Neutral Citation Number: [2010] IEHC 50

THE HIGH COURT

2008 1888 P

BETWEEN

ANTHONY McDERMOTT

PLAINTIFF

AND

PATRICK McCORMACK

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 26th February, 2010

1. On 26th August 2006, the plaintiff tried to cross the road in Athlone and was knocked down. He says he was going from his flat on the Dublin Road to the opposite side where there was a petrol station and shop. He wanted to buy cigarettes. At some point on the roadway he was struck by the defendant's taxi and suffered multiple fractures. The circumstances of the accident are disputed as to almost every detail. The plaintiff claims that he had left his flat and crossed to the centre of the roadway, waited some seconds for traffic to pass, and then stepped out, not noticing the taxi and was then thrown up in the air by the collision. The defendant did not see the plaintiff either. He claims that the first he heard or saw of him was when his head hit his windscreen and he "slithered down on the passenger side" of the vehicle. The defendant believes that he was coming from the petrol station and shop and had, in effect, bolted out into his path from the pavement on that side of the road.

2. The defendant argues that even if the plaintiff's case is correct, he should be awarded no damages. The circumstances giving rise to his injury were, it is contended, entirely within his control. Therefore, it is contended, whether he crossed the road from his flat, stopped in the middle of the road to look for vehicles and then stepped out into the path of the taxi; or whether he had already crossed the road, bought his cigarettes and was returning to his flat from the opposite side of the road, rushing out into the path of the taxi without looking, it makes no difference. In either case there is no question, the defendant submits, but that contributory negligence on the plaintiff's part extinguishes his right to damages.

3. For the plaintiff it is argued that whereas a degree of contributory negligence is to be expected, at in or around a third of the damages, the defendant failed in his duty of care to watch out for pedestrians, to travel at a speed which did not exceed that which would enable him to halt his vehicle within the distance he could see to be clear (Regulation 22 of Road Traffic General By-Laws 1964) and was travelling at grossly excessive speed for this particular area.

Resolution of the issues
4. In an attempt to resolve these issues, I now set down the case made by each party before making findings of fact.

5. The plaintiff was fifty-three at the time of the accident. He was an alcoholic. Unfortunately, he still is. That does not disentitle him to damages. For the previous twenty years he had been employed as a security man in a shopping centre in Athlone. Apparently, according to Richard Foy, his then manager, he performed satisfactorily but for two occasions when he had to warned by letter in respect of an unexplained absence and another occasion when he was not fit for work because of being hung-over. His skill with people was good, however. He was able to handle those who should not be in the shopping centre, was apparently able to keep a sharp eye out, and, because of his local knowledge was well able to follow up on undesirable persons and behaviour. He had an illness pattern of taking time off in two week blocks, sometimes coinciding with holidays, and other times obtaining doctor's certificates. The binges were about every six months or so. When working, his drinking was not severe but he had tendency to go on binges. It was at the end of one these one to two week binges that this accident had occurred. During the day he had attended two Alcoholics Anonymous meetings. The first was at lunch time. His purpose was to get inspiration so that he could wind down from very severe drinking and put himself in a position where he could return to work. The second meeting started at around 8.30 in the evening and finished at around 9.45. The accident happened, it seemed to be agreed by everyone at about 10 p.m. and, in that regard, the agreed evidence of Garda Michael Haugh is useful. By that stage the road would still have been quite bright, though the light was fading and it seems probable that the accident occurred virtually under a lamp standard which, at that stage, it is assumed by all the parties, should have been lit. The circumstances of this accident are, to a degree, unexplained. The plaintiff did not see the defendant. The defendant did not see the plaintiff. Two persons travelling in a car from the opposite direction of the defendant did not see the plaintiff either, until the virtual moment of the accident. This is all pleaded as part of the circumstances which give rise to the probability, the defendant says, that the plaintiff had rushed on to the road, having bought cigarettes, from the opposite side of the road to his flat.

6. The plaintiff says that after the evening AA meeting he was dropped home by a friend. This is undoubtedly so. He believes that he then had a couple of cans of beer. Earlier in the day he would have had one to two pints of beer prior to the lunch time AA meeting and then seven to eight pints afterwards. He probably at least started a can of beer, on being dropped home at around 9.45, prior to feeling a need for cigarettes to complete his evening.

7. The plaintiff describes the accident in this way. He said he was wearing a t-shirt, I am satisfied that this t-shirt was white in colour, and blue pants. The evening was not cold. He went to the footpath and crossed from right to left, as one is looking towards the town centre on the Dublin Road, stopped on the white line, looked to see and thought it would be safe. He then got a belt and was thrown up in the air and rendered unconscious. His life, as he describes it, was turned upside down. He only remembers lying on the road and then being in Portiuncula Hospital and then, later on, in Merlin Park Hospital in Galway. I will turn to his injuries later.

8. The defendant has been a taxi driver for ten years. On that evening he was driving a Toyota Camray which had the usual sign on top of it. This should have rendered him more visible. He knew this area, as he drove towards Athlone, along the Dublin Road, he didn't think there was traffic in front of him or behind him. He could remember no traffic coming against him. He claims to have been doing 25 k.p.h. As he was approaching the garage and shop, which were on his left, he felt a thump. He got out. He had seen nothing on the road, because to his mind, it was perfectly clear. No one was struck coming from his right, in other words coming from the

direction of the plaintiff's flat, rather, he says that the plaintiff was coming from the left hand side hitting the passenger bonnet near the washer and dinting in his windscreen. The road, he agreed, was a busy area and the garage and shop was a magnet for people. He was aware that there was an apartment block across the road and that he had a perfectly clear view for 200 metres back from the scene of the accident. As to which side of the road the plaintiff came from, it was his belief that he came from the garage and shop side; principally, it seems, because the thump came, as he described it, on the passenger side with plaintiff then "slithering down" the side of the car. He said the plaintiff was not thrown up in the air. He said that at all times he was paying attention and never takes his eyes off the road. He agreed that if the accident victim was on the garage and shop side of the road, he would have seen the plaintiff because he was paying attention but he saw no one on the footpath. In consequence, he believes that the plaintiff came out on to the road, just as he was passing by. In his statement to the Gardaí he told them that he was doing "20 to 25 m.p.h.". He claims to have mixed that up with kilometres per hour and now claims that his speed was 16 to 17 m.p.h. To the Gardaí he said "I never saw the man, if I did I would have stopped".

9. To this accident there were two independent witnesses. Gillian Dunning is a nurse and was travelling as a passenger in a car coming from Athlone city centre along the Dublin Road, in the opposite direction to the defendant. Her fiancée Derek Kinahan was driving. His recollection was of a bang and seeing a body in the air. His fiancé screamed. As far as he could see, there was no one standing in the middle of the road. He thought he saw someone on the footpath on the Statoil garage and shop side but this, he agreed, could be expected in that area and he could not say that this was the plaintiff. He did not see the taxi coming towards him and was only aware of it when the accident occurred and the defendant's car was ten or so feet way. He did not see someone slithering over the side of the car. He witnessed the accident. He described the plaintiff as being significantly in the air when he saw him, with his legs pointing towards the sky. His head was not even in contact with the car, he described what he saw as being "like on a trampoline". His recollection was of the plaintiff wearing a brown jacket but he now accepts that he was wearing a white t-shirt.

10. Gillian Dunning believes that the plaintiff was standing at the white line. Again, however, her recollection is not perfect as this is more a matter of inference since she says she saw the plaintiff as he was being hit. She believed that he just stepped from the middle of the road and the taxi hit him on the left. As he was hit, the plaintiff went up in the air and his head hit the windscreen, his legs went up and his legs went over the car. She did not hear brakes and she screamed. She describes the plaintiff as going up "like a rag doll, he kind of flew up in the air". She could not judge the force of the impact. She got out. She discovered the plaintiff with his head closest to the garage and shop with his legs pointing towards the back tyres of the car. She was aware that he had a white t-shirt on because, being a nurse, she rendered assistance and cut it open for the ambulance men to put on a heart-monitor when it came within about ten minutes. She would not have noticed if the plaintiff had cigarettes or chocolate on him, proving he had already made a trip to the shop. She could not be sure if the car stopped dead but she described it as stopping between the bollards, which are in front of the Statoil garage and shop. She was not watching the road and did not see cars coming towards her. She felt that she saw the plaintiff step out from the centre of the road and get hit. So, it was really only an impression that the plaintiff stepped off the white line and into the path of the taxi. She thought, however, that she saw him move forwards.

11. To this evidence I add of that of Tom O'Brien, a qualified engineer. He described the scene and confirmed that one could see 200 metres ahead from the Dublin side towards the city centre. He confirmed the presence of light standards for what was previously a national primary route. The total road width was 10.5 metres. There was no sight impediment for people on the road, no matter which direction they came from. There was no pedestrian crossing, however, either at the shop and garage or, even further up, where the road becomes a roundabout but where traffic is likely to stop if drivers encounter pedestrians. The area is busy because there is a shop opposite the garage and, he thought, a Chinese restaurant. He referred to standard charts on reaction time. The ordinary reaction time for driver in a vehicle travelling at 35 m.p.h. would be about 10 metres. The braking distance would be about 19 metres. If the car stopped dead, and I am not sure that the evidence establishes this, because the car and the pedestrian may well have travelled together upon impact, and there is no other definite evidence upon which I can rely, he could not answer logically why that is so. However, I find it difficult to accept that the car stopped dead in the context of what Ms. Dunning and Mr. Kinahan described. Mr O'Brien also referred to a standard chart on the position of bodies following an impact with a car. If this vehicle had been travelling at under 20 m.p.h., the pedestrian would merely have been folded over the bonnet with his head hitting the windscreen. Instead, the body was thrown in the air. It is clear from the evidence that there was a roof vault and that the collision was very severe. On his analysis this required a speed of a least 35 to 50 m.p.h.

12. I regard the plaintiff as being an honest person. I accept that he has a problem with alcohol and that this often involves self deception. It clearly does in his case as to his control over his alcohol intake. He made no attempt, however, to exaggerate his injuries and there was nothing about his evidence and his manner of giving it which indicated dissembling. When the plaintiff got to hospital a blood alcohol reading was taken. Because of the methodology involved the reading has to be reduced by around 14%. Nonetheless, it was very high: 338 microgrammes per hundred millilitres of blood. Professor Andrew Wilkinson provided the following useful chart on the effect of alcohol. I now reproduce it.

Sequence of Central Nervous Depressant Effects of Alcohol

Stage of Influence Blood Alcohol

Concentration

Mg/100 ml Clinical Effect
Sobriety 10 – 50 Often no obvious effect, may feel

"relaxed"

Euphoria 30 – 120 Mild euphoria with increased talkativeness

Decreased inhibitions

Increased self-confidence

Impaired fine motor skills

Excitement 90 – 200 Emotional instability

Poor sensory perception

Impaired memory and comprehension

Incoordination and loss of balance

Drunkenness 150 – 300 Disorientation, mental confusion

Disturbances of vision (e.g. diplopia)

Decreased pain sense

Increased incoordination with staggering gait

Slurred speech

Stupor 250 – 400 General inertia approaching paralysis

Marked lack of response to stimuli

13. Alcohol, however, like other addictive drugs, has a varying effect on the body depending upon toleration arising from length of use. The plaintiff was not a stage where his liver function was beginning to give up the fight against the toxic chemical ingested within the plaintiff's body. Instead, it was working well. He was a healthy man, as his recovery from these terrible injuries testifies. The plaintiff was a habitual drinker, capable of ingesting very large amounts during his bouts of binge drinking. He also drank a lot, but much less, when he was working. No matter how the plaintiff looks at it he has a problem with drink and is therefore an alcoholic. I found the evidence of Dr. Graham Kearon, the family doctor to the plaintiff, to be impressive. He said that as regards charts on the effect of alcohol, these had to be varied with the subject. The proof of the pudding, he told me, was in eating. Various people had described in evidence meeting the plaintiff during the day. In particular witnesses who brought him to and from the two AA meetings. He was able to get into a car, he was able to get out of a car and he was able to speak at one meeting and he was not staggering, going in or out of the evening meeting. He demanded coffee. The plaintiff accepted in cross-examination that on the road he would be shaky and staggering a little bit. Dr. Kearon's view was that his body was well habituated to alcohol. This was not a person who was unused to the effects of this depressant drug. He could recall the plaintiff coming in to see him during a drinking bout that week and looking for assistance. He accepted that the medication that he had put the plaintiff on, it seems a day or so before the accident, would have added to the effect of alcohol. I am satisfied, however, that the whereas the plaintiff's judgment was clouded, and contributed to this accident, that he was not staggering markedly and that he did not fall over into the path of the taxi.

14. In the light of all of that I make the following findings of fact:

> (1) I accept the evidence of the plaintiff because I believe that he is an honest person who is doing is best to describe the circumstances of the accident. The evidence of the defendant was also honest, but I think less reliable. He had a tendency to infer what had happened from the circumstances as he experienced them. His evidence is less accurate. Particularly in the light of the horrific circumstances in which he found himself of hitting a pedestrian, there is a certain amount of clouding of his recollection.
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> (2) The plaintiff was definitely thrown up into the air by the impact with the car. As to how this squares with the position of the body on the roadway relative to the car, I do not know. In all the circumstances I do not see it as precise. I do not find the absence of evidence in relation to damage to the bumper and lights area of the front of the taxi to be convincing. I think it is probable that both pedestrian and car travelled together for some small distance, the plaintiff being thrown forwards and upwards with the car travelling more quickly underneath it.
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> (3) The speed at which the car was travelling exceeded 35 m.p.h. This is an unsafe speed in this area. It can be expected to be busy with pedestrians crossing where they can. To that I add that in our cities minimum provision is made for pedestrians. Drivers may therefore expect them to be on the road. Unlike in other countries, for example Switzerland, there is a marked absence of pedestrian crossings. We seem to have gone from the old situation of zebra crossings to requiring perfection in road crossings with traffic lights and beepers, instead of making reasonable provision. This has made a marked contribution towards danger to pedestrians on our roads. It is a circumstance of which every driver is aware who travels through any city or large town in Ireland. It is particularly acute in this area where the accident happened.
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> (4) The plaintiff did cross from his flat to the centre of the road and then moved forward into the path of the taxi. He should have been seen. There was duty of care towards the plaintiff by the tax driver. It is evidence of negligence that he was not seen. Once a pedestrian is seen in the middle of the road then it is essential that drivers should take care, being aware that a pedestrian may make an error of judgment. Further, whereas the driver of a car is protected, the position of the pedestrian is that he is immediately in peril when on a roadway. It the duty of a driver to do what he or she reasonably can to ensure that the pedestrian is safe. This can be, depending on all the circumstances, to see that he or she gets safely to the other side of the road. Speeding past a pedestrian in excess of 35 m.p.h., whatever the speed limit, is not the exercise the reasonable care. Failing to see the plaintiff in the middle of the road is not the exercise of reasonable care. It is uncertain as to how the lighting condition contributed to this accident. The plaintiff was, however, clearly visible wearing, as he was, a white t-shirt. It could be that with the approach of twilight and the lighting up of street lamps that a dangerous lighting situation had come about. This called for the exercise of care.
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> (5) In assessing all the circumstances, I conclude that the plaintiff contributed markedly to the injuries which he suffered, through inattention and through alcohol impairment. Having read through the very helpful passages on the duty of care owed by motorists towards pedestrians which occur in McMahon and Binchy, Law of Torts (3rd Ed. Dublin, 2000) at paras. 15. 23 to 37 and taking into account paras. 15.16 to 15.22, I adjudge that the plaintiff was guilty of contributory negligence in the amount of 50%. I therefore turn to assess damages.

Damages

15. The plaintiff suffered severe injuries. His family practitioner Dr. Graham Kearon saw him three months after he was hospitalised. Since that time he has hardly come to the surgery with complaints. His injuries were summarised by Dr. Kearon as consisting of four broken ribs on the left hand side with a punctured lung, a fractured and not yet united left shoulder blade, a fractured left collar bone, a fracture to the left tibia and fibula and an extremely severe fracture to the right elbow. His elbow is severely disfigured and the arm is weak. One of the bones in his leg and another in his ankle had not yet reunited. They are now unlikely to reunite and Dr. Kearon explained that probably the muscles and tissues are making compensatory strengthening structures, though how this could happen I cannot imagine. Dr. Kearon said of the plaintiff "I can't think of someone making less of his injuries". Over time, the arm, he

said, may become slightly weaker and the plaintiff can expect pain and probably back problems into the future. He sees very little prospect of him working again. Dr. William A. Curtin offered the following opinion:-

> "Mr. McDermott walks independently, he reports no shoulder pain on the left hand side. Mr. McDermott has objective weakness of his right elbow with aforementioned deformity, however, he is able to lift light objects and is considering returning to work as a part-time security man in the near future. In view of the severity of Mr. McDermott's injuries and the problems associated with his alcohol dependence I am very happy with his clinical outcome. I do not plan any further intervention on Mr. McDermott in the near future, however, he will be reviewed in Merlin Park next December for further x-rays of his elbow, left tibia and right ankle. A final assessment of Mr. McDermott's disability should be deferred for one year until such time as he has returned to work and his sufficiency in this can be evaluated. Of a year later does not change this. The plaintiff walks upstairs using two feet to arrive on each step. He is not really capable of returning to work."

The reports of Dr. Curtin and those of Mr. Michael Glynn showed that the injuries to the elbow, leg, ankle and shoulder are serious and permanent. I quote from the final summary in Mr. Michael Glynn's report:-

> "In summary this patient sustained the following injuries
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> (1) Fracture of the left tibia and fibula, 8cm below the knee joint. He had two surgeries for this but it has healed well. The plate does not need to be removed. He has some symptoms in relation to the knee but these do not appear to be severe.
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> (2) Fracture of the right medial malleolus with minimal displacement. This has healed fully and is asymptomatic.
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> (3) Fracture of the left scapula and clavicle. The scapular fracture has healed and there is a non-union of the clavicular fracture. He has minimal symptoms in relation to this and no surgery is planned.
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> (4) Fracture of the right elbow, which has left gross deformity but good, rang of movement.
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> (5) Fractures of ribs, which have healed fully leaving no abnormality.
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> The patient's chart and the PIAB report indicate that this patient was intoxicated at the time of the accident and he has a past history of alcoholism and depression. In the long-term he is not fit for any type of heavy manual work".

16. I am obliged under legislation to have regard to the Personal Injuries Assessment Board, book of q*uantum.* I regard the passages on assessing damages in that work, which I will refer to as the green book, hearing loss cases having now disappeared, as being entirely reasonable. Whereas they were set in 2004, inflation during the intervening time has been offset by the serious economic difficulties of 2008 and 2009 and which continue.

17. The green book mentions €22,000 as being one of the possible figures in relation to a shoulder injury from which there has been substantial recovery. For serious and permanent injuries to the lower leg, the amounts indicated can vary between €47,000 and €87,000. For serious and permanent ankle conditions damages can range between €37,000 and €70,000. For serious and permanent fractures to the elbow the amounts indicated are between €53,000 and €82,000. When it comes to the plaintiff's rib injuries, I note these have recovered well. Despite that his lung was punctured he does not fit within the category of having a serious and permanent condition for that injury. Such an injury would attract between €65,000 and €82,000. He seems to me to be in the lower range of €12,000 to €27,000. I bear in mind, in addition that one just not add up various figures but that I should look to the overall range of damages with a view to ensuring an award that compensates the plaintiff for the experience which he has suffered.

18. On that basis I propose to award the following amounts.

For the plaintiff's shoulder injuries	€20,000
For the plaintiff's serious and permanent ankle and leg injuries	€70,000
For the plaintiff's serious and permanent elbow injury	€60,000
For the rib injury	€10,000

In making each of these awards I have substantially discounted them from their full value to take into account the overall proper award for the injuries suffered by the plaintiff. The plaintiff is therefore entitled to the sum of general damages in the sum of €160,000. That could be divided as €60,000 for pain and suffering to date and because the future looks very problematic €100,000 for pain and suffering into the future. In addition, there are agreed special damages of €55,080 in hospital expenses. A relevant proportion of 50% of those will be paid directly by the solicitor for the plaintiff to the hospital. Added to that is the small sum of €355 travelling expenses. This means that general damages are assessed in the sum of €226,435.

Work record

Peter Byrne, an actuary with Joseph T. Byrne and Sons, has given detailed evidence as to loss of earnings. Having regard to the entirety of the evidence, however, I have reached the conclusion that the plaintiff, with his alcohol problem and other on-going health issues, would be unlikely to obtain another full-time job in a security industry once the shopping centre in which he works was shut down. At the time he worked in that place, it was a vibrant shopping centre, though others were competing increasingly over recent years. Over the course of the last four years it has wound down so now there are only two shops and a post office remaining. The post office is soon to go and the other shops will depart very shortly thereafter. Richard Foy, his manager, was made redundant in April 2009. The plaintiff might probably have lasted up to the date of trial if the accident had not occurred. Further, the plaintiff had applied for redundancy voluntarily in the year or so before the accident, but was turned down. Mr. Byrne indicated that between August 2006 and February 2010 there would have been a net loss in employment remuneration of €79,600. Less the relevant social welfare payment of €39,277, there is a loss to date of €40,323. I add that sum in respect of loss of earnings. In addition, into the future, I believe the plaintiff may have obtained some part-time work from time to time. This is entirely incidental to the situation which I believe he would have found himself by now, of being redundant from employment when he had previously given generally good service. I would find it impossible to indicate that he would work again and it is highly likely that he would have lived on some form of Social Welfare payment.

Result
In the result the total damages that I would award in favour of the plaintiff, at full liability, amount to €255,758. There discounted by 50%, giving the plaintiff an award of €127,879.