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Judgment: approved by the Court for handing down | *Delivered:* **9/2/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JAMES McCLEAN

Plaintiff/Respondent;

-and-

GEORGE McLARNON

Defendant/Appellant.

STEPHENS J

[1] This is an appeal from an order made by Master Bell on 22nd January 2007, whereby he refused the defendant's application that the issue of liability be tried separately from that of damages.

[2] For the purposes of this appeal the defendant was represented by Mr Michael Maxwell whilst Mr Dowd represented the plaintiff.

[3] The plaintiff's cause of action relates to a road traffic accident which occurred on Monday 31st July 2000 at 1.00 p.m. The plaintiff, James McClean, was crossing the Woodvale Road, Belfast, from between two parked cars. The defendant, George McLarnon was driving his blue Rover Metro in a city wards direction. The plaintiff emerged from the defendant's left hand or passenger side and a collision occurred.

[4] The plaintiff sustained severe injuries. The statement of claim alleges that the injuries include a severe brain injury which required a craniotomy procedure.

That a tracheostomy was performed. That as a result the plaintiff has suffered significant intellectual and neuro behavioural dysfunction. That he has multiple scarring and mild weakness in his right arm and leg. In addition it is alleged that he has developed post traumatic seizure disorder and headaches. The plaintiff alleges that he has great difficulty functioning on his own, that he needs ongoing supervision and care and that he is unable to work.

[5] A copy of the Police Report in relation to the road traffic accident was exhibited to the affidavit grounding the defendant's application. It is apparent from the police report that the weather conditions were fine and the accident occurred on a straight section of the Woodvale Road. There is no dispute that the plaintiff was standing on a pavement between parked cars and accordingly that at least a part of his body would have been obscured from the defendants view. There is a 30 miles per hour speed limit and it is apparent from the defendants police statement that he contends that he was driving at 25-30 miles per hour. The relevant part of the defendant's police statement is as follows: -

> "I was looking ahead all the time. Suddenly a young man ran out into the middle of the road in front of me. He had run right off the pavement on my left hand side, between two parked cars right across the road. I was only about two-three feet from him when he appeared in front to me. I hit the brakes immediately but it was too late. He was so close to me. This young man was looking straight ahead of him. I remember that there was a black taxi sitting across the road from him. He must have been focusing on it. He wasn't looking at me at all. I believe he didn't even see me. I couldn't avoid hitting him. He came right up the bonnet and crashed against my windscreen. It all happened so quickly. I think he went over the side of my car. He landed on the road ahead of me just a couple of feet. I was now stopped on the road and I left the car where it was. I didn't move it."

[6] It is apparent from the police investigation that some part of the defendants account may not be accurate. For instance the defendant states that the plaintiff was only about 2-3 feet from him when the plaintiff appeared in front of him. However the defendant's car left a brake mark which was 15 feet 7 inches long. Furthermore at trial there will no doubt be a careful analysis of the police sketch and as to whether the point of impact is correctly marked on it. The point of impact is recorded in the police report as "not in dispute" and "agreed

by drivers". The plaintiff due to his injuries would have been in no position to agree the point of impact and he has no recollection of the accident itself. He was not a driver. It is unlikely that the point of impact was agreed with the plaintiff.

[7] During the course of the hearing before me Mr Maxwell, on behalf of the defendant, informed me that the defendant had not obtained an engineers report in relation to the issue of liability. Accordingly that he was not in a position to hand such a report into Court, to establish that the defendant, in the opinion of a Consulting Engineer, had a substantial prospect of defeating the plaintiffs claim. Mr Maxwell was content to rely on the police report and the account given by the defendant, contending that if the plaintiff did run out from between parked cars on the defendant's near side that there was a substantial chance of totally defeating the plaintiffs claim. Mr Maxwell recognised and accepted that this was not a case in which the plaintiff had no prospect of success. However he contended that there was sufficient evidence before the Court to enable the Court to form the view that there was a substantial prospect that if the liability issue was tried separately from and in advance of that of damages that the liability trial would dispose of the whole action.

[8] The plaintiff chose not to exhibit his engineers report to the replying affidavit and accordingly as the evidence stands at this interlocutory stage, there is no detailed analysis of the distances covered respectively by the defendants motor vehicle and the plaintiff nor an analysis of the time that it would have taken for the plaintiff to run or alternatively walk from the pavement to the point of impact. Nor was there any analysis of what period of time the plaintiff would have been in the defendants view after he had decided to leave the pavement.

[9] The leading authority in relation to the question as to whether there should be a split trial is the decision of the Court of Appeal in Millar (a minor) v. Peeples and another [1995] N.I. 5. I have also been referred to the decision of Mr Justice Deeny in the case of Mahon v. Graham and others [2005] N.I.Q.B. 8. The power to order a spilt trial is contained within Order 33 Rule 3 of the Rules of the Supreme Court (Northern Ireland) 1980 which is 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."

[10] In Millar v. Peeples the Court of Appeal stated that in exercising the discretion under Order 33 Rule 3 the Court should take a broad and realistic view of what is just and convenient. The proper criteria are the determination of what is just and convenient in the interests of all parties and in the public interest. It is apparent from the decision in the case of Mahon v Graham and others that the normal rule however is that the trial of both quantum and liability should be heard together by the same tribunal and the onus is on the party applying for a split trial to establish good reason for the Court to depart from that normal practice.

[11] Amongst the factors to be taken into account in exercising the discretion as to whether to order a split trial are the avoidance of unnecessary expense and the need to make effective use of Court time. In this case in broad terms both parties contend that the trial of the liability issue would take 2-3 days and the trial of any issue in relation to the amount of damages would take approximately the same period of time. In total there are seven or eight potential liability witnesses including the investigating police constable, the plaintiff, the defendant, two independent witnesses and potentially two or three engineers. Six medical experts have to date been retained by the plaintiff and in addition the plaintiff has an accountants report and a report from a care consultant. The accountant's report and the report from the care consultant have not been disclosed to the defendant's solicitors. It is apparent that the statement of claim will require to be amended to reflect the contents of both of these reports. The defendants have not as yet obtained any medical evidence or reports from an accountant or a care consultant. There will no doubt on the facts of this case be a substantial dispute as to the plaintiffs past and future loss of earnings and in part this will involve an allegation by the defendant that due to the plaintiffs character and history prior to the road traffic accident that he could not have anticipated an uninterrupted and consistent employment pattern, even if this road traffic accident had not occurred.

[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. At this interlocutory stage I consider that the defendant has persuaded me that he has a substantial prospect of success. I emphasise however that this is a view formed at an interlocutory stage and without the benefit of an engineer's report from either the plaintiff or the defendant.

[13] That however is not an end to the balancing exercise. It was contended on behalf of the defendant that whether a split trial would adversely affect the prospects of settlement was not a factor which I should take into account. I reject that submission. There is in Northern Ireland a culture of negotiations which was specifically recognised by the Civil Justice Reform Group chaired by Lord Justice Campbell which reviewed the civil justice system in Northern Ireland, see paragraph 10.30 of the Interim Report dated April 1999 and paragraph 108 of the Final Report dated June 2000. If a split trial adversely affects the prospects of settlement then that is a factor that should be taken into account. However on the facts of this case the plaintiff has carried out a considerable amount of investigation in relation to the amount of damages having a whole range of medical reports and reports from an accountant and a care consultant. In this case I consider that the plaintiff will have an ability to be advised as to what is the height of his claim in monetary terms and this knowledge could inform any settlement negotiations. Furthermore there is the prospect of being able to enter into a settlement based on a percentage of liability.

[14] I also take into account the fact that if a spilt trial is ordered the plaintiff potentially faces giving evidence twice and indeed faces the worry of trial on two occasions. In this case however the plaintiff will face a fairly hostile cross examination in relation to issues surrounding damages by virtue of his previous history and his employment background. The cross examination in relation to the liability issue will not be vigorous by virtue of the fact that the plaintiff has no memory of the precise circumstances of the road traffic accident.

[15] There has been a considerable delay in this case and it was contended that by ordering a split trial further delay and prejudice in relation to the issue of liability could be avoided. It is apparent that the road traffic accident occurred nearly seven years ago. This passage of time will already have affected the memories of the liability witnesses. All the prejudice may already have occurred. However where it comes to the attention of the Court that there has been delay in the conduct of proceedings, I consider that it is then necessary for the Court to take steps to prevent further delay occurring in the administration of justice. If I order a split trial then this will ensure that at least a part of the trial will now take place without any further delay.

[16] I have considered all the factors in this case and on balance I consider that it is an appropriate case to order a split trial but subject to the defendants now agreeing to an early trial date in relation to the liability issue which I propose to fix for Monday 20th March 2007. The parties are to be at liberty to apply to me to fix an alternative date within a week of this judgment being given, but only on the basis that there are insuperable difficulties with the availability of liability witnesses.

[17] I consider that in future applications seeking an order that there should be a spilt trial where the cause of action relates to a road traffic accident it would be preferable if the engineer's reports were made available to the Court and that an indication should be given as to the amount of the potential saving in costs. Furthermore I consider that the Court would be assisted if in addition there was an undertaking from the defendant to the effect that if the liability trial resulted in a finding in favour of the plaintiff, the defendant would at the conclusion of such a trial make an immediate interim payment to the plaintiff specifying the basis upon which the amount of that payment could be calculated.