Neutral Citation Number: [2011] IEHC 403

THE HIGH COURT

2008 2535 P

Between:

Kerrill Lindsay

Plaintiff

And

David Finnerty, Thomas Kelly and Motor Insurers Bureau of Ireland

Defendants

Judgment of Mr Justice Michael Peart delivered on the 25th day of October 2011:

1. During a couple of hours prior to sustaining an injury to his knee and abdominal injuries in a road traffic accident near his house at Gurteen, Ballinasloe, Co. Galway sometime after midnight on 12th August 2006 while a seat-belted front seat passenger in a car being driven by the first named defendant (Mr Finnerty), the plaintiff had been in the company of Mr Finnerty and the second named defendant (Mr Kelly) in a public house nearby. He had met these defendant and others there for a pre-arranged game of poker.

2. At the conclusion of the poker game he apparently suggested that they return to his house which was not far away. The plaintiff accepted a lift from Mr Finnerty, while Mr Kelly drove his own car behind them. It appears that for a while Mr Kelly had sight of Mr Finnerty's car ahead of him. However, another car got between him and the first named defendant's car for a while and he lost sight of Mr Finnerty's until after that intervening car turned off the road.

3. Having been not far behind Mr Finnerty's car, he soon came upon it again, but in circumstances where Mr Kelly's car was stationary on the road and facing back towards him. He saw this only as he came around a bend in the road, and he was unable to stop his car in time and collided head-on with Mr Finnerty's car. This is a small country road with no lighting whatsoever. Mr Kelly did not see the incident in which Mr Finnerty's car ended up on its wrong side of the road and facing back towards him.

4. The plaintiff gave evidence of what had happened. He stated that as Mr Finnerty was driving along this road, he was travelling at an estimated 80 kilometres per hour (50mph), and that the car suddenly veered into the bank on the left hand side, whereupon Mr Finnerty seemed to lose control of his vehicle which spun around causing the rear portion of the vehicle to hit a wall on the opposite side of the road, ending up at an adjacent tree, but facing the direction in which Mr Kelly was travelling. Moments after Mr Kelly's car hit the wall, the vehicle was hit head-on by Mr Kelly's vehicle.

5. Thus, there were two impacts to Mr Finnerty's car in quick succession.

6. The plaintiff was wearing his seat belt. Following the two impacts he was able to get out of the car, but apparently had sustained a minor laceration to his right knee but also had abdominal pain consistent with him being belted in the car.

7. Mr Finnerty was uninsured on this date, hence the MIBI is a party to these proceedings. Judgment in default of appearance has already been obtained by the plaintiff against Mr Finnerty on the 21st December 2009, damages to be assessed by this Court.

8. The principal issue to be determined apart from the assessment of damages and any apportionment of same between Mr Finnerty and Mr Kelly is a legal issue as to whether these two incidents are separate accidents, or whether those two defendants are or are deemed to be concurrent wrongdoers for the purpose of Section 11 of the Civil Liability Act, 1961 ("the Act of 1961"). The relevance of that issue is that I am urged by John Kiely BL for Mr Kelly that if it is concluded that these impacts occurred due to separate and distinct incidents, then the Court should assess damages against the respective defendants on the basis of which injuries were sustained in each accident, so that the MIBI would be liable for the award made against the first named defendant in the event that it is unsatisfied by Mr Finnerty, and so that Mr Kelly would be liable only for the award made against him. On the other hand, and as urged by David McGrath SC for MIBI, if Mr Kelly and Mr Finnerty are concurrent wrongdoers, and Mr Kelly is found to have been even 1% liable for the injuries caused, then the award would be on the basis of concurrent liability and can be satisfied by either defendant by virtue of Section 12 of the Act of 1961, and in particular by Mr Kelly with the result that the MIBI is not required to provide any indemnity in respect of the uninsured driver, Mr Finnerty on the basis of the so-called 1% rule. I shall return to that issue.

9. As I have said, Mr Finnerty's car went too close to the left hand edge of the road, and in an effort to correct this it went out of control, spun around, and the rere portion of the car hit a wall. I am not clear whether it was the rere side panel of the car or the actual rere itself which hit the wall, but in all probability it was the rere side panel. Not much turns on that in any event.

10. Mr Kelly's evidence was that as he was driving along the same road behind Mr Finnerty's car on his way to the plaintiff's house he came to the bend referred to, and collided head-on with Mr Kelly's car which was facing in his direction. He had not seen this car until the very last moment and a second or two before impact. Mr Finnerty's car had no lights on. Presumably they were damaged in the impact. Mr Kelly has stated that his own head lights were on full beam, and that he would have been travelling at between 60-65 kilometres per hour (40mph approx). The evidence of Mr John Mooney, Consulting Engineer has been to the effect that making allowance for the bend in the road at this point Mr Kelly would have had a line of sight to Mr Finnerty's car of about 70 metres, though if he did not have his lights on full beam this could be reduced to about 50 metres. Mr Mooney has stated that if, as Mr Kelly states, he was travelling at or about 60 kilometres per hour, he ought to have been able to bring his car to a halt within 39 metres. His conclusion is that either he was not paying sufficient attention to the road ahead, or that he was travelling in excess of 65 kilometres per hour. According to Mr Mooney's report the tarred surface of this road is about 12ft 6inches in width. It is therefore a narrow and unlit country road.

11. Judgment has already been obtained against the first named defendant. Liability is determined in that respect by the judgment which has been obtained against him, albeit a judgment obtained in default of appearance. That said, it is beyond doubt that the plaintiff's evidence as to how the first impact occurred demonstrates clearly that the first named defendant was driving negligently on

this night, and that in so far as the plaintiff suffered injuries in that impact, the first named defendant was totally responsible. He drove negligently and in a manner which resulted in his losing control of his vehicle, and causing the vehicle to hit a wall on the other side of the road.

12. There is no evidence of any contributory negligence against the plaintiff since it is beyond doubt that he was wearing a seatbelt while being carried as a passenger.

13. As for the second named defendant, it is clear from the evidence which has been given by John Mooney, Consulting Engineer, that even if he was driving at the speed which he stated and with his full beam headlights on, he ought to have been able to bring his car to a halt in sufficient time to avoid colliding with the first named defendant's car, even though that car ought not to have been in the position it was on the road, if he was keeping a proper lookout ahead of him. There is insufficient evidence to establish even as a matter of probability that the second named defendant was driving at a speed in excess of what he has stated. In my view and on the balance of probabilities, he cannot have been paying sufficient attention to the road ahead to avoid impacting with the first named defendant's stationary vehicle, and was negligent in that respect.

14. Given the evidence which I have heard, the second named defendant was liable to the extent of 20% for the second impact. Clearly he had no hand act or part in the first incident which was solely the responsibility of the first named defendant.

15. I will come to the plaintiff's injuries in due course.

Concurrent wrongdoers?
16. It is easy for a person looking at the bare facts of these two incidents to consider that they are separate in the sense that they occurred other than simultaneously in the strict sense and involved different vehicles. In that strict sense there are separate. But one must bear in mind that the first led directly to the second. The second would not have occurred if the first had not. That is the first thing to consider.

17. The second matter to consider is that the medical evidence does not make it clear whether the plaintiff's knee injury and/or his abdominal injuries was suffered in one incident or the other. Professor McAnena who gave evidence stated quite clearly that the abdominal injuries could have been caused by either impact. While the plaintiff in answer to a direct question from his own counsel agreed that his knee was hurt in the first incident, that question was leading in nature, or at least was a question which prompted the plaintiff to agree. I did not form the impression that he recalled particularly that this is what occurred, though of course it may have.

18. The third matter to be considered is the manner in which the Oireachtas has enacted Section 11 subsection (1) and subsection (2) of the Act of 1961, and provided guidance as to how the concept of concurrent wrongdoing must be considered.

19. Section 11 (1) provides:

> *"11.—(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and **are responsible to a third party** (in this Part called the injured person or the plaintiff) **for the same damage**, whether or not judgment has been recovered against some or all of them." (my emphasis)*

20. Section 11 (2) provides:

> *"11. – (2) Without prejudice to the generality of subsection (1) of this section –*
>
> *(a) persons may become concurrent wrongdoers **as a result of vicarious liability** of one for another, breach of joint duty, conspiracy, concerted action to a common end **or independent acts causing the same damage**;*
>
> *(b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;*
>
> *(c) it **is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive."** (my emphasis)*

21. Paragraphs (a) and (c) are particularly illuminating. It is clear from these provisions that if two persons are responsible for the same damage, it matters not firstly that the act of one person is independent of the act of the other, and secondly that the acts take in succession to each other and not simultaneously. In the present case the available evidence is to the effect that the injuries suffered by the plaintiff may have been caused by either defendant's act or both in combination. In my view that is sufficient to meet the provision of paragraph (a) above as it is perfectly possible from the evidence that each act caused the same damage even if to different degrees. It is clear also that the two incidents occurred in close succession, and that is sufficient to meet the provisions of paragraph (c).

22. I conclude therefore that the first and second named defendants are concurrent wrongdoers for the purpose of Section 11 of the Act of 1961, and that they share liability for the plaintiff's injuries and loss on a joint and several basis, whereby either defendant can be pursued for the recovery of damages. Each is liable for the plaintiff's damages and loss, but as concurrent wrongdoers each would be entitled to pursue the other in respect of any portion of those damages and loss which he has had to discharge in respect of the other's share of liability. Put simply, in the present case, the second named defendant will be obliged to discharge whatever judgment is awarded to the plaintiff, but would be entitled to seek to pursue the first named defendant in respect of 80% thereof, should he wish to do so.

General Damages:
23. The plaintiff suffered a minor laceration to his right knee which according to the medical reports required suturing although the plaintiff does not recall that sutures were inserted. It healed satisfactorily, and he is left with a small scar which does not concern him at all.

24. The significant injury was to his abdomen. Clearly this resulted from the fact that he was wearing a seatbelt, and the force of the impact and the restraint applied to his body by the seatbelt resulted in internal injuries and external bruising. He was brought to hospital where he was examined and admitted for surgical observation to establish if hehad a blunt intra abdominal trauma injury to one of the viscera. A CT scan was carried out which revealed some intra peritoneal bleeding but no source was identified. He was discharged on the 14th August 2006.

25. He was very unwell in the following two weeks and returned to hospital. A repeat CT scan was performed which showed that the mid segment of the small bowel was slightly dilated. He was discharged again on the 28th August 2006. During these weeks he was suffering from regular and severe abdominal pain, diarrhoea, and constipation. He was in great discomfort. He was also vomiting intermittently.

26. He lost a lot of weight over these months.

27. In October 2006 a laparoscopy was performed under anaesthetic which revealed an obstruction to the small bowel caused by an adhesion. This was eased. He had a barium meal x ray which came back normal. In the following months he was still suffering greatly as before, and due to extreme weight loss was re-admitted in February 2007 as an emergency. It was decided that he required a laparotomy and this was duly performed when a small section of his small bowel was removed.

28. He made a successful recovery and he regained his former weight and life gradually got back to normal. But he continues to suffer from intermittent rumbling in his abdomen which he finds uncomfortable, as well as somewhat embarrassing when he is in the company of others, particularly in quieter surroundings. This is likely to continue. Professor McAnena states that he cannot say for how long this will continue or whether he will recover completely in this regard at all.

29. The plaintiff was out of work for a total of 35 weeks on and off. He tried to continue with his work from time to time but was unable to continue. He eventually was laid off due to the downturn in the nation's economy and its effect on the construction industry, and he decided to go back to college where he remains at the present time.

30. I assess general damages in respect of the knee injury and the abdominal injuries and subsequent medical interventions and sequelae in the sum of **€75,000**.

31. In respect of future suffering resulting from the rumbling in his abdomen which are likely to remain with him indefinitely, I assess a further sum of **€7000.**

Special damages:
32. Special damages have been agreed in the sum of €50,428

33. The total for general damages and special damages is therefore €132,428 and there will be judgment against the first and second defendants for this sum on a joint and several basis, and the plaintiff will be awarded his costs of these proceedings against the first and second named defendants on the same joint and several basis, to be taxed in default of agreement, to include any reserved costs.

34. I will order also that the third named defendant do recover its costs of the proceedings against the plaintiff, with an order over in respect of those costs in favour of the plaintiff and against the first and second named defendants on a joint and several basis.

35. Given my finding that the first named defendant's share of responsibility for the plaintiff's injuries is 80%, I will order that the second named defendant do recover from the first defendant 80% of the amount paid by the second named defendant to the plaintiff in discharge of the joint and several judgment and costs, including 80% of the costs of the MIBI which have been ordered to be paid by the plaintiff and in respect of which I have made an order over against the second named defendant.

36. I will make no order as to costs as between the MIBI and the second named defendant in relation to the Notice of Contribution and Indemnity between those parties.