THE COURT OF APPEAL

Neutral Citation Number [2021]17
Record Number: 2018/356
High Court Record Number: 2016/4075P

Whelan J.
Noonan J.
Collins J.

BETWEEN/

AOIBHE NAGHTEN (A MINOR)
SUING BY HER MOTHER AND NEXT FRIEND TERESA CROWLEY

PLAINTIFF/RESPONDENT

-AND-

COOL RUNNING EVENTS LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of January, 2021

1. The appellant (the defendant) owned and operated a pop-up ice rink in Blanchardstown County Dublin operating on a seasonal basis between the months of November and January. On the 30th December 2015, the respondent (the plaintiff), then a ten-year old child, fell while skating at the defendant's rink onto her hand, when another patron skated over the back of her hand causing her injury. The High Court (O'Hanlon J.) in a judgment delivered on the 25th July, 2018, found the defendant liable and awarded a sum of €65,000 in general damages to the plaintiff. The defendant has appealed against that award to this court on both liability and quantum.

Background Facts

2. The plaintiff, who was born on the 16th May, 2005, attended at the defendant's ice rink together with her mother, Ms. Crowley, and her older sister Kerrie. Ms. Crowley having made an online booking for the three of them. The ice rink operated over the Christmas period between the hours of 10am and 10pm and held ten 50 minute sessions each hour during that period. The ten-minute interval was to allow for one group to leave and the next to enter. Ms. Crowley had booked for the 2pm session. Although only ten, the plaintiff was described as a proficient skater, having undertaken the activity a number of times previously.

3. The accident occurred at the end of the session as the skaters were leaving the ice rink via the single exit provided for that purpose at just before 3pm. In fact, CCTV footage recorded the accident at a time stamp of 14:58:58 or within one or two seconds of that time. The plaintiff appears to have been skating towards the exit reasonably close to the barrier. The CCTV footage shows a large gentleman holding onto the barrier with his back to the ice rink as the plaintiff approaches to skate behind him. As she does so, his body moves out slightly, whether by design or otherwise, so that the plaintiff collided with him and this caused her to fall to the ground onto her outstretched hands. It would appear that the skater immediately behind the plaintiff then inadvertently skated over the plaintiff's hand.

4. As a result, the plaintiff appears to have suffered fairly significant lacerations to the back of her hands as illustrated in photographs put before this court clearly taken very shortly after the accident. The plaintiff ultimately made a good recovery albeit with a degree of scarring remaining. Apart from those photographs, it would appear that no other up to date photographs were put in evidence before the High Court to demonstrate the appearance of the plaintiff's hand which was, instead, viewed directly by the trial judge during the course of the hearing.

5. The factual witnesses who gave evidence on behalf of the plaintiff before the High Court were the plaintiff herself, her mother and her sister. Each of them described the ice rink as being "packed" during their session. It was suggested to each in turn by counsel for the defendant that this was not an accurate description by reference to what was to be seen on the CCTV footage which was played in court. However, no evidence was given by any witness on behalf of the defendant who was present at the time of the plaintiff's accident. The CCTV footage also showed the presence of a marshal on the ice rink some time shortly before the plaintiff's accident but the marshal does not appear to have been present when the plaintiff fell and certainly did not come to her aid in the aftermath. There was a suggestion that he was attending to another fall at the time. The plaintiff was however attended to by one of the defendant's first aid officers who, it was agreed, looked after the plaintiff extremely well.

The Course of the Proceedings

6. A personal injuries summons was issued on the 9th May, 2016. It included fairly generic pleas of negligence and breach of duty and specifically alleged that there was overcrowding and inadequate supervision at the material time. In its defence, the defendant pleaded general traverses but raised a number of particular pleas worthy of note:

   (a) the defendant alleged that the plaintiff voluntarily assumed the risk of being injured by virtue of the doctrine of *volenti non fit injuria*;

   (b) the plaintiff was the author of her own misfortune and failed to have regard for her own safety. Despite this very specific plea that the plaintiff's own negligence caused the accident, no particulars of such alleged negligence were ever given, no suggestion was made to the plaintiff in cross-examination that she had caused the

accident by her own carelessness and no evidence was led by the defendant to substantiate such plea;

(c) the plaintiff's mother failed to exercise reasonable supervision and control over the plaintiff;

(d) the plaintiff's mother failed to have regard for the plaintiff's safety. Neither of these pleas were ever particularised. No suggestion was made to the plaintiff's mother in cross-examination that she had failed to supervise her daughter and no evidence was led to substantiate these allegations. This is unsurprising in circumstances where the uncontroverted evidence was that the plaintiff's mother was barely able to skate, if at all, in contrast to her daughters and particularly the plaintiff;

(e) the defendant further alleged against the plaintiff's mother that she failed to seek proper treatment or to take any steps to alleviate her daughter's pain and suffering. Again, no credible attempt was made at the trial to stand over this very serious and hurtful allegation of neglect made against the mother of a young child.

7. This defence was delivered on the 14th July, 2016 and an affidavit of verification supporting each of the pleas contained therein was sworn on the 4th August, 2016 by Ms. Orla O'Neill, who is described as a director and company secretary of the defendant.

8. During the course of 2016, the plaintiff's solicitors made a request of the defendant's solicitors for a joint engineering inspection of the locus of the accident to be carried out by the plaintiff's consulting forensic engineer, Mr. Niallo Carroll in consultation with the defendant's engineer. For reasons that are not apparent, such an inspection did not take place but it may be related to the fact that it was not possible at the time it was sought, in the summer of 2016, given the fact that the rink only operates at around Christmas time. The defendant was however, at least from that time, aware that the plaintiff had retained the services of an engineer to give evidence at the trial.

9. The hearing was fixed to commence on the 3rd May, 2017 and shortly before that, the parties exchanged their S.I. 391 schedules. The first schedule submitted by the defendant's solicitors was dated the 24th April, 2017 and listed five witnesses as to fact, two at least of whom, as it later transpired, were ice marshals present at the rink around the time of the plaintiff's accident. The only expert witness identified was a medical witness and notably, no engineer appeared on the defendant's schedule. Similarly, the only witness as to fact who was actually called by the defence at the trial, Mr. Bill Cremin, is absent from the first schedule. The plaintiff's disclosure schedule is dated the following day, the 25th April, 2007 listing Mr. Carroll as an expert witness and three factual witnesses being the plaintiff, her mother and sister.

10. The trial commenced on the 3rd May, 2017 before Hanna J. and proceeded for three days, on the 3rd, 4th and 5th May, 2017. On day two of the trial, the 4th May, 2017, the defendant's solicitors prepared a new schedule listing two additional witnesses, Mr. Barry

Tennyson of Tennyson Engineers whose report was awaited, and Mr. Cremin, described as managing director/founder of the defendant. When Mr. Tennyson ultimately came to give evidence, it emerged that he was instructed for the first time on either the 3rd or 4th May, 2017, after the commencement of the trial. His first report was dated the 4th May, 2017 and essentially comprises a critique of Mr. Carroll's report.

11. However, it would appear that the plaintiff's legal team only became aware for the first time on Day 3, the 5th May 2017, during the course of Mr. Carroll's cross-examination, that Mr. Tennyson would be giving evidence. It seems to follow, therefore, that when Mr. Carroll commenced giving his evidence, neither he, nor anybody on the plaintiff's side of the case, had any knowledge that Mr. Tennyson would be giving evidence or what the nature of that evidence might be. This unsurprisingly led to an objection from the plaintiff's side and Hanna J. deciding to adjourn the case back into the list for a new date to be fixed. Given what had occurred, he awarded all the costs to the plaintiff.

12. Thereafter, the defendant served a third S.I. 391 schedule on the 18th October, 2017 listing the same witnesses but now identifying Mr. Tennyson's report as that of the 4th May, 2017 with a second report from him awaited. A fourth schedule was served by the defendant's solicitors on the 27th November, 2017 which now included Mr. Tennyson's second report dated the 26th November, 2017. At this stage Mr. Tennyson had inspected the defendant's ice rink which was now up and running. The trial commenced afresh on the 26th April, 2018 before O'Hanlon J. and ran for four days.

The Evidence before the High Court

13. As previously noted, the plaintiff's own evidence was that the ice rink was very packed, particularly in the area of the exit at the end of the session. There was only one marshal present on the ice during the session but he was not to be seen when she had her accident. The plaintiff's mother, Ms. Crowley, said the rink was crowded with people and congested at the exit at the time of the accident. The plaintiff's sister, Kerri, gave evidence that she was in front of the plaintiff heading for the exit which was very crowded. There was no marshal present at the exit supervising. She agreed that there had been two marshals on the ice at one stage but around the time of the plaintiff's accident, only one. At the actual time of the accident, her evidence was that there was no marshal on the ice. She had to wait in the queue with her sister bleeding to get out as there was no marshal present whom she could inform.

14. Accordingly, the evidence of these three witnesses was to the effect that the ice rink was, during the session, very packed or overcrowded, and this was particularly so at the exit at the end of the session. Their evidence also established that whilst there may have been up to two marshals present on the ice at some stage during the session, at the time of the plaintiff's accident, there was no marshal present and nobody supervising patrons at or near the exit.

15. The only witness as to fact called by the defendant was Mr. Cremin, who was not present on the day in question at the ice rink. Of note, none of the other five witnesses as to fact listed on each of the four S.I. 391 schedules delivered by the defendant was called to give

evidence. This is despite the fact that at least one of those witnesses, Danny O'Rahilly, was a marshal on the ice at the time in question and was apparently present in court during the trial. Mr. Cremin confirmed that 281 tickets were sold for the session in question. He referred to guidelines for the operation of ice rinks known as the Ice Rink Managers Association (IRMA) guidelines, with which, he said, the ice rink complied.

16. Under cross-examination, Mr. Cremin expressly disavowed the suggestion that he had given instructions to the defendant's legal team to plead in its defence that Ms. Crowley was responsible for failing to supervise the plaintiff or to arrange for her proper medical treatment. There was ultimately very little dispute on the facts with the defendant primarily relying upon the content of the CCTV footage in support of its case.

17. There was, however, significant dispute between the experts as to the interpretation of the CCTV footage and particularly, as to the appropriate standards applicable to the operation of the ice rink on the day in question. In essence, Mr. Carroll's evidence, which remained consistent throughout, was that in his opinion, the defendant had been negligent in three respects. The first was that there were too many people on the ice rink at the material time. The second was that there was no adequate supervision at the ice rink and in particular, no supervision of the egress process. Thirdly, Mr. Carroll's opinion was that there should have been more than one exit which would have significantly reduced the risk arising from overcrowding at the sole exit provided.

18. In reaching these conclusions, Mr. Carroll's evidence was that he had placed significant reliance not on the IRMA guidelines but rather on subsequent guidelines published by the Ontario Recreation Facilities Association (ORFA). Mr. Carroll considered that the ORFA guidelines represented best practice and were the appropriate matters to have regard to in considering the safe operation of ice rinks. Mr. Tennyson considered that these guidelines were neither appropriate nor relevant and that those operating in the United Kingdom, namely the IRMA guidelines, were the most relevant. In his reports and evidence, Mr. Carroll identified specific reasons why he considered that the IRMA standards were not the appropriate ones.

19. The first was that the IRMA guidelines were compiled by ice rink owners/managers without any input from other relevant stakeholders, which Mr. Carroll considered might amount to a conflict of interest. Secondly the IRMA guidelines could not be accessed by the general public but only by ice rink operators using a specific password online so that transparency was lacking. Finally, he considered that the ORFA standard was more up to date having been published in October 2013 as against the IRMA standard in July 2011. He also noted that the IRMA standard appeared to contain some fairly basic errors. In his evidence, Mr. Carroll explained that there are approximately 16,000 dedicated ice rinks in operation worldwide and about half of those are located in Canada, as against the 60 or so in the UK.

20. On the basis of the ORFA guidelines, the defendant's ice rink allowed insufficient space per skater, leading to significant overcrowding. Secondly, there was insufficient supervision and finally, the ORFA guidelines required more than one exit. Mr. Tennyson

disagreed with each of these propositions and considered that the rink was fully compliant with the IRMA guidelines. There was also disagreement between the two experts as to the number of patrons actually present on the ice at the material time, with Mr. Carroll's estimated figure being approximately double that of Mr. Tennyson.

Judgment of the High Court

21. In her detailed judgment, the trial judge set out the background to the case and the evidence given by each witness. The judge noted that Mr. Tennyson had been robustly cross-examined on his evidence and impartiality in the case and she noted that certain passages from the judgment of this court (Irvine J.) in *Byrne v. Ardenheath Company Limited* [2017] IECA 293 had been put to him, as was the fact that his evidence was rejected by this court in that case.

22. In dealing with Mr. Tennyson's evidence, the trial judge referred to the fact that the plaintiff's solicitors had corresponded with the defendant as far back as the 23rdrd June, 2016 advising that they were retaining an engineer and seeking a joint inspection. She noted Mr. Tennyson's evidence that his first attendance in court was on Day 3 of the trial before Hanna J., the 5th May, 2017 and the report he had prepared on the 4th May was without the benefit of an interview with the plaintiff's engineer, the plaintiff herself or a joint inspection.

23. Having reviewed all the evidence, the judge came to her findings of fact and conclusions from para. 146 onwards. The judge observed that the belated instruction of Mr. Tennyson in the case meant that the length of the trial was greatly elongated and the attendant costs greatly increased as a result. The judge was highly critical of the fact that although Mr. Danny O'Rahilly was listed as a defence witness, he was not called to give evidence.

24. The court took the view that the engineering evidence was of some benefit but the court was not obliged to impose standards which might apply in Canada or England or elsewhere. The judge did however accept Mr. Carroll's evidence that the English guidelines were extremely hard to access and she viewed Mr. Tennyson's reliance on those guidelines with some caution in addition to other parts of his evidence. The judge noted that the defence of *volenti* had not been made out and further that there was no proper risk assessment or safety audit carried out by the defendant. She referred to Mr. Carroll's evidence stating (at p. 49): -

> "This witness gave clear evidence that in his view the accident occurred when the infant plaintiff fell to the ground and then the actual loss event was that the third patron came into the area and not having anywhere to go ran over her finger while wearing ice skates."

25. She continued (on p. 50): -

> "Having heard all of the evidence, this Court is of the view that the number of people who purchased tickets i.e. 251 [*it was in fact 281*] people for this particular

ice skating slot, has to be taken as the potential number and assessment of the safety requirements including supervision ought to be made based on that figure of tickets sold. In addition, the court accepts the evidence of [Mr. Carroll] when he makes the point based on solid reasoning that more than one exit route is necessary. It is common sense having considered this evidence in detail that the managers of such a facility have to take account of various levels of capacity, skating speeds and supervision to ensure safe exit from the ice rink.

154. Staff supervision is described as providing the best customer safety. The evidence of Mr. Cremin, in the view of this court, showed that the approach to the level of supervision and manner of supervision was very casual indeed. This witness attempted to persuade the court that the two stewards who were outside the ice rink were conducting the work of marshals although he did resile from this position. It is quite clear, and it is a clear fact that when this accident occurred, there was only one ice marshal in the rink at the far end attending to someone who had had a fall."

26. The judge was also critical of the fact that Mr. Cremin was unable to produce the safety statement when asked and gave no reasonable explanation for its absence.

27. The judge continued to set out her conclusions at pp. 50 – 51: -

"157. The evidence of the plaintiff's witnesses was that there was overcrowding especially at the exit area.

158. The court then asks the question was (*sic*) caused the particular injury to this child. This court accepts the view of Mr. O'Carroll (*sic*) engineer that it was not the rather large gentleman who turned who caused this accident rather it was the fact that the third party skated into this accident when the infant plaintiff was on the ground and having no means of escape because of the overcrowding skated over her hand causing her injury. In the view of this court this accident was reasonably foreseeable in circumstances where on the plaintiff's evidence there were 1,700 people booked into the various sessions throughout the day on the date of the accident and 974 people over a two-hour period with a twenty-minute turnaround on the occasion of this accident. Ten minutes is about the time allocated for patrons to exit the ice rink so that the ice is then resurfaced as well in the interlude, so in practical terms and as a matter of common sense, this court takes the view that it is highly probable that an accident would occur such as befell the plaintiff given the conditions and time constraints involved. This court takes Mr. Tennyson's point that this is not a high risk sport compared with other more elaborate forms of skating. This court finds that it preferred the evidence of Mr. O'Carroll (*sic*) to Mr. Tennyson and that his evidence gave a clear guide to the court, without us having to adopt standards of Canada for example, or England for that matter. The common law duty of care exists and the principles of health and safety apply. The defendant persisted in elongating these proceedings but the court accepts that there was a breach of the duty of care and negligent management of the ice rink at the time of

the accident which allowed this incident to occur. There was a casual approach taken by the defendants."

28. Referring to the evidence of Mr. Carroll, the trial judge said (at p. 52): -

> "He also made the point that three and half square metres per person for a number of 281 people is a dangerous and unsafe situation. He said that the IRMA guidelines would deem 360 people to be safe in such circumstances and up to 465 persons but that would only leave two metres per skater. This witness deemed that three marshals ought to be present. His thesis was that there should be more supervision therefore, more exits, more points of egress to prevent the massing of people at the exit or congregation at the barriers with a person there to move such people congregating or massing at barriers, along to the exit."

29. The judge's conclusion was (at p. 53): -

> "162. This Court concludes that the defendants have failed to take reasonable care and were negligent in the safety and management of this rink and that the accident was reasonably foreseeable in all the circumstances.
>
> 163. This court notes the medical evidence in the form of a report which it was agreed could be handed in to the court and the court has viewed the infant plaintiff's hand and awards the sum of €65,000 in respect of damages."

30. The defendant appeals on the essential ground that the latter finding from the trial judge amounted to an error of law. Other complaints are made in particular about the acceptance of the evidence of the plaintiff's engineer over that of the defendant. The award of damages is appealed on the basis that it is excessive.

Discussion

31. The belated decision by the defendant to instruct an engineer in this case had a number of consequences, identified by the trial judge. The first was that it wasted three days of court time which, apart from any consideration of costs, meant that this time was unavailable to other litigants waiting to have their cases heard. The second consequence was that it delayed the trial for a full year which, irrespective of the outcome, was unfair to the plaintiff. These consequences are significant but there are others.

32. S.I. 391 of 1998 was introduced to bring about a degree of transparency designed to avoid trial by ambush and as a consequence, in theory at least, to facilitate earlier resolution of personal injuries litigation. This was seen to be particularly important in the context of expert evidence where there was a perceived absence of equality of arms or, to use a more current expression, a level playing field. The requirement for simultaneous exchange of expert evidence meant that plaintiffs no longer laboured under the disadvantage of having to call their expert evidence without knowing what the defendant's expert might say, or indeed if the defendant had an expert at all. This conferred litigious advantage on defendants which was rightly seen as unfair.

33. Even after the introduction of the statutory instrument, questions remained as to whether the exchange of expert reports was to be simultaneous, an issue considered by the Supreme Court in *Kincaid v Aer Lingus Teo* [2003] 2 IR 314 and later by the High Court in *Harrington v Cork City Council* [2015] 1 I.R. 1. I considered both of these cases in *Dunne v Grunenthal GmbH* [2018] IEHC 798 where the issue was whether the plaintiff should be compelled to produce medical reports referenced in her pleadings for inspection by the defendant pursuant to O. 31 rr. 15 and 18 of the RSC.

34. In that case, the plaintiff's concern was that the production of these reports in advance of the requirement to simultaneously exchange under S.I. 391 would confer significant litigious advantage on the defendants who could submit the reports to their own experts for analysis. Commenting on this issue, I said at para. 23 *et seq*: -

> "23. The landscape in personal injury litigation was significantly changed by the introduction of the disclosure regime comprised in S.I. 391 of 1998 in regard to expert reports. One of the issues grappled with by practitioners was whether the S.I. required simultaneous exchange. It was often argued that it would be patently unfair for a plaintiff to be compelled to disclose his or her expert evidence to a defendant before any reciprocal requirement on a defendant's part. That would enable the defendant to analyse and critique such reports with the benefit of expert assistance before being required to commit itself to producing such reports as it considers suitable to respond.
>
> 24. This issue was considered in *Harrington v Cork City Council* [2015] 1 I.R. 1. The parties exchanged schedules of witnesses, the defendant indicating that it did not propose to call experts. The defendant sought disclosure of the plaintiff's expert reports and the plaintiff refused unless the defendant undertook not to make the reports available to any expert they subsequently retained. The defendant refused to give the undertaking sought. Kearns P. referred to an earlier Supreme Court judgment on this issue (at p. 4)
>
> > 'The Supreme Court in *Kincaid v Aer Lingus Teo.* [2003] 2 I.R. 314 held that the 'exchange' of reports should be contemporaneous to avoid the danger that the rules can be abused to enable one party to gain an advantage over another. Geoghegan J. giving the sole judgment of the court, with which McCracken and McGuinness JJ. concurred, held, at p. 320: -
> >
> > > "The obligation under O. 39, r. 46(1) is to 'exchange' scheduled reports. If a party's solicitor ensures that the 'exchange' is contemporaneous, there is no danger of the so called 'abuse' arising.
> > >
> > > If each party's solicitor ensures that an actual contemporaneous exchange of reports takes place, there is no danger that the procedure can be abused in the manner suggested by the plaintiff"…
> >
> > [7] It is the plaintiff's submission that *fairness* requires that his obligation, which is not disputed, to disclose his reports in accordance with O. 39 r. 46(3) be

conditional upon the first defendant's undertaking that those reports will not be given, directly or indirectly, to any expert retained by the first defendant until after such expert has furnished his report. The plaintiff submits that should he be required to disclose his expert reports under the current circumstances the first defendant would obtain an unfair litigious advantage which was the very tactic the Supreme Court feared in Kincaid…' (my underlining).

The court resolved the issue in the following way (at p. 7):

'[16] I am satisfied by reference to the various authorities cited that the requirements of fairness require a simultaneous exchange of expert reports and that requirement is not abrogated by the non-existence at this point in time of expert reports to the defendants. While specific cases have not been opened to the court, the jurisprudence of the European Court of Human Rights in recent years has repeatedly emphasised the concept of 'equality of arms' in litigation and I think it fair to say that this concept has increasingly permeated judicial thinking in this jurisdiction also. The plaintiff's apprehension that the first defendant will secure a litigious advantage in the current circumstances obtaining in this case is not one without any foundation.

[17] While the court is not going so far as to express a view as to whether some calculated strategy to that effect exists in this case, it would hold with the plaintiff's submissions. This is to do no more than follow and implement the decision of the Supreme Court in Kincaid…'

25. In the context of the within proceedings, it is important to note that in both *Kincaid* and *Harrington*, the court identified the non-simultaneous exchange of expert reports as potentially amounting to an *unfair* litigious advantage."

35. By its actions in this case, the defendant sought to, and did in fact, achieve an unfair litigious advantage of the kind identified by the Supreme Court in *Kincaid* as amounting to an abuse of process. Although this court is unaware of what application was made by the plaintiff to Hanna J. that led to the first trial being aborted, and in particular whether there was an application to exclude Mr. Tennyson's evidence entirely, it must in my view be open to considerable doubt as to whether an expert in the position of Mr. Tennyson in this case ought to be permitted to give evidence at all. I would however reserve that question for an appropriate case where it arises directly.

36. Apart from the foregoing considerations, it seems to me that the manner of Mr. Tennyson's instruction gave rise to a further difficulty quite separate from the patent unfairness to the plaintiff. I have already touched upon the robust cross-examination of Mr. Tennyson in which it was suggested to him that the manner of his instruction led to a situation where he could not fulfil his duty to the court as an independent expert. This issue was canvassed with Mr. Tennyson in cross-examination on Day 4 of the trial at pp. 20 – 21 of the transcript: -

"Q. And who is your obligation to Mr. Tennyson, when giving evidence as an expert?

A. It's to the court.

Q. Absolutely.

A. It's an impartial opinion.

Q. Impartial, objective, fair, having examined all of the relevant facts, not just the facts that are suiting one side or the other; isn't that right?

A. Not all the facts.

Q. Not all the facts that are relevant?

A. You must remember that I was brought in, the first report at the last minute, I didn't do a thorough investigation then, I didn't have time.

Q. I'm going to ask you about that in a moment. Can I just deal with the general parameters of your understanding as an expert as to what your function? Are you telling the court that you haven't had an opportunity in this case to examine all the relevant facts; is that what you're saying?

A. I haven't examined all the relevant facts."

37. Indeed, that last concession is manifest from the content of Mr. Tennyson's first report of the 4th May, 2017. This is not an engineer's report in the sense that most people would understand it but rather a fairly brief commentary on Mr. Carroll's report which appeared to be almost entirely focused on whether the ORFA or IRMA guidelines were the appropriate ones to apply. Mr. Tennyson offered the view that it was the latter, he having accessed the IRMA guidelines online with the benefit of a password furnished to him by the defendant. In his second report of the 26th November, 2017, Mr. Tennyson had by then had the benefit of an onsite visit to the Blanchardstown ice rink, which was then operative, and also the benefit of seeing additional CCTV footage not viewed at the time of his first report.

38. The duty of an expert to the court is to give an independent and impartial opinion based on all the relevant facts. Expert witnesses occupy a special position under the law of evidence in that, unlike ordinary witnesses as to fact, experts are permitted to give opinion evidence. The court will give careful consideration to such expert opinion, appropriately formed, when dealing with an esoteric area of, for example, scientific or medical knowledge, where that opinion is within the area of expertise of the witness concerned. Often however, experts give evidence of opinion on matters which are, in truth, well within the range of experience of ordinary people. In such cases, the court may, as a matter of common sense, be in just as good a position to form a view about the issue at hand as the expert. One such example occurred in the *Byrne v Ardenheath*

case. But at the end of the day, the court will have to form its own view on the ultimate issue, guided by the expert evidence it finds most persuasive.

39. As has been frequently observed in the past, courts have to be mindful of the fact that, despite their best endeavours to be impartial, experts can on occasion become too aligned in their opinion to the case their client wishes to advance. As Charleton J. put it in *James Elliott Construction Limited v Irish Asphalt Limited* [2011] IEHC 269 (at para. 13):-

> "A judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team."

40. This is a particular danger for forensic experts whose practice is mainly concerned with litigation, as inevitably and understandably, such experts will only be retained by parties whose case the expert will support. In the present case, in my view, the defendant placed Mr. Tennyson in an impossible position where he could not fulfil the duties required of an independent expert. That is not intended as a criticism of him but rather of the approach of the defendant to this case.

41. Mr. Tennyson was not instructed to form an independent and impartial view of the case but rather, *ex post facto*, to critically analyse the report of Mr. Carroll at a time when he did not even have possession of all relevant facts, as he readily acknowledged. By way of example, Mr. Tennyson based his first report on Mr. Carroll's finding that there were 213 people on the main ice rink during the plaintiff's session. This figure was based by Mr. Carroll on the number of ticket sales for that session at 281 apportioned as between the main rink and the smaller children's or beginners adjoining rink in proportion with their sizes. However, by the time Mr. Tennyson came to write his second report, he had concluded that there were in fact 111 people on the rink at the material time.

42. The trial judge expressed a clear preference for Mr. Carroll's evidence over that of Mr. Tennyson. It is not difficult to see why, when one has regard to the matters to which I have already referred. Despite that, she clearly had regard to Mr. Tennyson's evidence before coming to the conclusion that the evidence of Mr. Carroll was to be preferred.

43. For the hearing of this appeal, the defendant made available to the members of the court a video recording of the accident which had been shown also in the High Court and commented upon at length by Mr. Carroll and Mr. Tennyson. The court was invited to draw the conclusion from a viewing of the video that there was no overcrowding evident at the locus of the accident. The court was invited to conclude therefore that the evidence of the plaintiff, her mother, her sister and Mr. Carroll should be rejected by this court and the evidence of Mr. Tennyson accepted. I cannot accept that proposition.

44. The trial judge made clear and sustainable findings of fact on these issues that were supported by credible evidence which, on the basis of *Hay v O'Grady* [1992] 1 I.R. 210,

cannot be disturbed by this court. In essence, the defendant's case is that this court should set aside those findings of fact and ignore the evidence of the witnesses who testified before the High Court simply by viewing the video and drawing conclusions. That is in my view impermissible. It must be remembered that three witnesses who were present at the event gave evidence for the plaintiff. Not a single witness who was present was called by the defence, notwithstanding that such witnesses were not only available but actually present in court. If the plaintiff's witnesses were wrong in suggesting that the venue was overcrowded, the defendant was perfectly free to call witnesses to rebut that evidence. The defendant's failure to do so speaks for itself.

45. I am therefore satisfied that there was more than ample evidence available to the trial judge which entitled her to conclude that the defendant had been negligent in this case and such negligence caused the plaintiff's accident. There being no issue of contributory negligence pursued at the trial, as distinct from in the pleadings, quite properly in view of the plaintiff's age, it follows that the plaintiff was entitled to succeed one hundred percent.

Other Issues

46. I have already referred to the fact that a number of pleas were raised in the defendant's defence which were not pursued at trial and I have identified three such pleas. The first was *volenti non fit injuria*. In the High Court, the plaintiff's legal team conceded at the outset that in participating in the event, as with participation in, for example, a contact sport, certain risks were inherent. In skating, such risks would normally include the risk of falling. That was never the plaintiff's case. Whether the plaintiff could be said, as a ten-year old child, to have voluntarily waived her right to pursue the defendant for negligence in the organisation of the event did not arise for consideration as it was not pursued at trial. Given the nature of the event, perhaps the raising of such a plea could be excused even if it was not intended to rely on some particular evidence in that regard such as contractual conditions of entry.

47. However, the plea that the plaintiff herself caused the accident is less easy to excuse. At no time during the course of the trial was any suggestion made to the plaintiff or anybody else that she had by her actions caused or contributed to the accident. This is despite an express plea at para. 4(d) of the defence that the plaintiff acted in such a manner that she knew or ought to have known would cause her personal injury. Such a plea might perhaps be excusable if it was considered that there was some reasonable basis for anticipating a possible concession in cross-examination that some blameworthy behaviour on the part of the plaintiff had taken place.

48. No such consideration arises in this case because the defendant had the opportunity of observing the CCTV footage of the plaintiff skating for the best part of an hour, as well as consulting with the staff on duty on the day, including Mr O' Rahilly . If these staff members had witnessed any inappropriate behaviour on the part of the plaintiff, presumably they would have been called to give evidence. The defendant must therefore have known that there was no question of the plaintiff misbehaving or doing anything that could remotely be regarded as contributing to this accident. That is of course without any

consideration of whether contributory negligence could in any event arise in the case of a ten-year old child. I find it therefore impossible to hold that this plea was properly made in the defence.

49. The same necessarily must apply in relation to the allegations against the plaintiff's mother. For the same reasons, the defendant must have known that there was no basis for any plea that the accident was caused or contributed to in any way by the negligence of the plaintiff's mother in failing to supervise the plaintiff or have any regard for her safety. It must again have been perfectly obvious to the defendant from the outset that the CCTV recording showed the plaintiff's mother as being barely able to skate, let alone supervise her daughter who clearly did not need such supervision.

50. This plea was thus also advanced without any evidential basis and indeed, on the contrary, in the teeth of the evidence which was at all times in the defendant's possession. To suggest to any parent that he or she failed to have regard for their child's safety is distressing. To compound that by suggesting that the same parent negligently failed to take any steps to alleviate her child's pain and suffering is doubly upsetting and hurtful.

51. As if this were not bad enough, Mr. Cremin under cross-examination expressly distanced himself from these pleas and stated that they were not made on his instructions and therefore, presumably, neither on the instructions of any other officer or agent of the defendant. No explanation was forthcoming at the trial as to how each of these pleas came to be made in the defendant's defence but not only that, why they were not withdrawn and why no apology was offered for them either to the plaintiff, her mother or indeed the court.

52. Quite apart from any issues of professional propriety, the days of making allegations in pleadings without a factual or evidential basis, if they ever existed, have long since passed. Section 14 of the Civil Liability in Courts Act, 2004 obliges plaintiffs and defendants alike to swear an affidavit which verifies any assertions or allegations contained in pleadings in personal injuries actions. A person who makes a statement in such affidavit that is false or misleading in any material respect and that he or she knows to be false or misleading shall be guilty of an offence. The penalties for such an offence are severe being a fine of €3,000 or imprisonment for 12 months or both on summary trial or on indictment, to a fine not exceeding €100,000 or imprisonment for up to 10 years or both (s. 29).

53. The focus of s. 14 is most commonly on plaintiffs, particularly when taken in conjunction with s. 26 dealing with fraudulent claims. This case provides a timely reminder that s. 14 applies with equal force to defendants and careful consideration is required before pleas of the kind that are seen in this case are advanced, which I would deprecate in the strongest terms. Before affidavits of verification are sworn, it is of importance that solicitors explain to deponents that this is not a form filling exercise. Lay people may often not fully appreciate the niceties of legal language used in pleadings drafted by

professional lawyers, who have a duty to advise deponents what it is they are swearing to and the serious consequences that may ensue if what is sworn transpires to be incorrect.

54. Finally, on the issue of damages, the medical reports on both sides were agreed in this case. Whilst appellate courts often note that, in such circumstances, they are in as good a position as the trial court to evaluate the medical evidence, the situation is of course quite different in the case of cosmetic injuries where the medical reports only tell part of the story. In the present case, a significant, and perhaps the major, component of the damages was the residual scarring on the plaintiff's hand. In that respect, the trial judge noted (at para. 145): -

> "The plaintiff has scarring at the site of these injuries on her right hand which are permanent and very noticeable, across her thumb, index finger and middle finger. This Court has been shown the plaintiff's right hand with a permanent a very noticeable scar is visible across her thumb, index finger and middle finger."

55. As mentioned earlier, photographs of the plaintiff's hand in the immediate aftermath of the accident were put before this court. However, there were no photographs of the plaintiff's injury contemporaneous with the trial. This court was informed that the defendant's representatives expressly declined to view the plaintiff's scars at any time before or during the hearing in the High Court. The trial judge did so as her judgment records.

56. In the course of oral submissions on the appeal, counsel for the defendant submitted that the plaintiff should be required to produce up to date photographs of her scars for this court to consider. The court refused to direct such photographs be produced. It did so on the basis that no application had been made in advance of the appeal to adduce new evidence nor would it be proper to do so in circumstances where the award of damages, as in every personal injuries case, was made on the basis of the injuries as they presented at the time of the hearing. To require the production of up to date medical evidence for the hearing of appeals would in effect convert them into *de novo* first instance hearings.

57. In the foregoing circumstances, there is no basis upon which this court can attempt an evaluation of the plaintiff's injuries which would enable it to determine whether there was any error in the approach of the trial judge. As the onus remains on the defendant as the appellant to establish such error, this court cannot interfere with the award.

Conclusion

58. For the reasons I have outlined, I would dismiss this appeal. With regard to costs, as the plaintiff has been entirely successful in this appeal, my provisional view is that the plaintiff is entitled to her costs of the appeal. If the defendant wishes to contend for an alternative order, it will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the defendant may be

liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

59. As this judgment is being delivered electronically, Whelan and Collins JJ. have indicated their agreement with it.