

**THE HIGH COURT**

**RECORD No. 2018 4756 P**

**BETWEEN:**

**AMOS OSAYAWE**

**PLAINTIFF**

**AND**

**JOSEPH GANNON**

**DEFENDANT**

**JUDGMENT of Mr Justice Bernard J. Barton delivered on 25th June 2019**

**Introduction**

1. The Plaintiff was born on the 25th May 1967, and ordinarily resides at 32 Knightscourt Avenue, Castlepark, Mallow, Co. Cork. However, in 2016, when the events giving rise to the proceedings occurred, he was living Dublin and was an undergraduate reading business and law at University College, Maynooth, Co. Kildare. At the commencement of the trial he dismissed his legal team and chose to present his case unrepresented. It was agreed at the outset that the Court would try the issue of liability as a preliminary issue.

**The Accident**

2. The accident occurred shortly before 6 pm on the 15th December, 2016. It was a dark winter's evening. The Plaintiff was involved in a collision with a taxi while crossing the junction of Santry Road and Richmond Road, Dublin. The junction was illuminated by street lighting and controlled by traffic lights. He gave evidence that he crossed the junction on a green pedestrian light and that as he reached the centre of what was the outer of two traffic lanes the Defendant's taxi, which had been stationary to his right in the outer lane, suddenly drove forward and struck him.
3. He called an engineer to prove photographs of the accident locus and to give evidence with regard to road dimensions, traffic light sequencing and sight distances at the junction. The engineer also gave evidence of the relative speeds of a pedestrian and a vehicle starting from stationary positions. The Defendant's account differs from that of the Plaintiff in two material respects, he drove off on a green light and the Plaintiff struck the taxi. The Plaintiff's evidence was that he first became aware of the taxi as he approached the junction. It was stationary in the outer lane. There were no other vehicles in either lane, a fact on which both parties agree.
4. They also agreed on the traffic light sequencing at the time of the accident. The engineer's evidence with regard to the pedestrian lights was that there are two phases, green and amber, six seconds for green followed by eleven seconds for amber. Although the traffic lights are demand controlled, there is no occasion during the pedestrian light phases when the lights for traffic in any direction are showing green or amber. A short interval elapses between the expiry of the amber pedestrian light and the first engagement of a green light for traffic in any direction. Both parties insisted that they had the benefit of a green light when they commenced their respective manoeuvres, the Plaintiff when he commenced crossing and the Defendant when he drove off; it follows from the sequencing one or the other must be mistaken in his recollection.

5. The Defendant accepts that as he approached the junction the lights for traffic travelling in his direction were showing red and that this was the reason why he had stopped. He remained stationary until the lights turned green, at which stage he drove off. Before doing so he had seen a young man standing near the left-hand traffic light standard. There is no suggestion that this person moved away from the traffic light standard at a moment when, according to the Defendant, the lights changed to green in his favour. Within moments of moving off the Defendant became aware - to use his words - of the Plaintiff 'coming onto his car' from the left-hand side and falling on to the bonnet before he 'slid onto the ground'.
6. On his evidence, the point of contact was the near side front area of the vehicle, somewhere in the region of the wheel arch. The Defendant made a statement to the police in which he admitted not to having seen the Plaintiff until the impact occurred, however, in evidence he said the Plaintiff was running. When asked to reconcile the conflict he accepted that the assertion of running was based on an assumption that if the Plaintiff had been walking he would have seen him.

#### **Account of Independent Witness**

7. The accident was witnessed by a Mr. O'Callaghan, another pedestrian who happened to be standing outside the Mill Mount House, a private club located on the opposite side of the junction. He was a member of the club and had stepped outside to smoke a cigarette. He gave evidence at the trial and was quite emphatic that he was able to see the Plaintiff, whom he described as 'dressed in dark clothing', running onto the pedestrian crossing. He had seen the Plaintiff come around the corner before going on to the crossing. It was at this point he also noticed the traffic lights had turned green governing the road on which the Defendant's taxi had stopped. It follows from the traffic light sequencing that if Mr. O'Callaghan is correct in his recollection not only did the Plaintiff run out onto the road but did so when the pedestrian light was showing red.

#### **Other Witness Evidence**

8. Shortly after the occurrence of the accident Detective Garda Cannon came on the scene. He stopped to investigate and was approached by Mr. O'Callaghan, with whom he spoke. He was given contact details and an account of the accident by Mr. O'Callaghan which he noted. Garda Cannon attended the Plaintiff. He found him lying to the front and left of the taxi, the same position as stated by Mr. O'Callaghan and the Defendant. Accordingly, there is no conflict on the evidence in relation to the post impact resting position of the Plaintiff on the road. The young man who had been seen by the Defendant standing at the pedestrian light spoke to Garda Cannon at the scene. He told him that the Plaintiff had 'whizzed past him' but he did not want to get involved and did not give evidence at the trial.
9. The Plaintiff was critical of the investigations carried out by Detective Garda Cannon, whom he said hadn't come to the hospital to get contact details as indicated to him at the scene. This suggestion was refuted by the officer who gave evidence of having tried on a number of occasions to contact the Plaintiff afterwards but was unable to do so. It appears the most likely explanation was that the Plaintiff had returned home to Cork to

recuperate following major surgery for his injuries. In due course an officer from Mallow Garda Station managed to carry out an interview during which a detailed statement was taken; although the Plaintiff subsequently made a complaint that the statement was not as detailed as he had wished. However, I notice from the text that he was given an opportunity to amend or add to the statement in any way he wished but chose not to do so.

10. The Plaintiff sustained serious injuries as a result of the collision most notably fractures of the right tibia and fibula. Although the Court is not concerned at this juncture with the question of quantum this injury, which involved a spiral fracture, is relevant to the issue of liability. The significance of the spiral nature of the injury was canvassed on the cross-examination of the Plaintiff's engineer. He conceded that a spiral fracture was consistent with the rotational forces which would be generated if the Plaintiff had run into the side of the taxi as contended by the Defendant. The engineer had expressed the opinion when giving evidence in chief that the injuries were more likely attributable to and consistent with a full-frontal impact rather than with a side impact.
11. The concession is significant in another context. There was some controversy over whether the Defendant's taxi was stopped between the 'turn' sign on the road and the stop line or whether it had stopped at the stop line. The Plaintiff seemed to think that it was further back towards the word 'turn' written on the ground whereas the Defendant's evidence was that he stopped the vehicle literally at the stop line. The Defendant placed the position of his car at the point of impact between the stop line and the pedestrian traffic lines on the road whereas the Plaintiff placed point of impact with the taxi on the pedestrian crossing.
12. A vehicle assessor, Mr. Nangle, assessed the car after the accident and wrote a report in which he recorded an account of the accident furnished to him by the Defendant which accords with the account of the accident circumstances he gave at trial, namely, that the Plaintiff had collided with the near side front of the car. There was also a suggestion that damage seen on the bonnet had been caused in a previous accident involving a boy on a bicycle rather than as a result of contact with the Plaintiff.
13. Whatever the cause it is clear from the assessor's report that there was no damage to the bumper, the wing, the wheel arch or front body panels of the Defendant's car as a result of the collision. The Plaintiff's engineer didn't expect that there would be any such damage because, as he put it, it was common case that the Defendant's vehicle had actually pulled off from a stationary position just before the impact, so it could not have been travelling other than slowly.

#### **Decision**

14. The Plaintiff carries the onus of proof to establish the case he brings to Court on the balance of probabilities. Where, as here, the Defendant pleads contributory negligence the same onus of proof in that respect rests with the Defendant. The case made in this regard was that Plaintiff was the author of his own misfortune not only in failing to look where he was going and to yield right of way but also by running out on to a pedestrian

crossing and doing so at a time when a red light was showing against him. There was some cross questioning of Mr. O'Callaghan by the Plaintiff on how he had come to be involved in the case and on the allegation of running, which the Plaintiff suggested had been introduced into the case late and without notice. I am quite satisfied there is no basis for the criticism. The allegation that the Plaintiff ran onto the crossing is pleaded in the defence and cannot have come as a surprise.

15. Moreover, I am quite satisfied that there is nothing sinister in how Mr. O'Callaghan came to be involved in the case. I am satisfied and find that he did not discuss his evidence with solicitors for either party and that the first time he actually met the Defendant was in Court, indeed, there is no ground on which to found any conclusion other than that he is an entirely independent witness with no reason to favour one party over the other. I found him to be an entirely truthful witness on whose evidence the Court may rely.
16. The account of the accident he gave to the investigating police officer minutes after the accident occurred, and before any question of his involvement in a court case arose, is entirely consistent with his evidence which in the circumstances fills a lacuna in the evidence of the Defendant, who I am satisfied was unaware of the Plaintiff until the impact occurred, most likely because he ran around the corner out onto the road. I am also satisfied and find that the position where the Plaintiff was found on the ground, about which there is no controversy, together with the spiral nature of the fractures are best explained by the Plaintiff running into the side of the taxi rather than by as a result of a frontal collision.
17. While I am satisfied the Plaintiff, no doubt believes in the truth of the account of the accident circumstances he gave in evidence, in my judgment he is mistaken in his belief that he had a green light when he commenced crossing the junction and that he was walking rather than running when he did so. Of the competing accounts of the accident, I find the Defendant's case to be far more convincing. The alternative requires a finding that for some inexplicable reason the Defendant simply drove from a stationary position through a red light, at which he had stopped, straight into the Plaintiff who cannot but have been seen as he walked across the road with the benefit of a green light. The essence of the proposition advanced by the Plaintiff is that having stopped the Defendant decided to break a red light and drive into the path of a pedestrian who was clearly visible walking in front of his car, a scenario I consider to be highly improbable. I am fortified in reaching the conclusions I have by the engineering evidence that vehicle speed had little or no role to play in the cause of the injuries.
18. In this regard, the Defendant's vehicle came to rest a very short distance from where it had stopped. At worst from the Defendant's point of view he got as far as the pedestrian crossing, though on the Defendant's evidence his vehicle had only got as far as a point between the stop line and the pedestrian crossing lines, the position where the car was found by everybody who attended at the scene. So even on the Plaintiff's best case whatever speed had been gathered up by the vehicle starting from a stopped position, the

Defendant had been able to stop it in short order; speed was not a causative element in the collision.

19. That conclusion begs the question as to the source of the energy necessary to cause a spiral fracture of the right tibia and fibula. The only element of speed capable of generating the required forces is to be found in the account of the accident given by Mr. O'Callaghan. The evidence for speed is to be found in his evidence that the Plaintiff ran onto the crossing and impacted with the near side front area of the car thereby causing him to rotate off the car onto the ground, resulting in a spiral fracture of the right tibia and fibula in the process.

### **Conclusion**

20. Having found that the Plaintiff ran into the near side front of the Defendant's taxi in circumstances where the Plaintiff was seen on the foot path by Mr O'Callaghan before he reached the junction the question which arises is whether, notwithstanding he had a green light and thus the right of way, the Defendant's failure to see the Plaintiff amounts to causative negligence, particularly where the view to his left was unobstructed by other vehicles. In my judgment, the failure to see the Plaintiff in the circumstances is *prima facie* evidence of negligence. However, having regard to the findings made and conclusions already reached I am satisfied, and the Court finds that the Defendant's failure to keep a proper look out was not causative of the accident.
21. It follows that the cause of the accident is attributable, and attributable solely to the negligence of the Plaintiff in failing to keep a proper look out, in running out onto the pedestrian crossing, in crossing or attempting to cross the road against a red pedestrian light, in failing to yield right of way to the Defendant and in colliding with the near side front of his taxi.

### **Ruling**

22. Having regard to the findings made and the conclusions reached the Plaintiff's claim will be dismissed. And the Court will so order.