Neutral Citation: [2013] IEHC 505

THE HIGH COURT

[2010 No. 5156 P.]

BETWEEN

ANN DOODY

PLAINTIFF

AND

NIALL CLARKE

DEFENDANT

JUDGMENT of Mr. Justice Kevin Cross delivered on the 13th day of November, 2013

1. The plaintiff is a midwife, nurse and housewife who was born on 8th June, 1967 and resides with her husband and three children in Loughlinstown, Co. Dublin.

2. On 26th March, 2008, the plaintiff was taking an evening walk with two friends down the old Bray Road walking from north to south on the pavement, on her right side of the road, between her two companions. As she walked, suddenly without any warning, she felt a pain in her eye which caused her to fall towards the ground. The eye was bleeding. It transpired that the plaintiff had been struck in the eye by an egg which had been thrown by D.M. who was a backseat passenger in a motorcar owned by and being driven at the time by the defendant.

3. The plaintiff was taken to the Eye and Ear Hospital where she lost the sight of her eye and despite surgical repair, the eye had to be removed later and an artificial eye inserted. The plaintiff suffered and continues to suffer, pain and significant psychological trauma and physical disability.

Background

4. The defendant was, at the time of the incident, aged 17 and had just recently obtained ownership of the vehicle. On the afternoon/evening of 26th March, the plaintiff met up with his girlfriend (S.D.) together with three male pals (C.C., D.M. and P.S.). The defendant's male friends sat in the rear of the defendant's vehicle which was a Fiat.

5. The defendant and his companions talked of going to a party that evening and there was speculation among them as to whether they would be admitted to the house and someone of the group mentioned purchasing eggs. I accept and conclude that all the group including the defendant agreed and colluded in the purchase of eggs which they intended to utilise in the activity of "egging". "Egging" is a form of antisocial behaviour in which the participants throw eggs at intended targets in the manner of snowballs.

6. The defendant drove to the Lidl supermarket at Greystones and the defendant purchased a soft drink and the three male passengers purchased three packets of ten eggs and all the friends congregated around the checkout. The group then exited the supermarket and the defendant asked his friends to put the eggs into the boot so they would not "mess" with them. By this, I conclude that the defendant was concerned about any eggs being spilt in his new car.

7. The defendant drove back towards Dublin City to the Statoil filling station at Little Bray where they met a number of other friends of the defendant. I accept that the defendant left the car in the forecourt to go into the garage shop to purchase another soft drink and indeed a number of the passengers in the Fiat got out from time to time and engaged in conversations with their other friends.

8. It is not clear from the statements and the evidence that I have heard whether all three of the egg packages were initially left in the boot or whether just two of them were left in the boot. What is clear that by the time the Fiat left the Statoil forecourt, at least one of the packages of eggs was in the backseat area. There was different testimony suggesting that that package may have been in the back all the time or that someone opened the boot to place the extra egg carton in the car or that somebody pulled the backseat down and fetched the egg carton from the back.

9. There is a degree of self serving in the statements and evidence of the various passengers in the car and no one knows how the third package ended up in the car. Given the evidence of the plaintiff's engineer as to the difficulty of lowering the backseat with anyone situate in the rear, I hold that at least one of the witnesses would have been able to recall the backseat being lowered with greater precision than was their evidence and I doubt that in fact this method was used.

10. I think it is probable that one of the packages of eggs never made the boot in the first place, but I do not see when or how the package got into the back seat as being at all relevant to my consideration.

11. The fact of the matter is that the defendant's girlfriend, S.D. was varnishing or colouring one egg in her hand in the front seat for some time and I find that the defendant would have known and did know of this fact. In addition to S.D., there were two other eggs being handled in the rear seat, one of which was in the possession of C.C. and the other of D.M. C.C. states that at some stage he placed the egg back into the box and I must accept that evidence.

12. I hold that the defendant knew or ought to have known that a number of eggs were being passed around and being "played with" by his passengers.

13. When the car was in the forecourt of the filling station, the rear passenger side window had been lowered at least to a degree to facilitate conversation from the car to the friends of the defendant outside. I find as a fact that the defendant would have been aware of this.

14. The defendant's car headed north from the filling station and his other friends following them in their car. The defendant in his statement to the gardaí which was the only evidence that he gave in the case said "I told the lads not to mess with eggs in the car

just in case they had them". I find that in fact at this stage, the defendant was aware that eggs were in the car and that the lads were potentially going to "mess with them". It is not clear whether the defendant's concern at this stage was primarily with eggs being broken in the backseat and messing his car or some activity of egging.

15. What followed is nothing short of a tragedy in that as they approached the plaintiff and her two friends, D.M. bent over and possibly lowered the window further and threw an egg in the direction of the plaintiff which hit her in the eye causing the catastrophic injury. Just before he did this, one or both of the backseat passengers say that they said "don't throw the eggs out the window at these ladies". I am not sure whether that was said by either or both of the other backseat passengers and certainly the defendant in his statement does not mention it, however, I do not think that issue is relevant to my consideration.

16. Subsequent to the accident, I accept that none of the young people in the car was aware of the serious harm that had occurred. They then went on in what can only be described as a rampage of "egging" as they were excluded from the party. At various stages through the night they "egged" the house and various guests, some of whom they knew, some of whom they did not know who were going to the party and then indulged in a general melee among themselves and their friends.

17. The post accident actions of the defendant and his friends may indeed be relevant to show their intended target in "egging" was not restricted to the house at which the party was taking place. Indeed, it is the case that it would have been quite possible for further similar injuries to have been caused by anyone of the later episodes of "egging".

The Plaintiff's Case
18. The plaintiff contends that the defendant is liable in respect of this incident. The case is made that the defendant is vicariously liable for the actions of his passenger, though this case was not seriously contended. The stronger case is maintained is that the defendant is directly liable for the incident due to his failure to properly drive, car and control his motor vehicle as he is obliged to do so under the Road Traffic Act and at law and in particular he failed to properly control the activities of his passengers.

19. It is contended by the plaintiff that the defendant knew that there were eggs in the car which were being played with by his passengers that he knew or ought to have know that the D.M. and C.C. were handling or playing with eggs in the backseat as well as S.D. painting the egg in the front seat. Further, I find that the defendant knew or ought to have known that the back passenger window was down and that with this knowledge he gave a warning to his backseat passengers not to be "messing" with the eggs in the car but that such a warning did not prove sufficient to prevent the throwing.

Rather, Mr. Nolan, S.C., urged the defendant could have and should have:-

(a) ordered the passengers to put the eggs away,

(b) ordered that the window be put up,

(c) stopped his car, or

(d) put the passengers out of the car.

The Defendant's Case

(a) The tragic incident which the defendant through his counsel expressed regret and his sorrow was caused by the wrongful acts of D.M. in an assault for which the defendant is not liable.

(b) That the accident happened very quickly, the defendant having told his passengers not to be "messing" and that it was not foreseeable that eggs would be thrown and that the plaintiff is seeking to create an onerous standard for the defendant.

Evidence
20. I heard the sworn evidence of the plaintiff and her two walking companions together with Detective Garda D.J. Though the plaintiff and her companions did not know what had happened to them the gardaí were able to trace the defendant and his passengers as a result of complaints made by the owner of the house which was subsequently "egged" by them and using excellent detective work, Garda D.J. obtained the number of the defendant's car and interviewed the defendant and his passengers, all of whom made statements. The detective garda then obtained the CCTV footage of the defendant and his friends purchasing the eggs which I have seen.

21. Also, I heard the evidence from C.C. and S.D, passengers in the defendant's car who were called on behalf of the plaintiff. The defendant's statement to the gardaí was put into evidence and by agreement of the parties constituted the only evidence for the defendant.

22. I also was furnished by the sensible agreement between the parties with the plaintiff's medical reports which were clearly not in contention.

23. Unusually in a personal injury case I was advised without demur not just that the defendant had issued third party proceedings against D.M. which had not been proceeded with but that the defendant's insurers had repudiated liability and the defendant was defending the matter on his own.

24. By way of a comment, it does seem to me strange that the defendant's insurance company chose to "repudiate" liability to the defendant. Clearly, the defendant can only be liable to the plaintiff if the court finds that the defendant was negligent in the driving, care, maintenance and control of his motor vehicle. In other words, if the plaintiff succeeds against the defendant, the plaintiff must also succeed under the Road Traffic Act in an action against the insurance company and Mr. McParland of counsel was clearly doing the indemnifiers work for them when he defended the action.

The Law
25. Whereas the owner of a mechanically propelled vehicle is vicariously liable for the actions of a driver under s. 118 of the Road

Traffic Act 1961, I do not find that the owner or driver of the vehicle can as such be vicariously liable for the actions of his passengers.

26. In *Curley v. Mannion* [1965] I.R. 543, the defendant who was the owner and driver of a motor vehicle which was parked on its correct side of the road was held liable to a cyclist pedestrian who suddenly without warning was hit by the passenger door being opened by a passenger child of the defendant who did not look to see the coast was clear.

27. In that judgment, Ó Dálaigh C.J. stated (at p. 546):-

> "…a person in charge of a motor car must take precautions for the safety of others, and this will include the duty to take reasonable care to prevent conduct on the part of passengers which is negligent. In the present case that duty is, it seems to me, reinforced by the relationship of parent and child; and a parent, while not liable for the torts of his child, may be liable if negligent in failing to exercise his control to prevent his child injuring others."

28. In the same case, Walsh J. stated (at p. 549):-

> "In my view the defendant, as the owner and driver of the motor car in question, owed a duty to other persons using the highway not merely not to use or drive the car negligently but to take reasonable precautions to ensure that the car, while under his control and supervision, was not used in a negligent fashion. It would indeed be a startling proposition that a person in charge of a motor vehicle on a public highway should not owe any duty to third parties save in respect of his own negligent act in the use of the vehicle, or in respect of omissions relating to his own use of the vehicle, and that he should not be liable in negligence for failing to take reasonable steps to prevent the negligent use of a motor car by a passenger therein while it is under his control and supervision when such negligent use is actually known to or ought to be foreseen by him."

29. It is clear from the above that the passenger in *Curley* was a child of the defendant and clearly ought to have been amenable to more direct control than an adult but that the duty is not to be confined to children. Neither is the duty of care as outline in *Curley* (above) limited to the children of the driver/owner.

30. It is also clear that the danger that the defendant should guard against is not the precise incident that actually occurred (of hitting the plaintiff in the eye with an egg thrown from the car) but rather, what must guarded against in this case is a passenger throwing an egg from the window so as to constitute an assault on the pedestrian. The standard of care is, of course, a reasonable one.

31. I have considered this matter in great detail from many points of view. Clearly, the plaintiff was doing absolutely nothing wrong and has had an appalling injury. However, I have come to the conclusion that the propositions of Mr. Nolan – put the eggs the away – order the windows to be put up – stopping the car – put the passengers out of the car if necessary are too extreme and ultimately not reasonable.

32. I accept that the defendant and his friends were all on a common purpose to commit unlawful acts of "egging". I accept that whereas their initial target may have been intended to be the house of the party but that their actions established they had more general malice in mind.

33. I also accept that the defendant knew or ought to have known that there were in fact eggs in the backseat of the car and that what was occurring may have been potentially volatile. I accept that the defendant knew or ought to have known that the passenger window was at least partially open.

34. None of the passengers gave evidence as to any conversation about "egging" anybody on the road. This may well be selective amnesia but there is no evidence that the driver was warned or ought to have known that this was a likelihood. I am of the view that it would be unreasonable to import upon him the knowledge that an egg was going to be thrown or might be thrown in the direction of the plaintiff from his car. I am also of the view that in the circumstances to expect the defendant to take any of the actions which Mr. Nolan suggests would be to impose upon the defendant too high and too onerous a standard of care.

35. Had there been any evidence of a discussion of "egging" pedestrians then I would have accepted the submissions of Mr. Nolan on behalf of the plaintiff with alacrity.

36. I do not believe that the evidence establishes that the defendant was in breach of the duty of care he undoubtedly did owe to the plaintiff, the fellow road user, on the day.

37. Therefore, I with regret I must dismiss this action.