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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION

Between:

OWEN McFERRAN

Plaintiff

and

SEAN O'CONNOR

First Defendant/Appellant

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Second Defendant

and

THE NORTHERN IRELAND AMBULANCE SERVICE

Third Defendant

Mr Ringland KC with Mr Maxwell (instructed by Keoghs Solicitors) for the First Defendant/Appellant
Mr Power KC with Mr Taylor (instructed by Sheridan & Leonard Solicitors) for the Plaintiff
Mr Henry KC with Mr Rafferty (instructed by the Crown Solicitor's Office) for the Chief Constable PSNI
Mr O'Donoghue KC with Mr Smyth (instructed by BSO Legal Services (DLS) for the Third Defendant

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Before: Keegan LCJ, Horner LJ and Rooney J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal with leave from an interlocutory decision of Colton J ("the judge") refusing the appellant's ("first named defendant") application for a split trial. The decision of the judge was delivered on 21 February 2025 *ex tempore*. This reversed the previous order of Master Bell of 9 December 2024 ordering a split trial and that a hearing should take place first on liability matters.

Background

[2] The plaintiff was born on 14 October 1996. On 20 January 2018, then aged 21, he was a pedestrian on the Moneynick Road, Toomebridge, walking along the nearside of the road in the direction of Randalstown with his girlfriend Shannon McQuillan. At approximately 03:43 hours, they were struck by a vehicle driven by the first-named defendant causing the plaintiff to sustain serious and life changing injuries. Tragically, Shannon McQuillan died at the scene because of injuries sustained in the collision.

[3] Prior to the collision, at approximately 02:00 hours, the police requested an ambulance to attend Rainey Street, Magherafelt to administer to Ms McQuillan who had been unconscious. The ambulance arrived at 02:12 hours. Ms McQuillan, who had regained consciousness, was helped onto a stretcher by a paramedic and placed into the ambulance. She was heavily intoxicated and became abusive to the ambulance personnel when they attempted to assist, thereby necessitating a request for the police to reattend.

[4] Ms McQuillan agreed to travel to Antrim Area Hospital in the ambulance, accompanied by the plaintiff. During the journey the ambulance had to stop because of Ms McQuillan's conduct in the rear of the vehicle. The police were called again and spoke to the plaintiff and Ms McQuillan. At a bus stop on the Moneynick Road, Ms McQuillan and the plaintiff got out of the ambulance and proceeded to walk along the unlit road in the direction of Randalstown. A number of vehicles passed the plaintiff and Ms McQuillan on the road, prior to the collision with the appellant's van.

[5] A writ was issued on 6 January 2021. A statement of claim followed on 26 April 2021 which pleaded particulars of negligence against the first, second and third defendants. The Writ also referred to the fact that the plaintiff sustained very serious injuries, including permanent brain injury and disability. The plaintiff was employed as a joiner at the time of the collision and will be unable to work in future.

[6] Defences have been served denying liability in negligence and that any personal injury, loss and damage sustained by the plaintiff were caused or contributed to by the plaintiff's own negligence. The second defendant specifically

denies that he owes any duty of care to the plaintiff and, in the alternative, if a duty of care is owed, his servants and agents did not breach that duty, or in the alternative, any breach of duty was not causative of the injuries sustained.

This appeal

[7] The notice of appeal from the interlocutory order is dated 10 March 2025. There are three core grounds of challenge contained in paras 2, 3 and 4 which we summarise as follows:

(i) That in exercising his discretion in favour of the plaintiff, the judge was wrong in law and in principle to take into account or give weight to the fact that the plaintiff who had suffered a traumatic brain injury was entitled to additional consideration and protection by the court.

(ii) That the judge failed to have regard to the long-established principles governing the decision of whether or not a split trial should be ordered and, in doing so, was wrong in law and in principle.

(iii) That the judge failed to address or give sufficient weight to the overriding objective to deal with cases justly as set out in Order 1 r.1A of the Rules of the Court of Judicature (Northern Ireland) 1980

[8] Mr Ringland KC appeared for the appellant in this court and at the first instance hearing. As will be considered in more detail below, on appeal, Mr Ringland advanced a new argument that the judge, by focusing on the issue as to whether there was a substantial prospect that a split trial on liability would dispose of the whole case, had applied the wrong legal test. No submission on this discrete issue had been argued before the judge at first instance. Indeed, to the contrary, referring to the decision of Stephens J in *McClean v McLarnon* [2007] NIQB 9 in support, Mr Ringland submitted to the judge that consideration must be given to the issue relating to the substantial prospect of a successful defence as a prominent feature in the overall balancing test. Indeed, the same argument is strenuously advanced in the appellant's skeleton argument.

[9] In addition to this previously undebated submission, Mr Ringland advanced a further argument that the judge, in the exercise of his discretion, had effectively erred in the balancing exercise, either by not taking into account various relevant factors or by placing undue weight on other factors.

[10] This appeal was defended by Mr Power KC on behalf of the plaintiff. Mr Henry KC, on behalf of the second defendant, supported the appeal. The third defendant, represented by Mr O'Donoghue KC, took a different view on the basis as Mr O'Donoghue put it, a different legal test applied on appeal from a first instance judge to the Court of Appeal than on appeal from a Master, namely that the court

would have to be satisfied that the judge's exercise of discretion was wrong. On that basis, Mr O'Donoghue adopted a neutral position.

Relevant law

[11] This is an interlocutory appeal which concerns the exercise of discretion by a trial judge. As such, the appellate court should only intervene where the judge has exercised his/her discretion under a mistake of law, or in disregard of principle or misapprehension of facts, or for failing to take into account a material factor or taking into account irrelevant factors. Furthermore, it must be established that in exercising his/her discretion a judge has not strayed beyond a reasonable band of decision making (see *Short Brothers PLC v AAR Corp* [2025] NICA 18 and *Flynn v Chief Constable of PSNI* [2017] NICA 13).

[12] The power to order a split trial is contained within Order 33 rule 3 of the RsCJ, which provides in the following terms:

> "**Time, etc., of trial of questions or issues**
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> 3. The court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated."

[13] In *Miller (A minor) v Peoples and another* [1995] NI 5, Carswell LJ approved the dicta of Lord Denning MR in *Coenen and Payne* [1974] 2 All ER 1109 at page 1112d:

> "The normal practice should still be that liability in damages should be tried together. But the court should be ready to order separate trials whenever it is just and convenient to do so."

[14] In *Miller*, Carswell LJ went on to say:

> "The court should, in our view, take a broad and realistic view of what is just and convenient, which should include the avoidance of unnecessary expense and the need to make effective use of court time…In weighing up what is just and convenient, the court should balance the advantages or disadvantages to each party and take into account the public interest that unnecessary expenditure of time and money and a lengthy hearing should not be incurred."

[15] In this jurisdiction further cases have followed *Miller* such as *Mohan v Graham and others* [2005] NIQB 8, and *McClean v McLarnon* [2007] NIQB 9. In *Mohan*, Deeny J having examined the authorities, also raised the issue of a resolution of proceedings as a relevant factor to weigh in the balance, stating as follows:

> "The courts are more ready today than perhaps they once were to acknowledge that the compromise of disputes is an important aspect of the fair and expeditious administration of civil justice…It seems to me, and counsel did not dissent from this proposition, that it is often easier to resolve a personal injury action if the parties and their legal advisors are dealing with one trial with all the issues before them."

[16] In *McClean*, Stephens J also stated that if a split trial adversely affects the prospects of a settlement then it is a factor that should be taken into account in the balancing exercise. However, Stephens J emphasised that, under the rubric of "what is just and convenient in the interests of all parties and in the public interest," other factors should be taken into account in the exercise of the court's discretion. The factors include, the avoidance of unnecessary expense, the efficient use of court time, the potential prejudice caused by delay in the case, saving expense and costs and the prospect of witnesses having to give evidence twice at separate trials.

[17] Another important factor raised by Stephens J in *McClean* for a court to take into consideration in the overall balancing exercise is whether the defendant can establish that there is a substantial prospect that the issue of liability will dispose of the whole case. At para [12], the judge stated as follows:

> "[12] If there is an order that the trial be spilt there is no guarantee that the costs of the trial in relation to the amount of damages will be saved. The Court of Appeal in *Millar v Peeples* did not restrict the cases in which a split trial would be ordered to ones in which there was no real prospect of the plaintiff succeeding in relation to the issue of liability. However, in exercising my discretion in this case, where the trial in relation to liability and the trial in relation to damages will each take approximated 2-3 days, I consider that it is necessary for the defendant to establish that there is a substantial prospect that the issue of liability will dispose of the whole case. I do not consider that "any prospect" or "any reasonable prospect" that the liability issue will dispose of the whole case is sufficient to depart from the general rule that liability and damages should be tried at the same time. The smaller the saving in costs, the greater the prospects

> there will need to be that the liability issue will dispose of the whole case."

[18] The legal question for a court in the exercise of its discretion under Order 33 rule 3 is simply whether, on the facts of a particular case, it is just and convenient to order a split trial taking a broad and realistic view. The factors highlighted in the stated cases above constitute relevant and proper criteria in the determination of what is just and convenient in the interests of all the parties and in the public interest. Clearly, in our view, a consideration of the liability issues and whether they could substantially dispose of the case is a relevant factor.

[19] Order 1 rule 1A refers to the overriding objective to deal with cases justly, which encapsulates the public interest in ensuring that expense is saved and the effective use of court time. In many respects, the overriding objective and the matters raised in Order 1 rule 1A(2) are reflected in the factors highlighted above in *Miller, Mohan* and *McClean*.

[20] In *Gibney v MP Coleman Limited* [2020] NIQB 68, McFarland J utilised a checklist identified by Hildyard J in *Electric Water v Philips Electronics* [2012] EWHC 38, which serves as a useful guide as to the relevant factors which may be in play in a court's consideration as to whether to order a split hearing. However, each case is fact specific and there is no set formula for deciding this issue.

The judge's ruling

[21] We have had the benefit of reading the judge's *ex tempore* ruling. The material parts of this are as follows:

> "Yes, while this is an appeal from a decision by the Master to order a split trial in this case - the principles to be applied by the court are not in dispute. The starting point is that there should not be a split trial, the presumption is against a split trial and that is a presumption, I must say I favour. I am generally very wary of split trials and think it is better that quantum and liability issues are decided at the one trial. I think that is particularly so in a case such as this where there is a brain injury because the court will be anxious to supervise the proceedings at all times.
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> One is conscious that often these cases are compromised and that is not something that should be held against the defendants who might feel that they are put under pressure to settle cases they would otherwise run. But, this is a case which, if it is dismissed on liability, the court still has to ensure that the interests of the severely injured

> plaintiff are kept in mind. So, as I say, that is the general presumption and I think it is a good presumption and that is the preference that I have. So, in order for the defendants to succeed they must establish that there is a substantial prospect that the issue of liability will dispose of the whole claim and that, I think, is the focus for me.
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> I think that Mr Ringland, I think is correct, when he says that if there is not a split trial there will be delay, which is potentially prejudicial to the defendants and there will be additional costs. I think that is inevitable and that weighs on the balance of the split trial although, of course, if the application is refused, the court will be anxious to manage the case to ensure that there is no further delay in the matter and the court has the powers to do that, and will do that, if that is the decision it comes to. So, for me, the focus, what I am focusing on in terms of the decision here is can the defendants establish, which they must do, as a necessary requirement, that there is a substantial prospect that the issue of liability will dispose of the whole claim, and I acknowledge that there are very significant liability issues in this case.
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> That is obvious from the background that had been outlined to me and from the very detailed report from the coroner, but I am not persuaded that the liability issues in this case will be easily met with. First, though, I think there will be a significant number of witnesses involved, and their evidence will need to be tested. There will be significant legal issues, as well as the factual issues, and on the material available to me, I am not satisfied there is a substantial prospect that the issue of liability will dispose of the whole claim and for that reason, I allow the appeal, and I am not satisfied that this is a case for a split trial. That said, I intend to manage this case effectively and critically."

Our conclusions

[22] First, we are bound to say that Mr Ringland's proposition that the judge erred in law, is entirely without foundation. It does not appear in the notice of appeal. It does not appear in any of the skeleton arguments, and the judge was clear at the outset that the parties agreed on the legal principles. The law is simply stated, that in the exercise of discretion a judge must decide whether it is just and convenient to order a split trial taking a broad and realistic view.

[23] The question of whether there is a substantial prospect that a liability hearing would settle the case is a relevant factor, well-trammelled in the case law. It was the core of the argument advanced by Mr Maxwell (who is also junior counsel in this case) in *English v Braniff* [2022] NI Master 6. It also features heavily in the skeleton arguments filed in this case at first instance and on appeal wherein the first defendant engages with the question of whether there is substantial prospect that the determination of the liability issue will dispose of the whole claim. The judge has not erred in law or applied the wrong legal test.

[24] Various factors feed into this exercise of discretion. Some factors flow from Order 1 rule 1A, namely the avoidance of cost and expense. Another factor is whether there would be a substantial prospect that the issue of liability will dispose of the whole claim. Furthermore, a valid consideration is whether a split hearing would militate against settlement. However, there is no closed list of factors that a judge must consider given the fact sensitive nature of cases.

[25] The judge was also entitled to refer to the plaintiff's brain injury and the need for active case management as part of the background to the case. Reading the ruling as a whole (and making allowance for the fact that this was given *ex tempore*) we do not consider this was the determinative factor or that there has been a fatal flaw in the reasoning.

[26] The core reasons that the judge provides after conducting the necessary balancing exercise are sound. On one side of the balance, he considers costs and delay. These are both issues which feed into the public interest, and which reflect Order 1 rule 1A. Mr Ringland suggested that because the judge did not specifically mention either the public interest or Order 1 rule 1A, that his decision is invalidated. Such an argument cannot stand in circumstances where the judge has clearly covered the relevant territory and where it is plain that delay and costs are part and parcel of the public interest and in satisfaction of Order 1 rule 1A. Furthermore, on the other side of the balance, the judge was entirely correct to categorise this case as one where very significant liability issues would arise and could not, on his reasonable assessment, be easily dealt with. Consequently, we consider that the judge was entirely justified in deciding that there was no substantial prospect that the issue of liability will dispose of the whole claim.

[27] Taking a broad and realistic view of this case, we agree that liability is a complicated issue which will not be easily resolved. There are three defendants. We note in its defence, the Ambulance Service, pleads that it effectively asked the Police Service to assume responsibility for the plaintiff at the time. The different and various allegations of breach of duty against the different defendants persuade this court that the judge's view was correct, namely that there is no substantial prospect that a liability hearing will dispose of the whole case.

[28] We also consider the time estimate for the liability hearing of 3-4 days, to be unrealistic. To our mind, the liability issues in this case will require significantly

more court time and consideration than the quantum issues which are likely to involve agreement of at least some medical evidence, life expectancy assessment and care support. In addition, a reasonable prospect of settlement would be preserved if this case were heard as one trial.

[29] True it is, that there has been delay in this case. Mr Power has frankly conceded that point. However, the judge has taken that factor into account in the overall balance and has said that he would actively manage the progress of the action. We can see that progress has been made recently. The plaintiff now has an engineering report and updated medical reports and has indicated that quotes are being obtained and sent to legal aid in relation to care reports. Thus, while we understand that these cases take time, we think with active case management there should not be any further undue delay in this case.

[30] In summary, we find that the plaintiff's skeleton argument filed at first instance, which has largely been repeated in this court, properly encapsulates the core of this case at para [9] as follows:

> "There is a striking distinction to be made between those authorities in which a split trial was ordered and those where the application was declined by the court. It is the complexity of the evidence. In a simply focused case – pedestrian walks out from between cars, quad bike accident at work, disagreement about whose side of the road an impact was on, employee falling off a bin, whether complaints were made in line with contractual provisions – the court can make a reasonably quick interim assessment of whether a defendant has overcome the burden of establishing that there is a substantial prospect that the issue of liability will dispose of the whole case."

[31] In exercising his discretion the judge has not strayed beyond a reasonable band of decision making. He has not left out of account any material factor. He has conducted his own balancing exercise which is reflective of the particular facts of this case. The *ex-tempore* ruling we have read could of course be improved with the benefit of hindsight but is sufficiently clear on the core issues. Whilst the judge may not have specifically mentioned the public interest in Order 1 rule 1A, that is not determinative as we can readily imply that it was taken into account. Whilst he has not specifically mentioned the issue of prejudice or advantage to the plaintiff, we consider it obvious that given the complicated liability issues that arise in this catastrophic injury case a hearing of all matters together is likely to be a much more efficient use of time and the reasonable prospects of settlement would be best maintained if the liability and quantum reports are prepared simultaneously.

[32] In the light of our conclusions above it is not necessary to adjudicate on the application for admission of fresh evidence. We direct that this case be listed before the King's Bench Judge on 20 June 2025 with a view to timetabling outstanding reports towards a hearing in 2026. We see no reason why within 12 months from now this case cannot proceed to hearing on all issues.

[33] Accordingly, the appeal is dismissed. We will hear the parties in relation to costs.