

## THE HIGH COURT

RECORD NO. 12298P/2000

BETWEEN

DENISE DELARGY

PLAINTIFF

AND  
 THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT,  
 IRELAND AND THE ATTORNEY GENERAL  
 AND BY ORDER  
 THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANTS

**Judgment of Mr. Justice Roderick Murphy dated the 18th day of March, 2005.**

### 1. Outline of case

Over seventeen years ago, in September, 1987 the plaintiff was a pillion passenger on a motor bike owned and ridden by P.J. O'Neill, which was involved in a fatal road traffic accident involving pedestrians. The plaintiff herself suffered considerable injuries in respect of which, in an uncontested action she was awarded damages of £160,569 on 24th April, 1996, eight and a half years later. She failed to execute against the defendant, Mr. O'Neill.

The Road Traffic (Compulsory Insurance) Regulation of 1962 (S.I. 14/1962) did not then provide for compulsory insurance for motor cycle pillion passengers.

The European Communities, Directive 90/232/EC, did not at that time provide for compulsory insurance in relation to such passengers. Ireland had an obligation to comply before 31st December, 1998, over two and a half years after the judgment aforesaid.

The plaintiff submitted that, following the assessment of damages by Mr. Justice Barr on 24th April, 1996, and the failure, within 28 days therefrom, to recover from Mr. O'Neill, that she is entitled to recover from the third named defendant, (MIBI) or to recover damages from the first and/or second parties on the basis of the invalidity of s. 65(1)(a) and s. 56 of the Road Traffic Act, 1961, having regard to the provisions of the Constitution.

The plaintiff also seeks as against the Minister a declaration in relation to article 6 of the Road Traffic (Compulsory Insurance) Regulations, 1962.

The plaintiff further seeks a declaration that Council Directive 72/166/EEC as amended by Directive 90/232/EEC has direct effect and obliged the State parties to ensure that the liability of Mr. O'Neill to the plaintiff on foot of the judgment of 24th April, 1996 was indemnified.

The plaintiff submits that her right to bodily integrity and of equality before the law was breached insofar as compensation was awarded to the deceased and the injured party, as pedestrians, by the MIBI while she, as a pillion passenger was not able to enforce the award in her action before the High Court, Record No. 90/11612P.

### 2. Pleadings

2.1 Amended statement of claim delivered 31st October, 2002.

The originating plenary summons was dated 23rd October, 2000 and amended to include the MIBI on 19th July, 2001.

The amended statement of claim, delivered 31st October, 2002, outlined the circumstances of the accident and the statutory and European legislative provisions.

The plaintiff claimed:

- (1) a declaration that s. 65(1)(a) of the Road Traffic Act, 1961 is invalid having regard to the provisions of Article 15.1, Article 40.3 and Article 40.1 of the Constitution of Ireland;
- (2) a declaration that s. 56 of the same Act is invalid having regard to the provisions of Article 40.3 and Article 40.1 of the Constitution;
- (3) a declaration that Article 6 of the Road Traffic (Compulsory Insurance) Regulation, 1962 is invalid having regard to the provisions of Article 40.3 and Article 40.1 of the Constitution, that the Minister was acting *ultra vires* the powers conferred on him by the Oireachtas and that the same is null and void;
- (4) a declaration that the agreement entered into by the Minister and the MIBI dated 30th December, 1964 is void insofar as same purports to exclude the plaintiff's claim;
- (5) damages for negligence, breach of duty, breach of statutory duty and breach of the plaintiff's constitutional rights;
- (6) a declaration that Council Directive 72/166/EEC as amended and in particular as amended by Council Directive 90/232/EEC has direct effect and that the plaintiff is entitled to rely on the provisions of same;
- (7) a declaration that the said Directive as amended obliged the State parties to ensure that the liability of Mr. O'Neill (the defendant to the personal injuries action) to the plaintiff on foot of a judgment obtained by the plaintiff on 24th April, 1996 was covered by insurance;
- (8) damages for failure to implement the said Directives into national law;
- (9) a declaration that the plaintiff is entitled to claim as against the MIBI in respect of the liability of Mr. O'Neill to the plaintiff on foot of the said judgment.

## 2.2 Defences of the State

The amended defence of the State parties was dated 19th August, 2002. The defendants were strangers to the alleged Road Traffic Accident and proceedings and made no admission as to the alleged inability of the plaintiff to recover. The defendants made no admission as to the construction of the sections of the Road Traffic Act, 1961 and denied that any delegation of power by the Oireachtas to the Minister was an unlawful delegation. They relied on the European communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations, 1992 gave effect to the obligations of the State under the provisions of the relevant Directive (72/1/66 EEC; 84/5/EEC; 90/232/EEC and 90/618/EEC).

The State referred to the provisions of the Road Traffic (Compulsory Insurance) Regulations, 1962 (S.I. No. 14/1962) and contended that the provisions clearly prescribed to the principles and policies by reference to which the Minister was to exercise the powers provided for therein.

The State parties deny that that Regulations, or Article 6(2) thereof, exceeded the powers conferred on the Minister and/or that the Minister acted *ultra vires* any powers by defining "passengers" so as to exclude the plaintiff from the benefit of the legislation or that defined passengers in an arbitrary way or that had no power to define passengers.

The defence also denied the constitutional claims.

The State parties denied that by enacting the legislation aforesaid that they had deprived the plaintiff of her right to recover compensation from the MIBI. They were strangers regarding the alleged refusal of the MIBI to compensate the plaintiff.

It was further denied that there was any failure in duty of care or that the defendants were negligent or in breach of duty or in breach of the plaintiff's constitutional rights in excluding her from the benefits of any legislation (which exclusion was denied) or in failing to enact legislation to include her in provisions of the agreement with the MIBI.

The State defendants made no admission regarding the construction of Directive 72/116/EEC and denied that such Directive required them to provide compulsory insurance cover to injuries sustained by pillion passengers on motor cycles. They had no obligation to ensure that the liability of the motor cycle rider was covered by insurance. The Directives had no direct effect. There was no obligation to give effect to the Directive at the date of the accident in September 1987. The plaintiff lacked locus standi to seek the reliefs claimed. Loss or damage and liability therefore was denied. Without prejudice the alleged damage was caused or contributed to by the negligence or contributory negligence of the plaintiff in exposing herself to the risk of travelling as a pillion passenger where the driver did not have cover and where she failed to take any or any adequate steps to ensure or to ascertain whether there was insurance.

## 2.3 Defence of MIBI

The MIBI stated that it was not a law maker and played no part in the enactment of either the Road Traffic Act, 1961 or the Statutory Instrument 14 of 1962. The plaintiff had no right to recover compensation from the MIBI and was an excluded person under the appropriate Regulations.

## 2.4 Reply

The plaintiff had the benefit of the High Court judgment and that it was not open to the defendants to plead contributory negligence against her. It was denied that the plaintiff lacked *locus standi*.

The State defendants admitted that the plaintiff obtained judgment and had been unsuccessful in recovering any part of that judgment against Mr. O'Neill. They also admitted that the plaintiff had called upon the MIBI to satisfy the judgment but that the MIBI had refused to do so.

The MIBI did not reply to the notice to admit facts dated 29th October, 2004 in relation to the fatally injured and the injured pedestrian and the amount of judgment and costs discharged. No issue was taken in relation to same at the hearing.

## 3. Decision of the Court

### 3.1 Statutory Provisions

The Road Traffic Act, 1961, as amended, together with the Statutory Instruments made by the Minister thereunder, forms the basis of domestic law. In addition three directives are relevant which have been enacted under the European Communities Act of 1973.

Section 56(1) of the 1961 Act makes it a mandatory requirement to have motor insurance when using a motor vehicle. The obligation to insure in respect of liability for damages which the insurer has to pay "to any person (exclusive of the exempted persons)". There was, at the relevant time, no compulsion to have insurance against a liability to an excepted person as defined in s. 65(1) of the 1961 Act. Such a person was defined as:

"Any person claiming in respect of injury to person to himself sustained while he was in or on a mechanically-propelled vehicle (or on a vehicle drawn thereby) to which the relevant document [i.e., the insurance policy] relates, other than the mechanically-propelled vehicle, or a drawn vehicle, or vehicles forming a combination of vehicles, of a class specified for the purposes of this paragraph by regulations made by the Minister."

3.2 Counsel for the plaintiff referred to the exemption in s. 65(1) of the Road Traffic Act, 1961, as something of a "reverse definition" because it seems to say that everybody who claims damages is an excepted person unless the vehicle in question belongs to one of the classes of vehicles which may be specified by the Minister. The classes which are specified by the Minister are the classes to which cover will attach. The Minister made such regulations by way of the Road Traffic (Compulsory Insurance) Regulations 1962 as amended from time to time.

Article 6 of the 1962 Regulations in its original form reads as follows:

"(1) The following classes of vehicles are hereby specified for the purposes of paragraph (a) of subsection (1) of section 65 of the Act:-

(a) public service vehicles;

(b) vehicles constructed primarily for the carriage of one or more passengers;

(c) station wagons, estate cars and other similar vehicles which are constructed or adapted for alternative purposes (including the carriage of one or more passengers) and which are fitted with seats, whether rigid, collapsible or detachable in the area to the rear of the driver's seat.

(2) In sub-article (1) of this Article "a passenger" does not include a driver or a person being conveyed by a cycle whether in a side-car or otherwise." (Emphasis added.)

3.3 I have carefully considered the detailed submissions made by counsel and had regard to the test laid down in *Cityview Press* [1980] I.R. 381, *Cooke .v. Walsh* [1984] I.R. 710, *Harvey .v. Minister for Social Welfare* [1990] 2 I.R. 232, *Laurentiu .v. Minister for Justice* [1999] 4 I.R. 26 and *Lovett .v. Minister for Education* [1997] 1 I.L.R.M. 89.

The legislature in the present case permits the Minister to make a distinction between various classes of vehicles but does not provide any guidance whatsoever as to the principle upon which the Minister is to draw that distinction. The Minister has been given the power to introduce a provision which makes a difference between a case where one person injured by the negligence of another without the means to satisfy a judgment, can be compensated and a case where a person similarly injured with the same level of fault on the part of a similarly situated defendant cannot be so compensated.

It is, however, clear that in the absence of seats there is no requirement for passengers to be compulsorily insured.

Where there are no passengers seats, as on tractors or similar moving machinery, where there are no provisions for passengers, there may be a rational basis for exclusion of compulsory insurance for passengers. A passenger in an unseated area in the back of a van or lorry is not compulsorily insurable.

However, in the present case of the motor cycle there was accommodation for a passenger, the plaintiff. Motor cycles are usually constructed for the carriage of single passengers. It is difficult to see by what principle or policy the Minister had excluded cover under Regulation 6(2) of the Road Traffic (Compulsory Insurance) Regulation of 1962.

What the Minister has done is not merely regulatory or administrative only but is an attempt to arbitrarily restrict cover to a category of otherwise insured passengers.

In the circumstances, I will make an order in terms of paragraph 3 of the amended statement of claim: a declaration that Article 6 of the Road Traffic (Compulsory Insurance) Regulation is invalid having regard to the provisions of Article 40.3 and Article 40.1 of the Constitution of Ireland and further that the first named defendant was acting *ultra vires* the powers conferred on him by the Oireachtas and that the same is null and void.

It is not necessary in that regard to consider the issue of direct effect of the relevant directive.

I should now deal with the position of the MIBI, the third defendant.

3.4 The MIBI is a company limited by guarantee whose members are the insurance companies who write motor insurance business in the jurisdiction.

The obligations of the MIBI derive from an agreement for a Scheme of Compensation in respect of injuries to persons by uninsured motorists which was made between the Minister for Local Government and the MIBI in 1955 and subsequently amended. The Scheme was designed to secure compensation in respect of personal injuries to third-party victims of road accidents in cases where, notwithstanding the provisions of the Road Traffic Act, 1963, relating to compulsory insurance, the third party victim was deprived of compensation by the absence of insurance or of effective insurance. The MIBI undertook to pay the amount of an unsatisfied judgment against a motorist who was not effectively insured so far as it related to injury to persons coming within the compulsory insurance sections of the Road Traffic Act.

The accident, the subject matter of the relevant proceedings which caused the plaintiff's injuries, occurred in September, 1987. The relevant MIBI agreement is that of 30th December, 1964. The subsequent MIBI agreement of 21st December, 1988 came into operation on 31st December, 1988 in respect of claims arising out of the use of a vehicle in a public place on or after that date and does not appear to be relevant.

Under the 1964 agreement the MIBI undertook to satisfy a judgment in respect of any liability for injury to a person which was required to be covered by an approved policy of insurance under s. 56 of the Road Traffic Act, 1961 as amended, and any statutory instrument made thereunder and then in force. The obligations undertaken related, and solely related, to the extent of insurance which was compulsory under domestic law.

Directive 1990/232/EEC which required cover for "all passengers" gave Ireland until 31st December, 1998 to comply as regards pillion passengers on motor cycles. On that date over eleven years had elapsed since the accident and two and a half years had elapsed since judgment had been obtained.

At the time of the accident there was no requirement to have cover for pillion passengers. Accordingly the MIBI had and has no obligation under the agreement to meet the judgment which had been recovered by the plaintiff in respect of her injuries.

There was no issue regarding the intervention of European Community law which was not in contemplation at that time.

It would seem to follow, and the court so holds, that prior to 31st December, 1998 the Directive had no direct effect in Ireland of any kind, either against a public body or a private body or individual.

In arriving at the that conclusion I have considered *Withers v. Delany & MIB* in relation to the implementation of compulsory insurance in respect of a passenger sitting in the rear of a commercial motor vehicle where there were no seats. The European Court referred to the implementation of Council Directive 72/166/EEC; to the accident which had killed the claimant's son who was unseated in the back of the defendant's van on 23rd July, 1995, (being a date prior to the period laid down by the third Directive for transposition by Ireland of the Directive on 31st December, 1995) and to the Circuit Court judgment on 17th April, 2001 referring three questions to the European Court of Justice for a preliminary ruling.

The first of these questions answered negatively was as follows:

"1. Whether on the true interpretation of the provisions of [the First Directive] and [the Second Directive], Ireland was entitled on 23 July 1995 to maintain legislation (Section 65 of the Road Traffic Act 1961 and the Road Traffic (Compulsory Insurance) Regulations 1962) which did not make compulsory insurance mandatory for passengers injured in a 'part of a vehicle, other than a large public service vehicle, unless that part of the vehicle is designed and constructed with seating accommodation for passengers'?"

The Court referred to Case C-348/98 *Mender Ferreira and Delgado Correia Ferreria* (2000) ECR I-6711. On the grounds of that judgment, Member States remain competent to determine the extent of passenger cover.

As the accident which gave rise to the *Withers* proceedings occurred on 23 July 1995 before the date on which the period laid down by the Third Directive for transportation by Ireland expires, which was on 31st December, 1995, the Directive cannot be relied on by individuals before the national court.

The First and Second Directive did not require Member States to provide that compulsory insurance was to cover personal injuries to passengers carried in a part of a vehicle which is not adapted for the transport of seated passengers.

Moreover, the Court is not satisfied that there is evidence that the MIBI could be considered an "emanation of the State". In *Mighell v. Redding & Anor.*, *Evans v. Motor Insurance Bureau*, and *White v. White* [1999] 1 C.M.L.R., 1251 in the High Court and *White v. White (2)* [2001] 2 All E.R. 42 in the House of Lords, the English MIB was held not to be an emanation of the State. This appears to be more persuasive than the finding in *Dublin Bus v. MIBI* (Circuit Court, Unreported, 29th October, 1999).

Accordingly, the MIBI have no duty to indemnify.