

*Final but unapproved
No redaction required*



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 191

Record No 2020/249

Donnelly J

Haughton J

Collins J

BETWEEN

JANVIER TUMUSABEYEZU

Plaintiff/Appellant

AND

DANIEL MURESAN

and

THE MOTOR INSURERS BUREAU OF IRELAND

Defendants/Respondents

Judgment of Mr Justice Maurice Collins delivered on 7 July 2021

BACKGROUND

1. The Appellant, Mr Tumusabeyezu (*“the Plaintiff”*) suffered serious injuries in a road traffic accident which occurred in the vicinity of Mullingar, County Westmeath on 26 June 2017. He was travelling as a back seat passenger in a vehicle owned by and being driven by the First Defendant when the vehicle went out of control and crashed into the ditch. Following the accident the Plaintiff was brought to Mullingar Hospital where he was diagnosed with a perforated bowel and intra-peritoneal haemorrhage secondary to mesenteric tears. His injuries required emergency surgery and the Appellant remained in hospital until 5 July 2017.
2. The Plaintiff issued these proceedings on 27 February 2019. As is indicated by the fact that the Motor Insurers Bureau of Ireland (*“the MIBI”*) is named as a co-Defendant, the First Defendant’s driving was not covered by any policy of insurance at the time of the accident. There is no dispute about that or about the fact that his vehicle was not taxed and that the First Defendant did not hold a driving licence at the time of the accident.
3. A single Defence was delivered on behalf of both Defendants. It admits that the accident was caused by the negligence of the First Defendant. However, it then pleads that the Plaintiff is not entitled to any relief *“in circumstances where he voluntarily entered and allowed himself to travel as a passenger in the vehicle then owned and being driven by [Mr Muresan] at a time when he, the Plaintiff knew that there not in force an approved Policy of Insurance in respect of the use of that vehicle by [Mr Muresan] and in this regard the Defendants relies [sic] upon the provisions of Clause 5.2 of the 2009*

Agreement upon which the Plaintiff seeks to rely.” The Court was told that the Plaintiff did not seek particulars of this plea, which is rather surprising given the importance of the issue raised by it.

4. The “2009 Agreement “referred to in the Defence is an Agreement dated 29 January 2009 between the Minister for Transport and the MIBI relating to the *Compensation of Uninsured Road Accident Victims* (“the 2009 MIBI Agreement”). Since 1955, arrangements have been in place between the responsible Minister and the MIBI for the compensation of persons killed or injured as a result of the negligent use of a vehicle in a public place where the owner or user of the vehicle is uninsured or unidentified. These arrangements have been set out in successive agreements of which the 2009 MIBI Agreement is the most recent. Over the years, the coverage provided by the MIBI has steadily expanded, influenced significantly by successive Motor Insurance Directives adopted by the EU.

5. Clause 5.2 of the 2009 MIBI Agreement provides as follows:

“Where at the time of the accident the person injured or killed or who sustained damage to property voluntarily entered the vehicle which caused the damage or injury and MIBI can prove that they knew that there was not in force an approved policy of insurance in respect of the use of the vehicle, the liability of MIBI shall not extend to any judgement or claim either in respect of injury or death of such person while the person injured or killed was by his consent in or

on such vehicle or in respect of damage to property while the owner of the property was by his consent in or on the vehicle.”

6. An exclusion for persons who knew “*or ought reasonably to have known*” that the driver was uninsured was contained in the MIBI Agreements concluded in 1988 and 2004. The narrower terms of the exclusion contained in the 2009 Agreement were, it appears, prompted by Case C-211/07 *Commission v Ireland* and more accurately reflect the exclusion that is now to be found in Article 13 of Directive 2009/103/EC.

7. In light of the pleas set out in the Defence, the Plaintiff was clearly entitled to judgment against the First Defendant (subject to a rather tentative plea of contributory negligence in the Defence suggesting that the Plaintiff may not have been wearing a seatbelt) but there was a significant issue as to whether he could recover from the MIBI. If the MIBI succeeded in establishing that the Appellant “*knew that there was not in force an approved policy of insurance in respect of the use of [Mr Muresan’s] vehicle*” – and it is common case that the onus of proof lay on the MIBI in relation to this issue – then Clause 5.2 would operate to exclude any liability on the part of the MIBI in respect of any judgment obtained by the Plaintiff against Mr Muresan.

HIGH COURT HEARING AND DECISION

The Hearing

8. The action came on for hearing before Barton J in the High Court on 3 September 2020. On the morning, the Judge was asked to decide the issue of whether the clause 5.2 exclusion was applicable as a preliminary issue, with the issue of quantum being left over for future determination, and he agreed to proceed on that basis.
9. I should at this point describe – in brief, and I hope, uncontroversial terms – the broad circumstances in which the accident occurred. A detailed account can be found in the judgment of Barton J that is the subject of this appeal ([2020] IEHC 555).
10. The Plaintiff and the First Defendant had attended the Body & Soul Festival at Ballinlough Castle, County Westmeath over the weekend of 23-25 June 2017. Mr Muresan had been asked by another party, a Mr Feeney, to assist with security at the Festival and to recruit others for that purpose. The Plaintiff was one of a number of persons recruited. He had not known the First Defendant previously but they had mutual acquaintances. On either Thursday 22 June or Friday 23 June (surprisingly, the evidence did not clearly establish the position one way or another) the Plaintiff travelled to Waterford in the company of Cedric Humvimana, a friend of his (and of Mr Muresan) who had also been engaged to work at the Festival, to meet up with the First Defendant, who lived in Waterford. There, they met with Mr Muresan and also with Opeyemi Awe and Terry Krubu. The Plaintiff, Mr Humvimana and Mr Krubu were all born in Rwanda

and were friends. Mr Muresan was born in Romania. Those five then travelled in Mr Muresan's vehicle (a 2 door Mitsubishi Colt) to New Ross, where they met the remainder of the recruits (who were travelling in a separate vehicle) and then headed onwards to the Festival site in Co. Westmeath.

11. On the late afternoon/early evening of Monday 26 June 2017, after the Festival had ended, the First Defendant, the Plaintiff, Mr Humvimana and Mr Krubu left the Festival site in the First Defendant's Mitsubishi Colt. The Plaintiff was again sitting in the rear of the vehicle, behind Mr Humvimana who was in the front passenger seat. Mr Krubu was behind the driver. The First Defendant was returning to Waterford but there is some suggestion that he was to drop his passengers at the Red Cow roundabout *en route*. Driving conditions were poor, with heavy rain and the roads were unfamiliar. Not long after leaving the site, Mr Muresan lost control of the vehicle at a bad bend and it left the road and crashed into a ditch.
12. A neighbour called the Gardai (none of the occupants called the emergency services) and Sergeant Bernard Heaney – who was attached to Delvin Garda Station and who was on duty at the Festival site at the time of the accident – arrived at the scene very quickly. He gave evidence before the High Court which was material to the Judge's conclusions and to which it will be necessary to refer in considering the challenge to the Judge's findings.
13. The Defendants' case on the clause 5.2 issue was that the Plaintiff knew that Mr Muresan was uninsured because Mr Muresan had told him that that was the case prior

to the accident. According to the Defendants, when Mr Muresan and his four passengers were setting off from Waterford (on the Thursday or Friday) he told them that he had no insurance, driving licence or road tax. That disclosure was (so Mr Muresan said) prompted by the fact that, following a telephone conversation with this mother, he had made the sign of the cross which (so he said) had provoked sniggering from the back of the car (where the Plaintiff was sitting). That had irritated Mr Muresan. As he put it when he came to give his evidence, *“I heard a kind of laugh coming from the back and that offended me a little bit because it is a person who is praying, it is nothing to laugh about, and that is why I asked the guys what is funny because I did take this risk myself driving 160 and 180 kilometres and I don’t have a licence, insurance, NCT or tax.”*

14. This was put (in substantially these terms) to the Plaintiff in cross-examination. That appears to have been the first time that the Plaintiff was made aware of the detail of the Defendants’ case on the clause 5.2 issue. The Plaintiff denied hearing any such statement made by Mr Muresan and stated that *“he never said anything about that.”*. Mr Krubu then gave evidence (by video-link) on the Plaintiff’s behalf. He had known the Plaintiff for a number of years and was also a close friend of Mr Humivamana. Asked in his evidence in chief whether Mr Muresan had said that he was uninsured, Mr Krubu said that he had no recollection of *“that happening, that conversation”*. He was pressed on that answer in cross-examination but maintained his position, adding that he would not have got into a car with someone who was uninsured and who did not have a licence. Mr Humvimana then gave evidence. He was a close friend of the Plaintiff. Asked in his evidence in chief whether Mr Muresan had said that he was uninsured, Mr Humvimana said that had not happened. In cross-examination, he repeated that that had

not happened and was something that he would not forget. The suggestion that such a conversation had taken place was, he said, “*false*.”

15. The remaining passenger in Mr Muresan’s vehicle on the journey to Westmeath was Opeyemi Awe. It appears that he was listed on the Plaintiff’s schedule of proposed witnesses but in the event he did not give evidence.
16. The Defendants then went into evidence, with the First Defendant, Mr Muresan, as their first witness. In his evidence in chief he confirmed what had been put to the Plaintiff and his witnesses to the effect that he had told them that was he uninsured and unlicensed (and that the vehicle was not taxed and did not have a valid NCT). In cross-examination, he said that he had been convicted of driving without insurance and without a licence and had been fined. He denied that he had been in fear of imprisonment and had invented “*a series of cock and bull stories*” to avoid or minimise his criminal and civil liability. He did not accept that his account of having disclosed the fact that he was not insured was a “*total lie*”, “*a very cunning fabrication*” or an “*utterly false invention*”. He confirmed in re-examination that he had signed a mandate in favour of the MIBI and was aware that ultimately he would be liable for any damages awarded to the Plaintiff.
17. Sergeant Heaney then gave evidence on behalf of the Defendants. Obviously, he was not in a position to give any direct evidence on the clause 5.2 issue but he gave detailed evidence about the aftermath of the accident and the demeanour of the occupants of the vehicle. Mr Muresan was then recalled to answer questions from the Judge and in the

course of that further evidence he agreed that Sergeant Heaney had asked him to produce evidence of insurance and that he (Mr Muresan) had indicated that he would do so at Waterford.

18. As will be obvious, the above is a highly compressed summary of certain aspects only of the evidence heard by the High Court over three full hearing days.

The Judgment of the High Court

19. The Judge reserved judgment and in due course delivered a comprehensive written judgment. He noted the change in wording of clause 5.2 as compared to the equivalent clause in the 2004 MIBI Agreement, observed that the change had “*the practical effect of raising the bar which must [be] reached before the exclusion becomes operative*” (para 5) and noted – correctly – that the onus of establishing the requisite knowledge was on the Defendants (para 6). Whether the First Defendant had told the Plaintiff that he was uninsured to drive was “*the question at the heart of the controversy between the parties*” (para 7).
20. The Judge resolved that question in favour of the Defendants, for the reasons explained in detail in his judgment. He began his assessment by reminding himself that English was the not the first language of the witnesses (other than Sergeant Heaney) (para 56) He also accepted that caution had to be exercised in considering the evidence of witnesses who had been injured and/or were suffering from concussion or shock (para 57).

21. As I read his Judgment, the primary considerations which led the Judge to conclude as he did were as follows:

(1) The Judge noted that the evidence of Sergeant Heaney conflicted in several respects with the evidence given by the Plaintiff and his witnesses. For instance, the Plaintiff had given evidence that he was first out of the vehicle after the crash (even though he had been in the back seat of a 2 door car), that he had had to lie down on the road because he was in such pain and that he had asked for an ambulance to be called. Sergeant Heaney had given evidence that the Plaintiff was still in the vehicle when he arrived on the scene and that he and the passengers had all declined his offer to call medical assistance. The Judge preferred the evidence of Sergeant Heaney. While it had not been directly suggested that the Plaintiff and his witnesses had given untruthful as opposed to mistaken evidence, the Judge thought that “[e]ither way, their reliability as witnesses [was] called into question” (at para 64).

(2) The Judge noted inconsistencies and contradictions in the evidence adduced by and on behalf of the Plaintiff. Thus, the Plaintiff had confirmed in cross-examination that he had not lost consciousness whereas there was an allegation to that effect in the Personal Injuries Summons which the Plaintiff had verified in his affidavit of verification (also at para 64).

(3) Their refusal of Sergeant Heaney’s offer of medical attention and their “hurried/unusual departure from the scene” was “compatible and consistent” with

knowledge on the part of driver and passengers that the First Defendant was unlicensed and uninsured and thus exposed to the risk of trouble with the Gardai (para 69). (The Judge made it clear, however, that this was not determinative of the issue).

(4) The Judge noted that he had had an opportunity to observe the demeanour of each of the witnesses and had formed the impression of Mr Muresan that he had done his best “*to tell the truth in the knowledge that whatever the consequences for the other parties of the evidence he gave on the issue he would ultimately be liable to meet the judgment of the Court*” (para 70). Furthermore, he had “*nothing to gain by inventing a story, moreover, there was nothing to suggest a motive for such a course of action, such as vindictiveness towards the Plaintiff*” (*ibid*).

(5) In contrast, the Judge noted, the Plaintiff had “*a vested interest in the outcome*”. While the same could not be said of Mr Krubu or Mr Humvimana, they were close friends of the Plaintiff and “*understandably supportive*” of him, including in relation to assertions made by the Plaintiff which the Court had rejected. The unreliability of their evidence regarding the post-accident events called into question the weight to be given to their evidence in other respects, including their evidence that the First Defendant had not disclosed that he was uninsured and unlicensed to drive (para 74).

22. The Judge’s analysis led him to accept the evidence of the First Defendant and the Court found “*as a matter of probability, that before setting off for the concert, he informed the passengers that had no driving licence or insurance*” (para 75). It followed that, at the time of the accident, the Plaintiff knew that the First Defendant was uninsured. That

conclusion, the Judge noted, coincided with what would have been obvious to any passenger getting into a two door car, namely that the insurance, NCT and tax discs had expired (*ibid*). However, the Judge stated, that had not formed part of his reasoning and he had earlier noted in his judgment that it had not been relied by the Defendants (para 11).

THE APPEAL

23. The Plaintiff challenges the findings made by the Judge and the conclusion he reached. It is said that the High Court ought not to have been satisfied that the burden of proof had been discharged. This Court, it is said, has a jurisdiction to engage with findings of fact made by the Judge where there are material and/or significant errors in those findings. The Supreme Court's decisions in *Wright v AIB Finance and Leasing* [2013] IESC 55 and *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505 are cited in support of that proposition. The Notice of Appeal sets out 13 grounds of appeal which are each addressed in more detail in the Plaintiff's written submissions.
24. Unsurprisingly, the Defendants rely in response on the well-known line of authority emphasising the limited entitlement of an appellate court to interfere with or set aside findings of fact made by a trial court on the basis of oral evidence, including *Northern Bank Finance Corporation Ltd v Charlton* [1979] IR 149, *Hay v O'Grady* [1992] 1 IR 210, *Emerald Isle Assurances and Investments Ltd v Dorgan* [2016] IECA 12 and *Leopardstown Club Limited v Templeville Developments Limited* [2017] IESC 50, [2017] 3 IR 707. In its submissions, it addresses each of the Plaintiff's grounds of appeal and says that in no instance does the Plaintiff meet the "high threshold" for intervention identified in *Leopardstown Club Limited v Templeville Developments Limited*.

DECISION

General

25. The Judge here had to resolve what he aptly characterised as “*an almost complete conflict of evidence*” between the evidence of the Plaintiff, Mr Krubu and Mr Humvimana on the one hand and the evidence of the First Defendant on the other (para 19). There was of course no record, whether documentary or otherwise, of what had been said (or not) about the First Defendant’s insured status. All that the Judge had to go on as regards the conversation were the differing accounts given by four of the five occupants of the car at the relevant time and he had to undertake the very difficult task of reaching a conclusion as to which account was the more probable. As the Judge himself noted, that exercise called “*for a careful assessment of the reliability and veracity of the witnesses*” (para 19).
26. Historically, much emphasis has been placed in this context on the “*demeanour*” of witnesses and the advantage that a trial judge is said to enjoy as a result of having the opportunity – one denied to an appellate court – of observing first hand and in real-time how witnesses have given their evidence. In an influential essay, “The Judge as Juror”, the late Lord Bingham explained that the demeanour of a witness meant “*his conduct, bearing, behaviour, delivery, inflexion; in short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said.*”¹ He went on to observe that the current tendency was on the whole “*to distrust the*

¹ In Tom Bingham, *The Business of Judging* at page 8.

demeanour of a witness as a reliable pointer to his honesty.” A further observation of his has particular resonance on the facts here, namely that whatever limited insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when the witness is of some other nationality and giving evidence either in English as his second or third language, or through an interpreter.²

27. In this jurisdiction, the late Hardiman J addressed the difficulties of fact finding and the value of demeanour in that context in a number of judgments. In *JO’C v Director of Public Prosecutions* [2000] 3 IR 478, he stated (at 50)

*“In view of the tendency one sometimes finds to think that credibility is something that can be assessed quite easily in the absence of evidence of surrounding circumstances, it is useful to recall what was said by Lord Atkin in *Lek v Matthews* (1926) 25 Lloyds Reports 525:*

‘The lynx-eyed Judge who can discern the truth teller from the liar by looking at him is more often found in fiction or in appellate judgments than on the bench.’

*On the difficulties posed by the absence of known facts surrounding an allegation, the same learned judge said in *Soc. d’Avances Commerciales v Merchants Marine Insurance Company* (1924) Lloyds Reports 140:*

² *Ibid*, page 11

'I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts is worth pounds of demeanour.'

While Hardiman J was dissenting in *JO'C*, I do not think that that detracts from the force of these observations.

28. Hardiman J returned to this theme in *PL v Buttimer* [2004] 3 IR 494, where, as in *JO'C*, the applicant was seeking to restrain a criminal trial on grounds of delay. Having cited again the statement of Lord Atkin in *Lek v Matthews*, he went on:

“29 Every conscientious fact finder is, I think, conscious of this limitation. A purely impressionistic decision is as likely to be wrong as right and one cannot hope to justify it objectively. When one adds to the centuries' long experience aphorised by Lord Atkin the disturbing fact, illustrated below, that with lapse of time and perhaps in other circumstances as well, a person may state with perfect honesty and every appearance of conviction, that which is false, the difficulty is compounded. In particular any comfort one might derive from an assessment of the demeanour, that is the presentation and affect, of the witness is gravely undermined.

30 In such circumstances it is both natural and essential to seek some objective factor in the evidence for the purpose of forming a reasoned opinion as to where

the truth lies and for the almost equally important purpose of being able to justify a conclusion. The reason behind this almost instinctive search for an objective factor was, as it happens, pithily expressed, again by Lord Atkin in Société d'Advances Commerciales v. Merchants Marine Insurance Company (1924) 20 Lloyd's Rep. 140 [Hardiman J then cites the statement set out above]

31 This is in no way to denigrate the necessity for the tribunal of fact to see and hear the witnesses, the value of that exercise, or the difficulty, amounting in many cases to impossibility, of reaching a conclusion without doing so. But it serves to emphasise that to proceed without any element of comparison with known facts is a profoundly hazardous matter.”

29. In “The Judge as Juror”, Lord Bingham identified the following as the “*main tests*” to determine whether a witness was truthful or, though emphasising that their relative importance would “*vary widely from case to case*”:

“(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;

(2) the internal consistency of the witness's evidence;

(3) consistency with what the witness has said or deposed on other occasions;

(4) the credit of the witness in relation to matters not germane to the litigation;

(5) the demeanour of the witness.”

30. Helpful guidance is also provided by the observations of Goff LJ in *Armagas Ltd. v. Mundogas SA* [1985] 1 Lloyd's Rep 1 at pages 56-57 where he said:

“ speaking from my own experience, I have found it essential, in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence ... reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.”

While Goff LJ refers in this passage to “*cases of fraud*”, the approach set out is clearly not limited to such cases and has general application..

31. The common thread here is clear: assessing credibility on the basis of demeanour alone gives rise to a danger of a “*purely impressionistic decision*” that is as likely to be wrong as it is to be right.³ Thus it is “*essential to seek some objective factor in the evidence*

³ There is a very large body of research on this issue, some of which is referenced in a very accessible paper, “Assessing Credibility” by Hazel Glenn, available on the UK Courts and Tribunals Judiciary website

for the purpose of forming a reasoned opinion as to where the truth lies and for the almost equally important purpose of being able to justify a conclusion.”

32. In my judgment in *Morgan v ESB* [2021] IECA 29 I emphasised the need for findings of credibility to be *reasoned*:

“21 Nonetheless, where there is a material conflict of evidence, it can hardly be “sufficient for the [trial] court simply to declare that it accepts the evidence of the plaintiff” - or, I would add, the evidence of any other witness - “or that it is satisfied that he is a truthful witness without saying why that is the case”: per Irvine J (as she then was) in *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461, at para 48. *Such an approach would be wholly at odds with Doyle v Banville and indeed with Hay v O’ Grady itself. A finding of credibility, whether in respect of a witness’s evidence generally, or some specific evidence given by them, ought generally to be the product of analysis and reasoning that is capable of explanation in a judgment. That does not mean that a lengthy or discursive analysis is necessary. The degree of explanation appropriate will depend on*

www.judiciary.uk/wp-content/uploads/2016/01/genn_assessing-credibility.pdf). According to the author, “studies suggest that people are about 45-60 per cent accurate in spotting lies – in fact, very close to chance, which would be 50 per cent.” Studies suggest that this is also true of professionals (including judges) though in all groups “the subjects’ self-assessment of their skill at lie detection bore no relation to their actual score.” i.e. they all thought that they were much better at detecting deceit than they were. in fact. While there are different views expressed in the literature as to the weight to be given to demeanour and nonverbal signals, there appears to be a significant consensus that such ought not to be the primary factors in assessing credibility.

the nature, extent and significance of the relevant evidential conflict. Furthermore, there may be circumstances where a court must make its assessment based only on impression and demeanour but such circumstances will be rare.....”

33. Engaging in a reasoned analysis of conflicting evidence obviously improves the quality and reliability of the ultimate conclusion that the finder of fact arrives at. In addition, a reasoned explanation of why a trial judge has preferred the evidence of one witness over another is essential if this Court is to be in a position to exercise its appellate functions properly. This Court must not substitute itself as fact-finder. That is clearly not its role. However, it is entitled – indeed it is the Court’s duty – to “*ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts*”: *Doyle v Banville*, at para 14. It follows that the way in which trial judges reach their conclusions as to the facts must therefore be explained.
34. Here, while the Judge clearly took account of the demeanour of the witnesses who gave evidence before him (and nothing said above is intended to suggest that he ought not to have done so), he did not base his conclusions solely or primarily on that assessment. Instead he went on to analyse “*the overall probabilities*”. While the *manner* in which he carried out this exercise was the subject of criticism by Mr Callanan SC (Counsel for the Plaintiff), he did not quarrel with the Judge’s approach in principle. Indeed, he allowed, it was (at the level of principle) “*commendable*” that the Judge undertook the detailed analysis that he did. At the same time, however, Mr Callanan sought to suggest

that the Judge's approach implied that he had tried but had not been able to form a view as to who was telling the truth on the basis of demeanour only, the implication perhaps being that the First Defendant's demeanour had been such as to persuade the Judge to accept his evidence. I do not read the Judgment in that way. As I read it, the Judge undertook the exercise he did not because he felt unable to decide the evidential conflict on the basis of his impression of the demeanour of the witnesses but because he considered that the broader analysis he engaged in was the appropriate approach to adopt. I agree with the Judge's approach. The apparent implication of Mr Callanan's submission is that a trial judge should seek to decide conflicts of evidence on the basis of demeanour alone and only where it appears that such cannot safely be done should they engage in any wider analysis. As will be evident from the discussion above, that is not the correct approach in my view. Where there are objective factors capable of impacting on the trial judge's evidential assessment (and in some cases there may not be any) they should be considered as an integral part of that assessment.

The Criticisms made of the Judge's Assessment Here

35. Mr Callanan submitted forcefully that the Judge's assessment of the evidence had miscarried and that this Court should set aside his conclusion and either substitute for it a contrary conclusion on the preliminary issue or, in the alternative, remit the issue back for rehearing. Aply as Mr Callanan made his arguments, in my opinion he did not succeeded in identifying any error on the part of the Judge that might warrant this Court's intervention.

36. As regards the Judge’s general approach to the resolution of the Clause 5.2 issue, no error on his part has been demonstrated. The Judge noted that the change in wording in that clause compared with its predecessors had “*the practical effect of raising the bar which must [be] reached before the exclusion becomes operative*” and that “*the establishment as a matter of fact that the passenger knew the use of the vehicle was not covered by an approved policy of insurance (the user was uninsured) is a sine qua non to a successful defence under clause 5.2..*” (para 5, my emphasis). He was accordingly fully alive to the fact that the test is one of actual (and not constructive) knowledge. He was also clear that the onus of establishing actual knowledge was on the Defendants (para 6). The applicable legal framework was therefore correctly identified by the Judge.
37. The Judge explained in significant detail the basis for his conclusions and, in particular, why he had concluded that he ought to accept the evidence of the First Defendant. His analysis comprehensively addressed all of the evidence he had heard and it is significant that no suggestion is made that he disregarded or overlooked any material evidence. The Judge clearly had regard to the fact that Mr Muresan had committed criminal offences and also to the fact that his responses to Sergeant Heaney regarding the production of proof of insurance and driving licence were knowingly misleading (both of which matters were emphasised by Mr Callanan in his submissions). While it is clear that the Plaintiff considers that the Judge should have attached greater weight to these factors, the weighing up of conflicting factors was quintessentially a matter for the Judge. In any event, it is clear that there was no “*non-engagement with evidence*” such as could provide a basis for interfering with the Judge’s findings.

38. Much of the Plaintiff's criticisms are directed to the weight given by the Judge to the findings made by him as to what occurred in the aftermath of the accident. As a matter of principle, it appears to me that the Judge was entitled to have regard to these findings and I did not understand that to be disputed by the Plaintiff. The factual evidence of Sergeant Heaney as to what he observed at the scene of the accident was not challenged (though there was some debate about the reliability of the impression he formed that the occupants of the vehicle were unusually anxious to depart the scene without receiving medical assistance). Those "*objective facts proved independently of their testimony*" therefore provided a fixed point (or, as Hardiman J might have put it, an "*island of fact*") by reference to which the evidence of the other witnesses could be considered. Consistency with that evidence, or the lack of it, was a legitimate factor to be considered by the Judge. The internal consistency of the evidence was another entirely proper factor to be considered.
39. The Judge was therefore entitled to undertake that exercise. Indeed, in my view he would have been open to criticism had he had not done so. Having done so, and having identified significant conflicts between the unchallenged evidence of Sergeant Heaney on the one hand and the evidence of the Plaintiff, Mr Krubu and Mr Humvimana on the other (as well as conflicts and inconsistencies within their evidence), the Judge was entitled to conclude that their reliability as witnesses was called into question. In particular, the Judge was entitled to regard the evidence of the Plaintiff with reserve, having regard to the account he had given (supported, at least initially, by the evidence of Mr Humvimana) of having left the vehicle and lain down on the road screaming in

pain, an account which the Judge had rejected by reference to the evidence of Sergeant Heaney.

40. That said, as Mr Callanan submitted, allowance should be made for the fact that the witnesses had just been involved in a serious car crash. However, the Judge made it clear that he accepted that caution had to be exercised in that context (para 57). Furthermore, the Judge was entitled to have regard to the fact that the evidence of Mr Muresan (who had, of course, also been involved in the accident) had, in contrast, been “*corroborated to a significant degree*” by Sergeant Heaney’s evidence (para 63).
41. There is also force in Mr Callanan’s submission that the post-accident events do not bear directly on the resolution of the conflict as to what was or was not said in Mr Muresan’s vehicle a few days before. That is undoubtedly so. However, the Judge was well aware of the position. He did not decide the issue on the basis of his findings regarding the post-accident events. It was, rather, one of a number of factors to which the Judge had regard in reaching the conclusion he did. It was a relevant factor which the Judge was entitled to take into account and, in my view, there is nothing in the Judge’s Judgment that suggests that he misunderstood its significance or gave it excessive weight.
42. There is another aspect of Sergeant Heaney’s evidence that is canvassed in the appeal documents to which I should briefly refer. At paragraph 11 of the Judgment, the Judge stated that it followed from that evidence that it would have been evident to anyone getting into Mr Muresan’s vehicle that the discs had expired and that therefore the

vehicle was neither taxed nor insured. He added immediately that no argument to that effect had been advanced and while later (at paragraph 75) he indicated his own view that the situation would have been “*obvious*” to any passenger getting into the vehicle, he made it clear that this had not formed any part of his reasoning. The Judge would have been well-advised to refrain from expressing a view on this issue given that it had not been advanced by the Defendants. Furthermore, the suggestion that it would be “*obvious*” to passengers getting into a vehicle (even a two door vehicle) that the insurance and/or other discs on the windscreen had expired appears to me to be highly contestable. However, in light of the Judge’s clear statement that this point did not form part of his reasoning, it has no bearing on this appeal.

43. Criticism is next made of the Judge’s view (at para 69) that the refusal of Sergeant Heaney’s offer to call medical assistance and the apparent anxiety of all the occupants to depart the scene of the accident (as described by Sergeant Heaney in his evidence) was “*compatible and consistent with*” knowledge on their part that the First Defendant was uninsured and unlicensed. It is said – correctly – that the evidence suggested that the Plaintiff’s condition did not deteriorate until later. The Judge had accepted that as a matter of fact and it is said that the Judge made inconsistent findings on the issue. In my opinion, there is no inconsistency in the Judge’s reasoning here. Even allowing for the fact that the Plaintiff’s medical condition did not appear very serious in the immediate aftermath of the accident, the evidence given by Sergeant Heaney was such as to allow the Judge to find that the occupants had departed the scene in a “*hurried/unusual*” manner. He recognised that there were a number of possible explanations for that behaviour and was entitled to reach the view that one credible

explanation was the desire of the occupants to get away from Sergeant Heaney in circumstances where they were all aware that the First Defendant was unlicensed and uninsured. The Judge was entitled to take that view but he was careful to observe that it was not determinative of the issue.

44. The Judge's emphasis on the respective motives of the witnesses was also the subject of challenge. The motives of a witness were identified as an important factor by Goff LJ in the passage from *Armagas Ltd v Mundogas SA* set out above. In *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403, in a passage at 431 cited with approval by Peart J in the High Court in *Clayton v Cashman* [2006] IEHC 360, Lord Pearce identified motive as "*one aspect of probability*". Mr Callanan did not dispute that, in principle, the Judge was entitled to consider whether the witnesses he had had heard had a motive to tell the truth or otherwise. He accepted – as he had to – that the Plaintiff had an interest in succeeding against the MIBI given that otherwise any judgment he obtained might be of little or no actual benefit to him. However, he said, that was the case in all contested actions. As regards the Judge's observations that the First Defendant had "*nothing to gain by inventing a story*" and that no motive for doing so had been suggested, Mr Callanan said that the First Defendant's subjective motives were unfathomable (though he made it clear that it has never been the Plaintiff's case that he was motivated by vindictiveness) and he submitted that the Judge was wrong to attach the weight that he did to the apparent absence of any objective motive for inventing a story.

45. Allied to these criticisms was an issue on which Mr Callanan particularly focussed in

his oral submissions, what he referred to as the “3 v 1 issue”. The Judge, he said, did not give sufficient weight to the fact that the evidence of the Plaintiff on the central issue – whether the First Defendant disclosed his uninsured status as he said he had – was supported by the evidence of Mr Kubru and Mr Humvimina. The Judge, he said, had wrongly discounted their evidence. While they may not have been entirely independent witnesses, they had nothing to gain from their evidence. In this context Mr Callanan noted that neither of them had sued the First Defendant. The Judge should have rejected that evidence only if satisfied that there were strong grounds for doing so and, he submitted, there were none.

46. In my view, the Judge was entitled to take account of the fact that the Plaintiff had “*a vested interest in the outcome*”. He had suffered very serious injuries in the accident and it seems reasonable to assume that any practical prospect of recovering appropriate compensation for his suffering depended on bringing his claim home against the MIBI. He had an incentive to deny that he was aware that the First Defendant was uninsured. That was a legitimate factor – though only one such factor – in the Judge’s assessment. As regards the First Defendant, the Judge was entitled to have regard to the evident absence of any motive for him to have invented the story of disclosing his uninsured status to (*inter alia*) the Plaintiff. There appears to have been some suggestion during the trial that the First Defendant may have believed (mistakenly) that, if the claim against the MIBI failed, there could be no recovery from him either but that was ultimately not pursued and the Judge found that the correct position had been explained to him when he had been asked to execute the standard MIBI mandate. The Judge was left in a position where there was no identifiable objective reason for the First

Defendant to invent a story and, in those circumstances, he was entitled to give weight to that fact in conducting his assessment of the conflicting evidence.

47. As for the “3 v 1 issue”, it is clear that the fact that the Plaintiff’s account was supported by the evidence of Mr Kubru and Mr Humvimana did not preclude the Judge from preferring the evidence of the First Defendant. As McCarthy J observed in *Hay v O’Grady* (at page 217) the “*truth is not the monopoly of any majority.*” That is particularly so when – as here – there were strong ties of friendship between the Plaintiff and his witnesses and where, accordingly, those witnesses could not be said to be independent of the Plaintiff. The Judge was aware that Mr Kubru had not brought a claim (that fact is noted at para 35). There appears to have been no evidence one way or the other as regards Mr. Humvimana. In any event, the Judge was entitled to take the view that they were “*understandably supportive*” of the Plaintiff and to take that account in his assessment. In addition, the Judge’s view of the reliability of Mr Kubru and Mr Humvimana was affected by the view that he took of the credibility of their evidence concerning the events post-accident. I have already made it clear that, in my view, this was a factor which the Judge was entitled to take into account.

48. It is understandable that the Plaintiff should invite this Court to weigh the factors taken into account by the Judge differently and to take a different view of the evidence overall. But that, decidedly, is not this Court’s function. Whatever may be the limitations of demeanour as a factor on its own, the Judge here had the opportunity of observing all of the witnesses. This Court has not had any such opportunity. This Court is entitled – indeed it is duty-bound – to scrutinise the Judgement here to see whether the Judge has

made any material error in his assessment of the evidence such as might provide a basis for setting aside his conclusions in accordance with authorities such as *Doyle v Banville*. This Court is not entitled to re-assess the evidence *de novo* or to “*seek to second guess the trial judge’s view*” as to which evidence to prefer. That proposition is too firmly entrenched in the authorities to require elaboration. Even if such a re-assessment was open to the Court, there is no reason to think that this Court’s view should command any greater level of confidence than the views of the Judge or any greater claim to certainty. In cases such as this there simply can be no certainty that the fact finder has correctly resolved disputed issues of fact. The best protection against error – though it is by no means a guarantee – is to require the fact-finder to undertake a careful and reasoned analysis of the evidence and make clear findings which can then be subjected to appellate review within the parameters identified in the authorities.

49. In my opinion, that is precisely what the Judge did here and no error has been demonstrated in his analysis such as might permit this Court to intervene.

50. There are a number of other criticisms made of the Judgment that I should briefly refer to if only to demonstrate that I have not overlooked them. It is said that the Judge made too much of the fact that the Plaintiff and Mr Humvimana had not recognised Sergeant Heaney when he appeared in Court. The Judge certainly made an observation to that effect but there is no basis for suggesting that he attached any undue significance to that fact. It is said that the Judge’s observation at para 72 to the effect that, in a society where religious practice and belief is in decline, it was less improbable than might otherwise be the case that the Plaintiff saying a prayer and making the sign of the cross

would provoke “*a reaction of the type recounted.*” It appears to me that the Judge was entitled to consider the inherent probability (or otherwise) of the First Defendant’s account and the criticism of this part of his Judgment is, in my opinion, unfounded. Furthermore, the Judge made it clear that this observation could not found a conclusion that such had occurred (also at para 72).

51. More generally, Mr Callanan complains that the Plaintiff’s evidence was scrutinised by the Judge with a degree of rigour that he did not apply to the First Defendant’s evidence. It is difficult to know what the Court is to make of a charge of this nature, other than to consider the particulars provided and see whether they disclose some error of approach on the part of the Judge. Here it was said that the First Defendant was an admitted wrongdoer who had flouted the requirements of Irish law in several significant respects, particularly as regards the requirement to have a policy of insurance in place that covered his driving. That was a serious offence. Separately, it was said, the First Defendant had effectively misrepresented to Sergeant Heaney that he was in a position to produce insurance, tax and licence at Waterford Garda Station. Finally, reference was made to messages sent by the First Defendant to the Plaintiff after the accident in which he referred to having a wife when, in fact, he was unmarried. All of these matters, it was said, ought to have affected the Judge’s assessment of the Plaintiff’s evidence. No doubt that is so but the difficulty faced by the Plaintiff here is that the Judgment makes it quite clear that the Judge was alive to all of these issues and had regard to them. In substance, therefore, the Court is being invited to weigh these factors differently to the way they were weighed by the Judge and that is beyond the permissible scope of our appellate function.

CONCLUSION AND ORDER

52. For the reasons set out in this Judgement – which I have set out at some length in recognition both of the importance of the appeal to the Plaintiff and the force and conviction of Mr Callanan’s submissions on his behalf – I conclude that that the appeal must fail.
53. The form of order made by the High Court was not the subject of any discussion or dispute. Nonetheless, insofar as it orders that the Plaintiff’s claim be dismissed *simpliciter*, it is not evident to me how the High Court’s conclusion on the preliminary issue might justify the dismissal of the Plaintiff’s claim *against the First Defendant*. It appears to me that the appropriate form of order to be made is that the Plaintiff’s claim should be dismissed *against the MIBI*, having regard to the High Court’s determination that the Plaintiff knew that there not in force an approved policy of insurance in respect of the use of the First Defendant’s Mitsubishi Colt in which the Plaintiff was travelling at the time of the accident the subject of these proceedings. I would affirm an order in such terms.
54. As regards costs, given that the Plaintiff’s appeal has failed, it would appear to follow that the Defendants are entitled to the costs of the appeal, to be adjudicated in default of agreement.
55. If either side wishes to contend for a different form of order on this appeal (including the order for costs), they will have liberty to apply to the Court of Appeal Office within

21 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the party that requested the hearing may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Donnelly and Haughton JJ have authorised me to record their agreement with it.