

THE HIGH COURT

[2009 No. 5017 P]

BETWEEN

CIARAN CHESTNUTT

PLAINTIFF

AND

MICHAEL COYNE AND WATERFORD CITY COUNCIL

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 15th day of November, 2012

1. The plaintiff was born on 28th August 1987, and lives in Greystones, County Wicklow.
2. After leaving school, he took up a third level course in architectural technology in Waterford Institute of Technology (WIT).
3. On the morning of 26th October 2007, he suffered a serious head injury in a road traffic accident that occurred on Paddy Browne Road in Waterford adjacent to an entrance to WIT.
4. In this accident, the plaintiff suffered this injury as a result of contact with a lorry, the property of the second named defendant, and driven by the first named defendant who was, on the occasion, and still is, employed by the second named defendant as a driver.
5. Because of his injury, the plaintiff has no memory of the accident itself, or immediately prior to it or of the week following the accident.
6. His evidence was that on the morning in question, he was intending to go to an industrial premises which was partially demolished which was on the other side of the Paddy Browne Road, away from WIT, for the purposes of taking photographs of this building as part of a project he was doing.
7. His last memory before the accident happened was of getting off the bus at a stop within the WIT campus.
8. His evidence was that he frequently went in and out of the entrance to WIT on the Paddy Browne Road, and when crossing the Paddy Browne Road, he always crossed at the pedestrian crossing provided near the entrance to the WIT. When doing this, his invariable habit was to stand to the left side of the pole on which the traffic lights were mounted and to press the button which activated the necessary change of lights, with his right hand, and having done this, to wait until the light went green, permitting him to cross.
9. All of the evidence in the case establishes, to my satisfaction, that after the contact between the plaintiff and the defendants' lorry, the plaintiff ended up lying on the road close to the kerb at this pedestrian crossing with his feet close to the pole to which the traffic lights were attached and his head towards the entrance to WIT.
10. I am satisfied that the plaintiff was attended to, immediately after this accident, by Mr. Jackie Power, a member of the crew in the lorry, who turned the plaintiff onto his right side. Otherwise, the plaintiff had not moved from the time he ended up on the ground after the accident.
11. Photographs 9 and 10 of the garda photographs demonstrate the position of the plaintiff on the road after the accident. In these photographs, the yellow semicircles indicate where the plaintiff's head and feet were. It is apparent that his body was about two feet from the kerb and his feet about level with the pole and that his head was about six feet from there in the direction of the entrance to WIT.
12. From this evidence, I infer that the plaintiff, immediately before this accident, was attempting to cross Paddy Browne Road at this pedestrian crossing.
13. His destination was the industrial estate to which access was gained by a roadway off Paddy Browne Road. This roadway is some distance away from the pedestrian crossing where the accident happened and is on the other side of the entrance to WIT. In other words, a person coming out of the WIT entrance would veer left, if going straight to the entrance to this industrial estate, and would veer right if availing of the pedestrian crossing.
14. From all of this, I would infer that the plaintiff was not rushing to get to his destination, and very unlikely to have been running as he approached the pedestrian lights.
15. About fifty yards back from the pedestrian crossing, as one looks towards the roundabout, namely, in the direction from which the second named defendant's lorry came, there is a prominent sign that warns of the presence of the pedestrian crossing.
16. In the defendants' lorry, there was a crew of five men. They were on their way to open up a local authority house. Evidence was given by the first named defendant who was the driver of the lorry. Beside him in the front of the lorry were Patrick Dooley, who gave evidence, and Paddy Burns. In the back of the cab were Lee Douglas, who gave evidence, and Jackie Power.
17. The evidence of these three witnesses was in agreement on all matters except one, namely, whether there was any other traffic present on this road at the time of this road traffic accident. The first named defendant was adamant in his evidence that the road was entirely free of other traffic in either direction. Mr. Dooley, in direct evidence, supported the evidence of the first named defendant, but when confronted with his statement made to the gardaí on 4th November, 2007, in which he said, "*there was a bit of*

traffic around", he somewhat conceded on the point. The evidence of Mr. Douglas was, that, there was traffic around.

18. I am quite satisfied that there was other traffic present at the time of this road traffic accident. Indeed, at a location such as this, namely, the entrance to a large third level campus, in a built up area at 8.40am, it would be very surprising if there was not traffic present.

19. The significant feature of the evidence given on this topic is the adamant denial by the first named defendant that there was no traffic, when, manifestly, there was. I will return to this later.

20. All of the occupants of the lorry said that they saw no pedestrians in the vicinity except a man in a white top on the other side of the road who was seen by the first named defendant, and all these witnesses were of one voice, saying that the plaintiff was not visible or seen by any of them prior to the accident. All three were in agreement that their first intimation of anything untoward was hearing a loud bang or thump. They all said that this came from the back of the lorry and this noise was said to be similar to the noise that would result from a toolbox or ladder falling off the back of the lorry.

21. They realised immediately that the lorry had been involved in some sort of an incident. The first named defendant quickly brought the lorry to a halt a short distance away. The men got out and Mr. Power attended to the plaintiff because he had First Aid experience and the others set about controlling the traffic in the area.

22. They summoned the Emergency Services and the ambulance and the gardaí arrived quickly.

23. The plaintiff's case is that he was struck on the right side of his head by the wing mirror protruding from the passenger side of the cab of the lorry as he was standing on the kerb of the road waiting for the traffic lights to change to permit him to cross the road.

24. The defendants vehemently dispute this claim. Whilst acknowledging that the plaintiff's injury was caused by an impact between the plaintiff and the defendants' lorry, they say that the most probable cause of that impact was that the plaintiff, in crossing the road, either walked or ran into contact with the rear portion of the second named defendant's lorry, behind the rear wheel on the passenger side, so that the right side of his head came into contact with the tubular metal upright at the back of the lorry.

25. Expert evidence on this fraught topic was given by Mr. Denis Woods, a consulting engineer, engaged on behalf of the plaintiff. For the defendants, expert evidence was given by Mr. Tony Kelly, also an engineer, who although a member of An Garda Síochána, engaged in the provision of expert engineering evidence in litigation which did not raise a conflict with his duties as a member of An Garda Síochána.

26. There was no dispute between the engineering experts on the description of the wing mirror in question. It was mounted on the side of the cab and its function was to allow the driver vision behind the lorry and along its side and it could be extended outwards to cater for wide loads on the lorry itself. The wing mirror itself was mounted on a tubular metal bar which came down just behind the outer edge of the mirror. The mirror could be adjusted on this bar and the bar itself could be adjusted to four different positions. In position number two, the outer edge was 12 inches outside the body of the truck. In position one, it was closer in and could be extended out to 15 inches from the lorry. The height of this mirror above the ground, it was quite clear, would have corresponded to the head height of a person of the plaintiff's height.

27. The fracture injuries to the right side of the plaintiff's head were linear and consistent with that part of the plaintiff's head coming into violent contact with a linear object. In this respect, the outer edge of the wing mirror and the metal upright at the rear of the lorry were equally consistent with the infliction of the injuries that the plaintiff suffered.

28. What separates these two potential causes of the plaintiff's injuries is the mode of access to each of them.

29. The defendants say that it was much more likely that the plaintiff ran into contact with the rear upright, rather than being struck by the wing mirror as he stood on the kerb.

30. A striking feature of the plaintiff's injuries is that they were localised to his head. He had no other injuries, and in particular, he had no injuries to his torso or legs.

31. Mr. Kelly agreed in cross-examination that for the plaintiff to get the right side of his head into contact with the rear upright, he would have had to have got his head in over the side panel of the lorry which was outside the rear upright. For this to happen, he agreed that the plaintiff's feet would have to have gone under the side of the lorry, and contact between the plaintiff's torso and the side panel of the lorry would have been unavoidable.

32. I am quite satisfied that the theory advanced by the defendants is not only improbable, but so improbable as to be close to fantastical. If this accident happened as the defendants say it did, I simply cannot see how the plaintiff managed to escape without any injury to his torso or legs, given that his torso would have impacted first with the side of the lorry. Indeed, in that scenario, it would seem highly probable that the contact between the plaintiff's torso and the side of the lorry would have deflected the plaintiff's head away from the upright rather than facilitating contact with it.

33. I find it highly improbable that an intelligent young man who had taken the trouble, in the first instance, to go out of his way to avail of this pedestrian crossing would then run or walk into the rear side of this lorry, that had almost passed him by.

34. Prior to this accident happening, I think it is probable the plaintiff had, as was his habit, gone to the pedestrian crossing to cross this road and was probably standing to the left of the pole, having pressed the button to activate the green light in his favour. It is probable the plaintiff was standing on or close to the kerb as he waited for the traffic light to change. There can be no doubt but that the plaintiff was there and it is equally clear that the first named defendant failed to see him, notwithstanding the fact that he was there, and also the clear warning given by the traffic sign fifty yards back, which would have alerted the first named defendant to the presence of the pedestrian crossing.

35. I am satisfied that the first named defendant was not keeping a proper lookout as he approached the scene of this accident.

36. The first named defendant's emphatic denial of any other traffic at this location, when clearly there was other traffic present, is odd and revealing. It persuades me that what probably happened was that the first named defendant, when faced with oncoming traffic, manoeuvred his lorry in too close to the kerb on his left-hand side, and in so doing, caused the wing mirror on the passenger side of the cab to protrude in over the kerb, thereby catching and striking the plaintiff on the right side of his head.

37. It is probable that at the time the plaintiff was tilted slightly towards the right-hand side.

38. The evidence of the occupants of the lorry of hearing a loud bang or thump tends to reinforce my conclusion in this regard. If the plaintiff's head had struck the upright at the rear of the lorry, I do not think that that would have been perceived by those sitting in the cab of the lorry as a loud bang or thump. Indeed, a discrete blow to the side of the plaintiff's head inflicted by this upright would be unlikely to generate any noise or sensation that would be heard or felt by someone sitting in the cab, bearing in mind that the lorry was probably travelling at about 40 km *per* hour or 25 miles *per* hour, with all of the engine and other sounds that would be present in the cab in these circumstances.

39. On the other hand, the wing mirror striking the side of the plaintiff's head would, because of its attachment directly to the cab, be likely to generate a loud sound and perceptible sensation, as in a thump, within the cab.

40. I am satisfied that the loud bang or thump heard by all the occupants of the cab was more likely to have come from the plaintiff's head striking the wing mirror rather than the upright at the rear of the lorry.

41. It was argued for the defendants and the evidence of Mr. Kelly was to the effect that if the plaintiff's head was struck by the mirror, he would have been propelled by that blow, forward in the direction in which the lorry was travelling. Mr. Woods was of opinion that the position of the plaintiff's body on the road was entirely consistent with an impact from the wing mirror, but he acknowledged that a person struck in this way could be propelled forward up to a distance of 4 metres.

42. It is clear that in this impact, the plaintiff suffered a discrete blow to the right side of his head and nowhere else. Thus, no propulsion forces were applied to any other part of his body. The plaintiff ended up with his head close to 2 metres forwards in the direction of travel of the lorry. Thus, it would appear to me that the blow to his head did propel him in the direction of travel of the lorry, but the fact that the blow was confined to his head would have resulted in the rest of his body creating a drag on the forward propulsion of his head, limiting this forward movement of his head, and body.

43. I am satisfied that the position of the plaintiff's body on the road was entirely consistent with an impact by the wing mirror on this lorry to the right side of the plaintiff's head, and in this respect I accept the evidence of Mr. Woods and reject Mr. Kelly's opinion to the effect that the plaintiff's position on the road was consistent with the plaintiff running or walking into the side of the lorry at the rear and dropping to the ground at this point of impact.

44. It was contended on behalf of the defendants that the plaintiff could not have been struck by the wing mirror, because if he had been, the depth of the wing mirror was such that it would inevitably have caught the plaintiff's shoulder first.

45. Mr. Woods disagreed with this proposition, saying that if the plaintiff was tilted slightly to his right side, this would have removed his right shoulder from the path of travel of the wing mirror, thereby exposing the plaintiff's head to the full impact. In cross-examination, Mr. Kelly agreed with this. I am satisfied that this convincingly explains the absence of any impact or injury to the plaintiff's right shoulder area.

46. Some emphasis was laid by the defendants on the absence of any apparent damage to the wing mirror after the accident. In my view, this is explained by the fact that the tubular metal bar on which the wing mirror was mounted, in effect formed the outer edge which struck the plaintiff's head, thereby protecting the softer plastic portion of the mirror by absorbing the force of the blow to the plaintiff's head.

47. I am satisfied on the balance of probabilities that the plaintiff suffered his serious head injury as a result of being struck on the right side of his head or face as he was standing on the kerb waiting to cross this road by the wing mirror protruding from the near or passenger side of the second named defendant's lorry.

48. I am also satisfied that this accident was caused by the negligence of the first named defendant, for which the second named defendant is vicariously liable, in failing to keep a proper lookout, thereby failing to see the plaintiff who was clearly there to be seen, and in driving or manoeuvring his lorry so close to the kerb on which the plaintiff was standing so as to cause the wing mirror to protrude over the edge of the kerb, thereby striking the unwary plaintiff on the right side of his head.

49. There is no evidence of any contributory negligence on the part of the plaintiff. Thus, the defendants are liable to compensate the plaintiff for the full extent of his injuries and *sequelae*.

50. As a result of this accident, the plaintiff suffered very serious injuries to his head. These involved multiple facial lacerations, vertical ones; facial fractures including a fractures of the right frontal bone, right orbital bones, superior orbital bones, medial orbital wall and right inferior orbital rim, and also a fracture of the base of the skull. There was also considerable damage to his teeth, damage of the upper right central and upper right lateral teeth and upper left central tooth. He was rendered unconscious for a period. He did recover and was taken to Waterford Regional Hospital and in due course he recovered full consciousness. It is fair to say he has done very well for having suffered such a serious injury. Fortunately, the position of these fractures was such that no surgical intervention was required to restore the normal architecture of his skull and he recovered on conservative treatment thereafter.

51. There is no doubt that these injuries have had a huge impact on his life. These kept him out of action until well into the following year. He has impressed me with his willingness to struggle to get back to normal living. He did get back to his course in Waterford Institute of Technology. He undoubtedly lost a considerable amount of time and that set him back in his academic career. But he did get there.

52. He has had a number of serious residual effects from his injuries. His senses of smell and taste have been severely damaged or impaired since this accident and that continues to be the case and it will be permanent. He has significant scarring, one particular scar is a serious scar and unfortunately it does appear to have had a profound effect upon the plaintiff. Hopefully, in time, that will gradually abate. He has less serious scars, one under his right eye and one under his lip. But the scar to his right forehead is undoubtedly a serious cosmetic impairment.

53. As a result of suffering this accident, he has suffered an organic brain injury and that has affected, to some extent, his cognitive and other functioning. It is quite clear from the medical reports and evidence of Ms. Ann O'Connell, the neuropsychologist who has dealt with him, that he has made great strides in recovering from that. The deficits which she describes in her reports can be seen to be improved as time has gone on, to the extent that he has now got back to close to normal functioning, although there are still some residual deficits that will probably continue to affect him for the rest of his life. These are essentially in the area of memory. His

memory and concentration are not what they used to be and he has to develop strategies to cope with that. There is a sense that his personality has been altered to some extent. This seems to occur in the area of his relations with other people where he feels he is short-tempered or irritable or at times aggressive. This may well be exacerbated, and this is acknowledged by the plaintiff, by the consumption of alcohol which he now controls so as to avoid that type of situation, but it is a tendency that is there as a result of this head injury and there is nothing unusual about it, it is a predictable outcome of an injury such as he has suffered and he will have to cope with it insofar as he can. He will have to adapt and control his behaviour to eliminate it as a serious consequence or adopt strategies to be able to live comfortably with it.

54. He also suffered serious injuries to his teeth and he has had to have had a lot of work done on his teeth to restore them to where they were. That is not a finished project and will have to be repeated as life progresses.

55. He also suffered significant trouble with his right eye. This involves a tendency for the right eye to water. The worse feature of his eye problem is the presence of a spot which is there constantly. It is quite understandable that this would be a significant irritation, which I think what it is, a constant irritant. From reading the medical reports of both the plaintiff and defendants, it is clear that this is going to be a permanent feature which the plaintiff will have to endure for the rest of his life.

56. I have to assess compensation for him under a number of different headings. There is pain and suffering to date. In my view, having regard to the seriousness of the injury and the way it has affected him in the five years that have gone by, I think the appropriate sum to compensate him for his pain and suffering to date is the sum of €100,000.

57. So far as the future is concerned, he still has scarring, he has the problem with his loss of smell and taste; he will have to cope with his behavioural problems for the future, which will hopefully improve. All of that is going to be with him in the long term, probably for life. He is going to have the problem with his eye for life; he is still a very young man, so that is a long time.

58. I would estimate the appropriate sum to compensate him by way of general damages for his pain and suffering in the future is also the sum of €100,000.

59. That brings me to the final aspect of the matter and that is what impact, if any, will his cognitive impairments have on his future career.

60. The plaintiff has done extremely well in coping with his injuries. He got his academic career back on track. He qualified as an architectural technician and took a year out after that and returned to WIT and is now taking a five-year architectural course. The evidence of Ms. O'Connell satisfies me that the plaintiff is not and will not be impaired from academic or career achievement because of any deficits he has. He was functioning at a high level to begin with. The deficits that are there seem to me at this stage to be quite subtle. But the consequences of them for him will be that he will have to struggle a bit more to achieve his objectives than would have been the case otherwise.

61. Listening to Ms. Coughlan, I also think that that he may have some degree of disadvantage in an interview situation, if seeking employment as an architect. This might come from his inhibition in fluency of speech. I think that is something that is of relatively marginal consequence. Overall, I think he will get there. There is no doubt he will have some degree of vocational disadvantage as a result of his residual deficits.

62. For that, I think the appropriate sum to compensate him by way of general damages is the sum of €50,000. I am not satisfied that any case has been made out for an award of damages on any other basis.

63. Therefore, it seems to me that the appropriate way to compensate the plaintiff is by way of an award of general damages under that heading.

64. Special damages were agreed at €50,000.

65. The total award, therefore, will be €300,000.