Neutral Citation No. [2013] NIQB 73 | *Ref:* **MCCL8928**

Judgment: approved by the Court for handing down | *Delivered:* **28/06/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S DIVISION

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF NEWTOWNARDS

BETWEEN:

CHRISTINE FLANAGAN

Plaintiff:

and

BRITVIC (NI) PLC, JOHNNY IRVINE AND MITSUI SUMITOMO INSURANCE

Defendants:

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McCLOSKEY J

Introduction

[1] The issue which this appeal determines is whether the Plaintiff should be permitted to give her evidence by affidavit or video link, rather than in person, upon the substantive hearing of her claim for damages against the Defendant. The application made to the judge at first instance, by Notice of Motion, sought an Order permitting –

> "…… that the evidence of the Plaintiff in this matter be given by way of affidavit or such other method as the Court may direct."

The application was refused and the Plaintiff has appealed to the High Court accordingly.

The Relevant County Court Rules

[2] While the Notice of Motion did not specify any provision of the County Court Rules, upon the hearing of the appeal transacted in this court attention was focused on Order 24 (arranged under the rubric of "Evidence"), which contains two potentially applicable provisions. First, Rule 2 provides:

> "2(1) Save as otherwise provided by these Rules, the evidence of witnesses at the hearing of any action or matter shall be taken orally on oath, and where by these Rules evidence is required or permitted to be taken by affidavit, it shall nevertheless be taken orally on oath if the Judge or District Judge (as the case may be), on any application before or at the hearing, so directs.
>
> (2) The Court may allow a witness to give evidence through a video link or by any other method of direct communication."

This latter provision was introduced by an amendment of the Rules made in 2007 [see SR 2007/500]. The second potentially applicable provision is Rule 4, which states:

> "4(1) Subject to paragraphs (2) and (3), the Court or District Judge (as the case may be) may at any time order that –
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> (a) any particular fact or facts may be proved by affidavit; or
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> (b) the affidavit of any witness may be read at the hearing on such conditions as the Judge or District Judge (as the case may be) thinks reasonable; or
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> (c) any witness whose attendance in Court ought for some sufficient cause to be dispensed with be examined by interrogatories or before an examiner.

(2) Where it appears to the Judge or District Judge (as the case may be) that any party bona fide desires the production of a witness for cross examination and that the witness can, without undue expense, be produced, an order shall not be made authorising his evidence to be given by affidavit.

(c) Nothing in any order made under paragraph (1) shall affect the power of the Judge or District Judge (as the case may be) at the hearing to refuse to admit evidence tendered in accordance with any such order if in the interests of justice he thinks fit to do so."

[3] I would emphasise that where an application of this kind is made, it is essential that all evidence potentially bearing on its determination be laid before the Court. In short, the Court must be placed in a position to exercise its discretion on a fully informed basis. It is regrettable that this did not occur in the present case. Two adjournments of the appeal to the High Court, followed by an "unless" order directed to the Plaintiff, were required to rectify the deficiencies – which were bilateral – in the application.

The evidential matrix

[4] Upon the invitation of the court, the parties agreed certain basic facts, which included the following:

(a) This is a claim for damages arising out of a road traffic accident which occurred on 17 November 2010. The Plaintiff claims damages for personal injuries and various items of financial loss. She was travelling in a vehicle owned and driven by her.

(b) The accident involved an alleged collision with another vehicle, driven by the second Defendant, an employee of the first Defendant, owner of the vehicle.

(c) Proceedings were initiated by Civil Bill dated 18 August 2011.

(d) Following the initiation of proceedings in August 2011, the Plaintiff travelled to Australia, initially on holiday. Laterally, she has intimated that she is working there and, at this juncture, is disinclined to travel to this jurisdiction for the purpose of prosecuting her claim.

[5] It is clear that the Plaintiff's case was ready for listing in early 2012. Accordingly, her unavailability by choice has delayed the trial by over one year. This

substantial period of delay is regrettable, being antithetical to the expeditious disposal of contentious litigation and the overriding objective. There have been various review and case management listings before the judge during this period.

[6] At this court's request, a draft of the affidavit which, if permitted, would be presented on behalf of the Plaintiff, evidently approved by her, was prepared. This contains averments to the effect that on the occasion in question a vehicle driven by the second Defendant collided with the rear of a vehicle owned and driven by the Plaintiff. It is averred that the Plaintiff's vehicle "…. was stopped to allow an oncoming taxi to approach ….". No further description or particulars of the accident are provided. The remainder of the affidavit details the Plaintiff's claim for special damage, the components whereof appear to be substitute vehicle hire, storage of the damaged vehicle and temporary insurance, together with her alleged personal injuries. In the draft affidavit the Plaintiff denies any allegation of fraud. The affidavit concludes in the following terms:

> "I have instructed my solicitors to try and have the case heard by way of affidavit or video link if possible. If not, then I would like the matter to be generally adjourned to a time in the future …… I am unable to return to Northern Ireland due to work commitments in Australia …. It is highly unlikely that I will be able to return to Northern Ireland [for] another two years."

[7] The second adjournment of the hearing of the Plaintiff's appeal also resulted in the preparation of an affidavit sworn by her solicitor. This particularises the Plaintiff's claim for special damage, which totals almost £6,000. It records that following the initiation of proceedings on 18 August 2011, the Plaintiff communicated on 20 December 2011 that she was in Australia on holidays and would probably remain there until summer 2012. The next communication from the Plaintiff was, evidently, some 13 months later. This was apparently the stimulus for the application to the County Court Judge giving rise to this appeal. The solicitor further avers:

> "The Plaintiff's instructions are to proceed with the case as far as possible. We are instructed that if the case cannot proceed in her absence we should try to have the matter adjourned generally so that it can proceed **when she returns to the jurisdiction at an unknown date in the future**."
>
> [My emphasis.]

It is clear from the averments in both affidavits that any award of general damages for personal injuries will be of fairly modest dimensions. The medical reports

describe a soft tissue injury to the neck which resolved within some four weeks and a soft tissue injury to the lower back expected to settle within approximately nine to twelve months. As regards the claims for financial loss, it would appear that the only loss actually sustained by the Plaintiff consists of her claim for £950 arising out of the total economic loss of her vehicle. The other items will presumably be payable to the credit hire company concerned, Crash Services, if recovered.

[8] An affidavit sworn by a solicitor in the firm representing the first Defendant (the vehicle owner) but not the second Defendant (the vehicle driver) was generated some time ago for the purpose of having the relevant insurance company joined as third Defendant. This contains the following material averments:

(a) On the date of the alleged accident, the second Defendant was not actively working for the first Defendant, being on long term sick leave.

(b) There was no report of the alleged accident by the second Defendant to the first Defendant.

(c) The first Defendant first learned of the alleged accident upon receipt of a letter from the Plaintiff's solicitors.

(d) The second Defendant "……. was involved in a number of previous road traffic accidents in similar circumstances to the accident which is the subject of these proceedings …… there are suspicions surrounding the second named Defendant's involvement in this accident ……. he is presently travelling in Australia ……"

Ultimately, a further affidavit was adduced by the Defendant's solicitors, exhibiting a letter . The latter contains assertions that the second Defendant was the driver involved in three strikingly similar vehicle collisions between February and November 2010, the third being the subject accident. It is further asserted that another passenger claim for damages arising therefrom was dismissed by the court, without elaboration or particulars.

Conclusion

[9] My analysis of the regime established by Order 24 of the County Court Rules is that it establishes a dominant provision to the effect that in County Court cases the evidence of a party or witness shall normally be given on oath, *viva voce*. This, in my view, has the status of a strong general rule. It mirrors its High Court counterpart in Order 38, Rule 1 of the Rules of the Court of Judicature. It is clear that in cases where other permitted methods of receiving evidence – for example by video link or affidavit – are canvassed, the judge is invested with a broad discretion. It is equally clear that the exercise of such discretion will be informed by the judge's assessment of the interests of justice in the particular case, under the shadow of the dominant Rule at all times. This may, potentially, entitle the judge to take into account a

broad range of factors. Furthermore, any judge seized of an application such as that in the present case **must** seek to give effect to the overriding objective enshrined in Order 58, Rule 2 [the County Court cousin of RCC Order I, Rule 1A]. Thus, as in the present case, considerations such as equality of arms, saving expense and fairness to both parties will frequently arise.

[10] One of the features of our adversarial system for the adjudication of civil disputes between citizens in this jurisdiction is the attendance of parties and witnesses at a trial and the adduction of their evidence by the conventional mechanisms of examination in chief and cross examination. However, in furtherance of the interests of promoting efficiency and expedition and avoiding unnecessary time, costs and complexity, there is, in contemporary litigation, a greater willingness to receive certain forms of evidence by other media, such as affidavits, agreed reports of experts, agreed schedules of facts and live link. The Court's assessment of the interests of justice will always be the determining factor in a context where, as I have suggested above, a dominant, but not inflexible, rule of practice has reigned almost from time immemorial. It is appropriate to recall that oral hearings represent one of the established features and virtues of the common law tradition which is practiced in our legal system. Moreover, this practice is rooted in, *inter alia*, fairness to both parties. It provides a level playing field for all. However, it has recently been subject to the winds of change.

[11] Unmistakably, the correct approach to the Court's determination of this kind of issue is not confined to a consideration of **the parties**. The prism is not bilateral. It is, rather, triangular in nature, involving also **the Court**. Thus the question of the Court's ability to determine any claim in accordance with the interests of justice and according fairness in full to both parties will always be a material consideration. In evaluating these factors, the Court will be alert to the reality that, at this interlocutory stage, it is not adjudicating on the merits of the dispute between the parties. It is, rather, engaged in the exercise of forming an evaluative judgment based on the competing – but untested – material assertions of the parties and such objective evidence (such as medical reports) as may be available.

[12] It is trite that every case of this kind will be unavoidably fact sensitive. This is confirmed by the decision of the House of Lords in Polanski – v – Conde Nast Publications [2005] 1 WLR 637, where the Plaintiff's explanation for not pursuing his action in defamation in person in England, based on an assertion that he had fled to France as a fugitive from USA justice, was held sufficient to warrant the reception of his evidence by video conference link. Importance was attached to the consideration that he was exercising his constitutional right, as a citizen of France, not to be extradited: per Lord Hope, paragraph [66]. The impact on, and any possible prejudice to, the party resisting applications of this kind is an obligatory consideration for the court: per Lord Nicholls, paragraph [16]. Lord Nicholls further stated:

> "[17] ….. The trend on matters of this kind is to look broadly at the requirements of justice. Whether the use of the Court's procedures in a particular way would bring the administration of justice into disrepute or, as it is sometimes put, would be an affront to the public conscience, calls for an overall balanced view …. The courts increasingly recognise the need for proportionality. The sanction must be appropriate having regard to all the circumstances."

Also noteworthy is the observation of Baroness Hale concerning the hearsay reforms introduced by the Civil Evidence Act 1995:

> "[74] The substantive law following the 1995 Act, therefore, is that relevant hearsay is always admissible; there are various procedural safeguards aimed at reducing the prejudice caused to an opposing party if he is not able to cross examine the maker of the statement; but the principal safeguard is the reduced – even to vanishing – weight to be given to a statement which has not been made in court and subject to cross examination in the usual way. The court is to be trusted to give the statement such weight as it is worth in all the circumstances of the case."

Lord Carswell, in a notable dissent, considered that the overarching principle in play was "the power of the Court to prevent misuse of its procedure in a way which would bring the administration of justice into disrepute." The reasoning of Lord Carswell also drew on the established principle that the right of access to a court is not absolute: see paragraph [94].

[13] By virtue of Order 24, Rules 2 and 4 of the County Court Rules, there are two options to be considered by the Court in the present case. The first is that the Plaintiff be permitted to give her evidence by affidavit. This would plainly be inappropriate in this case, as it would deprive the Defendant of the conventional adversarial tool of cross examination and would, simultaneously, disable the Court from assessing the Plaintiff's demeanour and presentation. Furthermore, I am satisfied that Rule 4 contemplates that, **as a general (not inflexible) rule,** the Court's power to order that any particular fact or facts be proved by affidavit will **normally** be exercisable in relation to some discrete factual issue or issues which, for whatever reason, is or are contentious. In practice, this power is more likely to be exercised in respect of quantum, rather than liability, issues. Finally, the Plaintiff's affidavit, as indicated above, is inadequate.

[14] The real question in this appeal is whether the Plaintiff should be permitted to give her evidence by video conference link. In contemporary litigation, this mechanism is increasingly commonplace. Its primary virtue is that it saves expense, a consideration which typically, but not invariably, applies to expensive professional witnesses, rather than parties. The general practice remains that **parties** are expected to travel to court and, if necessary, give evidence in the prosecution and defence of civil actions. A second virtue of the video link mechanism is that, in some cases, it can be deployed to avoid delay. Where this particular consideration is in play, as in the present case, the Court will naturally consider the reasons for the delay which would, or might, accrue if the order were refused. The Court will also take into account, to the best of its forecasting ability, the likely consequences of making or refusing the order sought, viewed from the perspectives of both parties. Finally, the Court will always be mindful that cases of the present *genre* are tried by an experienced judge sitting without a jury.

[15] In determining this appeal, I give effect to the principles and factors expounded above in the following way:

(a) I take judicial notice of the absence of any general criticism of video conference link as a satisfactory method of receiving evidence in appropriate cases.

(b) I note the absence of any suggestion of any undesirable technical shortcoming in the reception of video evidence from a first world country such as Australia.

(c) The Plaintiff will be subject to cross examination in the usual way.

(d) Suitable and proportionate conditions can be attached to the making of a video link evidence order (*infra*), in the interests of fairness to both parties and in order to avert any possible misuse of the court's process.

(e) I am satisfied that the Plaintiff's application *per se* does not entail any misuse of the court's process.

(f) To refuse the application could drive the Plaintiff from the seat of judgment in a disproportionate manner, since a successful application to dismiss her claim for want of prosecution could foreseeably eventuate.

(g) The Plaintiff's proffered explanation for remaining abroad for some considerable time, grounded in employment and nationality considerations and opportunities, is *prima facie* credible and cannot be dismissed as unreasonable or otherwise unacceptable.

[16] I conclude, therefore, that the Plaintiff's application should succeed. Her evidence will be received by video link conference, subject to the following conditions:

(a) She will testify, under oath, in an isolated room unaccompanied.

(b) The trial judge must be satisfied about the quality of the video conference link.

(c) The Plaintiff will be "in attendance" throughout the trial and will be *incomunicado* from beginning to end.

(d) The Plaintiff will be strictly bound by all procedural and practical directions given by the trial judge.

(e) The Plaintiff will be strictly bound by the trial date next fixed by the County Court judge.

In making this order, I am also mindful of the sanction of contempt of court**.**

Costs

[17] As appears from paragraphs [1]–[7] above, the presentation and prosecution of the Plaintiff's application at first instance and on appeal were far from satisfactory. Moreover, the Plaintiff failed to comply initially with the order of this Court dated 17 May 2013 (regarding further affidavits) and no timeous application to extend time was made, giving rise to an "unless" order dated 19 June 2013. For these reasons, while the Plaintiff has ultimately succeeded in this interlocutory chapter of the litigation, I exercise the Court's discretion under section 59 of the Judicature (NI) Order 1978 by making no order as to costs above or below.