

## THE HIGH COURT

[2013 No. 7090 P.]

BETWEEN

ADRIAN O'SULLIVAN

PLAINTIFF

AND

LOUISE NALLY

DEFENDANT

**JUDGMENT of Mr. Justice Barr delivered on the 21st day of April, 2015**

1. This action arises out of a road traffic accident which occurred on 16th August, 2011, on the Old N55 Road leading from Granard, Co. Longford, to Ballinagh, Co. Cavan. The accident happened at approximately 18.30hrs. It was a dry, fine evening. According to the report compiled by Dennis Wood Associates, Consulting Forensic Engineers, the speed limit at the locus was 100kph.
2. The plaintiff's case is that he was driving his BMW K200 motorcycle at a speed of approximately 40mph along this road. He was approaching a fairly sharp bend to his left. He stated that he took up a position slightly to the right of the centre of his lane. This enabled him to have the best view possible of the bend which, for him, was a left hand bend.
3. The plaintiff stated that as he was going around the bend, the defendant's car, which was travelling in the opposite direction, came across the continuous white line in the centre of the road and her wing mirror clipped the plaintiff's right shoulder. He also struck the car on the rear in the area of the rear wheel. This caused the plaintiff to go into a speed wobble, which caused him to cross over to his incorrect side of the road and he headed straight for a van which was travelling behind the defendant's car. The plaintiff lost control of the motorcycle and he fell to the ground. The van had taken evasive action by turning to its left and it ended up in the ditch and hedge at the side of the road.
4. The plaintiff stated that the impact between the defendant's car and his motorcycle happened between telegraph poles no. 1035947 and 1035948 as shown on the map prepared by Tony O'Keeffe and Company Limited, Consulting Forensic Engineers. The plaintiff was adamant that the defendant's car and, in particular, the wing mirror thereon were over on his side of the road at the time of the impact between the wing mirror and his right shoulder. He stated a number of times that the defendant's vehicle appeared out of nowhere and that the accident happened in a split second.
5. The plaintiff was supported in his account by the evidence of Mr. Bernard Donohue, the owner of a garage premises, which was a little further up the road on the plaintiff's side of the road and closer to Ballinagh, almost directly opposite pole no. 48. Mr. Donohue was standing in a portacabin, which was used as an office, at the front of the garage premises. He was standing at a window looking back up the road in the Ballinagh direction. He stated that he recalled seeing the plaintiff approach the garage. The plaintiff was travelling quite slowly. In fact, he recalled commenting to his son, who was in the office, *"If everyone travelled as handy as that we would have no accidents"*. He estimated that the plaintiff was travelling at about 40mph. The plaintiff was in the centre of his lane. Literally seconds later, he heard the crash and ran out to see if he could help.
6. By agreement between the parties, a map and photographs prepared by Tony O'Keeffe and Company Limited on behalf of the defendant, were used at the hearing. On the map, the width of the plaintiff's side of the road was given as 3.24m and the width of the defendant's carriageway was 3.22m. This tallied with the garda sketch of the locus which gave the plaintiff's carriageway as being 10 feet, 8 inches wide and the defendant's carriageway as being 10 feet, 5 inches wide. According to Mr. O'Keeffe's report, the sight line that each of the vehicles would have of the other was 54m.
7. The defendant's account of the accident was at variance with the plaintiff's account in that she denied ever crossing over the centre white line onto the plaintiff's side of the road. The defendant stated that she was driving her Citroen C4 Picasso car on the day in question. She was bringing her mother-in-law, who was 78 years of age, back to a hospital in Monaghan. She stated that she had been travelling at approximately 50/55mph as she came into the bend which, for her, was a right hand bend. She was adamant that she was, at all times, on the correct side of the road. She stated that the plaintiff's motorcycle was travelling too fast for the bend. She stated that his motorcycle drifted across the centre white line and impacted with her driver's side wing mirror.
8. The defendant stated that the plaintiff's motorcycle proceeded to glance off the side of her vehicle and she heard a thud as it struck the rear bumper area. She continued up the road and brought her vehicle to a halt in the vicinity of pole no. 49. She checked that her mother-in-law was all right and she then turned and brought her vehicle over to Mr. Donohue's garage, where she parked at the side of the road.
9. The plaintiff suffered very severe injuries in the accident. He had a fracture to his right scapula and clavicle, bilateral lung contusions, bilateral pneumothorax, spinal fractures to his C2, T10 and L1, and multiple rib fractures. He required surgical intervention on his right shoulder and back. He went on to develop complex musculoskeletal pain, an ongoing reversible airflow obstruction consistent with asthmatic bronchitis and a reactive depression for which he required counselling. In the days and weeks following the accident, he experienced excruciating pain in all areas of his body. He described living in a *"bubble of pain"*, for which he had to take up to 40 painkillers each day. This is relevant because on 21st January, 2012, the plaintiff made a cautioned statement to Garda Michael Kelly. That statement was in the following terms:-

*"On 16/8/11 I was travelling from Cavan to Longford. The road conditions were very good, it was like it was a new road, very good conditions for bike riding. I was riding motorbike 07-D-90315. I was coming into Granard Village, coming towards a series of bends, road surface looked to be very good, very dry weather, recently done. I was coming up to a bend going around to the left. I can remember seeing a van in the distance and I can also remember seeing a sign on the road saying that there was a series of upcoming bends. The next thing I remember is jamming on the brakes. After*

*that, all I can remember is waking up on the side of the road, lying on my right shoulder. I was then rushed to Cavan Hospital and then transferred on to the Mater Hospital. As for the accident itself, I can't remember anything else. From the accident, I suffered a broken back, broken ribs, broken collarbone, deflated lungs and when I woke up first on the road I could not move my body. This statement has been read over to myself and I do not want to make any additions or alterations to this statement."*

10. It was put to the plaintiff that he had not made any mention in the statement of the defendant crossing over the white line and coming onto his side of the carriageway. The plaintiff stated that he had been in severe pain that day, hence he had just made a very short statement, as his main objective was to get back to bed as quickly as possible. He stated that he thought that he had said to the garda that the defendant's vehicle had come across onto his side of the road.

11. The plaintiff's account of making this statement was supported by the evidence of his wife, Collette O'Sullivan. She stated that in January 2012, her husband had only just been discharged from hospital. In addition to his injuries, he had contracted MRSA while in hospital. He had lost three stone in weight. He was also suffering from depression.

12. She recalled Garda Kelly taking the statement. It had been taken in the form of questions and answers. The statement had been taken in the kitchen of her home. An additional complication was the fact that one of the plaintiff's children was also quite ill at the time. She recalled her husband saying that he was hit by the wing mirror of the car, which came out of nowhere. She recalled her husband saying this a number of times. He repeatedly stated that he got side swiped by the mirror.

13. Garda Michael Kelly gave evidence in relation to the taking of the statement. He said that he was obliging a colleague with the investigation of the accident as he, Garda Kelly, was stationed in the area where the plaintiff lived. He went out to the plaintiff's house to take the statement. He administered the usual caution at the commencement of the statement. Garda Kelly stated that the plaintiff told him what happened that day and he wrote it down as the plaintiff's statement. At the conclusion of the statement, he read the statement over to the plaintiff and the plaintiff signed the statement. He stated that it was an accurate account of what the plaintiff had told him on that occasion. He further stated that the plaintiff did not tell him that the accident happened on his side of the road.

14. In cross examination, Garda Kelly accepted that the plaintiff was very badly injured in the accident. He accepted that the plaintiff may well have been in pain on the occasion when the statement was taken. He was not aware that the plaintiff was taking a very large amount of painkillers at the time. However, he repeated that the plaintiff did not mention to him that the wing mirror had struck him.

15. I accept the evidence of Garda Kelly that he took down what the plaintiff told him on that occasion. I am satisfied that the plaintiff did not tell Garda Kelly that the accident happened on his side of the road, nor that he had been struck by the defendant's wing mirror. If these things had been said by the plaintiff, they would have been recorded by Garda Kelly.

16. Evidence was also given by Garda Gerry McGee who was stationed in Cavan Garda Station. He was notified of the accident and arrived at the locus at approximately 19.05hrs. It was a dry evening. At the scene he saw the white van in the hedge near the telegraph pole. There were skid marks on the road caused by the van. There were no skid marks caused by either the plaintiff's or defendant's vehicles. The defendant's car was on the right hand side of the road, parked in front of the garage. He spoke to the defendant at the scene of the accident. She stated that the motorcycle had come over the white line and collided into her car. She stated that the motorcycle had drifted onto her side of the road.

17. Garda McGee stated that he spoke to the driver and passenger in the van, who gave a similar story that the motorcycle had crossed over the white line. Garda McGee stated that he could not get a statement from the plaintiff at the scene, as he was too badly injured.

18. Garda McGee drew up a sketch of the scene of the accident. Both lanes were approximately 10 feet wide, which would enable the vehicles to pass each other in safety. He got a statement from Mr. Brady, the driver of the van. He had been travelling about 50mph. The defendant made the allegation that the plaintiff was travelling "too fast" at the time of the accident. She did not say that the plaintiff had tried to straighten up his motorcycle.

19. Garda McGee stated that coming from the Granard direction, the defendant would have travelled around a series of bends, then a small straight section and then the bend where the accident happened. There was a slight slope in the road, coming to this bend from the Ballinagh direction.

20. It was put to the plaintiff in cross examination that he had been prosecuted in the District Court arising out of the accident and that the charge had been struck out on his agreeing to pay €300 to the charity, Cystic Fibrosis. The plaintiff stated that he had been prosecuted in the District Court but that the summons had been struck out and that there was no conviction. He was adamant that he never admitted crossing the white line.

21. There was no evidence called by the defendant in relation to whatever criminal proceedings there may have been in the District Court. In the circumstances, I have not had regard to this aspect when considering liability in this case.

22. It was also put to the plaintiff that the defendant had claimed for the damage to her car from her own insurers. They had paid the claim in the sum of approximately €3,500 and had claimed this amount from the plaintiff's insurers, who had paid over the entire claim to the defendant's insurers. The plaintiff stated that he could not comment on this, as he had changed insurers after the accident. In the absence of proof of the alleged payment by the plaintiff's insurers to the defendant's insurers, I have not taken this aspect into account in my deliberations.

23. It was put to the plaintiff that he had told the psychologist, Mr. Ryan O'Neill, who he saw on 24th August, 2013, the following in relation to the accident:-

*"He recalled that he has always been very aware of the context of the accident but has never been able to recall the impact."*

24. The plaintiff stated that what he meant by that was that he did not recall what impact it was that had broken his back. He did not know whether he hit the ground and the van, or just the ground. However, he stated that he was very clear in relation to the impact between his motorcycle and the defendant's car. He stated that there were some errors in Mr. O'Neill's report, such as the statement that the plaintiff had been travelling from Kerry on the day of the accident. This was not correct. The plaintiff said that he

had told Mr. O'Neill that he had, in the past, gone on motorcycle trips around Kerry. Furthermore, the plaintiff stated that in other reports from other doctors, a correct account of the accident had been given by the plaintiff.

25. The defendant made a cautioned statement to the gardaí on 26th September, 2011. It was in the following terms:-

*"Q. Do you remember the 16/8/11 at Corduff, Ballinagh, Co. Cavan, can you tell me what happened?"*

*A. At approximately 18.30pm, myself and my mother in law, Josephine Nally were travelling towards Monaghan. I was driving a C4 Citroen, silver in colour, registration 11-MN-457. As I approached Corduff corner, a motorcyclist coming in the opposition direction was coming too fast and could not get the corner and hit my side mirror on the driver's side and scraped along the side and back of my car. When I say the back of my car, I mean the bumper of my car. The motorcyclist continued on and hit another white van which was also on my side of the road. I was on the left side of the road along with the white van. The motorcyclist was coming on the right but when he hit my car, he was on my side of the road. I know the white van had to swerve not to hit the motorcyclist straight on. I saw the motorcyclist coming and I knew he was not going to make the corner.*

*Q. Were you or your mother in law injured in the accident?*

*A. Neither of us were injured in the accident.*

*Q. Have you had your car repaired?*

*A. Yes I have now. It cost me €3,500 approximately.*

*I have had this cautioned statement read over to me and it is correct, I do not want to make any changes to this."*

26. Evidence was given by Mr. Damien Brady, the driver of the white van, which had been travelling behind the defendant's car. He stated that it had been a dry evening. He had been driving on his side of the road in the centre of the left hand carriageway. The defendant's car was in front of him and he had been travelling behind her for about 10 minutes. There was nothing out of the ordinary about her driving. He stated that he was travelling at approximately 50mph.

27. Mr. Brady stated that he was behind the defendant's car as the car was going around the corner. He saw the plaintiff's motorcycle drift across the white line by approximately 1ft and there collide with the defendant's car. The bike then came towards him and he pulled in his van onto the ditch at the left. He stated that the defendant's car was definitely 10-15 inches to the left of the white line. He stated that the plaintiff crossed the white line; he had no doubt about that. He stated that the plaintiff collided with the defendant on the left side of the road.

28. In cross examination, he stated that he was looking out in front of him as he was approaching the bend. He slowed down and he saw the motorcycle coming across the road. He was 15m behind the car. The car was 12-15 inches in on its correct side of the white line.

29. He did not think that the plaintiff was travelling fast. He thought that the plaintiff was travelling at normal speed. He did not see the motorcycle coming into the bend. He stated that he was behind the defendant and saw the plaintiff hit the mirror and side of the defendant's car and then headed towards him. After the impact, he was facing into the field. He stated that the mirror on the defendant's car would project out about 4 inches. He stated that she was 12 inches on the left side of the road. There was a good space between the defendant's car and the white line. From her wheel to the white line was about 12 inches.

30. Evidence was also given by the passenger in the van, Mr. Declan Galligan. He stated that the defendant's car had been in front of them for approximately 10 minutes. The defendant was driving normally. He saw the motorcycle and the car a split second before the bike hit the car. It was about 20 yards in front of them. Her wheel was about 1ft to the correct side of the road. He saw the motorcycle coming across the white line into the side of the defendant's car. The defendant's car was on its correct side of the road.

31. In cross examination, he stated that he did not allege that the plaintiff had been going fast. The defendant's car was about 20 yards in front of them. Mr. Brady slowed down coming into the bend. The accident happened in a split second. He stated that the wheel of the defendant's car was 12 inches on the correct side of the road. The mirror projected out from the vehicle about 4 inches. He stated that he saw the wheels of the car on her correct side of the road.

## **Conclusions**

32. In this case there is a stark conflict between the parties as to the side of the road on which the accident occurred. The plaintiff and the defendant are each adamant that the accident occurred on their side of the road. There were no skid marks left by either of the vehicles, so the point of impact could not be determined from an examination of the roadway. Independent evidence was given by Mr Donohue to the effect that prior to the impact, the plaintiff had been travelling slowly in the centre of his carriageway.

33. In reaching my decision, I have attached some significance to the fact that when the plaintiff made his statement to the Gardaí, some five months after the accident, he did not mention that the defendant had come over onto his side of the road; nor did he state that her wing mirror had hit him on the shoulder. While I accept that the plaintiff may well have been in considerable pain when giving that statement, he was still able to give a reasonably detailed account to Garda Kelly. It is noteworthy that he did not blame the defendant when he made that statement in January 2012.

34. In contrast, the defenant has always maintained that the plaintiff came over onto her side of the road and there collided with her driver's side wing mirror. She stated this at the scene to Garda McGee. She repeated this account in her Garda statement taken on 26th September, 2011. She gave the same account in her evidence at the trial of the action.

35. The only independent evidence of the actual collision was the evidence given by Mr. Brady and Mr. Galligan. They were in a good position to see the accident as they were approximately 20m behind the defendant's car. Each of them was very clear that the plaintiff's motorcycle drifted across the white line and went onto the defendant's side of the road. I accept their evidence as an honest and accurate account of what happened.

36. I find that this accident occurred due to the fact that the plaintiff's motorcycle crossed slightly over the centre white line and there made contact with the wing mirror on the defendant's car. The plaintiff's motorcycle travelled down the side of the defendant's car and made a secondary impact with the rear bumper area of the car. He then went into a speed wobble and came off his

motorcycle.

37. I am satisfied that at all material times, the defendant's car was on its correct side of the road. It was travelling within the speed limit for the area. It was travelling close to the white line in the centre of the road, but did not cross over it. In the circumstances, liability for causation of the accident must rest with the plaintiff. Accordingly, I dismiss the plaintiff's action against the defendant.