



THE COURT OF APPEAL

**UNAPPROVED
NO REDACTION NEEDED**

**Neutral Citation Number [2021] IECA 253
Appeal Number: 2017/595**

**Whelan J.
Faherty J.
Collins J.**

BETWEEN/

SEAMUS COMERFORD

APPELLANT

- AND -

CARLOW COUNTY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 8th day of October 2021

Introduction

1. This is an appeal against the order of the High Court of 24 November 2017 dismissing the appellant's claim for damages for personal injuries arising from a trip and fall which occurred while he was walking on the public footpath in the vicinity of his home in Tullow, Co. Carlow on the evening of 2 March 2013. The action was heard before the High Court on 20, 21 and 24 November 2017. The appellant's contention is that fundamental unfairness arose in the conduct of the hearing of the case, including in particular the failure to apply the so-called "Phipson Rule" to the issue of admissibility of the disputed contents of unproven medical notes (the CareDoc notes). The Phipson Rule has been characterised as the principle that counsel

ought not to rely in the course of cross-examination on the contents of a document unless she is in a position and entitled to put it in evidence when called upon to do so.

2. The trial judge had initially ruled, quite properly, on 21 November 2017 that the appellant could be cross-examined on foot of the said notes on the condition that their author, Dr. McInerney, be made available for cross-examination the following Friday, 24 November 2017. Notwithstanding that ruling, and after taking away the CareDoc notes to consider same on 24 November, the trial judge gave judgment whilst wholly disregarding the Phipson Rule on the consequences of a defendant's failure to comply with the said evidential rule. The appellant further contends that fundamental unfairness arose due to the failure to afford the appellant's legal team an opportunity to cross-examine the author of the CareDoc notes, the contents of which were in dispute; the alleged misapplication of the principles in the decision of this court in *Byrne v. Ardenheath* [2017] IECA 293; and, the manner in which the trial judge identified certain factors as tending to undermine the appellant's recollection of the accident such as, *inter alia*, a claim in special damages pertaining to the costs of plastic surgery and his assessment that the case from a quantum perspective lay within the Circuit Court jurisdiction. The appellant contends that to the extent that he considered those matters relevant to the determination of the issue of liability, the trial judge erred such that the orders of the High Court require to be vacated and a new trial directed.

3. For the reasons stated in detail hereafter, the court is satisfied that on this occasion the conduct of the trial in its totality was unsatisfactory and that a retrial is warranted.

Key chronological dates

4. The appellant attended CareDoc on 3 March 2013 and came to be treated by Dr. Carole McInerney. It was in that context that the notes in connection with that consultation came to be generated.

5. On 28 February 2014 a personal injuries summons issued. On 9 January 2015 an affidavit of verification was sworn by the appellant.

6. An appearance was entered on behalf of the respondent on 20 May 2014. Thereafter notice for particulars and a request for further information were submitted and responded to.

7. On 18 March 2015 a defence was delivered. At para. 2(a) the respondent required proof of “[t]he occurrence and narrative description of the incident alleged to have occurred on the 2nd of March 2013, particulars of which are denied as if same were set out and traversed *seriatim*”. Paragraph 4 of the defence pleaded:-

“The grounds upon which the defendant alleges that some or all of the personal injuries contended for by the plaintiff (the existence of which is denied) were occasioned in whole or in part by the plaintiff’s own acts: -

...

(f) Failed to mitigate his loss...”

A specific defence to the items of special damage claimed was pleaded including, *inter alia*:-

“...if the plaintiff did incur the alleged or any item of special damage (which is denied) same was not caused by the alleged or any act or default on the part of the defendant, its servants or agents.”

8. By letter of 18 October 2016 solicitors for the respondent elaborated on the allegation of contributory negligence pleaded at para. 4(f) of the defence:-

“...we note that the Plaintiff has failed to attend or to undergo appropriate treatment for his nasal deformity and to this extent, insofar as the Plaintiff complains of a persistent deformity in his nose, contributory negligence is alleged on the part of the Plaintiff in failing to seek/undergo appropriate medical attention in this regard.”

9. Thereafter on 6 January 2016 an affidavit of discovery was sworn by the appellant. Among the discovered documents were consultation notes from the practice of the appellant’s

treating GP, Dr. Gerard Moran in Carlow. The first entry is dated 3 March 2013. The notes appear to have been authored by a *locum* Dr. Carole McInerney on the said occasion. The entry appears to record a consultation with the words “obs taken by nurse”. The entry appears to be shorthand in nature and includes the following:-

“...edges look like they are healing already? injury older than stated...”

Elsewhere there is the entry:-

“...says he fell off footpath but? injuries not entirely consistent with a fall...” (emphasis added)

The discovered CareDoc notes were in the possession of the respondent for approximately one year and ten months prior to the trial of the action. A general notice to produce was served by the respondent on 24 February 2017.

Disclosure of reports and statements

10. Order 39, r. 46(1), as substituted by the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (S.I. No. 391 of 1998), provides:-

“The plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the Court.

Within seven days of receipt of the plaintiff’s schedule, the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule.”

11. Each party furnished schedules to the other in accordance with the said rule. In the case of the respondent, the schedule identified two witnesses “none of whom would appear to have relevance to the medical records concerned” (*per* counsel on behalf of the appellant, day 2 of High Court hearing, p. 21, lines 1 to 2). According to the submissions made on behalf of the respondent to the court, witnesses potentially relevant to the disputed CareDoc notes (none of whom was listed in the respondent’s schedule) were:

- (1) Dr. Gerard Moran;
- (2) Dr. Carole McInerney;
- (3) Ms. Helen Curtis, the practice secretary.

Day 2 of hearing before the High Court - 21 November 2017

12. On the second day of the hearing, at the commencement of cross-examination of the appellant, counsel on behalf of the respondent stated, “Judge, there are discovered medical records in this case...I would like to hand in a copy of those” (Day 2, p. 19, lines 3 to 5). When objection was made, he countered:-

“...If my friend wants to get technical, he is correct, these records have been given on a voluntary basis and I propose to defend the case on the basis of the contents of those records. If my friend wants to put me on formal of proof [*sic*] I will have to deal with it in another way, but if my friend doesn’t want the court to see his medical records so be it.” (Day 2, p. 19, lines 11 to 17)

Strenuous objection was made on the appellant’s behalf; it being asserted – with considerable justification in my view – that the court was being invited “to make negative inferences in the context of a plaintiff whose representatives are simply asserting that the rules of evidence must apply in this court” (Day 2, p. 19, lines 19 to 22).

The appellant's objection as articulated to the High Court

13. Reliance was placed on the schedule produced by the respondent pursuant to O. 39, r. 46(1); it being asserted that based on the said schedule, the respondent was “actually calling no medical evidence” (Day 2, p. 21, lines 7 to 8). The objection was framed on the basis that the respondent “would appear to be about to cross-examine from those records and invite the court to make undoubtedly negative inferences based on evidence that has not properly been admitted before this court” (Day 2, p. 21, lines 18 to 22). Reliance was placed on the decision of Edwards J. in *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2010] IEHC 152 (“*Leopardstown*”) and the textbook *McGrath on Evidence* (2nd ed., Round Hall, 2014). At p. 22 of the transcript the objection is articulated thus; that counsel for the respondent had:-

“...decided to adopt an improper procedure by indicating that he was going to cross-examine out of medical records that he would not appear to have been in a position to prove and he is not in a position to prove and he only...will be in a position potentially to prove it if he is granted liberty to do so by the court.” (lines 20 to 26)

At p. 24 counsel on behalf of the appellant suggested:-

“...what [counsel for the respondent] is attempting to do in putting the contents of the document is that he will be putting an expert opinion to this witness and that is a matter which obviously this witness cannot comment on at all and my friend should know that and in so doing I can only assume he is inviting the court to take any negative inference that might arise.” (lines 9 to 15)

Reliance was also placed on the Supreme Court decision of Hardiman J. in *The People (Director of Public Prosecutions) v. Diver* [2005] IESC 57, [2005] 3 I.R. 270 and the so-called “Phipson Rule”, as articulated in that case, was opened to the court.

14. With regard to the costs implications for a party who breaches the Phipson Rule, reference was made to fn. 308 of *McGrath on Evidence*:-

“...within the judgment of Edwards J. [in *Leopardstown*] in the context of a civil matter where this issue arises he also warned that a court might mark its displeasure at the failure to prove the document by an award of costs against the person or the party seeking to rely on the document in respect of which they are not in a position to prove and could not be in a position to prove at the outset of the case” (Day 2, p. 26, lines 17 to 25)

Counsel for the appellant referred the court to the Phipson Rule as articulated by Edwards J. at para. 5.53 of *Leopardstown*:-

“...if the defendant indicates that he does not accept that what the document purports to record is true then the contents of the document cannot be adduced in evidence unless and until the document is proven (or an undertaking is given to do so later), or the requirement has been waived.”

15. It was further contended that if the document be held inadmissible, as where it constitutes inadmissible hearsay, then only very limited use could be made of it. Reliance was placed on *Leopardstown* for the proposition that a cross-examiner should not refer to the contents of a document that has not been proven or is not admissible without giving his or her opponent advance notice and adequate opportunity to object (Day 2, p. 30, lines 18 to 22). There was a formal objection to counsel for the respondent leading the CareDoc notes in the absence of an ability to prove the documents in question.

Stance of the respondent

16. By way of response, counsel on behalf of the respondent asserted that on 8 November 2017, over a week prior to the hearing, the respondent’s solicitors had written to the appellant’s solicitors, stating, *inter alia*:-

“...we confirm our agreement to the admission of the medical reports of Dr. Nair and Dr. O’Reilly without formal proof. By the same token we request that the notes of Dr.

Moran in your client's discovery also be admitted without formal proof and you might please so confirm."

That letter was never replied to. In fairness, it was not contended that either the sending of that letter or the failure to respond to same conferred any procedural or evidential advantage on the respondent and it was not entitled to assume that the notes had been or would be admitted without formal proof.

17. Elsewhere, counsel for the respondent stated:-

"The only way that I can deal with it, my friend having taken the objection which in law he is entitled to take, is to apply to the court for leave to issue a subpoena for Dr. Gerard Moran, Dr. Caroline [*sic*] McInerney and the practice secretary Ms. Helen Curtis and to abbreviate the time for service of that subpoena to Friday morning in this court and to resume the case on Friday morning. I am entitled to amend my schedule of witnesses at any time during the trial and I will need to do so to include those three witnesses. Once those three witnesses are here I am then in a position to cross-examine fully and freely on the documents which have already been voluntarily discovered by the plaintiff."

(Day 2, p. 33, lines 8 to 21)

Counsel then continued:-

"The court will appreciate that this another [*sic*] one of those cases where a claim is brought against the local authority where there are no witnesses and where it is essential to test. In the public interest, it is essential to test the veracity of the plaintiff's account in the fullest possible way and to do so I need to be in a position to prove what happened when he attended for medical treatment and I propose to do so with the leave of the court." (Day 2, p. 33, lines 21 to 29)

18. With regard to the legal arguments advanced on behalf of the appellant, they were acknowledged to be:-

“...a correct statement of the law, subject to the court’s views and interpretation, but I need to put this in context: this is civil litigation, it frequently arises in civil litigation that documents are discovered, usually voluntary, and that those documents are then used in the case without formal proof.” (Day 2, p. 32, lines 5 to 11)

Ruling of trial judge on 21 November 2017

19. In a brief ruling the trial judge observed:-

“An objection has been made to this document. I’m going to grant leave to issue a subpoena returnable for Friday, if that objection continues in relation to it. I’m going to rise for five minutes to see if there is any prospect of the parties agreeing in relation to the medical reports.” (Day 2, p. 36, lines 3 to 8)

When the hearing resumed, counsel on behalf of the respondent advised the court:-

“... my solicitor...with permission of the plaintiff’s counsel, is just talking to Dr. Nair now to identify precisely who we need to subpoena for Friday to prove the notes. On the basis therefore I will be in a position to prove the notes, I’ll propose to cross-examine.” (Day 2, p. 36, lines 24 to 29)

At no time thereafter was the objection on behalf of the appellant withdrawn.

20. Thus the clear and explicit basis on which the cross-examination of the appellant on the CareDoc notes proceeded was that the Phipson Rule would be complied with and that the relevant witness or witnesses who authored same would be before the court for cross-examination at a resumed hearing the following Friday 24 November 2017.

The cross-examination

21. At the outset, the position of the respondent was put to the appellant thus:-

“You will understand that it does happen that people have an injury, find a defect and make a complaint, it does happen, okay, I put it no further than that.” (Day 2, p. 37, line 28 to p. 38, line 2)

The cross-examination proceeded on the basis that this was a fraudulent personal injury claim. Various possible scenarios that might account for the appellant's injuries, including that he fell down while drunk or was injured in a fight, were floated by counsel. Counsel focused on alleged delay between the time of the alleged trip and fall which was said to have occurred between 7:30pm to 8pm on 2 March 2013 and the time of the appellant's attendance with the CareDoc *locum* doctor the following morning:-

“Counsel: There is [*sic*] a number of explanations, I would suggest: one is that if you had been drunk you would sober up, secondly, it would be more difficult to stitch your wounds, and the third is that you are feeling no pain at the time and you are not aware that you have a significant injury; isn't that right?

Mr. Comerford: I was fully aware.” (Day 2, p. 47, lines 17 to 23)

22. At p. 48 of the transcript of day 2, the contents of the disputed consultation note ascribed to Dr. Carole McInerney were put to the appellant:-

“[Dr. McInerney] found that the edges of your wounds were healing already and suggests that the injury was older than you stated, in other words, it didn't happen the night before, it happened at some time previous to that. Are you sure you got the date right?” (p. 48, lines 24 to 28)

To this, the appellant answered that he was “100 per cent sure.” It was posited that the injuries were not entirely consistent with the fall and that they could be consistent with a fight. The appellant was also cross-examined on his failure to attend for a subsequent hospital appointment for the purposes of having his nose manipulated. It was put to the witness that the accident had not happened where or when he said it had occurred. His response was, “It happened where and when I said it happened” (Day 2, p. 53, line 27).

Evidence of other witnesses

23. Dr. A.K. Murali Nair also gave evidence on the second day of the hearing. His medical report of 10 June 2013 was admitted. He confirmed having met with the appellant on 4 March 2013. His evidence was that when he examined the wound:-

“...it did look to me like it was about two days old. Now if you ask me could it be three days old, it could be. But if you said could it be a week old, I say no.

...

Because usually the abrasions, you will get something called ‘crusting’, you will get a lot of crusting up, and so, yes, I’ll go with what he said.” (Day 2, p. 64, line 26 to p. 65, line 4)

24. Dr. Nair was thereafter cross-examined on behalf of the respondent as to the contents of Dr. McInerney’s notes thus:-

“Counsel: Now if it [*sic*] a doctor/colleague notes ‘steri-strips to large laceration as too late to stitch’, I suggest to you that that is not consistent with a wound that has occurred within the previous eighteen hours.

Dr. Nair: I cannot comment on that because that is Dr. McInerney’s opinion.

...

So I don’t think she is around today.

Counsel: It is a view which is placed presumably on what that doctor sees.

Dr. Nair: Again I would have to leave that to Dr. McInerney to explain.

...

That was her opinion and her management.” (Day 2, p. 67, lines 11 to 26)

25. In response to the query “At what stage do the edges of a wound start to heal, would that be after two or three days that you would see signs of healing in the edges of a wound?”, Dr. Nair responded, “On the face, yes, it will start healing sooner than compared to other places. In

fact on the face when you stitch people we say try to take the stitches out within five days” (Day 2, p. 67, line 27 to p. 68, line 5). The cross-examination continued as follows:-

“Counsel: But a wound that has not been stitched, if the edges are starting to heal, that is something that doesn’t take place I suggest to you for perhaps 48 hours, visible signs of healing?

Dr. Nair: On the face, yes, the edges can start sticking together, by the third/fourth day it will heal up.

Counsel: No, if the edges of a wound look like they are healing already –

Dr. Nair: Okay.

Counsel: – that wound I would suggest to you is at least a couple of days old?

Dr Nair: A day or two, yes, which would be consistent with what Mr. Comerford said.”

(Day 2, p. 68, lines 8 to 20)

There followed a line of cross-examination which appeared to be directed towards a characterisation of the appellant as intoxicated at the time he fell:-

“Counsel: Am I right that if somebody falls and hits their head first, that it is an indication that it is what is called a ‘helpless fall’, somebody who is too infirm or too incapable to get an arm out before they hit the ground?

Dr. Nair: I’m not – I’m not here to kind of dispute anything. What I’m saying is it can happen that you hit your head first. Say you are walking with your hands in your pocket, you trip on something, you can fall straight down, hit your face.

Counsel: Yes but there has to be a reason for it, in a young fit man, there has to be reason for it?

Dr. Nair: You mean if there’s no injuries to the hand?

Counsel: If they hit their head first, it is not the norm?

Dr. Nair: Well you can put your hand out and still get most of the impact onto the face.

Counsel: Yes but you will then have an injury to the hand?

Dr. Nair: Again it would depend upon what kind of place you are falling in, if it is grassy area and maybe the centre was rough.

Counsel: But you are going to get a wrist fracture or a collarbone fracture or something like that?

Dr. Nair: Not necessarily, no.

Counsel: Or certainly an injury?

Dr. Nair: Again not necessarily.

Counsel: I suggest to you that normally when people fall and hurt their heads and don't hurt their hands or arms that it is either because they are elderly, unwell or helpless for some other reason?

Dr. Nair: Usually, yes, but it can happen the other way too." (Day 2, p. 68, line 24 to p. 69, line 24)

26. Thereafter the engineer for the appellant, Mr. Barry Tennyson, was called. Counsel for the respondent effectively conceded the poor state of repair of the footpath at p. 78 of the transcript of day 2: "Sorry, but I think I can effectively concede, Judge, at this stage that that is a bad repair. It is a bad footpath repair. I am prepared to concede that" (lines 7 to 10). Elsewhere counsel for the respondent stated:-

"I am conceding that it was substandard and the court will be entitled to find that the local authority had not effectively discharged their statutory duty in carrying out that repair." (Day 2, p. 78, line 27 to p. 79, line 1)

Mr. Tennyson was cross-examined extensively on the possible mechanics of the appellant's fall.

27. At the conclusion of the second day of the hearing, counsel for the respondent initially indicated he was not going into evidence and thereafter stated:-

“I’m sorry, Judge, I have made a mistake because I had indicated that I would be in a position to prove the notes and I am obliged to do so, so I have that witness.

...

...So I will have that witness on Friday morning, Judge.” (Day 2, p. 92, lines 1 to 8, emphasis added)

The identity of the witness was not stated. It became apparent on Friday 24 November 2017 that the intended witness was Dr. McInerney. It transpired that there had never been any contact with her on behalf of the respondent to procure her attendance in court.

Day 3 of the hearing – 24 November 2017 – Application for an adjournment

28. On Friday 24 November 2017 at the resumed hearing, the respondent moved an application for an adjournment in circumstances where it had apparently been unable to trace the whereabouts of Dr. Carole McInerney since the previous Tuesday 21 November 2017, it being clear that no subpoena had been served. The court was informed:-

“She still is on the medical register, I checked that two evenings ago, so she clearly is traceable and still working as a GP it seems, but we haven’t been able to track her down, and I apologised to the plaintiff team for that fact, Judge. Our application is that the matter would be listed for the 12th for mention and we would hope to be in a position to update the court at that stage as to our efforts to find her.” (Day 3, p. 4, lines 18 to 26)

29. Counsel for the appellant made the following submission:-

“My application, firstly, is that the matter proceed to judgment today and the defence withdraw the allegations which were predicated upon Dr. McInerney note entries, Judge. If the court is not with me on application, Judge, my application then is that the matter can be adjourned to facilitate Dr. McInerney attending and being cross-examined but costs of today should be thrown away, Judge, in the circumstances and that is my application, Judge, twofold application, at this juncture.” (Day 3, p. 5, lines 18 to 27)

It was further argued that:-

“...there was a proper manner in respect of which this witness could have been tendered in evidence, that wasn't done. The defence have sought to utilise today as an adjourned date for her attendance without any reference to Dr. McInerney herself it would appear, as they simply plumped for today without any reference to whether she was available for today, and she isn't.” (Day 3, p. 5, line 29 to p. 6, line 7)

The respondent replied:-

“...we probably have to accept that not having made arrangements for Dr. McInerney's attendance in advance of the trial is something which the court could potentially criticise the defence but, as against that, I would say, Judge, the necessity for her as a witness would only arise in the event that the content of the note was not accepted by the plaintiff, and that's something which only of necessity emerged during the course of the plaintiff's evidence in the case.” (Day 3, p. 6, lines 15 to 24)

The court was advised that the appellant had been notified the previous afternoon of the difficulty encountered. Counsel on behalf of the appellant reiterated the importance of Dr. McInerney's evidence, noting:-

“Dr. Nair is in stark disagreement it would appear with the inference being invited, or the inference being tendered, by Dr. McInerney's evidence that we have yet to hear. It, you might recall, was the entry in the notebook where Dr. McInerney noted that the injury appeared to be older than the two days that it was being suggested by virtue of the early healing process and such like, Judge.” (Day 3, p. 8, lines 4 to 12)

30. The respondent did not accede to the request of the appellant that it withdraw the assertions advanced during cross-examination which were substantially predicated upon Dr. McInerney's note entries. The appellant then sought an adjournment on the basis that costs

should be awarded against the respondent on a “thrown away” basis. The trial judge proposed the following course of action:-

“Perhaps the way for me to deal with is Dr. McInerney’s note is the one of significance is it?

...

I might review the papers in relation to that and then see. I will put the matter in for mention this morning at 12.00 and then I can make a decision as to whether I can give judgment or whether I am going to adjourn the matter. So I just want to address the significance of the note of Dr. McInerney in the overall –

...

This was about the age of the injury he’s relying upon?” (Day 3, p. 8, line 18 to p. 9, line 3)

The trial judge specifically confirmed; “Well I’ll examine Dr. McInerney’s note” (Day 3, p. 9, lines 19 to 20). Counsel for the appellant reiterated, “it should be noted that obviously the plaintiff hasn’t had the opportunity to cross-examine and the court might be cognisant of that” (Day 3, p. 9, line 28 to p. 10, line 1). The trial judge observed, “Yes, I appreciate that” (Day 3, p. 10, line 6).

The *ex tempore* judgment

31. The judgment is curious, in light of the assurances of the trial judge outlined above, for its complete omission of any reference to the CareDoc notes of Dr. Carol McInerney. No reference whatsoever is made to the crucial procedural and evidential dispute between the parties notwithstanding that the trial judge had expressly risen for the purpose of, *inter alia*, reviewing the said notes. He made no reference to the applications of both the respondent and the appellant for an adjournment necessitated by the absence of the witness. He did not at any point indicate that he was disregarding or excluding the CareDoc notes from his consideration

or not attaching weight to their tenor. The court expressed the view that it did not find the appellant's recollection of the details of the alleged accident convincing for a variety of identified reasons:-

“He said his foot went into a hole and then he fell forward and his face hit the ground on some rough concrete some 30 inches from his foot. The plaintiff is 5 ft 6 inches tall and in this court's view the plaintiff's account of how he fell is improbable when one considers that he did not have any injuries to his knees or his hands and yet landed on his face only 30 inches from his foot.” (para. 4)

It is to be observed that the reference to the absence of any injury to his hands is reflective of one of the controversial observations of Dr. Carole McInerney in the CareDoc note entries.

32. The court noted that the appellant had claimed that the fall had occurred outside his house, as recorded in Dr. Nair's letter of 10 June 2013, but the hole into which he allegedly fell was some 200 metres distance from his residence. The court found at para. 4 that the hole into which the appellant said he had fallen could not be described as a “pothole but a hole in a pedestrianised section of block paving”. The judgment opined that if, as the appellant had given evidence, he was coming from his home to the footpath and was walking to a field some 30 metres away, then the obvious route for him “was to stay on the footpath and avoid the hole in the cobble lock, or to take the most direct route over the cobble lock to the field and this would have avoided the hole by some 10 metres” (para. 4). The court concluded that the route taken by the appellant “would not therefore have been the logical route to take to his destination” (para. 4). The court's assessment of credibility and the adverse conclusions in relation to same were further addressed at para. 5 where the trial judge stated:-

“It is also relevant to note that the plaintiff was advised by a specialist that he saw within days of the accident that he should return to have his nose rebroken and reset within a 10 day window after the accident. He failed to do so and is now claiming that the plastic

surgery to have his nose rectified, at a cost of approximately €10,000, should be paid for by Carlow County Council as a result of his failure to follow medical advice.”

33. The court proceeded to cite the decision of the Court of Appeal in *Byrne v. Ardenheath*, stating:-

“...that it is obliged to ‘bring ordinary common sense to bear on their assessment of what should amount to reasonable care’. Applying this principle, it is difficult to see how the plaintiff did not see the hole of this size and simply avoid it, particularly as it is directly under a lamppost and there was no suggestion that the lamppost was not working at the time of the accident.” (para. 6)

A further reason identified by the trial judge for his determination was that it was “the plaintiff’s own decision not to have his nose re-broken and straightened within the 10 day period after the accident” which, as the court noted, “would have obviated the need for an extra €10,000 in cosmetic surgery” (para. 7). The court concluded at para. 8 and 9 that:-

“...the plaintiff has not established on the balance of probabilities that the accident occurred as alleged and, even if it did, it would have been entirely the responsibility of the plaintiff.

On this basis the claim is dismissed.”

Notice of appeal

34. The appellant’s notice of appeal and key submissions at the appeal hearing raised three net grounds of appeal:

- i. the failure of the trial judge to apply the Phipson evidential rule correctly gave rise to a trial which was fundamentally unfair;
- ii. the trial judge erred in misunderstanding and misapplying the decision of this court in *Byrne v. Ardenheath*; and,

- iii. the trial judge failed to decide the case on the basis of the evidence and took into account wholly irrelevant matters in his judgment.

Detailed and helpful submissions were furnished by both parties and all of same together with the comprehensive oral arguments of the parties have been taken into account in reaching the determination outlined below.

Oral evidence

35. As the authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) observe at para. 21-02:-

“The cardinal principle that evidence is, in general, to be given orally is enshrined in Order 39, rule 1 which also allows for a number of exceptions to this principle...”

Order 39, r. 1 provides:-

“In the absence of any agreement in writing between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action, or at any assessment of damages, should be examined *viva voce* and in open court, but the Court may, at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court may think reasonable...”

That fundamental principle has been part of the civil law at least since the judgment of Palles C.B. in *Cronin v. Paul* (1881) 15 I.L.T.R. 121.

The requirement for oral evidence to prove “the gist of the action”

36. The authors of *Delany and McGrath on Civil Procedure* at para. 21-03 observe:-

“The interpretation of the predecessor of this rule was considered by Palles C.B. in *Cronin v. Paul*. He distinguished between evidence going to the gist of the issues in the action which could not be proved by affidavit and evidence in relation to formal matters which could be so proved:

‘It is the ordinary practice that everything going to the gist of the action should be proved by oral evidence in cases of trial by jury. If proof of mere formal matter were required I would grant this application; but here the evidence required goes to the issues in the action; and the plaintiff’s evidence as to these matters would also, I think, be confined to evidence by affidavit.’”

37. The authors observe at para. 21-04, “These principles were endorsed and refined in what is now the leading authority, *Phonographic Performance (Ireland) Ltd. v. Cody* [[1998] 4 I.R. 504].” In that case, the High Court (Keane J.), in the context of an intellectual property suit, ruled that certain specific issues could be proved by affidavit. Against that determination an appeal was brought to the Supreme Court where Murphy J. delivered the judgment of the court which, as the authors of *Delany and McGrath* observe at para. 21-06:-

“...took the view that [Keane J.] had overstated the degree of discretion enjoyed by a court under Order 39, rule 1 and had misapplied it on the facts. Murphy J. endorsed the analysis of Palles C.B. in *Cronin v. Paul*, that an order dispensing with oral evidence could only be made in relation to formal or collateral matters and not in respect of issues that went to the gist of the action. He disagreed with the conclusion of Keane J. on the facts of that case that the gist of the action was the reasonableness of the remuneration sought by the plaintiff. He accepted that this was part of the gist of the action but another part of it was the right of the plaintiff to receive such remuneration. The defendants were entitled to put the plaintiff on proof of its title and the strength or weaknesses of the case to be made by either side did not alter the importance of the issue.”

38. In his judgment Murphy J. observed at p. 524:-

“The case of *Cronin v. Paul* (1881) 15 I.L.T.R. 121, itself illustrates the proposition that the weakness of an argument, in that case its failure on five previous occasions, did not render an issue any less the ‘the gist of the action’ so as to permit proof by affidavit. As

I am satisfied that the ownership of the copyrights or the exclusive licence therein is or forms part of the ‘gist’ of the present action I must conclude that the learned trial judge misapplied the principles established in *Cronin v. Paul* and consequently erred in the exercise of his discretion.”

39. The decision in *Cronin v. Paul* represents good law in this jurisdiction and has been followed in this jurisdiction, for instance, in the High Court in *Northridge v. O’Grady and Thompson* [1940] Ir. Jur. Rep. 19, a probate suit where a witness could not be produced. An affidavit was furnished wherein the witness deposed to residing in England stating, “I am 78 years of age and owing to my age and indifferent health am unable to undertake a journey to Dublin for the purpose of attending in court on the trial of the above action.” Maguire P. held that since the evidence sought to be given in the affidavit went to the gist of the action and since counsel for the opposing side had intimated a *bona fide* desire to cross-examine the witness, the court would not permit such evidence to be given by affidavit and its decision was based on the authority of *Cronin v. Paul*.

The Phipson Rule

40. It is important to recall that counsel for the appellant had specifically objected to the course of action and procedures proposed by the respondent at the commencement of cross-examination of the appellant. Counsel for the respondent had acknowledged that the adumbration of the relevant law by his colleague was correct.

41. It is well settled that the principles governing the admissibility of evidence, in the absence of statutory intervention, are the same in both civil and criminal proceedings. The Phipson Rule has been characterised as the principle that counsel ought not to suggest to the jury, by cross-examination or otherwise, the contents of documents which she is not entitled to put in evidence (see: *R. v Seham Yousry* (1916) 11 Cr. App. R. 13).

42. An example of the approach to be taken in a personal injury claim can be gleaned from the decision of Barrington J. in the Supreme Court in *Moloney v. Jury's Hotel plc* (Unreported, Supreme Court, 12 November 1999). The High Court judge had relied on statements which tended to discredit the plaintiff contained in medical reports in circumstances where the doctors who had authored the said reports had not been called as witnesses by the defendant. Barrington J. considered that the trial judge should not have considered same as evidence for such purpose.

He stated:-

“In making [his] analysis the learned trial judge referred to two hospital notes which he assumed tended to undermine a portion of the plaintiff's evidence and to support that of [another witness]. The trouble is that neither note is evidence. While either note could have been put to the plaintiff in cross-examination (and one was) the cross-examiner would have been bound by her answer. The persons who made these notes were not called to give evidence. They were not cross-examined and the possibility that either, or both, of them might have made a mistake was not explored. There is also the fact that the notes are mutually contradictory and inconsistent with the nature of the plaintiff's injuries as described by all the doctors who gave evidence. These notes are of no evidential value and should not have been used by the trial judge to detract from the weight of the plaintiff's testimony.”

43. In the within appeal, the only medical witness to give evidence, Dr. Nair, was steadfast in his position (particularly during cross-examination) in connection *inter alia* with the following factors:

- (a) that a wound to the face will start healing sooner compared to other places;
- (b) that you can put your hand out and still get most of the impact onto the face in a fall;

- (c) with regard to Dr. McInerney's comments and observations, "I would have to leave that to Dr. McInerney to explain";
- (d) that "it can happen that you hit your head first" in a fall and you will not necessarily get a wrist fracture or a collarbone fracture or something like that;
- (e) that it will depend on what kind of place you are falling as to whether an injury to the hand is sustained; and,
- (f) that the phrase or term "a helpless fall" is not a proper medical term but is rather a layman's term.

44. The trial judge disregarded the expert evidence of Dr. Nair regarding the likely modalities of such falls and the fact that that they can and do occur without hand injuries - contrary to the hypothesis advanced by counsel on behalf of the respondent. There was no probative evidence before the court that the appellant's account of how he fell was rendered improbable by reason that he did not have any injuries to his knees. In fact such a specific proposition was not put to Dr. Nair. Whilst it had been put to the appellant in cross-examination that if he had fallen down he would have landed on his knees, the appellant responded, "Not if you were off balance, no."

45. No reference is made by the trial judge in his judgment to that aspect of the evidence of Dr. Nair notwithstanding that the respondent adduced no expert evidence to contradict his expert view.

Leopardstown Club Ltd. v. Templeville Developments Ltd.

46. The judgment in *Leopardstown Club Ltd. v. Templeville Developments Ltd.* embodies a comprehensive analysis of the Phipson Rule and traces its jurisprudential history. The English decision in *Snowden v. Branson* (Unreported, Court of Appeal of England and Wales (Civil Division), 6 July 1999), as Edwards J. noted, had reiterated the proposition which the judgment acknowledged to be a correct one; that a document which is inadmissible cannot be rendered admissible simply because it is put to a witness in cross-examination.

47. At para. 5.35 of the judgment, Edwards J. observed:-

“*Snowden v. Branson* concerned an appeal by an unsuccessful plaintiff to the Court of Appeal against the jury’s verdict in a libel case. One of the grounds of appeal involved a serious complaint by counsel for the plaintiff about the manner in which some documents were introduced and used by leading counsel for the defendant, and in particular that the *Phipson Rule* had been disregarded. At an early stage in his judgment Otten L.J. stated:

‘The principle involved is stated in Phipson on Evidence 14th Edition at 12-18:

“If a document written by some other person is put to a defendant and the defendant accepts what the document purports to record as true, the contents of the document become evidence against him, but if the defendant refuses to accept as true what the document purports to record the contents of the document cannot be evidence against him...A document which is inadmissible cannot be made admissible simply because it is put to an accused in cross-examination. Further, it is improper for counsel, in cross-examination, to describe to the jury the nature of a document inadmissible in evidence, which he holds in his hand, while asking the witness to look at it and then say whether he still adheres to his answer. The proper way is for counsel to put the document into the hands of the witness and without describing it at all simply to ask, ‘look at that piece of paper: do you still adhere to your answer?’ (The ‘Phipson Rule’).””

48. The Phipson Rule and the *Leopardstown* decision are considered in detail in the text *McGrath on Evidence* (3rd Ed., Round Hall, 2020). The author succinctly outlines the position as follows:-

“[3-131] The first matter to be addressed is whether the requirements for receivability of the document have been satisfied. If so, then subject to any issues that arise in relation to the admissibility of the document, a cross-examiner can proceed to question a witness about the document. However, if a document that a cross-examiner wishes to use for the purpose of cross-examination had not already been proven, then he or she either has to prove the document at that juncture (if necessary, by standing the witness down temporarily with the leave of the court to enable this to be done) or, alternatively, continue subject to an express (or more usually an implied) undertaking to do so later. Although not referred to by Edwards J., the position in this regard had been confirmed by the Supreme Court in *People (DPP) v. Diver*, where Hardiman J. regarded it as well established that it is not proper for counsel to cross-examine out of a document by way of suggesting that the contents of that document and not the evidence of the witness being cross-examined represent the true position unless he or she is in a position to prove the document and its contents.

[3-132] Edwards J. went on to note that, if the cross-examiner subsequently fails to prove the document, then he or she will not be able to rely on it and, in the case of a trial by jury, the judge will have to give a warning to the jury in strong terms that they must not have regard to the document as it does not constitute evidence or it may even be necessary to discharge the jury if the risk of prejudice cannot be ameliorated by such a warning. He also held that, if a cross-examiner is unable or unwilling to prove a document, then only very limited use can be made of it using what has become known as the ‘Phipson formula’” (footnotes omitted)

49. In the instant case, there is no doubt but that the CareDoc notes were tendered in evidence and were deployed on behalf of the respondent as a central plank in its case that in substance this was a fraudulent claim and that the accident did not occur on the date the appellant claimed,

nor did it occur at the *locus* or in the manner in which the appellant had alleged. It thereby transpired that the fundamental evidential injustice outlined by Edwards J. was visited upon the appellant and the trial judge failed to engage with or address the clear risks arising as the proper administration of justice required.

50. The principles outlined by Edwards J. in *Leopardstown* had been expounded by the Supreme Court in substantially similar terms in *The People (Director of Public Prosecutions) v. Diver*. In that judgment, Hardiman J. referenced the decision of *R. v. John Morris Cross* (1990) 91 Cr. App. R. 115 where, as he observed at para. 54:-

“...the difficulty arose because counsel cross-examined out of a document which he or she knew could not be proved as to its execution or contents.”

51. In the instant case it is obvious that no step whatsoever was taken in advance of the trial to ascertain the whereabouts or availability of Dr. McInerney. Subsequent to the commencement of the hearing of this action, it was apparent that Dr. McInerney had not been included in the schedule of witnesses. It is not clear whether a revised schedule of witnesses was ever served up to and including the conclusion of the hearing. The respondent was never in a position to confirm her availability to attend court on Friday 24 November 2017. It is clear that a subpoena was never served on any witness for the purposes of proving the CareDoc notes or their content or rendering same receivable in evidence.

52. It was implicit from the application of counsel for the respondent for an adjournment that they understood the inevitable legal ramifications of that state of affairs. I am satisfied further that counsel on behalf of the appellant outlined the options available to the trial judge; being to adjourn the matter to procure the attendance of the witness whilst addressing the issue of costs, or, in the alternative, to confront, engage with and address the non-production of the witness and to make a determination of the implications for the trial were he minded not to grant the adjournment sought by the respondent to procure the absent witness. Irrespective of the

outcome of the case in terms of liability, a discrete and distinct issue with regard to the costs of that aspect of the case fell also to be determined if the trial judge elected to proceed to conclude the hearing and give judgment.

53. As Edwards J. observed, engaging with the central importance of the Phipson Rule at para. 5.54 of *Leopardstown*:-

“The *Phipson Rule* relates to the admissibility of evidence. Admissibility is about lawfulness. Evidence is only admitted for the Court’s consideration if it is lawful to do so. The *Phipson Rule* allows only very limited use to be made of a document which is either inadmissible, or which has not yet been ruled admissible, particularly in a trial before a jury. The reason for this is that the rules of evidence exist in the interests of justice and fairness of procedures and a court will not lightly countenance a cynical and/or strategic circumvention of them.” (emphasis added)

He concluded at para. 5.55:-

“...although the *Phipson Rule* is primarily concerned with restricting the use to which inadmissible documents may be put in cross-examination the general approach recommended is, it seems to this court, equally valid and to be commended with respect to the use of controversial or potentially controversial documents not yet proven.”

Failure to engage with evidential deficit

54. The *ex tempore* judgment of the trial judge makes no reference to the CareDoc notes of Dr. McInerney, the tenor of same or the evidential issues arising from the conditional admission of same on day 2 of the hearing and the manner of their deployment in cross-examination. Two distinct aspects undermine the appropriateness of the trial judge’s approach; firstly, counsel for the respondent had stated at p. 36, lines 29 to 29 of the transcript of day 2, “On the basis therefore I will be in a position to prove the notes, I’ll propose to cross-examine”, to which the trial judge responded, “Alright. That’s fine.” Secondly, on day 3, Friday 24 November 2017, at

p. 9, lines 19 *et seq.*, before he rose, the trial judge observed, “Well I’ll examine Dr. McInerney’s note.” Counsel for the appellant emphasised to the trial judge: “...it should be noted that obviously the plaintiff hasn’t had the opportunity to cross-examine and the court might be cognisant of that.” The trial judge enquired, “Cross-examine in relation to?” The response was, “Dr. McInerney”. The trial judge responded, “Dr. McInerney’s note?” Counsel stated, “Note, yes”. The trial judge responded, “Yes, I appreciate that.”

55. In the context of the centrality of the notes, it is surprising and unfortunate that the trial judge made no reference whatsoever in his judgment to Dr. McInerney or how he was dealing with or treating the notes which he had taken away with him earlier for the express purpose of perusing same. If he was excluding the notes as inadmissible – as clearly he ought to, given that Dr. McInerney had not at that point been made available for cross-examination – it was incumbent on him to make that clear. It was also necessary for him to address the fact that the notes had been used for the purpose of cross-examining both the appellant and Dr. Nair on the explicit basis that they would be proved in evidence, which they had not been. Justice required both that the judge should not place any reliance on the notes and the cross-examination based on same *and* that he should clearly explain that position to the parties.

56. There were clearly very significant points of difference between what might be inferred from the contested notes, on the one hand, and, for instance, the evidence of Dr. Nair, on the other, regarding the likelihood of the time of the accident or the circumstances whereby the accident occurred but the trial judge carried out no analysis or at least disclosed none in the judgment delivered.

57. Basic fairness dictated that in giving his *ex tempore* judgment the trial judge was required to address the issue and indicate what approach he was taking to that aspect of the evidence. Non-reference to the CareDoc notes could not be taken as equivalent to a decision to disregard or exclude their content in light of the express approach indicated by the trial judge. The failure

of the trial judge to address the issue of costs with due regard to the non-admissibility of the said notes further fatally undermines the lawfulness and fairness of the approach adopted by him.

58. Thus, in my view the threshold for intervention on appeal as identified by MacMenamin J. in *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] IESC 50, [2017] 3 I.R. 707 at paras. 109 and 110 of his judgment, namely clear non-engagement by the trial judge with essential parts of the evidence, was reached in this case – particularly in circumstances where the cross-examination had been conducted on the basis that the appellant was a dishonest litigant and, in effect, that the accident had not occurred as alleged; that it had not occurred at the location alleged nor on the date alleged. From the outset of cross-examination, the defence of the claim had been framed against a backdrop that the local authority was regularly contending with bogus claims. It was therefore essential for the trial judge to engage with the evidence primarily relied upon by the respondent as the springboard to discredit the appellant, namely the CareDoc notes.

59. The decision in *Hay v. O'Grady* [1992] 1 I.R. 210 sets out the classic statement of the appropriate approach to be taken by an appellate court in respect of findings of fact made at first instance, particularly *per* McCarthy J. at pp. 217 to 218. Of importance is the emphasis placed by McCarthy J. on the importance of a clear statement by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusions that follow. The later decision of *Doyle v. Banville* [2012] IESC 25, [2018] 1 I.R. 505 makes clear the fundamental importance that a judgment of the trial court engages with the key elements of the case as advanced by both sides and provides a reasoned conclusion as to why the case on the facts made by one or other side is preferred.

60. Rather than ruling on the issue of the unproven CareDoc document and identifying what weight, if any, was being attached to it or whether it was being disregarded, the trial judge

elected to ignore it whilst and at the same time echoing language found within it, such as the lack of any injuries to the appellant's hands, as an element that the court found rendered the appellant's account of how he fell "improbable". Neither did he indicate what weight (if any) he attached to the lengthy cross-examination of the appellant and his witnesses based on same. The complete failure to engage with the issue of the CareDoc notes results in the substantial absence of any reasoned conclusion as to why the case on the facts as advanced by the respondent was preferred.

61. In my view this represents a significant and material error in the methodology apparently deployed by the trial judge to reach a conclusion as to the facts and is one in respect of which this court can and ought to intervene, given the patent unfairness visited upon the appellant.

62. The fact that the trial judge simply ignored the CareDoc notes and the Phipson Rule in the circumstances of having decided to deliver judgment without addressing the nuanced issue of costs that called for consideration on the non-attendance of the witness at the adjourned hearing; that he did so against a backdrop where senior counsel for the respondent had readily and fairly conceded that he could only proceed to cross-examine based on the disputed notes in circumstances where the witness was later to be called by him; and, against a backdrop where, at the resumed hearing on Friday 24 November 2017 the application of the respondent, quite properly, was for an adjournment to address the deficit and ensure that the CareDoc notes were in evidence in the case, served to underline that the judgment was delivered with undue expedition and without adequately discharging the obligation on the trial judge to engage with and adequately address key elements in the case. This undermined the judgment and rendered it lacking in adequate reasoning as required by the Supreme Court jurisprudence, including *Doyle v. Banville*.

63. The respondent never withdrew the allegations which were predicated on Dr. McNerney's note entries which it had undertaken to prove prior to their deployment at the

hearing. The trial judge failed to engage with the practical and evidential consequences that followed from the state of the evidence as it stood when he turned to consider the applications of the parties, including the respondent's application for an adjournment so that Dr. McInerney could be called to prove the disputed notes.

64. The stated purpose of the trial judge in rising to review the papers on 24 November was "to address the significance of the note of Dr. McInerney". The tenor of his judgment is consistent with him having taken aspects of the said CareDoc note into account including the entry regarding "no hand injury" and an observation that "? injury older than stated". It cannot be said with confidence that the CareDoc notes and the cross-examination of the appellant on the contents of same were not material to the trial judge's finding on liability. In circumstances where the determination of the trial judge was aligned substantially with the disputed contents of the CareDoc notes; where no witness at all was called by the respondent; and, where the appellant and his witnesses disputed the sundry hypotheses advanced on behalf of the respondent in cross-examination, simply ignoring the issue of the CareDoc notes in his judgment whilst alluding to hypotheses within them resulted in the omission of a necessary ruling to formally disregard the entirety of not alone the notes but the cross-examination pursued on foot of same. That omission was not cured by simply avoiding any reference to the notes. Accordingly, it has given rise to an injustice, particularly in circumstances where the court concluded that in effect this was a dishonest claim and that the accident did not occur as alleged.

65. The course of action embarked upon by the trial judge was not sought by either party. By choosing the path of ignoring the clear arguments advanced on behalf of the appellant on the Phipson Rule, which were conceded by the respondent, one is left with a state of affairs where the rule was not properly applied or operated by the trial judge. The total non-engagement with the Phipson Rule in light of the clear authorities which had been open to the trial judge was an

error which visited a fundamental injustice on the appellant, depriving him of his right to a fair trial, and undermined the validity of the trial judge's findings on liability. This is a high threshold, but I am satisfied on balance that same has been met in the instant case and in all the circumstances the determination of the trial judge is fundamentally flawed in a manner that is *prima facie* prejudicial to the appellant and creates a reasonable doubt that a fair trial was not had in the first instance. Accordingly, that determination is required to be set aside.

66. The trial judge simply ignored the landmark decision of Edwards J. and indeed the earlier Supreme Court decision of Hardiman J. in *The People (Director of Public Prosecutions) v. Diver* of the Supreme Court. The latter decision was clearly binding upon him. He identified no reason for taking this course of action. In failing to follow a precedent of binding authority the trial judge fell into error. The decision in *Diver* had been raised and referred to during the course of the hearing. The respondent had acknowledged that the law was as the appellant had contended it to be on the specific issue under consideration. The fundamental difficulty is that the trial judge had not given the parties any indication that he was minded not to follow *Diver* and the *Leopardstown* decision of Edwards J., nor had he afforded the appellant the opportunity to make submissions arising from his proposed course of action that he should proceed to follow neither decision and the procedural or costs implications of such a course of action. Ignoring the decision in *Diver* and disregarding the decision in *Leopardstown* in the manner in which it took place was fundamentally unfair and led, in the circumstances of this case, to a threshold of unfairness such that the decision of the court must, regrettably, be set aside and a new trial directed.

Costs of the High Court trial

67. The engagement and focus of the trial judge on the disputed CareDoc notes throughout the trial was extensive. On the second day of the hearing, the trial judge granted leave to issue subpoenas for the identified witnesses including two medical witnesses in relation to same. A

strong impression had been given on behalf of the respondent at that point that the medical witness would be readily available on Friday 24 November 2017. Unfortunately, the fact that the trial judge elected to ignore the issue of the extensive cross-examination based on the discovered medical records fatally undermines the contention that this issue was not material to the trial judge's determination on the liability issue. The appellant was entitled to know what position the trial judge was taking on the issue – particularly where some findings in his judgment echoed elements of the disputed Care Doc notes. Further, in light of the Phipson Rule jurisprudence, a consequential order was required to address the discrete element of costs pertaining to so much of the hearing as was taken up with the issue of the inadmissible hearsay document, once a decision by the trial judge was made to disregard the entirety of same. The absence of that aspect being addressed by the trial judge precludes the possibility of inferring that the trial judge disregarded the CareDoc notes in their entirety together with the cross-examination of witnesses based upon same.

Byrne v. Ardenheath

68. The decision in *Ardenheath* is clearly distinguishable in a number of material respects. The decision does not allow courts to disregard or re-write the rules of evidence. It will be recalled that in *Ardenheath* liability was very much in issue, whereas in the instant case the position of senior counsel for the respondent bears repetition where he quite properly agreed on day 2, p. 78, line 7 *et seq.*, “I think I can effectively concede, Judge, at this stage that that is a bad repair. It is a bad footpath repair. I am prepared to concede that” and, later on the same page stated, “I am conceding that it was substandard and the court will be entitled to find that the local authority had not effectively discharged their statutory duty to carry out that repair.”

69. The instant case was distinguishable from *Byrne v. Ardenheath* insofar as in that case it was not contended that the plaintiff was advancing a false claim although the accident did not occur in the manner in which it had been contended on the evidence. By contrast, in the instant

case the cross-examination was conducted on the basis that in substance this was a fraudulent claim; that it had not occurred as the appellant alleged it had occurred, on the date he claimed it had occurred, or at the *locus* he claimed it had occurred. In other words, although the *locus* was acknowledged to have been in a parlous state of repair, the proposition advanced was that the injuries befell the appellant elsewhere; it being posited to the appellant in evidence that it might have occurred when he was drunk or involved in a fight.

70. It is noteworthy that no engineer was called on behalf of the respondent to contradict the evidence of the appellant's engineer. Indeed the respondent called no witness at all. The evidence of Dr. Nair under cross-examination was to the effect that, having regard to the edges of the wound and that healing, the wound was a day or two old and was consistent with what the appellant had said in relation to the occurrence of the accident. Dr. Nair had also confirmed that an individual will not necessarily suffer an injury to the hand, a wrist fracture or collarbone fracture in a trip and fall resulting in facial injuries. No witness was called to dispute or contradict Dr. Nair's evidence in that regard.

71. In *Dunphy v. O'Sullivan* [2021] IECA 171 Noonan J. observed:-

“33. Expert evidence is thus a guide which informs the court on the ultimate issue. The court of trial is entitled to accept the evidence of an expert that it finds persuasive, once in doing so, it engages with that evidence, provides its reasoning for accepting it and why it is to be preferred over other expert evidence. That does not always call for a very detailed elaboration. In cases of conflict between experts, the trial judge should at least ‘indicate in brief terms the reasons why the views of one expert was preferred’ – see the judgment of Clarke J. (as he then was) in *Donegal Investment Group plc v. Danbywiske, Wilson & Ors* [2017] IESC 14 at para. 7.4.”

The trial judge failed engage with the evidence of Dr. Nair or explain how he came to effectively reject it.

Conclusion

72. The Phipson Rule was acknowledged by the respondent to be applicable in the instant case. It is long settled that the rule applies to civil as well as criminal litigation as the Supreme Court made clear in *Cooper-Flynn v. Radio Telefís Éireann* [2004] 2 I.R. 72. No explanation was identified by the trial judge for his decision not to operate or comply with the evidential rule in question.

73. The appellant had repeatedly protested that the CareDoc notes on which he was cross-examined were inaccurate and the court had ruled that they should be proved in evidence and the GP author of same made available for cross-examination.

74. The decision in *RAS Medical Ltd. v. Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63 has noted at para. 76:-

“...It is...inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented. It may, at one end of the spectrum, be the case that the documents are merely being presented on the basis that they will be properly proved in evidence but will have to be disregarded entirely if not so proved.”

That was the basis on which the documents were admitted by the trial judge. Simply refraining from referencing the documents in the judgment delivered did not engage with or address the unfairness visited upon the appellant. It was necessary for the trial judge to have expressly indicated that he was disregarding the CareDoc notes created by Dr. McInerney in their entirety by reason that they had not been proved and engaged with the consequences of such a ruling. This he failed to do.

75. In this case, by contrast with *Ardenheath*, it was unnecessary for the appellant’s engineer to give any opinion with regard to negligence in relation to the state of repair of the footpath

having regard to the concessions made on behalf of the respondent regarding same. The principles in the decision of this court in *Byrne v. Ardenheath* did not have any immediate or obvious application in circumstances where negligence had been in substance conceded by the respondent.

76. Once the respondent had conceded the unsatisfactory state of the footpath and elected not to call any evidence, asserting to the court that the sole issue was the credibility of the appellant and that the accident did not occur, it was incumbent on the trial judge to address the Phipson Rule head on and either adjourn to hear the medical witness who was the author of the CareDoc notes and have her cross-examined or otherwise disregard the notes and the extensive cross-examination in relation to same, expressly confirming that this course of action was being taken, and proceed to address the discrete costs implications that necessarily followed.

77. The deprivation by the trial judge of the appellant's right to cross-examine the author of the CareDoc notes on the central issue pertaining to the appellant's honesty and credibility, coupled with the fact that the respondent called no witness to support the creative hypotheses advanced by counsel that the manner of the fall was "improbable" and that, *inter alia*, the route reported by the appellant to have been taken by him on the occasion in question was not "logical", resulted in the evidence not being fairly dealt with or fairly appraised culminating, in short, in an unfair trial. A judgment emanating from an unfair trial is writ upon water. Accordingly, the case falls to be remitted to the High Court at the next sittings in Kilkenny for a full re-hearing.

Costs of this appeal

78. In all the circumstances, it is appropriate that the orders including the costs order made in the High Court be vacated and in their stead an order be made granting the appellant the costs of the High Court hearing and also the costs of this appeal when ascertained. If either party contends for an alternative order regarding costs, written submissions should be filed in the

Office of the Court of Appeal within 21 days following electronic delivery of this judgment; the other party being entitled to respond within a further period of 21 days. Thereafter, if required, a date for legal argument will be fixed by the Office of the Court of Appeal.

79. Faherty and Collins JJ. agree with the within judgment and proposed orders.