Neutral Citation: [2014] IEHC 514

THE HIGH COURT

[2009 No. 10757 P.]

BETWEEN

JOHN (JACK) O'BRIEN

PLAINTIFF

AND

JOHN REILLY AND THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered the 31st day of October 2014

1. The records of the Accident Emergency Department of the Midlands Regional Hospital, Mullingar, contain an entry that the plaintiff was brought in, "with a friend", at 02.55 hours on the 20th February, 2007. The name for next of kin and person to be contacted is Irene O'Reilly his partner. I am fully satisfied on the evidence that the plaintiff was brought in by Irene O'Reilly alone and, that she was the "friend" referred to. The plaintiff was subsequently diagnosed at Mullingar Hospital and later at the Midlands Regional Hospital, Regional Orthopaedic Unit at Tullamore, where he arrived at 18.00 hours on the 20th February, 2007 and came under the care of Mr. Michael Glynn, Consultant Orthopaedic Surgeon, as having suffered a transverse fracture of his left humerus, a "hangmans fracture" of his C2 vertebrae and a severe brachial plexus injury.

2. I am satisfied from his own evidence, from the evidence of his partner Irene O'Reilly and her sister Celine O'Reilly and, from the contents of the hospital records admitted into evidence, that the plaintiff did not know how he came to suffer these injuries. In a statement made by the plaintiff on the 17th July, 2007, to Mr. T. Mulligan, an Accident Investigator who was investigating the incident on behalf of the Motor Insurers Bureau of Ireland (hereinafter "the MIBI"), he said:-

> "I'd approximately 8 – 10 pints of Guinness and a few shorts . . . I was more tired than drunk. . . . I fell asleep in the van. I woke up on the road that's what happened to me. I did not have my seat belt on. . . . I woke up on the road. It's fairly blank after that."

3. A Ward Note made on review of the plaintiff at Mullingar Hospital at 08.30 hours on the 20th February, 2007, contains, *inter alia*, the following statement:-

> "3) alcohol excess, concentration 202ml per dl."

The blood/alcohol sample was taken at 03.15 hours and, the result was received at 04.17 hours on the 20th February, 2007. I am satisfied on the evidence of the plaintiff, which is supported by the statement of his partner Irene O'Reilly to Mr. T. Mulligan on the 17th July, 2007, that he had stopped drinking at approximately 11.30 pm on the 19th February, 2007. He told the court that this was a Monday night and there was nobody about in Athboy. Mullingar Hospital Accident and Emergency Department Admission Record timed 02.55 on the 20th February, 2007, states, "does not recall what occurred". A post admission Ward Note from the same hospital records, "amnesia of the event". There is no suggestion in any of the hospital records of Mullingar Hospital, Tullamore Hospital or the Mater Misericordiae University Hospital, in all of which the plaintiff received medical and surgical treatment, that this "amnesia of the event" might not be genuine despite the fact that the plaintiff does not appear to have suffered any facial or cranial injuries.

4. In her statement to Mr. T. Mulligan on the 17th July, 2007, Celine O'Reilly, the plaintiff's sister-in-law said:-

> ". . . I met the two lads on the road in front of me . . . my brother John was holding Jack up. . . . Jack was in and out of consciousness. . . ."

5. In her evidence at the hearing of this action, but not in her statement made to Mr. T. Mulligan on the 17th July, 2007, Irene O'Reilly the plaintiff's long-time partner and sister of Celine O'Reilly and John O'Reilly told the Court that when Celine O'Reilly brought the plaintiff back to the mobile-home, where the plaintiff, his partner and their children were living while a dwelling house was being built, that "Jack was snow-white and not talking a lot". She said that she noticed blood on his jumper and shirt. She cut these off and then saw that a bone was sticking out above his left elbow. In her statement to Mr. T. Mulligan on the 17th July, 2007, she said that:-

> ". . . They came in and it took a while to realise how bad he was. . . . I just grabbed John O'Brien and went out the door to the hospital. . . ."

6. She told the court that shortly after they arrived at the Accident and Emergency Department of Mullingar Hospital, the plaintiff became unconscious and no one could speak to him. I find that this is not borne out by the Mullingar Hospital records. Though she was not called in evidence, it is clear from her recorded entries of the presenting complaints that Triage Nurse Morris was able to communicate with the plaintiff at 02.55 hours on the 20th February, 2007. The fact that the plaintiff's position on the Glasgow Coma Scale recorded at 15 over 15 is a strong indication that this was so.

7. In a note made in the hospital records of Mullingar Hospital shortly after 02.55 hours on the 20th February, 2007, Triage Nurse Morris under the heading "Presenting Complaint" wrote the following:-

> "Found by partner with injury to left arm.
>
> Does not recall what occurred.
>
> Had been out for a few pints on way home . . ."

None of the boxes in the Accident and Emergency Department Admission Form which cover an extensive list of "type of event/how caused" are ticked. It was admitted at the hearing of this action that the plaintiff had given the above information to Nurse Morris.

8. In Ward Notes from Mullingar Hospital which are dated the 20th February, 2007, but are not timed and which do not indicate whether they were made by a ward nurse, a doctor or a member of the surgical staff, the following is written:-

> "Brought in by wife. Complaining of left arm pain and large C2. . . (indecipherable)
>
> ?? Hit by car.? Assault.
>
> Amnesia of event.
>
> ? loss of consciousness.
>
> Wife found him.
>
> Conscious, complaining of left arm pain walking at scene also complaining of neck pain."

9. As no psychologist gave evidence on behalf of any of the parties, I do not know whether what is being referred to is true "amnesia" or an anterograde "enbloc" alcohol induced blackout.

10. At 05.30 hours on the 20th February, 2007, a Nursing Intervention Note made at Mullingar Hospital records that:-

> "Brought into Accident and Emergency by partner. She had been on her way to collect him from pub. Jack remembers deciding to walk out to meet her, but no recollection of events after this. Found on edge of road. . . ."

11. At 06.00 hours on the 20th February, 2007, the Senior Surgical Registrar on call at Mullingar Hospital, Mr. Farrukh Nasseem, made the following entry in the Ward Notes:

> "Alcohol on board.
>
> Found on roadside by wife."

He told the court that his recollection on seeing the file, even though it was seven years later, was that the plaintiff had a high alcohol level at 06.00 hours on the morning of the 20th February, 2007, in common parlance he was drunk.

12. At 13.00 hours on the 20th February, 2007, Mr. R. Lynch, Accident and Emergency Consultant, made the following entry in the Mullingar Hospital Ward Notes:-

> "Front seat passenger in van.
>
> Asleep in van.
>
> No seat belt.
>
> Driver crashed into the ditch.
>
> Thrown out the window.
>
> Gardaí informed."

13. It was decided to transfer the plaintiff from Mullingar Hospital to the Regional Orthopaedic Unit at Tullamore Hospital. In a referral letter which accompanied the plaintiff, Mr. R. Lynch wrote:-

> "Kindly review this patient with a history of unstable C2 fracture: open fracture left humerus. Front seat passenger RTA, no seatbelt, ejected from vehicle."

14. At 18.00 hours on the 20th February, 2007, Mr. Michael Glynn, Consultant Orthopaedic Surgeon at Tullamore Hospital made the following entry in his Clinical Notes:-

> ". . . RTA. 14 hours ago. Unrestrained passenger – high velocity single vehicle collision. Ejection. . . ."

15. Because of the unstable C2 fracture, the plaintiff was transferred from Tullamore Hospital to the National Spinal Injury Centre at the Mater Misericordiae University Hospital on the 21st February, 2007. The Admission Record includes the following note:-

> ". . . Hit by a car on Monday night and was taken to Accident and Emergency Mullingar Hospital . . ."

16. On the 22nd February, 2007, the following entry, (*inter alia*), appears in the Observation Chart of the National Spinal Injury Centre:-

> "Reason for admission/diagnosis - hit by car 19.2.07"

17. On the 24th February, 2007, a Surgical Intern wrote in the plaintiff's records in the Mater Misericordiae University Hospital, "he was hit by a car". This entry appears to have been made on the date when the plaintiff was re-transferred to Tullamore Hospital.

18. This series of entries in the admitted hospital records gave rise to extensive cross examination of the plaintiff and his partner Irene O'Reilly at the hearing of the action. In a Claim Form dated the 26th April, 2007, submitted under the plaintiff's signature to the MIBI. on the 27th April, 2007, by his then solicitor Mr. Leo F. Branigan, (since deceased), it is stated:-

> "Vehicle crashed and later burned out. Claimant's work tools lost. Claimant asleep in car: passenger seat. John O'Reilly took car without his permission. Claimant too drunk to drive, awaiting his partner to collect. O'Reilly lost control of car and

claimant was thrown from the vehicle. Garda details – 20th February, 07 Mullingar."

19. I accept the evidence of Mr. Eugene Carr, who gave evidence in the case for the MIBI, that he came upon a van, which was admitted at the hearing of this action to be the plaintiff's van, at 08.30 hours on the 20th February, 2007. The van was overturned onto its side and completely burned out at about the half-way point on a cul-de-sac, approximately 1 mile long, which led from a third class road to his then very elderly (97 years of age) and now unfortunately deceased father's land, farmyard and farm house where he then resided. I accept Mr. Carr's evidence that the van was pointing in the direction of the road and away from the farmyard. I find, based on Mr. Carr's evidence of wheel marks which he observed on the surface of his late father's farmyard that morning, that this van had travelled down the cul-de-sac, had turned sharply in the farmyard and had been travelling back up the cul-de-sac when it struck or mounted the field bank or ditch to its left and overturned onto the tarmac surface of the cul-de-sac. I accept the evidence of the plaintiff and his partner, Irene O'Reilly that the van had been white, had been purchased some weeks or months previously and had the plaintiff's name painted in large letters on the side.

20. I have no reason to doubt the plaintiff's evidence that there had been two five gallon drums of petrol, a few cans holding a mixture of petrol and oil and perhaps also a container with diesel fuel in the rear of the van. The plaintiff explained that these fuels were essential for the on-site refuelling of motor powered equipment, such as metal and concrete saws, used by him in the course of his work. It is a reasonable inference that one or more of these containers must have leaked or ruptured when the van turned over and this highly volatile fuel had been ignited by an electric spark or by contact with very hot metal. This must have resulted in an intense conflagration preceded, almost certainly, by an explosion. So fierce was the heat that it reduced the van and its contents to a burned out shell.

21. The fact that the van was found turned over on a cul-de-sac, which both sides accepted was a "public road", is *prima facie* evidence of negligence in the driving, care and control of the vehicle. Celine O'Reilly in her statement made to Mr. T. Mulligan on the 17th July, 2007, said that after she met her brother, John O'Reilly and the plaintiff on the Clonmellon to Athboy Road and, while they were driving back to the mobile-home she asked John O'Reilly what had happened and he replied that he had crashed the van. She told Mr. T. Mulligan that she did not know how long the "two lads" had been on the road or where the van had crashed. I am satisfied from details in her statement to Mr. Mulligan and from her evidence, including evidence by reference to maps, that where she said she met the "two lads" on the road was close to where the cul-de-sac on which the van was found branches off from this road,

22. In his evidence John O'Reilly claimed that he had been driving the van when it struck the ditch and overturned. He claimed that the plaintiff was asleep in the passenger seat unrestrained by a seat belt and, had been ejected through the windscreen on to the tarmac surface of the cul-de-sac. It is asserted on behalf of the plaintiff that John O'Reilly is the defendant in these proceedings though, it is claimed, named in error "John Reilly" in the title of the action. Judgment in Default of Appearance was given in favour of the plaintiff against the first defendant named in the title of the action on the 2nd July 2012. The effect of this order which has been passed and perfected and, whether it can now be amended if the court is satisfied that John O'Reilly was the intended defendant is a matter of serious dispute between the plaintiff and the MIBI and will be addressed later in this judgment.

23. I accept the plaintiff's evidence that when driving home from work on Monday the 19th February, 2007, at approximately 20.30 hours he had stopped in Athboy for a drink. Delvin which is nearer his home, would be where he more usually stopped. Athboy itself is also only a short journey from his home. Unfortunately, on this occasion the plaintiff consumed a very great deal of alcohol. This is borne out by the Mullingar Hospital records, to which I have already referred, recording the concentration of alcohol in the plaintiff's blood at 03.15 hours on the 20th February, 2007, at more than two and one third times the then legal limit. The total amnesia which the plaintiff suffered with respect to the very traumatic events in which he sustained severe personal injuries must, on the balance of probabilities, have been alcohol and not trauma induced as the plaintiff is not recorded in any of the admitted hospital records as having suffered concussion or any cranial injuries. I attach very little weight to the plaintiff's evidence that he had consumed 8 – 10 pints of Guinness and several shorts, other than as giving some indication of the amount of alcohol likely to have been involved. I am satisfied on the evidence of the plaintiff and of his partner, Irene O'Reilly, and also from the statement of Irene O'Reilly given to Mr. T. Mulligan on the 17th July, 2007, that there were occasions when the plaintiff indulged in episodes of excessive drinking. I am satisfied on the evidence that one such episode occurred on the night to Monday the 19th February, 2007.

24. The only direct evidence of how the plaintiff's van came to be overturned and burned out on an obscure cul-de-sac on an indirect route between Athboy and the plaintiff's home and, how the plaintiff came to suffer the personal injuries in respect of which he brings this claim is that of John O'Reilly. Making every due allowance for the unfamiliar and no doubt daunting experience of giving evidence and being examined and then vigorously cross-examined by eminent Senior Counsel in a large and public courtroom in the Four Courts, I found Mr. John O'Reilly to be a most unreliable witness. However, on this basis alone, it would be wrong to dismiss the plaintiff's claim. In making findings of fact, the court is acting as a jury and must carefully consider and thoroughly examine and weigh all the relevant evidence with a view to reaching a conclusion on the balance of probabilities. Other evidence upon which the court might properly rely could lend support to key aspects of his evidence. The fact that a plaintiff calls in evidence a witness who proves to be disputatious, evasive and in respect of some matters even mendacious does not mean that the plaintiff must be regarded as having attempted to mislead the court. In the present case, while I am satisfied that there was evidence of concerted action by several members of his family to shelter John O'Reilly from inquiries by Mr. T. Mulligan, the accident investigator on behalf of MIBI and by Garda Damien Dore of Delvin Garda Station, neither of whom ever succeeded in interviewing him, I find that there was no evidence of collusion between the plaintiff and John O'Reilly.

25. The submission that Mr. John O'Reilly is simply not to be believed and the plaintiff while walking on the road was struck and injured by a mechanically propelled vehicle which was then driven away from the scene seems to originate with the admitted hospital records, particularly from the four entries in the Mullingar Hospital record, at 02.55, 05.30, 06.00 and at some time after 06.00 but before 12.45. It was admitted that it was the plaintiff himself who informed Triage Nurse Morris that he had been found by his partner with an injury to his left arm, but did not recall what had occurred. He had been out for a few pints on his way home from work. The plaintiff's G.C.S. score is recorded at 02.55 hours as being 15 over 15. It had dropped to 8 over 15 at 08.30 hours after the plaintiff had been given 10mg Midazolam (a sedative) and, 50mg Petadine (an opiate), intravenously. Mr. Richard Lynch, Accident and Emergency Consultant and Mr. Nasseem Farrukh, now a General Surgeon, but in February 2007, Senior Surgical Registrar at Mullingar Hospital, confirmed that this had occurred. The purpose of the medication was to permit manipulation of the plaintiff's left humerus. His G.C.S. score had returned to 15 over 15 by 10.30 hours. There can be no question, but that information recorded in the 05.30 Nursing Intervention Note was provided by the plaintiff. It will be recalled that this note read:-

> "Brought in to A and E by partner. She had been on her way to collect him from pub. Jack remembers deciding to walk out to meet her, but no recollection of events after this. Found on edge of road. . . ."

The entry in the untimed Ward Note that, "wife found him, conscious complaining of left arm pain walking at scene: also complaining of neck pain", may have originated with the plaintiff himself or may have been derived from the 02.55 and the 05.30 entries in the

record. I believe that there can be little doubt but that the 06.30 entry "found on road-side by wife" is derived from the earlier record entries. The untimed entry in the Ward Notes raises a question of whether the plaintiff had been hit by a car or assaulted.

26. The plaintiff's partner, Irene O'Reilly, gave evidence that at approximately 04.00 a nurse had asked her if the plaintiff had been involved in a "hit and run" accident. She said that she had told this nurse that it had been a car accident, but did not say that it was her brother John O'Reilly who had been driving. She told the court that the nursing staff would not permit her to leave Mullingar Hospital until the garda arrived. This they said, was because of the injuries which the plaintiff had suffered. Irene O'Reilly gave evidence that she was in the hospital canteen at 08.00 hours or 08.30 hours with the plaintiff's mother, who coincidentally was herself a patient in Mullingar Hospital at the time, when two members of the garda from Mullingar Garda Station spoke to her. She said that she had told them that her brother John O'Reilly had crashed the van. She recalled that one of the garda made a note in his notebook and asked her to tell John O'Reilly that they wanted to speak to him. Irene O'Reilly said that she had driven home at about lunchtime, but I am satisfied that it was somewhat earlier. Having first ensured that there were no problems at home, she then drove the short distance to her parent's house. Her brother John O'Reilly was there and she questioned him about what had occurred. She said that he told her that he had gone down a wrong road, had lost control of the van and hit the ditch. The van turned over and went on fire. She said that she told him that the garda in Mullingar wanted to contact him. He then left the house for a short while and when he came back in he told her that he had been in contact with the garda. She accepted what he said and drove back to Mullingar Hospital.

27. The following entry was made in the Ward Notes at Mullingar Hospital by Mr. R. Lynch, Accident and Emergency Consultant at 13.00 hours on the 20th February, 2007:-

> "Front seat passenger in van.
>
> Asleep in van.
>
> No seat belt.
>
> Driver crashed into ditch.
>
> Thrown out the window.
>
> Garda informed."

Mr. Lynch told the court that he could not recall who had given him this information. I find on the balance of probabilities that this information was provided by Irene O'Reilly, the plaintiff's partner on her return to the hospital after she had spoken to her brother John O'Reilly at their parent's house. In his referral letter which accompanied the plaintiff when he was transferred from Mullingar Hospital to Tullamore Hospital later that evening Mr. R. Lynch wrote:-

> "Kindly review this patient with a history of unstable C2 fracture: open fracture left humerus. Front seat passenger RTA, no seat belt, ejected from vehicle."

28. As I have already noted, at 18.00 hours on the 20th February, 2007, Mr. Michael Glynn, Consultant Orthopaedic Surgeon at Tullamore Hospital Regional Orthopaedic Unit recorded in his clinical notes:-

> "RTA – 14 hours ago – unrestrained passenger – high velocity single vehicle collision – ejection."

In these circumstances, unless the plaintiff's records did not follow him, which seems altogether unlikely, I am at a loss to understand why in records made on the 21st February, 2007, 22nd February, 2007 and the 24th February, 2007, in the Mater Misericordiae University Hospital it is stated that the plaintiff was hit by a car. Irene O'Reilly, the plaintiff's partner, gave evidence that about two weeks after the 20th February, 2007, the plaintiff remembered the van hitting him. The plaintiff's evidence to the court was that he had fallen asleep and then remembered a bang and lying on the road and seeing a white van coming at him. If this is a genuine recollection at such a remove from the events of the 19th February, 2007, on the balance of probabilities this was his own white van from which he had been ejected and may still have been in motion or he considered that it was.

29. I find that his recollection as recorded in the Nursing Intervention Note in the Mullingar Hospital records made at 05.30 hours on the 20th February, 2007, that he decided to walk out to meet his partner who was on her way to collect him from the pub, but had no recollection of events after that, is fanciful and not worthy of any evidential weight. This "recollection" is altogether different from the account given by the plaintiff in his statement made to Mr. T. Mulligan on the 17th July, 2007, and in his evidence at the hearing of this action. It was almost midnight, and on his own evidence there was nobody about in Athboy. Also, on his own evidence he was very tired. He was undoubtedly very drunk. It was only a short drive for his partner from their home to Athboy. His van was safely parked in a lit up area outside the licensed premises where she would expect to find him. In these circumstances it is not likely that he would have decided to walk out to meet her or if he had, that he followed the thought with the deed. I am also satisfied that his partner Irene O'Reilly did not find him on the roadside, on the edge of the road or walking on the road.

30. I have no reason to doubt the statements given by Irene O'Reilly, the plaintiff's partner and, her sister Celine O'Reilly to Mr. T. Mulligan on the 17th July, 2007, and their evidence at the hearing of this action almost seven years later, that it was Celine O'Reilly who had driven to Athboy at about midnight on the 19th February, 2007, to collect the plaintiff and who had come across the plaintiff and her brother John O'Reilly walking on the Athboy to Clonmellon Road about four miles from the mobile-home and approximately the same distance from Athboy. At the time Irene O'Reilly was four months pregnant, had an infant about one year old and another child aged five or six years and was living in a mobile-home. There can be no doubt by reference to the Mullingar Hospital records that it was Irene O'Reilly, who brought the plaintiff to the Accident and Emergency Department of that hospital arriving at 02.55 hours on the 20th February, 2007. She told the court in evidence that the journey from the mobile-home to Mullingar Hospital took approximately 30 minutes. Somebody had to have stayed behind in the mobile-home to care for the two sleeping children. I am satisfied on the evidence that this person was Celine O'Reilly and that she had been with her sister Irene O'Reilly in the mobile-home on the 19th February, 2007. I have no reason to doubt the evidence of Irene O'Reilly or Celine O'Reilly to this effect or, the evidence of the plaintiff that his partner did not like being in the mobile-home on her own and, that at this time the sisters were very close and Celine O'Reilly was frequently in the mobile-home.

31. I am satisfied on the balance of probabilities that the plaintiff was not the victim of a "hit and run" incident. Had this occurred I am satisfied on the evidence that he would have been incapable of helping himself or of summoning assistance due to the effects of alcohol and the injuries which he sustained. If, as all three asserted in their statements to Mr. T. Mulligan on the 17th July, 2007, and

in their evidence at the hearing of this action, the plaintiff had made a mobile telephone call to his partner Irene O'Reilly to collect him, there is a possibility that whichever woman made the journey might have noticed him on the road. If such a call had not been made it is most improbable though not impossible that John O'Reilly and his brother Frank O'Reilly driving about in the latter's car, may fortuitously have come upon him on the road. If they had so come upon him, one must ask why Frank O'Reilly did not drive him immediately to Mullingar Hospital or at least bring him home. This also means that someone must have driven the plaintiff's van on that night to this particular cul-de-sac where it was overturned and went on fire. In my judgment this is simply not credible.

32. I am satisfied on the balance of probabilities and I find that the plaintiff was not driving his van when it overturned on the cul-de-sac. It is possible, but not probable, that the plaintiff having consumed so much alcohol could have driven at midnight the particular route taken by the van to the point where it overturned. Had he attempted to drive it, it is much more likely that the plaintiff would have collided with something far sooner. I have no reason therefore to doubt the evidence of the plaintiff, of his partner Irene O'Reilly and of Celine O'Reilly that on the previous occasions when the plaintiff had drunk too much alcohol he had not attempted to drive, but had contacted his partner Irene O'Reilly and arranged with her to collect him and bring him home. The plaintiff's explanation for why he had sat in the passenger's seat rather than in the driver's seat of the van is credible and does not savour of artifice. He explained that on an occasion when he had been working in Trim, after he had finished work he discovered that he had a flat tyre and had no spare tyre. He had telephoned his partner to collect him and while waiting he had one or two drinks and had then fallen asleep in the drivers seat of his vehicle. He was woken by a female garda, who told him that she could charge him with committing an offence, but she gave him a warning instead. I think it probable that he would have recalled this incident before he was overcome by the effects of alcohol and had fallen asleep in his van on the 19th February, 2007.

33. The plaintiff suffered abrasions and deep lacerations of his upper left arm and fragments of glass were subsequently found buried deeply in the tissue. This appears to me to be more consistent with an unrestrained passenger being expelled from the van through the windscreen than the sort of injury that would be sustained by a driver holding and somewhat protected by the steering wheel. Mr. Richard Lynch the Accident and Emergency Consultant at Mullingar Hospital who had taken over management of the plaintiff's case from the surgical team at 08.30 hours on the 20th February, 2007, gave evidence that a lot of energy and force was required to cause the "hangman's fracture" to the plaintiff's cervical spine and ejection from a vehicle was a probable cause of such an injury. Mr. Nasseem Farrukh, General Surgeon but then Senior Surgical Registrar at Mullingar Hospital agreed that expulsion through a windscreen was a probable cause of this type of fracture even though he did not agree that it was truly a "hangman's fracture". If John O'Reilly was in the plaintiff's van at the time it struck the ditch at the side of the cul-de-sac and turned over, he appears too have suffered no physical injuries.

34. I find it very difficult to understand why John O'Reilly would claim that he was driving the van at the time and had lost control so that the van struck the ditch and turned over causing the plaintiff to be ejected through the windscreen, unless this is what actually occurred. As the plaintiff had no recollection of the events, John O'Reilly could readily have claimed that the plaintiff had been driving. At a time when his license to drive a mechanically propelled vehicle had been suspended, when he had no insurance was not insured to drive the van under the plaintiff's insurance and had a deplorable record of road traffic offences, for him to make such a claim unless it were true seems incomprehensible given the likelihood of serious consequences for himself. If I accept that what Celine O'Reilly set out in her statement to Mr. T. Mulligan on the 17th July, 2007, five months after the accident, is true, then John O'Reilly had admitted from the very beginning that he had crashed the van.

35. The evidence of Celine O'Reilly and Irene O'Reilly relating to the events of the night of the 19th February, 2007, was shown by cross examination to be materially different from the accounts given by them in their statements made to Mr. T. Mulligan on the 17th July, 2007. In her evidence under cross examination, Celine O'Reilly stated that she could not remember having made the statement at all, had no recollection of the statement being read over to her or of signing it. The original statements written out by Mr. T. Mulligan and signed by Celine O'Reilly and Irene O'Reilly and witnessed by Mr. Mulligan were produced and proved in evidence at the hearing of the action. I do not accept the claim by Celine O'Reilly and Irene O'Reilly that there are paragraphs missing from these statements.

36. In brief summary the version of events given in their statements by Irene O'Reilly, the plaintiff's partner, and Celine O'Reilly was as follows:-

> "The plaintiff contacted Irene O'Reilly on his mobile telephone at about midnight and asked her to collect him at a particular licensed premises in Athboy.
>
> Celine O'Reilly was in the mobile-home at the time and Irene O'Reilly asked her to collect the plaintiff.
>
> As Celine O'Reilly was driving towards Athboy on the Clonmellon to Athboy Road about four miles from the mobile-home she was surprised to come upon her brother, John O'Reilly on the road with the plaintiff.
>
> John O'Reilly was supporting the plaintiff. Driving back Celine O'Reilly asked what had happened and John O'Reilly said that he had crashed the van."

37. In their evidence at the hearing of the action, Irene O'Reilly and Celine O'Reilly told the court that:-

> "The plaintiff contacted Irene O'Reilly on his mobile telephone at about midnight and asked her to collect him at a named licensed premises in Athboy.
>
> Celine O'Reilly was in the mobile-home at the time and Irene O'Reilly asked her to collect the plaintiff.
>
> As Celine O'Reilly was driving towards Athboy on the Delvin to Athboy Road, Irene O'Reilly rang and told her to return as John O'Reilly had contacted her on his mobile telephone and said that he was bringing the plaintiff home.
>
> Celine O'Reilly was returning when Irene O'Reilly contacted her again and told her that John O'Reilly had rung and said that he had crashed the van and asked that they be picked up on the Athy to Clonmellon Road.
>
> Celine O'Reilly drove past the mobile-home and took the Clomellon to Athboy Road. She met John O'Reilly and the plaintiff on the road and John O'Reilly was supporting the plaintiff."

38. Key elements in these accounts are the same, but in the evidence given to the court, there is the addition of the two alleged mobile telephone calls from John O'Reilly to Irene O'Reilly, to the extra journey by Celine O'Reilly, the fact that Celine O'Reilly had expected to find her brother John O'Reilly in the company of the plaintiff and knew before meeting them that John O'Reilly had crashed

the van. Celine O'Reilly accepted in cross examination that she had forgotten about the statement she had made to Mr. T. Mulligan on the 17th July, 2007.

39. While Irene O'Reilly did not claim to have forgotten about her statement to Mr. T. Mulligan made on the 17th July, 2007, I am satisfied that she had forgotten about it. When the various material differences in the accounts were put to each of them in cross-examination, but in greater detail to Irene O'Reilly, both Irene O'Reilly and Celine O'Reilly claimed that there were parts missing from their statements. I do not accept this. Not alone are the individual statements complete and consistent in themselves, but they are also entirely compatible with each other. I am satisfied that the account of events given by Irene O'Reilly and Celine O'Reilly in evidence is not credible as to the two alleged mobile telephone calls to Irene O'Reilly from John O'Reilly and her alleged communication of those calls to Celine O'Reilly.

40. Irene O'Reilly accepted in evidence that she was aware that her brother John O'Reilly had problems with the garda because of a number of past road traffic offences, that he did not have a car, that she believed that his driving licence had just been restored, that he was uninsured and was not a named driver on the plaintiff's motor policy. This policy was third party fire and theft only. Garda Damien Dore gave evidence that John O'Reilly's licence had been suspended for three years from the 29th April, 2005 and was restored on the 1st March 2007. When she was asked in cross examination why, when John O'Reilly telephoned she had not told him that Celine O'Reilly was on her the way to collect the plaintiff and warned him emphatically not to drive the plaintiff's van. Irene O'Reilly told the court that she must have assumed that John O'Reilly had met somebody in Athboy and that he and the plaintiff were coming home with that person. This is simply not believable. It is altogether unlikely that John O'Reilly would have said that he was bringing the plaintiff home, when in fact they were getting a lift home from someone who for some unknown reason he did not name. Even if she had made such an assumption, in my judgement Irene O'Reilly would still have mentioned to John O'Reilly that Celine O'Reilly was well on her way to collect the plaintiff and that she would have to try to stop her. She would also I believe, have asked about the van, was it secure, was it locked, where was it parked, who had the keys and other questions of that sort. She knew that this van had only recently been acquired and she knew that it contained all of the plaintiff's tools and equipment, matters which could not but have caused her enormous concern.

41. When Celine O'Reilly was asked in cross examination why she had said in her statement made to Mr. T. Mulligan on the 17th July, 2007, that she was surprised to meet her brother John O'Reilly with the plaintiff and on the road and had asked what had happened, when her evidence to the court had been that she had been told by Irene O'Reilly that they were together and that John O'Reilly had crashed the van, her response was to insist that she had not told Mr. T. Mulligan that she was surprised to find John O'Reilly and the plaintiff together and had not asked them what had happened. Mr. T. Mulligan is an accident investigator who was instructed by the Insurers handling the claim on behalf of MIBI. He gave evidence that he had carefully written down what Celine O'Reilly and Irene O'Reilly had told him, had read it back to each of them and each of them had signed the original under the statement, "I have heard this read over and it is correct". He had witnessed each signature. He told the court that neither Celine O'Reilly nor Irene O'Reilly had asked for any changes or corrections or for anything to be added. The evidence of Mr. Mulligan was not in any way undermined and I am satisfied that the statements proved in evidence are true and accurate records of what Irene O'Reilly and Celine O'Reilly recounted to him five months after the events of the 19th February, 2007. In cross examination it was put to Irene O'Reilly that the first occasion on which the MIBI had heard of these two mobile telephone calls to her from John O'Reilly was during the course of the hearing of the action more than seven years after the events of the 19th February, 2007. She could offer no explanation. There is however no obligation on a plaintiff to disclose to any defendant the evidence on which the plaintiff intends to rely at the hearing of the action. I do not see how this matter could legitimately have been made the subject of a valid notice for particulars and interrogatories were not served in this case. The MIBI had available to them since the 17th July, 2007, the statements made to Mr. T. Mulligan by the plaintiff, Irene O'Reilly and Celine O'Reilly. The discordance between the contents of these statements and the evidence given by Irene O'Reilly and Celine O'Reilly to the court is a matter for cross examination and something which goes to the weight, if any, to be given to their evidence.

42. I find on the balance of probabilities, having carefully considered and weighed all the evidence, that their account of events given in their statements to Mr. T. Mulligan on the 17th July, 2007, is more probably true. I can only surmise that their evidence at the hearing of the action was an embroidery of the facts arising from too much consideration and discussion of the events of the 19th February, 2007, during the inordinate amount to time it took to bring this claim to a hearing.

43. This is an appropriate point at which to advert to another unacceptable aspect to this case. It was stated in the PIAB claim form lodged on the 13th September, 2009, on behalf of the plaintiff and also in the personal injuries summons filed on the 27th November, 2009, that John O'Reilly was drunk while driving the plaintiff's van. There was not a scintilla of evidence led on behalf of the plaintiff to substantiate this allegation. Celine O'Reilly in her statement expressly said that John O'Reilly had not been drinking. Mr. T. Mulligan gave evidence that nobody had said to him that John O'Reilly had been drinking. This Court has in the past, on several occasions expressed its strong disapproval of this type of pleading, especially in relation to the pleading of intoxication.

44. At Item 30 of the replies to particulars dated the 26th March, 2010, in response to a question as to who had been with the plaintiff after the accident, but before he was taken to hospital, the reply given was Irene O'Reilly, Celine O'Reilly, John O'Reilly and Frank O'Reilly. In his statement to Mr. T. Mulligan on the 17th July, 2007, the plaintiff said that Frank O'Reilly did not know about the accident until the next day. In their statements to Mr. T. Mulligan on the 17th July, 2007, Irene O'Reilly and Celine O'Reilly both said that John O'Reilly had been in the mobile-home for a short time at least after the accident. In evidence both claimed that they had not said this to Mr. T. Mulligan and both denied that John had been in the mobile-home after the accident. Celine O'Reilly stated in evidence that she had first driven John O'Reilly to their parent's home where he had alighted and she had then driven back with the plaintiff to the mobile-home. She said that she had not known that the plaintiff was badly injured. I am satisfied on the balance of probabilities that the account given by Irene O'Reilly and Celine O'Reilly in their statements to Mr. T. Mulligan is correct and I do not accept the evidence to the contrary given by them and by the plaintiff. In her statement to Mr. T. Mulligan on the 17th July, 2007, Celine O'Reilly said that the plaintiff was in and out of consciousness and in her evidence to the court Irene O'Reilly said that there was blood on his sweater and shirt so that she had decided to cut these garments away. It is simply not credible that Celine O'Reilly would in these circumstances have driven past the mobile-home to their parent's house where John O'Reilly got out of the car and though not injured in any way left her to drive back to the mobile-home and get the plaintiff out of her car and into the mobile-home as best she could. I am quite satisfied on the evidence that the plaintiff was unlikely to have been conscious of who was in the mobile-home after he was brought there. John O'Reilly claimed that he had been in the company of his brother Frank O'Reilly throughout the entire of the 19th February, 2007, up to the point where he claims he set out to drive the plaintiff home in the plaintiff's van. Mr. Frank O'Reilly did not give evidence that though listed as a witness in the schedule furnished on the 2nd December, 2013, in compliance with the provisions of Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (S.I. 391 of 1998).

45. It was a matter of very great controversy at the hearing of this action as to whether the plaintiff as he claimed in his statement to Mr. T. Mulligan on the 17th July, 2007, and in his evidence had contacted his partner Irene O'Reilly on his mobile telephone and

asked her to collect him at a named licensed premises in Athboy. The plaintiff gave evidence that he had several mobile telephones at the time which he used for different purposes. He could recall the number of most of these, but not the number of the mobile telephone on which he claimed he had contacted his partner and asked her to collect him. This particular mobile telephone was never located. Irene O'Reilly could not recall the number of this particular mobile telephone nor produce any mobile telephone on which it was recorded. Because of a delay of more than three years in making the request, the System Supplier could not verify whether the call had been made as it was their policy to destroy all records more than three years old. Discovery of the plaintiff's mobile telephone records ordered by this Court after voluntary discovery had been refused did not enable the relevant number to be identified. In his statement made to Mr. T. Mulligan on the 17th July, 2007, the plaintiff said that he had made this telephone call, "when he was in the chippie". In his evidence to the court the plaintiff said that he had made this mobile telephone call while either crossing the road to the chippie or crossing back on his way to the van. In her statement made to Mr. T. Mulligan on the 17th July, 2007, the plaintiff's partner Irene O'Reilly said that the plaintiff told her that he would go to the chipper and get some food and that he would wait for her in the van. She said in this statement that he always waited in the van when she had occasion to collect him.

46. One might well ask why the plaintiff should have such a clear recollection of making this mobile telephone call and the details of it when he had no recall of events following. If the plaintiff suffered an alcohol induced anterograde memory impairment while he might not be able to form new memories after he became intoxicated, he could still recall events from before he became intoxicated. I understood Mr. Naseem Farrukh to have been of this opinion, but I must also accept that this might not be altogether within his area of expert knowledge as he is a General Surgeon and not a psychiatrist or a psychologist. However, I am satisfied on the balance of probabilities that this mobile telephone call was made by the plaintiff to his partner Irene O'Reilly some time between 11.30 and midnight on the 19th February, 2007. I have found it improbable that John O'Reilly made the two alleged mobile telephone calls to Irene O'Reilly. Someone therefore, had to have made contact with her to cause someone to set out in a motor vehicle to collect the plaintiff from Athboy or from somewhere else and bring him back to the mobile-home or directly to Mullingar Hospital. Even the version of events which claims that the two mobile telephone calls had been made by John O'Reilly to Irene O'Reilly accepts that the first call to Irene O'Reilly to collect the plaintiff came from the plaintiff himself. Despite the differences as to where exactly in Athboy the mobile telephone call was made, I am satisfied that the accounts given in the statements made by the plaintiff, Irene O'Reilly and Celine O'Reilly to Mr. T. Mulligan on the 17th July, 2007, as to the making of that mobile telephone call, are on the balance of probabilities true. This is consistent with what is set out in the statements given by him and by Irene O'Reilly and Celine O'Reilly to Mr. T. Mulligan on the 17th July, 2007, that whenever he drank alcohol to excess, he invariably contacted his partner Irene O'Reilly and arranged for her to drive him home.

47. Having regard to all the circumstances, despite my misgivings about the reliability of John O'Reilly as a witness and, the aspects of the evidence of Irene O'Reilly and of Celine O'Reilly, which I do not accept, I am satisfied on the balance of probabilities that the events which occurred on the night of the 19th February, 2007, were as described in the statements made to Mr. T. Mulligan on the 17th July, 2007, by the plaintiff, Irene O'Reilly and Celine O'Reilly. I am therefore satisfied to accept the evidence of John O'Reilly that he was driving the plaintiff's van when it collided with the ditch on the cul-de-sac and that the plaintiff was ejected through the windscreen of the van onto the road surface. In a medical report dated the 7th December, 2012, Mr. Kevin Cronin, a Consultant Plastic and Hand Surgeon records that the plaintiff told him in the course of a consultation on the 10th December, 2012, that the accident had taken place very close to his home and, "that he was able to extricate himself from the vehicle". I am satisfied that the accident indeed occurred apparently four miles from the plaintiff's mobile-home. I am however also satisfied on the evidence that the plaintiff was so inebriated that he would have had the utmost difficulty in extricating himself from the overturned van, even with the assistance of John O'Reilly, and had this occurred both men would have been extraordinarily fortunate not to have suffered serious burns. All the evidence suggests that it is far more likely that the plaintiff was ejected through the windscreen of the van, through which John O'Reilly was fortunately able to make his escape before the van exploded into flames.

48. Mary O'Reilly (nee Callaghan) identified by pointing in court to the person who called himself John O'Reilly and who had given evidence to the court, as her son, born the 11th June, 1983, and named John Paul O'Reilly. A long form birth certificate issued pursuant to the Births and Deaths Registration Acts 1863 to 1996 was produced in evidence. Mary O'Reilly identified the person named in that birth certificate as one and the same person as John O'Reilly who had given evidence to the court and who had been identified by her as her son. She gave evidence that in February, 2007, John O'Reilly resided in the family home at Scurlogstown, Delvin, in the County of Westmeath with her late husband, Patrick O'Reilly, (now deceased four years) herself, Celine O'Reilly, Frank O'Reilly, and some others of her family of sixteen children. She told the court that no person called "John Reilly" lived at Scurlogstown, Delvin.

49. In an affidavit grounding a motion for judgment in default of appearance sworn on the 18th April, 2012, by Leo F. Branigan, solicitor, since deceased, but then solicitor on record representing the plaintiff, it is deposed that on the 7th December, 2009, he personally served the personal injuries summons on the first defendant at Scurlogstown, Delvin. The first defendant named in the title of the personal injuries summons is "John Reilly". However, in a letter dated the 7th December, 2009, from Leo F. Branigan and Company to the Superintendent of the Garda Síochána at Mullingar garda station the following appears:-

> "We met with our client recently and then subsequently met with John O'Reilly to serve him with the Plenary Summons herein. We are somewhat surprised at the failure of the gardaí to serve criminal proceedings on Mr. O'Reilly."

50. The authorisation issued by the Personal Injuries Assessment Board pursuant to the provisions of s. 17 of the Personal Injuries Assessment Board Act 2003, to John O'Brien to bring proceedings, named the defendants as, "John O'Reilly and Motor Insurers Bureau of Ireland". In the application made to the Personal Injuries Assessment Board pursuant to the provisions of s. 11 of the Act of 2003, stamped "Received" by the Board on the 16th February, 2009, the person against whom the claim was being made is stated to be, "John O'Reilly, Scurlogstown, Delvin, Co. Westmeath".

51. The covering letter from Leo F. Branigan and Company, Solicitors, returning the claim notification form completed by the plaintiff to the MIBI, dated the 27th April, 2007, carries the heading, "John O'Brien v. John O'Reilly" and, in the account of events set out in that letter the person referred to throughout is John O'Reilly of Scurlogstown, Co. Westmeath, brother of the plaintiff's partner Irene O'Reilly. In the claim form enclosed with this letter "Vehicle driver name and address" is given as John O'Reilly of Surlogstown, Co. Westmeath". Requests for particulars and for further and better particulars by the MIBI are headed, "Re: John (Jack) O'Brien v. John O'Reilly and M.I.B.I.". Replies however, are under the title and record number of the action. Correspondence between AXA Legal Services, solicitors acting on behalf of MIBI and the plaintiff's former and present solicitors was, at least to the extent disclosed by the documents admitted into evidence, carried on under the heading, "John (Jack) O'Brien v. John O'Reilly and the MIBI". The correspondence between Leo F. Branigan and Company, solicitors and the Superintendent of the Garda Síochána at Mullingar, which was copied to AXA Insurance Limited, handling the plaintiff's claim on behalf of MIBI, concerning the prosecution of criminal proceedings arising out of the events of the 19th February, 2007, refers throughout to "John O'Reilly".

52. The several interlocutory orders made by this Court in these proceedings were in the title of the personal injuries summons. The order of this Court (Ryan J.), made 2nd July, 2012, and perfected on the 4th July, 2012, is in the following terms:-

> "It is ordered and adjudged (subject to the court being satisfied as to service) that the plaintiff do recover against the first named defendant such amount as the Court may assess in respect of the plaintiff's claim herein for damages and the costs of suit on taxation such costs to include the costs of this motion and of the assessment and that such assessment be had before a judge without a jury and be set down for hearing accordingly."

53. While in the majority of pre-hearing documents and correspondence, the reference throughout is to "John O'Reilly", the first defendant named in the title of the action has remained "John Reilly" from the date of the personal injury summons which was issued on the 27th November, 2009. In a memorandum dated the 7th December, 2009, on the files of Leo F. Branigan and Company solicitors transferred to the solicitors now representing the plaintiff and, admitted into evidence, under the heading, "Re: Serving summons on John O'Reilly", the following appears:-

> "Went out to Jack O'Brien. Met Jack O'Brien and also met with the partner, Irene. . . . John O'Reilly called to the house and Leo served proceedings on him. . . . Leo also notes that John Reilly is the name used as a defendant so it is incorrect it should be John O'Reilly."

For some perplexing and unexplained reason no application was ever made to amend the title of the action. It was submitted by Senior Counsel on behalf of the MIBI that the order of this Court granting judgment to the plaintiff against the first named defendant, "John Reilly" which has not been appealed, is a final order and this Court has therefore no jurisdiction to amend that order or to amend the proceedings after the making of that order.

54. In *Belville Holdings Limited (In Receivership and in Liquidation)* [1994] 1 I.L.R.M. 29, the Supreme Court considered the circumstances in which a court might amend a final order after it had been passed and perfected. In delivering the judgment of the Court, Finlay C.J. (Blayney and Denham J.J. concurring) at p. 36 and 37 held:-

> "The position and principles appear, however, to be accurately stated in the judgment of Romer J. in *Ainsworth v. Wilding* [1896] 1 Ch. 673, where, at p. 677, he stated as follows:
>
> > 'So far as I am aware, the only cases in which the court can interfere after the passing and entering of the judgment are these:
> >
> > (1) Where there has been an accidental slip in the judgment as drawn up, in which case the court has power to rectify it under O.28, r. 11;
> >
> > (2) Where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended'."

55. Finlay C.J. went on to state at p. 37:-

> "I would emphasise, however, that it is only in special or unusual circumstances that an amendment of an order passed and perfected, where the order is of a final nature, should be made by the court. The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not likely be breached."

56. I am unable to accept that the order of this Court made on the 2nd July, 2012, does not correctly state what the court actually decided and intended. The affidavit grounding the motion for judgment in default of appearance referred only to the "first named defendant". The first named defendant then was and remains "John Reilly". The Court could not in the circumstances have intended to give judgment against someone named "John O'Reilly". I am quite satisfied that there was no accidental slip in the judgment as drawn up.

57. The principles stated by the Supreme Court in the *Belville Holdings Limited case (cited ante*) apply where the order in question is a "final order". In my judgment the order of this Court made on the 2nd July, 2012, is not a final order in this action. In the present action, something yet remains to be done, that is the determination of liability or not on the part of the MIBI and, the assessment of damages. Until these occur the proceedings are not over despite the order of the 2nd July, 2012, establishing the liability of the first defendant to the plaintiff.

58. The *Duke of Buccleuch (a ship)* [1892] P. 201, an Admiralty action in personam for damages, raised the issue of whether a plaintiff could be added or subtracted after a decree which fixed liability but left damages to be assessed. In the course of his judgment at first instance, Jeune J. held as follows at pp. 208-209:-

> "The result is, that really the only questioned determined by the decree is the fixing of the liability; the amount of damages and the persons to receive them are questions left to be determined by the registrar and merchants. I think that the fact that the damage remained to be assessed rendered the decree of the judge at the hearing no final judgment. The learned counsel for the Duke of Buccleuch relied on the analogy of common law, and said, on the authority of *Chapman v. Day* 48 L.T. (N.S.) 907, in the Queen's Bench Division that a judgment determining the liability was a final judgment, though the damages remain to be assessed; but I think that the judges in the Court of Appeal, in reversing that judgment (15 Ch. D. 436) intended to express, as they clearly held, a different view, because they followed their judgment in *Phillip v. Homfray* 25, Ch. D. 750, a case in the Chancery Division given shortly before, and in the latter case Bowen L.J., giving the judgment of himself and Cotton L.J. said (10 App Cas. 608):
>
> > 'The claim of the plaintiffs is in substance, so far as these inquiries are concerned, an action for trespass. The inquiries, whatever the form of language in which they are directed, are an assessment of damages, and until they have been completed the action is still undetermined'.
>
> It would appear therefore, that both in the Queen's Bench and Chancery Divisions a judgment is not to be considered as terminating the action whilst damages remain to be assessed."

59. On appeal it was held by Lord Esher M.R. 211, as follows:-

> "The underwriter of the cargo was the real plaintiff. I will assume that the wrong name was put on the record. It was not fraudulent. It was not done with any motive; it was a mistake. The rule said that if a wrong plaintiff was put on, they might put on the right one. It was within the very words of the two rules. But it is said that a judge cannot do that after

> the decree fixing the liability. That was an argument against the very words of the rule, which said 'at any stage'. The decree fixing liability in the Admiralty Court is not a final judgment. The proceedings are not over. If there were no other judgment to be signed, the proceedings are not over, for the matter has to be sent to the registrar and the merchants. I take it that there would be, if necessary, another decree after the registrar and merchants had found what the amount would be. If there was any fuss about it, that would be drawn up in the final order, and then there would be a monition."

60. Fry L.J. more tersely stated:-

> "The words of Order XVI., rr. 2 and 11, are quite ample to justify and require the amendment. I base my decision upon the words 'at any stage of the proceedings'. It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case. In this case there remains the assessment of damages. In this instance the name of a person has been improperly joined as plaintiff, and the names of other persons are necessary to settle the questions at issue. It is the duty of the Court to add the names of the right plaintiffs."

Lopes L.J. agreed with both these judgments.

61. The Rules in question were O. XVI, r. 2 and r. 11 of the Rules of the Supreme Court 1883 which provided as follows:-

> "O. XVI, r. 2 Where an action has been commenced in the name of the wrong person as plaintiff . . . the Court or a judge may, if satisfied that it has been so commenced through a bona fide mistake and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted . . . as plaintiff upon such terms as may be just."
>
> O. XVI, r. 11 of the Rules of the Supreme Court 1883 provides:
>
> "The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined . . . as plaintiffs . . . be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff . . . without his own consent in writing . . ."

62. These provisions of O. XVI, r. 11 of the Rules of Supreme Court 1883, are to the above extent, in all material respects the same as those of O. 15, r. 13 of the Rules of the Superior Courts 1986 (as amended). The latter also provides that the name of any parties improperly joined as defendants may be struck out.

63. In the instant case I find that an error was made in the proceedings, in that the first defendant was incorrectly named "John Reilly" instead of "John O'Reilly". In the title of the action the patronymic was omitted in error. I am satisfied that this was a mistake and was not fraudulent or done with any motive. The evidence clearly established that there was not at any time a person with the name "John Reilly" concerned in any way with the events giving rise to these proceedings.

64. As I have indicated the MIBI and the insurance company nominated by it to handle the plaintiff's claim on its behalf were from the very outset fully aware that John O'Reilly was the person alleged to have been driving the plaintiff's van at the time it overturned and the plaintiff sustained the personal injuries in respect of which he was making the claim. I am satisfied therefore that there could be no prejudice to the first defendant or the MIBI in amending what was clearly an error in the proceedings.

65. Order 28, s. 12 of the Rules of the Superior Courts 1986 (as amended) provides that:-

> "The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

66. In the instant case there is no occasion to add, strike out or substitute any defendant. I find that the intended first defendant, John O'Reilly, was personally served with the personal injuries summons and accordingly no party has been improperly joined in the proceedings as a defendant. As the order of the Court made on the 2nd July, 2012, and passed and perfected on the 4th July, 2012, was not a final judgment or order, the court has jurisdiction to amend the proceedings pursuant to the provisions of O. 28, r. 12 of the Rules of the Superior Courts. The title of the proceedings and all orders of the Court made to date in the proceedings will therefore be amended by replacing "John Reilly" wheresoever it occurs with "John O'Reilly".

67. In these circumstances the plaintiff is entitled to judgment against the MIBI for any, if any, damages he may be awarded for personal injuries, loss and damage suffered by him by reason of negligence and breach of duty on the part of the first defendant in and about the driving and control of the van on the 19th February, 2007.