



THE COURT OF APPEAL

[2019] IECA 274
Record No. 2017/548

Whelan J.
McCarthy J.
Costello J.

BETWEEN/

EOGHAN GOUGH

**PLAINTIFF/
FIRST NAMED RESPONDENT**

- AND-

DARREN HURNEY

**FIRST NAMED DEFENDANT/
SECOND NAMED RESPONDENT**

**AND
JOHN BRIGGS**

**SECOND NAMED DEFENDANT/
APPELLANT**

JUDGMENT of Ms. Justice Costello delivered on the 30th day of October, 2019.

1. This is an appeal against the decision of the High Court apportioning liability for injuries sustained by the plaintiff equally between the defendants. It is brought by the second named defendant, the appellant, (Mr. Briggs) who seeks an order holding the second named respondent (Mr. Hurney) solely liable for the accident which occurred, or, in the alternative, for a reduced apportionment of liability in favour of Mr. Briggs. He does so on the grounds that there was a lack of evidential basis for the trial judge's findings of fact and secondly, even if this court accepts the findings of fact, that she failed to reason her decision.
2. Before considering the judgment of the High Court it is useful to reiterate the principles applicable to this appeal. They were very neatly summarised in M.C. v F.C. [2013] IESC 36 by MacMenamin J. speaking for the Supreme Court which would apply equally to this Court: -

"This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As Hay v O'Grady makes clear, if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence (see also Pernod Ricard and Comrie plc v Fyffes plc

(Unreported, The Supreme Court, 11th November 1988)). Furthermore, in Hay v O'Grady, McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the trial judge, where such inference depends upon oral evidence or recollection of fact. In drawing of inferences from circumstantial evidence, an appellate tribunal is, of course, in as good a position as the trial judge (see also O'Connor v Dublin Bus [2003] 4 I.R. 459; Quinn (A Minor) v Mid Western Health Board and Another [2005] 4 I.R. 1)."

It follows that this court is confined to considering the issues of fact raised in the trial and may not consider issues not so raised even if this court is of the opinion that relevant issues were not considered in the court below, unless there was a fundamental failure on the part of the trial judge to engage with central issues in the case.

3. On the 14th July, 2012 the plaintiff, Mr. Gough, was a backseat passenger in a Honda Civic car owned and driven by Mr. Hurney. He was not wearing a seatbelt and in the incident which occurred he was thrown from the vehicle and sustained serious injuries. It was agreed between the parties that he was guilty of contributory negligence and this was agreed at 25%. On the day of the accident, Mr. Hurney was eighteen years old and was driving on a provisional licence unaccompanied by a fully licensed driver. The car was driving on the Monivea to Galway road in the direction of Galway City. At the locus in question, the road is straight and narrow and approaching a slight bend. The speed limit for the road is 80 kilometres per hour. There was an unbroken white line down the centre of the road. Mr. Hurney accepted that he had previously been driving at 75 miles per hour *i.e.* 120 kilometres per hour, and the trial judge held that by the time he arrived at the locus of the incident giving rise to these proceedings he was travelling at 60 miles per hour, which equates to 96 kilometres per hour in an 80 kilometre per hour zone.
4. Mr. Briggs lived in a mobile home on this road. His brother lived 200 metres away from his house. Mr. Briggs was driving a white van on the day in question. He drove out from his brother's property, turned onto the Monivea to Galway road and drove 200 metres in the Galway direction towards the entrance to his own property. The entrance to Mr. Briggs' mobile home was not very wide and was not splayed. This meant that any person seeking to drive into the entrance would have to slow down to practically a standstill in order to make the 90 degree turn.
5. There was a dispute as to how the incident which led to the accident in which the plaintiff was injured occurred. In broad terms, Mr. Briggs was commencing the right-hand turn into his entranceway. At the same time, Mr. Hurney was overtaking Mr. Briggs' van. He swerved to avoid colliding with the van and crossed into the gravel on the right verge of the carriageway. He tried to regain control of the vehicle but oversteered too far to the left with the result that he collided with a stone wall on the left side of the carriageway, thirty metres from the locus of the emergency. The impact demolished a considerable portion of the stone wall and the vehicle ricocheted and hit the wall a second time, demolishing further portions of the wall. The Honda Civic ended further down the road on its right-hand side, the front of the vehicle was completely

demolished. As a result of the impact, Mr. Gough was thrown from the vehicle by the force of the collision.

6. Mr. Hurney accepted that he was partially responsible for the accident. He accepted that he was driving on a provisional licence unaccompanied by the holder of a full driving licence, that he was driving at 96 kilometres per hour in an 80 kilometre per hour zone and, that he was overtaking Mr. Briggs on a continuous white line. He accepted that he could see Mr. Briggs in front of him and that he was slowing down as he approached Mr. Briggs' van. He admitted that he was making ground on the van in front and closing pretty fast and that he was braking as he was getting closer. He said "*the van was going slow so I overtook him*", and he said "*if I wanted to stop I would braked*" (sic). He also said "*I couldn't stop, I made up my mind to overtake even though there was a white line.*" He pleaded guilty in the Circuit Court to a charge of careless driving causing harm.
7. The plaintiff and Mr. Hurney maintained that Mr. Briggs was also liable for the accident which occurred on the basis that Mr. Briggs ought to have looked in his mirror prior to commencing his right-hand turn into his driveway and that had he done so, he would clearly have seen Mr. Hurney's car approaching fast and overtaking him. Secondly, they argued that Mr. Briggs failed to indicate his intention to turn right and that there were no indicator or brake lights to alert Mr. Hurney to the fact that Mr. Briggs was intending to turn into the entranceway of his mobile home.
8. Mr. Briggs said that he had indicated and that he had braked, and that he only glimpsed the Honda Civic in his wing mirror when he commenced his turn.
9. The trial judge dealt with these conflicts of fact as follows: -

"But I take the view that the first named defendant's evidence is quite logical and he's quite consistent as to how the accident happened. He says the second named defendant veered onto the incorrect side of the road in a movement to turn into his home place and that caused him to swerve and caused him to have a loss of control. I believe that he would never have attempted to turn right (sic) [overtake] had there been an indicator on the van indicating a right-hand turn, or had there been brake lights. So, in all circumstances I prefer the evidence of the first named defendant to that of the second named defendant. I think it's quite clear from the cross examination of the second named defendant that as a matter of probability at the end of [the] day I think he accepted, number one, he did not look in his mirrors before attempting his manoeuvre, which he should have done. I don't believe he ever indicated. And I do believe he was over the continuous white line."

She then held that both the first and the second named defendants were negligent by reference to the pleadings in the personal injuries summons. She then said that: -

"I came to the conclusion that it's fifty-fifty on liability."

10. The first issue on appeal is whether the High Court's findings of fact, that Mr. Briggs did not look in his mirror before attempting his manoeuvre, or that he failed to indicate his intention to turn right, or that he had crossed over the continuous white line in executing the right-hand turn, is not supported by evidence or cannot, in all reason, be supported by the evidence.
11. Mr. Hurney denied that Mr. Briggs had his indicator on from 100 yards back, he denied seeing brake lights, and he said that Mr. Briggs' van crossed the unbroken white line to turn right. He said he told the gardaí that Mr. Briggs' van had no indicator on but the gardaí did not put this into his statement.
12. A backseat passenger in Mr. Hurney's car, Mr. Darren Duggan, gave evidence. His evidence was that there were no brake lights and no indicator lights on the van showing. This accorded with his witness statement given to the gardaí on the 16th January, 2012.
13. In the circumstances, I am quite satisfied that there was credible evidence to support the findings of fact made by the trial judge to the effect that Mr. Briggs failed to indicate, and no brake lights were showing which would have alerted Mr. Hurney to the fact that Mr. Briggs was intending to turn right into the entranceway to the mobile home on the right-hand side of the roadway.
14. In relation to the mirrors, Mr. Briggs accepted that the road was straight for approximately 200 metres behind him and that had he looked in his side mirrors he could have seen the approaching Honda Civic. On Day 3 of the trial, Mr. Briggs gave the following testimony under cross examination: -

"Q.634: Counsel: Can you explain to the court why it is that you never saw the car driven by Mr. Hurney before you began your manoeuvre?"

A. I don't know. I didn't see him.

Q.635: Is that because you didn't use your mirrors?"

A. Maybe.

Q 636: Is there any other explanation?"

A. No, there is no other explanation."

15. In those circumstances, I am satisfied that there was ample evidence upon which the trial judge was entitled to conclude that Mr. Briggs did not look in his mirrors before attempting his right-hand turn. It is not appropriate for this court to interfere with her findings of fact. Accordingly, the balance of the appeal must be decided on the basis of those findings of fact.
16. In the circumstances of the facts as found by the trial judge, in my opinion, it was appropriate for the trial judge to conclude that Mr. Briggs was also responsible for the accident which occurred and that the sole responsibility for the accident did not lie with Mr. Hurney.

17. The second issue for consideration on this appeal is whether the trial judge was correct in apportioning that liability equally between Mr. Hurney and Mr. Briggs. Apportionment of liability is essentially the application of legal principles to the facts found by the trial judge. It follows that this court has jurisdiction to make its own assessment of apportionment and it is not dependent on the assessment of the credibility of the witnesses. Apportionment of liability reflects the court's assessment of the moral blameworthiness of the parties rather than the respective causative contributions of each of the parties at fault for the resulting event.
18. The trial judge was entitled to have regard to the admissions and credibility of one witness over the other in determining whether or not to accept the evidence of Mr. Hurney over the evidence of Mr. Briggs where they were in conflict. But such an assessment has no role in the apportionment of liability. Logically, the denial or admission of a fact cannot make that fact, once established, more or less significant when assessing the moral blameworthiness for the accident. Therefore, insofar as the trial judge may have relied upon the relative reliability of each of Mr. Hurney and Mr. Briggs in making her determination on liability, she was in error.
19. It is by no means clear that this is in fact what occurred, as unfortunately she gives no reason as to why she apportioned liability as she did. She finds as a fact that each of the defendants were negligent but does not proceed to analyse the apportionment of liability. This need not be a detailed exposition of her reasons, but all of the parties are entitled to know why she decided the case as she did, and this includes her apportionment of liability. In my judgment it is not clear why she apportioned liability on a 50:50 basis. In the circumstances, this is a fundamental failure to reason her judgment, in my opinion, and fails to meet the requirements set out in *Doyle v Banville* [2012] IESC 25. However, as I have said, this court is in a position to make its own assessment of the apportionment of liability on the basis of the facts found by the trial judge, so it is not necessary to remit the case for a rehearing.
20. In my judgment, the actions of Mr. Hurney were more egregious than those of Mr. Briggs and, therefore, it is not appropriate to apportion liability on an equal basis. I believe that the trial judge was in error to a significant extent both as to her apportionment of liability and her failure to reason her decision, such that it is appropriate for this court to substitute its own assessment for that of the court below.
21. Mr. Hurney was guilty of four separate serious breaches of the Road Traffic Acts and the rules of the road: -
 - (a) He was driving on a provisional licence unaccompanied by the holder of a full licence. A holder of a provisional licence is not permitted at any time to drive unaccompanied on the public road. The reason for this is so the experienced driver can warn the provisional driver of possible dangers or mistakes. In this case, such a driver could have warned Mr. Hurney not to exceed the speed limit and not to attempt to overtake Mr. Briggs' van where there was an unbroken white line down the centre of the narrow carriageway. Potentially, this breach of the Road Traffic Acts led to the accident and so is an important element in the overall assessment by the court.

- (b) He was driving at 96 kilometres per hour in an 80 kilometre per hour zone on a narrow road. This was very considerably over the speed limit, though less than his previous speed. He stated in evidence that he couldn't stop when Mr. Briggs started his turn. The fact that his car demolished the stone wall in two places indicates graphically how dangerous his speed was in all the circumstances. This, in my judgment, was the major cause of the accident.
 - (c) He was driving too fast to react to hazards ahead. He stated in evidence that he could not stop when Mr. Briggs commenced his turn into his mobile home and that he, Mr. Hurney, had decided to overtake the van. Mr. Briggs had to slow right down in order to make the 90 degree turn so Mr. Hurney ought to have been alerted to a potential danger ahead, even though neither the brake lights nor an indicator were showing on Mr. Briggs' van. As I have stated, in my view this was the major cause of the accident.
 - (d) He was overtaking a vehicle by crossing an unbroken white line. A solid white line means that all drivers must keep to the left of the line and may not overtake another vehicle. Under no circumstances should he ever have attempted to overtake Mr. Briggs' van. There was no emergency which could justify any exception to the clear prohibition on any such overtaking. The fact that he was overtaking at a place where he ought never to have attempted to overtake Mr Briggs' vehicle, at a speed which meant he could not stop so as to avoid the emergency, was the principal cause of the accident and therefore, to my mind, makes him morally blameworthy for the accident.
- 22.** In my judgment, the trial judge failed to give adequate weight to these facts when she apportioned liability between the defendants.
- 23.** Mr. Briggs, on the other hand, was attempting a lawful manoeuvre – turning right into the entrance of his driveway – in a negligent, unlawful manner. He ought not to have attempted to make a right-hand turn without first checking in his rear-view or side mirrors and indicating his intention to make the turn. We cannot know, but it is possible, indeed even probable, that had he so acted, the emergency which arose might have been averted and the accident avoided. Therefore, he bears some responsibility for the accident, but, in my judgment, not to the extent held by the High Court.
- 24.** Section 21 of the Civil Liability Act, 1961 provides for contribution between concurrent wrongdoers in respect of damages. Subsection (2) provides: -

"In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault...."

In my judgment, it is not just and equitable that the defendants be held equally liable for the damages payable to the plaintiff in this case. I believe that the trial judge did not apportion

liability in accordance with the provisions of the section in light of her findings of fact and so it is appropriate for this court to intervene and substitute its assessment for that of the trial judge.

- 25.** I am of the opinion that the trial judge erred in her failure to explain her reasons for, and her apportionment of, liability between the defendants. In my judgment, on the facts as found by the trial judge, the just and equitable apportionment of liability was 80% as to Mr. Hurney and 20% as to Mr. Briggs.
- 26.** I would, therefore, allow the appeal to the extent of varying the apportionment of liability in the High Court accordingly.