

**THE HIGH COURT****2008 27 CA****BETWEEN****DENIS FLANAGAN****PLAINTIFF****AND****BUS ATHA CLIATH/DUBLIN BUS****DEFENDANT****JUDGMENT of Mr Justice Michael Peart delivered on the 5th day of February, 2009**

The plaintiff suffered personal injuries on the 9th May 1991, when a bus, owned by the defendant and driven by one of its employees (now deceased), came into contact with the driver's door of the plaintiff's vehicle which was parked on a pavement in the immediate area of a bus stop on Terenure Road North in the City of Dublin, and pushing it forwards.

That incident occurred a very long time ago. On 24th February 1994, proceedings were commenced in the Dublin Circuit Court, and for reasons which are not really relevant now, have only now been heard in the High Court, having been transferred from the Circuit Court. Suffice to say that there is no suggestion that the reason for the tardy manner in which this case has come on for hearing cannot be laid at the door of the defendant. A motion to dismiss the proceedings for want of prosecution was dismissed by the High Court in recent times, on appeal from an order of the Circuit Court dismissing the case for want of prosecution made on the 8th February 2008.

I intend to address the liability issue before coming to the issue of damages, which may not arise. Another issue which may arise, depending on my conclusion on liability, is whether the plaintiff's action must be dismissed under the provisions of s. 26 of the Civil Liability and Courts Act, 2004, on the basis that the plaintiff has given evidence which is false and misleading and which he knows to be false and misleading.

**The incident on the 9th May, 1991**

The plaintiff has stated, in his evidence, that on this date, he parked his car on the pavement outside a shop that he wished to visit in order to obtain some materials in connection with his occupation as a television aerial erector. He has stated that he parked his car entirely on the pavement – in other words, that no part of the car was on the road. The position where he so parked was immediately before a bus stop. Photographs of the locus have confirmed this. It appears that at the point at which he mounted this pavement is not as high as the part ahead of that position. While that facilitated a person mounting the pavement in this way, the plaintiff accepts that it was not permissible to park on the pavement. He recollects that this occurred in the afternoon and that it was not wet at the time. He states that, having parked his car in this way, he turned off the engine, took off his seatbelt, put the car into gear, checked his mirror and having seen traffic approaching from some distance, decided to get out of his car in order to go into the shop (T.1, Q.33). The driver side of the car was that closest to the road rather than the shop. In other words, he parked on the left side of the road in the direction in which he had travelled to that point.

He believed at the time that it was safe to get out of his car. He says that as he began to get out of his car, he realised that a bus was approaching from behind his car at a speed which he believes was "fast", and having concluded then that it was not safe to get out at that point, he decided to "close in the door in case the bus decided to pull in or let people off" (T.1, Q. 33). This was a double-decker bus, which is, as the evidence has been, a Bombardier type bus.

He went on to state that as he closed the door, the bus pulled in at the bus stop ahead of his car to let out passengers, and two ladies alighted from the bus between six and ten feet in front of his car (T.1, Q. 34).

He then stated that after these ladies had alighted, the bus pulled out and that "the back part of it came in towards my car door and it caught a grip of it" (T.1, Q.36) He went on:

*"I think it was some sort of a vent where you put oil or petrol in the car (sic) which protruded a little from the main body of the bus that came into contact with my door where the door meets the frame, and in doing so, it pulled me down towards the two ladies getting off the bus..... Just as I thought I was going to make contact with the two ladies, the bus suddenly stopped and I got thrown forward and the door swung open a bit then, open more, and I ended up being out on the road. The bus stopped and he came back and he wanted to call an ambulance and I said I am okay. He said "I am terrible sorry, I thought I would have cleared you, I thought I would have cleared your car....." (T.1, Q. 36).*

As I have already referred to, the bus driver has since died, so the Court has not had the benefit of his evidence.

Fortunately, these ladies were not injured, though one of them has given evidence which indicates that she actually mounted the bonnet of the car in the incident. The door and front driver wing of the plaintiff's car were damaged. The plaintiff was very shocked by this incident because of the possibility that the ladies might have been injured. He also sustained an injury to his shoulder. He went on to deal with his own injuries, but I will leave that aspect of the evidence for the moment.

When cross-examined, the plaintiff confirmed that when he parked his car on the pavement, he had pulled entirely up onto the pavement (T.1, Q. 130). He accepted also that he was illegally parked on the pavement. He stated also that after he had stopped on the pavement he had looked in his mirror, and stated that he had seen the bus approaching from behind him (T.1, Q. 149), and that he opened his door and "partly alighted" (T.1, Q. 150). He was asked how close to the edge of the footpath his car was – in other words, the driver side of his car – and he indicated about six inches. In other words, he was fully on the pavement and six inches in from the edge of the pavement. He stated, also in cross-examination, that he made to get out of his car, looking back to see if it was safe to do so, but that he saw that "it might be a little bit on the dangerous side to get out, so I decided to stay put and close the door over (T.1, Qs. 154-156).

He was asked why he had not closed his door completely when he had seen the bus approaching, to which he replied that he attempted to close it over and pulled it in tight, so that there was no part of the door hanging overhanging the pathway (T.1, Qs. 159-160). It would appear that when he says he pulled the door "in tight" he means that the door was not fully closed but was closed on the first of the two clicks, so that the door was not quite flush with the rest of the body of the car. It would have been proud of the body of the car by about an inch (T.1, Qs. 162-168).

The plaintiff was also asked about how close the bus was to the curb when it pulled in to allow the ladies to alight. He stated that it was "pretty close", and that when the bus was stopped it was beside his car but the driver of the bus would have been at the bus shelter itself shown in the photographs, and ahead of his car, but the body of the bus was alongside his car. He stated, in that regard, that if somebody had been standing between the side of his car and the side of the bus "it would have been pretty tight" (T.1, Qs. 174-179).

He stated then that as the bus moved off, the bus made contact with the edge of his car door, and that the damage to his car was to the door and front wing. He confirmed that what he was saying is that when the bus moved off, some part of the bus made contact with the edge of the door that was "sticking out somewhere in the order of an inch or two inches (T.1, Q. 190). That part of the bus, as far as he believes, was a little vent on the back of the left-hand side of the bus", and he accepted that he had told one of his doctors that it was the petrol cap on the bus, and he stated it may have been a petrol cap or a filler cap. He cannot recall if there was any damage caused to the area of the car behind the driver door. He then said that he thought it may have been a grill at the back of the bus which was not flush with the side of the bus. He is unsure if, before coming to court, he had ever stated his belief that what was protruding at the rear of the bus was some sort of grill, and he does not "know for certain whether that grill was flush with the body of the bus or whether it protruded" (T.1, Qs. 199-219).

The plaintiff was further cross-examined about exactly where on the pavement he had parked and to what extent his door was partially closed over, by reference to what he appears to have told his engineer, Alan P. Conlon, according to the latter's letter to the plaintiff's solicitor dated 9th July 1993. In that letter, Mr. Conlon states:

*"[the plaintiff] reports that he had parked his car on the pavement outside the launderette a few feet from the kerb. He reports that he had opened the driver's door by a foot or two in order to get out, and when he saw the bus coming he closed the door a little, then the bus turned out from the bus stop angled to the kerb. As the bus did this, [the plaintiff] reports that he grabbed the handle of the door and at the same time, the grill at the rear side of the bus caught the edge of the door and pulled the car violently forward. He reports that the door remained open by about 15/20 degrees and the car remained on the pavement. Suddenly, the bus came to a halt, he was thrown forward and hit his head against the windscreen....."*

This passage was put to the plaintiff and he stated that the reference therein to being "a few feet from the kerb" was intended to be a reference to what he called the "slip", being an area of pavement that was lower than the rest of the kerb and where he went up onto the pavement. He stated that at no time was he a few feet onto the kerb, and that what he had stated was correct i.e. six inches or so. He also stated that it was not correct that he had opened the door of the car "by a foot or two". He stated that the reference to the door being "open by 15/20 degrees" refers to after the bus had come into contact with the car (T.1, Qs. 229-246).

The plaintiff agreed, when it was put to him, that for the bus to have come into contact with his car, the back section of the bus would have to have swung in on the pavement, since the plaintiff has stated that his car was six inches onto the pavement. He said that was exactly what happened, and that he had often seen buses pulling away from a kerb and the rear coming over the pavement in the process. (T.1, Qs. 257-263). It was put to him that for such a thing to happen, the front wheels of the bus would have to have been turned very sharply to the right. The plaintiff stated that he was not an engineer and could not give an expert opinion in relation to that. But neither could he say if the bus was moving off in a straight line or whether it had to move out to the right in order to move on (T.1, Qs. 267-273).

### **Evidence of James Scally: Independent witness of fact**

Mr Scally, on the date of this accident, was inside one of the shops to the left of where this accident happened, on the same side as the plaintiff parked his car. He worked in the shop at the time. He stated that what caught his attention was a car being pulled by a bus. He could not remember if he had seen the car on the pavement prior to that. He thinks that the car was pulled forward by about ten feet. He cannot recall if there were any people in the vicinity of the car at the time. Neither did he observe anything about the rear of the bus, since he remained within the shop. He remembers the plaintiff entering the shop after this occurrence and that he was disorientated and holding his shoulder. It appears that he knew the plaintiff simply as a customer of the shop in question (T.2, Qs. 177-205).

### **Evidence of Ms. Pauline Nolan – Independent witness of fact**

Ms. Nolan was one of the ladies who alighted from this bus just before this accident occurred. She got off the bus in order to go into a launderette which was one of the shops to the left of the plaintiff's car, as he parked it. She recalled a car being on the pavement, and that it was fully on the pavement. It was not unusual to see cars parked on the pavement at that point. She was asked to recall, if she could, how close to the edge of the pavement the car was parked, to which she indicated a distance of about twelve inches from the edge of the path. She recalled getting off the bus and then looking up and seeing the car coming towards her. She stated in that regard *"It was obviously caught on the end of the bus and it was being dragged towards me"* (T.3, Qs.10-23).

She thinks that this happened as the bus pulled away after she had alighted. She stated that it was the back of the bus which came into contact with the car, and then asked to be more specific as to the part of the bus which caught the car she stated: *"... like a ridge on the back of the bus, you know, like a gap type of thing on the back of the bus where the engines would have been..."* (T.3, Qs. 25- 30).

She was cross-examined as to the basis for saying that the car was twelve inches or so from the edge of the pavement, to which she replied that she had only walked a couple of steps after alighting and that the car then came towards her. She stated, also, when further questioned about this, that her opinion was based on where cars would normally park on this pavement rather than by recalling this particular car on this occasion (T.3, Qs. 45-50).

As to her recollection of the back of the bus coming into contact with the car, she stated that at that stage, she was up on the bonnet of the car, but says, nonetheless, that she saw *"the door of the car caught in the bus"* (T.3, Q. 58).

### **Evidence of James Watson, Engineer, called by the defendant**

Mr. Watson visited the location of this accident in 1995, some four and a half years post-accident. He took photographs of the locus and took some measurements of the road. Nothing much turns on that evidence, save to say that the entire width of this two carriageway street is put at 32 feet, 6 inches, meaning that the lane in which the bus was travelling was 16 feet and three inches wide. The width of the bus in question was 8 feet, 2 inches. The footpath on which the plaintiff parked his car was 14 feet and 9 inches wide. He described the road as being straight as one approaches the bus stop, and he stated that in the normal course, there would have been no need for the bus driver to turn his front wheels to be other than straight when moving off (T.4, Qs.14-15).

Mr. Watson stated that it was possible for a bus to perform a manoeuvre which would cause the rere of the bus to swing over the pavement, if the driver had a hard lock turning the bus towards the right as he moved off. It is Mr. Watson's view that a professional bus driver would move forward a short distance and then turn wheels hard right, rather than turn them to the right while stationary. Since the bus driver has since died, that evidence is purely speculative, but it is, nevertheless, an expert opinion as to how such a driver might have driven. Mr. Watson stated that there were two possibilities in this case, and he put it this way:

*"The first [possibility] is that the bus did turn hard to the right. The rere of the bus would have engaged against the car. It could have pushed the car into the left and then the bus as it proceeded forward would be travelling more or less diagonally from the kerb and would disengage the kerb. For the car to have been dragged forward, this means that the bus must have been travelling parallel to the kerb. If the bus was travelling parallel to the kerb, then the more probable scenario is that the door was opened outwards and engaged in some part of the bus, because there would be no tail swing..."* (T.4, Q. 32).

He went on:

*"The only scenario I can envisage, based on the evidence which I heard and based on the scenes of the photographs (sic) ... is that the accident occurred as the plaintiff described, and his car was dragged forward. That can only have occurred if the bus was travelling parallel to the kerb. And the only way in that situation that the car and the bus became entangled is that his door was opened outwards catching on a part of the bus* (T.4, Q. 34)

### **Conclusion on liability**

I have set out in some detail all the evidence which was given to the Court relating to the circumstances in which this accident occurred. In considering the issue of liability, I bear in mind that it is the plaintiff who must discharge the onus of proving that, as a matter of probability, the driver of this bus drove in a negligent manner, causing the impact with the plaintiff's car, and dragging it forward, thereby causing him an injury.

Firstly, I am completely satisfied from the plaintiff's own evidence, in particular, but also to an extent the evidence of Ms. Nolan, that the plaintiff parked his car fully on this pavement, and I accept the evidence that the driver side of the car was about six inches inside the line of the kerb. The only evidence about the line in which the bus was travelling is that of the plaintiff who has stated that it came in a straight line down towards him. There is no evidence that the bus came up onto the kerb even by a very small amount. The bus was at all times entirely on the street, and stopped at the bus stop in a perfectly normal and unremarkable way. Neither is there any evidence that when the bus pulled off again, it did so other than in a straight line. There is no evidence, in particular, that the driver locked hard to the right when moving off. Nevertheless, some part of the rere of the bus caught the plaintiff's driver side door. That can only have happened, and certainly, I conclude, as a matter of probability, that it did, if the edge of the driver's door was protruding out over the edge of the kerb enabling it to come into contact with some part of the rere of the bus. Mr. Watson has stated that this is how this accident occurred in his view (see T.4, Q. 34 above).

In my view, for the plaintiff to succeed, he would have to establish as a matter of probability, either that the bus came

onto the pavement in some way causing the contact with his door, or that there was some part of the bus which was faulty and protruding in a way which was not normal, causing contact with the plaintiff's car door, while it, even though opened slightly, or, more correctly, not completely closed and flush with the side of his car, was parked six inches or so inside the edge of the kerb. There is no such evidence in this case.

The overwhelming preponderance of the evidence suggests that as a matter of probability, what happened was that, having opened his car door to get out, the plaintiff suddenly realised that the bus was close to the kerb, and that he resumed his seat, pulling the door closed as quickly as he could manage. But it appears that he did not entirely close his door, and thus, something at the back of the bus was enabled to come into contact with the door, pulling the car forward. If the car had been parked, even to a small extent, over the edge of the pavement, it might be possible to show that the bus driver failed to take reasonable care, even allowing for the fact that the plaintiff ought not to have parked in that way. But that did not happen. The plaintiff was entirely up on the pavement. I am satisfied as a matter of probability, that the door of the car was opened sufficiently for the rear of the bus to make contact with it, and that this did not occur because of any swing of the rear of the bus over the pavement as the bus drew away. The onus is on the plaintiff to establish, if he can, that the bus driver pulled off at the sort of angle which Mr. Watson has stated would be required if the rear of the bus was to be caused to swing over the pavement. There is no such evidence.

There is no negligence made out against the defendant in this case, and accordingly, I must dismiss the plaintiff's claim.

That being the case, it is unnecessary to address the issue of damages, or the allegation by the defendant that the plaintiff has knowingly given evidence that he knew to be false or misleading.