Neutral Citation No. [2005] IEHC 51

THE HIGH COURT

[2001 No. 557P]

BETWEEN

MICHAEL COUNIHAN

PLAINTIFF

AND
BUS ATHA CLIATH – DUBLIN BUS AND ARTHUR EBBS

DEFENDANTS

AND
THE HIGH COURT

[2001 No. 558P]

BETWEEN

KATHLEEN COUNIHAN

PLAINTIFF

AND
BUS ATHA CLIATH – DUBLIN BUS AND ARTHUR EBBS

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 2nd March, 2005.

1. The respective plaintiffs are husband and wife. On 14th May, 2000 they were walking along the footpath on the Sillorgan dual carriageway travelling towards Donnybrook on the Belfield side. Without warning a bus owned by the first defendant ("Dublin Bus") and being driven by the second defendant ("Mr. Ebbs") travelled across a number of lanes of the city bound carriageway, mounted the footpath and struck a blow against both plaintiffs. As a result they suffered significant injuries. The incident occurred in the early afternoon on a Sunday when driving conditions were good and the traffic on the roadway was relatively light. In all those circumstances it would be likely to require somewhat unusual, if not extraordinary, circumstances in order that an action in negligence by the plaintiffs against the defendants could be the subject of an arguable defence. However, on any view, there are extraordinary circumstances.

2. The bus concerned was a tour bus which had commenced its route earlier in the day in Dublin city centre. It had travelled to Killiney, where it stopped, and onwards to Avoca Hand Weavers where the customers had lunch. It was in the course of travelling back to Dublin city centre when the accident occurred.

3. David Mudd who was a passenger on the bus gave evidence, which was not disputed by either of the defendants, which described the tour up to the time of the incident. With the exception of commenting that he found Mr. Ebbs to be lively he noted nothing unusual about the way in which the tour was conducted. His comment on the liveliness of Mr. Ebbs related to the fact, with which Mr. Ebbs agreed, that he engaged in a fair amount of talk and banter together with some singing in the course of conducting his tour.

4. However when the bus had passed through the traffic lights at the junction of Foster Avenue and was heading under the flyover which leads to the Belfield campus Mr. Mudd noticed a change. It is common case that Mr. Ebbs drew the attention of his passengers to the presence of the Belfield campus on what would have been his and their left. He also drew their attention to the presence of the Montrose Hotel on the right. Thereafter he did not pass any comment and it would appear likely turned off his microphone. As the bus was beginning to come up the incline on the city side of the flyover it is again common case between Mr. Mudd and Mr. Ebbs that the bus was in the right hand lane which is designated as a lane for making a rightward turn at the upcoming junction on the corner next to the RTE premises at Montrose. However at some stage on the upward incline the bus began to drift over towards the left hand side of the carriageway. Initially Mr. Mudd did not consider that anything unusual was happening. Mr. Mudd and his wife were visitors from England and were unfamiliar with the roads in the vicinity. He gave evidence that his assumption was that the bus intended to take a left turn somewhere further up the carriageway.

5. Mr. Ebbs evidence is that soon after he had drawn his passengers attention to the Montrose and stopped speaking he felt warm. He states that he recollects loosening his tie and thereafter has no recollection of any events until coming to in circumstances where the bus, having already injured the two plaintiffs, had crashed into the railings at the entrance to the Belfield Court Apartments which are on the left side of the carriageway travelling into the city.

6. The only other evidence relating to what physically happened on the occasion in question came from a Mr. John Sweetman, who was driving a car travelling in the same direction as the bus, and from a Mr. Derek Gibbons who was driving a Number 10 bus back towards Dublin city centre having exited from the Belfield campus.

7. Mr. Sweetman's evidence confirms, in general terms, the evidence given by Mr. Mudd and Mr. Ebbs. However he did add two matters which have the potential to be material and which I should set out. However prior to doing same it is important to note the context in which Mr. Sweetman initially made a statement of his recollections of the events. He did not stop at the scene but drove to Donnybrook Garda Station to report the accident. Some months later on 14th August, 2000 he made a statement to the Gardaí. In that statement Mr. Sweetman said as follows:-

> "I became aware of a Dublin Bus double decker bus ahead of me with the registration number that I now know to be 96 D 283. It was either in the outer lane or it pulled it into it as I got near to it so I assumed it was going to turn to the right at Nutley Lane. I proceeded to pass it on the left hand side. As I drew abreast, it began to pull back into my lane. The driver appeared to see me and straightened out. At this stage we were about at the top of the incline at the end of the underpass. I passed by. As I continued, in my rear view mirror I saw him pull back across behind me. He continued across into the converging bus lane, mounted the pavement and entered the railings and hedge outside the apartment complex and came to a halt upright."

8. In evidence Mr. Sweetman indicated that he had initially felt that he had made eye contact with the driver but that he now felt that that was unlikely having regard to the difficulty of seeing a bus driver from his position in his car. However he remained of the view that the bus appeared to straighten as an initial response to his presence and only continued to cross the carriageways when he had passed by. I found Mr. Sweetman a most careful witness. However, his recall of the detail of the accident (for example what lane the bus was in before the event) was, for understandable reasons, somewhat hazy.

9. Mr. Gibbons evidence was that he was travelling down the slip way bus lane from Belfield when he saw the bus being driven by Mr. Ebbs coming across the various laneways. Subject to the fact that it appeared to Mr. Gibbons that Mr. Ebbs bus was not giving him much room he did not feel that the driving was particularly unusual until the bus continued to cross over onto the footpath and into the railings.

10. The above apparently strange set of circumstances is placed in much clearer light when one considers the medical evidence. Dr. Gearty, a Consultant Cardiologist at St. James' Hospital, was called to give evidence by the defendants and gave evidence of having reviewed the notes from St. Vincent's Hospital (the hospital to which Mr. Ebbs was taken immediately after the accident). Dr. Gearty's evidence, which was not contested, was to the effect that the clinical findings evidenced by those notes were that Mr. Ebbs was suffering from sick sinus syndrome. This is a condition which affects the rhythm of the heart. While the more normal onset of the condition gives rise to what Dr. Gearty described as "little dizzy spells and fainting" he indicated that while not common it was equally not rare for the condition to present itself initially in quite a dramatic fashion giving rise to what he described as a "profound blackout". The condition is treated by implanting an electric pacemaker. Dr. Gearty further gave unchallenged evidence that the condition was of a degenerative variety, was unknown in infancy and childhood and that while there was a small scattering of incidents noted in the literature in respect of the onset of symptoms in people in their twenties the average age of clinical presentation was 50.

11. On the basis of that evidence I have no doubt but that Mr. Ebbs suffered from the relevant condition. Having regard to the description of the condition by Dr. Gearty, the evidence of Mr. Ebbs as to the circumstances surrounding the accident, and Dr. Gearty's clear indication that the account given by Mr. Ebbs was entirely consistent with his case being one of a dramatic initial presentation of the symptoms, I have come to the view that what occurred on the occasion in question was that Mr. Ebbs suffered a complete blackout as a result of a latent sick sinus condition. On the basis of his evidence and also the evidence of Dr. O'Connell (a panel doctor with CIE who has acted as his general practitioner) I am satisfied that there was no preliminary warning of the condition such as would have led Mr. Ebbs to be concerned as to his ability to drive. Furthermore on the basis of Dr. Gearty's evidence I am satisfied that there is no reasonable test that could have been carried out which would have ascertained the existence of the condition in advance of this accident. As Dr. Gearty pointed out, the tests which show the irregulatory in the heart rhythm can only do so when the test is carried out at a time when the patient is actually suffering from a manifestation of the condition. In the circumstances it is highly improbable that any test would have detected the condition until it became symptomatic. For the reasons indicated above I am satisfied that the condition was not symptomatic in advance of the accident. While there was some contest as to whether Mr. Ebbs might have suffered from fainting as a child, on the basis of the evidence as to the timing of the onset of the condition, this does not seem to be relevant.

12. In those circumstances it seems clear to me that there is no basis for suggesting that either Dublin Bus (as employer) or Mr. Ebbs (as driver) ought to have been aware of the danger of Mr. Ebbs driving and any contention of negligence based on such a proposition must, necessarily, fail.

13. The remaining aspect of the plaintiffs case gives rise to a consideration of a difficult question of law. In the light of the findings of fact above can it be said that Mr. Ebbs was guilty of negligence in his driving of the vehicle in circumstances where both he would be liable and Dublin Bus would be vicariously liable.

The Law
14. In *O'Brien v. Parker* [1997] 2 I.L.R.M. 170 Lavan J. approved the principles decided in the English case of *Roberts v. Ramsbottom* (1980) 1 W.L.R. 823 to the effect that a defence of automatism was a defence in civil law.

15. However Lavan J. went on to hold that there were strict limits to be maintained in order for a successful defence to be established under that heading. He found that there must be "a total destruction of voluntary control on the defendants part. Impaired, reduced or partial control is not sufficient to maintain the defence".

16. On the facts of the case before him Lavan J. was not satisfied that there had been such a total loss of control. It should be noted that the position in England has advanced since the *Roberts* case. In *Mansfield v. Weetabix Limited* (1998) 1 W.L.R. 1263 the Court of Appeal disapproved of the dictum of Neill J. in *Roberts v. Ramsbottom*. The basis of the court's decision was that in criminal cases the question is whether the defendant was driving and hence it is necessary for the defendant, if he is to escape conviction, to show that he was in a state of automatism. Since that is not the test in civil cases, consideration of criminal cases can only introduce confusion. The decision of the Court of Appeal is based on the first principle of liability for negligence that is to say the duty of care which a driver owes to other road users. The standard of care which such a driver was obliged to show was that which was to be expected of a reasonably competent driver unaware that he was or might be suffering from a condition that impaired his ability to drive. The court was of the view that to apply an objective standard in a way that did not take account of such a condition would be to apply a test of strict liability. The court's view was, therefore, that in cases where the driver did not know and could not reasonably have known of his infirmity which caused the accident he was not at fault and was not negligent. For the reasons indicated above I have concluded that the driver in this case did not know and could not reasonably have known that he was suffering from the condition which ultimately caused the accident. There seems to be little doubt, therefore, that applying the test in *Mansfield* the defendants must succeed. However if one were to apply the *Roberts* test as approved by Lavan J. in this court a somewhat more difficult question arises.

Application of *Roberts* test to this case
17. If the *Roberts* test is the correct test then it is necessary for a defendant in circumstances such as Mr. Ebbs, to establish that he had a total lack of control over his ability to drive on the occasion in question. An impaired ability would not suffice. It is in that context that the evidence of Mr. Sweetman comes into play. The plaintiffs case is that:-

> (a) the *Roberts* test is the correct test; and
>
> (b) on the *Roberts* test and in the light of the evidence of Mr. Sweetman, Mr. Ebbs must have retained some control over the bus so as to react to Mr. Sweetman's presence on the road.

18. In that context counsel for the plaintiff canvassed with Dr. Gearty the possibility that Mr. Ebbs might either have been partially but not completely blacked out or alternatively might have had a conscious moment in the course of being blacked out. Dr. Gearty's view was that as identified in the medical literature incidents seem to arise either as relatively minor fainting and dizzy spells or as complete blackouts but not to any significant degree at an intermediate level. Having regard to that evidence and Mr. Ebbs own account, which I accept, I am satisfied that Mr. Ebbs suffered a complete blackout on this occasion.

19. As to the possibility of a "lucid" interval Dr. Gearty felt that such was highly improbable but that if it had occurred it was unlikely

that Mr. Ebbs would remember it. Even if there was a "lucid" interval during which Mr. Ebbs was in some control of the vehicle for a moment so as to react to Mr. Sweetman's presence on the road it does not seem that his driving on that occasion was in fact what led to the accident. On the contrary on that scenario he would have, to the best of his ability, sought to correct matters while lucid. What would then have caused the accident was a relapse into a total blackout after he had managed the initial correction to avoid Mr. Sweetman. It seems therefore clear that whatever else may be the case the driving which led to the accident (which was the driving, if that can be the appropriate term, which occurred after Mr. Sweetman had passed by the bus) occurred at a time when Mr. Ebbs was totally blacked out. For these reasons even on the *Roberts* test I am satisfied that the defendant is entitled to succeed.

20. Determining whether the *Roberts* test is the correct test does not, therefore, seem to me to arise on the facts of this case but in case this matter goes further I should express a view that the test set out in *Mansfield* appears to more closely fit into the principles applicable to the establishment of liability for negligence in civil law than the test suggested in Roberts. It might be added that a driver remains under a duty of care, after the onset of symptoms, to do his best to control the difficult situation in which he finds himself. There is no evidence of any failure on the part of Mr. Ebbs to so act.

21. Before leaving this matter it does seem to me that I should comment on what is undoubtedly a most unfortunate situation from the point of view of the plaintiffs. They were injured through no fault of their own. In *Snelling v. Whitehead*, The Times, 31st July, 1975 Lord Wilberforce said as follows:-

> "The case is one which is severely distressing to all who have been concerned with it and one which should attract automatic compensation regardless of any question of fault. But no such system has yet been introduced in this country and the courts, including, this house, have no power to depart from the law as it stands. This requires that compensation may only be obtained in an action for damages and further requires, as a condition of the award of damages against the (driver), a finding of fault, or negligence, on his part … it is … not disputed that any degree of fault on the part of the (driver) if established is sufficient for the plaintiff to recover. On the other hand, if no blame can be imputed to the (driver) the action based on negligence must inevitably fail".

22. Having quoted the above passage Leggatt L.J. in *Mansfield* went on to comment as follows:-

> "In the present case the plaintiffs may well have been insured. Others in the position may be less fortunate. A change in the law is, however, a matter for parliament".

23. Apart from agreeing with the above observations it is worthy of some note that in respect of persons who are injured in motor accidents (though not other accidents) through no fault of their own, legislation and administrative action in this jurisdiction have gone some considerable way towards ensuring that such persons are, in practice, able to recover compensation. As a matter of statute all drivers are required to carry insurance. Where a person is injured as a result of the negligence of an uninsured driver arrangements are in place through the Motor Insurers Bureau of Ireland to ensure that compensation will be forthcoming. Such arrangements now apply even in circumstances where the driver concerned cannot even be identified. Furthermore separate arrangements are in place to ensure that effective compensation is available to those who may be injured due to the negligence of visiting drivers.

24. In all those circumstances, it is, perhaps, somewhat surprising that a category of persons who, on the basis of my findings above, include the plaintiffs in these actions, who are injured due to no fault of their own are, as a result of the state of the law, deprived of appropriate compensation. However, as was pointed out in *Mansfield*, a change in that law is a policy decision which is a matter for the Oireachtas.