

THE HIGH COURT

[2016 No. 19 CAT]

NORTHERN CIRCUIT COUNTY OF MONAGHAN

BETWEEN

AMANDA GERVIN

PLAINTIFF/RESPONDENT

AND

MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Baker delivered on the 4th day of May, 2017.

1. This judgment is given in respect of nine separate appeals from the Circuit Court sitting in Monaghan. The nine plaintiffs were passengers in a minibus and claim to have suffered personal injuries arising from an incident when the minibus was alleged to have been hit from the rear by a motor vehicle which is untraced.

2. The defendant is the Motor Insurers' Bureau of Ireland, ("the MIBI") sued by virtue of an agreement made on 31st March, 2004 by which a person seeking compensation for personal injuries in proceedings against an unidentified or untraced owner or user of a vehicle may enforce that claim against it.

3. Most of the appellants succeeded in their actions in the Circuit Court and in those cases the appeal is by the MIBI. The claims of two of the plaintiffs were dismissed in the Circuit Court and they have brought these appeals.

4. This judgment is headed in the action first heard, that of Amanda Gervin. The titles and record numbers of the other appeals are set out in a schedule to this judgment. As each of the plaintiffs makes a claim in respect of the same incident, this judgment is given in respect of liability in all nine appeals.

The details of the incident

5. The incident in respect of which the claims are brought occurred in the evening between 7:45 and 8:00pm on 9th August, 2008, at Drumgoole, Silverstream, Co. Monaghan. The plaintiffs are friends, and in some cases relatives, whether by birth or marriage, and they had hired a minibus for the purposes of travelling from their homes, most of them in Northern Ireland, to enjoy an evening together at the greyhound track in Dundalk, Co. Louth.

6. David Morgan, one of the plaintiffs was agreed to be the designated driver and he and another person hired the minibus for the evening for the sole purpose of travelling to and from Dundalk.

7. The incident happened at a T-junction known locally as Snips Bridge where the L5310 and L5920 roads meet, a country road.

8. Each of the plaintiffs in their own way described an incident where they felt a jolt or a thud to the rear of the vehicle as they were turning left off the L5310 onto L5920. Only two of the plaintiffs saw a vehicle, what they describe as a saloon type car of a green colour, although neither of them noticed the number plate and whether it bore an Irish number plate or a yellow Northern Irish plate. The vehicle did not stop and no independent evidence is available of any vehicle of the type described having been present on the roadway at the material time.

9. All of the plaintiffs suffered whiplash type injury, from which most have recovered, although some of the plaintiffs say that they still suffer residual symptoms.

10. Three gardaí attended at the scene of the incident, one of whom was a trainee female garda. Two of the gardaí gave evidence and neither saw any debris or marks on the road that might assist in understanding the nature of the accident.

11. I set out briefly the plaintiffs and their injuries.

12. Amanda Gervin is 44 years of age. She has two children, no relevant past medical history or no prior or subsequent claims for damages for personal injuries. She was wearing a seatbelt and suffered an injury to her neck, shoulders and upper arms.

13. David Morgan was the driver of the vehicle, is aged 41 and describes himself as being of a nervous disposition. Since the incident he was the victim of a very frightening terrorist incident. He had one prior claim arising from an assault when he was a young child which was compromised. Mr. Morgan described himself as being very shook up at the scene and thereafter, such that he was unable to drive the minibus back to the home of Bernadette McBride, the home nearest to the incident. He suffered injury to his neck and general anxiety.

14. Paul Campbell is a married man aged 39 with four children, one of whom was in utero at the time of the incident. He has no prior claims. He took charge after the incident and phoned the gardaí. He gave evidence of debris on the road following the incident. His claim in the Circuit Court was dismissed. He complains of injury to his low back which radiates to his legs.

15. Lyndsey Gervin is 33, she has two children one of whom is deaf. There is nothing relevant in her medical history. At aged 13, she was injured in an accident and was compensated. She suffered injury to her neck, shoulder, bruising and a buzzing sensation in her head.

16. Bernadette McBride is 58 and has nine children, and she cares for the child of her predeceased daughter, her granddaughter. She had an accident claim very many years ago but no other relevant claims. She has a history of back and left leg pain. She claims the injury exacerbated the pain in her back.

17. Deirdre Campbell is 40, and now has four children. She was seven months pregnant at the time of the incident. She is married to Paul Campbell. She was particularly concerned with regard to her pregnancy as she had suffered an ectopic pregnancy and a miscarriage in the past. She has a history of back and wrist pain. She claims to have suffered pain and injury to her hip and left shoulder. No medication was prescribed because of her pregnancy.

18. Kevin Kernaghan is 43, single and not working at present. He suffers from a congenital eye defect resulting in double vision and eye irritation, and is certified blind. He has no relevant medical history although he fell in May, 2008. He claims to have suffered an injury to his neck, right arm, headache and pins and needles as a result of the accident. He has a past claim arising from a car accident in 2000.

19. Joanne McGirr is 35 and works as a secretary. She describes herself as being of "extremely nervous" disposition. She has no previous claims and no relevant past medical history. She claims to have suffered shock, injuries to her neck, back and shoulder and anxiety.

Fiona McGirr, sister of Joanne McGirr is 38 and has one child. She was awarded compensation arising from a terrorist incident in her youth, and from an accident claim when she was a young child. She has no relevant medical history. She suffered back pain in 2006 and a right ankle injury in 2007. She claims to have suffered back and neck injury in the incident.

The question of liability

20. There being no independent witness, and in circumstances where only two of the plaintiffs saw a vehicle, a description of which they are unable to give, and as each of the plaintiffs gave evidence in respect of the claims of the others, and liability being the central issue in the appeals, I propose dealing with the question of liability in all nine cases together.

21. Two of plaintiffs, Amanda Gervin and Lyndsey Gervin, saw a car. Amanda Gervin says she saw a car driving away and Lyndsey Gervin that she saw a car speeding off, but no more. Amanda Gervin is the sole person who might have identified the colour of the license plate or car but she "can't recall" whether the car had a white or yellow license plate. Both witnesses say the car was green.

22. Certain of the plaintiffs heard a car or a vehicle, or at least a noise. Amanda Gervin says that she heard a loud thud; David Morgan, a "noise"; Paul Campbell and Lyndsey Gervin a "bang"; Bernadette McBride and Kevin Kernaghan a "thud"; Joanne McGirr a "massive bang". Fiona McGirr and Deirdre Campbell heard or saw nothing, but both felt a jolt or a "good jolt" forward. Six of the plaintiffs felt that they were jolted forward in the minibus. Most, but not all, of the plaintiffs got off the minibus, although Bernadette McBride returned almost immediately afterwards. Lyndsey Gervin stayed on the minibus until the gardaí arrived. Some of the plaintiffs say the minibus was pushed forward: David Morgan, Lyndsey Gervin, Deirdre Campbell and Kevin Kernaghan. Some of the plaintiffs heard a loud thud or bang: Amanda Gervin, Paul Campbell, Lyndsey Gervin, and Bernadette McBride. Joanne McGirr heard the sound of an engine but saw nothing. Amanda Gervin heard the sound of a car reversing.

23. Amanda Gervin and Paul Campbell are the only witnesses who say there was debris in the form of glass on the road behind the minibus, and described the glass as coloured, not white. Both Amanda and Lyndsey Gervin say the step on the back of the minibus was somewhat damaged, or had a "dent". The other seven plaintiffs never inspected the back of the minibus and gave no evidence as to damage or debris on the road. Most of the plaintiffs said their memory of the incident was now poor having regard to the passage of time, and some of them, particularly David Morgan and Joanne McGirr say their memory was very poor not merely on account of the passage of time.

24. All of the plaintiffs attended either an A&E Department in a local hospital or their general practitioner. All of them claim to have suffered soft tissue injuries, some of which have resolved. No bony injury was found in any case.

25. The plaintiffs in general did not exaggerate their injuries or the sequelae, although one of them made the somewhat remarkable observation that she would never wish to go back to the South of Ireland after the incident.

26. Engineering evidence was heard from both the plaintiffs and the defendant and I will return to this later.

27. The evidence from the two garda witnesses, Garda Colm Dolan and Garda Ciaran Marks was that there was no debris on the road. Garda Dolan said that no one pointed out debris or marks on the road and had there been debris he would have called for photographs. Garda Dolan indicated that had there been debris or signs of damage that he would have recorded the incident as a "material damage RTA". Which he did not.

28. Both garda witnesses accepted there was some damage to the step of the minibus.

29. Garda Marks accepts that the plaintiffs were pleasant and appreciative of their help at the incident. He described the plaintiffs as "open and well disposed".

30. Garda Dolan drove the minibus back to the home of Bernadette McBride, as David Morgan was still shaken up after the incident and not in a position to drive.

31. The garda evidence was that there was no factor which would have enabled the gardaí to trace the mystery car and although a call was put out to garda cars in the area, nothing remotely useful was ascertained.

The authorities: the standard of proof

32. Morris J. in *Bennett v. MIBI* (Unreported, High Court, Morris J., 22nd April, 1994) suggested that a plaintiff making a claim against an untraced driver has a "very high onus to discharge...that everything he said in relation to the claim is true". As he said:

"... it would be so easy for a Plaintiff to come before the Court and tell a story which in the nature of things can't be contradicted because the absent driver of the motor car is not in Court, and is unable to contradict what the Plaintiff says. Therefore, I perceive in a case of this nature, one must view the Plaintiff in a critical light to be sure and to be certain on a high balance of probabilities that what he is telling the court is true."

33. The suggestion that a plaintiff must prove a claim in a civil action other than on the balance of probabilities is not borne out by the authorities, but the judgment of Morris J. does identify a need for vigilance in the scrutiny of evidence given by a plaintiff when rebutting evidence cannot be called by or behalf of the driver of an untraced vehicle. In those circumstances, a court would take particular note of objectively ascertained facts, or evidence given by an independent person.

34. In *Walsh v. MIBI* (Unreported, High Court, Geoghegan J., 15th May, 1996), Geoghegan J. also noted a concern that it is "important that a court should be extra careful in assessing the truth, accuracy or otherwise of the evidence of the plaintiff because no opposing story will be heard". It follows that independent evidence assumes a particular importance, or might carry a particular weight.

35. Later in his judgment, Geoghegan J. noted that the court should not engage in "sheer speculation".

36. The Supreme Court considered the nature of a claim against the MIBI in *Rogers v. MIBI* [2009] IESC 30 and made the following observation:

"The legal burden of proof in all civil cases lies upon the person who asserts the affirmative on each issue in the case. If at the completion of the evidence the burden has not been discharged the decision must go against the party on whom the burden lay. To find for the plaintiff in an action such as the present the judge must be satisfied on the evidence that a particular fact or state of affairs is more likely to have occurred than not. If he is not so satisfied then he must find that the burden has not been discharged."

37. Finnegan J. accepted that the standard of proof was the civil standard but explained that this meant:

"If at the conclusion of the evidence the probabilities are equal then the required standard of proof has not been achieved. There is no burden on the defendant to prove a negative: an exception is where *res ipsa loquitur* applies and the proper inference to draw from the proven facts is that the defendant (in this case the unidentified or untraced owner or user) was negligent."

38. I adopt that statement of the law, that the test to be applied is the civil standard, that the burden of proof lies on the plaintiff to establish the case on the evidence. The exercise engaged therefore is to examine the evidence to test its credibility, and whether the evidence taken as a whole establishes the facts asserted, namely that an untraced car collided with the rear of the vehicle in which the plaintiffs were passengers, or in the case of David Morgan, the driver, as a result of which they suffered personal injuries and loss.

Discussion on evidence

39. Taken alone, the fact that seven out of the nine plaintiffs did not see the untraced car driving away after the incident does not weigh against their case. The plaintiffs were on a social evening with friends, almost all had had one or two drinks. The incident as described occurred in a very short time, measured in seconds, although on Amanda Gervin's evidence, if the mystery car was to have reversed, the incident would have lasted a bit longer. I accept also that the shock of the forward jolt would have been the main focus of attention of the passengers and the driver of the minibus, and that they would not in those circumstances be expected to have looked out the window to see what caused the jolt. The fact that two of the passengers saw a car drive away is incidental to their position on the minibus and to the fact that they happened to be looking out the window.

40. Of itself the fact that only two of the nine plaintiffs saw a motor vehicle is not determinative. Some incident may have occurred as a result of which the minibus jolted forward. The evidence as to the extent to which the minibus was pushed forward on the road is so vague, and the recollections of the plaintiffs admittedly so frail now having regard to the passage of time, that I cannot make any judgment as to an assertion that the impact was severe or, at least, moderate.

41. I have had the opportunity of observing the demeanour of the witnesses in court and noted they were frail in their recollection but did their best to be honest and not to exaggerate their symptoms or the extent of the impact. All of the plaintiffs say they were injured, and the doctors found some clinical evidence in each case of a whiplash-type injury consistent with an accident.

42. Only two plaintiffs saw debris. Paul Campbell says he pointed it out to the gardai, which they deny. The presence of debris is contradicted by the very clear evidence of the two garda witnesses, one of whom was quite clear that the presence of debris would have alerted him sufficiently to have called for photographs, and would have been of particular importance in a hit and run type accident because debris could have led to some forensic analysis and have given a clue as to the type of car involved.

43. Another factor that weighs in the balance is that most of the plaintiffs expressed no curiosity regarding the presence of debris on the road, and most of them, even those who did immediately get out of the vehicle, did not search for debris or examine the rear of the minibus. It is clear there was some minor damage to the step on the minibus but it is not at all clear whether this was fresh, or existing, damage or whether it contained any paint residue. The presence of paint residue was also a factor identified by the garda witnesses as likely to be useful in giving a lead to the untraced vehicle.

44. Of more concern and curiosity, however, is the fact that when the minibus was driven back to the home of Bernadette McBride and parked in the driveway or roadway outside, the plaintiffs, who by then had settled in to have tea and talk about the incident, did not think to observe whether any damage was to be found on the rear of the minibus. By then, any shock they had been feeling had resolved, and the plaintiffs all readily indicated that whilst some of them had begun to feel some degree of pain in their neck or back area, that the shock of the incident had dissipated. I accept that two of the plaintiffs, Paul Campbell and his wife, were more concerned with the stability of Ms. Campbell's pregnancy rather than damage to the minibus and their lack of curiosity can be readily understood.

45. However, I find it curious that the plaintiffs made no effort, even at the stage when there was no danger to them, and when the initial shock had worn off, to ascertain some objective evidence of the nature of the damage to the minibus.

46. This fact must also be seen in the context that the minibus was hired, and no evidence was adduced as to how the hirers of the vehicle dealt with the hire company regarding the damage. The fact that some of their friends might have been liable to meet the cost of the repair would surely have been something that caused sufficient concern for the plaintiffs for them to have checked the extent of the damage, either at the scene of the incident or more probably when they were safely back in the home of Ms. McBride.

47. In the present case, it is said that the untraced vehicle passed the home of an identified person, seconds or minutes after the incident, but that person has not been called. One person who did not bring a claim following the incident was also not called to give evidence, although that may arise more from the fact that he was in a personal relationship with one of the plaintiffs which has now ended.

48. Another approach to the evidence is to identify differences and discrepancies between the evidence given in the course of the trial and that in contemporaneous or near contemporaneous documents.

49. Amanda Gervin told her doctor that the green car had reversed and then sped away. This particular factor was also mentioned in the MIBI claim notification form completed by Amanda Gervin but this evidence was not given in examination in chief nor in the Injuries Board form A. Taken alone this discrepancy may not be significant, but it is of some note that Amanda Gervin is the only witness who says the mystery car reversed, and it is more likely than not it would have driven away at less speed than that described.

50. Amanda Gervin also says that she saw coloured glass on the road behind the minibus. If the accident happened as alleged, and the minibus was rear ended, the glass was more likely than not to have been white glass, from a headlight, as there is no suggestion that any of the lights on the minibus were damaged.

51. Mr. Morgan frankly says his memory of the incident is very poor and attributed this to the shock that he suffered.

52. Lyndsey Gervin in her direct evidence said that since the incident she had not gone back to her previous hobby of going to the gym every day. Her Facebook page was put to her in cross-examination, and I am satisfied from the entries, which she admitted had been posted by her, that she had returned to the gym by 2013 at least, and her suggestion that the evidence had been obtained in breach of her privacy settings is not credible, as at the relevant time she did not have a privacy restriction on her Facebook account.

53. Ms. Gervin's evidence of her inability to visit the gym taken alone might again not be sufficient to reject the credibility of all aspects of her evidence, but she is one of the witnesses who saw a car speeding off, and was only one of two witnesses who firmly say that the incident was caused by the mystery car. What might seem like a minor fact or discrepancy in her evidence, whether she did or did not attend the gym in the years following the accident, throws doubt on the credibility of her evidence in general but it must be seen as particularly significant in the light of the fact that she is only one of two witnesses who can link this incident to a mystery car.

54. Joanne McGirr gave evidence of having suffered from anxiety and a depressive type response to the incident for about a year. This is not contained in form A, and again that throws some doubt on her evidence, as the MIBI form was completed quite close to the accident on 9th March, 2010. There is also no evidence of this effect in the report of Dr. Simpson dated 17th May, 2009, the plaintiff's own medical report.

55. Ms. McGirr said that she "vaguely" heard the noise of a car engine and "doesn't know" if she heard a screeching sound from the vehicle. She showed a curious lack of interest in the cause of the accident. In the circumstances, I consider it more likely than not that she was not convinced of the cause of the bang by which she says she was injured.

56. Bernadette McBride's evidence is equally vague with regard to the jolt in the minibus and equally she was lacking in curiosity regarding the cause of the incident. Her evidence with regard to her back injury is not consistent with the form A completed on 21st July, 2009 and I do not accept her evidence that she "misread" the entries, and that she thought the request was to identify pre-accident claims only. There is also a discrepancy to be noted in her account of the injury, and Mr. Harrington the orthopaedic surgeon seems not to have been told of the neck injury which allegedly arose.

57. Equally, Ms. McBride was lacking in curiosity regarding the damage to the minibus and said she would have been interested in the damage to the minibus only had it been her own vehicle, and that she had "no curiosity at all". She also said that when the friends returned to Ms. McBride's house after the incident, having been driven there by Garda Dolan, that they did not talk about the accident.

58. Ms. Campbell had little or no memory of the accident, as she was not able to say whether the minibus had completed the left turn onto the minor road and had little or no curiosity as to the condition of the minibus.

59. I consider it not to be credible that the plaintiffs would not have made every effort in the time after the accident to seek to ascertain the damage, if any, to the minibus by the impact of which they now complain. The answer that most of them give is that they have no interest in the damage to the minibus, and many of them say that they do not remember sufficient details of the accident having regard to the passage of time. It is perfectly credible that the memories of the plaintiffs will have faded with time, but in the present context the plaintiffs have had several opportunities to refresh or support their memories, as each of them filled in a form making claim to the MIBI in early 2009, each of them gave details to the gardaí on 9th August, 2008, each of them filled in an Injuries Board form A sometime in 2010, each of them had several visits to the doctor and each gave accounts to their own doctors and to the doctors appointed to examine on behalf of the defendant. Further, evidence was given in the Circuit Court in July, 2014. Whilst more than six years have elapsed since the date of the accident, the intervening occasions on which each of the plaintiffs was required to refresh their memory of the events means that one would expect that the events would not have faded in their minds to the extent claimed.

60. I consider that the fact that many of the plaintiffs in cross-examination explained a discrepancy in their evidence or a lack of clarity by reason of a frailty of memory, and that the plaintiffs do not remember the incident, either well or at all, is consistent with the proposition that the incident did not occur in the way in which they assert, or at the very least that the incident did not carry the dramatic flavour that is now presented. That there was no impact, or it was so slight that it caused no concern on the date of the accident is consistent also with the fact that most of the plaintiffs either did not get off the minibus or did not check the damage to the minibus.

Engineering evidence

61. Dr. Noel McKenna B.E. gave evidence on behalf of the plaintiffs and explained the nature of whiplash injury as in many cases arising from forces not very different from those found in ordinary life, but where because a person is enclosed in a vehicle and because it is unexpected, a person is unable to brace against the force. He confirmed that there was nothing unusual about the junction, or the road. He had not been in a position to examine the minibus.

62. The hypothesis presented by Dr. McKenna was that the impact was a steel on steel impact and this he extrapolates from the fact that there was some damage to the rear steel step on the minibus. He hypothesises therefore that the bumper would not have absorbed the force of the impact and this would have resulted in a more severe impact than might normally occur in a rear collision at moderate or low speed.

63. Dr. McKenna's evidence is predicated on a number of assumptions that I cannot accept. He predicates that the mystery car was a heavy vehicle or at least heavier than a normal saloon car, and he makes this assumption from the fact that all of the plaintiffs given evidence of having heard a "thud". The word "thud" was used in evidence but this is a very subjective term, almost elastic in its descriptive power, and a thud can be softer or harder, more or less forceful and loud. Dr. McKenna regarded as significant to his hypothesis that the minibus was pushed down the road, and not all of the witnesses said this was so, and indeed those who did say

this were unable to give any evidence of how far down the road the minibus had moved.

64. The hypothesis that the impact was an impact of steel on steel is predicated on an assumption that the mystery car was a heavy car and that the impact was between the steel rear step on the minibus and metal behind the front bumper of the car, such as the radiator. He could not explain in those circumstances how there could be no debris, and how if the plastic bumper, trim and attached lights were damaged, no paint residue or debris at all was to be found. It is also not explained how, if the radiator in the mystery car was damaged, there was no fluid on the road and none was identified by the attending gardaí. The final hypothetical proposition of Dr. McKenna was that the steel step could have "slipped into" a horizontal slot in the radiator. This is mere speculation and not based on the facts.

65. I consider Dr. McKenna's evidence to be based on far too many hypotheses and assumed variables. Having regard to the paucity of evidence with regard to the mystery car, and with regard to the receiving vehicle, and the lack of a rational explanation by Dr. McKenna as to how modern crash barriers, assumed to be present on the minibus had not absorbed the impact, I cannot accept his evidence.

66. Mr. Anthony Tennyson B.E. gave evidence for the defendant and accepted that the steel step on the rear of the minibus had no impact absorbing properties, although he noted contemporary research that the injury threshold was not thereby elevated significantly. He explained that the only structural part behind the bumper cover, grill and number plate was a "reinforcing beam", and that a radiator in these vehicles is usually made of aluminium not steel. He accepted that it was possible that the steel step could have hit the bumper, the number plate or the grill but in any of these eventualities, some debris would be left and the car would have been damaged, in the case of the radiator causing it to leak radiator fuel.

67. Under cross-examination, Mr. Tennyson accepted there could be a rear end impact without debris, but on the hypotheses as postulated by Dr. McKenna the step would have cut through the soft elements of the car and the presence of some debris would have been inevitable in those circumstances.

68. Either there was damage to the soft elements bumper and lights, in which debris was inevitable, or there was damage to the radiator or reinforcing beam where secondary damage was also inevitable.

69. The evidence of Mr. Tennyson is more credible and not based on as many hypotheses, and is based on the known structural elements of the vehicle, and the alleged fact that, taking the plaintiffs' case at its height, there was some coloured glass on the road. The hypothesis that the steel step on the minibus impacted with the steel (or aluminium) radiator in the mystery car would not, it seems to me, have produced coloured glass debris on the road, as the impact would have been to the centre of the mystery vehicle and the impact on the minibus would not have been to the lights. In any of the situations where damage of the kind envisaged to the radiator or the bumper reinforcing beam, there would almost certainly have been some obvious damage to the minibus, other than a small or slight dent to the rear step.

70. In the circumstances, I consider the engineering evidence not to offer much by way of support for the likelihood that this vehicle was struck by the mystery vehicle. Rather, the lack of debris on the road, or the presence of glass and no other debris is suggestive that there was no impact. If the primary basis on which the plaintiffs assert that there was a rear impact is the damage to the step on the minibus, the impact must have resulted in some debris on the road. Therefore, I consider that the damage to the step does not point to a rear impact.

Other evidence

71. In cross-examination, Mr. Paul Campbell said that "I assume" the car impacted with the minibus and also said that £2,000 was kept back from his cousin's credit card by the car hire company. No evidence was adduced as to whether the entire of that money was refunded, whether the hire company had carried full insurance against damage, and whether, when the minibus was returned to the hire company, the damage to the step or any other damage was identified. No documents of the hire company were adduced in evidence.

72. Mr. Campbell cannot recollect hearing a car screeching or reversing but he says he did see glass, and confirmed that one of the gardaí saw the glass, which is denied in evidence by both gardaí. He also confirmed in cross-examination that the lights on the minibus were not broken.

73. Mr. Campbell and his wife, Deirdre Campbell, failed to give evidence of an incident that occurred in 2011 and in respect of which Mark Browne, who works for AXA in Belfast, gave evidence. Mr. Browne noted a newspaper article concerning the first day of the High Court appeal where the plaintiffs were named, and contacted the defendant and offered to give evidence of an incident that happened in 2011 in which AXA insured the receiving vehicle in a rear ended collision which resulted in seven claims being lodged, from the three passengers in one vehicle and the four in the other. Mr. and Mrs. Campbell lodged claims arising from that incident. Neither claim was ultimately continued or prosecuted, but the fact is that neither plaintiff identified this action in the course of the examinations by the medical witnesses, that no evidence was given of these incidents, and both witnesses denied any relevant accident are factors which bear on credibility. I am satisfied that these circumstances throw some doubt as to the credibility of these witnesses as a whole.

Conclusion

74. The onus is on the plaintiffs to establish to my satisfaction that an incident occurred as a result of which the minibus in which they were travelling suffered an impact from a vehicle which did not stop. I am not satisfied that the plaintiffs have satisfied the burden of proof. I am satisfied that most of the plaintiffs in the course of their evidence expressed little confidence or enthusiasm for a version of events that implicated a mysterious car. All of the witnesses described a jolt or a thud, but most of them were not persuasive, or indeed convinced, that the thud had been caused by a mystery vehicle which sped from the scene.

75. All of the plaintiffs have clinical signs of whiplash type injury, but that of itself does not mean the injuries were caused in the way in which they describe. Essentially, this case comes down to the fact that of the nine people who make a claim, two say they saw a vehicle, neither of whom is clear as to the type of vehicle or number plate, and no debris was found on the road.

76. It is not the case that the defendant must show that the incident did not occur in a way which it is contended, but rather the plaintiffs must prove their case. I find the evidence too slight and unconvincing to enable me to conclude that the injuries of which the plaintiffs complain were caused by an impact from an unidentified and untraced vehicle and accordingly, I find that the plaintiffs have not made out their case on liability.

77. In the circumstances, I will allow the appeal by the MIBI in the case of seven of the plaintiffs and will dismiss the appeals of Paul

Campbell and Kevin Kernaghan against the dismissal of their claims in the Circuit Court.

SCHEDULE

NAME RECORD No.

Amanda Gervin v. Motor Insurers' Bureau of Ireland 2016 No. 19 CAT

Fiona McGirr v. Motor Insurers' Bureau of Ireland 2016 No. 20 CAT

Deirdre Campbell v. Motor insurers' Bureau of Ireland 2016 No. 21 CAT

Lyndsey Gervin v. Motor Insurers' Bureau of Ireland 2016 No. 22 CAT

Joanne McGirr v. Motor Insurers' Bureau of Ireland 2016 No. 23 CAT

David Morgan v. Motor Insurers' Bureau of Ireland 2016 No. 24 CAT

Paul Campbell v. Motor Insurers' Bureau of Ireland 2016 No. 25 CAT

Kevin Kernaghan v. Motor Insurers' Bureau of Ireland 2016 No. 26 CAT

Bernadette McBride v. Motor Insurers' Bureau of Ireland 2016 No. 27 CAT