath On Civil Procedure* (4th ed., Thomson Reuters, 2018).
11. That list is not exhaustive. A trial judge is also entitled to exercise his or her discretion and to depart from the general principle if the Court considers that a line of inquiry introduced by counsel was improper, having regard to all the circumstances of the case.

12. The line of questioning at issue in this appeal was that conducted by counsel for the appellant on 17 May 2019. It is set out at p. 38 of the transcript for that day and it merits being cited in full. At line 19, counsel for the appellant asked the respondent:

Q. How were you in the days after that? How did the fracture affect you?

A. Well I couldn't use my right hand. It was fractured.

Q. And you were protecting you. You were guarding it as it were.

A. Absolutely, but I wasn't put in a sling. When I initially saw the doctor in Dundrum I was put in a cast and a sling. They removed them on 20th.

Q. You were effectively disabled as it were by the fracture.

A. That is correct.

Q. Can I just show you a picture from your Facebook account from 24 May 2015? I am just going to hand a copy to you. Obviously, you are wearing a, sorry, the person in the picture is wearing a backwards baseball cap and so that is you.

A. It was at my friends 40th and you can see I am wearing the splint.

Q. I can absolutely see that you are wearing a splint.

A. Yes.

Q. Just to be clear, you are gesticulating with the hand. You were engaged in some kind of dance movement.

A. No, I wasn't dancing. I wasn't dancing. Somebody wanted to take a photograph of my splint so I went like that."

She indicated the gesture.

"A. I wasn't dancing."

At this point Cross J. intervened:

"Q. You raised your right arm to show the splint.

A. Yes. I raised my right arm. Yes."

Counsel for the appellant continued:

"Q. That may explain what you were doing with your right hand. But does that explain what you were doing with your left hand. This was just posing to show off the splint. That is what this picture is.

A. Yes. I don't see the relevance of this."

Mr. Gleeson intervened:

"A. *I am not sure of the relevance of this, Mr. Mills?"*

At this point Cross J. intervened:

"Q. *Is it suggested, Mr. Mills, that the plaintiff is in some way over-magnifying her injuries?"*

The reply was:

"A. *I am going to suggest to the plaintiff that in circumstances where she suggests that she was significantly disabled by the fracture and in circumstances where she suggests that she was protecting or guarding the hand, that this picture taken in a social setting in the manner in which it was taken suggests that perhaps she was not doing so. What weight you attach to that, Judge, is ultimately a matter for you."*

Cross J. replied:

"Q. *Yes, I am just interested to know what case you are making against her.*

A. *I was actually sitting down. I raised my right hand."*

This is the plaintiff speaking.

"A. *You can actually see my 3 fingers are clawed in like that..."*

The plaintiff, again, indicates the gesture.

"A. *[A]nd the only finger I am able to extend is my index finger."*

Counsel for the appellant continued:

"Q. *If that is the explanation for the picture that is the explanation for the picture.*

A. *You will also see that the splint isn't even covering my hand and fingers. I don't understand what you are trying to insinuate here.*

Q. *I am suggesting that shortly after this fracture which you have just told the judge was significantly disabling, you were out and about socially.*

A. *Also on that night I had to ask a friend to go to the loo with me to undo my belt to use the loo.*

Q. *It may well have been somewhat disabling. I am just suggesting that it wasn't as disabling as you want me-"*

He was interrupted by an answer.

"A. *I didn't say I couldn't raise my arm at any point. I did not say that. I said my hand was affected. I did not say I could not raise my arm.*"

13. It is clear from the transcript that the trial judge did not consider that the line of questioning pursued by counsel for the appellant was proper. It is also clear that the respondent was, at least to some extent, offended by the line pursued. The trial judge intervened as he was entitled so to do.
14. Counsel for the appellant has urged upon this Court a defendant's entitlement to pursue a line of questioning that is directed towards, or at least involves, a certain measure of scepticism and he referred the Court to the judgment in *Rosbeg Partners v LK Shield Solicitors* [2018] IESC 23 as authority for his proposition in this regard. Whereas this proposition may be true, the Court, nevertheless, considers that there must be a proper basis for pursuing a line of inquiry that is directed towards questioning the truthfulness or honesty of a witness.
15. The Court accepts that this case was a medical negligence action and that counsel for the appellant was entitled to conduct a robust cross-examination of the claim in negligence that was made against him. However, it observes that counsel for the appellant did not cease with his particular line of cross-examination when an explanation was given for a picture which he had introduced into evidence and which was taken from Facebook. The Court observes that this line of inquiry was also pursued, to some extent, when Mr. Colgan gave his evidence.
16. Insofar as counsel for the appellant refers to a letter written to the respondent a week before trial, inviting her to withdraw her action with no costs, the Court is satisfied that the trial judge had regard to this letter in coming to his decision and that he was entitled to afford it the limited weight that he did.
17. I consider that the trial judge was also entitled to indicate his disapproval of the line of inquiry pursued. However, in making no order for costs in circumstances where the appellant had fully and successfully defended a claim in medical negligence, I am of the view that the trial judge's decision was disproportionate.
18. To allow such an order to stand in circumstances where no allegation of fraud was actually made would, in my view, create a certain 'chilling effect' upon defendants who robustly cross-examine plaintiffs with a view to establishing the extent to which, if at all, a plaintiff may be overstating certain symptoms. In conducting a robust cross-examination, counsel for a defendant must, of course, be satisfied that there is some evidential basis for putting such questions to a plaintiff.
19. In view of the foregoing, I consider that while the trial judge was entitled to express his disapproval of the line of inquiry pursued by counsel for the appellant, he ought to have done so in a manner that was proportionate, having regard to all the circumstances.

20. The Court considers that a more proportionate order would have been to allow the appellant to recover 50% of the costs he had incurred in defending this claim.
21. Accordingly, I would allow the appeal and make an order in accordance with this judgment.