THE HIGH COURT

[2022] IEHC 139

Record number 2018/11232p

BETWEEN

IAN O'CONNELL (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND MICHAEL O'CONNELL

PLAINTIFF

AND

NATIONAL PARKS AND WILDLIFE SERVICE, THE COMMISSIONER OF PUBLIC WORKS IN IRELAND, MINISTER FOR CULTURE, HERITAGE AND THE GUIDE., MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr Justice Cian Ferriter delivered this 11th day of March 2022

The application

1. In this application, the defendants seek an order directing that the trial of the plaintiff's claim be heard in two separate modules, the first dealing with liability and, the second, if it arises, dealing with assessment of damages.

The proceedings

2. In these proceedings, the plaintiff claims damages for catastrophic personal injuries sustained as a result of a cycling accident that occurred in August 2017 in the grounds of Killarney National Park. As a result of the accident, the plaintiff was rendered tetraplegic and has suffered devastating and life-altering injuries which will require lifelong treatment.

3. The defendants have filed a full defence. The defendants deny that the plaintiff was a "visitor" within the meaning of the Occupier's Liability Act, 1995. In particular, the defendants say that the plaintiff was a "recreational user" within the meaning of the Occupiers Liability Act, 1995 as amended and cannot demonstrate "reckless disregard" for his safety on the part of the defendants. A further issue arises as to whether the accident *locus* constituted an allurement. It is clear that there is going to be a full fight on liability.

The law

4. The principles governing the exercise by the court of its jurisdiction to direct a modular trial of proceedings have been extensively explored in the authorities in recent years.

5. It is clear that the starting point is a presumption that there will be a unitary trial and that the onus is on the applicant to demonstrate why a modular trial would be more consistent with the efficient administration of justice than a unitary trial in the circumstances of the case.

6. Charleton J. in *McCann v Desmond* [2010] 4 IR 554 ("*McCann v Desmond*"), in a passage approved by Clarke J. (as he then was) in the Supreme Court decision in *Weavering Macro Fixed Income Fund Ltd v PNC Global Investment Servicing (Europe) Ltd* [2012] 4 IR 681 at 696, set out the test as follows:

> "(1) *Are the issues to be tried by way of a preliminary module readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic*

whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.

(2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.

(3) Would a modular order result in any prejudice to the parties?

(4) Is the motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues"

7. It is common case that point 4 above (i.e. the motion being a device) has no application to the facts here.

8. In *Cork Plastics v Ineos Compound UK* [2008] IEHC 93 ("*Cork Plastics*"), Clarke J. (as he then was) considered the factors to be considered when determining whether to allow a modular trial. Clarke J. cited "*the complexity and length of the likely trial*" as the "first and most obvious factor" to be taken into account.

9. Clarke J. then addressed other factors that might be taken into account (from paragraphs 3.9 to 3.14 of his judgment). These can be summarised as:

   (i) the impact of an appeal from a module on the overall duration of the case;

   (ii) the need to insulate a party who is involved with only some of a wide range of issues from the expense and time of having to attend a lengthy trial;

   (iii) whether there are a variety of approaches to damages depending on how liability is determined;

   (iv) the likely relative length and complexity of the respective modules which might be proposed;

   (v) the prejudice to a party (as opposed to a perceived tactical advantage);

   (vi) whether there is potential for doubt as to the boundaries delineating the modules;

   and

   (vii) the extent to which there might be significant overlaps in the evidence or witnesses that would be relevant to all modules.

10. In discussing the factor of the "*likely relative length and complexity of the respective proposed modules*", Clarke J., in a passage particularly relevant to the facts of these proceedings, stated as follows (at paragraph 3.11):

> *"…taking the simple division between liability and quantum as an example, it would seem unlikely that any sufficient advantage could be found in a modular trial where the quantum issues arising in the event that liability were established would be straightforward and unlikely to occupy a very great deal of court time. On the other hand a case which involved only a very net issue on liability but was complex in relation to quantum would, prima facie, be a particularly appropriate candidate for such a modular trial. In truth, it is likely that the length and complexity of subsequent modules (in the above example of the quantum hearing) is the issue which is likely to weigh most heavily in the court's consideration of the basic advantage of the modular hearing. This is because what is saved by the modular hearing is the risk that an unnecessary quantum hearing will have to take place."*

11. In *Donatex v Dublin Docklands Development Authority* [2011] IEHC 538 ("*Donatex*"), Clarke J. summarised the principles by stating (at paragraph 2.8) that two broad considerations should be taken into account in deciding on whether a modular trial should be ordered, namely:

> *"A. is there a logical division of the case into modules which could realistically lead to a saving in time and costs: and*
>
> *B. is there any true prejudice to any of the parties, as opposed to mere tactical disadvantage, as a result of a modular hearing"*

12. I was referred, at the hearing of the application, to a series of recent cases in which the above principles have been applied, including *Ryanair v. Vola* [2020] IEHC 308; *STT Risk Management v. Transdev* [2021] IEHC 214; *James Elliott Construction v. Lagan* [2017] IEHC 278; *AB, TB, JB (A Minor suing by his Mother and Next Friend) v. Wexford County Council, Ireland and AG* [2021] IEHC 205; *Helen Forde v. Emirates* [2021] IEHC 298 and *Bradley v. Birthistle* [2021] IEHC 695. While it is of assistance to see how the principles have been applied in a variety of different contexts, in truth, the application of the principles will inevitably be fact-sensitive to the proceedings in which an application for a modular trial is brought, and the issues raised by those proceedings.

The parties' positions

13. In summary, the parties' positions on the application were as follows.

14. The defendants contend that a unitary trial would take four to five weeks with the liability issues likely taking no more than one week of that time. They submit that this case is particularly suited to a modular trial because, while the issue of liability could be disposed of in one week of Court time, the damages assessment phase of the case (if reached) will be lengthy and complex, in their view taking up to 3 to 4 weeks of Court time i.e. at least three times longer than the liability phase. The defendants contend that as there is no

issue of causation (unlike in many serious personal injuries actions), there will be no overlap of witnesses between the two proposed modules, apart from the plaintiff himself (and, possibly, his parents). Accordingly, they submit, this is a case where, to apply the two principal considerations to be taken into account, per Clarke J. in Donatex, there is a logical division of the case into modules which could realistically lead to saving of time and costs and there is no true prejudice to the plaintiff.

15. Counsel for the plaintiff, for his part, submitted that ultimately this was a straightforward personal injuries action. He submitted that the approach advocated for by the defendants in this case could lead to very many personal injuries actions becoming bogged down with separate hearings in relation to modular trials, and possible appeals of decisions on such applications, leading to a protracted and wasteful "double layer" in the process of getting personal injuries trials to hearing.

16. The plaintiff contended that, to use the language of Charelton J. in *McCann v Desmond*, personal injuries cases should be properly characterised as "an organic whole" such as to come within the *dictum* of Charleton J. set out at point 1 of his 4 point test, above i.e. that to separate liability from quantum would "tear the fabric of what the parties need to litigate".

17. The plaintiff also submitted that he had a right in a personal injuries context to give his entire evidence at one hearing, not just as to the circumstances of the accident but also as to the grievous *sequelae* suffered by him as a result of the accident, and that he would be prejudiced if denied that opportunity in the event a modular trial is ordered here. His counsel sought to characterise this matter as one of "*access to justice*" on the plaintiff's part.

Discussion

Application of principles to personal injuries cases

18. There appear to be very few reserved judgments addressing applications for modular trials in personal injuries cases. Heslin J. did grant a modular trial in the personal injuries case of *Forde v Emirates* [2021] IEHC 298, in an *ex tempore* ruling, in the slightly unusual circumstances of a net legal issue presenting itself on liability as to whether the matters the subject of the claim came within the provisions of an international aircraft convention which had been incorporated into Irish law. In *Bradley v Birthistle* [2021] IEHC 695, a nervous shock case, Heslin J. refused to direct a modular trial on the basis that not all liability issues would be dealt with in the proposed first module and that the case was one "*in which the evidence relating to liability, causation and damages is strongly interlinked and overlapping*" (at paragraph 78).

19. As counsel for the defendants correctly pointed out, there is no "carve-out" for personal injuries cases in the principles enunciated in the case law dealing with modular trials. While it may be that many of the applications for modular trials to date have arisen in a commercial litigation context, the principles that underpin such applications (being the efficient and cost-effective administration of justice) are just as applicable to personal injuries cases as they are to any other type of case. Applications will necessarily be fact-

sensitive, having regard to the principles set out in the case law and I see no basis in principle not to have the facility of a modularised trial available in respect of a lengthy and complex personal injuries action if such cases meet the criteria set out in the case law.

20. I do not accept that the making of an order for a modular trial in this case would likely lead to a situation where the court is inundated with applications for modular trials in personal injuries cases. In reality, an application for a modular trial in a personal injuries matter is only likely to be stateable where a unitary trial is likely to run for at least two or three weeks; where the assessment phase of the trial is likely to exceed the liability phase and where there is no material overlap of witnesses as between those two phases. One can envisage that modular trials are unlikely to be appropriate in many complex personal injuries cases, such as medical negligence cases where issues of causation arise and where there is likely to be significant overlap in expert evidence as between liability and damages issues. Indeed, as much was noted by Clarke J. in *Cork Plastics*, when he pointed out that expert medical witnesses in personal injuries actions may often be in a position where they are giving evidence both as to matters going to damages but also to matters relevant to liability such as causation (*Cork Plastics*, paragraph 3.12).

21. Accordingly, it is likely to be very much an exceptional personal injuries case where a modular trial will be appropriate. However, there is no reason in principle why, if the tests for ordering a modular trial are met, such an order should not be made in a personal injuries case.

22. I will accordingly turn to the application of the applicable principles to the facts of this case. As the plaintiff met the application on the basis of addressing the first three questions posed by Charleton J. in *McCann v Desmond*, I will do likewise for ease.

(1) Issues capable of ready division in to modules?

23. The first question raised by Charleton J. in *McCann v. Desmond* was whether the issues the subject of the proposed modularisation are "*readily capable of determination in isolation*". I am satisfied that there is no material overlap, or blurring of issues, as between the issues arising in this case on liability and those arising as to assessment of damages. There is no issue in causation. The legal issues on liability will centre around the application or otherwise of the relevant provisions of the Occupier's Liability Act; the doctrine of allurement; and, potentially, other issues as to duty of care and contributory negligence. The relevant factual evidence will relate principally to the circumstances of the accident and will likely include the plaintiff, witnesses to the accident, expert engineering evidence and, potentially, the plaintiff's parents.

24. The issues on the assessment side will address very different areas of expertise, and therefore of evidence, including the evidence of medical consultants (orthopaedic, psychological, neurological and urological); experts on nursing care, aids and appliances and building adaptation; vocational assessors; accountants and actuaries. The plaintiff will need to give evidence on the assessment also as in all likelihood will his parents.

25. In my view, this is not a case where the case of either the plaintiff or the defendant would be damaged through being seen in the context of separate hearings on liability and damages. This is not a case in which there are, a variety of approaches to damages depending on how liability is determined. Likewise, there is no potential for doubt as to the boundaries delineating the modules. There would be no significant overlap in the evidence or witnesses relevant to both modules.

(2) Clear saving in time and costs if modules?

26. Consideration of this factor involves looking at a number of the issues identified by Clarke J. in *Cork Plastics* including the likely length of a unitary trial, and the likely relative length and complexity of the proposed modules.

27. As noted earlier, the defendants are of the view that a unitary trial would take four to five weeks. The plaintiff believed this estimate was somewhat excessive but did not disagree that a three to four week trial would likely be involved. The defendants believe liability could be addressed in one week; the plaintiff thinks liability could go into a second week. There was also some modest disagreement about the potential length of the assessment phase of any trial with the plaintiff not disputing the likely range of experts the defendants believe will be required to address the issues arising on quantum but rather contending that many areas should be capable of agreement without the need for prolonged evidence.

28. Accordingly, while the parties differed on the likely respective lengths of the liability phase of any trial and the assessment phase of trial, it was common case that the quantum phase was likely to be at least twice as long as the liability phase, if not more, and that the overall length of trial time was likely to be at least three to four weeks.

29. It follows that, if the defendants are successful on liability, both parties will be spared the cost of running a two to three-week assessment module, and court time of that length would also be spared and can be made available to other litigants.

30. While the plaintiff complained at the hearing of the application that the defendant had not costed the likely cost savings if a modular trial is ordered, in my view, it is manifest that a potential saving of a two to three-week hearing involving multiple experts across a whole range of specialist disciplines could potentially lead to very significant costs being saved.

(3) Prejudice

31. As regards the plaintiff's contention that he had a right to give his entire evidence at one hearing in a personal injuries action, no authority was identified in support of this proposition. In fairness, the plaintiff did not contend that he would not be in a position to give evidence on two separate occasions (albeit there may undoubtedly be inconvenience stemming from same). In my view, it cannot be said that there is a denial of access to justice to a plaintiff just because the plaintiff may have to give evidence on different aspects of his claims on two separate occasions. The important point is that if there is a trial in two modules, and he is successful in the first module, he will be fully free to give any relevant evidence as he sees fit in relation to the assessment of damages in the second module. I see no material prejudice to the plaintiff in this regard.

32. The plaintiff also noted that the granting of a modular trial carried with it the possibility of two separate judgments and, possibly, two separate appeals. As regards the impact of an appeal on a module of the overall duration of the case, the defendants fairly pointed out that the mechanism identified by Clarke J. in *Cork Plastics* could be deployed to minimise any disadvantage to the plaintiff otherwise arising from this risk. The mechanism suggested by Clarke J. (at paragraph 3.6) was "*for the court to refrain from making any order in respect of the liability issue, if that is considered appropriate, so that any time for appeal will only run from the conclusion of the quantum hearing*". This is seems to me to be an appropriate mechanism to deploy here and I will return to this below.

33. While I accept that a modular trial will lead, in the event the plaintiff is successful on liability, to some additional delay before quantum is determined, I do not believe that this creates a level of prejudice outweighing the other factors which point in favour of a modular trial.

Conclusion

34. In my view, this is not a case where the separation of the trial of the action into two modules will be one where the apparent shortest route is the longest way home.

35. Unusually, on the facts of this case, there is a very clean division in terms of legal issues, range of evidence and likely witnesses as between the liability aspect of the proceedings and, if it arises, the assessment of damages. In light of the comparative likely length of the two modules, there is a clear potential for very significant savings in the parties' costs and Court time. In truth, there is no material downside from the plaintiff's perspective to such an approach. If he wins the liability module, in light of the *Cork Plastics* mechanism which I propose to put in place, he will proceed without delay to have his damages assessed. If he loses the liability module (including after any appeal), he will be spared the very significant cost and time of an assessment hearing which will have proved unnecessary.

36. I will accordingly grant the relief sought and order that the trial of the plaintiff's claim be heard in two separate modules, the first being a liability module and, dependent on the outcome of the liability module, the second module dealing with assessment of damages.

37. As noted earlier, in order to minimise any potential prejudice to the plaintiff, in the event that he is successful on liability, by the delay that would be caused by an appeal from a liability determination before quantum matters are addressed, it seems to me that this would be an appropriate case for the trial judge to deploy the mechanism suggested by Clarke J. in *Cork Plastics*, i.e. for the court to refrain from drawing up any orders as to the liability issue until the conclusion of the quantum hearing so that, in the event that the plaintiff is successful in the liability module before the High Court, the plaintiff can then proceed to have his quantum hearing before one final order is drawn and in respect of which time limits for appeal would then run (and any appeal would relate to both liability and quantum issues). I am making my order for a modular trial on the basis that the defendants will not seek to contend for the contrary before the trial judge.

38. Subject to hearing from the parties to the contrary, I propose to make the costs of this application costs in the cause.