Neutral Citation Number: [2011] IEHC 450

THE HIGH COURT

2009 8975 P

BETWEEN

DAMIEN O'HARA

PLAINTIFF

AND

EIREBUS LIMITED AND BRIONI LANE

DEFENDANTS

Judgment of Ms. Justice Irvine delivered on the 2nd day of December, 2011

1. The plaintiff in these proceedings was born on 11th November, 1975, and resides at Swords, County Dublin.

2. The within proceedings concern injuries sustained by the plaintiff when present as a pedestrian on the N6 Motorway close to Rochfortbridge on 11th November, 2007, on which occasion he was struck by the second named defendant's motor vehicle, having earlier been a passenger on the first named defendant's coach.

Background

3. I do not intend to summarise all of the evidence in the course of this judgment. However, I will briefly refer to the plaintiff's account of what happened in the period leading up to the collision just referred to.

4. The plaintiff, his four-year-old son and father were amongst a party of about 30 members of St. Kevin's Football Club who travelled to Tullamore to watch an away match on 11th November, 2007. They stopped for their breakfast at Monasterevin on the way down. They then watched the match and afterwards were hosted to soup and sandwiches by the local team in a social club in the town. The plaintiff says they were there about an hour and that he had three or perhaps four pints of beer. He then went to the off-licence to buy four cans of Budweiser to have on the coach on the way home. The coach left Tullamore at approximately 6.30pm.

5. The plaintiff maintains that he was on the coach for about 20 minutes and had drunk about half of one of the cans of beer when a number of those on the coach wanted to use the toilet. They were told by the driver the toilet was out of order. After a few minutes, and following a number of further requests to the driver including two requests from the manager of the group, Mr. Bermingham, the driver, pulled the coach onto the hard shoulder of the N6 carriageway. It was pitch dark and everybody, with the exception of a number of women on the coach, got off the coach for what was described as a "pit stop". The plaintiff first assisted his son to go to the toilet and put him back on the coach before getting off again to relieve himself. The driver was standing on the ground at the door of the coach. The plaintiff said he moved about halfway down the side of the coach where several other club members were relieving themselves. The next thing he knew, the coach was driving off. He banged on the side of the coach to try to stop it leaving but to no avail.

6. Somewhat alarmed by what had occurred, the plaintiff immediately phoned one of his fellow club members who was on the coach but got no answer. He made a second call to another friend who answered the call. He had only managed to tell his friend that he had been left behind when his phone ran out of battery and died.

7. The plaintiff maintains that he then decided to go along the motorway in the direction of Dublin in the hope of either catching up with his own coach, believing that it may have stopped to wait for him, or alternatively in the hope he would pass an SOS box. There was some traffic on the motorway which illuminated his path from time to time. However, after he had travelled a short distance he became aware of lights behind him. He turned around to see an oncoming car, at which stage he realised that he had veered from the hard shoulder and was actually in the fast lane of the motorway. He immediately ran in the direction of the hard shoulder but unfortunately was struck by the offside of the second named defendant's vehicle as he got to the centre of the eastbound carriageway. His body came to rest on the centre line of that carriageway as depicted in the garda abstract.

8. As a result of the collision, the plaintiff was taken to Mullingar Hospital but was later removed to Tullamore Orthopaedic Unit prior to his ultimate transfer to Tallaght Hospital. He sustained a very significant laceration to his left elbow, a lateral compression fracture of his right pelvis, a Denis Type II fracture to the right sacrum and a fracture of the left pubis. The plaintiff was two weeks in hospital and was discharged in a wheelchair. He was on crutches for sixteen weeks and it was the better part of twelve months before he returned to full activities. He maintains that it was only when he began to fully mobilise that he realised that he also had sustained soft tissue injuries to his back. He asserts that the combined effect of all of his injuries has rendered him unable to return to sport at any significant level, he continues to have discomfort in his left elbow and he finds routine heavy work problematical as it produces pain in his back and hips.

9. The plaintiff maintains the injuries which he sustained on 11th November, 2007, ought to be ascribed to the negligence of the defendants. He maintains that the first named defendant, Eirebus Limited, was negligent in number of respects. He claims that the coach driver ought not to have pulled onto the hard shoulder of the motorway so as to permit himself and others to get off the coach to have what was described in evidence as a "pit stop". He asserts that this was extremely hazardous due to inadequate lighting and that the coach driver ought to have stopped the coach at the earlier lay-by which was close to Rochfortbridge Bridge. Alternatively, he should have driven on to the next lay-by which was only 2km to 3km further from where he actually stopped. It is further maintained that having stopped the coach, the driver was negligent in failing to ensure, whether by way of conducting a head count or otherwise, that all of the club members were back on the coach prior to taking off. Finally, it is alleged that the failure on the part of the coach driver to open a locked toilet on the coach was negligent in all of the circumstances and was also in breach of the contract for the supply of the coach which he maintained required the first named defendant to provide a coach equipped with a DVD and functioning toilet.

10. As against the second named defendant, who was the driver of the vehicle that struck the plaintiff, it is maintained that she was not keeping a proper lookout. In particular, it is alleged that she was negligent in that she was driving on dipped headlights, thus significantly reducing her ability to assess the safety of the road ahead. It is contended that if she felt it necessary to drive on dipped headlights that she should have reduced her speed to that which would have permitted her to stop in the distance she could see to be clear ahead. Alternatively, it was maintained that had she been driving on full beam headlights that she would have seen the plaintiff in sufficient time to allow her to take evasive action.

Findings of Fact

11. Prior to reaching my conclusions on liability, it is necessary for me to resolve the evidential dispute between the parties as to the situation which pertained in relation to the toilet on the first named defendant's coach as of 11th November, 2007. Having carefully considered the evidence adduced by the relevant witnesses, and in particular the documentary evidence proved in the course of the hearing, I am absolutely satisfied that the situation prior to 11th November, 2007, was that on some but by no means on all occasions, St. Kevin's Football Club hired coaches from the first named defendant on the basis that the same would have both a DVD and a toilet on board. However, where a DVD and toilet was requested, the documentation in respect of the hire of such a coach would highlight this fact and the requirement would be noted on the hard copy invoice. The hard copy invoice in respect of the contract between St. Kevin's Football Club and the first named defendant establishes without doubt that Mr. Pat O'Connor hired the coach for the Tullamore trip and that he did not require it to have either a DVD or toilet facility. Further, the price paid by the club in advance of the trip reflects the fact that the coach would not have these additional facilities.

12. I also accept the evidence of the driver, Mr. Slepavicius, who I found to be a careful and reliable witness, that when he collected the coach on 11th November, 2007, that the toilet had not been cleaned, and given that the ticket furnished to him by his employers indicated that no toilet was required for the Tullamore trip, he did not bring the coach to the service area to empty the waste water/sewage and to take on fresh water or clean the toilet, as would otherwise have been required had a toilet been ordered. I also accept that it was for this reason he locked the toilet door and then deployed the switch on the dashboard which would have disabled both the lighting in the toilet and the toilet's flushing facility. I further reject as without foundation the assertion that the reason the toilet was locked was because Mr. Slepavicius wanted to avoid having to clean it on his arrival back in Dublin.

13. Having regard to these findings, I reject the evidence of Mr. McDermott and another witness called on the plaintiff's behalf who stated that after the collision they later used the toilet facility and that at that time, the toilet was clean and functioning normally.

Liability Conclusions

14. In the course of the hearing before me, I had the benefit of seeing and hearing each of the witnesses give their evidence. I also had the benefit of seeing that testimony subjected to scrutiny in the course of cross-examination and this has assisted me in coming to my conclusions on the factual matters in dispute. In this respect, I have to say that I found the plaintiff's evidence to be unconvincing in many areas, not only as to the factual circumstances surrounding his accident, but also as to his work and social welfare history. In particular, I view as sceptical the explanations given by him for the withdrawal of a substantial loss of earnings claim and his explanation as to why he made no report of his back complaints during the first two-year period post his accident. Likewise, the eleven months claim for loss of earnings which he did pursue was premised on the evidence of a payroll clerk who did not produce the type of documentation which ought to have been available had the claim been valid. Further, the claim made was for earnings of an amount and for a duration which the Company, of which the plaintiff was a director, could not lawfully have paid, having regard to its ongoing liabilities.

Liability of Eirebus/First defendant

15. Notwithstanding the fact that the stopping of the coach by Mr. Slepavicius on the hard-shoulder of the motorway was a breach of the Rules of the Road and possibly in breach of the Road Traffic (Public Service Vehicles) Regulations 1963, I am not satisfied that his actions, having regard to the circumstances which pertained, were negligent. He was faced with a very difficult situation. Mr. Birmingham, the manager of the group on the coach had asked him to stop on two occasions. He had also been approached by a number of the club members, all of whom wanted to disembark to go to the toilet. The toilet on the coach was out of service for the reasons already stated. There was very little traffic on the roadway travelling eastbound towards Dublin and I think it was reasonable for Mr. Slepavicius to conclude that if he pulled the coach into the hard-shoulder that his passengers might safely get off the coach to relieve themselves.

16. I do not accept the criticism of Mr. Terry, Consulting Engineer retained on behalf of the plaintiff, to the effect that the coach driver ought to have pulled in at a lay-by some 2km short of where he actually pulled in, namely, the lay-by described as being close to Rochfortbridge. Firstly, Mr. Slepavicius stated that he did not know of the existence of that lay-by. Secondly, Mr. Corrigan, Consulting Engineer, retained on behalf of the first named defendant told the court that that lay-by was one reserved for garda vehicles and was of the type that provides a raised ramp onto which a garda car can be driven. It was not a lay-by in the normal sense that would accommodate a coach. I also accept Mr. Slepavicius's evidence that at the time he came under pressure to stop the coach, he had no idea how far he might have to drive before reaching a lay-by where he could stop with a greater degree of safety. In these circumstances, I believe he took a reasonable decision to stop the coach. Further, given that almost all of the passengers on the coach, with the exception of the female passengers, got off to relieve themselves when the coach was brought to a standstill within 20 to 30 minutes of leaving Tullamore, I am absolutely satisfied that something close to an emergency situation pertained on the coach at the time Mr. Slepavicius agreed to pull in onto the hard shoulder.

17. Even if I had concluded that Mr. Slepavicius was negligent in pulling onto the hard-shoulder of the motorway to allow passengers to avail of a "pit stop", I am not satisfied in any event that this decision caused the plaintiff's injuries because, but for the fact that the plaintiff did not get back on the bus prior to its departure, he would not have been injured.

18. The next question then is who is responsible for the fact that the coach left without the plaintiff? I am satisfied that it was the plaintiff's responsibility to take whatever steps he considered necessary to ensure that the bus did not leave without him, given that he elected to get off the bus. Any adult of 35 years of age in full control of their faculties might reasonably be expected to be able to alight safely from a coach and to conduct themselves in a manner so as to ensure that the coach would not leave without them. In this respect, the plaintiff could have asked any of the lads who were back on the coach as he got off for the second time to ensure the coach waited for him. He could have made a like request of the passenger into whose care he had entrusted his son or of any of the lads standing beside him as he relieved himself. Alternatively, he could have asked the driver who, on his own evidence, was allegedly outside the coach at the bottom of the steps as he got off for the second time to make sure he did not leave without him, but he did none of these things.

19. Accordingly, I am not satisfied that the driver of the coach was negligent in leaving without the plaintiff. I accept his evidence that he checked his wing mirrors before he left to scan the side of the bus for passengers and that he had also received an assurance from Mr. Declan Dolan, as he boarded the coach, that there was no one else outside. However, regardless of these facts, in my view, there was no obligation on Mr. Slepavicius to count the passengers back onto the bus after the pit stop. That was not his responsibility as was made clear in course of the evidence. In a group situation, that responsibility may become that of the tour guide or fall to the manager of a group in circumstances such as arose in this case. Indeed, Mr. Bermingham had earlier carried out a headcount before the bus left Tullamore, and if there was any duty on anyone other than the plaintiff to ensure that he was back on the coach prior to its departure, that responsibility possibly fell to Mr. Bermingham who on two occasions, in his role as group manager, had asked the driver to stop the coach on behalf of the passengers.

20. Even if I am wrong as a matter of law in relation to the aforementioned matters and the driver of the coach was negligent in departing the lay-by without the plaintiff on board, I do not accept that he should have foreseen that a passenger left behind who had managed to notify the coach of this fact might get knocked down as a result.

21. I am satisfied that the plaintiff found himself on the fast lane of the motorway immediately prior to his collision, solely by reason of his own negligence. Any adult in full control of their faculties, having been left behind, might reasonably have been expected to conduct themselves in a manner that would keep them safe from the hazards of motorway traffic, particularly when they had been able to communicate their situation to those on the coach. Whilst it may have been reasonable for the plaintiff to proceed in the direction in which the coach was travelling in the belief that it may have stopped to wait for him, or believing he might meet up with an SOS box on the way, it was not foreseeable that he would take that course of action if he could not see his hand in front of his face or considered it so dark that he could not see to the level required to permit him remain well in on the hard shoulder. If that was so, he should have stayed where he was in the certain knowledge that he would be collected within a very short time rather than taking the reckless approach which he adopted.

22. However, I do not in any event accept as a matter of fact that the plaintiff, if he had been fully in control of his senses, would not have been in a position to walk safely along the hard-shoulder of the motorway regardless of how dark it may have been due to the lack of on street lighting. The hard shoulder was 2.4m wide. Inside that again was a grass margin of approximately 2m. The plaintiff could have taken physical guidance from the inner grass margin which he could have ensured remained under at least one of his feet as he progressed. On his own evidence he had the benefit of lighting from intermittent traffic passing by every 30 seconds or so to guide his path of travel. Also, there was apparently a fairly consistent stream of traffic heading out of Dublin westbound, and again, this should have given some illumination at the locus in quo. Accordingly, the plaintiff, assuming that he proceeded at a relatively modest pace, should have been able to see all of the relevant road markings such as the yellow line demarcating the highway from the hard shoulder and also the cat's eyes dividing the two traffic lanes at least some of the time. I believe that my conclusions in this regard are borne out by the evidence of Mr. Bermingham who, some minutes after the collision, walked back from the coach to try to locate the plaintiff. He said he had been able to do so safely without any street lighting and without the need to use his mobile phone to light his way. Further, he did so without the benefit of any illumination that might otherwise have been provided by eastbound traffic, which, because of the collision, had been brought to a standstill. Accordingly, on either the plaintiff's own account of the visibility available to him or on the basis of the visibility that I am satisfied he enjoyed, I believe it was not foreseeable that a passenger left behind might migrate to the outer lane of the highway and thereafter be struck by a vehicle using either lane of the motorway.

Liability of the driver/second named defendant

23. As to the second named defendant, she was travelling at 90-100km per hour when she first saw the plaintiff running in the direction of her vehicle. She was travelling Eastbound in the direction of Dublin in the inner lane of the N6 Motorway and her carriageway is divided from the westbound carriageway by a three-foot high concrete central median barrier. There was no traffic ahead of her, the road surface was wet but it was not raining.

24. I accept the evidence of the second named defendant that there was a continuous stream of oncoming traffic heading westbound out of Dublin and that notwithstanding the existence of the concrete median barrier between the two carriageways, she felt it necessary to drive on dipped headlights to avoid interfering with their vision. She drives this motorway on a regular basis and I am happy to accept her evidence that the barrier does not fully protect drivers from the beam of oncoming motorists. Accordingly, I am not satisfied that the second named defendant was in breach of the Rules of the Road in deciding to drive on her dipped headlights.

25. The question then is whether or not the second named defendant was negligent in not being in a position to bring her car to a standstill within the distance she could see to be clear ahead of her. In this regard, it was agreed that dipped headlights provide the motorist with a site line of 30m. The engineering evidence was to the effect that a motorist, to be able to stop within this distance on a wet surface, would have to be driving at a speed somewhat less than 50km per hour. I do not accept that in the circumstances pertaining in this case, the plaintiff, even if in breach of the road traffic general bylaws, can be considered to have been negligent because she was not travelling at less than 50km per hour. It is common case that by reason of the presence of oncoming vehicles on a motorway at night, vast numbers of vehicles have to drive on dipped headlights. It would be an extraordinary scenario if, by reason of the road traffic general bylaws, those motorists had to drive at a speed below 50km per hour if the road surface was wet. There was no traffic ahead of the second named defendant and she had no reason to believe that an emergency situation was likely to occur. Whilst perhaps it would have been more prudent for the second named defendant to have been driving her vehicle at a slightly lesser speed, I am not satisfied that that would have made a material difference given that she still would not have been in a position to stop in time to avoid the collision that occurred.

26. Even if I had concluded that the second named defendant should have been driving on full beam headlights, she would not, in such circumstances, have been in a position to stop her vehicle within the 100m visibility provided by those lights. The stopping distance required by a motorist travelling at 100km per hour on a wet road is 122m. Further, those figures are based on a combination of the distance required to allow for reaction time and a further distance for breaking. As was agreed by Mr. Corrigan consulting engineer, all motorists have different reaction times. The standard reaction time referred to in the Rules of the Road does not take into account that reaction time is likely to vary depending upon the individual circumstances which present to a motorist, and he agreed that the reactions of a motorist driving on a motorway may well be reduced by reason of the controlled environment in which they are travelling. In this case, the plaintiff was not driving in a built up area. She was not driving on a road where she might have expected she could have to deal with hazards created by oncoming traffic, traffic emerging from entrances, cyclists and/or pedestrians. She was driving in a location from which pedestrians were precluded and where, whatever about the extremely remote possibility of a pedestrian emerging from the driver's left-hand side from the hard shoulder, the possibility of a pedestrian running towards her car in dark clothing from the centre of the roadway, which has a concrete median barrier, must have been infinitesimal. Further, the plaintiff was moving at the time he was first sighted by the second named defendant and this again is material to any criticism that might be made regarding the type of evasive action that might have been open to the second named defendant had she

seen the plaintiff somewhat earlier than actually occurred.

27. Accordingly, I am not satisfied that there was any actionable negligence on the part of the second named defendant.

28. In reaching my conclusions on the liability issue, I have taken into account the submissions made by Mr. McGovern, S.C., on behalf of the plaintiff, and in particular have noted his reliance upon the decisions of McWilliams J. in *Dockery v. O'Brien* I.R. (16th July, 1975) and the decision of Walsh J. in *Curley v. Manning*. To my mind, these decisions do not offer support to the plaintiff's claim and are distinguishable on their facts. They relate primarily to the liability of the owner of a vehicle for the actions of those who might use or be permitted by their negligence to use their vehicle in a manner which might forseeably cause damage to a third party. The only liability under consideration in this case, insofar as Eirebus is concerned, is the liability of the owner of the coach to its passenger who did not cause any injury to a third party.

29. This is a case in which the plaintiff was injured because of a series of actions on his part for which he must accept full responsibility. Firstly, within 20 minutes of leaving Tullamore, he needed to alight from the coach to relieve himself. Secondly, having got off the bus, he failed to conduct himself in a reasonable manner in that, unlike all of the other passengers, he failed to get back on the bus prior to its departure. Thirdly, having been left behind but having contacted those on the bus, he did not stay at the locus in quo but managed to wander into the fast lane of the motorway creating a hazard for all potential road users.

30. I think it is highly likely that all of the actions to which I have just referred were fuelled by the consumption of alcohol at a level way beyond that disclosed to the court. I do not accept the plaintiff's evidence that he was only in the social club in Tullamore for about an hour or thereabouts. I think it is far more likely, having regard to the timings adduced in the course of the evidence, that he was there for the better part of two hours and had consumed significantly more alcohol than the three to four pints that he admitted to, perhaps influenced by the fact that it was his birthday. Regardless of whether I am correct in this conclusion, it is wholly unreasonable and unsustainable as a matter of law for the plaintiff to claim that everything that happened thereafter was the responsibility of the bus driver and or the motorist rather than his own recklessly dangerous behaviour which, but for good fortune, could have had catastrophic consequences for innocent third parties using the motorway on the night in question.