

THE HIGH COURT

Record Number: 2004 No. 16924P

BETWEEN

ROBERT LEWIS

PLAINTIFF

AND
BUS EIREANN - IRISH BUS

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 6th day of December 2006**The plaintiff's background**

1. The plaintiff is now aged thirty six and has a history of heroine addiction which goes back many years. It would appear that he has been living with his present partner, Lisa Rochford for about ten years – give or take – and they have two young children. He has also two other children from a previous relationship, according to a history contained in a medical report from Dr. Whately.
2. The plaintiff says that during the nine years or so since the eldest of his children was born, he has been for the most part clean of drugs, although in his own evidence he admitted to what he referred to as a 'slip'. I suspect that there has been more than the one slip. He appears to be on a methodone programme, part of the requirement of which is that he gives urine samples twice a week. These, he says, have been clean.
3. The defendant's medical report from Dr Whately contains a history – presumably on the basis of what he was told by the plaintiff and his partner when he was examined by Dr. Whately for the defendant company. That report states that in 1999 the plaintiff was diagnosed with Hepatitis C associated with liver failure, and that he ceased his employment from that time and draws Disability Benefit. However that report also states that, the plaintiff had last used heroine on the day before this incident, but that the reason that he was travelling on the defendant's bus on the 15th May 2003 was in order to attend a Dr. Oliver Lynn who was starting him on a methodone programme that very day.
4. I do not know whether that is true or not, considering that there is evidence that while on the bus on this day he was drinking beer – he says that he had one can of beer on the bus, but I am satisfied that there were other cans found on the bus after the plaintiff alighted at Drogheda Bus depot. It is not clear however how many were empty and how many were still full. He seems to have told Dr Whately that before getting onto the bus he had also consumed one pint of beer. Perhaps there is nothing inconsistent between travelling to commence a methodone programme with Dr Lynn, and consuming alcohol on the way. I do not know whether that would be contradictory. At the end of the day it does not matter to this case.
5. Dr Whately has also stated in his report that he has looked at the plaintiff's hospital notes, and amongst these is one noted as being for "08/05/05" to the effect that the plaintiff while in the hospital went missing and security had to be called. When he returned stating that he had been in the car-park he was found to have dilated pupils, and Dr Whately states that this would indicate the use of drugs. He reports also that these records note that "he was to be discharged on Saturday 17th but because of his heroine problem he was detained in hospital until the 19th because he would not have been able to get methodone over the week-end". The injury sustained on the bus was on the 15th May 2003 and not May 2005, so I am not clear whether the date is incorrect in Dr Whately's report or whether the plaintiff was in hospital on that occasion in May 2005 for some other reason. The latter may well be true because of the reference to his going missing on "08/05/05" since if it is a mistake as to the year, it would be a week before the incident which this case is all about.
6. One could speculate and conclude that the aggressive behaviour of the plaintiff while on the bus was the action of a man who had by then consumed much more than a pint of beer and a can of beer, but that behaviour may for all I know be the result of his use of heroine on the previous day, if that is true. I have no medical evidence as such in this regard, and neither have I any evidence except some from John Hetherington the bus driver, which assists in establishing in any clear way whether the plaintiff was what is confusingly yet generally termed 'drunk'. Accuracy in this regard is not crucial to the Court's decision, since I am satisfied from the evidence, which I shall come to, that the plaintiff's behaviour on the bus was aggressive and unacceptable towards the bus driver, John Hetherington. I have no doubt that Mr Hetherington was justified in making arrangements with Drogheda bus depot to have the Gardai present when the bus arrived in Drogheda.
7. The plaintiff is quite clearly now a very ill man as a result of his liver disease and Hepatitis C. This has nothing to do with the injury to his knee. He is visibly pale, frail, weak and unbalanced on his feet. Dr Whately's has stated in his report that when the plaintiff attended his surgery for examination for the purpose of his medical report for the defendant the plaintiff was "very pale and very sleepy and nodded off a few times during the consultation". He also states that the plaintiff has poor recall of events and that much of the history was given by his partner who attended with him. That description of the plaintiff is entirely consistent with how the plaintiff was in Court before me, though he did not as far as I know "nod off" during the case. But he was visibly weak, unclear in his recollection of some events, unclear in his speech, and was generally speaking a witness who had difficulty answering questions clearly, even those asked by his own Counsel.

8. Some of his evidence was unclear and confused. Some of his evidence was shown to be incorrect, such as in relation to his previous conviction record. Some of his recollection of events is self-serving in as much as, at times, he downplays his own part in what happened on this occasion, and in my view exaggerates the involvement of others. He is a witness who comes to Court with many disadvantages as a witness. His recollection is poor, he is ill in the way I have described, his speech is weak and slurred making it difficult to understand all that he says. But the Court must make allowances for these features in assessing his credibility, since credibility is important in this case, given the conflict of evidence in important matters.

**The Facts
On the bus**

9. This story starts on a bus going from Dundalk to Drogheda in the middle of the day on the 15th May 2003. The plaintiff, his partner and young daughter are on the bus, which appears to have been quite full. The plaintiff says that he was on his way to commence a methodone programme that day with Dr Oliver Lynne.

10. The plaintiff has stated that as the bus was on its way to Drogheda the driver would stop from time to time to let off passengers near to where they wished to get to rather than at actual bus-stops. The plaintiff states that such passengers would go to the driver and ask if they could get out at that point.

11. John Hetherington, the driver denies that he stopped other than at official stops. One way or another the plaintiff seems to have got it into his head that this was what was happening, and decided to ask the driver to do the same for him. He went up the bus to the driver and an altercation took place. That altercation seems to have been triggered by the fact that the plaintiff was carrying at that time a can of beer. The driver says that he saw the plaintiff coming up towards him on the bus, and that he was shouting that he wanted to get off the bus. He goes on to state that he told the plaintiff that there was a stop 400-500 yards further on and that he would let him out there, and that he also asked the plaintiff to give him the can of beer. The plaintiff refused, and started to be verbally abusive to the driver, including that he would smash the driver's glasses with the can. The plaintiff denies saying this on the basis that since he was at that time expert in the art of karate and some other martial arts he would not need a can of beer in order to break the driver's glasses – hardly a meritorious defence to the allegation made against him.

12. Mr Hetherington described how the plaintiff then emptied the remaining contents of the beer can around the back of the driver's seat and on the floor of the bus. The plaintiff's partner says that only drips of beer were spilt around the bus. The plaintiff's own evidence about this was not clear.

13. I am satisfied that the driver's evidence is to be relied upon in this regard. I am satisfied that at this point the plaintiff's behaviour was completely unacceptable on the bus. I have not been told whether the driver stopped the bus while this altercation was taking place or whether it happened while the bus was moving. But one way or another, a danger was created for the travelling public by the plaintiff's behaviour, and I can fully understand why the driver would have felt it appropriate to arrange to have the Gardai present when the bus arrived, so that they could interview the plaintiff about his behaviour on the bus.

14. He told the plaintiff that he was calling the Gardai to meet the bus at Drogheda. The plaintiff says that he told Mr Hetherington to go ahead and call the Gardai if he wished. The plaintiff, according to Mr Hetherington, resumed his seat on the bus. The plaintiff's partner also said that the plaintiff sat down after this altercation.

Arrival at the depot

14. The plaintiff states that when the bus arrived at the depot he started to get off the bus, and that as he did so the driver grabbed hold of his jacket, that when off the bus he was jumped on from behind by the driver, that he carried this man on his back into the depot, that as he was doing this a second man also jumped on his back and that thereafter because of the weight he fell heavily to the ground thereby injuring his right knee. His right knee cap was badly fractured. In cross-examination the plaintiff denied that he had been ordered off the bus by the bus inspector, Mr Begley who came to the door of the bus when it arrived at the depot. He also denied that as soon as he got off the bus he ran off in order to avoid meeting the Gardai who he saw were about to arrive at the depot. It was put to him by Mr Gleeson for the defendant that he simply fell as he was running away from the bus, but the plaintiff denied that and reiterated that he fell because there were two men on his back.

15. The plaintiff's partner, Ms. Rochford says that she saw the plaintiff's jacket being pulled by the driver at the depot, and that the driver was trying to keep the plaintiff on the bus until the Gardai arrived. She says that the plaintiff went off the bus and that as he was going into the depot Mr Hetherington jumped on his back, and that another man also was at the plaintiff's back. She says that she did not know if the second man was just trying to get the driver off the plaintiff. She described the second man as being tall with blond hair, but that she could not see this man in the courtroom. She was asked if it might have been the inspector Mr Begley, but she said it was not. She did not actually witness the first man jumping up on the plaintiff's back, presumably as she was getting the child's buggy out from the hold of the bus immediately after she alighted from the bus.

16. Mr Hetherington's evidence has been that when he arrived at the depot, the station inspector, Mr Begley was there since he had rung ahead about the incident on the bus. He says that he opened the door of the bus, that people got off, and that the plaintiff got off and headed over to the entrance of the depot. He denies touching the plaintiff at all when they were on the bus. He says that the plaintiff began to run into the depot, and that he ran after him, and that the plaintiff fell on the floor of the depot cutting his knee very badly. When asked whether the plaintiff had carried him on his back into the depot, Mr Hetherington said that did not happen, and that he had simply pursued the plaintiff into the depot and that he fell on the floor. He recalled that Mr Begley, the inspector was behind him and that he lifted the plaintiff onto a chair and phoned an ambulance. The Gardai also arrived into the depot. He thinks that the plaintiff's partner arrived into the depot a few minutes after the plaintiff had fallen.

17. When cross-examined by Mr Moylan, Mr Hetherington stated that he had pursued the plaintiff because he thought that he would run away, and he wanted to stop him running away before the gardai arrived. He accepted that he had been somewhat annoyed about the beer can incident on the bus, but stated also that the reason for his concerns in that regard were because he did not want the plaintiff to cause injury either to himself or to others on the bus. He said that the plaintiff "seemed to be under the influence of alcohol". He was pressed as to whether he was saying that the plaintiff was "drunk" but he did not go that far. Mr Moylan suggested to him that somebody who had consumed alcohol, and certainly somebody addicted to heroine as the plaintiff was at the time, could not have run as fast as somebody sober. Mr Hetherington also stated that the plaintiff's speech was slurred and that there was a smell of drink from the plaintiff.

18. Mr Moylan asked him also about what had happened after the plaintiff had got off the bus. He stated that when the door of the bus was opened on arrival, Mr Begley was there and told the plaintiff to get off the bus. He says that Mr Begley did not do anything to the plaintiff at that time, that the plaintiff went past Mr Begley towards the depot, and that he (Hetherington) went after the plaintiff. He was pressed as to the manner in which he went after the plaintiff. He denies that he jumped onto his back, and says that he just started to run as he got to the doors of the depot and would not have been too far behind the plaintiff at that point. He would not accept that he was actually running after the plaintiff – simply that he was starting to run or trot after him. I am not entirely clear what is meant by that, but I presume that it is intended to convey that at no time was Mr Hetherington running at full tilt so to speak.

19. He denied jumping on the plaintiff's back, and reiterates that the plaintiff simply fell on the floor, and that Mr Begley, who was behind him, went to the assistance of the plaintiff and lifted him into a chair to await the ambulance. Mr Moylan suggested that the reason why Mr Hetherington had not given any assistance to the plaintiff was that he felt guilty for having caused the injury, but he denied that this was so.

20. Mr Hetherington stated that when the Gardai arrived he showed them the beer spilt on the floor of the bus, as well as the other cans on the bus.

21. Mr Paddy Begley, the station inspector, also gave evidence. He said that he had received a call from Mr Hetherington, and that he had called the Gardai on account of the incident on the bus. He awaited the arrival of the bus to the depot and the arrival of the gardai. He saw passengers get off the bus, and Mr Hetherington identified the plaintiff as being the man who was involved in the incident. He says that he told the plaintiff to get off the bus and that the gardai were arriving. In fact the gardai were only about one

hundred yards away at that time. He recalled seeing the plaintiff running away from the bus in the direction of the depot, with Mr Hetherington in pursuit. There are apparently two sets of double swinging doors into the depot and he saw the two men heading through the first set of doors. He then went into the depot himself and saw the plaintiff on the ground. He did not see any contact occur between the plaintiff and Mr Hetherington, and did not see the plaintiff fall.

22. Garda Hanlon gave evidence of attending at the depot on this occasion in answer to a call. He did not see the plaintiff fall either. The first time he saw the plaintiff was while he was seated in a chair in the depot. He also inspected the bus and saw three or four cans of beer on the bus, and saw that the floor of the bus was wet.

Liability

23. The Court has to determine what happened on this occasion on the basis of probabilities. There is a conflict of evidence as to whether the reason why the plaintiff fell to the ground was because one or even two men jumped on his back while in hot pursuit of him, or whether he simply fell as he ran away from Mr Hetherington in the depot so as to avoid contact with the gardai. The plaintiff is an unreliable historian, as is sometimes referred to. Because of his drug addiction and his other serious health problems his recall of events is not good, and I am certain that he has been inclined to recall exactly what happened in a way which minimises his own culpability in these events, and maximises the involvement of others.

24. The plaintiff was a sick man even in May 2003. He was a weak man through his abuse of drugs and it is beyond doubt that he was under the influence of alcohol on this date to add to his difficulties. There can never have been any prospect of his escaping from the gardai for any length of time. I am sure they would have been well able to locate him quickly after he got off the bus, especially because they were so near the depot when the bus arrived. Nevertheless, Mr Hetherington decided to pursue him rather than run the risk that he might get away before the gardai arrived. He need not have done that. He is a bus driver, and while I fully accept that he acted in the public interest and so that the gardai would be able to interview him arising out of the behaviour on the bus, it must be remembered that the incident on the bus was relatively minor. Nobody was hurt. I am not for one moment condoning the plaintiff's behaviour on the bus. I am sure that it was a most unpleasant and threatening experience for Mr Hetherington who was driving the bus and was responsible for the safety of all his passengers. But there was no obligation upon him to pursue the plaintiff into the depot, especially since the gardai were almost at the depot themselves. I doubt if it is part of his terms of employment that he should act in that way, or that he has any training in that regard.

25. One issue to be determined on the basis of a probability is whether the plaintiff was jumped on in the manner he states, either by one man or two. He says that he was, whereas Mr Hetherington says that he was not. Nobody else witnessed the events once the two men got inside the first set of double doors. Mr Begley says that he saw the plaintiff running towards the depot with the driver running behind him, but he never stated that he saw the driver jump onto the plaintiff's back. The plaintiff on the other hand says that as soon as he got off the bus, the driver jumped onto his back and that he carried the man into the depot in this way. I regard that as improbable. First of all Mr Hetherington says that this did not happen at all, and Mr Begley has stated definitely that he saw Mr Hetherington running towards the plaintiff into the depot. He did not see the plaintiff carrying Mr Hetherington on his back. Secondly, the plaintiff was not in good health at this time. He was about to commence recovery from an addiction to heroine, had Hepatitis C and liver damage, but had also been drinking before and while on the bus. It is improbable in my view that he would have made it as far as beyond the second set of swinging doors in the depot with one man on his back, let alone two. That just seems unlikely to me.

26. However, an important feature of this case is that the plaintiff sustained a very serious and heavy impact to his right knee when he hit the ground. He either stumbled and fell, or he was driven to the ground with some force. That could have happened by Mr Hetherington catching up with the plaintiff and bringing him to the ground, but without him being actually on the plaintiff's back at the time. Mr Hetherington on the other hand says that the plaintiff simply fell himself as he ran away. That is also possible. The report of Mr Reidy, Orthopaedic Surgeon states there was "significant crushing damage to the articular surface of the patella". This is certainly capable of being consistent with what the plaintiff says happened, but might be accounted for by some weakening of the plaintiff's bones generally, caused by his drug habit and associated conditions.

27. I have not had the benefit of any live evidence from an orthopaedic surgeon who might have been able to express a view on what degree of force would be required to sustain the type of injury suffered by this plaintiff to his right knee-cap. That evidence might have suggested that a simple trip and fall while running would be unlikely to cause a fall of such severity that a knee cap would fracture, particularly a light man such as the plaintiff. Such a doctor may have been able to say that as a matter of probability the injury is consistent with a man being upon the plaintiff's back when he fell to the ground, the extra weight causing the force necessary for such an injury to occur. Such a doctor may have been able to say as a matter of probability that even without the added weight of a man on his back, this plaintiff's medical condition and his history of drug abuse rendered his bones more prone to fracture, making it possible for the fracture to happen when he fell. As I say, either party might have called such evidence to assist in establishing what they each say happened, but have not. The Court is left unaided in that regard.

28. The Court cannot resolve the conflict of evidence as to whether Mr Hetherington was on the plaintiff's back or not. But whether he was or not, he was undoubtedly in hot pursuit of the plaintiff when he need not have been. I do not overlook also the fact that the plaintiff was essentially fleeing not from Mr Hetherington but from the gardai who he had every reason to believe would be upon him very quickly. So, to that extent he may have tripped and fallen in any event, even if Mr Hetherington was not in pursuit. But he was and need not have been in such pursuit, and in my view ought not to have been. I am prepared to find that this needless pursuit contributed significantly to the fall of the plaintiff, even though it is likely in my view that the plaintiff is inaccurate in his recollection of the events or may even be exaggerating what occurred. I prefer to rely on faulty recollection, combined with some imaginative reconstruction of the events in his mind over the intervening years. I have not formed the view that he is deliberately telling lies to the Court. I am bearing in mind his poor state of health also.

29. I therefore find that the defendant, its servant or agent was negligent on this occasion, even if from a public spirit point of view he can be commended for unnecessarily pursuing the plaintiff so that he would be available to the arriving gardai. He exposed even himself to some risks in these events.

30. However, It is necessary also to find that the plaintiff has placed himself in the position he found himself in when he alighted from the bus. I have no doubt that his behaviour on the bus was far worse than the rather benign account which he has given himself. I am also satisfied that when he got off the bus he made a run for it, not waiting for his partner and child before running away into the depot in order to escape the attention of the gardai. While it was unnecessary in my view, it was understandable that Mr Hetherington would give chase. But the defendant must be found to have significantly contributed to his own injury whether or not there was somebody on his back, as he claims. I find him liable to the extent of 50%. This would not have happened at all if he had not been acting aggressively and inappropriately on the bus.

The injury

31. The plaintiff suffered a comminuted stellate fracture of his right patella. He was placed in plaster and admitted to hospital. On the following day he was taken to theatre where the fracture was reduced and fixed with two K wires and a tension band wire. Mr Declan Reidy, Consultant Orthopaedic Surgeon reports that this fracture was "highly comminuted i.e. multi-fragmentary and that there was significant crushing damage to the articular surface of the patella." Following removal of the cast, physiotherapy was recommended, but the report states that he attended only once for physiotherapy. The plaintiff stated in evidence that he had been told by doctors not to attend for physiotherapy on account of his liver problems. I do not accept that evidence in the absence of corroboration from any doctor who may have said it.

32. The plaintiff has a 13cm scar on his knee. The fracture has completely healed. He has full extension and full flexion of the knee. There is no swelling remaining and the knee is for all practical purposes the same as his left knee. There is no evidence of arthritis, but according to Mr Reidy's report there is a "high possibility" (which I equate to a probability) that he will develop degenerative changes in the patellofemoral part of his knee joint in the future. I have not been told at what stage in the future this will occur, except that in his latest report in August 2006 Mr Reidy has stated that recent x-rays have shown some irregularity in the articular surface of the knee cap, which he says is indicative of post-traumatic arthritis. Dr Whately for the defendant does not disagree with this arthritis probability.

33. Other symptoms which the plaintiff complains of are linked to his other medical conditions and not to the injury to his knee.

34. He has been recommended physiotherapy to improve this prospect but has not attended for this.

Damages

35. I assess the sum of €35,000 for past pain and suffering. For future pain and suffering related to arthritic changes into the future which are probable, I assess a sum of €25,000. In that regard I take some account of the fact that the plaintiff is not acting on the advice that he should attend for physiotherapy which might ease the ongoing arthritis situation.

36. Allowing for the 50% deduction in respect of contributory negligence, I give judgment in the sum of €30,000, in addition to any special damages which may have been agreed between the parties.