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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

PHILIP ENGLISH

Plaintiff

and

CONOR BRANIFF

Defendant

Master Harvey

Introduction

[1] This is an application by the defendant seeking an Order pursuant to Order 33 rule 3 of the Rules of Court of Judicature (Northern Ireland) 1980, providing that all issues of liability should be tried as a preliminary issue in advance of quantum.

[2] In this application the plaintiff was represented by Mr Lavery and the defendant by Mr Maxwell. I am grateful to them for their oral and written submissions and to the defendant's solicitors Ms McClean and Ms Houston, for the helpful hearing bundle.

[3] The plaintiff's cause of action relates to a road traffic accident which occurred on 23 July 2019 when there was a collision between the plaintiff's motorcycle and defendant's car.

[4] The plaintiff sustained severe injuries, as set out on the Particulars of Personal Injuries of the statement of claim dated 9 April 2021 including a superior dislocation of his right sternoclavicular joint, disruption of his right acromioclavicular joint, a first right rib fracture and right tibia fracture.

[5] A copy of a medical report from Mr Monaghan dated 20 August 2020 was exhibited to the affidavit grounding the defendant's application. The Police Report is

also exhibited and includes a 'rough sketch' of the accident scene, drawn by a Constable Woods which contains an 'estimated point of impact.' The police report also contains a statement from the defendant (undated) and a statement from the plaintiff dated 6 January 2020. A statement was added to the hearing bundle by the defendant's Solicitor, taken from the driver of a car by the Police, dated 31 January 2021. This individual was, according to his statement, in close proximity to the incident having apparently been overtaken by the plaintiff's motorcycle shortly before the collision between the parties. After the hearing, the Court was provided with a set of 15 colour photographs from the defendant Solicitor, taken by the Police.

The legal principles

[6] The power to order a spilt trial is contained within Order 33 rule 3 of the Rules of Court of Judicature which is in the following terms:-

> "Time, etc., of trial of questions or issues
>
> 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."

[7] The leading authority in relation to the question as to whether there should be a split trial is the decision of the Northern Ireland Court of Appeal in *Millar (a minor) v. Peeples and another* [1995] N.I. 5. Carswell LJ approved the views of the England and Wales Court of Appeal in a case of *Coenen v Payne* [1974] 1 W.L.R. 984 in which at page 998, Lord Denning stated;

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

In *Millar,* Carswell LJ highlighted that they had been used relatively frequently and that "if the power is used properly it is an effective means of saving unnecessary expense and hearing time". He continued;

> "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 in a lengthy hearing should not be incurred."

[8] In addition to the aforementioned cases, in the course of oral and written submission, counsel helpfully referred me to the decisions in; *Mohan v. Graham and others* [2005] N.I.Q.B. 8, *Glen Water Limited v Northern Ireland Water Limited* [2016] NIQB, *Gibney v MP Coleman Ltd* 2020 NIQB 68 and *McClean v McLarnon* 2007 NIQB 9.

[9] In *Mohan* Deeney J allowed the defendants application on appeal for a split trial, noting among other factors that the plaintiff was legally aided meaning the defendants, if successful at full trial, would not recover costs from the plaintiff. He also noted there would be delay of "a year and quite possibly more before a quantum trial is ready." In addition, there was the "possibility that the court would be assisted in resolving liability issues by hearing the issue of quantum." On the issue of compromising cases on liability on the basis of percentages, and saving quantum for another day, he observed; "experience would indicate that settlement is facilitated less by such a situation than where the parties can arrive at an actual monetary sum."

[10] In *McClean*, Stephens J, assessing whether to exercise discretion to order a split trial, looked at the prospects disposing of the whole action. At para 10 he stated;

> "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."

[11] In addition to the test in *Millar,* Stephens J considered the prospect of the of settlement, the plaintiff giving evidence twice and the delay in bringing the case to full hearing.

[12] In *Glen Water*, Deeny J, on ordering a split trial, considered a range of factors including how quickly the matter could get to trial, the costs saving, length of the hearing required and the possibility of assisting the parties in understanding their positions for the purposes of negotiations.

[13] McFarland J in *Gibne*y, on considering whether a liability hearing could avoid a hearing of the quantum issues, stated;

> "A dismissal of the case will conclude the matter. A finding of liability (whether in full or at a reduced rate) may not avoid a final hearing on quantum, but will operate as an incentive to both parties, particularly the Defendant, to settle the action, reducing costs and delay."

[14] It is apparent from the decisions of various courts on this subject, that the normal rule is that the trial of both quantum and liability should be heard together and the onus is on the party applying for a split trial to establish good reason for the Court to deviate from the conventional approach. The factors to be taken into account in exercising the discretion as to whether to order a split trial include the avoidance of unnecessary expense and the need to make effective use of Court time.

[15] I have also considered a split trial decision in a clinical negligence case; *McKelvey V Penelope Hill & The South Eastern Health And Social Care Trust* [2019] NIQB 109.

In that case, Mr Justice Maguire stated (my emphasis added);

> "The key factors, on the other hand, which point towards the court favouring the usual model of holding a single trial on all issues number three.
>
> Firstly, a regrettable aspect of a split trial in this particular context will be that it is likely, in the court's estimation, to bring about **delay**. It is not unrealistic, in the court's estimation, that the delay between the outcome of the liability hearing becoming known and the beginning of the quantum hearing may be in the region of 12 months.
>
> Secondly, a casualty of a split trial approach, in the court's estimation, will be that if adopted **it will be likely to reduce the prospects of a negotiated settlement**. At the hearing of this application, it was accepted that the court could legitimately and properly take into account when making a decision under Order 33 the adverse effect that a decision permitting a liability only hearing may have on the prospects of a settlement being achieved…would expect the defendant to place the issue of settlement, other than perhaps a buy off , on the backburner, while it prepares for the liability hearing. Indeed, the first named defendant would be quite likely to adopt a hard position against settlement of any sort. It seems to the court that if such a position is adopted by the defendant this would fit in with the stance that it would not prepare for any quantum hearing until after the liability hearing has been determined.
>
> Thirdly, it witnesses, especially lay **witnesses, may have to go through the process of giving evidence twice**. In general, in the court's view, this would be undesirable."

[16] In *Gibney*, McFarland J at para 16 carried out a pragmatic exercise assessing the various factors also used by Hildyard J in *Electrical Water v Philips Electronics* [2012] EWHC 38*;*

> "The matters in favour of a split hearing are –

(a) The issues of liability and quantum are compartmentalised, and apart from the need for the legal representatives to attend both hearings, there would be no other duplication save for the plaintiff giving evidence twice. As the plaintiff has brought this application, that cannot be assumed to be a negative factor.

(b) The liability hearing (3 days) will be much shorter than the quantum hearing (2 weeks);

(c) The liability case is ready for hearing. The quantum case still requires a significant amount of preparatory work to be carried out (particularly by the defendant);

(d) There are no additional complexities arising from split hearings, either for the parties, their representatives or the judge. In fact, the liability hearing has all the hallmarks of being a straightforward matter;

(e) A dismissal of the case will conclude the matter. A finding of liability (whether at a full or reduced rate) may not avoid a final hearing on quantum, but will operate as an incentive to both parties, particularly the defendant, to settle the action, reducing costs and delay;

(f) There is no evidence to suggest that the defendant, which opposes the proposed split hearing, will be prejudiced in any way."

[17] The court has wide discretion when considering an application under Order 33, rule 3 of the Rules of Court of Judicature. The oft cited Order 1 rule 1a of the Rules of Court of Judicature states;

"1A. – (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate to –
    (i) the amount of money involved;
    (ii) the importance of the case;
    (iii) the complexity of the issues; and
    (iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule."

The dispute between the parties

[18] It is apparent that a crucial aspect of this case will be the position of the vehicles immediately prior to impact, with each party claiming the other was on the wrong side of the road, thereby causing the collision. This will, at trial, require analysis of the police sketch map, examination of the witnesses and any experts together with relevant reports, to determine whether the point of impact is correctly marked or can be reliably identified.

[19] Mr Lavery contended the estimated point of impact was "on one view, in the middle of the road". My interpretation is that on the sketch map, it looked to be clearly on the defendant's side, in keeping with the defendant's account, however, given he moved the car at some point post collision, possibly before the police constable drew the sketch map, it has the potential to undermine its reliability.

[20] Mr Lavery asserted that in the lead up to the crash, on entering the right hand bend of the road prior to impact with the defendant, that the plaintiff had a more restricted view than the defendant. The defendant in this police statement indicated; "I travel along this road every other evening in life." It therefore seems he is familiar with the road and navigated the bend in question on many occasions. It is not clear as to the plaintiff's familiarity with the locus of the collision.

[21] The statement from the 'witness', Mr McAleenan, the driver of a car who arrived at the scene of the incident just moments after it occurred, states;

> "No more than 30 seconds later, I came over the top of a hill and noticed a plastic bike part in the middle of the road, I saw a charcoal coloured seat car parked. This car was parked where it had stopped in the oncoming lane and it had a smashed windscreen. I then pulled in and spoke to the driver of the car. He informed me he had been hit by a motorbike and that he had no idea where the driver was."

[22] Mr McAleenan stated that the plaintiff, immediately prior to the collision had overtaken him and had been "dodging in and out of traffic behind me." Mr Lavery, referring to this overtaking maneouvre by the plaintiff, pointed out that the witness stated the plaintiff had "moved back into his own lane" after the maneouvre and that this was evidence he was in fact on the correct side of the road when the impact occurred. I note, however, that Mr McAleenan's statement indicates he lost sight of the plaintiff, presumably as he entered the right hand bend, meaning he cannot assist on this point.

[23] There is conflicting evidence between the plaintiff and Mr McAleenan, regarding the speed at which the plaintiff approached the right hand bend prior to impact. Mr McAleenan states the motorbike "accelerated past me at speed" which

conflicts with the plaintiff's account that he "had slowed my vehicle" before negotiating the right hand bend and colliding with the Defendant.

[24] Mr Lavery argued the court could draw little assistance from Mr McAleenan's statement. While I approach this issue with a degree of caution, as the author of this statement has not been cross examined in court to test the strength of the evidence and his credibility, nonetheless, I find the statement carries significant weight. No evidence was presented suggesting he was anything other than an independent witness and while not a witness to the collision itself, he was passed by the plaintiff immediately prior to it and appears to have arrived at the scene within seconds, finding the Defendant's car "in the oncoming lane" i.e. the correct lane.

[25] The gap between Mr McAleenan being overtaken and arriving at the scene, was "no more than 30 seconds", therefore, it seems, on the balance of probabilities, and in the absence of expert evidence or any analysis of the accident locus and police sketch map, that the position of the defendant's vehicle, as he found it, was close to, if not the precise point of impact and accords with the "estimated point of impact" from the police report.

[26] Mr Lavery asserted that the defendant "accepted that he moved his vehicle after the collision and acknowledges that he should not have done so", the inference being that the position where his vehicle stopped was not the correct point of impact and this undermines the police sketch and the account from Mr McAleenan. The statement of the defendant to the police stated that after the collision; "I then drove my car further short distance up the road and parked so as to avoid creating a driving hazard on the road. I know I should not have moved my vehicle after the collision."

[27] Without detailed cross examination of the various witnesses, as would happen at the substantive trial, it is difficult to come to definitive conclusions, however, on balance it would seem unlikely, in the short space of time available to the defendant after such a serious and no doubt shocking collision that he had time to compose himself, gather his thoughts, and either in consideration of the safety of other road users, or in an attempt to conceal the fact he had been on the wrong side of the road, proceed to move his vehicle to a different location on the road before the arrival of Mr McAleenan, apparently a matter of seconds later.

[28] There is sufficient information before me to determine, on balance, that there is a substantial prospect of the Defendant defeating the Plaintiff's claim, however, that is not the only factor I must consider when exercising my discretion whether to order a split trial. I will go on to consider a range of other factors as part of the necessary balancing exercise in this Judgment.

Expert evidence

[29] I was informed by Mr Maxwell that his Solicitor had obtained an engineer's report in relation to the issue of liability. Mr Lavery did not have such a report. I referred the parties to the comments of the trial Judge in the case of 'McClean' in relation to engineering reports. Mr Maxwell was familiar with the case, having similarly appeared on behalf of the defendant in the action.

[30] In the concluding paragraph of that Judgment, Stephens J stated;

> "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."

[31] In the present action, the defendant elected not to exhibit any engineer's report to the grounding affidavit to the summons. Mr Maxwell asserted he was not in default and that under Order 38 of the Rules of Court of Judicature he was under no obligation to do so. Mr Lavery agreed this was the convention in this type of case but asserted that the Court should draw inferences from the fact Mr Maxwell had not at the very least, served the photographs from the report.

[32] It is certainly unhelpful, in an application such as this, bearing in mind the overriding objective of Order 1 rule 1a, that the defendant asserts his right not to share material which may assist the Court's determination. I do recognise that given the plaintiff did not have an engineer's report, this may well have been a factor in the defendant's determination not to deviate from the conventional approach, as any exchange would not have been on a 'like for like' basis.

[33] Mr Maxwell agreed to share the police photographs with the plaintiff's counsel immediately after the hearing and I had the benefit of sight of them the next day via email from his solicitor. They are colour photographs of the accident locus taken on the day of the accident. They show, among other things, the defendant's vehicle on the correct side of the road, however, I find this of limited assistance given the defendant's admission he moved it after the collision.

[34] I pause to reflect that if the plaintiff was also in possession of an expert engineering report and the parties decided not to exchange them, or the Court, in an application of this nature, it would appear contrary to the 'cards on the table' approach which has been promoted in recent protocols in the field of civil litigation. It is also referred to in the Pre Action Protocol for Personal Injury Litigation dating back to 1 April 2008. As an aside, it strikes me that given the commendable work of

the Shadow Civil Justice Council Sub-Committee currently producing a raft of protocols in similar subject areas, an updated High Court Personal Injury Protocol may well be something the Council and/or King's Bench Liaison committee wish to consider.

Applying the legal test

[35] In exercising my discretion as to whether to order a split trial I must consider a range of factors. This includes taking a broad and realistic view of what is just and convenient.

Disposal of the whole action

[36] Mr Maxwell contended that there was a substantial prospect that determination of the liability issue would dispose of the whole action. He stated in his skeleton argument, "Simply put, if the accident occurred on the defendant's side of the road, then the plaintiff's account of the defendant veering into the plaintiff's side of the road is unstainable."

[37] Mr Lavery submitted that the defendant had not established the prospect of the issue of liability disposing of the whole case. He also indicated that the quantum issues could take less time than liability and the matter should proceed to full trial. Mr Lavery stated there was overlap between the quantum issues and liability given what he stated are credibility issues in the case. In *Mohan*, Deeny J noted this also, referring to Carswell LJ in *Millar* "that the court would be assisted in resolving liability issues by hearing the issue of quantum" as "it is not uncommon for evidence to appear on the issue of quantum which points one way or another to the credibility of a plaintiff."

[38] The pragmatic exercise as favoured in the *Gibney* case by Mc Farland J, if carried out in the present case, leads me to conclude, that, on balance;

(a) The issues of liability and quantum are compartmentalized. Apart from the need for the legal representatives to attend both hearings, there would be no other duplication save for the plaintiff giving evidence twice;

(b) The liability hearing (2-3 days) may be shorter than the quantum hearing;

(c) The liability case is almost ready for hearing. The quantum case requires a massive amount of work to be carried out on both sides (particularly by the plaintiff);

(d) There are no additional complexities arising from a split hearing, the liability hearing may prove a straightforward matter of apportioning all or no liability to either side, subject to the expert evidence of 1-2 engineers and hearing from the witnesses;

(e) A dismissal of the case will conclude the matter. A quantum hearing may not be avoided but will operate as an incentive to both parties to settle the action, reducing costs and delay;

(f) I am not reliably convinced there is evidence to suggest that the plaintiff, who opposes the proposed split hearing, will be prejudiced significantly.

Saving expense

[39] Mr Maxwell stated "this is case where a split trial should be ordered as it would be just and expedient and will save costs and court time."

[40] Upon being questioned by me regarding the potential costs saving of a split trial, he estimated this to be in the region of £20,000. It would have been helpful if some thought had been given to this prior to the hearing, preferably with calculations set out in a grounding affidavit by the defendant's solicitor. Ultimately, at hearing both counsel admitted they could not give an estimate of costs savings with any degree of accuracy. I find the estimate of £20,000 to be a potentially significant underestimate. If the matter is disposed of in a liability trial, a quantum hearing with up to 10 experts in total, the cost of the expert reports, 3-4 days of court time with associated legal fees would likely be significantly more than this figure.

[41] There is clearly a saving to the public purse if extensive and costly quantum investigations, which may prove unnecessary until liability is determined, are avoided. There is also a saving for the defendant if they dispose of the action as they avert a quantum trial of double the duration and cost of a liability only hearing. In the event liability is established in favour of the plaintiff, the defendant will ultimately either make an interim payment, settle the case or proceed to a quantum hearing for which they will bear the cost, not the public purse.

[42] Mr Lavery indicated the plaintiff now qualifies for legal aid funding. As things stand, the plaintiff has one medical report, the defendant has none. The plaintiff requires expert reports from a psychiatrist, plastic surgeon, orthopaedic surgeon, care expert and accountant. They may also need a prosthesis expert. The defendant added that reports may also be required from an expert in rehabilitation and a vascular surgeon. On one side alone, that could amount to 8 experts, not factoring in the possibility of reciprocal reports which Mr Maxwell stated was "likely." The quantum investigations, given the serious nature of the injuries, will be extensive, costly and, based on the parties' submissions, the reports will take up to 2 years to obtain.

Effective use of court time

[43] In this case, both parties contend that the trial of the liability issue would take 2 days, up to a maximum of 3 days. The quantum issues would take, according to Mr Lavery, possibly less time, and according to Mr Maxwell, more time and possibly in the order of up to 4 days. Given the active case management of the Courts and the

propensity of the parties in civil litigation to agree medical reports, thereby obviating the need for experts to attend court, I believe each hearing could each be in the order of 2-3 days.

[44] While the trial of the quantum issues may take an equal or, if Mr Lavery is correct, less time than the liability issues, nevertheless, I find that there will be significant delay in getting to a quantum hearing. It will necessitate obtaining a raft of expert reports of the type normally associated with cases of this nature. The cost, additional inconvenience and time involved for the parties and expense to the public purse in pursuing the quantum reports, are such that a short liability trial in early course, making effective use of court time, determining the liability issues would seem to be more just and convenient to both parties.

[45] In relation to the liability issue, there are seven or eight potential witnesses including the investigating police constable, the plaintiff, the defendant, independent witnesses and potentially two engineers. It would be achievable to hear a liability case of this nature in 2-3 days, and relatively soon.

Delay

[46] In *McClean*, Stephens J concluded;

> "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."

[47] Having queried with the parties as to the likely date for a hearing on liability only, defence counsel stated that it could be listed before or after Easter (in or around April 2023). He later indicated in his oral submissions it could be as early as March 2023. After the hearing, having made enquiries with the Central Office in the High Court, I am in fact advised that the High Court could accommodate a trial of up to 3 days' duration in late November 2022 or January/February 2023. It therefore seems that there is no impediment to an early hearing of the liability issues, avoiding unnecessary delay. The defendant indicated they would agree to an early trial. On the plaintiff side, it appears there is only one or two witnesses, the plaintiff himself and perhaps an engineer, if one is to be instructed. It would seem a trial could be listed for hearing relatively quickly.

[48] Mr Maxwell contended that to wait and deal with liability and quantum together, could take up to 18 months, Mr Lavery conceded the plaintiff was at the "early stage of medical investigations" and it would take 2 years to get the whole case to trial. The delay between the liability hearing and the beginning of the quantum hearing of up to 2 years is, therefore, twice that envisaged in the case of *McKelvey*.

Prejudice to the parties

[49] Mr Lavery asserted there was more prejudice to the plaintiff than defendant if the court permitted a split trial. There would be some delay and it would cause additional expense for the defendant but the plaintiff would suffer more prejudice. He felt a split trial was a "treacheous shortcut". Indeed, this is something Lord Scarman stated in *Tilling v Whiteman* [1980] AC 1 at 25: "Preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense."

[50] On the subject of prejudice, Mr Maxwell contended that there was no financial disadvantage to the plaintiff as he was now in receipt of legal aid funding and that the public purse would be spared money if the application was successful. Similarly, the caselaw in this area notes that there is potentially a considerable saving to the defendant if a split trial is permitted.

[51] As for prejudice to the defendant, I am mindful of the comments of Deeny J in *Mohan*, he stated; "the plaintiff is legally aided so that even if the…defendants succeeded they will not recover their costs from the plaintiff." In the present action, there is a real prospect of a lengthy quantum and liability trial, in approximately 2 or more years' time, which, even if the defendant wins, they are unlikely to recover any costs. There is insufficient evidence to suggest that the plaintiff, who opposes the proposed split hearing, will be prejudiced significantly.

The impact on prospects of settlement

[52] I accept that if a split trial adversely affects the prospects of settlement then that is a factor that should be taken into account. There is, however, in this jurisdiction a well recognised culture of negotiations. I am not convinced that a split trial rules out such a possibility. Experience would suggest that the vast majority of personal injury actions in this jurisdiction resolve prior to trial with only a tiny fraction proceeding to hearing.

[53] Similar to the remarks of Stephens J in *McClean*, I indicated to the parties that the Court would be assisted if there was an undertaking from the defendant that if the liability trial resulted in a finding in favour of the plaintiff, the defendant would, at the conclusion of the trial, make an interim payment to the plaintiff. I am heartened by the indication by defence counsel that there is a "high likelihood of an interim payment" in the event the plaintiff succeeds on liability. Given the plaintiff's economic circumstances as indicated by his counsel, this would put him in a better position than waiting a further 2 years before he receives any compensation, if his case proves successful. While not binding and falling short of the type of undertaking envisaged by the trial Judge in *McClean,* it is the view of experienced counsel whose clients will no doubt benefit from his advice.

[54] The difficulty with such an approach in this case, as identified by Mr Lavery, is that in the absence of expert reports, it may prove difficult calculating the amount of that payment. Put simply, Mr Lavery states he cannot compromise a case where he does not know the value. Mr Lavery pointed out that in *McClean* the parties had the benefit of medical reports which could inform any settlement negotiations and help to "give a ball park regarding the value of the case" and make it "easier to compromise," thereby distinguishing it from the present case. While I have some sympathy with that argument I note, however, as stated by the trial judge in *McClean*;

> "…there is the prospect of being able to enter into a settlement based on a percentage of liability."

[55] In fact, Mr Lavery conceded in oral submissions that the possibility of such an agreement "could not be ruled out" and candidly quoted a hypothetical apportionment figure which I do not wish to repeat here to avoid prejudicing any future negotiations.

[56] I do not believe the lack of expert reports make the prospect of calculating an interim payment on quantum or agreeing a percentage liability split to be an insurmountable task, given the material available, the nature of the injuries, experience of counsel on either side and the guidance available from the '*Green Book*' (Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (5th edition) 2019).

[57] While Mr Lavery contended that a liability only trial diminished the prospect of settlement as it was more likely the action would settle if all issues were dealt with at once, I agree with the comments of the trial Judge in *Gibney* as the outcome of a liability trial may well serve to incentivize settlement.

[58] The prospects of reducing the chances of settlement are relevant, as are the defendants placing their quantum investigations on the 'backburner'. Indeed, it is likely with an imminent split trial date, both parties will have to pause quantum investigations. Nevertheless, with a trial possibly only a matter of weeks away, the chances of settlement remain. It is possible, if not likely, the plaintiff will secure an expert engineer's report relatively quickly and there will inevitably be court directed pre-trial discussions/negotiations between the legal representatives. There is also the opportunity for a negotiated percentage split on liability, something Mr Lavery did not rule out.

Duplication of evidence

[59] Mr Lavery argued that it would be "unfair and oppressive" to require the plaintiff to give evidence twice. A full trial would reduce costs, inconvenience and worry for the plaintiff. I recognise the prospect of giving evidence in court is arduous and stressful on witnesses, particularly lay witnesses. The likelihood of them giving evidence twice is reduced by the fact that other than the plaintiff, all

other witnesses will deal with the liability issue. I am concerned about the prospect of putting the plaintiff through the process of giving evidence twice, however, he is now over 3 years on from his accident and no closer to resolution of his claim. The prolongation of litigation is in itself a stressor for the witnesses and parties. The fact this could last another 2 years or more, which would be 5 years post-accident, is unsatisfactory for all involved.

[60] While I take into account the risk from a split trial approach that there may be additional anxiety for the plaintiff, I expect a liability trial can be accommodated within a matter of weeks and this will determine the outcome of the case. It will also, if the plaintiff is unsuccessful, avoid the expense, inconvenience and time of undergoing a series of intrusive medical assessments, not for therapeutic benefit but for medico-legal purposes to assist the lawyers and the court in assessing the extent of his injuries.

[61] I must also consider the saving to the public purse given the expert reports will be covered by legal aid funding. The plaintiff has one medical report, obtained over 2 years ago. A decision to proceed to an early liability trial will not it seems, lead to the cancellation of a series of medical assessments given it appears from counsel that only one date for an assessment has recently been obtained for a further expert. Therefore, the likely delay in bringing this matter to a full trial, and the expense of gathering a raft of reports together with the series of medical assessments for this plaintiff outweighs the duplicated effort him giving evidence twice, particularly as that may be avoided once the liability issue is determined.

Conclusion

[62] The onus is on the party applying for a split trial to establish good reason for the Court to depart from the normal practice that the issues of quantum and liability should be heard together.

[63] In this case, I find the material available to me at this interlocutory stage as more compelling in favour of the defendant and therefore determine that the defendant has a substantial prospect of defeating the plaintiff's claim and disposing of the whole action.

[64] I have sought to take a broad and realistic view of what is just and convenient and considered the overriding objective pursuant to Order 1, rule 1a.

[65] I conclude that a split trial will save expense and ensure that the action is dealt with expeditiously and fairly, making the most effective use of court time. It will avoid considerable cost to the public purse and the parties and avoid the prospect of an inordinate delay of up to 2 years if the Court was to wait and deal with quantum and liability together.

[66] I grant the defendant's application and award costs to the defendant, such costs not be enforced without further order as the Plaintiff is a legally assisted person.