THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 308

Record Number: 2016/177

Peart J.
Irvine J.
Hogan J.

Between:

SAMANTHA AHEARNE

PLAINTIFF/RESPONDENT

- AND -

BILL TUOHY

DEFENDANT / APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 29TH DAY OF NOVEMBER 2017

1. In these proceedings the plaintiff seeks damages from the defendant for personal injuries which she sustained when his vehicle collided with her vehicle on the 4th October 2012 in circumstances where she alleged that he was negligent.

2. At the conclusion of the hearing in the High Court (Abbott J.) the defendant was found to have been driving negligently. However the trial judge went on to conclude that the plaintiff herself was guilty of significant contributory negligence, and he apportioned liability as to one third against the defendant and two thirds against the plaintiff.

3. Having so concluded the trial judge assessed general damages in the amount of €60,000, being €20,000 in respect of past pain and suffering, and €40,000 for pain and suffering into the future, to which he added an agreed figure of €1,360 for special damages, making a total figure of €61,360. In accordance with the apportionment of liability, judgment was entered against the defendant in the amount of €20,453.

4. The trial judge then made what is referred to in the Court's order as a differential costs order (see s. 14 of the Courts Act 1981), since the award after apportionment was below the jurisdiction threshold of the High Court, and measured that sum in the amount of €,2000. Judgment was entered against the defendant for the amount of €18,453, and in addition, costs were awarded against the defendant on the Circuit Court scale, such costs to be taxed in default of agreement in the normal way.

5. The defendant has appealed against the finding of negligence (one third) made against him, and seeks to have the proceedings dismissed in their entirety. He says that there was no credible evidence upon which the trial judge was entitled to find him to have been negligent, let alone to the extent of one third. He appeals also against the amount of damages awarded. Finally he appeals against the differential costs measured in the amount of €2,000 and against the order for costs made against him. He argues that given the amount of the award following the apportionment of liability, the trial judge ought to have made an order under s. 17 of the Act of 1981, as amended, rather than measuring the differential sum in the way he did. I will come to that issue later in this judgment, if necessary.

The circumstances of the accident

6. On the 4th October 2012 at about 12.25 p.m. the plaintiff had travelled along the Glenconnor Road, Clonmel (the minor road) close to where she lives in Co. Tipperary, and having reached the junction where that road joins the Western Road (the major road), she stopped at the white line at the junction as she was required to do before proceeding onto the major road. She was intending to drive across the Western Road, and then turn to her right in the direction of Cahir in order to collect her young nephew. Before moving out into the junction she needed to be sure that there was no car approaching her from her right. If there was none, then it was safe to move forward at least to the centre of the junction. Then, if there was no car approaching from her left, she could continue to make her turn right onto the Western Road itself and proceed on her journey in the direction of Cahir.

7. The plaintiff stated in her evidence that she looked to her right before moving to the centre of the junction, and that she saw no car approaching from her right. She stated that she then looked left, and then right a second time before moving forward. She stated that when she looked to her right on that second occasion she saw a car approaching from her right (*i.e.* the defendant's vehicle) and that it was some distance away "at the top of the road". The plaintiff's engineer measures that line of sight to have been c. 78 metres. She is very familiar with this junction. She uses it several times each day. She considered it safe to proceed to the centre of the junction notwithstanding the approaching vehicle, and commenced to do so. However, before she had fully gained the safety of the centre of the junction the defendant's vehicle collided with the rear side of her vehicle. The damage to her vehicle was to the area of the rear wheel on the driver's side. Her car was caused to spin 180 degrees, and was moved a little back from its position in the junction.

8. This is a built up area. There was a 50km per hour speed limit in operation. The defendant says that he was driving at a normal speed along the Western Road, and that when he was a short distance back from the junction where the plaintiff's vehicle was stopped, she suddenly drove forward into his path, giving him no opportunity to avoid colliding with her car, despite braking. The defendant says that he was not exceeding that 50km per hour speed limit. The plaintiff contends that, given the distance that he was from her when she saw him, he must have been driving considerably in excess of the limit, as otherwise she would have easily made it safely to the centre of the junction. The defendant counters this by pointing to the fact that there was only minor damage to the front of his car, and that his airbag did not activate. The engineering evidence was that the airbag is designed to activate upon impact at over 25mph. The defendant stated also that having hit her car his own vehicle was still able to stop within a very short distance, and that when asked to move his vehicle by the Gardai he was able to simply make a left turn into Glenconnor Road, without having to reverse his car in order to make that turn. He considers this to indicate that he had travelled only a very short distance following the collision, consistent with having been driving within the 50km speed limit, and having braked as quickly as he could prior to the impact.

9. When under cross-examination by counsel for the defendant, it was put to the plaintiff that her oral evidence in court differed from the account of the accident which she had given to her expert, Mr Hugh O'Rourke, Consultant Engineer. That account as recorded by him in his report states:

> "At approximately 12:25 pm on the 4 October 2012, the plaintiff, Samantha Ahearne was driving south along Glenconnor Road towards Western Road. At the Glenconnor Road and the Western Road Junction, the plaintiff stopped her car, *looked up and down the Western Road, she did not see any oncoming cars, before crossing the Western Road*, with the intention of driving west along the Western Road. While crossing the Western Road, the defendant, Bill Tuohy who was travelling east along the Western Road collided with the plaintiff's car, causing the plaintiff's car to rotate 180 about its front wheels, and coming to a final stop as shown in Figure 2…".[Emphasis provided]

10. When this was put to her, she was asked which account was correct, to which she replied "Well, on the first glance as I said I didn't see a car and then when I looked back right after looking left, the second time I looked right". A short time later she stated "no, it wasn't there on the first time. When I looked right first it wasn't, and then I looked left and when I looked right again the tip of it was starting to come at the top of the road".

11. During her cross-examination, the plaintiff was also referred to the form which had been completed by her solicitor on her behalf and forwarded to the Personal Injuries Assessment Board. In that form she had stated that she had looked to her left and to her right, and that she "had noticed the car coming from the right" and that "judging that it was far enough distant so that she could pull out onto the Western Road she did so, and when she was more than half way across the road the respondent's car unable to slow down collided with the applicant's car with force".

12. It was put to her that she had pulled out suddenly without warning, and that the defendant must have been very close to her car when she did so, and had no opportunity to avoid the collision. She disagreed.

13. The defendant gave evidence. He also travels this road frequently and is familiar with the junction in question. He was 100% certain that he was driving within the speed limit of 50km per hour. He recalled seeing the plaintiff's car stopped at the junction as he approached, and simply proceeded along the road. His evidence was that just as he reached what he referred to as a bollard (in truth a small upright yellow plastic sign with an arrow in blue indicating that traffic should keep to the left of the island) marking a small traffic island just before the junction itself, the plaintiff's car pulled out in front of him, and that even though he braked hard he could not avoid colliding with the back wheel of her car. His car suffered minor damage only. He confirmed also that when the Gardai asked him to move his car off the junction he was able to simply make a left turn into Glenconnor Road without having to reverse in order to make that turn. This, he suggested, indicated that he had not moved forward very much after the impact as far as the plaintiff had stated in her evidence.

14. Under cross-examination the defendant stated that he was a publican and that on this occasion he was travelling to an appointment with his accountant. He was not in any particular hurry, and was travelling at a normal speed in a built-up area. He denied the plaintiff's suggestion that at the moment when she began her move forward into the junction he was about 70 to 80 metres back from the junction, and therefore must have been travelling too fast since he collided with her vehicle before she had even reached the middle of the junction. He stated that he would have been at or near the bollard when she suddenly pulled out into his path, and that by reference to that bollard he would have been a matter of some 14 metres or thereabouts from the junction when she emerged into his path. He stated that he braked as hard as he could but could not avoid hitting her vehicle.

15. The plaintiff's expert, Mr O'Rourke, Consulting Engineer gave evidence and had provided a report. The defendant's engineer, Mr Vincent O'Hara of Tony O'Keeffe & Partners, Consulting Engineers, also gave evidence and provided a report. Both engineers attempted calculations of the speed the defendant was travelling at by reference to the time estimated by the plaintiff between the time she started to move forward from her stationary position at the stop line to the impact occurring (4 seconds by her estimate), and the distance which she stated that the defendant was on the road when she says that she first saw him.

16. Mr O'Rourke for the plaintiff in fact prepared two reports. His first report is dated the 22nd October 2013. He later provided an Addendum report on the 1st March 2016 having reviewed Mr O'Hara's report dated 26th February 2016. In his Addendum he accepted that the calculations contained in his first report were incorrect.

Mr O'Rourke's evidence

17. Based on it having taken the plaintiff four seconds from the time she started to move forward to reach the point at which the rear side of her car was hit, and taking the defendant's account of having reached what he called the bollard at the small traffic island at the junction – which is 20.9 metres back from the junction - Mr O'Rourke calculated that in order to travel that 20.9 metres in four seconds the defendant would have to be travelling at 18km per hour which equates to 12 mph. However, Mr O'Rourke noted that the plaintiff's rear wheel had been pushed in or twisted by the impact, and her car had been spun around 180 degrees, and he opined that this would have required the defendant to have been travelling in excess of 18km per hour. In answer to the defendant's reliance on the fact that his airbag did not activate thereby indicating a speed at impact of less than 25mph, Mr O'Rourke explained this by describing the impact as a "glancing blow" rather than the defendant's vehicle hitting full-on. He explained the airbag activation mechanism, and was of the view that it was not designed to activate where the impact was a glancing blow rather than full-on.

18. Mr O'Rourke, again relying on the plaintiff's evidence that she was four seconds into her move forward when the impact occurred, calculated that if the defendant was travelling at 30km per hour he would travel 33.3 metres in four seconds. In other words, when he first saw the plaintiff move forward he would have to have been 33.3 metres back from her. According to his calculations the braking distance at 30km per hour is 5.6 metres, and even allowing for some reaction time which he put at 1.5 seconds, his opinion was that the plaintiff would have travelled some 18 metres, and ought to have been well able to bring his vehicle to a halt before impacting with the plaintiff's vehicle.

19. Mr O'Rourke did a similar exercise predicated upon the same four seconds that the plaintiff says it took her to reach the point of impact, but on the basis of the defendant driving at 40km per hour – still within the speed limit. At that speed using the same methodology, he opined that the defendant in four seconds would travel 44 metres, and would need 24 metres to bring his vehicle to a halt, and again should have been able to do so with 20 metres to spare.

20. A similar calculation was done based on a speed of 50km per hour. This indicated that with a stopping distance of 36 metres, the defendant would have travelled 81 metres over the four second period, and again would have had sufficient time to bring his vehicle to a halt before reaching the plaintiff's vehicle.

21. Using the distance of 70 metres back from the junction, which is roughly the point at which the plaintiff says that she first saw

the defendant's vehicle on the road to her right, Mr O'Rourke stated that for the defendant to impact her vehicle after four seconds, he would have to be travelling at a speed of 63 km per hour – which is in excess of the speed limit of 50km per hour. If the defendant was 90 metres back (which is the maximum line of sight according to the defendant's engineer rather than Mr O'Rourke's measurement of 70 metres), Mr O'Rourke stated that the defendant's speed would have to have been 81km per hour in order to hit the plaintiff's vehicle after that four second period.

22. His overall conclusion taking account of what he considered to be the "glancing blow" nature of the impact which explained the lack of significant damage to the front of the defendant's vehicle, the significant damage to the rear wheel of the plaintiff's vehicle, and the fact that it was caused to spin 180 degrees, was that the plaintiff must have been much further back from the junction than he says he was when he first saw the plaintiff's vehicle move forward in front of him, and that he was therefore travelling above the permitted speed limit. If he was driving within the limit, Mr O'Rourke's opinion is that he ought on Mr O'Rourke's calculations to have been well able to avoid the collision.

Mr O'Hara's evidence
23. Mr O'Hara first of all drew attention to the fact that all the calculations made by Mr O'Rourke were based on information provided to him by the plaintiff, since there was no Garda sketch made at the scene, and no photographs taken of the vehicles after the collision had occurred. He pointed to the fact that it was six months post-accident that the plaintiff provided those details to Mr O'Rourke.

24. In that context, it is interesting to note that the trial judge himself stated in discussion with Mr O'Hara that he thought that four seconds was a long time for the plaintiff to have taken to reach the point in the junction at which the impact occurred. Mr O'Hara agreed, and stated that if there was any variation in that four seconds period it would have a significant impact on the calculations of speed and distance. Of course, all the calculations of the defendant's speed which were made by Mr O'Rourke are predicated on that four second period which the plaintiff stated it took her to reach the point at which the impact occurred. If that figure is wrong then all his calculations are wrong and irrelevant.

25. Mr O'Hara stated that he had accepted the four second period *for the purpose of his calculation*, but went to state that "[he] would expect the car to emerge in a shorter time period". He stated:-

> "It sounds like a long time to me, judge. I have accepted it for the purpose of the calculations that I did in the original report but I would expect the car would emerge in a shorter time period. To clear the lane is a distance of 4.6 meters. If that is in or about 16 feet then if we come out at an average speed of approximately 7.5/8 miles an hour you are going to be travelling at 10 feet per second. So you are going to cover it between two and three seconds. So I would say that the time of 4 ½ seconds is at the outside or the longest period of time it could take you to emerge … a time of four and a half seconds is at the extremity of what it would take to emerge."

26. As regards the damage to the defendant's vehicle Mr O'Hara described the collision as a minor impact, noting that the defendant's bumper had been damaged, but that there was no damage to the front lights. He concluded that "there is no evidence of speed in that impact". He also considered that the fact that the airbag did not activate, and the fact that the defendant was able to make a left turn directly onto Glenconnor Road when asked to move his vehicle by the Gardai indicated that this was not a severe impact. He went on to state that having measured the width of the Glenconnor Road junction, he considered that for the defendant to have been able to simply make a left turn into that road when asked to move his vehicle, he must have stopped his vehicle "almost instantaneously after the impact".

27. Under cross-examination, it was put to him that in his report he had accepted the four and a half second period referred to. He accepted that he had done so for the purpose of his calculations, but went on to say that this did not mean that all vehicles that emerge from that road would take that time to get to the middle of the junction. He agreed that the plaintiff had demonstrated to Mr O'Rourke at the locus that this is the length of time that it took her on the occasion when she met him at the locus. He agreed that when Mr O'Rourke gave his evidence based on that four and a half second period, he was not challenged on it. Nevertheless he stated that all the calculations of the defendant's speed were predicated on that time-frame, and that if that time changes then all the calculations change.

The trial judge's findings
28. In his *ex tempore* judgment the trial judge first of all acknowledged clearly that the plaintiff was under an obligation to first of all stop at the white line at the junction, and secondly, to yield right of way to any traffic approaching her on the Western Road – even traffic that may be exceeding the speed limit in the area. He noted that the plaintiff had correctly brought her car to a halt at the stop line and where she could have a line of sight to her right of "between 70 and 90 metres" in the Cahir direction. He recorded her evidence that she had looked right, then left, and then right again, and that on that second occasion she had seen the defendant's car approaching at a distance of about 70 – 90 metres "but certainly it was a fair distance away". The trial judge then stated his conclusion that the plaintiff had been negligent and he explained why he so concluded.

29. However, quite correctly, the trial judge then stated that his first task was to determine whether the plaintiff had proved negligence against the defendant. He stated:

> "the real issue in this case is whether the defendant was, one, travelling too fast to fail to pay sufficient attention to the manoeuvre of the plaintiff, which was a manoeuvre which one could expect to be taken in a town. Many of these manoeuvres are made."

30. Rather than attempt a summary of the trial judge's further conclusions, I shall set them out as they appear in the transcript:

> "It seems to me that the defendant's account of the incident in his evidence whereby he just saw the plaintiff' vehicle emerged in front of him as he was just approaching the bollard on the Clonmel [sic] side of the plaintiff's car doesn't really stack up with the engineering evidence on either side that he had to be a significant distance back from the plaintiff's car, otherwise he would have struck the plaintiff's car on its front. I accept that this is a factor which aids the Court in relation to its determination facts so that the defendant's car was obviously some distance further back than the defendant, who was doing the very best he could to describe matters on his recollection, and he struck me as being a most honest witness but, nevertheless, I don't think he was fully accurate in relation to his determination there. He was that bit further back than he said he was and that he was probably travelling around somewhere around the speed limit of 50 [sic] mph.
>
> It struck me during the whole hearing of the case, which involved a considerable amount of technical evidence in relation

to measurements and calculations based on these measurements from the plaintiff's engineer in particular, that one should take cognizance of these measurements and the focus which they brought to the case, but nevertheless to look at the situation in the round. That prompted me to ask the defendant what his attitude in relation to the whole make-up of the construction on the road which consisted of a sort of ghost island coupled with two bollards, which provided a centre dished out concrete area for pedestrians to seek refuge as they reached the middle position along what would very often be a very busy road leading out of Clonmel and also where the track of these pedestrians had been marked out by the Roads Authority at some stage with two white lines providing an informal track but without a zebra crossing or anything like that. But it was plainly conceded by the defendant that he didn't actually take any steps to moderate or control his driving away from the manner in which he approached that particular traffic island, and set of bollards, together with the junction in circumstances where he had seen the plaintiff's vehicle parked in a situation where it could have emerged.

So, my conclusion is that the accident was at least contributed to and caused in a contributory way by the negligence of the defendant insofar as he was probably driving a bit too fast, was probably not paying enough heed to the movements and likely movements on the road, so that he cannot be said, as many people in circumstances the defendant found himself …, to be negligence free, and in circumstances where the plaintiff would not have proven her case.

I find that by reason of the fact that this was a built-up area, was in a position where the Roads Authority thought it fit to install traffic calming measures, that the defendant did not react sufficiently in his driving which could have been regarded as quite faultless 100 yards back towards Cahir, but which would have required some moderation or modulation as he went through this traffic calming area. It must be remembered that looking at figure 1 and the photographs that while the road was not narrowed physically, the lane structure together with the configuration of the concrete structure around the bollards, left traffic approaching from Cahir with only one lane to drive. That meant that it had reached the situation where there was less room to take evasive action arising from a pedestrian or a car shooting out from the left, which is always a possibility when one drives in an urban area. So that there was an element of lack of care or negligence on the part of the defendant, but it was the minority of negligence. It was in the minority of causality in relation to this accident I consider that the major causation in the accident was that of the plaintiff, regrettably."

31. Before reaching any conclusions as to whether the defendant was negligent it was necessary for the trial judge to make any findings of fact from the evidence which would underpin a finding of negligence against the defendant. It seems to me that the following findings of fact are discernible from the *ex tempore* conclusions which I have set out in full above:-

(a) The collision occurred in a built up area and therefore, by implication at least, that the applicable speed limit was 50 kilometres per hour (c. 30mph).

(b) In the light of the evidence given by the engineers on each side the defendant must have been some distance further back on the Western Road than he said he was, at the point at which he saw the plaintiff's car begin to move out into the junction.

(c) The defendant was probably travelling around 50 kph, and was not exceeding the speed limit.

(d) The defendant was probably driving "a bit too fast".

(e) The defendant was probably not paying enough attention to what he called "movements and likely movements on the road".

(f) The defendant did not react sufficiently to the traffic island and bollards (which he described as a traffic calming measure) as he approached the junction by moderating or controlling his driving, even though he had seen the plaintiff's vehicle stopped at the junction, and from where she might emerge.

32. It is immediately noticeable that the trial judge made no finding of fact as to how far back on the Western Road the defendant was when first seen by the plaintiff, or when the defendant first observed the plaintiff either stationary or beginning to move forward. Neither did he make any finding of fact as to whether the plaintiff had taken 4 seconds to reach the point of impact from the moment she moved off. He made no mention of the latter whatsoever, and it will be recalled that while that time period was used by each engineer for the purpose of their calculations of the defendant's speed, each stated that any movement in that period of four seconds would alter all the calculations. In relation to the defendant's distance back on the road he simply found that the defendant was "a bit further back" than he had stated in his evidence.

33. The trial judge himself introduced the idea that the small island with two so-called bollards (but which are, in fact, as I have stated earlier, small yellow plastic signs about a metre high with a left-indicating arrow) amounted to a traffic calming measure, and imposed an obligation on the defendant to moderate or control his driving, which I take to mean that he was obliged to reduce his speed, even though there was no road sign reducing the speed limit as one approached the small island. The plaintiff's engineer made no reference to a traffic calming measure in either of his reports. Neither did the defendant's engineer. Nor did either engineer give any evidence that the island and bollards constituted a traffic calming measure or as to what it implied for the driver approaching same. As I say, the trial judge introduced the phrase when he began to question the defendant during the course of his cross-examination. This discussion arose when the Court was being referred to certain markings on the road indicating a place for pedestrians to cross to the island, but falling short of an actual 'zebra-crossing'. The trial judge described this as a 'ghost island', and having said that it was not "a true ghost island" he asked the defendant if he would agree "that that would be referred to by Council engineers generally as a traffic calming measure, and asked whether the defendant had ever come across that. The defendant stated: "Yes – I did of course". The trial judge then asked the defendant: "and what is your understanding of that then as a traffic calming measure?" to which the defendant replied: "As a traffic calming measure it would be that you would slow down obviously". The trial judge then asked whether he had slowed down "especially having regard to it". The defendant replied:

"Well, my concern was the junction, judge, and to see a car stopped at the junction, there was no pedestrians around the area at the time and I was just driving my car at a normal speed approaching the junction. I saw the car stopped at the junction and at the last minute the plaintiff decided to make a manoeuvre with her car and unfortunately I was unable to avoid her."

34. The trial judge then asked the defendant if his general attitude would be to not pass much heed to traffic calming installations, to which the defendant replied: "Not at all judge".

35. This line of questioning continued for a short time further during which the defendant said that he would normally come across

traffic calming measures on the way into a town or village, but that these would normally come out into the road and narrow it, unlike the island that was being discussed in this case, "so that you are forced to slow down". The judge seems to have accepted that the island in question "was not as severe" as the sort of traffic calming that the defendant had referred to.

36. This was the extent to which "traffic calming" was referred to in any of the evidence, and is the only basis on which it found its way into the trial judge's conclusions. As I have said there was no expert evidence to establish that the island was indeed intended as a traffic calming measure imposing some extra obligation on a driver to moderate his/her speed approaching it. I do not consider that the defendant's responses to these questions represent a concession on his part that this island was a traffic calming measure.

37. Nevertheless, while the trial judge accepted that the defendant was driving within the speed limit, he concluded that the defendant had failed to moderate his speed further as he approached the junction in order to take account of this island in the road i.e. the "traffic calming measure". There was no evidence to support this conclusion.

Principles applicable to findings of fact on appeal

38. As there is no real dispute concerning the principles to be applied on this appeal, it is unnecessary to refer to them in any great detail. Suffice to say that when it comes to interfering with the findings of a trial judge, the well-worn principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210, apply. If the findings of fact made by the trial judge are supported by credible evidence, an appellate court is bound by those findings, however voluminous and apparently, weighty the testimony against them may be. As was stated by McCarthy J., the truth is not the monopoly of any majority. Further, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge to draw such inferences.

39. In my view reliance by the trial judge upon the traffic island constituting a traffic calming measure cannot stand since there was no evidential basis for it being considered to be such. Given that there was no finding that the defendant was exceeding the speed limit of 50kph, there is no evidential basis for the conclusion that the defendant was "probably travelling a bit too fast". Neither is there any evidence of any other feature of the road and scene generally which faced the defendant as he was approaching the junction, which would have obliged him to reduce his speed still further below the permitted limit, such as children being in the vicinity, it being a rainy day, there being ice on the road, it being dark, or there being pedestrians waiting to cross the road onto the island. In such situations there is of course an onus on a driver to take additional care, and to moderate his/her driving to take account of some such special feature. But no such special feature was present on this occasion. The plaintiff was undoubtedly stopped at the junction, and can be presumed by the defendant to be waiting to cross the junction in order to make a right turn. But she was required to yield to the defendant. That is clear. Given that the defendant had seen that she had already stopped, the defendant was entitled to assume that she would stay in that position until he had passed by. As a matter of law there was no additional duty upon him at that stage to moderate his driving to take account of some unlikely possibility that she might negligently move out into his path. In my view the trial judge erred in this regard.

40. The trial judge's finding of negligence against the defendant was not reached by reliance upon the evidence given by the plaintiff's engineer, Mr O'Rourke, as to the extent of the damage to the rear wheel on the plaintiff's car which in his view indicated that the defendant was travelling at a speed greater than was permitted, or upon the fact that the plaintiff's car had been caused to spin 180 degrees by the force of the impact, or perhaps even the position in which the plaintiff had stated that the defendant's vehicle was positioned after the impact had occurred, or a combination of all those pieces of evidence which he would have been entitled to accept as credible.

41. He would have been entitled to prefer that evidence to that of the defendant who pointed to the lack of any significant damage to the front of his car, and to the fact that his airbag did not activate. These matters are not referred to at all in his conclusions. He might well have reached a conclusion of negligence on the basis of this evidence by resolving any conflict of fact in the plaintiff's favour but he did not do so.

42. Equally the trial judge might have concluded as a fact that the defendant was between 70 and 90 metres back from the junction when the plaintiff first moved forward, and based on the evidence of Mr O'Rourke, he might have concluded also, by way of the speed calculation evidence, that the defendant was travelling at some 81kph. Again, he did not do so. He made no finding as to the position on the road that the defendant occupied when the plaintiff first observed his car and moved off. There is therefore no finding of fact from which the trial judge could properly conclude that the plaintiff moved forward at a point in time when the defendant ought to have been able to avoid the impact but for the fact that he was driving in excess of the speed limit.

43. There was no evidence given at trial to support the trial judge's finding of fact set out at para. 31(d) above, that the defendant was probably not paying enough attention to what were referred to as "movements and likely movements on the road". This is pure supposition and for which there was no evidence.

44. The only findings of fact made by the trial judge as I have listed them at para. 31 for which there was evidence which he could accept are those at (a) and (c). They are that a 50kph speed limit was applicable in the area, and that the defendant did not exceed that limit. Clearly neither of those findings of fact can, without more, sustain a finding of negligence against the defendant. There was no more.

45. My overall conclusion therefore is that there was no proper evidential basis for a finding of negligence against the defendant for the reasons which I have given.

46. I would allow the appeal, set aside the order made in the High Court, and dismiss the proceedings.

47. It is unnecessary in view of these conclusions to address the defendant's appeal against the award of damages, or his appeal against the measurement of differential costs, and the order for costs made in the High Court.