THE HIGH COURT

2010 no. 1666 P

BETWEEN

ERIN GALLAGHER

PLAINTIFF

AND

OLIVER McGEADY

Defendant

JUDGMENT of Mr Justice Ryan delivered the 8th March 2013

This case is an assessment of damages subject to two issues of contributory negligence. It arises out of a road traffic accident that occurred around midnight on Saturday night, the 191h July, 2008, on the road between Falcarragh and Gweedore in Co. Donegal. It was a single vehicle collision in which the car was driven by the defendant and the plaintiff was one of four passengers. On a narrow side road the car went out of control and struck a telegraph pole and then overturned a number of times before coming to rest in a field. The occupants of the car were travelling from a public house in Falcarragh and intending to go-to a nightclub in Gweedore. The defendant admits liability for the crash. The issues that arise in the case are whether the plaintiff was guilty of contributory negligence in travelling in a car with a driver who was under the influence of drink and in failing to wear a seat belt. The plaintiff denies that she knew or ought to have known that the defendant was affected by alcohol so as to be impaired in driving and claims that she was indeed wearing a seat belt.

The plaintiff's evidence is that the evening began when she left home by taxi and travelled to a public house in Falcarragh, the Comer Bar. There she met her boyfriend, who is now her husband, and other people including the defendant, Oliver McGeady. She did not spend time in Mr. McGeady's company, but soon after she went into the bar, she went to join a group of her own friends a little distance away. She herself had three or four bottles of beer during the course of the night. Around 11.40 or so, her boyfriend and she agreed to head for Gweedore to the night club and Mr. McGeady was offering a lift. She did not notice anything untoward about his condition and he drove off in a normal manner without causing any alarm.

Mr. McGeady's story is entirely different about what happened up this point. He says that he and a friend named Pat Coyle actually collected the plaintiff from her home and brought her to Falcarragh where the evening began. He said that they were due to collect her a little earlier than they did in fact, but she was not ready and they stopped at a bar and had drink to give her time to get ready. Then they drove to her home and collected her. The defendant lived about one mile from the plaintiff's home at the time. On arrival in Falcarragh the group first went to the Anchor Bar. They stood around the bar with the plaintiff's boyfriend, Owen Curran and Sean McCullough. The Anchor Bar is a small rural public house where everybody could see everybody else. This group of five were together for the period of about one hour that they stayed there. They were drinking in rounds, so ever body could see what everybody else was drinking. Mr. McGeady said that he was drinking bottles of Heineken. The plaintiff also had a number of drinks.

After spending time in the Anchor Bar, the party according to Mr. McGeady then moved across to the Comer Bar where the proceedings were similar to what had happened in the Anchor Bar. He agreed that Ms. Gallagher had moved away at some point for some time to another group, but he said she was not there for the whole time as she said and from where she was talking to the other group she was still able to observe what was going on in her original one. It was obvious that Mr. McGeady was drinking, just like everybody else.

The first question is whether the plaintiff was in one bar or two bars in Falcarragh before setting off with Mr. McGeady on the journey in which the accident happened. In a statement that she made to the gardaf, the plaintiff stated that she had been in the Anchor Bar in Falcarragh, whereas in her evidence, she said it was in the Corner Bar. I was provided with the transcript of the cross-examination of the plaintiff by Mr. Barton S.C. and it is possible to read the plaintiffs answers as being an admission that she was in two public houses. I think however, that it is possible that she might not have expressly admitted being in the two public houses when she was answering counsel. What is clear however is that Ms. Gallagher in her garda statement acknowledged being in the Anchor Bar and in her evidence said that she was in the Corner Bar.

My view is that Mr. McGeady is more reliable on this point. I think the plaintiff is unsure about the events of this night and I think that Mr. McGeady's evidence is to be preferred. There is no reason why he would invent the story of collecting the plaintiff and his account of it and his candour generally in giving that account are quite convincing in my view. The general description of the events and how they unfolded in the two public houses is rational and entirely believable. The plaintiff and defendant were in view of each other more or less throughout their time in the bars. There is no significant difference as I understand the evidence between the Corner bar and the visibility of patrons in it as compared with the Anchor Bar. This was a group of five people who were out socialising together, which does not mean that they spent every moment of their time exclusively with the other members of the group. It was apparent therefore, that Mr. McGeady was drinking along with all of the other people and that was going on for approximately two and half hours or more in two different licensed premises. His evidence was that he had a bottle of Heineken before he collected the plaintiff, three bottles of Heineken in the Anchor Bar and another three or so in the Corner Bar. My own feeling is that he may have had more than that, but that is the evidence. The front seat passenger in the car was Sean McCullagh and the others were in the back.

In the circumstances, it was observable that the defendant was drinking over the entire period and it was obvious that his capacity to drive was likely to be impaired. The plaintiff should have observed that and should not have travelled with the defendant because of that. It does not have to be the case that a person is staggering around or is obviously incapable of speech or balance or ordinary activities in order to have his or her driving capacity impaired by alcohol. It is clear from the cases that there is a much more acute understanding of the social damage brought about by drink driving and this is reflected in the attitude of the courts.

Mr. Barron S.C for the plaintiff argues that it was not sufficient that the driver's capacity to control the car be impaired by alcohol,

but that it had to be shown in addition that the accident came about because of that. Proceeding with that argument, he pointed out that the defendant appears to have driven the car normally for some time after the journey began. This is undoubtedly correct. There is no evidence of complaint during the early part of the journey. There came a point, however, when Mr. McGeady turned off the main road and took a narrow minor road and at this point his driving seems to have become more erratic and dangerous. He said he took this road to reduce his chances of being sought by the Gardaí and breathalysed. That tells what he himself thought of his condition. There was no other reason to take this narrow and dangerous road late at night.

The driving now got faster and the passengers or some of them were alarmed. They told the defendant to slow down, but he ignored them. Mr. McGeady moved to his left to avoid an oncoming car and did so successfully but the left rear wheel appears to have gone into the muddy edge of the road and the car went out of control. To be more accurate, Mr. McGeady was driving so fast in the circumstances including his own condition of lack of sobriety- he said around 60 miles a hour - that he was unable to control the car. The car went some 65 feet with the rear passenger wheel in the roadside depression and then struck a telegraph pole and broke it, after which it overturned a number of times before ultimately coming to rest in a field.

Garda Eoin Moore, who attended the scene with Garda Rory Harrison, found the car on its roof in a field where it was 15 feet, 5 inches off the road. There was a tyre mark of 65 feet to the telegraph pole which was broken. He said there was a strong smell of drink from the defendant, Mr. McGeady to whom he spoke while Mr. McGeady was sitting in the passenger seat of a car owned by a person who stopped at the scene. He was unable to breatalyse the defendant because of his injuries. Garda Rory Harrison confirmed the strong smell of drink from the defendant.

Sergeant John McDaid the PSV Inspector described the car as being damaged on the right section of the bonnet which was evidence of frontal impact; more specifically, it was on the driver's side of the front at a point medial to the front driver's side headlight.

I pause there to consider Mr. Barron's suggestion that the evidence does not establish that it was the impairment by alcohol that was responsible for the accident. I do not agree. It seems to me irresistible that the defendant's capacity to drive -and of course implicit in that is his capacity to make judgments and his capacity for self control in relation to the car and his capacity to react to other traffic and road features - was substantially impaired by the alcohol that he consumed. I say all this, of course, as a matter of probability, but it seems to me in the circumstances to be a matter of high probability. Not only that, I think that common knowledge and observation endorsed by courts and widely in society confirm the blatantly obvious, which is that alcohol impairs driving capacity. The question can scarcely be considered to be debatable.

In the circumstances, it seems to me irresistible as a matter of probability that the accident happened because the defendant was seriously impaired in his capacity to drive because of the alcohol he had consumed. The plaintiff should have known that. She had ample opportunity to observe it. She failed to do so. If she was unable to observe the defendant because of the alcohol that she herself had consumed, that according to the authorities is not an answer to a plea of contributory negligence. I hold accordingly that the plaintiff was indeed guilty of contributory negligence in travelling with the defendant at a time when his capacity to drive was impaired by alcohol.

I turn now to the seatbelt issue. The defendant claims that the plaintiff was also guilty of contributory negligence in failing to wear a seatbelt. The basis of this claim was that the plaintiff was ejected from the car, that her injuries were consistent with that history and, moreover, that she told the triage nurse at Letterkenny Hospital to which she was removed after the accident that she was not wearing a seatbelt. The plaintiff's case is that she was confused after the accident because she had suffered a severe impact to her head. There was evidence that she was confused and mumbling when she was in the ambulance and at Letterkenny Hospital and the hospital records indeed completed by the triage nurse Mr. Campbell recorded that she was confused. The plaintiffs own evidence was that she always wore a seatbelt and did so on this occasion.

Dr. Mark Jordan, Consulting Engineer, gave evidence for the plaintiff and expressed the opinion that the plaintiff was wearing a seatbelt, claiming that he was very sure she was doing so. His report was more tentative and confined itself to the statement that the fact a person was ejected from a vehicle did not prove that he or she was not wearing a seatbelt. Dr. Jordan went further in his evidence because he said he was convinced by the injury that was demonstrated by a photograph which showed scarring of the plaintiffs left thigh and Dr. Jordan said that this was entirely consistent with having been caused by the friction of a seatbelt. He suggested a number of possible modes by which somebody could be ejected from a car, notwithstanding wearing a seatbelt.

At the end of case, counsel for the plaintiff Mr. Barron S.C. made a submission that there was no evidence that the plaintiff was indeed ejected from the car. In circumstances where the onus of proving contributory negligence was on the defendant, which is undoubtedly the position, he said that the defendant had failed to prove this aspect of the case. However, as Mr Barton pointed out, the personal injury summons said that the plaintiff was ejected from the car. Counsel himself in opening the case expressly stated that the plaintiff was thrown from the car. It was agreed between the parties that the Garda report and statements would be submitted to the court as evidence and Mr. McCullagh 's statement made to the Gardaí was that the plaintiff was thrown out of the car. Ms. Gallagher was found in a field by her sister. In those circumstances, there is ample proof that the plaintiff was indeed ejected from the vehicle and this point must accordingly be rejected at the outset.

The defendant's medical expert Mr. Fintan Shannon, Orthopaedic Surgeon, gave evidence that the plaintiff’s injuries were consistent with the history of being ejected from the car and were not consistent with wearing a seatbelt.

My conclusion is that the plaintiff was not wearing a seatbelt. My reasons are as follows. Dr. Jordan said that studies showed that 97% of people who were ejected from vehicles after crashes were not wearing seatbelts. Experience and common sense confirm the extremely high likelihood of such being the case. One of the possibilities is that a belt could become unlatched because of a defect in it.

The PSV Inspector Sergeant O'Dowd said that the seatbelts front and rear were in working order and that the release buttons on the locking mechanism were inset to prevent accidental release. He thought it was impossible that a person being thrown around in a car that was overturning would dislodge the belt by accidentally striking the release button. There was not a basis for saying that the seatbelt was defective.

That left another possibility for Dr. Jordan. That was that in the overturning of the car, the seatbelt would not be restraining the upper part of passenger on one side and that would leave the lap part of the belt to come loose thus enabling the person to be thrown from the vehicle. This is where Dr. Jordan got his theory of the injury to the plaintiffs left thigh. As between Dr. Jordan and Mr. Shannon, the former is admittedly not a doctor but claims expertise in biomechanics and to have made a close study of medical matters in relation to seatbelt questions, I prefer the evidence of Mr. Shannon. It is simpler, clearer and more consistent in my view with the evidence. I find that the bilateral clavicle injuries, the bilateral rib injuries and the absence of whiplash to the plaintiff’s neck

being immediately present as backing up Mr. Shannon's opinion. Dr. Jordan's theory on the other hand is quite unconvincing. It is in the first place statistically extremely improbable. The evidence of the injuries that he cites does not account for the bilateral nature of the rib injuries and the clavicles. By contrast, the opinion of Mr. Shannon does fit in with an impact with the ground. It is also to be remembered that the plaintiff probably suffered injuries in the car and on her way out of the vehicle which can easily account for the scarring of her left thigh and for the serious facial and jaw injuries that she sustained. Whereas Dr. Jordan thinks that the plaintiff suffered the head injuries by being struck by the head of another passenger in the car and that is evidence that she was not ejected from the car, but was restrained in a seatbelt at the time, that does not follow. It is perfectly possible - indeed it is just as probable as Dr. Jordan's suggestion - that the plaintiff struck another passenger before she left the vehicle or that she struck some part of the car itself. It is of course difficult to reconstruct from injuries what might have happened and one has to be conscious of that. But that point rather weighs against Dr. Jordan's theory rather than in favour of it.

As for the information in the hospital note that was recorded by the triage nurse, the person involved was Mr. Mark Campbell who is a senior staff nurse in the Emergency Department at Letterkenny Hospital. He is an experienced triage nurse having been engaged in that work since 1993. He has experience of other hospitals. His note generally indicates somebody who takes care to be accurate. He impressed me as a witness. Mr. Campbell had no recollection of the plaintiff or this particular occasion and was relying in those circumstances entirely on his note. He acknowledged that he would get information from different sources and he said he would not write down that a patient had not been wearing a seatbelt unless he was "fairly sure" of that. He went on to say that he would always check such information with the patient. I accept Mr. Campbell's evidence. I think the fact that he was careful to qualify the degree of certainty that he expressed did not undermine the reliability of his evidence, but rather enhanced it. I think his note taking was impressive. Overall, he struck me as being a reliable professional person.

Mr. Campbell made clear that he would have examined the plaintiff without the presence of relations. The evidence is that he did so with a female nurse. The plaintiffs sister Deirdre who gave evidence about her being in a confused state and misstating her date of birth at the hospital said that she was with the plaintiff at the relevant time in Letterkenny Hospital, but I do not think that she was there when Mr. Campbell had his conversation and made the record of her response about the seatbelt. I do accept that the repeated references in the notes can probably be ascribed to the fact that nurses and doctors were referring back to the triage record made by Mr. Campbell. Therefore the repetition of the information does not confirm it.

Considering all the evidence, it is clear to me that the plaintiff was not wearing a seatbelt at the time of this accident.

In regard to the quantum of contributory negligence, Counsel helpfully prepared a book of authorities which are of great assistance. The position may be summarised by saying that a passenger in a car driven by a person who is under the influence of alcohol takes the risk of being seriously injured. The courts have acknowledged the change in values that has occurred in society and the reduced toleration or even indulgence of drink driving. This is reflected in the heavy penalty that is visited on a passenger in those circumstances. The decided cases cover a range of findings of contributory negligence that in the modern jurisprudence seems to come between 30% and 50%.

The failure to wear a seatbelt is visited with less severe sanction in terms of finding of contributory negligence. It is nonetheless very significant. In a case where a passenger knew or ought to have known of the intoxicated condition of the driver and also failed to wear a seatbelt, there was finding of contributory negligence in the amount of 55%. It is of course the case that no two actions are the same. No two situations present themselves to a passenger are quite the same. There are extreme cases. Some of them are reported in the cases that are cited. Mr. Barron points out that there were extreme cases, in one of which contributory negligence led to an apportionment of liability as to 55% on the plaintiff passenger.

In this case, the driver was not on the evidence so grossly intoxicated as to make it wholly reckless for somebody to get into a car with him. Nevertheless, the situation is clear on the facts as I find them. The party of five set off for a night's entertainment, which up to the point of the accident consisted exclusively of drinking. That happened in two separate public houses in Falcarragh. Then the intention was to head for a night club in Gweedore. There was something of the joint enterprise about the expedition. Everyone in the group was drinking including the driver. It should have been obvious to the plaintiff and to the others that the driver was going to be affected by drink to the extent to being incapable of exercising proper control over the vehicle or himself.

Having regard to these authorities and to the submissions, in view of my findings on the issue of contributory negligence in relation to the condition of the driver and the failure to wear a seatbelt in the circumstances of this case, I assess contributory negligence in the amount of 40%.

The injuries
The plaintiff was born on the 2nd October, 1981. She is a qualified childcare worker and she also has a qualification as a special needs assistant. She was not married at the time, but is now married to her then boyfriend Owen Curran and she has two small children. She has been in receipt of jobseekers allowance since 2010, according to the evidence of the defendant's vocational assessor Ms. Crena Shevlin.

Some of the plaintiff's injuries are not in dispute. She suffered a significant head injury with fractures of the cheek bone and jaw. These fractures of the zygona and mandible were very painful and the nerves in her face around the right side of her mouth have been affected. She suffers from numbness and she has some dribbling and discomfort. She has some limitation of opening of her mouth. She had fractures of left and right clavicles with significant shoulder pain. There was bony irregularity on the left side and it was thought that Ms. Gallagher would need to have revision surgery, but in the result the union was sufficiently successful on conservative treatment that only minor paring of the bone was required. She is left with a bony irregularity on the left side at the clavicle and there is a scar present. She has restriction of left shoulder movement.

The plaintiff had fractures of her ribs bilaterally. She had lacerations of the left hip, the right buttock and the left thigh and the last of these has left a significant scar.

The plaintiff also has memory difficulties resulting from the accident. Dr. Niall Pender, Neuropsychologist, gave evidence and provided the two reports. He described the plaintiff's problems as being particularly in regard to concentration/attention and storing information. She has some continuing problems which will be permanent and their impact on the plaintiff will depend on what she does and what demands are made on her. Nonetheless, she has made a significant improvement in this area and with the techniques and strategies that Dr. Pender has recommended, the plaintiff is well able to cope.

There is dispute about injuries to the plaintiff's neck and her back. It is noteworthy that she has not had an MRI scan, a CT scan or even an X-ray of her back. It is also significant that the plaintiff did not make any complaint about her back to her orthopaedic surgeon Mr. Thompson, because there is no reference to it in his first medical report. To the contrary, he records in clinical notes of

his first examination of the plaintiff that took place more than a year after the accident that she complained to him of pain in the low back whose onset was some three weeks previously. On the other hand, Mr. Barron for the plaintiff points out that there is a reference in the plaintiffs General Practitioner notes of a complaint by her of low back pain some three weeks after the accident. Mr. Thompson's opinion as to the future in regard to the neck and low back is that no specific treatment will be required and that it will respond to what he calls normal conservative measures.

Considering the manner in which this accident happened, I think it is quite understandable that the plaintiff would have suffered some soft tissue injuries of her neck and back but I do not think that they are serious or disabling. The evidence of Mr. Thompson is just to that affect.

The plaintiff made another complaint about balance and dizziness, but that is not reported on by Dr. Pender or indeed by any expert. There has been no radiological testing and indeed no expert attention to that particular complaint. Counsel suggests that because he asked the neuropsychologist whether that condition would be consistent with the accident and received an affirmative answer, therefore he is entitled to make that case. But I do not agree. I do not think that is sufficient. The onus of proof is on the plaintiff to prove that she suffered the injury in the accident and that was not done in a satisfactory manner in relation to these complaints.

The plaintiff makes the case that her capacity to go back to work has been seriously impaired by the injuries she sustained. Her vocational assessor, Ms. Mary Feely, offered the opinion that the plaintiff would have severe difficulties and would not be able to go back to her work as a child care worker. In regard to her qualification as a special needs assistant, it is well known that the number of these assistants has been reduced in recent times and her prospects of actually getting a job would be very small. Added to this is the fact that with the plaintiff’s cluster of complaints she would be at a disadvantage in presenting herself of any employer. Of particular relevance to Ms. Feeley's assessment was the dizziness/balance issue and the back problems.

The plaintiff’s vocational assessor was Ms. Crena Shevlin, whose qualification as a vocational assessor was challenged by Mr. Barron, but I am satisfied that with the nine years experience to which she testified that she is amply expert to assist the court in this area. Ms. Shevlin pointed to the plaintiffs poor work record even in the boom years when she was earning just below the national minimum wage. She is managing two small children and had done the Special Needs Assistant Course. She had not mentioned any difficulties of memory at Ms. Shevlin's assessment. Nevertheless it is accepted that the plaintiff does have memory difficulty albeit at a low level and in a way that is manageable by useful techniques. Ms. Shevlin pointed out that the plaintiff has been on jobseekers allowance since 2010, which implies that she is actively looking for work and that she is fit for such work. This point represents a serious obstacle for the plaintiff in making a case of incapacity now and into the future.

I think that when one has regard to the evidence of the plaintiff's orthopaedic surgeon, Mr. Neville Thompson, the defendant's orthopaedic expert Mr. Fintan Shannon, the fact that she is looking after two young children, sometimes on her own when her husband is working away from home and the fact that she is by her own declaration fit for work and actively looking for it since 2010, it would be quire unrealistic to find that the plaintiff was impaired in her capacity to work and earn. I do not propose accordingly to make an award under this heading. However, the sequelae of the injuries include ongoing pain, discomfort and some general loss of faculty that must be reflected in damages.

The plaintiff's injuries were undoubtedly severe and she has significant ongoing difficulties. She has some pain and discomfort, she has scarring, facial abnormality which is occasionally distressing and she has significant scarring and the irregularity of the left clavicle. In addition to this, there is some memory impairment which I accept can be ameliorated, but is not going to go away.

I also take into account the plaintiff's time in hospital in Letterkenny and Derry, the severe pain she experienced, the multiple areas of her body that were affected and the lengthy recuperation.

I assess general damages for the past at €100,000 and for the future at €65,000 and to this must be added the agreed special damages of €25,500. The total sum of €190,500 is reduced by 40% in view of my finding as to contributory negligence. There will accordingly be judgment for €114,300.