

**THE HIGH COURT****Record Number: 2001 No. 1432P****Between:****Joseph Dempsey  
Plaintiff****And****Frank Moen  
Defendant****Judgment of Mr Michael Peart delivered on the 11th day of May 2005:**

In this personal injury case, liability only is in issue.

While the facts are easily set forth and show an accident occurring in a not uncommon way, the question as to which lorry was at fault is not an easy one to decide. But the Court has reached a conclusion based on all the evidence heard and on the balance of probabilities.

**Summary of Facts:**

The plaintiff was driving a lorry which is 6 feet and 3 inches wide, and 14 feet in length along a road having a total width of about 21 feet, 6 inches (10 feet, 9 inches each direction). He was travelling from the direction of Kilashee towards Lanesboro in County Longford and had reached a portion of the road at which there is a difficult

left-hand bend. On the plaintiff's left-hand side there was a narrow grass verge with a stone wall, about four feet high immediately behind it. Simultaneously, the defendant was driving a much larger articulated lorry which is 8 feet, 2 inches wide, and 51 feet and 4 inches in length, towards the plaintiff, and he was therefore approaching what was for him a right hand bend in the road.

In the centre of this road there is a continuous white line. On the defendant's left-hand side as he approached the bend, there was a narrow grass verge with trees behind, and at the apex of the bend, and roughly where this accident happened, the road widens out on the defendant's left into a gravelled area.

What is not in doubt is that as these two vehicles came together at the bend they collided. However, while the plaintiff states that this was because the defendant's vehicle was over the white line to some extent, the defendant states that the plaintiff was travelling too fast and that the plaintiff collided with the defendant's vehicle. The defendant states that when he first saw the plaintiff's vehicle approaching the bend at speed, he pulled over to his left as much as he could over onto the wider gravelled part of the road in the time available to him, but that nonetheless the plaintiff collided with him.

Both drivers stated that they were very familiar with this stretch of road, and they are both very experienced drivers. It is clear just from the measurements of the truck and of the road, that two vehicles of this size passing at this bend can do so, but with no significant room for error. The road is only about 10 feet 9 inches wide on each side of the white line. In addition there is a bend at which visibility of on-coming traffic is very limited. It is superfluous to state that great care would have to be taken by both drivers, particularly given the size of their respective vehicles, especially where on their own admission they were each familiar with this stretch of road and the bend.

There was significant damage to the front driver's corner of the plaintiff's vehicle. There has also been evidence, which I accept, that there was damage to the front driver's corner of the defendant's vehicle, including a punctured tyre. The plaintiff's vehicle ended up at an angle (the precise angle being a matter of dispute) and embedded to some extent in the side of the trailer part of the defendant's vehicle. The plaintiff does not recall two impacts with the defendant's vehicle – one at the front driver's corner, and another with the side of the defendant's vehicle. He says that he collided with the side of the defendant's vehicle only, because the defendant's trailer part was over the centre white line as it rounded the bend. The defendant on the other hand says that as the plaintiff's lorry met his articulated vehicle, it came into contact with the front driver's corner of his vehicle, bounced off that area and proceeded into the side of the trailer part.

### The plaintiff's account:

The plaintiff stated in his evidence that as he approached this bend he saw the trailer part of the articulated vehicle coming towards him, and that it was "about a foot and a half over the white line" as he approached the corner. When asked what happened next he stated that he heard what he described as "an unmerciful bang" and that everything went a bit fuzzy for a while. He then recalled that after his vehicle came to a halt it was "just below the jacks on the trailer". He recalled also that after the accident a man whom he now realises was the defendant came to him and spoke words indicating that he thought that the plaintiff was driving very fast as he approached the bend. The plaintiff of course denies that he was travelling fast at all as he came to this bend. In his evidence he stated in this regard:

*"I categorically deny that. I had just come through the village around two dangerous bends, S-bends, and I'd just changed up into third gear at that point on the approach up the hill when I met the green Scania truck on the corner."*

He also pointed out that he was travelling up a gradual incline, and had about six sheets of aluminium mesh security sheeting on his truck, and a half barrow of sand. These sheets would have protruded over each side of his truck by about two inches each side. He estimated that his speed would have been in the order of 25 to 30 miles per hour.

In cross – examination the plaintiff stated that he was driving very close to the wall on his left and well in from the centre white line. In fact he went as far as to say that there would have been approximately the width of an ordinary car between his truck and the white line. He also stated that as he was coming up the hill towards the bend he first saw the top of the trailer part of the defendant's vehicle, and also that he slowed down when he saw the trailer. He was referred to the fact that he had never mentioned to the Gardai that he had braked but he said that he could not recall if he had said it or not. At any rate he said he did brake slightly because he was approaching a bend and that it would be the normal thing to do. He stated that as he came to the bend itself he saw the cab, but could not at first say whether the cab as opposed to the trailer was over the white line, but when pressed on the matter stated that *"...the cab would have been coming up along the white line. It was the trailer I was more interested in. It was the trailer that was out."* But he could not say definitely whether the cab of the vehicle was over the white line, as it had gone past him when the impact happened. He described himself as being sandwiched between the trailer and the ditch.

Turlough O'Donnell SC, for the defendant, asked the plaintiff what part of his vehicle was damaged. The plaintiff stated that "the complete driver's side" of the vehicle was damaged, but he denied that the front of his truck was damaged at all. When it was put to him that the front was in fact damaged, he specifically stated that this was incorrect. He stated that after the impact the front right hand side of his vehicle became embedded in the side of the trailer, but not the entire front.

The plaintiff stated that in relation to damage to the defendant's lorry, he could only confirm that there was damage to the trailer section. It was put to him that in fact there had been damage also to the front cab part of that vehicle also, and the plaintiff stated that while he had reason to believe that the front part had been damaged he could not say what it was. It was put to him that in fact the front bumper, the head lamp and right front tyre were damaged, but the plaintiff stated that he does not know.

Shortly after this questioning he stated that he could recall colliding with the cab part of the defendant's vehicle [Day 1,p.42, Qs. 184-185]. Mr O'Donnell asked him how he would have collided with the cab of the defendant's lorry if, as he had stated, he (the plaintiff) was travelling about a car's width inside the white line and also, as he had stated in evidence, the cab of the defendant's vehicle was not over the white line but just on it. The plaintiff was unable to explain this and stated that he had been asking himself the same question for the past five years. It was put to him that if the accident had happened the way the plaintiff was saying it had happened, the plaintiff would have at least got beyond the cab without colliding with it. The plaintiff was unable to answer that proposition. It was put to him also that even if the plaintiff's own account was correct and that the defendant's vehicle was not more than two feet over the centre white line, then if there was the width of a small car between the plaintiff and the centre line, there would have been room for each vehicle to pass without incident. Again, the plaintiff could not respond meaningfully to this proposition.[T.1, pp. 42-43]

In relation to what happened immediately after the impact, the plaintiff stated under cross-examination that after impact his vehicle was rotated to some extent and dragged backwards, and that the front of his vehicle was pulled around (i.e to the right). The Garda sketch map was produced to him, which showed the plaintiff's vehicle almost at a 90 degree angle to the side of the trailer, but the plaintiff stated that this angle was not correct. He could not say exactly what the angle was, but he was sure that it was not as is shown on that sketch. He said that it was the front right hand side of his truck which was impaled in the trailer's side. It was put to him that there was no damage to the rear of his truck and there was no damage to the ditch on his left, in spite of the rotation of his vehicle, and that this evidence meant that he was on his incorrect side of the road when the collision occurred. By way of further explanation, I should just say that the plaintiff's employer gave evidence that when he arrived on the scene shortly after the accident, the plaintiff's vehicle was at an angle of about 45 degrees to the trailer. Whatever angle the plaintiff's vehicle was turned, it is clear from the evidence that the rear of the

plaintiff's vehicle did not come into contact with the wall on his left-hand side.

The plaintiff's employer, Mr Albert Manning gave evidence of arriving at the scene as the emergency services were extricating the plaintiff from his vehicle. They needed to cut the front of the driver's side of the vehicle in order to get him out. The vehicle had by then also been pulled back somewhat from the defendant's vehicle in order to facilitate that. Mr Manning stated that when he came to the scene, he saw that the first set of wheels at the front of the trailer were about two feet over the centre white line. It is a three axle trailer, and he was quite clear that it was just the front wheel of the trailer which was over the line. He was just looking at the front wheel, but in relation to the middle and rear wheels he could not say if they were over the line but that they were definitely on the line. But he accepted that he had not looked at the back wheel and it is clear from the evidence that Mr Manning was surmising to an extent as to the positioning of the middle and rear wheels, and that the only wheel he could speak of was the front. He also stated that the burst front tyre of the lorry was on the white line.

#### **The defendant's account:**

The defendant stated that as he approached this bend, which he is familiar with, he was driving inside the centre white line. He thinks that he was doing about 30 miles per hour. He stated that as he came to the bend he saw the plaintiff's truck coming towards him at speed, and that the plaintiff was going to crash into him. He saw the wider gravelled area to his left and drove into it but that the plaintiff's vehicle came across and hit him at the front wheel area, immediately under where he was seated in the cab. The windscreen of the defendant's cab was shattered in the impact.

Colm Smyth SC for the plaintiff cross-examined the defendant as to why when he made his statement to the Gardai a couple of months after the accident, and at a time when everything would have been fresh in his mind, he had not said anything about having swung over to the gravel surface on his left in order to try and avoid the plaintiff's vehicle. The defendant stated that he had no reason not to mention it, but that he had answered anything he was asked at the time. It was put to him that from the angle at which he appears to have entered that gravelled area, based on marks on the road, his trailer would have to have been over the white line. However the defendant was sure that he was on his correct side of the road. He stated that he had been travelling down a straight portion of road as he came to the bend and was on the correct side of the centre white line at that time and that he was still on the correct side of the line as he came into the bend. Mr Moen stated that after he drove to the left onto the gravelled area he went in an arc and pulled out again somewhat. He stated: *"...when I went in.....as I went to avoid doing more damage to the left-hand side of the truck, I came out again. But he had already hit me at this stage and I was trying to get as far in as I could before any more damage would be done."* (T1, p. 116)

He stated also that as he was taking this evasive action, the plaintiff's vehicle came across the centre white line and hit his vehicle in the area of the front wheel of the cab. The defendant says that there was only one impact really which caused the damage to the plaintiff's car and that after that impact, the plaintiff's vehicle ended up at an angle into the side of the trailer, but that there was not an impact as such with the trailer. The defendant thought that the plaintiff's vehicle suffered damage across most of the front of the vehicle. He was shown photographs of the vehicle taken after the accident and he accepted that the damage was concentrated to the right front of the vehicle.

#### **Independent witness - Mr Felim Henry:**

Mr Henry had been travelling behind the defendant's vehicle as they approached the bend in question. He is a Primary School Principal and he was driving towards Longford in order to visit his father who is in a nursing home there. He stated that he would have been behind the defendant's vehicle for a short time before the bend, having caught up with it as he drove along the road. He says that he had a clear view of the articulated truck at all times, and that it was at all times on its correct side of the road and inside the centre white line. He then stated that as the defendant was negotiating the bend a truck appeared *"very very quickly"* at the apex of the corner and struck into the defendant's vehicle *"like a dart sticks to a dartboard"*. He said that the plaintiff's vehicle was on its incorrect side of the road, and that the defendant's vehicle was on its correct side. When cross-examined he accepted that given that he was behind a large articulated lorry coming into the bend he would have had only a limited view of the plaintiff's on-coming vehicle. He also accepted that it would be fair to say that from where he was seated in his saloon car he would not be able to see the position of the front cab part of the defendant's vehicle on the road, and that this explained why he had not referred in his Garda statement to the defendant pulling his lorry into the gravelled area to the left. He had not seen that happen, but he was aware that the defendant's vehicle ended up going in off the road at the time of the collision, even though he did not see the cab actually turning (T2, p.11)

Mr Henry saw only one impact and that was when the plaintiff's vehicle went into the side barrier of the defendant's trailer. He was unaware until he heard the evidence in court that the plaintiff's vehicle had made contact with the cab part of the defendant's vehicle. He also stated that he had not seen any damage to the front of the defendant's vehicle because he had not looked (T2, p. 13-14).

Mr Henry described the weather conditions as quite poor, and that the road was greasy and there was a mist, and not a good day for driving.

### ***Conclusions without reference to the Engineer evidence:***

Based on the plaintiff's evidence, the defendant's evidence and the evidence of Mr Henry, being all the persons present when this accident occurred, I reach certain conclusions of fact on the basis of the balance of probability. I will express these now, and then consider whether the expert evidence, particularly that of Mr Abbott, the plaintiff's engineer, can alter or affect such conclusions.

Mr Henry's evidence is very important to me, because it confirms the defendant's own evidence that he was driving on his correct side of the centre white line as he came to this bend. Mr Henry has also stated that the plaintiff's vehicle came to the bend very "very quickly". But it is fair to say that his ability to estimate the plaintiff's speed with any accuracy must be questionable given the limited view, both in terms of time and space, he would have had of that vehicle. However, I am also satisfied that the plaintiff's vehicle came into contact with the front driver's corner of the cab of the defendant's vehicle and then subsequently went into the side of the defendant's trailer. First of all, the front driver's side tyre was burst by the impact. Secondly the windscreen of the cab of the defendant's vehicle shattered in the impact. There can be no doubt that this was the point of first contact between the two vehicles.

Even though Mr Henry accepts that he did not see the cab of the defendant's vehicle from his position behind the trailer, he has stated that at all times the defendant's vehicle was on its correct side of the white line. I regard Mr Henry's evidence as supportive of the defendant's own evidence that he was inside that line as he came into the bend. That must mean that if the outside front wheel of the defendant's cab was inside the white line, the plaintiff's vehicle must have been over the centre line in order to make contact with the driver's front corner of the cab. There is no other conclusion possible in my view. I find the plaintiff's evidence unsatisfactory in relation to this very important aspect of the case. The plaintiff stated that he had not made any contact with the cab of the defendant's vehicle and that the only impact was with the side of the trailer. Since that evidence could not possibly be correct, and since there has been no evidence that the plaintiff has anything than full recall of everything which happened, even down to being able to say that the trailer part of the defendant's vehicle was over the white line by about "a foot and a half", I have some doubts about the credibility of his evidence generally, when he states that he was not driving fast and was so far in to his left that there was the width of a small car between his vehicle and the centre white line. I do not accept that that can possibly have been so. In this regard I must also refer to the fact that Mr Abbott, when he gave his evidence, stated that he had not found the plaintiff very helpful in relation to where on the road the cab of the defendant's vehicle was when he first saw it before the collision.

It is unsurprising to me that in the five years or so since this accident happened the plaintiff has been unable to answer, even to himself, the question how he could have collided with the cab of the defendant's lorry if, as he had stated, he was travelling about a car's width inside the white line and also, as he had stated in evidence, the cab of the defendant's vehicle was not over the white line but just on it.

I believe that the plaintiff was much nearer the centre of the road than he says, as he came up this road towards the bend, and that as he came into the bend he was over the white line and travelling at a speed which prevented him from taking the care necessary to avoid colliding with the defendant's vehicle. It is not possible to say what that speed was, but this is a stretch of road where great care would be needed, and I am satisfied that the plaintiff, who knows the road very well and is an experienced driver, ought to have and did not make due allowance for the risks at the bend in the event of meeting any vehicle, let alone a vehicle of the size of the defendant's. That is not to suggest that there is not an equal if not greater onus of the defendant to take care when approaching the bend, given the size of the vehicle under his control, but there is no evidence given by the plaintiff or by Mr Henry which has led me to conclude other than that the defendant took all due care. I am satisfied that he drove in a proper fashion coming into this bend. I am satisfied that when he first saw the plaintiff approaching, he took immediate evasive action in so far as he could by pulling his cab to the left onto the gravel area and that having gone into that area he pulled his cab out again a bit, before coming to a halt. There is no evidence that when he applied his brakes, there was any skid mark to suggest that he was braking from a speed which would have been dangerous. Any mark such as that which I accept as being 31 feet and five inches, and not 81 feet and five inches, as per the Garda sketch, is not indicative of unreasonable or unsafe speed for a vehicle of that size. Everything in my view points to the fact that this is how the accident happened.

The fact that the rear of the plaintiff's vehicle made no contact with the wall on his left-hand side also suggests that his vehicle was well out from that wall, contrary to what the plaintiff has stated. In saying that, I have allowed for the fact that the drawing of the scene made by Garda Taylor and which shows the plaintiff's vehicle at about a 90 degree angle to the side of the defendant's vehicle, is wrong. I am accepting the evidence of Mr Manning, the plaintiff's employer who arrived at the scene shortly after it happened, that the plaintiff's vehicle was at more like a 45 degree angle. I am satisfied, again on the balance of probabilities, that if the defendant's trailer was over the white line, even a 45 degree angle would have been

sufficient to cause the left rear corner of the plaintiff's vehicle to come into contact with the grass verge and wall on the left, given that the length of the plaintiff's vehicle is about 14 feet, according to the evidence of Mr Abbott, and it can be inferred therefore that the length from the driver's right corner to the rear corner on the passenger side would be somewhat longer - say 15 feet. If the trailer of the defendant's vehicle was one and a half feet over the white line, this means that there could only have been a width of about nine and a half feet between it and the wall on the plaintiff's left-hand side. If the plaintiff's vehicle was presented to it at an angle of 45 degrees, it seems to follow that there would have to have been contact between the rear passenger corner of the plaintiff's vehicle with the wall. However, even if I am wrong about such contact being inevitable, the other evidence is determinative in any event.

#### **The expert evidence:**

The remaining question is whether the evidence which I have heard from Mr Frank Abbott, Consulting Engineer, on behalf of the plaintiff, based, as it is, largely on the position and measurement of certain physical elements at the locus of this accident, and certain calculations arrived at by him, can alter my factual conclusions to the point where I would be satisfied that on the balance of probabilities, that despite the evidence which I have already outlined, this accident was caused in fact by the negligence of the defendant. In considering that question, I would also have to have regard to the expert evidence of Ms. Anne Kelly, Consulting Engineer, on behalf of the defendant.

#### **Mr Abbott:**

He stated that the width of the road was 21 feet and 6 inches wide, and that the plaintiff's vehicle was 6 feet and 3 inches wide, and the width of the defendant's vehicle was 8 feet and 2 inches. This means that the combined width of the two vehicles was 14 feet and 5 inches - i.e. 7 feet and 1 inch narrower than the width of the road. Mr Abbott took a number of photographs of the locus, including some of lorries similar to the defendant's lorry approaching the same bend, and of a vehicle similar to the plaintiff's vehicle approaching the bend. I shall return to these photographs in due course.

In relation to the sketch of Garda Taylor, Mr Abbott opined that given the damage to the plaintiff's front driver's corner and side, and the absence of damage to the passenger side at all, the angle at which the plaintiff's vehicle presents to the side of the defendant's trailer should be reduced to about 45 degrees to be consistent with the damage. That is consistent with what Mr Manning found when he arrived at the scene after the accident.

When Mr Abbott gave his direct evidence of how this accident may have happened based on the location of the damage to the front corner on the driver's side, he stated as follows:

"...having regard to the length of the pick-up truck and the general circumstances of the accident, I would say that the impact started as a tangential impact and then the pick-up truck got caught on the truck, it was pulled by the heavier truck and it was rotated possibly through typically about 45 degrees and no more because if it went more there would be more damage to the front of the vehicle. If it were rotated through more than 90 degrees, damage would start to occur on the passenger side and that didn't happen. So I would say at best that it was a tangential type of impact and then it got caught possibly in the tri-axle." Mr Abbott stated that in so far as the Garda sketch indicated that the passenger side of the plaintiff's vehicle collided with the trailer of the defendant's vehicle, this was not correct.

Mr Abbott was asked to comment on the significance of an item in the Garda sketch namely what is written as "*length of brake mark 81' 5" "*. Mr Abbott expressed the view that the length of this arc indicated that the defendant had lost control of his vehicle. However, it is clear, and I am so satisfied from the evidence of Grad Taylor, that this measurement is intended to read "31' 5" and not 81' 5". It follows that Mr Abbott's statement that the defendant had lost control must be disregarded completely, as must his views on what speed the defendant must have been doing as he came into the bend, since those views also were arrived at based on a supposed arced braking line of 81' 5".

Mr Abbott was at the locus for over three hours when he was examining it. He stated that during that time he never noted an articulated lorry travelling in the same direction as was the defendant, which did not cross over the white line coming into this bend by two feet. He did not record any lorry staying within the white line. He took some photographs of this phenomenon. However, while that may all be factually correct on the day of observation, I am not prepared to infer from that that the defendant's cab was over the white line on the date of this accident. The reason for this is that it is clear from the photographs in question that there is parked at the commencement of the gravelled area a large grey Mercedes car, and it is impossible to assume that its presence at that precise point did not affect the line which the driver of the articulated vehicles took while the photographs were taken. In other words, the scene when the photographs were taken was not identical in all respects with the scene on the day the accident happened. In another set of photographs showing the scene, there is a red vehicle similarly parked, and again I can make no inference from these in relation to where the defendant's vehicle may have been in relation to the white line.

When he was cross-examined by Mr O'Donnell, Mr Abbott agreed that when he was trying to reconstruct how this accident might have happened, nobody had told him that that there was damage caused to the cab of the defendant's vehicle. He said

that the only information which he had was the Garda sketch and the evidence of the two witnesses who had said that the plaintiff's vehicle had collided with the tri-axle at the back of the trailer. He agreed that if the plaintiff was travelling on his correct side of the road, the only way the cab of the defendant's vehicle could have been damaged was if the cab was on the incorrect side of the road. He added: *"I would find it very easy to believe that the cab was on its incorrect side in view of the curved thing on the Garda sketch"*. However, as I have already stated I am satisfied that Mr Abbott was looking at that arc as being 81' 5" in length, rather than 31' 5". I must therefore ignore his remark.

At this point there really is no purpose to be gained by setting out the evidence of Ms. Kelly. I believe that the plaintiff's inability to recall for Mr Abbott the position of the cab on the road, as opposed to the trailer, and the failure of anybody to tell Mr Abbott that there was damage to the front of the cab, as well as his assumption that the arc measured 81' 5", has left him in an impossible position from which to express an accurate opinion as to how this accident happened based on his observations. This is no reflection, of course, on his professional expertise. It is simply that the factual basis on which he has reached his conclusions are incomplete and/or incorrect. I therefore cannot use his evidence to add in any helpful way to the evidence given by the plaintiff himself. There is therefore no need for me to set out the basis on which Ms. Kelly seeks to disagree with some of Mr Abbott's conclusions.

The onus is as always on the plaintiff to satisfy this Court on the basis of the balance of probability that the defendant has been guilty of negligence. I cannot find any evidence in this case upon which I can rely in order to reach such a conclusion. All the evidence points in the other direction, as I have already explained.

With regret therefore I must dismiss the plaintiff's claim.