

THE HIGH COURT**2009 794 P****BETWEEN/****DAVID CARR****PLAINTIFF****AND****JOAO OLAS****AND****JENNIFER DORAN****DEFENDANTS****JUDGMENT of Mr. Justice Hogan delivered on the 15th March, 2012**

1. A split second decision made in the heat of the moment shortly after mid-day on Tuesday, 22nd January, 2008, has resulted in tragic consequences for the plaintiff, Mr. David Carr, which will profoundly affect him for the rest of his life. At the time of the accident, Mr. Carr was an experienced motor cyclist who had previously worked as a musician, but who was now working in the courier business.

2. On that particular day, the weather in the Sandyford/Leopardstown area of South Dublin was bright and sunny. There had been some rain earlier, but driving conditions were all but perfect. The traffic was steady and relatively free flowing. Shortly after mid-day, Mr. Carr travelled down the Leopardstown Road on his Honda CVR600 motorcycle before coming to a major roundabout. The roundabout has four exits: one of these lies due north and leads on to Brewery road. The other exit lies due east and it is at this point that the Leopardstown Road continues and leads on to join up with the N11 dual carriageway.

3. Mr. Carr entered the roundabout at the south-westerly entrance. Shortly afterwards, Mr. Carr had a chance encounter with the first defendant, Joao Olas, who on that day happened to be driving his father's Peugeot 306 motor vehicle. Mr. Olas is a Portuguese citizen who has been living here since 2003. He is a truck driver with Kerry Foods and he had just finished work following a 4 am start. Mr. Olas had exited the M50 motorway at junction 14 and he was in the course of travelling home to Foxrock when the incident occurred. There is some dispute as to how exactly the parties came to meet on the roundabout or whether as Mr. Carr claimed and Mr. Olas denied, the former was required to take evasive action as a result of the driving of the latter. What is not in issue is that some form of incident took place – the rights and wrongs of which have been superseded by subsequent more serious events – which prompted Mr. Carr to make a rude gesticulating signal to Mr. Olas and Mr. Olas responded in kind.

4. Mr. Carr then indicated that he wished to move off the roundabout and move on to Brewery Road. Mr. Olas travelled from a point equivalent to 8 o'clock on the roundabout until he took the 3 o'clock exit back onto the next stretch of Leopardstown Road. Mr. Olas was now heading due east, heading home to Foxrock. While this section of the road is a three lane carriageway, Mr. Olas was travelling on a single lane as he headed in the direction of the N11 and there were two on-coming lanes on the opposite side of the road. There was free flowing traffic in both directions. The single lane is a relatively narrow road, with a width of 3.2m at the point of the accident. Perhaps reflecting this fact, the relevant speed limit is 50kph. Mr. Cathal Maguire, the well known consulting civil engineer gave evidence that lanes of this kind normally are 3.65m wide.

5. In the meantime, Mr. Carr had made a fateful decision. Having exited off the roundabout on to Brewery Road, he then decided to double back and to seek out the driver of the car with whom he just had an altercation. After progressing about 50m down Brewery Road, Mr. Carr turned his vehicle at a traffic island when there was gap in the traffic and went back in the direction of the roundabout to seek out the driver of the vehicle. While Mr. Carr may well have crossed a continuous white line in the course of this reversal of direction, this was probably not in itself significant, save that it is at least some evidence that Mr. Carr was agitated and cross by reason of the conduct of Mr. Olas.

6. In the meantime, Mr. Olas had proceeded down the Leopardstown Road. It is common case that there were vehicles both ahead of him and behind him and the traffic was moving at a speed of approximately 40kph. It is not in dispute but that Mr. Carr overtook traffic and caught up with Mr. Olas's car at a point approximately 190m from the exit point on the roundabout on to this section of Leopardstown Road. It is also common case that Mr. Carr came alongside Mr. Olas's vehicle and, keeping his right hand on the steering wheel of the bicycle, gesticulated with his left hand and – according to some witnesses, albeit disputed by Mr. Carr – then banged on the wing mirror and the driver's window.

7. It is not disputed but that at this point the vehicle swerved to the right and then back again. Nor is it seriously disputed but that the swerve was the proximate cause of the accident, so that either the motorcyclist was himself forced to swerve and lost control as a result or (as I rather think) the front right hand wheel of the car clipped the front wheel motorcycle, so that the latter spun out of control. At all events, the motorcycle banked sharply at about a 45 degree angle and the motorcyclist and his machine both careered into the passenger side of a motor vehicle, a red Mazda MX5 sports car, driven by the second defendant, Ms. Jennifer Doran which was travelling on the opposite side of the road in the direction of the roundabout. Mr. Carr was thrown into the air and landed head first in the centre of a boxed junction beside the entrance to Tudor Lawns, an access road which leads to a group of houses off the Leopardstown Road. Mr. Carr was knocked unconscious as a result and his body thus lay just inside the outside lane of the two-lane carriageway which was heading in the opposite direction towards the Leopardstown Road.

8. The Gardaí and the emergency services were called. The investigating member, Garda Michael Murphy, arrived at 12.36pm and confirmed in evidence that he found Mr. Carr laying unconscious on the junction box, clad in ordinary motorcyclist's apparel, together with a helmet and visor. The Mazda was damaged by extensive scraping beside the driver's door. Minimal damage had been done to the motorcycle, which he described as being medium-sized. Little damage had been done to the Peugeot either, but Garda Murphy

noticed scratch marks on the right hand side, which suggested a possible point of impact. He did notice that the wing mirror of this vehicle had been retracted backwards.

9. Mr. Carr was very seriously injured as a result of this grave accident. He was hospitalised and required extensive treatment. The entire joint of his shoulder, wrist, one of his ribs and lungs all suffered extensive injuries. There was damage to his bronchial nerve, with the result that he cannot move his shoulder and, as a consequence, he has lost the effective use of one arm. There was also damage to his frenic nerve, with the result that he has a partially frozen right lung. This leads to breathlessness and affects his ability to sing. Mr. Carr also has extensive and disfiguring scarring over his torso. These extensive injuries and disabilities in turn has lead to psychological problems such as depression and, quite obviously, Mr. Carr's quality of life has been gravely affected by this accident

10. Mr. Carr has sought to combat the adverse effects of this accident and has set about a rehabilitation regime. While it is greatly to his credit that he has made such sterling efforts to rehabilitate his life, the personal and financial consequences for him of this most serious accident are nevertheless very considerable indeed. To state only the most obvious, he is presently surviving on disability benefit and it is unlikely that he will ever hold down gainful employment again.

11. Returning now to the accident itself, Ms. Doran was driving on the outside lane at about 40kph in the direction of the Leopardstown roundabout when she saw Mr. Carr's motorcycle approach alongside the driver's door and window of Mr. O'Las' vehicle. At this point she was about 15m.-20m away from the boxed junction. Although the accident itself happened in the course of two to three seconds, she herself swerved into the inside lane (i.e., the lane running alongside the entrance to Tudor Lawns) in an effort to avoid the banking motorcycle. Despite her best efforts, the motorcycle and its driver careered at an angle into the driver's side of her car just above the wheel and this impact took place a few metres from the boxed junction. It may be significant that the Mazda MX5 is a low body sports car and but for this fact and the fact that Ms. Doran managed successfully to swerve into her inside lane, the consequences for Mr. Carr might have been ever graver than they actually were.

How did the accident happen?

12. There is no doubt but that the altercation at the roundabout put in train a series of events which led to the accident. There are, however, a number of individual factors – speed, travelling over the continuous white line, whether Mr. Carr kept a proper look-out, whether Mr. Carr banged on the driver's window and wing mirror, whether Mr. O'Las's car swerved to the right, thus catching Mr. Carr's motorcycle and, if so, whether this action was deliberate and the role of Ms. Doran – which require to be separately examined in order to determine the cause of the accident. We may now consider these in turn.

i. Speed

13. If, as appears to be common case, Mr. O'Las was travelling at about 40kph, then it follows that Mr. Carr must have been travelling at a greater speed in order to catch up with him, albeit that just in the few seconds before the accident both parties must have been travelling at more or less the same speed given that the motorcyclist was riding along aside the driver. This is especially so given that Mr. Carr had already travelled a little distance in the opposite direction down Brewery Road, waited for a gap in the traffic and then turned back in the direction of the roundabout, before catching up with Mr. O'Las after a distance of about 190m.

ii. Whether Mr. Carr travelled over the continuous white line

14. It must be recalled that the single lane is merely 3.2m in width and it is thus a relatively narrow lane for a carriageway of this general quality. It is accepted that Mr. O'Las was travelling in the centre of his lane. If one accordingly allows for a margin of perhaps 0.6 metre gap between the car and the kerb, then the distance between the car and the continuous white line must have been in the order of a similar margin. All of this suggests that, at best, the wheels of the motorcycle must have been just within or actually on the continuous white line. In fact, I think it more likely that the wheels of Mr. Carr's motorcycle was probably just over the white line.

iii. Whether Mr. Carr kept a proper look-out

15. All the relevant witnesses are agreed that Mr. Carr did not keep a proper look-out. Mr. Carr himself does not dispute this and, indeed, given that it is accepted that he was (at least) gesticulating and remonstrating with Mr. O'Las at the time of the accident, it was all but impossible for him to have a kept proper look-out in such circumstances.

iv. Whether Mr. Carr banged on the driver's window and wing mirrors

16. We next come to the crucial question of whether Mr. Carr endeavoured to attack or break Mr. O'Las' wing mirror and whether he also banged on the window adjacent to the driver's seat. Here it is necessary to review and evaluate the evidence of all five witnesses to the accident, three of whom claim to have witnessed such conduct.

17. Mr. Carr maintains that all that he did was to gesticulate and remonstrate with Mr. O'Las as he came up along side him. But I fear that I cannot fully accept this account, since it is contradicted by the preponderance of the evidence. I also have regard to the fact that, as Mr. Carr himself acknowledged, his memory of the events has been (understandably) impacted by the gravity of the injuries he suffered.

18. Another witness, Shea O'Brien, was the passenger in an Isuzu truck, but there were some three to four vehicles between this truck and Mr. O'Las's car. Mr. O'Brien was certainly sitting in an elevated position in the truck, but the truck was also several vehicles behind Dr. Staunton's car. Mr. O'Brien seems to have noticed the motorcycle only when it was adjacent to driver's side and as the car then swerved to its right. However, if the banging on the window occurred, it occurred immediately before this point and since Mr. O'Brien's attention was only called to the motorcycle just before the swerve, this would explain why this banging simply did not register with him.

19. Dr. Pauline Staunton was in the car immediately behind that of Mr. O'Las and, along with Ms. Jennifer Doran, she probably had the best view of any witness. She described how the motorcyclist overtook her car on her driver's side as she approached the entrance to Tudor Lawns. She was then taken aback to see the motorcyclist "thumping" the car around the driver's window, immediately before the car swerved to the right.

20. Similar evidence was given by the second defendant, Jennifer Doran who was coming in the opposite direction. Ms. Doran saw the motorcyclist draw up beside the driver's window and bang on the window. While she saw only one bang on the window and could not recall seeing any interference with the wing mirror, she described Mr. Carr's actions as amounting to very dangerous driving. It may be noted that Ms. Doran was the only person who had the opportunity of seeing Mr. O'Las's face immediately before the accident, yet she did not see any aggression on his part.

21. Finally, similar evidence was also given by Mr. Olas who described Mr. Carr endeavouring to push back the wing mirror and bang several times on the window. A photograph of the car taken after the accident shows that the wing mirror had been retracted and pushed back. It will also be recalled that Garda Murphy confirmed that he had found that the wing mirror had been retracted backwards, albeit that it was not broken.

22. In these circumstances, I am coerced to conclude that Mr. Carr did bang on the window, probably on two or three occasions and I further find that he attempted to wrench back the wing mirror on the driver's side of Mr. Olas's car.

v. Whether Mr. Olas's car then swerved to the right

23. All the witnesses are agreed (and I so find) that, in the split second or so after the banging on the window, Mr. Olas' car swerved to the right towards the middle of the road. This appears to have been the proximate cause of the accident in that the right hand wheel of the car appears to have touched the front wheel of the motorcycle, causing it to bank and to spin out of control.

vi. Whether Mr. Olas swerved deliberately

24. This brings us to the most critical question of all. Did Mr. Olas intentionally swerve the car into the path of Mr. Carr by way of response to the banging on the window and the earlier incident at the roundabout? Counsel for Mr. Olas, Mr. Mohan SC, does not flinch from accepting that, were I to make such a finding, I must then find in favour of the plaintiff on liability - subject, of course, to a high proportion of contributory negligence - as this would have amounted to an assault.

25. In approaching this question, I should perhaps first say that I found Mr. Olas to be a most impressive witness. He gave his evidence fairly, fluently and without any evasion whatsoever in the teeth of (an equally impressive) cross-examination conducted by Ms. Dillon S.C. on behalf of the plaintiff. He was emphatic that he did not intend to injure Mr. Carr by swerving, but rather that the swerve was caused by his own instinctive reactions to the banging on the window.

26. Mr. Olas explained that he had been variously distracted, confused and, indeed, scared by this sudden sequence of events. He gave a graphic depiction in the witness box of how he recoiled with his body backwards and moved slightly to his left away from the perceived direction of the blow and how in the course of this the car swerved slightly to the right, even though he had both hands on the steering wheel of the motorcycle. This analysis was supported by Mr. Maguire, who noted that Mr. Carr must have been banging with his left hand, with his right hand on the steering wheel. Given that Mr. Carr was adjacent to the driver's window, this blow would have been perceived by the driver of the car as a backhand blow coming from the front. Mr. Maguire insisted that in such circumstances the driver would instinctively recoil away from the direction of the blow. By moving back and to his left in this fashion, he was more likely to move the car to the right.

27. This conclusion is supported by one further item of evidence. While Mr. Carr suggested that he could see that Mr. Olas was very angry as he moved along side him, I think it more likely that what he really saw was a driver who was bewildered and even momentarily frightened. Significantly, perhaps, Ms. Doran insisted that she saw no evidence of aggression on the part of Mr. Olas immediately before the accident.

28. These factors all point to one, admittedly critical, conclusion, namely, that the swerve was the result of an instinctive reaction on the part of Mr. Olas as his body recoiled in an instant to avoid what appeared to be a blow from the back of Mr. Carr's hand coming in his direction as the latter banged on the window. This instinctive movement caused the sudden lurch to the right, which in turn caused the right hand wheel of the car to touch the front wheel of the motorcycle, which in its turn caused the motorcycle to bank and spin out of control. It is for these reasons that I reject the argument that Mr. Olas intentionally turned his vehicle into the path of Mr. Carr.

29. Mr. Olas was pressed in the course of cross-examination as to whether he had recognised Mr. Carr as the driver of the motorcycle with whom he just had an altercation. The suggestion was to the effect that he had done so and that he had elected intentionally to injure Mr. Carr as a result. But it must be recalled that Mr. Olas was confronted with a sudden emergency and his thought process must have struggled to assimilate a quantity of different questions - what is happening?, why is this happening?, who is this attacker? - in the small number of seconds during which this incident occurred. Even if his mind could have swiftly assimilate and process this information, I doubt that he could have done in so in the course of the small number of seconds during which this incident took place so as to form an intention to injure Mr. Carr. Even if I am wrong in this - and one would perhaps have had required the evidence of a psychologist for this purpose - I nonetheless fully accept Mr. Olas's account of what happened and that the swerve was the product of an instinctive reaction which was not deliberate.

30. Mr. Olas was also pressed about alleged inconsistencies in prior statements he had made with regard to these events. Thus, for example, he said in evidence that he thought that Mr. Carr had hit the wing mirror twice, whereas it was suggested to him that on one construction of his statement to Garda Murphy on 31st March 2008 ("...the motorbike beside me hit my wing mirror with his hand..."), he had acknowledged that this had occurred only once. While one could debate endlessly the linguistic nuances of statements of this kind, the photograph of the retracted wing mirror tells its own story. For my part, I accept that Mr. Olas has at all material times given consistent and coherent evidence regarding these incidents and the events leading up to the accident.

vii. Whether Ms. Doran was responsible for the accident

31. All the witnesses were agreed that Ms. Doran was completely blameless in respect of the accident. I accept completely her evidence to the effect that she was driving on the outside lane of the (two lane) carriageway heading in the direction of the roundabout, coming from the N11. She was travelling at about 40kph as she approached the yellow junction box outside the entrance to Tudor Lawns she saw Mr. Carr bang on the window. Just as the Peugeot swerved to the right, causing the motorcycle to bank, she then took evasive action by swerving into the inside lane. She could not, however, stop the motorcycle and rider careering into the side of her car. The very fact that Ms. Doran's car was impacted at her right hand side is itself ample testimony to her quick-minded endeavours to avoid a collision. Indeed, but for her commendably prompt actions, this serious incident might well have led to a fatality.

32. It follows, therefore, that as Ms. Doran was totally blameless, she has no liability to the plaintiff, whether in negligence or otherwise.

Could Mr. Olas be liable in negligence?

33. I turn now to the question of whether Mr. Olas could be liable to the plaintiff in negligence, quite independently of the question of assault. In effect, the argument here is that, irrespective of the conduct of Mr. Carr, Mr. Olas still owed him a duty of care as a

fellow road user. Mr. Mohan SC ripostes by saying that whether by reference to the principles of *ex turpi causa* or otherwise, the imposition of a duty of care would be incongruous.

34. So far as the *ex turpi causa* doctrine is concerned, s. 57(1) of the Civil Liability Act 1961 provides that:-

"It shall not be a defence in an action of tort merely to show that the plaintiff is in breach of the civil or criminal law."

35. As Finnegan P. noted in *Anderson v. Cooke* [2005] IEHC 221, [2005] 2 I.R. 607 at 613, "the effect of s. 57(1) is to modify, but not to abolish, the defence of *ex turpi causa*". In other words, the mere fact that the plaintiff is in breach of either the civil law or criminal law does not mean that the law of torts will not supply him with a remedy if he were otherwise entitled to such. If that were not the law, then the fact that the plaintiff might be guilty of some infraction (whether technical or serious) of the Road Traffic Acts - such as, for example, that he or she was driving in a bus lane or was driving marginally in excess of the speed limit or (to take an example at least close to the present case) driving marginally over a continuous white line would have the consequence that a defendant who negligently injured that plaintiff in the course of a road traffic accident would have no liability.

36. In *The People v. Barnes* [2006] IECCA 165, [2007] 3 I.R. 170 the Court of Criminal Appeal held insofar as the common law had permitted the householder to kill a burglar merely because he was such, this rule has not survived the enactment of the Constitution in view of the State's obligation under Article 40.3.2 to protect the life of all citizens. By the same token, insofar as the common law's *ex turpi causa* rules permitted a defendant to avoid tortious liability merely (and I stress the word "merely") because the victim happened in some respect to have also committed an illegal act, such rules would not be compatible with the State's duty contained in Article 40.3.2 to vindicate the person. While the law of torts may be regarded as the primary mechanism whereby the State's constitutional duty to vindicate the life and person is achieved (cf. the comments to this effect of Henchy J. in *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 629 and those of Hardiman J. in *Grant v. Roche Products Ltd.* [2008] IESC 35, [2008] 4 I.R. 679), the common law must, where necessary, be remoulded and re-fashioned in order to reflect and to accommodate itself to these basic constitutional values: see generally Professor Binchy's masterly analysis of this topic, "*Meskeel, the Constitution and the Law of Torts*" (2011) Dublin University Law Journal 339.

37. It is against this context and in the light of these constitutional obligations that s. 57 of the Act of 1961 falls to be interpreted. Just as the decision in *Barnes* made it clear that burglars cannot be regarded as some form of modern day outlaws who have forfeited any entitlement to constitutional protection by reason of their wrong-doing, so by analogy, the same is broadly true even in the case of those road users who have clearly committed serious breaches of the Road Traffic Acts. Indeed, the modern *ex turpi* case-law focuses on those cases where the tortfeasors and the victim have both engaged in a joint illegal enterprise which is of necessity *mala in se* rather merely *mala prohibita*. Thus, as Peart J. put it in *Hackett v. Calla Associates Ltd.* [2004] IEHC336, the modern day *ex turpi causa* principle is confined to those cases where the conduct of the plaintiff has been "so egregious that he ought not to be allowed recover damages for an injury sustained which results from that behaviour."

38. Another contemporary example is supplied by *Wasson v. Chief Constable, Royal Ulster Constabulary* [1987] N.I. 420, a case where the plaintiff was entitled to recover damages for assault where he was struck in the head by a baton round fired by a police officer in circumstances where the defendant had failed to prove that it had been discharged in self defence. Hutton J. found for the plaintiff even though he had been convicted of riotous assembly. It may possibly be relevant that the plaintiff here sued for assault and trespass. Would the result have been different if, for example, the plaintiff had sought to make good his escape from the scene of the riot by travelling as a passenger in the car belonging to and driven by a fellow rioter and had then endeavoured to sue the driver of the car for negligence when it crashed as the occupants sought to evade police detection?

39. Nevertheless, in circumstances where the participants are jointly engaged in serious criminal activity - the textbook examples of which are cases arising from injuries sustained in the course of robbery or (as in the decision of the Australian High Court in *Gala v. Preston* (1991) 172 C.L.R. 243) car theft - the courts lean against recovery in tort for reasons associated with public policy and maintaining the integrity of the administration of justice. As MacLachlin J. said in her judgment in *Hall v. Herbert* [1993] 2 SCR 159:-

"My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. It follows from this that, as a general rule, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts. As to the form the power should take, I see little utility and considerable difficulty in saying that the issue must be dealt with as part of the duty of care. Finally, I see no harm in using the traditional label of *ex turpi causa non oritur actio*, so long as the conditions that govern its use are made clear.

40. To this may be added a category of cases where the court cannot, in effect, calibrate or evaluate a duty of care by reason of the rank illegality of the actions of the participants (cf. the comments of Mason C.J. in *Gala v. Preston*). This is illustrated by *Anderson v. Cooke* itself. Here the plaintiff had been a passenger in a motor vehicle had had been adapted for motor sport purposes. He had agreed with two others to have the car driven at the maximum possible speed with a view to taking photographs of the speedometer for submission to an internet website. The plaintiff suffered injuries when the car crashed at a speed in excess of 190kph.

41. Finnegan P. held that in those circumstances it was impossible to determine what the duty of care ought to have been ([2005] 2 I.R. 607 at 616):-

"If the joint enterprise was that the car should be driven at 70 m.p.h. where speed was limited by regulation to 60 m.p.h., the Court might well be in a position to establish the standard of care owed by the driver to the passenger: each case must turn upon its own circumstances. In the present case I cannot establish the duty of care, if any, which was owed by the defendant to the plaintiff in order to determine if there was a breach of the same. Insofar as there is authority for the proposition that the Courts in a case in which the plaintiff and defendant were joint participants in illegal conduct the Court will not hear evidence to enable it to establish whether and if so what duty of care is owed by the defendant to the plaintiff by reason of s. 57(1) of the Civil Liability Act 1961, that is no longer the law. The denial of relief is related not to the illegal character of the activity, but rather to the character and incidents of the enterprise upon which the plaintiff and the defendant are engaged and to the hazards which

are necessarily inherent in its execution. In the circumstances of this case, as I am unable to determine the duty, if any, which was owed by the defendant to the plaintiff and accordingly to determine whether or not there was a breach of the same the plaintiff fails."

42. While the facts of the present case are decidedly unusual, the principles enunciated by the Supreme Court in *McComiskey v. McDermott* [1974] I.R. 75, are nonetheless of considerable assistance. In that case the plaintiff and the defendant were both university students who were participating in a motor car rally in County Wicklow. The aim of the competition was that competitors were to maintain a steady speed of about 50kph as they traversed the course. They were expected to arrive at a series of checkpoints at pre-determined times. If they arrived late they incurred penalty points and should they arrive early, they were penalised even more. Each car was manned by a driver and navigator and navigational skills was of the essence of this particular competition.

43. The plaintiff was the navigator and the defendant was the driver of the motor vehicle which participated in the rally. The competition itself was held on a wet autumn night on secondary roads in County Wicklow. In the course of the rally the defendant's car turned sharp left to negotiate a left hand bend. As this happened the driver was confronted with two cars blocking the road some 45m away. One of the cars was that of an official who was manning the checkpoint and the other car was that of a competitor. The driver felt that in these wet and muddy conditions he could not brake effectively and he essentially turned the car into the ditch at the right hand side of the road to avoid the two obstructing cars. The car overturned and the plaintiff was injured.

44. The jury entered a verdict for the defendant, whose verdict of no negligence was upheld by a majority of the Supreme Court. For the majority, Henchy J., posed the following question ([1974] I.R. 75 at 88):-

"Was that conduct negligence on his part? Counsel for the plaintiff says that it was; they say that he should have been driving at a speed which would have enabled him to cope with an emergency such as this, and the duty owed to the plaintiff was no more nor less than the duty to show care that a motorist owes to other users of the road. I think it is important to bear in mind that, while the general duty owed by a motorist to other users of the road is the objective one of showing due and reasonable care, the duty becomes particularised and personalised by the circumstances of the case. For example, it might be negligence to drive at 50mph at a group of boisterous people coming from school, yet it may not be negligence to drive at that speed past a group of adults. Therefore, it is necessary in each case to consider who is the person claiming to be owed the duty of care, who is the person it is claimed against, and what are the circumstances."

45. Henchy J. continued thus ([1974] I.R. 75 at 88-89):-

"The essential feature of the relationship between the plaintiff and the defendant in this case is that they were bound together as a team engaged in a joint competitive venture. Each undertook to use his skills towards the common end of scoring as well as possible in the competition. To achieve this the plaintiff, as navigator, acted as a map reader and time keeper and to convey the necessary information to the defendant, as driver; and then it was for the defendant to use his driving skill and the best advantage in the light of that information. All this had to be done in the context of the prevailing climatic and other conditions, the fact that to keep up with the time schedule laid down for the event an average speed of 35mph had to be maintained, and the fact that a team that started out one minute before them and another team one minute after them. The law of negligence lays down that the standard of care which is to be expected from a reasonably careful man *in the circumstances* ...I consider that the duty of care owed by the defendant to the plaintiff was to drive as carefully as a reasonably careful, competitive rally driver would be expected to drive in the prevailing circumstances."

46. If one applies the *McComiskey* principle here, it follows that the duty owed by Mr. Olas to Mr. Carr was to drive as carefully as a reasonably competent driver would have driven in the circumstances of an emergency which was not of his creation, making all due allowances for the sudden and unexpected nature of that emergency and the fact that Mr. Olas was required to react in a matter of split seconds. In this respect, the present case is different from that of *Anderson* in that, unlike that case, it is in fact feasible for the court to prescribe appropriate standards of care, albeit that the duty of care in question is an attenuated one having regard to the special - if not, indeed, extraordinary - circumstances of the case. Nor can it be said that the present case presents a form of criminal enterprise such that permitting recovery by way of compensation would strike at the integrity of the administration of justice or would undermine a key objective of public policy enshrined in civil or criminal legislation enacted by the Oireachtas.

47. Judged, therefore, by the application of the *McComiskey* principles, I cannot say that Mr. Olas was negligent. There is no suggestion that he was driving at an excessive speed or that he was not keeping a proper look-out. It is true that Mr. Carr maintains that Mr. Olas was agitated and that he had an aggressive demeanour - which suggestion, if true, might have affected his driving - but this is contradicted by the evidence of Ms. Doran who probably had the best view of Mr. Olas' countenance. Moreover, insofar as Mr. Olas was agitated, it was probably the result of surprise, bewilderment and momentary fear rather than anything else.

48. All that can be said against Mr. Olas is that he swerved suddenly. Yet, as I have already endeavoured to demonstrate, this swerve was the product of an instinctive reaction, prompted by a natural recoil from the banging on the window. If, as Henchy J. pointed out in *McComiskey*, the standard of reasonable care "becomes particularized and personalized by the circumstances of the case", it was asking too much of Mr. Olas to require that he should not have reacted instinctively, not least when he was presented with a completely unforeseeable set of circumstances with which he was instantly required to deal.

The Rules of the Road

49. In addition to arguments based on purely common law negligence principles, Ms. Dillon S.C also emphasised the following passage from the *Rules of the Road*, the latest version of which was published in March, 2007. The Rules are not a legal instrument, but are rather an administrative document which in places endeavours to summarise in non-legal language the requirements of the Road Traffic Acts while also giving practical advice and exhortation to drivers as how best to drive safely. The opening introduction recognises this in the following passage:-

"It uses **must** and **must not** to draw attention to behaviour the law clearly demands and forbids. It uses terms such as **should** and **should not** to tell you how best to act in a situation where no legal rule is in place."

50. Section 13 of the Rules provides:-

"Road Rage and Aggressive Driving

If you display road rage as a driver, it means you have uncontrolled anger that results in intimidation or violence against another driver.

Aggressive driving is inconsiderate, stupid driving. It involves speeding, tailgating (driving too close behind another vehicle), failing to use an indicator for lane changes, recklessly weaving in and out of traffic and overuse of a horn or flashing headlights. If another driver is attempting to provoke you, don't react. Don't be tempted to speed, brake or swerve suddenly. This could cause a crash or make other drivers think you were confronting them. Instead, stay calm and remain focused on your driving to complete your journey safely. Always remember that safety is your number one concern."

51. As it happens, the distinction drawn by the Rules between must and should is not observed in this passage. Moreover, despite the use of the imperative mood ("...stay calm and remain focused on your driving..."), this passage would be regarded by readers as containing wise advice, but as being largely exhortatory in nature. The passage cannot accordingly *in itself* be regarded as reflecting a mandatory legal rule akin, for example, to the duty to observe a speed limit or the obligation to wear a seatbelt.

52. At all events, Ms. Dillon S.C. emphasised that the Rules urged (or, if you will, oblige) drivers not to react by, *inter alia*, swerving. The whole context, however, of this passage pre-supposes that the driver will be in a position to make a conscious decision ("...Don't be tempted to speed, brake or swerve suddenly..") by way of response to the aggressive or inconsiderate driving of another. Those who prepared the Rules of the Road certainly did not envisage the type of scenario at issue here, nor were they endeavouring to prescribe a course of conduct to deal with a situation where the driver reacted immediately and in an instinctive fashion to a sudden perceived threat.

53. It is for these reasons that Mr. Carr cannot succeed in negligence against Mr. Olas.

Conclusions

54. It gives me no pleasure at all to reach these conclusions which are adverse to Mr. Carr. It is clear that he was (and is) a diligent and up-standing member of society. The tragic accident and its sad consequences for Mr. Carr came about as a result of a momentary (and doubtless quite uncharacteristic) loss of temper which set in train these most unfortunate events. It is perhaps easy to criticise Mr. Carr for his conduct, but I would rather reserve this task in the first instance to those who can truthfully say that they have never reacted angrily and in a headstrong fashion to some passing slight.

55. Nevertheless, if one looks beyond this and endeavours objectively to evaluate what happened, I am driven to the conclusion that the accident was the product of an instinctive recoiling of Mr. Olas to the sudden (and inherently dangerous) actions of Mr. Carr. For the reasons I have attempted to set out, I must conclude on the evidence that the swerve was instinctive and not deliberate. Over and above this, there was no evidence of negligence on the part of either Mr. Olas or Ms. Doran.

56. In these circumstances, I find myself obliged to dismiss the plaintiff's claim.