

THE HIGH COURT

Record Number; 2003 No. 12254P

BETWEEN

GERARD CONNOLLY

PLAINTIFF

AND

COLIN O'DONNELL AND EDMUND O'MAHONEY

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 22nd day of November 2005

1. The plaintiff was knocked down shortly before 1am on Saturday 18th May 2003 just as he had commenced to cross O'Connell Street in Sligo. The car which hit him was being driven by the 1st defendant, with the permission of the 2nd defendant who apparently owns a number of taxis, of which this vehicle was one. It is denied however that the 1st defendant was driving the vehicle as a taxi on the occasion, but instead it is claimed that he had been given permission to drive it for his private use that day, and at that hour of the night had decided to take a drive around the town.

2. Prior to the impact with the plaintiff, the car had come from Grattan Street where it had been stopped at traffic lights. When the lights turned green the 1st defendant turned right, into the mouth of O'Connell Street, and just after he entered into O'Connell Street the car came into contact with the plaintiff. There is some dispute as to whether the plaintiff walked into the driver's side of the front of the car from the pavement to the 1st defendant's right, or whether the plaintiff was hit by the front of the vehicle to the driver's side.

3. One way or another the plaintiff was injured, principally by the infliction of a severe gash to his forehead which required some thirteen stitches, but he also received soft tissue injuries to his left leg and left side, as well as some minor injury to his neck. The scar which remains has been a source of great distress and embarrassment to him in the few years since the accident.

4. He also says that he began to seriously abuse alcohol after, and as a result of, the incident, but that he has now ceased abusing alcohol since January 2005. On the other hand the defendants seek to establish that on this night the plaintiff was intoxicated at the time of the accident and was the author of his own misfortune due to his consumption of alcohol, by commencing to cross the street when it was not safe to do so. The defendants have called a witness, Susan Lynch who has stated that she observed the plaintiff behaving dangerously in relation to traffic a few minutes prior to his injury being sustained. But I shall return to that evidence in due course.

5. I do not propose to set out in detail all of the evidence which has been given, but I will refer to some of it and draw conclusions as to fact from all the evidence given.

6. The plaintiff at the time of this accident worked as a trainee nurse and care assistant in Sligo. He says that on this particular Saturday he had spent the afternoon watching football on television at home, and that after his evening meal he then decided to go out into town for the evening at about 7.20pm. He says that during the course of his evening in the Garavogue Bar he consumed six or seven bottles of Budweiser by the time he decided to leave the premises.

7. He did not seem to be certain what time he left the premises, but after cross-examination on the point stated that he left the premises at some time around 11.45pm – 12 midnight. That would suggest that he was in the Garavogue for about four hours.

8. In their replies to particulars dated 22.3.2004, however, the plaintiff's solicitors stated that their client had been in a public house in Sligo for two and a half hours.

9. There is little doubt, having regard to all the evidence which I have heard, that the accident happened sometime between 12.45am and 1am that night, so there is a period of roughly one hour between the time the plaintiff states he left the premises, and the time of the impact. The plaintiff explains that lapse of time by his heading off to a fast food establishment, The Four Lanterns, which is on John Street, not far from the point of impact. He also states that he went from that premises in the direction of an Abrakebabra outlet on Grattan Street so as to get a taxi home, but that he then crossed over Grattan Street and proceeded down O'Connell Street in his search for a taxi, before coming back up to the top of O'Connell Street to the point at which he decided to cross back over O'Connell Street in order to walk home by means of John Street.

10. Even given the circuitous nature of this itinerary, it is impossible to explain in my view, without more, the passage of one hour from the time he left the Garavogue. From the evidence of Mary Clarke there is no doubt that he called to the Four Lanterns for some food because, as will be seen from her evidence, she saw him carrying a Four Lanterns bag just prior to the impact. She also saw him walking up O'Connell Street towards Grattan Street just prior to the impact. So, there is no doubt in my mind that some of what the plaintiff says he did is true, but without going into the evidence in more detail, I am satisfied to say that the plaintiff does not have a complete and/or reliable recollection of his movements that night after he left the Garavogue. I am also satisfied that he was not rendered unconscious by the impact even though he sustained a head injury, and that his unsatisfactory recollection of events is not to be explained by the head injury which he undoubtedly sustained. The reason why I am so satisfied is that immediately after the impact, Garda Boyle was speaking to him while he was still on the ground and the plaintiff had the presence of mind at that point to ask for a phone so that he could call his solicitor. I am satisfied that this was said even though Mary Clarke, a reliable witness in my view, says that she did not hear the plaintiff say that. But the Garda wrote it down in his note-book, albeit not at the particular time, and while I am very dissatisfied with the manner in which Garda Boyle set about the investigation of this case, I am satisfied that he heard the plaintiff request a phone to ring his solicitor. The fact that the plaintiff made that request suggests to me certainly that he was not knocked unconscious even momentarily, and that, more probably he had consumed alcohol to an extent that caused him to decide that the first matter to be attended to was to obtain the services of his solicitor at 1am. In my view it is not the thought of a normally rational, sober and clear-thinking man who has received a nasty facial injury having been hit by a car. In my view, it casts doubt, as a matter of probability, on the plaintiff's assertion in answer to the suggestion put to him in cross-examination that he was inebriated, that when he left the Garavogue he was "OK".

11. That the plaintiff may have been "worse for wear", so to speak, after he left the Garavogue is certainly consistent with some of the evidence of Susan Lynch as well. There are aspects of her involvement in this case which are unsatisfactory, and I may come to some of that, but I am satisfied that she is reliable when she says that during a short period of time immediately prior to this impact, which she observed also, she had seen a man whom she identifies as being the plaintiff behaving in a strange and dangerous manner with traffic on O'Connell Street. She has said that as she drove down O'Connell Street she saw a man on a few occasions jumping out

at traffic causing the drivers, including herself, to swerve and sound their horns to avoid hitting him. He has no recollection of behaving in this fashion and denies that he did so. However I propose to decide this case without reference to the evidence of Ms. Lynch because there are some aspects of her involvement which cause me to hesitate to attach complete reliance on all she has to say, although in fairness and in spite of those reservations I did not conclude that she was unreliable in much of what she has to say. But I am in a position to deal with liability issues without reference to her evidence to a large extent.

Mary Clarke

12. I was impressed by the evidence of Mary Clarke who was at the scene when this accident happened, and it was she who gave very caring and valuable assistance to the plaintiff as he lay on the ground after the accident. But she gave evidence also of what she saw immediately before the plaintiff walked off the pavement in order to cross the street.

13. On that Saturday night she had spent some time in McHughs Bar in Grattan Street beside the Abrakebabra premises already referred to. She had been in company of two friends of hers. They left at about 12.30am. In cross-examination she said that during that evening in McHughs she would have consumed three bottles of Budweiser. She was walking just ahead of her two friends. She crossed over to the other side of Grattan Street and was walking towards O'Connell Street, with the intention of going on to a night-club with her two friends. As she crossed Grattan Street a car stopped to let them cross the street, and the same car stopped to let a taxi pull away from the pavement in Grattan Street. She recalls turning right into O'Connell Street, still slightly ahead of her two friends. She intended to cross O'Connell Street on her route to the night club. As she went down into O'Connell Street there was a telephone kiosk on her left hand side and close to the edge of the pavement. In fact the pavement is wider by a few feet at the area of the kiosk, and becomes narrower again thereafter. As she passed this kiosk she noticed a man coming towards her on the footpath. She said that they were walking towards each other. He then went to cross the street near the kiosk at the same time as she was going to cross. She recalled that he was carrying a Four Lanterns bag in his hand and was walking at a normal pace. She says then that he stepped out onto the street but that she was still on the pavement at that time.

14. The first lane into which he stepped is in fact a parking lane on which traffic does not travel as such, so before the impact he had to pass over this parking lane. As he entered the first of the traffic lanes on this one-way street, she was still on the pavement and she saw him being hit by the car. She had been standing on the pavement with him and he set off to cross the street before she left the pavement. When cross-examined she stated that she had not seen the car as it came around the corner from Grattan Street because she would have had her back to the corner at that time. She also stated that when she saw the car first the plaintiff had already left the pavement and was on the street.

15. She remembers exclaiming and asking that an ambulance be called. She immediately went over to the man and urged him to remain still and calm. She also removed his glasses and put them in his shirt pocket. She saw that there was a lot of blood from the wound on the plaintiff's forehead. She recalled also that there were two Gardai present at the scene.

16. She gave evidence of having seen the plaintiff go up on the bonnet of the car and then land on the road and that he was then on his back and facing down O'Connell Street. She also said that she saw a dent in the car bonnet, and remembers that it was in fact the same car which had stopped to let her cross over Grattan Street a short time previously. When cross-examined she stated that she had seen the car hit the plaintiff's legs and that she was almost certain that it was the front of the taxi which had hit him. She was sure that the plaintiff had not simply walked into the side of the car.

17. She did not recall any sound from the car horn or any braking noise before the impact, and described the impact as being "quite severe".

The plaintiff

18. The plaintiff himself was able to say very little about the actual impact. He said that he had been walking up O'Connell Street towards the kiosk which I have referred to and that he intended to cross the street at that stage in order to walk home via John Street. All he can say is that as he crossed the road he was hit by a car, and that afterwards he was shocked and dazed and that there was bleeding from his head. He remembers some person holding a towel to his head. This would have been Mary Clarke. He also remembers a Garda coming over to him. The plaintiff was cross-examined about his movements prior to the accident, and I have referred to some of that already. But he was asked his statement to the Gardai which was made only two days after the accident. There is no doubt that this statement is extremely brief. The salient part of the statement is as follows:

"On the night of the accident I was in the Four Lanterns in Sligo where I got fish and chips. I then was walking over to the taxi rank outside Abrakebabra on Grattan Street. I was walking on O'Connell Street, Sligo towards Abrakebabra where the taxis are when I was hit by a car. I remember a blonde girl saying 'you'll be ok' and the Gardai the same. I then remember a neck brace being placed on me and being stretchered into an ambulance..."

19. This account bears so little relationship to what undoubtedly happened that it must be further confirmation in my view that the plaintiff had consumed an amount of alcohol sufficient to have clouded his recollection of his movements that night.

Colin O'Donnell (the 1st defendant)

20. He recalls that on this Saturday he had borrowed this car (a taxi/hackney) from the 2nd defendant so that he could bring his family on a day trip to Bundoran. He says that when they got back he had put his children to bed and had his meal and that he then decided to go out in the car into Sligo town. He says that he left his house to go into town at about 12.30am – 12.40am, and that he just intended to cruise around. He said that he was not operating as a taxi that evening, and that he was not looking for fares when the accident happened.

21. He recalls being in the car on Grattan Street and letting some people cross the street ahead of him – presumably Mary Clarke and her friends. He states that after the lights went green he turned right into O'Connell Street – a one-way street, and that he was in first gear travelling at about five miles per hour. He says simply that a body appeared on the bonnet of his car just as he was passing the kiosk to which I have already referred. He says that he was able to stop dead immediately after the impact because he is certain that he was still in first gear. He believes that the plaintiff went up on the bonnet at the front right hand side of the car and that he rolled down off the front of the bonnet onto the road.

22. It was suggested to him under cross-examination that he was on the look-out for a fare when this impact happened and that his story about just going into town to cruise around was not correct, but he was adamant that he was not operating as a taxi or looking for a fare. He says that he was being very observant on the occasion and that the fact is that the plaintiff just appeared out of nowhere in front of the car.

23. As I have said I do not propose relying on the evidence of Susan Lynch in relation to liability as I am able to reach conclusions

without reference to that evidence. I also do not propose to rely at all on the Garda sketch and the measurements taken by Garda Boyle, as it does not assist really.

Conclusions as to liability

24. As far as liability is concerned, I am satisfied firstly that the 1st defendant was travelling very slowly as he entered O'Connell Street from Grattan Street. It does not seem to matter greatly whether he was still in first gear or whether he had just gone into 2nd gear as was suggested. There is no evidence of any speed, except his own estimate of five miles per hour. Mary Clarke said that the impact was 'quite severe' but it is not possible to infer a speed from that remark.

25. I am also satisfied that at a time when Ms. Clarke deemed it prudent to remain on the footpath before commencing to cross the road, the plaintiff stepped out from the pavement, and proceeded across the safe parking lane and into the first traffic lane and straight into the path of the car driven by the first named defendant whom he had not seen prior to the impact. I am satisfied that he did not look to his left before stepping off the pavement because if he had done so he would have had to see the car approaching.

26. However, I am also satisfied that given the speed that the 1st defendant states he was travelling at, and given the evidence that the streets were busy that night, and given also the time of night, the 1st defendant ought to have been keeping a look-out sufficient to have enabled him to have the plaintiff emerge onto the road, especially given the fact that there is a parking or loading bay lane between the footpath itself and the traffic lane in which the 1st defendant was driving. In these circumstances, even if the plaintiff left the pavement suddenly, he had the width of that parking lane to walk before coming into the line of the defendant's vehicle. He ought to have been able to stop in time to avoid him or at least sound his horn in advance of the impact. The fact that he did not do so indicates negligence in my view.

27. But I am satisfied that the defendant must share a significant portion of blame. I have found that he did not look to his left before commencing to cross the road. I am also of the view that this omission and his progressing across the road into the traffic lane was a carelessness for his own safety induced, on the balance of probability, by the consumption of alcohol, and I have already dealt with that aspect of the facts of the case. However the primary responsibility must lie with the plaintiff who was driving a car on the occasion. I find him to have been responsible to the extent of 65%, and that the plaintiff was guilty of contributory negligence to the extent of 35%.

The injuries

28. The plaintiff suffered a nasty gash to his forehead and some other soft tissue type injuries.

29. As far as the cut is concerned, he required fourteen stitches to the mid-forehead, and he had some other facial abrasions and bruising. He is left with a scar which is 6cms in length. Mr McHugh has described the scar as a "hockey shaped ...broad stretched scar...dark in appearance which means that there is some ingrained dirt present and this draws one's attention to it".

30. I have looked closely at the scar, and I have to say that it was less visible than I was expecting to find. Nevertheless I accept that it is visible and to some extent noticeable close-up, but it is not a scar which one could describe as being very disfiguring. But there is no doubt even at this stage that it is visible and permanent and that in all probability no further treatment will assist its appearance. I accept the plaintiff's evidence that for him this scar was a matter of great distress and embarrassment in the years after the accident. I am not prepared to accept however that this injury was the cause of much of the psychological difficulties to which reference has been made, and in particular to his abuse of alcohol. My findings in relation to his sobriety on the occasion would seem to fly in the face of the suggestion that it was only following this accident that he abused alcohol. He did, on the other hand, in his evidence, state that whereas it was only at weekends before the accident that he would drink, he found that afterwards his drinking was daily. But I am not satisfied on the balance of probability that it would be fair and reasonable to conclude that it was the accident which caused him to drink more heavily.

31. He has also stated that he was not sleeping properly after the accident, and that he was very self-conscious about his scar when he was in company, and at work in the hospital. He was prescribed some anti-depressant tablets by Dr Maguire, a consultant psychiatrist. He has now ceased taking these. Again, I do not believe that it is reasonable to attribute all this to the accident. But I will be making some allowance for the fact that the plaintiff suffered embarrassment from his scarring and that it may have contributed to the psychological sequelae of the accident.

32. The plaintiff also suffered some soft tissue injury to his left side, his left leg, left arm and to his neck but these have cleared up and were no significant, except that he says that he still suffers some headache type pain in the neck/back of head area.

33. There has been some controversy in this case about the doctors whom the plaintiff attended in relation to this case. His own GP made no referrals but his solicitor appears to have suggested that he attend certain medical personnel and has obtained reports from these, none of whom were treating doctors, except perhaps that a Dr Cooke stated that as part of the consultation for the purpose of a medico-legal report, he would have given the plaintiff certain advices generally about his being so self-conscious about the scar and possibilities for improving the scar. I do not propose dealing with the controversy which arose with regard to the plaintiff being referred to these personnel by his solicitor. That should perhaps await a case in which those other personnel may have more relevance or impact on the quantum of damages. In the present case the plaintiff simply has a scar and the usual abrasions and pain associated with an impact of this kind, complicated to a limited extent only by the onset of some psychological sequelae. I am happy to deal with these matters without having to pass any further comment or make findings in relation to that controversy.

34. Taking into account the injury to the forehead, the other facial abrasions and bruising, the pain to the left side, arm, knee and neck, and an amount of embarrassment and self-consciousness about the scarring, I assess damages for past pain and suffering in the sum of €45,000. In respect of the future, including the fact that he will have this scar for the remainder of his life, I assess a sum of €15,000, making a *total of €60,000* for general damages. Special damages are agreed at €435, making a total sum of €60,435. Allowing for a deduction of 35% for contributory negligence, I direct that the plaintiff have judgment in the sum of €39,282.75.