



THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 366

APPEAL NO.: 260/2015

PEART J.
HOGAN J.
MURPHY J.

BETWEEN/

MARGARET MCGARR

PLAINTIFF / APPELLANT

- AND -

DUBLIN BUS/BUS ATHA CLIATH

DEFENDANT / RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 5TH DAY OF DECEMBER 2016

1. At approximately 8.30pm on the 3rd October 2008 the plaintiff fell backwards down the stairs of a No. 19 bus shortly after paying her fare and before she had reached the top of the internal stairs. She suffered a nasty injury. She was visiting Dublin from the UK where she lives, and was staying with relatives in Glasnevin. She had arranged to meet a friend for a meal in Temple Bar area of the city, and thought it would be nice to sit upstairs on the bus so that she could have a better view of the city lights.
2. In these proceedings she alleged that the bus driver drove his bus negligently as it moved off from the stop where she had got on. She said in her evidence that as she approached the top of the stairs *"there was a sudden, very sudden, jerk of the bus"*, which caused her to fall backwards and all the way down to the bottom of the stairs. Another passenger who was seated downstairs on the same bus gave evidence that just before the plaintiff landed at the bottom of the stairs, the bus jerked or jolted *"quite violently"* as it moved away from the stop, such that he even commented upon it to his wife who was seated beside him. While he accepted that buses jerk and jolt all the time, and that this was to be expected, this particular jerk or jolt was *"more pronounced than normal"*.
3. Having heard all the evidence adduced by the parties, and having viewed the CCTV footage of the incident taken by cameras situated within the bus (which this Court has also viewed), the trial judge (White J.) found that the plaintiff had not made out a case in negligence against the defendant, and dismissed her claim. She appeals to this Court against that finding.
4. Her appeal raises an important question as to the extent of the defendant's duty of care to passengers whom it carries on a double decker bus. There is no doubt that there is a general duty to take reasonable care for the safety of its passengers. But is it fair and reasonable that this duty should extend to the driver having to satisfy himself or herself that any passengers who have got on and paid their fare are actually seated, and in particular perhaps those who may have entered the stairwell to gain the upper deck, before the bus moves away from a stop? The trial judge concluded that it did not extend that far.
5. An important piece of evidence that became clear when the CCTV footage was shown was that when the plaintiff was climbing the stairs she was holding her ticket in her left hand (and had a shoulder bag on her left shoulder) and was therefore not holding the left-hand rail. In addition it showed that as the plaintiff made to take the left turn to mount the final three steps at the top of the stairs, she removed her other hand from the right hand rail also so that she could grip a cross-rail at the top. A cruel misfortune of timing meant therefore that at the precise moment when the bus moved away from the stop and into the traffic, she was holding neither hand rail and was therefore completely unsupported at the top of the stairs. The judge found as a fact that at that precise moment when the plaintiff lost her balance and fell backwards she was holding neither hand rail.
6. As I have said, both the plaintiff and the other passenger, Mr. McEntee, stated that the bus jerked or jolted more severely than normal. Mr. McEntee went as far as describing it as *"a violent jerk"*. Each party called an engineer to opine on the nature of the movement of the bus away from the stop by reference to what is seen on the CCTV footage. Any conflict between the evidence for the plaintiff and that called on behalf of the defendant was resolved by the trial judge in favour of the defendant by reference to what the trial judge viewed for himself on the CCTV footage. In his ex tempore judgment on the 28th April 2015 he concluded as a fact that the movement of the bus was not a violent movement. In that regard he stated:-

"There is a conflict of evidence about the movement of the bus. The plaintiff fell as the bus started to move off. The plaintiff and an independent witness on the bus, Mr Eamonn McEntee, gave evidence of a sudden jerk movement. Mr. McEntee stated the bus jerked violently. The defendant relies on the CCTV evidence and the evidence of the bus driver Kenneth Martin. The plaintiff relies on the expert evidence of Peter Johnstone, engineer and the defendant relies on the expertise of a forensic accident investigator, David Land. Peter Johnstone gave evidence that because the bus stop was near a T-Junction the bus would have to pull out to the right and then drive straight ahead, giving an explanation for the sudden jerk. Mr. Land stated that because of the engine configuration of the bus there was an interval of 0.16 of a second to 0.33 of a second from the time the bus started to move to the passenger falling. He could determine this from the design of the engine of the bus and from the CCTV footage from the start of the movement of the bus to the fall of the passenger. The Court's preferred evidence is the CCTV footage from the top of the double-decker bus when the plaintiff was emerging at the top of the stairs. And at the exact time the plaintiff was losing her balance, a passenger at the front of the upper tier was drinking from a can and in the process of putting the can to his lips. If the movement of the bus was violent this Court would have expected the can to move or liquid to spill. This did not occur. The Court finds as a matter of fact where there was sudden movement when the bus moved off, it was not violent movement."

7. The trial judge went on to state that *"there are a number of ways she could have secured her safety as the configurations of the rails on the stairs were safe"*. The plaintiff has levelled some criticism of this statement and submits that there was no expert evidence given as to whether these rails were properly configured and safe. However, firstly, I would say that in her personal injury

summons the plaintiff makes no complaint that the rails were in any way defective, unsafe, or falling short of any recognised specification. But, secondly, her own engineer was asked about them in cross-examination. He stated that he had not investigated the rails for the purpose of his report, but that he assumed and accepted that they were made to the appropriate standard, and he believed that it was a reasonable assumption to make. In my view, the trial judge was entitled to express himself as he did in relation to the rails in the light of this evidence.

8. The limited basis upon which this Court may interfere with findings of fact made in the court below are well-known from the judgment of McCarthy J. relied upon in *Hay v. O'Grady* [1992] 1 I.R. 201. It suffices to quote just one paragraph at p. 217 of the judgment as follows:-

"If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them. The truth is not the monopoly of any majority."

9. To that remark may now be added what Clarke J. has stated in *Doyle v. Banville* [2012] IESC 25 as follows:-

"It is no function of an appellate court such as this to re-weigh the balancing exercise which any trial judge is required to do when sitting without a jury for the purposes of determining the facts."

10. On this appeal, the plaintiff submits that insofar as the trial judge supported his conclusion as to the non-violent nature of the movement of the bus by reference to his viewing of the upstairs passenger holding a can to his lips and not seeing that can move or the liquid spill, the trial judge failed to take account of the fact that the same passenger was sitting in his seat with his arm braced against the back of the seat, and accordingly his position is not comparable to that of a person such as the plaintiff who was climbing the stairs. The plaintiff refers to the fact that Mr Johnstone stated in his evidence that he did not think that this particular passenger was "a good marker" given the fact that his arm was braced on the backrest and he was sitting into the corner between the seat and the side wall.

11. It is also submitted that if anything the evidence of Mr. Land to which the trial judge has referred as to the interval between the bus commencing to move off and the plaintiff's fall, supports the proposition that it was the movement of the bus that caused the plaintiff to fall. My own view is that this submission misses the point. There is little doubt that the movement of the bus caused the plaintiff to lose her balance and fall backwards. But the issue determined by the trial judge as a fact was that that very movement was not of a violent nature. In other words it was not abnormal or other than any bus user might reasonably expect to occur, and that she fell because she was not holding onto any hand rail at the critical moment.

12. I, along with the other members of the Court, have viewed the CCTV footage carefully. In addition to the man upstairs on the bus drinking from a can without any apparent disturbance at the precise moment that the plaintiff fell backwards, it was of interest to note also that the footage also showed that as the plaintiff paid her fare and moved towards the stairwell, there was another young lady following behind her and who was pushing a baby buggy on her way to a seat on the lower deck. If the bus moved as unusually violently as the plaintiff and Mr. McEntee stated one would certainly have expected some effect upon that young lady as she manoeuvred her buggy down the bus. At the precise moment that the bus moved away from the stop, this young lady was clearly undisturbed. I appreciate that the trial judge did not state his conclusion by placing reliance on this, but nevertheless it tends to confirm the trial judge's conclusion that this was not a violent movement of the bus as it moved away from the stop. The defendant's engineer expressed his view of this part of the CCTV by saying that the lady with the buggy "seems very stable" at the moment that the bus moves off, and that she would have been jolted backwards by any sudden jolt forward by the bus, and the CCTV did not show that.

13. I can see no basis upon which this Court should overturn the trial judge's finding of fact in relation to the nature of the movement of the bus. There was ample evidence given by the defendant's forensic accident investigator, Mr. Land, which the trial judge was entitled to accept, to support his finding that the bus did not move forward violently. From his analysis of the of the footage and the calculations which he was able to make he concluded that the time between the bus commencing to move away and the plaintiff beginning to fall was between 0.16 seconds and 0.33 seconds. He went on to state that allowing for the fact that it is highly unlikely that the events happen "at the exact point at which the frame is recorded" it is "*very highly probable that the true time between the bus movement and [the plaintiff] falling was somewhere between that range*". Whatever the space between the bus commencing its movement away from the stop and the commencement of the plaintiff's fall, it is fractional. He went on to express his view that in that short space of time there was insufficient time for the driver to have applied acceleration for the bus, and that it was on what he called "tick over" and "could only be creeping forward". This is evidence which the trial judge was entitled to prefer and to make his finding of fact in accordance with it.

14. The trial judge then addressed what he called 'the standard of care' issue. He reached his conclusions on it by stating the following:-

"The plaintiff relies on the direction given to bus drivers by the defendant in written form in the Driver's Safety Handbook. Under the heading 'Moving off from Bus Stop' the direction states:-

"Never move off until customers secure themselves".

The plaintiff contends that the bus driver should not have moved off while the plaintiff was still clearing the stairs to get to her seat. The bus driver has a screen to monitor the top deck which is visible in front of him in his cab. He does not have a screen to monitor the stairs. The Court considered just the law on this particular issue and is quoting from the Law of Torts, 4th edition, McMahon and Binchy, and the chapter on the standard of care. In Kirby v. Burke [1944] IR 207 at 204, Gavan Duffy J. stated:-

'... the foundation of liability at common law for tort is blame worthiness as determined by the existing average standards of the community; a man fails at his peril to conform to these standards. Therefore, while loss from accident generally lies where it falls, a defendant cannot plead accident if, treated as a man of ordinary intelligence and foresight, he ought to have foreseen the danger which caused injury to his plaintiff.'

In Byrne v. Macdonald, an unreported judgment of 7th February 1957 at p.10, Kingsmill Moore J. stated:

"The act or omission must be judged in the light of the knowledge, actual or imputed, which the plaintiff has, for if

there is, or should be, no knowledge that the act or omission involves danger then the plaintiff cannot be convicted of failing to take reasonable care. To every adult is imputed the knowledge of risks which the normal reasonable person may be assumed to have ...".

At paragraph 7.27 McMahon and Binchy state:-

"[7.27] whilst the standard of the reasonable person gives some substance to the concept of negligence, a number of more specific indicators have been identified in an effort to elaborate more particularly what is or is not reasonable in particular circumstances. Four factors in particular have been discussed in the decisions and among the commentaries on negligence. These are:-

(a) the probability of an accident;

(b) the gravity of the threatened injury;

(c) the social utility of the defendant's conduct; and

(d) the cost of eliminating the risk."

And (a) and (c) are relevant in this particular case. At paragraph 7.29 the text states:-

"[7.29] The greater the likelihood of harm to the plaintiff, the more probable it is that the court will regard it as unreasonable for the defendant to engage in the risky conduct or to fail to take steps to avert the threatened injury."

And an important element of the legal situation in this case is also the social utility of the defendant's conduct. At paragraph 7.40 [the authors state]:-

"Regard must be had to the object of the defendant's conduct. Where it has a high social utility it will be regarded with more indulgence than where it has little or none."

It is a fact of life that buses move and stop all the time in urban spaces. In a double-decker bus there is regular movement between the upper and lower deck. Buses are manned by one driver. It is too high a standard of care to impose on the defendant that a bus driver, having regard to his duty to never move off until the customers secure themselves, as to ensure that a passenger is seated on the upper deck and has cleared the stairs before moving off. The Court finds that any sudden movement could have caused the plaintiff to fall as she was not holding on. There are a number of ways she could have ensured her safety as the configurations of the rails on the stairs were very safe. The court does not find negligence against the defendant, and dismisses the plaintiff's claim."

15. The plaintiff's grounds of appeal set forth in her notice of appeal on this aspect of the trial judge's conclusions state the following:-

"3. The learned judge erred in law and/or alternatively in fact in finding that it was too high a standard of care to impose on the defendant that a bus driver, having regard to his duty to never move off until the customers secure themselves, as to ensure that a passenger is seated on the upper deck and has cleared the stairs before moving off.

4. In making such a finding, the learned judge failed to have adequate regard to the duty of a bus driver to 'never move off until customers secure themselves'.

5. The learned judge erred in law and/or alternatively in fact in finding that it was too high a standard of care to impose on the defendant that a bus driver, having regard to his duty to never move off until the customers secure themselves, and to his ability, has to ensure that a passenger is not in the act of climbing the stairs before moving off."

16. It is clear from the plaintiff's submissions on this appeal that, as noted by the trial judge, she places reliance upon the direction to drivers to "never move off until customers secure themselves." She submits that this direction indicates that the defendant has assumed a duty of care in that regard, and has imposed it upon its drivers. In such circumstances, she submits that the trial judge fell into error as a matter of law when he found that it was too high a standard of care to impose upon the defendant that its drivers must ensure that passengers have secured themselves in their seat before the bus moves off.

17. Insofar as the trial judge referred to the "social utility of the defendant's conduct" by reference to passage quoted from McMahon and Binchy, the plaintiff submits that this factor is not determinative, and has referred to some English authorities stating that social utility should not be permitted to outweigh the need to ensure the public is not exposed to unnecessary danger – viz. *Quinn v. Scott* [1965] 2 All E.R. 588, and *Griffin v. Mersey Regional Ambulance* [1997] EWCA Civ. J 1008-2, and, in the latter which was a case where an ambulance on an emergency call had gone through a red light and had collided with the plaintiff who had the green light in his favour, a passage from the judgment of Simon Brown L.J. where he found the defendant negligent by:-

"... not waiting just a little bit longer to be sure that all the westbound traffic at this busy junction, and not just the vehicles in the first and third lanes, were aware of his presence and were stopping to allow the ambulance across. Given the way that the white van was restricting his view to the left, he could not otherwise be sure that it was safe to pass in front of it. Second, the judge found the defendant's driver negligent in having set off across the front of the stationary wide than just a little faster than he should have done. Given that he could not see whether a vehicle was about to enter the junction from the middle lane, he should, at most, have inched out."

18. That case is relied upon for submitting that social utility does not in all cases trump the defendant's duty to take reasonable care, and counsel points to the obvious social utility performed by ambulance drivers answering an emergency call.

19. It is worth noting at this stage the very different facts at play in *Griffin*, and also to note that Simon Browne L.J. made it clear, as must be correct, that each such case turns on its own facts. But the plaintiff submits that the trial judge placed too much reliance on the principle of social utility is determining that the standard of care contended for by the plaintiff in this case was too high a standard, considering the likelihood of an injury being sustained by a person ascending the stairs as a double decker bus moves off.

20. The plaintiff has also submitted that when concluding that the standard of care contended for by the plaintiff was too high, he nevertheless did not define what the lower standard of care comprised.

21. The plaintiff has sought to rely upon the judgment of Denham J. in *Shelley-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232 where the defendant was found to be negligent resulting in an injury to the plaintiff who fell down the stairs of a double decker when it moved off from traffic lights. In that case, however, Denham J. upheld the finding of fact by the trial judge that the bus had moved off abruptly causing the plaintiff to jerk forward and fall. But it is also noteworthy that in *Shelley-Morris* the evidence accepted by the trial judge was that the plaintiff was holding onto the hand rail with her right hand at the time she was thrown forward. He found that the primary cause of the accident was that "the bus jerked off abruptly". In those circumstances the driver was found to have been negligent and primarily responsible for the plaintiff's injuries. She in turn was found guilty of 25% contributory negligence because she was holding a small child on her left hip as she went up the stairs. That finding of contributory negligence was increased to 50% on appeal.

22. *Shelley-Morris* is, in my view, entirely distinguishable given the specific finding of fact that the bus in that case "jerked off abruptly" causing the plaintiff to fall. That was the primary cause of the fall as found by the trial judge in that case. In the present case, by contrast, the finding of the trial judge was that there was not a violent movement when the bus moved off. There is no meaningful difference between an abrupt movement and a violent movement for present purposes. The sense is the same. But in the present case there is, in addition, the incontrovertible evidence that the plaintiff was not holding onto a hand rail at the time the bus moved off. That is also a difference between the facts as found in *Shelley-Morris* and the present case. In the present case the primary cause of the plaintiff's fall was that she was not holding onto the hand rail at the time that the bus moved off. If she had, the probability is that she would not have fallen at all given the fact that this bus did not move off violently or abruptly as she contended.

23. The plaintiff suggests that, as in *Shelley-Morris*, she should perhaps be found to have been guilty of some contributory negligence by having let go of the rail at the critical moment as she turned left at the top of the stairs, but that the trial judge erred in not finding of negligence against the defendant.

24. Before the question of any contributory negligence on the part of the plaintiff arises, the defendant must first be found to have been negligent thereby causing the plaintiff's injury.

25. The crux of this appeal is whether the defendant's driver fell short of what is reasonably required of him in order to discharge the duty of care owed by the defendant to the plaintiff. That duty of care is one which requires it to take reasonable care in all the circumstances. I will come to what should be considered when considering all those circumstances.

26. We know by now that the driver did not move forward in any abrupt, sudden or violent manner. Had he done so it would be open to find him guilty of negligence, and then to consider the extent to which the plaintiff contributed to her injuries by failing to have reasonable regard for her own safety by having let go of the rail on her right hand side at the critical moment so that she was unsupported as she rounded the turn at the top of the stairs as the bus moved off. But that is not the situation in the present case as found by the trial judge, and he was, in my view, entitled to make that finding of fact.

27. So, where the driver did not drive his bus negligently as he moved off, what else was he obliged to do or not do from which it can be concluded that he breached the defendant's duty of care owed to the plaintiff? The plaintiff urges that the driver ought to, indeed was obliged to under the Driver's Safety Handbook, have ensured that the plaintiff was in some way secure before he drive away. The trial judge discussed with the plaintiff's counsel at the conclusion of the evidence what exactly the plaintiff was saying as to the standard of care required of the defendant. Counsel clarified that the duty extended to ensuring that the passenger was secure. He went on to state that a person on the lower deck could be considered to be secure if he/she was in a standing position but was holding onto to one of the vertical rails that are in place. In contrast, it was submitted, a person on their way up the stairs could not be said to be secure, and accordingly that it is unsafe for the driver to move away from the stop until that person has reached the top of the stairs, even where the bus moves off calmly and without any abrupt movement. Counsel stated that the duty of care he was advocating was "a significant duty of care" in the context of the bus being a public utility, and where persons might be ascending a stairs.

28. The defendant's expert was asked if he would consider that the plaintiff was "secure" at the point when she was holding the hand rail with her right hand. He stated that he would. The plaintiff herself agreed that the hand rails were in place so that passengers could hold onto them to prevent them falling due to the movement of the bus. She agreed that buses move in unusual ways and all the time. She in fact stated that she was holding the hand rail when she fell, until it was pointed out that the CCTV footage would show that she was not.

29. In my view, the standard of care contended for by the plaintiff is too high. It is unreasonable, and completely ignores the realities of modern day bus travel. I appreciate that on the occasion of this unfortunate accident the bus may not have been particularly full. But when considering the duty of care on the defendant company and its employee' drivers one must state the duty in general terms. It cannot be the case that when the bus is full to the rafters there is one level of care required, and a higher one owed when the bus is half full, and perhaps an even higher one when there are but a few passengers. It is utterly unreasonable and unrealistic to expect that before moving away from the stop on each of the many occasions that this happens throughout the day, the driver must make sure that not only have all the passengers who have just got onto the bus secured themselves in some way, but also presumably that existing passengers are still in their seats or otherwise secure by holding a rail. Indeed, if the plaintiff is correct, the driver might be even obliged to leave his seat to ensure that no person is still on the stairwell trying to ascend to the upper deck. This also assumes that the driver will know if passengers have decided to move upstairs, and how many.

30. It really only needs to be stated in this way to appreciate how impossible a standard of care is that for which the plaintiff contends. It is way beyond what must be considered as a duty to take reasonable care for the plaintiff's safety.

31. The duty of the defendant is to take what in all the circumstances is reasonable care for the safety of the passenger. This will naturally involve driving with reasonable care and at a speed that is both within the permitted limits and which is appropriate to the road conditions. With reference to the facts of the present case the duty of care extends to the driver taking care as he moves away from the bus stop not to do so by negligently causing the bus to lurch forward or jerk abruptly so that a person mounting the stairs who is holding both rails, or even either rail, is still knocked off balance and caused to fall. There will always be cases where, for one reason or another, the driver encounters an emergency situation caused perhaps by another road user's negligent driving, and it may not be negligent on his/her part if the bus must be brought to a halt abruptly. But I am dealing with the situation in the present case where that did not arise. The driver moved off from this stop in a manner that has been found to be not violent or unusually abrupt, even though there may have been the sort of inevitable movement of the vehicle which has to be expected.

32. In my view, the driver is entitled to assume, unless a passenger is perhaps a young unaccompanied child or is seen to be suffering from some physical impairment which could place upon him/her under a greater duty than otherwise, that the average normal able bodied adult will take reasonable care for his/her own safety by availing of the clearly visible and hand rails to secure their own safety, be it on the stairs or on the lower or upper deck, but especially while mounting the stairs. Rails on each side are specifically provided to assist the person who ascends to the upper deck. In the present case the driver did nothing he was obliged by his duty of care not to do. The plaintiff on the other hand failed to keep hold of even one of the hand rails as she mounted the final three steps of these stairs. That alone is what caused her to lose balance when the bus moved off. There was no breach of the duty of care owed to her by the defendant.

33. The defendant is entitled to assume also that by now it is common knowledge, and the experience of everybody who uses a bus, that because of their sheer size and the volumes of traffic in which they typically travel in the city they tend to sway and lurch a bit, even when driven with great care. People know this, and that that they need to hold onto the rails that are provided when standing on either of the decks or moving around, whether that is on the stairs or along the passageway between the rows of seats on either deck when the bus is in motion.

Conclusions

34. While I have every sympathy for the plaintiff for the injury which she sustained and for the obvious distress that she suffered at the time, it is nevertheless the case unfortunately, as the trial judge found, that she was the author of her own misfortune by mounting these stairs in the manner which has been found to be the case. I would therefore dismiss the plaintiff's appeal.