

THE HIGH COURT**2011 no. 5498 P****Between****LISA LUDLOW****PLAINTIFF****AND****DARREN UNSWORTH and ZURICH INSURANCE Plc****DEFENDANTS****JUDGMENT of Mr Justice Ryan delivered the 12th April, 2013**

This case concerns a road traffic accident that occurred late on the night of Friday the 8th May, 2009. The plaintiff claims that she was a passenger in her own car, a Mazda 6, that crashed into the wall of Bettystown Golf Club. She says that the driver was Darren Unsworth, the first defendant. Her car was insured with Zurich Insurance, the second defendant, but Mr. Unsworth was not a named driver. In those circumstances, the insurance company denied that it had any liability and the plaintiff counters that contention by citing the first, second and third Directives of the EEC/EC/EU which, it is contended, outlaw any exemption that would exclude liability for injury to a passenger. The fact that the passenger happens to be the owner of the car is of no relevance, it is submitted. Mr. Anthony Collins SC, for the plaintiff, went to a good deal of trouble in opening the case to develop this argument but I do not think that it needs to detain us long. My view, in a word, is that the submissions made by Mr. Collins are essentially correct in their application to the case: any exclusion contained in the policy of insurance issued by Zurich that excluded the entitlement of a passenger (whether owner or otherwise) is void under the Directives.

There are UK cases that of assistance but Counsel for the insurer, Mr. Kieran Fleck SC did not seek to contradict the argument put forward by Mr. Collins in relation to the exclusion of any purported exemption in the policy.

The essential questions in the case are factual. The plaintiff is a young and successful woman who is now living in England. At the time of this accident - Friday night, 8th May, 2009- she was working in Finglas and living in Balbriggan. She had in the recent past had a relationship with a man named Terry Treacy, who lived in Bettystown and who was a named driver on her policy with Zurich Insurance for her Mazda 6 car. She was still friendly with Mr. Treacy and after work on this Friday evening she drove over to Bettystown and collected him and drove to the Neptune Pub. She parked nearby. She had three or four pints of Coors Light in the pub and Terry Treacy had the same or a greater number of pints. She had started work at 8.00 am and finished at 5.00 pm. She got to Bettystown about 5.50 pm and they arrived, she and Terry, at the Neptune Bar at around 6.30. They left the bar at around 9.30 or 9.45.

Ms. Ludlow said that she would not drive when she was under the influence of drink, as she was on this occasion. Neither would she have been happy for Mr. Treacy to drive being as how he was in the same condition. In other or normal circumstances, she would have left the car where it was parked in Bettystown and they would have walked home, which in this case was back to Mr. Treacy's house that was located in an estate whose entrance is opposite the Golf Club in Bettystown.

When the two left the pub, Ms. Ludlow said that they bumped into an acquaintance of theirs named Darren Unsworth. He appeared to have been doing some shopping - he was coming from the shops. They had met him previously in the Neptune Bar and that had happened some weeks before. Terry or both of them invited Mr. Unsworth back to Terry's house. Ms. Ludlow said that she vaguely remembered giving the keys of her car to Mr. Unsworth who was going to drive them back to Terry's. Her last recollection before the accident was of having her hand on the passenger door of the car. Her next memory was getting out of the car after the accident, but she had no recollection of what went on in between.

There is no doubt that there was an accident. The car was found crashed into the wall of the golf club which is a low perimeter wall set back a little from the road. From the damage it is clear that the car impacted more or less head on into the wall and also rotated so that rear near (passenger) side also impacted with the wall. The car was found facing in the direction of Bettystown and hard by the wall.

A crowd quickly gathered and emergency services were alerted. The ambulance arrived within 3 or 4 minutes and the gardai momentarily after that. There was a late committee meeting going on the golf club on the second floor and two of the officers came down to the scene approaching it from the inside that is from the golf course side, but when they saw that the situation was under control and the plaintiff was being attended to they withdrew.

The plaintiff, Ms. Ludlow was sitting in the passenger seat of the car and the door was open at the time when the ambulance got there.

The ambulance brought Ms. Ludlow to Our Lady of Lourdes Hospital, Drogheda. There is an ambulance document that records the relevant information as noted by the crew. There is also a triage note that followed her initial assessment in the hospital.

There was no sign of anyone else at the scene of the accident. No Terry Treacy and no Darren Unsworth. The plaintiff says that she has no recollection of the two men departing the scene. She simply does not remember what happened. Her first recollection as I have said is of being in the car after the accident. She did agree that she had got out of the car and looked at its condition and sat back in.

She said that she always wore her seatbelt, that it was a routine matter for her anytime she got into a car.

The plaintiff said she was in a wheelchair at Drogheda Hospital. She just knew that she had to get out of there. She asked the hospital reception to phone Mr. Treacy and she spoke to him and he said that he would send a taxi. She took the taxi and the plaintiff

said that she next remembers waking up in her mother and father's home in Donnycarney the next morning. She did not remember how she got to Donnycarney, but just remembered waking up.

At this point the evidence of the Gardaí is relevant. Garda Semple and Garda Teefy attended at the scene of the road traffic accident sometime before midnight on Friday night the 8th May, 2009. The same officers responded to a call to the station at 01.40 am on Saturday morning, 9th May reporting a domestic violence incident at the home of Terence Treacy in which the injured party was Lisa Ludlow. On arrival at the address, Garda Semple spoke to the plaintiff Ms. Ludlow but she was not willing to make a statement and that was the end of the matter.

It is obvious therefore that the plaintiff was taken from the scene of the accident to Drogheda Hospital and from there she went by taxi to Mr. Treacy's house in Bettystown, where there was a domestic incident resulting in the call that Ms. Ludlow made to the Garda Station. However, when the Gardaí got there she was not willing to pursue the matter by making a statement. Therefore, she must have gone to her parents in Donnycarney, not from Drogheda Hospital but from Mr Treacy's home. That appears to be consistent with the evidence of the plaintiffs father that he went to bed around 3.00 am and was not aware of any banging on the door or the arrival of his daughter Lisa, therefore he must have been asleep at the time and that would have taken some little time. Mrs. Rose Ludlow, the plaintiff's mother, gave evidence that it was in fact around 4.00 am when Lisa arrived and began banging on the door and Mrs. Ludlow paid for the taxi.

The plaintiff's father was due to go to work in Dublin Bus control centre on Saturday and he got up about 10.00 am, at which time he learned of Lisa's arrival from his wife, Rose. They got Lisa up and asked her what had happened. Mr. Ludlow then set about trying to find out where the car was and they established that it was in Drogheda where it had been taken from the scene. They drove out there and Lisa collected her handbag from the car. Then the trio headed back to Bettystown to Terry's house in Brabazon Grove. At the scene they met Terry's mother and his sister and the sister's husband, who had been knocking at the door trying to get in. This was sometime around midday/1.00 on the Saturday. It seems that Terry's family members were worried and they contacted the Gardaí and Fire Brigade who arrived at the scene and the Fire Brigade made their way in by breaking a window and getting access to the front door lock. The Fire Brigade went upstairs and discovered Terry lying on his bed. He came downstairs and the emergency services left and the visiting party sat down in the kitchen and had a cup of tea. Terry claimed not to remember what had happened in the accident or how it had come about, just as Lisa did.

It seems obvious that Terry's family knew something of what had gone on and were worried enough to send for the Gardaí and the Fire Brigade, but how they knew that or suspected anything is entirely unknown.

Lisa stayed in Donnycarney over the weekend giving no more relevant information and, significantly, not mentioning Darren Unsworth. The first mention according to the Ludlows that she made was at the earliest on Monday and possibly even later perhaps Tuesday or so. Lisa stayed in Donnycarney over the weekend, but on Monday she inexplicably- perhaps- went back, not to her home in Balbriggan, but to Terry Treacy's home in Bettystown where she stayed for the next three weeks while she was recuperating and while she remained out of work. Thus, the first mention of Unsworth was made after the plaintiff resumed living with Terry Treacy in Bettystown.

In June 2009 on an occasion when she made a statement, Ms. Ludlow handed to Garda Semple a piece of paper with the name Darren Unsworth, Mullingar, Co. Westmeath and a number which appears to be in the form of an English mobile phone number. The Gardaí were unable to establish the existence or whereabouts of any such person and there was no answer at the number.

The plaintiff sent an email to the golf club seeking witnesses to the accident and a notice was put up but nothing came of it.

Terry Treacy did not give evidence. Mr. Collins said that his solicitor had issued a subpoena to Mr. Treacy, but the latter said he was not going to come to court because he would jeopardise his job. Mr. Collins did not apply for a Bench Warrant to bring him.

Mr. Fleck SC, for the second defendant, says that the case is all about credibility. He submitted that the plaintiff's account of the whole episode is riddled with inconsistency and with things that are incredible to such an extent as to make it impossible to rely on any of her evidence. He also argues that as a matter of public policy somebody who tells so many lies as he alleges Ms. Ludlow has done is not entitled to be awarded any compensation. That is the essence of his argument. He cited the judgment of O'Sullivan J. in *Quinn v MWHB* and another, unreported, 14th March 2003 in support but I do not find that authority to be of assistance in this case.

There is also section 26 of the Civil Liability and Courts Act 2004, which mandates the dismissal of the action of a plaintiff in a personal injuries action who knowingly gives evidence that is false or misleading in any material respect unless that would result in specified injustice being done. The courts have held that the intention of the measure is that a plaintiff who is otherwise deserving of success to the extent justified by truthful evidence nevertheless suffers dismissal by knowingly adducing false evidence in any material respect. The mere fact that the plaintiff would have succeeded to some extent is not injustice in the meaning of the provision.

Was Darren Unsworth driving the plaintiff's car at the time of the accident? Indeed, is there such a person? The plaintiffs account of meeting him casually on the street, having previously made his acquaintance in one encounter in the public house, inviting him back or being with Terry Treacy who invited him back to the Treacy home, giving Mr. Unsworth the keys of her car to drive them home and Mr. Unsworth then disappearing after the crash is very improbable. When further details are added such as that Mr. Unsworth had to get out of the car, collecting his shopping as he went and make away before anyone arrived - that adds to the difficulty of giving credulity to this account. The delay by the plaintiff in informing her parents of the central role of this third party and the failure to mention it to the Gardaí until much later make the story even more unbelievable. The fact that a third party was driving would have exonerated Terry Treacy from responsibility for the collision and perhaps mitigated his blame for abandoning the plaintiff to her fate at the scene. And it would indeed have enabled him to stand by the plaintiff without fear of prosecution for driving offences.

On the question of Mr. Unsworth and whether he was driving the car and whether he actually exists, Mr. Collins S.C. submits that, without making any admission or even acknowledging that there is any validity in the proposition, he contends that it does not matter once the court is satisfied that the plaintiff Ms. Ludlow was not herself driving the car. In other words, it does not matter who was driving the car as long as she was not doing so. The only circumstance in which the plaintiff would be disentitled to compensation, according to Mr. Collins, is if it could be shown that Ms. Ludlow was herself the driver.

I do not believe the plaintiff's evidence about Darren Unsworth driving the car. It is possible that some such person exists but I cannot accept the plaintiff's evidence as to his role. There is no other choice in this matter between believing her and not believing her but the situation is that she has to establish her case on the balance of probabilities. In this respect, as to the fact the Mr. Unsworth was driving the car, I find that she has not established her case on the balance of probabilities. I do not believe that the

plaintiff has such a memory loss as she asserts. I appreciate that she had a head injury and that she could have retrograde amnesia. However, she got out of the car and looked at the damage and then got back into the car. She was taken to Our Lady's Hospital in Drogheda. She was questioned by the ambulance crew in a normal way, and they filled out their standard form. It recorded that she was complaining of soreness/injury over the left shoulder and at the right hip region. That would of course make sense if she was in the passenger seat and wearing a seat belt at a time when the vehicle was involved in a significant collision, which it was. The ambulance crew also noted that she had no obvious signs of injury. They would have noticed particularly, in my opinion, if she had had a black eye, which she was later noticed to have. Similarly, I think with the triage nurse at Drogheda.

The plaintiff remembered being in a wheelchair in Drogheda and deciding that she had to get out of there. She phoned Terry Treacy and was obviously able to get into the taxi that he arranged to come to the hospital to collect her. She was also able to telephone the Gardaí and have a conversation with Garda Semple when they arrived in response to her complaint about the incident of domestic violence with Mr. Treacy.

It is likely that she phoned the taxi that brought her to Donnycarney.

Was the plaintiff driving the car? I do not believe this is the case. There is firstly some evidence in the ambulance record of the plaintiff's complaints as to soreness at two locations that are consistent with wearing a passenger's side seat belt. That is particularly the case with the left shoulder complaint. Second, she had an injury to the left side of her head in the form of a skull fracture and obviously that is much more likely if she was sitting in the passenger seat where her head would have been closer to the window or doorframe on that side. Thirdly, she sustained whiplash type injuries which may also be considered consistent with the wearing of a seatbelt, although complicated in this instance by the fact that the two airbags in the front of the car deployed in the accident. More generally, I suspect that the injuries would have been perhaps more severe if she was not wearing a seatbelt or at any rate they might have been different including perhaps a chest injury on hitting the steering wheel, but again this is complicated by the airbag deployment and one has to notice that if there was somebody else driving the car then he was able to walk away from it and indeed make his escape very quickly after the accident occurred. On balance, it seems to me that the evidence points to the plaintiff being in the passenger seat of the car and it also indicates that she was wearing a seatbelt.

The probability is that Terence Treacy was driving the car and that Darren Unsworth has nothing to do with this accident. If such person exists, his connection with the accident is very improbable. I think that the plaintiff was endeavouring to protect Mr. Treacy for whatever reason and that is why she claimed to have such an absence of memory and introduced this other alleged casual acquaintance of theirs.

I am also disbelieving of the plaintiff's evidence that she could not and cannot remember any of the events that happened after the accident except the tiny islands of recollection that she described. I am particularly unimpressed by the fact that she did not describe having the row with Mr. Treacy that led to her phone call to the Gardaí complaining of an incident of domestic violence and which happened at 1.40 am.

My findings on the balance of probabilities are as follows:-

- (a) The fact that the car crashed into the wall is prima facie evidence that it was driven negligently;
- (b) In the circumstances, it is reasonable to infer that alcohol consumption was probably the major cause of the collision;
- (c) The plaintiff was a front seat passenger;
- (d) The plaintiff handed over the keys of her car to Terry Treacy, a person who was intoxicated and whose driving capacity was seriously impaired;
- (e) The plaintiff's account of the involvement of Darren Unsworth was introduced in order to protect Terry Treacy;

My findings inevitably give rise to consideration of the public policy issue raised by Mr Fleck and to the application of section 26. The evidence the plaintiff gave as to Darren Unsworth was obviously material to the case. So was what happened later at Treacy's home but that is arguably distinguishable because less directly material and the issue is amnesia not express falsity. I will consider that presently. For the reasons I have given, I have rejected the plaintiff's evidence as to the driver of the car. My finding is that Terry Treacy was driving. That means that the plaintiff gave false evidence. She did so to protect Treacy.

The plaintiff has to prove her case. It is true that it is sufficient for her to establish that she was injured when travelling as a passenger and the identity of the driver does not determine liability. But a plaintiff cannot play fast and loose with the truth, cannot tell some truth but not the whole of it, cannot tell a mixture of lies and truth and leave it to the court to try to winkle out the good from the bad. The circumstances of the case are material. They include the events before the critical incident in which the injuries were sustained as well as what happened after.

I do not accept that the plaintiff cannot remember what occurred at Treacy's house early on Saturday morning. She called the Gardaí from there because of an altercation in which she complained that she was the victim and Treacy was the perpetrator. This was obviously a serious incident but the plaintiff claimed she could not recall anything about it. There was so much circumstantial detail about this time including:- the incident itself, the conversation with Garda Semple, the decision not to proceed with the complaint, the organising and taking of the second taxi ride of the night - a long drive to Donnycarney; and the fact that the plaintiff was necessarily an active participant --all these features make it impossible to believe that the plaintiff is telling the truth when she denies any memory of those quite momentous events.

The domestic incident is relevant to the injuries that the plaintiff sustained. She did not have a black eye when the ambulance crew brought her to hospital. The triage nurse did not record such an injury. But the plaintiff did have that facial feature when she got to Donnycarney at 4 am. It is possible as Mr Pidgeon said that the skull fracture on the left side of the plaintiff's head could have resulted in an orbital haematoma but that does not make the domestic episode irrelevant.

The plaintiff in her evidence to the court told some of the truth but stopped substantially short of telling the whole truth and nothing but the truth.

In light of my findings, I must conclude that the plaintiff knowingly gave evidence that was false and/or misleading in material respects. Section 26(1) mandates the dismissal of the claim unless there is specific injustice, which is not present.

