Neutral Citation Number: [2009] IEHC 349

THE HIGH COURT

2008 5179 P

BETWEEN

PATRICK McCAHEY

PLAINTIFF

AND

THE MOTOR INSURERS BUREAU OF IRELAND

DEFENDANT

Judgment of Mr. Justice Birmingham delivered the 15th day of July, 2009.

1. The background to this case is that on the 1st April, 2006, the plaintiff, a sixty-five year old retired gentleman was cycling his bicycle along Chapel Street, in Carrickmacross when a car pulled out from a parked position, striking him, causing him to fall from the bicycle and to suffer injuries, including a broken leg**.**

2. On the basis that, he says, the driver and owner of the vehicle remain untraced, the plaintiff has brought proceedings naming the Motor Insurers Bureau of Ireland as defendant purporting to do so pursuant to the terms of the agreement between the Minister for the Environment and the Bureau dated the 31st March, 2004.

3. In the course of its defence in para. 8, the defendant pleaded as follows:-

> "The defendant denies that it, its servants or agents were negligent or in breach of duty including breach of statutory duty as alleged or at all. The said defendant denies that same occurred as a result of the negligence or breach of duty or breach of statutory duty or wrongful act of an unidentified or untraced motorist but were caused or contributed to by the negligence and breach of duty and breach of statutory duty and wrongful act of an identified motorist for whose actions or otherwise, the said defendant cannot be held responsible."

This matter is put even more starkly in paragraph 2 where it is pleaded that the accident was caused by the negligence and breach of duty of a named individual, to whom I will refer throughout this judgment as John Doe.

4. This issue arises in these circumstances. According to the plaintiff the vehicle that injured him was driven off after the accident. While he was in a shocked and traumatised state, having been knocked from his cycle, he was anxious to get the registration number of the offending vehicle. He attempted to make a mental note of the registration number involved and then in a situation where he had a Lemsip carton in his possession, which apparently he had just purchased, he wrote down on it what he believed to be the number.

5. Following the accident, the plaintiff was able to make his way home. When he reached home the Gardaí and an ambulance were summonsed. The Garda who responded to the call Garda (now Sergeant) Martin, spoke to Mr. McCahey, but in a situation where Mr. McCahey was obviously seriously injured and in distress, he did not feel it appropriate to take a statement at that stage, but decided to defer this.

6. Ultimately, he did speak to the plaintiff about a month later, the exact date on which the statement was taken, is not recorded. The statement taken down by Garda Martin which was signed by the plaintiff states the vehicle involved was XX00XX [full number provided], it was a silver car.

7. On foot of this information, the Gardaí traced the vehicle which bore the registration number that they had been given and within a few days spoke to the person believed to be the usual driver of the vehicle, a male living locally. This person confirmed that he was the usual driver. The vehicle is insured in his wife's name and it appears that the car is also registered in her name. In the course of that statement the interviewee is recorded as saying that his wife whom he names is the owner of the car of that registration number and that it is a silver Toyota Avensis. He says that he does not recall his exact whereabouts on the 1st April, 2006 but that he honestly doesn't believe that he was on Church Street on that date. It appears that Church Street and Chapel Street are used interchangeably locally. He says that he doesn't recall coming into contact with any bicycle and if it did happen, he would have reported it straight away to the Gardaí and that he doesn't believe he was involved in the incident. It appears that some time after this, the interviewee made contact with the Gardaí once more, and made a further statement in which he says that he had recalled something after discussing the incident, that Sergeant Martin had spoken about to him with his wife. He went on to say that one evening, possibly a Saturday, he was walking towards the Chapel when he saw a man stopped on his bike standing. He asked him was he alright and he answered "I ran into the back of a car". The interviewee reiterated that he still has no recollection of anyone hitting his car.

8. In the course of evidence, Sergeant Martin explained that a file had been submitted to his superiors and a decision was taken that there was insufficient evidence to proceed with a criminal prosecution. He also indicated that the interviewee was someone whose statement he himself would believe.

9. On the 27th July, 2007, in accordance with procedures usually followed, the plaintiff was interviewed by an insurance official acting on behalf of the bureau. In the course of this statement he is recorded as saying;

> "The car stopped in front of me. I saw its brake light come on and then release. He did this twice and moved away a little. I knew it was going to leave. I decided to get its number. I wrote the registration down on the box of Lemsip with a pencil. I was on the ground. It was two car lengths away approximately and my glasses were still on. The car drove away. She drove away as soon as I stood up. I had to use the bike as a support. I had no weight on my leg. I could not see the driver. It was a silver grey car. It was Japanese, but I'm not sure of it. After car drove off John Doe [actual name

> provided] came running. He appeared from Joan's new house on the left side of the street, the opposite side of the street to the church. He shouted "Pat, Pat are you alright." He was flustered. He was 100 feet away from me. I did not speak back to him."

10. Later in the statement the plaintiff commented, "I know John Doe. He grew up near where the accident happened. I got John's father a job once and John knows me".

11. On behalf of the defendant, emphasis is placed on the fact that the vehicle, the registration number of which was given by the plaintiff is in fact a silver car of Japanese make and it is said this should have been seen as a strong indication that what was recorded on the Lemsip box was reliable.

12. In the course of cross-examination of the plaintiff, it was in effect put to him that a decision had been made to exempt John Doe and his family because he was known to the plaintiff and the Doe family and McCahey family were known to each other. For my part I regard that suggestion as unlikely. It doesn't seem consistent with the fact that about a month after the accident, the plaintiff was providing the Gardaí with a registration number, and a description of the car, and fourteen months later he was telling Mr. Mulligan of MIBI how he had written down the registration number on the lemsip box and was introducing John Doe into the situation as someone who had spoken to him in a flustered state after the accident, at the scene

13. In that regard, I feel bound to say, the plaintiff did not present as an impressive witness. On the contrary, he was both evasive and obstructive. Notwithstanding the unimpressive demeanour of the witness it seems to me unlikely that was the case. First of all, there is a degree of improbability in a suggestion that a plaintiff would jeopardise his claim and certainly make it more difficult to process by excluding a culprit from the picture deliberately. In a situation where at some remove from the accident he provided the Gardaí with a registration number and letters that he said he had recorded and gave a description of the vehicle involved which had the effect of leading the Gardaí to John Doe, this seems more unlikely. He then followed this up by making himself available for interview with a representative of the bureau as he was obliged to do and in the course of that, interview gave an account of the aftermath of the accident which served to bring Mr. John Doe into the picture. Why would he do that if the intention was to write Mr. Doe out the script?

14. Mr. Barton, SC on behalf of the bureau makes the point that the bureau is a fund of last resort, a proposition which is clearly correct, having regard to the express terms of the 2004 agreement and that accordingly it was necessary and appropriate that the plaintiff launch proceedings against John Doe and/or Mrs. Doe.

15. He accepts that the plaintiff would have had to advert to the possibility that involvement would be denied and that, accordingly, as a matter of prudence would also have to issue proceedings against the MIBI. Had that happened, then in accordance with the decisions in *Feeney v. Dwane and O'Connor and Feeney v. MIBI*. (Johnston J., as he then was, July 30th, 1999), the cases would have been heard at the same time. He said this would have been advantageous to the defendant.

16. Mr. Barton, has sought to rely on the decision of *Stephen Lynch v. MIBI,* the 10th May, 2005, a decision to which both sides have referred as being supportive of their case. Mr. Barton draws attention in particular to a sentence at p. 3 of the judgment of Macken J. as follows:

> "I read that obligation as being no more than one which is intended to ensure that all appropriate parties who might have a liability are proceeded against."

He argues that the Does were persons who clearly <u>might</u> have a liability and therefore ought to have been proceeded against.

17. While both sides have drawn comfort from the *Lynch v. MIBI* decision, I, for my own part do not find it of great assistance. The factual background, one caused by the presence of oil on the roadway and the legal submissions forming the backdrop to the judgment which were that there was an onus on the plaintiff to establish that the oil had not been deposited by an exempted vehicle, means that the case is rather distant from the present.

18. Ms. Patricia Moran, SC on behalf of the plaintiff says that the position is that the driver was and is untraced. She says that the plaintiff and his advisors were entitled to be guided by the Gardaí, who having investigated the matter, took the view that the identity of the culprit had not been established. Caution is, in my view, required in such a case in relying on the conclusions of the Gardaí. They are investigating the matter with a view to a criminal prosecution, where if it is to proceed they would be under an obligation to prove their case beyond all reasonable doubt. The high onus required of them in a criminal case, must inevitable mean that there will be cases where they conclude, that notwithstanding the depths of their suspicions that it would not be reasonable to expect a conviction beyond reasonable doubt and that accordingly it would not be responsible to proceed with the prosecution.

19. In this case the Garda investigation would seem to have been quite a limited one and there was certainly nothing in its outcome, which forced a conclusion that in civil proceedings it would not be wise to proceed against the Doe family members.

20. In a situation where the plaintiff and his advisors concluded that the identity of the driver had not been established with sufficient clarity so as to justify the issue of proceedings, even if the situation is, that other plaintiffs and other advices may have concluded differently, what is the position? It seems to me that the plaintiff does not lose his right to look to the MIBI by reason of making a tactical judgment, even if it is not the judgment that would be made by others. In that regard the provisions of s. 3.10. of the 2004 agreement are relevant to this issue. This section provides as follows:-

> "If so required by MIBI and subject to full indemnity from MIBI as to reasonable costs, the claimant should take all reasonable steps against any person whom the claimant may have a remedy in respect of or arising out of the injury or death or damage to property, provided that any dispute as to the reasonableness, of a requirement by MIBI that any particular step should be taken to obtain judgment against any such person shall be referred to the Minister whose decision shall be final."

21. In this case the MIBI did not make any requirement of the plaintiff. All they did do, was to point out that Mr. Doe was insured with Hibernian Insurance and it was their belief that the Hibernian's Insurance Company inquiries were continuing. In fact the plaintiff's solicitor had already been in touch with Hibernian Insurance who had responded that their investigations to date had failed to show that liability was attached to their insured and that their driver had no recollection of the incident.

22. In a situation where a plaintiff and his advisors have formed the view that they have insufficient evidence to proceed against a party, who may be the subject of suspicion, they are not to be blamed for deciding not to proceed.

23. Had MIBI wanted the plaintiff to proceed against Mr. and Mrs. Doe, it was open to them to make a requirement under s. 3.10 of the 2004 agreement and provide the appropriate indemnity in relation to costs. This was, after all, a case where there was a clear disagreement. The Bureau believed that the state of the evidence was such that proceedings should issue against the Does, while the plaintiff and his advisers took the contrary view. When the MIBI failed to do that it became a matter for the plaintiff's judgment as to how to proceed. In choosing to proceed as they did, they ran the risk that it would be established on the balance of probabilities that the accident was the fault of the Does, which would have seen these proceedings fail. However, that has not happened. A cloud of suspicion, has undoubtedly been cast over the Does, but it does not go beyond that.

24. In these circumstances I am of the view that the plaintiff is entitled to succeed against the MIBI and accordingly I turn to the question of quantum. In the accident the plaintiff suffered a fracture of the right tibia, as well as fractures to the third, fourth and fifth metatarsals. He was detained in hospital for a couple of days and thereafter his injuries were treated by him being put in a cast.

25. The initial prognosis was that symptoms would improve over a period of twelve to eighteen months. It wasn't expected that he would develop any long term sequelae as a result of the fractured tibia, but it was the expectation that he would complain of intermittent right foot pain. However, the plaintiff's account of how he actually faired would suggest that this was somewhat optimistic. He says that he continues to experience significant pain and discomfort. He says that his ability to walk any distance, though not to cycle has been effected. He has been advised to use a particular form of insole. While he states that he has compiled with this request, some hesitancy in this regard would seem to emerge from the medical report. At present he walks with a slight limp.

26. All told, the plaintiff has had a not insignificant difficulty over the past three years and these persist. It is very likely that some degree of discomfort will persist into the future and that he will continue to experience the after effects of the accident. However, with the passage of time, this can be expected to lessen somewhat. In all the circumstances I will assess general damages to date in the sum of €30,000 and damages into the future in the amount of €37,500, making a total of €67,500.