Neutral Citation: [2014] IEHC 436

THE HIGH COURT

[2011 No. 9238 P]

BETWEEN

MICHAEL TEVLIN

PLAINTIFF

AND

KEVIN McARDLE AND MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Cross delivered the 6th day of October 2014

1. The plaintiff is a self-qualified plasterer, born on 20th March, 1979, who, on 27th December 2010, suffered significant injuries when travelling as a passenger in a motor vehicle being driven and owned by the first named defendant which was uninsured at the time.

2. The circumstances and the results of the accident were truly horrific and will be referred to subsequently.

3. The plaintiff initiated proceedings against both the defendants and no appearance was entered on behalf of the first named defendant who, at the time of this case, was serving a prison sentence, as a result of his driving causing this accident. The plaintiff, at the commencement of the trial, applied for and obtained judgment in default of appearance as against the first named defendant.

4. The plaintiff's claim against the second named defendant was for a declaration that they were obliged to satisfy in full any judgment, or part of any judgment, remaining unsatisfied with 28 days after date of which judgment was entered against the first named defendant, pursuant to the Motor Insurers of Ireland Agreement entered into on 29th January, 2009.

5. The defence of the second named defendant put a number of matters in issue and pleaded as against the plaintiff:

> (a) that the plaintiff knew that there was not in force an approved policy of insurance in respect of the use of the motor vehicle;
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> (b) that he travelled in the first named defendant's vehicle, knowing that the first named defendant ought not to have driven the vehicle following the consumption of alcohol, and that the plaintiff consented to voluntarily enter into the vehicle which caused the damage or injury.

6. In relation the latter plea, counsel on behalf of the second named defendant stated at the commencement of the trial, that this was not just a plea in contributory negligence, but they were going to make the case that the plaintiff was not owed any duty of care by the defendant, given his conduct, and that the plaintiff, in effect, abdicated his own safety.

7. Contributory negligence was also alleged by the failure of the plaintiff to wear a seat belt.

8. Counsel for the plaintiff countered the first and second named defendants' opening submissions by stating that under the MIB agreement, the Bureau was obliged to indemnify any unsatisfied judgment after 28 days and could not maintain any defence other than the issue of the knowledge of the uninsured nature of the driving at para. 5(a) above. As will be seen subsequently, this submission was abandoned later by the plaintiff, and the second named defendant conceded that the plaintiff did not know that there was no policy of insurance in placed at the time, and, accordingly, the only issues *vis-à-vis* the second named defendant were:

> (a) whether the second named defendant could escape any liability due to the conduct of the plaintiff and
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> (b) whether or to what extent any damages of the plaintiff could be reduced for contributory negligence due to the consumption of alcohol and the seat belt issue.

The Issue of the First Named Defendant

9. The plaintiff is entitled to damages to be assessed in full against the first named defendant; he was travelling as a back seat passenger and he was not wearing a seatbelt. The accident was apparently a high speed, head-on collision.

10. The plaintiff sustained fractures of his pelvis, sternum and ribs and a severe head injury. He was taken initially to Drogheda Hospital and subsequently transferred to Tallaght Hospital. He has no recollection of the events of one week prior to the accident and some weeks thereafter. He was treated with a brace for a number of months. He had symptoms of Depression and was treated by his General Practitioner in that regard. It subsequently transpired that the plaintiff was not suffering from Depression, but had significant behavioural problems and a personality change. He suffered significant diminishment of his interests in the world, difficulties in interpersonal relationships (a long-term relationship with his girlfriend was terminated by her). He suffered a cognitive impairment and the accident had a severe affect on his memory.

11. The plaintiff is an honest witness who tended to minimise his difficulties and gives the impression that he is "grand" and attributes any difficulties in relation to work or otherwise to his physical disabilities. I accept that the plaintiff is incorrect in this belief and that his main continuing difficulties result from his head and brain injury.

12. I have had the benefit of hearing and the reports of Dr. John Owens, psychiatrist, Ms. Alice Gormley, occupational therapist, Ms. Susan Tomlin, occupational therapist and vocational evaluator, Mr. Donnacha O'Brien, consultant neuro surgeon and from Prof.

Michael Hutchinson, consultant neurologist on behalf of the defendant. I feel that Professor Hutchinson was overly reassured by the plaintiff's own optimistic account of his disabilities.

13. The plaintiff was not a person with any educational qualifications. He always had a poor level of literacy. He left school prior to doing his Junior Cert in order to take up employment. He worked as a plasterer and his former employer said he was a very good plasterer, though he was not formally qualified. It is true to say that prior to the accident, even during the height of the booming economy, the plaintiff did not work fulltime and seemed to have had a rather casual approach to employment.

14. The plaintiff was expertly managed in hospital and his physical injuries, apart from his brain/psychological problems improved though the plaintiff is left with low back pain which he believes renders him incapable of doing his pre-accident plastering. I accept that the plaintiff is not fit for his pre-accident work, or indeed any meaningful work in the open economy, but I find that this unfitness is due to a combination of his back and head-related injuries. The most serious limiting factor is the head-related injury.

15. The plaintiff, on admission to hospital, had a Glasgow Como scale of 3/15 and was not obeying commands. He was incubated and ventilated. He was then transferred to Tallaght Hospital where he was treated for his "poly-trauma". He developed a respiratory tract infection while in the ICU in Drogheda, in which he resided until the 10th January, 2011. The plaintiff has made an improvement, however, I accept the evidence of Theresa Burke, consultant neuro psychologist, when she stated:

> "The prognosis for this man, in terms of functional limitations will, in my opinion, depend on the extent to which he can access and engage with rehabilitation services. However, based on the time that has elapsed since the accident and based on the mostly modest improvements to date, despite eth passage of time and despite ongoing intervention by a consultant psychiatrist and the intervention from an occupational therapist OT, prognosis must, however, be guarded.
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> Given his current presentation, it is difficult to see how Mr. Tevlin will be capable of holding down full time employment. He is clearly limited in terms of his ability to cope with any physically demanding job and he exhibits significant cognitive and behavioural problems that will preclude him from undertaking a wide range of other jobs. Without very significant improvement the possibility of which is increasingly unlikely, employment prospects are extremely limited.
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> Given his current presentation, it is also difficult to see how this man would be capable of living alone, without significant supports. Were it not for the high level of support provided currently, by his mother, he would almost certainly, have already required that significant community support services be put in place. One must consider therefore, that this man will almost be definitely require significant outside support in his current support network , if his current support network was no longer available to him."

16. At the moment, the plaintiff, whose relationship with his long-term partner was terminated by her after the accident due to his behavioural difficulties, is now living alone, although is mother comes to the house and performs household tasks for him. He socialises mainly with his mother, going to bingo with her and the like. I have no doubt that the plaintiff has had a significant disruption of his lifestyle. It is the case that he was not academically gifted prior to the accident but from all evidence, which I accept, the plaintiff had an engaging personality, he was able to work and work well when he wished to do so and he was maintaining a loving relationship. Indeed, despite his separation, his former partner gave supportive evidence on behalf of the plaintiff.

17. I believe that he is unlikely to be able to work again in anything other than the sheltered employment that is proposed for him when he takes up engagement with the acquired Brain Injury Ireland 'Work 4 You' in the future.

General Damages
18. In relation to general damages, I am obliged to take account of the Book of Quantum from 2004.

19. Generally speaking, I do not find the Book of Quantum of assistance, given its antiquity. Nothing in the Book of Quantum really relates to the plaintiff's injuries. In previously cases, I have heard it argued that with the downturn in the economy, the Book of Quantum might again have relevance, but it is not correct to say that since 2008, there has been any deflation, rather, there has been some inflation, and coupled with the inflation between 2004 and 2009, I find it is of no assistance to me.

20. Taking the findings in relation to the plaintiff's injuries, and accepting that there has been some improvement up to now, but that the plaintiff is now on a plateau, as the expert indicated, and is unlikely to have significant improvement in the future. This accident, accordingly, has had a very severe impact on the plaintiff to date and has radically altered his life with permanent effects into the future. The plaintiff is young man. I will assess general damages to date in a sum of €200,000 and general damages in the future in the sum of €100,000.

Special Damages
21. It is undoubtedly correct that the plaintiff was unemployed at the time of the accident and had not been working for some significant periods during the boom times of the economy. I note the evidenced of his previous employer that work would have been available between the accident and the present, and I find that the plaintiff would have availed of some of that work.

22. The plaintiff has been in receipt of just less than €33,000 in social welfare, and assuming that that all should be deducted from any loss to date, I note that the plaintiff's potential loss of earnings up to May 2014, came to €93,459, but allowing for the plaintiff's work history, I will assume that the plaintiff would have only worked approximately half of that period, which, after the deduction of social welfare payments, would leave a net figure of €14,000 for loss of earnings to date.

Care
23. The plaintiff at the moment is essentially being cared for by his mother. That is a care that cannot be expected to last for the plaintiff's life. I have not, however, been given figures for the cost of this care into the future. Ms. Gormley gave evidence of a number of additional expenses the plaintiff will be obliged to incur, and I will allow the occupational therapy and mental health review of €1,000 per annum or €20 per week, which amounts to €1,420 for the next five years, and an additional €19,320 for life. I will assess this figure in the sum of €20,000.

Loss of Earnings
24. I have been furnished with an actuary's report and will treat the actuary's figures as a guide. I must bear in mind that the plaintiff's poor work history suggests a reduction above any normal *Ready v. Bates* deduction, I also take into account the differences between the marketplace and what the plaintiff actually expects to earn in the very limited field of sheltered work available to him, and calculate that the plaintiff might have expected to earn some €500 per week over and above what he can now earn from his sheltered employment when he would have been working. I find that the average loss per week, taking account of his poor work

history, and allowing for a work rate of approximately 50% of the time available, would therefore be approximately €250 which up to age 68 would mean a loss of €327,250 (say €326,000), I therefore assess the plaintiff's loss as follows:-

(a) general damages €300,000

(b) earnings to date €14,000

(c) various care into the future €20,000

(d) loss of earnings into the future €326,000

Total €660,000

for which sum the plaintiff is entitled to judgment against the first named defendant.

The Second Named Defendant

25. At approximately 9:30am, on 27th December, 2010, the plaintiff entered the licensed premises owned by the first named defendant known as 'The Porterhouse' in King's Court. Throughout the day, the plaintiff remained in the company of the first named defendant, who was but a casual acquaintance, and they went on what has been rightly described as a drinking spree around various licensed premises to which they drove in Cavan, Louth, and North Meath until, on the evening of the day, the plaintiff and the first named defendant were heading towards the first named defendant's home in Carrickmacross, County Monaghan in the company of two other friends who they had joined them during the day, when, it seems, the first named defendant's car engaged at speed in an overtaking manoeuvre and collided into an oncoming car, tragically killing the two other passengers in the first named defendant's car as well as the driver of the oncoming car and her unborn child.

26. It is agreed that in the course of their drinking, from approximately 9:30am until after 6pm, the plaintiff consumed some twelve pints of beer and four half measures of spirits and the first named defendant consumed some ten and a half pints of beer and five half measures of spirits.

27. The plaintiff's journey took him from 'The Porterhouse' in King's Court to 'Monahan's' in Louth Village to 'McNeill's' in Innishkeen back to 'The Porterhouse' in King's Court and back to 'Monahan's' in Louth and onto 'Byrne's' in Corcreeghadh, 'Tennant's' in Ardee and 'McGahon's' outside Ardee before the four men left on their fatal journey.

28. As part of the criminal prosecution against the first named defendant, An Garda Síochána prepared CCTV footage of the plaintiff and the first named defendant and their friends drinking at the aforementioned establishments. The gardaí are to be warmly congratulated on their industry in this regard.

29. By agreement of the parties, I was asked to and did view the "highlights" of the CCTV footage which highlights lasted some 90 minutes.

30. There can be no doubt that alcohol played a considerable part in the tragic accident that ensued.

31. The Motor Insurers Bureau of Ireland Agreement obliges the Bureau to pay any judgment which remains unsatisfied after 28 days. The MIBI Agreement is in essence a contractual agreement between the Bureau and road users in respect of which the Bureau and the State have undertaken not to plead privity of contract. The Bureau and the Agreement also fulfils the State's obligations under various EU directives.

32. In this case, Judgment was obtained in open court in the presence of the Bureau by the plaintiff against the driver and there is no question of any collusion in this regard. No application has been made to set this judgment aside. Neither is this a case in which the Bureau has under a mandate authority to act on behalf of the first named defendant, and no application was made to the court for liberty for the Bureau to defend the case on behalf of the first named defendant.

33. Notwithstanding these facts, counsel on behalf of the plaintiff did not rely upon the issue that the Bureau might have an obligation under the Agreement to satisfy any judgment obtained against the first named defendant in full.

34. I do not find the case of *Curran v. Gallagher & Ors* as being authority for other than the Bureau being entitled to raise the issue of the plaintiff travelling in a vehicle which he knew (or at that time ought to have known) was not insured. The statement in that regard by Lynch J. "I appreciate that judgment in default of defence against the second named defendant does not bind the third named defendant…" must be read in conjunction with the fact that the *Curran* case concerned the undoubted defence that is available to the Bureau lies that the plaintiff knowingly travels in an uninsured vehicle.

35. Accordingly, that case or this case is not to be taken in any way as supportive of any general proposition that the Bureau is on its own regard in the absence of any representation of the driver's interest entitled to make the pleas that it has made in this case. However, the plaintiff in this case does not rely upon the wording of the Agreement and accepts that the second named defendant is entitled to maintain the pleas as referred to above. The second named defendant accepts that the plaintiff was not aware that there was not an approved policy of insurance in force, indeed, the vehicle displayed what appeared to be a valid insurance disc at the time of the accident, accordingly, the issue as against the second named defendant is as stated at para. 8(a) and 8(b) and above.

36. Two related arguments were advanced to support the second named defendant's contention that the plaintiff ought not recover or be given any order against the second named defendant, namely (a) what may be described as *ex turpe causa* and (b) Public Policy.

37. Counsel for the Bureau relies upon the decision of Finnegan P. in *Anderson v. Cooke & Anor.* In that case, the plaintiff was a passenger in a car being driver by the second named defendant. The plaintiff was present in the vehicle for the purpose of taking photographs of the speedometer of the vehicle travelling at its maximum speed for submission on an internet website. The plaintiff encouraged the driver to drive at excessive and dangerous speeds which, in turn, caused the accident. It was claimed by the defendant that this activity rendered the plaintiff a party to an illegal enterprise, and that defence of *volenti* or *ex turpi causa* precluded him from recovering any damages.

38. In that case, Finnegan P. held that since the provisions of s. 34(1)(b) of the Civil Liability Act 1961, that as there was no prior agreement to waive his legal rights, the defence of *volenti* could not be relied upon. In the circumstances, he held that the defence

of a *ex turpi causa* applied and that there was a joint enterprise to drive the car at great speed. The plaintiff in *Anderson* actively encouraged the driver to recklessly speed, and accordingly, the plaintiff's claim failed and the plaintiff was owed no duty of care.

39. In his judgment, Finnegan P. referred to a number of Australian cases including *Galla v. Preston* [1991] 172 CLR 243, in which the plaintiff and defendant drove together for some four hours after drinking beer and sharing the driving and it was held that the driver of the vehicle owed no duty of care.

40. In *Anderson v. Cooke*, Finnegan P. stated:-

> "It seems to me that the Civil Liability Act 1961, even in cases of a criminal act in which both the plaintiff and defendant are jointly engaged, the court is required to inquire upon the basis of proximity whether a duty of care and if so, what duty, arose on the part of the defendant to the plaintiff in the circumstances of the particular case. If the court is unable to determine if, and if so, what duty of care arose, the plaintiff's claim will fail."

41. It is urged upon me that because the plaintiff was allowing himself to be carried by the defendant, when both had clearly consumed over the legal limits of alcohol permitting driving, and indeed certainly by the evening of the day, when both would also have been unfit to drive, that the driver owes no duty of care to the plaintiff.

42. I cannot accept that proposition. There is a considerable difference between a driver being urged on by the passenger to speed in order to post the picture of the speedometer on the internet, and, in effect, jointly engaging in a criminal activity and what was a tragic result from an enterprise that undoubtedly commenced (and indeed continued, as far as the participants were concerned, from my viewing of the DVD), as a misguided exercise in post-Christmas camaraderie. I believe that *Anderson v. Cooke & Anor*. resulted from a highly unusual set of circumstances that are unlikely to be repeated, and certainly are not replicated in this case. In this case, I do not find that there was any example of the passenger egging on or encouraging the driver to engage in a joint criminal enterprise. I do not find that the argument based on *ex turpe causa* as being applicable to this case.

43. It has been urged upon me by the second named defendant that Public Policy should somehow prevent an intoxicated passenger plaintiff from recovering damages against an intoxicated driver. References to 'Public Policy' generally tell one more about the state of digestion of the Decision Maker than any real account of what Public Policy may be. True Public Policy and its interpretation in the courts is best understood to arise out of decisions of the Oireachtas and any changes in the law. In this regard, it is clear, as indicated by Kearns J. in *Hussey v. Twomey* [2009] 3 I.R. at p. 293 (which will be discussed in more detail below), that there has indeed been change in Public Policy since the case of *Judge v. Reap* [1968] I.R. 226. *Judge v. Reap* was an appeal from a jury decision of March 1967 which acquitted a passenger (who had engaged in a similar activity as the plaintiff in this case) from any contributory negligence and the Supreme Court allowed the appeal. Since that jury decision, the legislature has introduced mandatory limits for the consumption of alcohol by drivers, which limits have been steadily reduced over the years. Undoubtedly, this was the basis for Kearns J's reference to the enormous sea change in society's attitude to drink driving since 1967.

44. If Public Policy, in the form as suggested by the defendants and devined by a judge without any real basis, were to have any role to play, and if I were obliged to devine it, I would have to hold that any Public Policy which exempted drunken drivers from tortious liability to their passengers, however intoxicated, would serve to encourage the irresponsibility of drunken driving and must be fundamentally flawed.

45. The courts in these cases have no function to act as a substitute for an English Victorian or a Welsh Edwardian or an American 1920s pulpit. I am, in accordance with the authorities, obliged, when assessing degrees of fault, to take some account of the views of society in relation to drunken driving. I believe the correct basis for this is contributory negligence. This was the approach taken by the Supreme Court in *Hussey v. Twomey* [2009] 3 I.R. 293.

46. In that case, both sides to the appeal accepted that the following principles should apply and I respectfully agree:-

> (a) The court may where a passenger voluntarily elects to travel in a motor vehicle in circumstances where he knows, or should reasonably been aware, that the driver has consumed alcohol, be penalised in contributory negligence.
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> (b) In determining the issue of contributory negligence, the court must approach the issue on an objective basis though the test cannot it self be absolutely objective in that the personal characteristics of any given plaintiff and the circumstances in which that plaintiff elects to travel as a passenger must be taken into account. A passenger in a given case may be relieved of any responsibility to make enquiry in the particular circumstances such as in the case of a passenger travelling in a taxi.
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> (c) An intending passenger who has consumed alcohol cannot rely on self intoxication for the purpose of avoiding a finding of contributory negligence and in particular can not rely on self intoxication in an effort to avoid the consequences of facts which would otherwise have been reasonably discernible to him.

47. I accept that the aforementioned principle also precludes the passenger from relying on self-intoxication for the purposes of disputing the degree of contributory negligence that ought to be apportioned. In the *Hussey* case, the High Court assessed the plaintiff's contributory negligence at 40% which decision was not overturned by the Supreme Court on appeal.

48. In this case, the quantity of alcohol consumed is greater than that in *Hussey v. Twomey*. The amount of contributory negligence does not necessarily automatically rise with each pint of alcohol consumed. The apportionment of damages in relation to a passenger who elects to travel with an intoxicated motorist is different to that in relation to a passenger who has neglected to wear a seatbelt. The wrongdoing of the intoxicated passenger lies, as found in *Hussey v. Twomey*, in the decision to travel in the first instance. The degree of contributory negligence is directly proportionate to the extent to which the plaintiff realised or ought to have realised the risks being undertaken.

49. In this case, the parties were in each other's company for approximately nine hours. In this case, the plaintiff cannot drive, and certainly some account must be taken for that fact and that the final journey was from the licensed premises in Ardee to Carrickmacross where it was intended for the plaintiff to get a taxi home.

50. I am grateful to the parties for making available to me the DVD recording of the plaintiff and the first named defendant and their friends and others on 27th December 2010. I have seen young men do what many others have done before, and at no stage, as I observed them, did any of the parties give any appearance of being intoxicated, though I accept that by the end of the night, at least the plaintiff and the first named defendant undoubtedly were. I take into account the excessive amount of alcohol consumed by

the plaintiff and by the first named defendant. I take into account the nature of the enterprise upon which they were engaged. I take into account that unlike the *Hussey* case, I have had the benefit of witnessing the apparent lack of intoxication of the parties concerned which would have, or ought to have, informed the plaintiff on the issue of driving as a passenger in the first named defendant's car. I also take into account the long period through 27th December 2010 that the consumption of alcohol occurred.

51. I believe that the correct assessment of Degrees of Fault under the Civil Liability Act 1961, that the negligence of the driver almost always, and certainly in this case, is greater than that of the passenger. The degree of fault on the tortfeasor whose intoxication was the prime cause of this accident must be greater than the contributory negligence of the plaintiff who allowed himself to be carried by the intoxicated driver. In the circumstances, I think that the finding of 35% contributory negligence in respect of the intoxication plea would be appropriate.

Seatbelt

52. The liability for contributory negligence in failing to wear a seatbelt is longstanding. It predated the legal obligation to do so in Criminal law.

53. Contributory negligence is degree of fault to be found against the plaintiff in respect of the failure to look after his own safety. In relation to seatbelts, evidence must be available that their absence of a seatbelt caused or contributed to the injuries sustained.

54. In this case, I accept the evidence from the medical witnesses that the wearing of a seatbelt would have, in probability, lessened the physical injuries to his pelvis, sternum and ribs. However, I also accept the somewhat surprising opinion that the head trauma, with the resulting psychological problems, would not have been affected by the absence of a seatbelt, but were caused by the brain being rocked back and forth against the skull which would have occurred with or without a seatbelt. The head trauma is the most significant aspect of the plaintiff's claim.

55. In addition, one cannot merely add the contributory negligence finding in relation to seatbelts to other findings of contributory negligence, one must also assess the contributory negligence of the plaintiff as a whole.

56. In the circumstances, the plaintiff was a backseat passenger, that his head and brain injuries and the resultant personality change were not exacerbated by it. I note that the plaintiff is already facing a reduction of 35%, I think, being fair to all the parties, an additional 10% reduction for contributory negligence is appropriate and therefore the total figure for reduction by way of contributory negligence is 45%.

57. Accordingly, the plaintiff is entitled to a decree in damages against the first named defendant in the sum of €660,000. As against the second named defendant it was agreed that an additional €2,500 should be added by way of other special damages to the damages which the plaintiff is entitled to making a gross total of €662,500 and accordingly, the plaintiff is entitled to a declaration as against the second named defendant in terms of sub-paragraph (b) of the personal injury summons with the addition of the following words: "up to a limit of 55% of €662,500".