

# High Court considers legal costs arising from accident caused by untraced driver

June 2024

In a set of related appeals, the High Court held that an untraced driver caused a collision that resulted in a plaintiff's injuries. Another defendant was let out of the proceedings on the basis no case had been made against him.

Damages were measured at €16,305, which included agreed special damages of €2,305. The Motor Insurers' Bureau of Ireland (**MIBI**) were held to be two-thirds liable on behalf of the untraced driver, while the plaintiff was adjudged to be one-third liable on account of his failure to drive in a manner that enabled him to react sufficiently to the emergency. The net award for the plaintiff was, therefore, €10,870. The two matters, *Kazmierczak v Gaizauskas and Kazmierczak v Motor Insurers' Bureau of Ireland* [2024] IEHC 445, came back

before the High Court for the determination of a number of contested costs applications.

## Entitlement of the Plaintiff to Circuit Court and High Court Cost Awards

Pursuant to Section 169 of the Legal Services Regulation Act 2015, a party who is entirely successful in civil proceedings is entitled to an award of costs, unless the court orders otherwise having regard to certain factors including the conduct of the parties. The High Court held here that the plaintiff was "*entirely successful*" having succeeded in recovering an award of damages, despite the finding of contributory negligence, and was entitled to a costs order against the MIBI.

In respect of the Circuit Court hearing, the plaintiff was held





to be entitled to District Court costs only as the net award of €10,870 was within the lower court's jurisdiction. However, given the complexities of a case involving an untraced motorist, the court was satisfied to grant a certificate for junior counsel in the Circuit Court and a certificate for two counsel for the High Court appeal.

## Liability for the Costs of the Successful Defendant

Section 78 of the Courts of Justice Act 1936 gives the court jurisdiction to order that an unsuccessful defendant pay to the plaintiff the costs which the plaintiff is liable to pay to a defendant who has successfully defended the proceedings. In this case, Mr Gaizauskas was let out of the case and the plaintiff sought an 'over order' against the MIBI in respect of his costs.

The MIBI resisted the application on the basis, *inter alia*;

- the onus is on the plaintiff to choose what parties to sue and it should bear the responsibility for the consequences of its decisions in this regard;
- the plaintiff gave evidence which exonerated Mr Gaizauskas of any wrongdoing so that it had not been warranted to issue the proceedings against him at all and particularly, not to proceed with the appeal against him; and
- the MIBI faces difficulties in investigating accidents as it has no client per se and so it is reasonable for it, more than other litigants, to adopt a wait and see approach on the possible concurrent liability of other defendants.

While noting the validity of arguments raised by the MIBI, the court, in adopting a balancing exercise, agreed to grant the order sought based on the following factors;

- the plaintiff issued what is known as an 'O'Beirne

*letter'* warning that if an admission of liability was not forthcoming, he would be obliged to institute proceedings against both defendants and in the event only one party was found liable, an application would be made for the unsuccessful defendant to pay the successful defendant's costs. It was noted by the court that this scenario came to pass;

- after the Circuit Court hearing, the plaintiff's solicitor issued a '*without prejudice save as to costs*' letter to the MIBI, which included an offer to settle the proceedings for €5,000, plus District Court costs, certain outlay and an indemnity for the costs of the other defendant. It further stated that the letter would be brought to the attention of the court in respect of any future costs applications. A substantive response to the letter was not provided. The court noted that the letter contained a reasonable settlement offer for an amount less than that ultimately awarded by the court; and
- the court reasoned that the '*1% rule*' in cases involving the MIBI mean it may well be professionally prudent for a plaintiff's solicitor to err on the side of caution when considering the inclusion of potential defendants in proceedings. The 1% rule, based on the principle of the MIBI being the payer of last resort, allows for an entire award to be recovered against any other defendant whose negligence contributed to the injuries no matter how small a part the negligence played in causing the accident.

## Entitlement of MIBI to a Differential Costs Order

Section 17(5) of the Courts Act 1981 provides that if an award of damages is within the jurisdiction of a lower court, the plaintiff may be ordered to pay the difference between the costs actually incurred by the defendant and those which would have been incurred had the proceedings been commenced and determined in the appropriate court. The

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MIBI sought such a differential cost order in this case, arguing that the action should have issued in the District Court.

While the onus is on the plaintiff to ensure that the proceedings are conducted in the lowest court that has jurisdiction to make an award in an amount that is reasonable to expect, the trial judge has discretion on whether to grant such an order.

The court in this instance refused to grant the differential costs order on the basis;

- the damages award, excluding the application of the contributory negligence discount, did exceed the jurisdiction of the District Court. As such, this was not a case where the award was significantly within the jurisdiction of the lower court and so it was reasonable for the proceedings to have issued in the Circuit Court;
- there was no evidence that the MIBI issued a letter calling on the plaintiff to remit the proceedings to the lower court; and
- a reasonable compromise was offered by the plaintiff in its '*without prejudice save as to costs*' letter. The plaintiff secured a better outcome in the appeal. A differential costs order would undermine the valid purpose and utility of this letter.

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