THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 239
Record Number: 2018/263CA
High Court Record Number: 2013/12479P

Noonan J.
Faherty J.
Binchy J.

BETWEEN/

EDWARD O'CONNOR

PLAINTIFF/APPELLANT

-AND-

WEXFORD COUNTY COUNCIL

DEFENDANT/RESPONDENT

JUDGMENT (*ex tempore*) of Mr. Justice Noonan delivered on the 30th day of July, 2021

1. The appellant ("the plaintiff") brings this appeal today against the dismissal of his personal injuries action by the High Court (Twomey J.) in a judgment of the 2nd May, 2018 and the subsequent order of the court of the 17th May, 2018.

Background

2. On the date of the accident, the 6th February, 2011, the plaintiff was a 56 year old water inspector employed by the respondent (the Council). He had held this position for some 16 years at the date of the accident. His duties included making a daily visit to Ferns Reservoir for the purpose of checking the water level and carrying out other checks and observations. This was a task that had to be performed 7 days a week, 365 days a year, and when the plaintiff was unavailable due to holidays or other reason, a substitute was arranged. Ferns Reservoir is entirely enclosed and relatively small at twenty metres square. It is covered over in concrete and soil on which grass has grown.

3. The reservoir is located in a field which appears to be somewhat sloped so that at one end, the reservoir is almost level with the surrounding field, while at the other, it is significantly elevated above ground. The reservoir is surrounded by a steeply sloping grass bank with an incline of between 1:3 and 1:2.3. The vehicular access to the reservoir field is at the southern end which is almost level and there is a grass track around the perimeter of the reservoir. There is plenty of space to park a vehicle at the southern end. One then travels

downhill towards the northern end where there is located a small concrete building known as the meter room which the plaintiff also had to check daily. Before reaching the meter room, as one drives around the reservoir, about halfway along one side of it, there is a small concrete construction, known as the telemetry kiosk, and beside that a manhole lid that provides access from the top of the reservoir. A ladder is located beneath the manhole cover that drops down into the reservoir and the plaintiff could ascertain the water level by reference to the steps on the ladder.

4. The plaintiff's invariable practice when he came to the reservoir was to park his jeep on the downhill slope towards the meter room and to walk up the steep grass bank, check the manhole and walk down again. The plaintiff gave evidence that on 6th February 2011, a Sunday, he slipped and fell while on the way down the embankment. He said he was almost "down" i.e. at the bottom of the bank when he fell. He was at work alone, and there were no witnesses. He said he got a little bit of a shock, and felt some discomfort, but he continued home and had a normal day afterwards. The next day, he mentioned the accident to his colleague, Michael Kavanagh, and he also went to the water services section to request an accident report form with a view to formally reporting the accident. However, he said that this did not prove possible, because the staff member concerned became distressed and "burst into tears" apparently because the Council had moved offices in the previous days. In the event, he completed this form the following Friday, 11th February. He did not seek medical assistance for some three weeks after the accident, when he first attended his general practitioner.

5. The plaintiff's evidence was that he had been shown the route to the meter room and manhole chamber by his predecessor, Paul Keogh, when he started the job some 16 years earlier. Mr. Keogh's evidence was that he had acted as the water inspector for about four years before the plaintiff started, and before that again, John Foley had been the water inspector and had shown Mr. Keogh the ropes as it were. When Mr. Keogh started, there was a well-worn path up the side of the grass bank to the telemetry kiosk, which he used in the same way as the plaintiff subsequently used it. The plaintiff often worked with a helper, another Council employee, Michael Kavanagh, who assisted him from time to time and in fact Mr. Kavanagh took over as water inspector after the plaintiff.

6. Mr. Kavanagh's evidence was that he also used the well-worn track up the side of the reservoir both during the plaintiff's tenure and after Mr. Kavanagh took over. Mr. Kavanagh also described the well-worn path which had been shown him by the plaintiff as the route to take to the inspection manhole. He said the path was always obvious. Mr. Kavanagh's evidence was that he had himself slipped and fallen on the steep path about eight months prior to the plaintiff's accident but suffered no injury. Mr. Kavanagh was with the plaintiff when this happened and as a result, the plaintiff told Mr. Kavanagh that he would see about getting steps installed up the side of the reservoir.

7. The plaintiff's evidence was that he had raised the issue of steps with the Council engineer, Neville Shaw, and Mr. Shaw agreed that the issue of steps had been raised. However, there was a difference of recollection between the plaintiff and Mr. Shaw on the subsequent

conversation. The plaintiff said that Mr. Shaw had agreed to put in the steps. Mr. Shaw disputed this and said that he had refused to put in steps and instead told the plaintiff that he should walk across the top of the reservoir at the "shallow" or southern end.

8. The plaintiff disagreed that this had been said. Mr. Kavanagh gave evidence that the plaintiff had told him that Mr. Shaw agreed to put in the steps. Mr. Kavanagh continued to work in the Ferns area up until about 2016 by which time new telemetry equipment had been installed by the Council which rendered it unnecessary for the water inspector to physically check the water level at Ferns Reservoir. Mr. Kavanagh confirmed that after the plaintiff's accident, Mr. Kavanagh continued to use the same route up the side of the reservoir until the new system became operational.

9. It was put to the plaintiff and his witnesses, and indeed it was the essential gravamen of the Council's case, that the plaintiff should have used an alternative safer route by parking his jeep near the entrance to the reservoir where there was no appreciable slope and walked across the top of the reservoir from there. There was a dispute between the parties as to the suitability of this route with the plaintiff suggesting that it was unsafe because the ground was disturbed by cattle that got into the field and left holes in the ground which were covered to some extent by long grass.

10. It was, however, accepted that using this route might have taken a little longer but not much. It would either involve the plaintiff parking his jeep twice, once at the entrance to the reservoir and once at the meter room after checking the level, or alternatively, parking in either location and walking the additional distance necessary to perform the two operations. Essentially, the established path was a quicker and more convenient route for the plaintiff and indeed for his predecessor and successor.

11. Evidence on behalf of the plaintiff was given by Michael Byrne, a consulting forensic engineer. His evidence was (Day 2, Question 34): -

> "Q. And as an engineer what do you think of the safety and the legal aspect of that in terms of the duties imposed on an employer?
>
> A. Well, judge, this area is a workplace. So to use the slope, I took a measurement here and I think there is general agreement, even with my colleague, the slope here is between 1:3 and 1:2.3. It's not a constant slope down, it's a pretty rough build and that type of slope for a workplace, in my view, is unsafe and dangerous and over time someone is inevitably going to fall in such an area.
>
> 35. Q. Yes.
>
> A. It is well outside the guidance figures for any type of a ramp and it is not a suitable place for walking."

12. I think it is fair to say that there was no real contest about this evidence but rather, as already noted, the essential thrust of the Council's case was that the plaintiff should have used the alternative route that was available to him and which was safe. Mr. Byrne in his

evidence referred to various relevant provisions of the Safety, Health and Welfare at Work Act, 2005 and in particular s. 8(2) which provides in relevant part: -

"(2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular to the following: …

(c) As regards the place of work concerned, ensuring, so far as is reasonably practicable –

(i) The design provision and maintenance of it in a condition that is safe and without risk to health,

(ii) The design provision and maintenance of safe means of access to and egress from it. …"

13. Mr. Byrne's opinion was that in order to render the access safe, steps should be installed.

14. On the issue of training, instruction and supervision, Mr. Byrne was asked the following (at Day 2, Question 45): -

"45. Q. Yes. And what about training and instruction and then supervision of employees or giving warnings to employees?

A. Well as I understand this gentleman's job he went to a lot of different remote sites looking at different reservoirs and other water facilities and waste water facilities. So, as such, he is going to be a lot of time working on his own or with one other. Now, I wouldn't expect someone to be with him every day or every week but I would expect and it's required under the same Act but when risk assessment is being carried out to assess the risk, to see number 1 how is the work being carried out and is it okay, if it's not okay what do we need to do to make it okay in simple terms. So, I would think given, I've heard the previous evidence of the previous three witnesses that there was a path worn down up there. So if there was any kind of inspection or risk assessment or a visit from a supervisor then it would have been obvious that this unsafe means of access was being used and that should have been addressed."

15. Mr. Byrne considered that a risk assessment should be done every couple of years and that even a drive through would make it obvious that this unsafe route was being used. In that regard Mr. Byrne referred to s. 19 of the 2005 Act which provides: -

"19 – (1) Every employer shall identify the hazards in the place of work under his or her control, assess the risks presented by those hazards and be in possession of a written assessment (to be known and referred to in this Act as a "risk assessment") of the risks to the safety, health and welfare at work of his or her employees, including the safety, health and welfare of any single employee or group or groups of employees who may be exposed to any unusual or other risks under the relevant statutory provisions."

16. Mr. Byrne also referred to the Safety, Health and Welfare at Work (General Application) Regulations 2007, and Regulation 23 in particular: -

"23. An employer shall ensure that when employees are employed at outdoor workstations, the workstations are, as far as possible, arranged so that employees–

…

(c) cannot slip or fall."

17. In cross examination, it was put to Mr. Byrne that the Council had in fact adopted a site specific safety assessment and risk assessment in relation to the Ferns Reservoir dated 7th February, 2008. This identified the risk of crossing farmland and uneven ground and care should be taken when walking on uneven ground and suitable footwear worn. In response, Mr. Byrne, in commenting on the risk assessment, said that given that there was a worn path present which was clearly unsafe, this was easy to spot and should have been addressed. At the conclusion of Mr. Byrne's cross examination, the following exchange took place (Day 2, Q. 129 onwards): -

"129. Q. … Mr. Byrne, unfortunately I have to suggest to you that the plaintiff here was entirely the author of his own misfortune. I know you disagree with me but I had better say that to you?

A. I think an unsafe means of accessing the kiosk had developed over time and it seems to have existed for a quarter of a century and nothing had been done to address it. That seems to be the case here and that is why the employer has a duty to do something about that.

130. Q. But obviously an employee equally has a duty to take reasonable care for himself under the same Act that you have referred to?

A. Of course.

131. Q. And clearly on the basis of the presentation on the day; namely rainy conditions and wet grass, the plaintiff himself, irrespective of the issue of the employer which I don't concede for a moment, but the plaintiff himself failed to exercise reasonable care for his own safety?

A. I think if you had been using it for, is it twelve or thirteen years prior to that, he probably didn't realise that there was a possibility or a high risk of falling. To my mind I am surprised that someone didn't fall there quicker than eleven or thirteen years or twenty-three years or, however long it was, between the two witnesses yesterday."

18. It is important I think to note that the Council called no independent expert corresponding to Mr. Byrne. Instead it relied exclusively on the evidence of Mr. Shaw which, while it impressed the trial judge, could not be viewed as independent. In fairness however to Mr. Shaw, his evidence was largely confined to matters of fact and he did not purport to give expert evidence regarding the safety or otherwise of the route adopted by the plaintiff and

others, nor did he appear to suggest that this route would not, on inspection, have been reasonably obvious.

19. Following the conclusion of the evidence, the trial judge had the benefit of written and oral submissions from the parties. The plaintiff placed specific reliance on the provisions of the 2005 Act to which I have referred and drew attention to a number of authorities relevant to the issue of employer's liability. The Council in response referred to two judgments of the Supreme Court dating from the 1970's and a 1959 decision of the House of Lords, all of which of course long pre-dated the 2005 Act, and the essential thrust of which was that the employer is not an insurer and is only required to do what is reasonable in the circumstances.

Judgment of the High Court

20. The trial judge gave an *ex tempore* judgment on the 2nd May, 2018. While the judge referred in passing to the 2005 Act, the only section he singled out for attention was s. 13(1)(a) by which an employee has a duty to take reasonable care for his safety. I think it is fair to say that the trial judge was not overly impressed with the plaintiff's evidence and said that he did not find him to be a convincing witness. On the other hand, he considered that Mr. Shaw was such a witness and preferred the latter's evidence in relation to the alleged reporting of Mr. Kavanagh's slip and fall. The judge laid emphasis on the fact that he found the plaintiff's medical complaints somewhat inconsistent and this clearly had a bearing on his overall view of the plaintiff in terms of his credibility.

21. The judgment does not deal in much detail with the evidence in the case but I think it is of particular note that nowhere in his judgment does the trial judge refer to the evidence of Mr. Byrne, save in the sole context of the plaintiff not having told him of Mr. Kavanagh's fall. The judgment contains no consideration of any kind of the breaches of statutory duty alleged by the plaintiff against the Council nor does it refer to the largely uncontroverted evidence of Mr. Byrne concerning risk assessment and the fact that the well-worn path was obvious for all to see and had been present for decades. This issue is not referenced anywhere in the judgment. It seems to me that a number of facts emerged from the evidence, that were either agreed or never seriously disputed, were of significant relevance to the liability issue in the case and were not considered by the trial judge. These included the following:

    (1) The plaintiff in effect received on the job training from Paul Keogh who showed him the route to take to the top of the reservoir.

    (2) There was undisputed evidence from three witnesses, including the plaintiff, that there was a well-worn path up the side of the reservoir which had been present for decades and which was there to be seen by anybody who cared to look, even on a drive through inspection.

    (3) The presence of this well-worn path ought to have been obvious to a person carrying out a risk assessment and should have been expressly addressed in that risk assessment.

(4) The issue of steps was raised by the plaintiff with Mr. Shaw.

(5) The well-worn path was dangerous, and obviously so.

(6) There was no evidence to suggest that anyone had ever used the Council's proposed alternative route over a period of very many years.

22. The trial judge referred to only one case in his judgment, *Byrne v Ardenheath* [2017] IECA 293, a case cited by neither party but one upon which the judge appeared to place significant reliance. He interpreted that case as requiring the High Court to bring ordinary common sense to bear on what amounts to reasonable care by a plaintiff. While recognising that *Ardenheath* was not an employer's liability case, nonetheless the trial judge considered that common sense is also relevant to employees who are injured at work.

23. The judge considered that the plaintiff knew of the risk he was taking in following this route, especially when it was wet, and that knowledge was undoubtedly reinforced by Mr. Kavanagh's accident eight months earlier. His conclusion, therefore, was that ordinary common sense should have indicated to the plaintiff that it was foolhardy for him to continue using this route when there was a flat route only metres away. He did not accept the plaintiff's reasons for not using the flat route. As in the *Ardenheath* case, he held that the plaintiff failed to take reasonable care for his own safety and an application of common sense principles require that the plaintiff's claim be dismissed.

Discussion

24. The trial judge's reference to *Byrne v Ardenheath* is, I think, somewhat problematic in a number of respects. It was not referred to by either party in oral and written submissions as a relevant authority. That of itself does not mean that a court ought not be entitled to refer to authorities that might not necessarily be cited in argument but nonetheless come to the attention of the court in carrying out research for the purposes of a judgment. Sometimes a court may refer to a case or cases that may illustrate a particular point being made in the course of a judgment but may not necessarily be decisive to the outcome.

25. In such cases, it is not usually necessary to seek further assistance from the parties before judgment is delivered. However, where a court intends placing primary reliance for its decision on a judgment that has been neither cited nor the subject of argument by the parties, in general the proper approach is to invite the parties to address the court in relation to that authority before a final view is reached.

26. If that procedure were adopted in this case, it is perfectly possible that the trial judge might have been swayed by arguments as to its relevance or non-relevance but unfortunately, that opportunity was not afforded the parties and, in particular, the plaintiff. In my view, *Byrne v Ardenheath* is of little, if any, assistance in the present case. It bears a passing factual resemblance to the present case in that it involved a person slipping down a steep grassy slope instead of pursuing an alternative route. There, however, the similarity ends.

27. In that case, the defendants were the proprietors of a shopping centre with car park attached. The plaintiff drove into the car park and parked her car there. She did not in

fact intend visiting the shopping centre but rather to distribute leaflets in the locality. In order to do so, she had to access the public footpath which was adjacent to the car park. The car park was in a raised position relative to the footpath and separated from it by a steep grassy bank which was wet at the material time, much like in the present case. Rather than walk out the entrance to the car park which would have entailed a slightly longer route, the plaintiff elected to go down the grassy bank and in so doing, slipped and suffered an injury.

28. Evidence on behalf of the plaintiff was given by a consulting engineer who said that the car park had a design defect insofar as there was no designated safe pedestrian access from the car park to the adjoining footpath. The trial judge accepted this evidence and found in favour of the plaintiff but on appeal, this court found that he erred in doing so. This conclusion was arrived at by Irvine J. (as she then was) on the basis that the expert evidence of an alleged design fault was simply not credible and should not have been accepted by the trial judge on the facts of the case. At para. 32 of her judgment, Irvine J. said: -

> "I mention these facts because they highlight the need, particularly in cases where the court is not dealing with a complex specialist field of activity, for the trial judge, not only to consider the expert evidence tendered by the parties but to bring ordinary common sense to bear on their assessment of what should amount to reasonable care. The present case would, in my opinion, fall into that category insofar as it concerns the care to be expected of the owner of a shopping centre car park for visitors seeking to exit the car park on foot."

29. In my experience at any rate, this quotation is sometimes relied upon by appellants who urge this court that they should substitute a common sense view of the evidence for that of an expert witness where that evidence does not suit the appellant. Exactly such an argument was advanced to this court in *Dunphy v O'Sullivan* [2021] IECA 171, which involved a low-speed rear ending car accident resulting in little or no damage to the plaintiff's car. In commenting on *Byrne v Ardenheath*, I said the following: -

> "32. It is of course true to say that the court is not bound to slavishly follow the opinion of experts, especially when they fly in the face of common sense regarding everyday matters with which most people would be expected to be familiar. As Irvine J. pointed out, the situation would of course be different where the court is dealing with the evidence of experts in a very specialised field of activity outside of ordinary everyday experience. I commented on this issue in *Naughten (a Minor) v Cool Running Events Limited* [2021] IECA 17 (at para. 38) where I noted that when experts are dealing with matters within the range of experience of ordinary people, the court may, as a matter of common sense, be in just as good a position to form a view about the issue at hand as the expert. *Byrne v Ardenheath* was such a case.
>
> 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.

34. *Byrne v Ardenheath* is not, as the defendants appear to suggest, authority for the proposition that an appellate court is free to substitute its own 'common sense' view of the expert evidence where the trial judge has accepted that evidence, has explained why he or she has done so and the evidence is manifestly credible. To do so would be at variance with the function of an appellate court, long since settled by *Hay v O'Grady* [1992] 1 IR 210."

30. It seems to me that the opposite position obtains in the present case. In *Byrne v Ardenheath*, the evidence of the plaintiff's expert engineer was subject to serious challenge by the defendants who advanced the contrary position that the evidence was simply not credible on any ordinary common sense view of the matter. It was also totally contradicted by the evidence of the defendant's engineer. Irvine J.'s comments have to be seen in the context in which they were made, namely of a somewhat extravagant theory of a design fault advanced by the plaintiff's engineer which any rational analysis ought to have shown did not withstand scrutiny.

31. Ignoring for a moment that this is an entirely different category of claim, being one in employer's liability rather than occupier's liability, the so-called common sense considerations do not, on analysis, arise here at all. Here, there was undisputed evidence from the plaintiff's expert that there was a clear breach of statutory duty by the plaintiff's employer, the Council, not only in terms of failing to provide a safe access to his place of work but also in failing to carry out a proper risk assessment of that access. That evidence was never seriously disputed and as I have pointed out, it was not even contradicted by an opposing expert.

32. It was in my view simply not open to the trial judge to effectively ignore that evidence. If it was to be rejected, the trial judge was duty bound to engage with that evidence, largely unchallenged as it was, and explain why he was rejecting it. As Clarke J. observed in *Doyle v Banville* [2012] IESC 25: -

> "Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost. …. To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred."

33. Regrettably, that feature is absent from the judgment of the High Court in this case.

34. In *Byrne v. Ardenheath*, a visitor to the premises, elected at her own risk to take a shortcut on a once off basis that the defendants as occupiers had absolutely no reason to anticipate. The duties owed to her as between occupier and visitor were of course of an entirely

different nature to that owed by an employer to an employee. This was not a one off situation but one that has endured for decades, and what's more, one that the employer could and should have known about and taken steps to prevent.

35. Where the evidence establishes that a clear breach of statutory duty occurred which was causative of the plaintiff's accident, which it does here, it is in my view simply not open to the court to say that the plaintiff failed to take care for his own safety and therefore his claim fails. That is not the law. On the contrary, where such a breach of statutory duty on the part of an employer was established, it used to be the case that a plaintiff would not even be found guilty of contributory negligence. As observed by Walsh J. in *McKenna v Meighan* [1966] IR 288 at 290: -

> "It is well established that the workman's knowledge of the danger is not in itself contributory negligence as knowledge is only an ingredient in negligence."

36. A similar observation was made by Kingsmill Moore J. in *Stewart v Killeen* [1959] IR 436 at 450: -

> "Where it can be shown that a regular practice exists unchecked it is difficult to convict of contributory negligence a workman who follows such practice."

37. That this position no longer obtains is evident from the provisions of s. 13 of the 2005 Act which provides: -

"13 – (1) An employee shall, while at work –

> (a) Comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work…"

38. There are two other quotations from Supreme Court decisions referred to in the plaintiff's submissions which I think are apposite in this case. In *O'Reilly v Irish Rail* [2002] WJSC – SC 5703, Keane CJ said (at 5713): -

> "There has always been a tendency for courts to approach cases of this nature on the basis that the degree of fault to which an employer was manifestly shown to have operated an unsafe system of work will be subjected to will be on the whole somewhat more significant than the degree of fault that might be attached in other areas of the law of negligence. That is for obvious reasons: that workmen have to get on with their work; they have to get on with their jobs. They may do things, take shortcuts and do things which they should not do if they were looking to their own safety: In a sense the primary responsibility always rests on employers to ensure that they have a safe system of work for the benefit of their employees."

39. The second relevant quotation is from *Kielthy v Ascon Limited* [1970] IR 122 where Ó'Dálaigh CJ said (at 129): -

> "In my opinion if an employer offers without distinction a number of modes of access to the company's office of which all, except one, are safe, he cannot be relieved of his liability because a workman happens to choose to use the one which turns out to be unsafe. His duty is not to see that *some* modes of access which he offers are safe but to see that all of them are safe."

40. It is true to say, as the Council urges, that an employer is not an insurer and employees do of course have both a common law and a statutory duty to take care for their own safety. That, however, is far from suggesting that where that occurs, an employer is thereby discharged of any statutory or common law obligation to his employee, which in effect is what the trial judge concluded here.

41. For these reasons therefore I am satisfied that the trial judge fell into significant error in dismissing this claim on the basis he did. While of course the trial judge was in a much superior position in terms of assessing the credibility of witnesses, and expressed clear views in that regard for example in the context of conflicts between the plaintiff and Mr. Shaw, that view of the plaintiff's evidence cannot displace the undisputed facts to which I have alluded already.

42. The outcome of this case was not dependent on findings of fact made by the trial judge in relation to disputed evidence but rather on the application of legal principles by him which I have found to be erroneous. In those circumstances, I am satisfied that this court is in as good a position as the High Court to determine the liability issue based on the clearly established facts and the respective legal obligations of the parties as I have identified them.

43. The heavy onus that lies upon an employer to comply with its statutory and common law duties suggests in this case that the major part of responsibility for this accident lies with the employer. I also, however, must have regard to the fact that the plaintiff was a very experienced employee and ought, on reflection, to have appreciated the risks inherent in the route he habitually adopted. As the trial judge pointed out, this appreciation ought to have been heightened by the slip and fall accident that befell his work colleague, Mr. Kavanagh, only eight months prior to the index accident and accordingly, there must be a finding of contributory negligence against the plaintiff.

44. Taking all these matters into account therefore, I am satisfied that the appropriate apportionment of liability in this case is 75% against the Council and 25% against the plaintiff. I would therefore allow this appeal, set aside the order of the High Court and remit the matter for damages to be assessed accordingly.