[2005] IEHC 27

THE HIGH COURT

Record Number: 1999 No. 9631P

BETWEEN

MARTIN TWOMEY

PLAINTIFF

AND

KEITH CREAN AND MICHAEL O'DONOGHUE

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 10th day of February 2005

The Court has been informed by Counsel for the plaintiff that judgment in default of appearance has been obtained against the first named defendant, Keith Crean. While the order obtained against that defendant has not been produced as yet, I am happy to accept that what I am told is the case. The case before me proceeded only as against the second named defendant, except so far as the Court is required to assess damages as against the first defendant, for the purposes of the judgment which was obtained in default of appearance.

The facts of the case are simple enough regardless of which of the parties is giving the correct account of how this accident happened and as a result of which the plaintiff, a pillion passenger on the motor cycle being driven by the first named defendant sustained a very significant leg injury.

The plaintiff says that on the 8th May 1998 at about 10.10pm he was travelling as a pillion passenger on a motor bike being driven by the first named defendant, along Harbour Road, when the second named defendant, who he says was parked on the left hand side of the road (the same side of the road on which the plaintiff was travelling)

without any prior warning made a u-turn manoeuvre which caused the motorcycle to hit the car broadside on the driver's side of the car, and in particular into the driver's door. He states also that the first named defendant had put on his right indicator in order to pass this supposedly parked car. He says that the headlight of the motorcycle was definitely on.

The plaintiff has stated that the impact occurred on Harbour Road, opposite a Statoil Filling Station which is just beyond a right turn into a road referred to as Hollyville. The suggestion made, which is denied by the second named defendant, is that he was doing a u-turn in order to double back, as it were, in order to turn into Hollyville.

The plaintiff and the first named defendant were thrown from the motorcycle and ended up, in the case of the plaintiff, about 30-40 feet beyond the car. He could not say whether he ended up on the left or the right hand side of the road.

The plaintiff has sworn that the defendant's car was parked, or more accurately I suppose pulled over to the left hand kerb at the side of the road with its left indicator on, prior to making its u-turn across the path of the motorcycle on which he was a pillion passenger.

He also says that he and the first named defendant were wearing helmets, and that his helmet had come off his head in the collision because there was no clip on the helmet. He said that before they got onto the motorbike, the first named defendant had two helmets with him at a basketball ground where they and some friends were congregated, and had given one of them to the plaintiff to wear.

Mr John Curtin, Orthopaedic Surgeon, on the other hand has given evidence that when he was given an account of the accident by the plaintiff at the hospital, he was told by him that he was not wearing a helmet, and furthermore Mr Curtin has stated in evidence that the plaintiff was not prepared to discuss the details of the accident.

Sgt Kelleher has also given evidence that when he went to the scene of the accident immediately after it happened, he found no helmets at the scene. The second defendant in his evidence stated that after the impact he got out of his car and went immediately to assist the two persons who had been thrown from the motor vehicle, and was the first to reach them and that he saw no helmets at the scene.

The plaintiff's evidence has been that the first named defendant was travelling at about 20mph at the time of the impact with the defendant's car, since it was only a low cc.machine, and could not go faster than 35mph.

He stated that he and the first named defendant had gone to an off licence and were returning from that visit. In his direct evidence he stated that they went to the off-licence to buy cigarettes. He said that they bought the cigarettes and then the accident had happened as they were returning to where they had come from. On cross-examination, however, it was put to them that at the scene some cans of beer were found on the road, and in answer to that he stated that the first named defendant had gone for the beer, and that he, the plaintiff, had gone for cigarettes. Sgt. Kelleher and the second named defendant had also seen the cans of beer on the road after the accident.

He stated that everything that happened after the accident is a blur to him now. He says that he was conscious when being brought to hospital, but cannot recall being brought. I have heard evidence from Sgt. Kelleher, which has not been challenged, that he learned from enquiries made at the Mercy Hospital that the plaintiff had arrived, not by ambulance, but in the back of a red Hiace van. He was removed from that hospital after admission and brought by ambulance to the Cork University Hospital because the injury to his leg was serious. The plaintiff states that when he was taken from the scene of the accident he was not aware that his leg was broken. The first he recalls after the accident was when he came to after surgery by Mr John Curtin, Consultant Orthopaedic Surgeon on the 10th May 1998 – 2 days after the accident.

Finding for the plaintiff in this case would involve me being satisfied that the accident happened more probably the way the plaintiff says it happened than the way in which the second named defendant says it happened. Of course the plaintiff does not have the benefit of the evidence that the first named defendant might have been able to give. Such a finding would inevitably mean that among other things I would be satisfied that the accident happened beyond the entrance into Holyville and outside the Statoil Station. Such a conclusion in turn would mean that I rejected the evidence of the second named defendant that it happened opposite the mouth of the junction, in favour of the plaintiff's account, and also the evidence of Sergeant Kelliher who was quickly on the scene after the accident, and who made notes at the scene of the position of the vehicles on the road after the impact, and he prepared a sketch from those notes. Such a rejection of that evidence would involve a finding that the second named defendant was not just mistaken in his recollection, but in all likelihood was deliberately lying under oath, and that his lie was being wilfully corroborated by Sgt. Kelliher by a deliberate concoction of a sketch designed to mislead the Court. There was, to put it no stronger,

an innuendo from some of the evidence, that the fact that the defendant was a member of An Garda Siochana was of some significance in this regard. I am perfectly satisfied that there is absolutely no basis on which it can even be suggested by way even of an innuendo, that this could possibly be the cause for the manner in which the evidence has been given by the second named defendant and Sergeant Kelliher. That in my view is sufficient to satisfy me that the accident happened in the way the second named defendant says it did, as a matter of probability.

My assessment of the evidence is affected also by what I find to be a lack of credibility on the part of the plaintiff, and while not setting out in full a number of matters which have caused me to doubt the accuracy and correctness of his evidence, I will point to a couple of matters. Firstly, the plaintiff told Mr Curtin soon after this accident happened that he was not wearing a crash helmet, whereas now he swears in Court that he was. Neither was any helmet found at the scene even though the plaintiff says now that it came off his head in the collision due to the absence of a strap. Secondly, his evidence about going to the off-licence for cigarettes was lacking in candour since he later explained in cross-examination that the presence of a number of cans of beer on the road after the impact was explained by the fact that it was the first named defendant who was getting the beer while he himself was only buying cigarettes. I was also not happy about the manner in which this plaintiff was at the least economical with the truth in relation to some of the previous injury evidence. Generally speaking, I did not find the plaintiff to be someone whose evidence could be relied upon in material respects, and certainly not such as could be relied upon to displace evidence given by the second named defendant and Sgt. Kelliher.

I will add, however, that I have not taken into account when assessing his credibility, the evidence which I heard concerning his previous criminal record, lest to do so might be unfair to him. But there is ample other evidence of his lack of credibility.

Since I am not satisfied that this accident happened in the manner in which the plaintiff says it happened, he has not discharged the onus of proof which is upon hi, and I therefore dismiss the claim as against the second named defendant.

As far as his injuries are concerned for the purpose of damages against the first named defendant, I assess them in the sum of €50,000. He suffered a transverse fracture of the mid-shaft left femur which was comminuted, as well as a left ankle fracture. In addition he had the usual abrasions and soforth one would associate with being thrown from a motorbike, including, curiously, "a left periorbital haematoma and abrasion on left forehead", which has some significance given his evidence that he was wearing a helmet (which I do not accept, as I have stated).

Mr Curtin notes that he walks without a limp some two years after the accident, and had full movement of his knee, ankle and hip. He has expressed the view that he has made a full recovery with no long term risk of arthritis.

I therefore give judgment to the plaintiff as against the first named defendant only in the sum of €50,000.