

THE HIGH COURT

[2010 No. 11561 P.]

BETWEEN

C.T. (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND H.P.T.

PLAINTIFF

AND

BUS ATHA CLIATH/DUBLIN BUS AND E. O'S

DEFENDANTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 24th day of April, 2013

1. Introduction

1.1 The plaintiff is a minor who was born on 12th March, 1996, and brings these proceedings through his father and next friend against the owner and driver of a bus which was involved in a collision with the plaintiff on 4th February, 2009, at Herbert Road, Bray, Co. Wicklow.

1.2 In the said accident the plaintiff sustained horrific injuries and by agreement between the parties, the issue before the court was that of liability. The plaintiff himself due to his injuries can give no evidence concerning what occurred.

2. The Incident

2.1 On 4th February, 2009, the plaintiff was 12 years of age and resided in Madrid, Spain, was in Ireland with a number of his classmates learning the English language at a local school in Bray.

2.2 At a time of approximately 16.50, the plaintiff and his friends having purchased sweets headed for Herbert Road, crossing a green in front of Killarney Heights estate. They proceeded a short distance in a southerly direction up Herbert Road when they reached a lamppost and the plaintiff suddenly ran across the road and the defendant's bus which was coming behind him which collided into him.

2.3 Evidence was adduced which the court accepts from a number of the plaintiff's fellow student to the effect that on one or two occasions prior to 4th February, 2009, when the plaintiff and his friends were making a similar journey, they had been involved in an altercation with local youths, a few years older than the plaintiff's group, who had congregated on the green area beside Herbert Road confronting the students verbally, brandishing hurleys and on one occasion there was apparently an exchange of snowballs.

2.4 The plaintiff's friends stated, and I accept, that they became agitated at the prospect of a confrontation with the youths and they started altering their positions in the group and that the plaintiff said words to the effect that he had done nothing wrong and he did not want to get involved and he suddenly ran out at an angle to get to the other side to the road.

2.5 A considerable amount of the time of hearing was spent in an analysis of the stills and moving pictures from three of the CCTV cameras installed in the defendant's bus. In particular, camera 1 showed the face of the driver in his cab, camera 2 showed the downstairs portion of the bus taken from the front of the bus looking backwards and camera 8 showed the driver's view from his cab.

2.6 At the outset, I wish to state that every witness who gave evidence was most helpful and truthful and trying as best they could, frequently "against interest" to recall the events of this tragic afternoon.

2.7 On behalf of the plaintiff, Mr. D McC, gave evidence that he had been travelling on the upper compartment of the bus, went downstairs as it approached the bus stop in Killarney Heights, was the second person preparing to alight and looked in front of him and saw on the left hand side pavement a group of young boys who he said were "boisterous" and that they were not walking in "military style" and in cross examination he added that the boy's actions did not cause him any concern, they were "bobbing" a bit and that the driver's driving was in no way untoward and he was slowing down to stop. Mr. D McC added that he first viewed the boys at an estimate of 50 yards before the entrance to Killarney Heights.

2.8 On behalf of the defendant, Mr. J. who was travelling in the opposite direction to the bus, stated that the bus was travelling at normal speed, he noticed some people on his right hand side and suddenly he noticed the accident.

2.9 Further, on behalf of the defendant, Mr. J. McN who was the first passenger in line to alight at the next stop, gave evidence. The nature of his interaction with the bus driver will be discussed later in this judgment, but he stated he noticed a couple of girls out of the window and had a brief exchange with the bus driver which he described as "a couple words". He became aware of the bus swerving and the accident occurring.

2.10 Mr. O'S, the driver of the bus, gave evidence that at the junction of Herbert Road and Killarney Heights, he saw "kids" with green trousers at the corner coming up to the lamppost and that when he was approaching the junction he was concentration on the stop ahead. Mr. O'S marked on a photograph the point where he first saw the boys. This mark was where the bus just was crossing the entrance to Killarney Heights.

2.11 Subsequently, under cross examination, Mr. O'S indicated that he may have seen the boys at some earlier point when the timelines were suggested to him. I think that the truth is Mr. O'S first noticed the boys a small distance earlier than his mark on the photograph indicates. I believe and hold that Mr. O'S saw the boys, at a point as stated in his evidence when the bus was just approaching the junction.

2.12 The court also heard the evidence of a number of experts, Dr. Dennis Wood, on behalf of the plaintiff who produced a set of photographs and the map. Also Mr. Michael Hogan and Mr. Martin Duggan who were both experts in driving and testing of heavy vehicles and buses etc. On behalf of the defendant, the court had the benefit of the expertise of Mr. David Land who is an accident

investigator and also Garda Tucker who is a well experienced PSV inspector who investigated the accident on behalf of the gardai.

2.13 It should be noted that it is common case between all the experts and indeed it was accepted by counsel on behalf of the plaintiff that from the moment that the plaintiff ran out in front of the bus, that the bus driver could not have done anything more than he did. Mr. O'S applied the brakes, moved the bus out towards the centre of the road and brought the vehicle to a stop indicating a speed of approximately 40km per hour and indicating a reaction time what was probably less than one second.

2.14 The case being made on behalf of the plaintiff, who unfortunately due to his injuries was unable to give evidence himself, was that whether being distracted by engaging in conversation with Mr. J McN or otherwise that the driver did not see the boys in time, did not take note that they were acting boisterously and did not take proper evasive action in order to warn the plaintiff of his presence and/or slow down the bus further prior to the plaintiff running out in front of it and/or manoeuvring the bus out towards the centre of the road.

2.15 It is contended on behalf of the plaintiff that the defendant through its driver was negligent and that in the first instance there should be no contributory negligence against the plaintiff. It is accepted that the plaintiff (age 12/13) is capable of contributory negligence but it is submitted on behalf of the plaintiff that because of his subjective fear of the older boys and his unfamiliarity with Irish roads and driving on the left hand side that the level of contributory negligence that would normally be found against a 12 year old boy should not apply to the plaintiff and that he should be exonerated of any contributory negligence.

2.16 It is submitted on behalf of the defendant that the defendants are blameless of the accident.

3 The Liability of Drivers and the Presence of Children

3.1 There is no controversy in this case as to the state of the law, it was summarised by Budd J. speaking for the Supreme Court in *McDonald v. C  ras Iompair   ireann* [1971] 105 ILTR 13.

3.2 The accident in the above case occurred on 7th February, 1967 and it is noteworthy that from the date of the accident to the pleadings to the High Court jury trial presided over by Butler J. and to the decision of the Supreme Court took only until 16th October, 1968.

3.3 Budd J. in directing a retrial stated the law which has been consistently followed by instinct as well as by citation since that case and which is not disputed by any of the parties here to be as follows:-

"The jury should be told that the presence or expected presence of children on or near the travelling surface of a highway casts a heavy responsibility on the driver of a vehicle approaching such children. He must alert himself to their presence and be mindful that they may act in the heedless fashion that children do. He must place himself in such a position to be in readiness to take all such precautions as he reasonably can to avoid causing injury to any one of them who acts in a heedless fashion. This will involve, inter alia, such matters as keeping a careful watch on the children possibly giving warning of his presence, keeping a reasonable distance from them, and having his vehicle under such control and travelling at such speed and otherwise acting in such a fashion as will enable him to take all such steps as are reasonably possible to avoid their heedless movements and actions. The details of what is said must of course vary with the circumstances of the case. The time, place, presence of other traffic and other relevant matters must influence what is said. It is also necessary to avoid conveying the impression to the jury that it is the duty of a driver in the presence of young children to ensure their safety in all circumstances. What is required is that he should take all such steps as can reasonably be expected of him as a prudent man, bearing in mind the heavy responsibility resting on him in the presence of young children..."

3.4 It is noteworthy that Mr. O'S under cross examination when asked what he would have done had he apprehended that a potential hazard existed by the boisterous behaviour children on the pavement echoed almost word for word the strictures at law stated by Butler J. in *McDonald* (above).

3.5 McMahon and Binchy *Law of Torts* (3rd Ed.) paras. 1507 onwards indicates that the abolition of juries in personal injury litigation has had the effect of "to encourage trial judges to define the duty (of drivers towards children) in somewhat fuller and franker terms".

3.6 In *Mulcahy v. Lynch* (Unreported, Supreme Court, 25th March, 1993), Blayney J. held that where an 8 year old boy ran out from behind a school bus into the path of an oncoming car which was travelling between 5 and 10 miles per hour that the driver's failure to sound his horn constituted negligence. Then he stated:-

"Where a driver is approaching a school bus which has stopped to let children out, one of the obvious things that must be anticipated is that where the children will want to cross the road and may be suddenly running out from behind the bus. The approaching driver should be aware of the approach of the car is obscured from view by the presence of the bus so that the only way you can give warning with approach is by blowing the horn. In such circumstances it seems to me that the heavy responsibility referred to by Budd J. in *McDonald v. CIE* can only be satisfied by not only driving slowly and keeping a careful lookout but also by blowing the horn..."

3.7 It should be noted that in *Mulcahy*, the bus was a school bus which obscured the view to the oncoming defendant and the presence of children was not visible to the defendant prior to the accident. It was held in *Mulcahy* that though the driver did not see any child prior to the accident, the mere presence of a school bus ought to have alerted the defendant not just to the presence of school children but to the fact that is likely that these children would dash out from behind the bus obliging the driver as he approached without seeing any children to sound his horn.

3.8 This Court will accept the law as set out by the Supreme Court in *McDonald* (above) as being correct without any refinement of further elaboration of the law that may have been made since the abolition of juries in personal injury actions.

4 The Issue of the Defendant's Liability

4.1 The fact that Mr. O'S apparently did not pass the driving test to drive buses on the first attempt is of no relevance to this case. The fact that Mr. O'S apparently completed a course in advanced motoring but did not sit the exam at the end is also of no relevance. On the other hand, the fact that Mr. O'S won bus driver of the year is also of no relevance.

4.2 I have no doubt that Mr. O'S is generally a very safe, consciousness and careful driver. I have no doubt that by the time the plaintiff stepped onto the roadway, Mr. O'S was alert and demonstrated this fact by his prompt braking of the bus within one length, a time of one second.

4.3 The issue in this case whether the defendants are negligent because of the failure of Mr. O'S to keep a sufficient lookout and to be sufficiently alert to notice the presence of the Spanish boys on the road and to notice the fact that, though they were giving Mr. D McC no cause for alarm, that they were acting boisterously, and as a result should be faulted for his failure to take the steps of applying his brakes, moving towards the centre of the roadway and possibly blowing his horn.

4.4 Mr. Michael Hogan, the plaintiff's expert stated if the defendant had been aware of a potential danger at approximately 50m back from the impact he would have had ample time to react.

4.5 Under cross examination, Mr. O'S stated that if he had seen children moving boisterously he would have blown his horn, slowed down and moved out towards the centre of the roadway.

4.6 The issue is whether had Mr. O'S noticed the presence of children acting in the manner that they stated and in which Mr. D McC observed, some 50m back from the accident ought this to have alerted Mr O's to the possibility of an incident such as occurred. In other words was Mr. O'S insufficiently alert on the run up to the junction which caused him not to notice the children until he was approximately one second away from the point when the plaintiff ran out and had Mr. O'S been alert would he have reacted and been able to react earlier and would he have been able to alert the plaintiff as to his presence on the roadway.

4.7 As previously stated, I have had the opportunity of studying the CCTV, pictures and stills during and after the hearing. This case will not be decided in milliseconds however reference to the CCTV frames showing what Mr. O'S was doing, what he could have seen and what he possibly could have done will be relevant.

4.8 The accident occurred at 6.53:36. At 16.53:21, in camera 1 you see Mr. O'S looking ahead of him and what will transpire to be the hand of Mr. J. McN appearing over Mr. O'S's left shoulder clearly about to move into position so he can alight from the bus. Mr. J. McN's face appears in camera 1 at 16.53:23. We see in camera 1, Mr. O'S from time to time looking slightly to his left or right doing what he says was mainly checking in the mirrors. At some stage after 16.53:27, and clearly by 16.53:32, Mr. O'S and Mr. J. McN are engaged in some conversation or banter. It is clear by examining both the footage from camera 1 and camera 2 that Mr. J McN advanced beyond the white line to engage in this conversation with Mr. O'S and at one stage (16.53:37), Mr. O'S to emphasise a point or whatever is seen gesturing with his left hand which is not on the steering wheel.

4.9 Mr. J McN states that the conversation between himself and the driver finished at 16.53:38 and in this he is supported by Mr. O'S who contends that his manoeuvring of his head subsequent to this point is not indicative of continuation of the conversation but rather that he was checking in his mirrors as he approached the bus stop on her Herbert Road.

4.10 It is noted that 16.53:38 is some six seconds prior to the accident. In camera 2, Mr. D McC, the second passenger, who wished to alight from the bus stop is clearly in place by 16.53:32. He gave evidence that he noted the children on the pavement approximately 50 yards back from the scene which is approximately four or five seconds away from the accident i.e. 16.53:38 or 16.53:39.

4.11 Mr. J. McN, did not take note of the children until just before the accident and there was no reason why he should do so.

4.12 Mr. O'S, the driver indicated that he first saw the children when the bus was already commencing to pass the entrance to Killarney Heights.

4.13 Accepting that Mr. O'S does himself no favours by this answer or indeed by the placing of the X. where he says the bus was when he first saw the children, which was indeed confirmatory of his previous evidence and I give the benefit of the doubt to Mr. O'S and conclude that he actually saw the children before or just before rather than after he entered into the junction, it remains the case that Mr. D McC noted the children and noted that they were acting "boisterously" from about 50m. This point would place the bus at approximately 16.53:39 or 16.53:38 when Mr. O'S and Mr. J. McN state that any conversation between the two of them had finished.

4.14 The holding of a conversation with a passenger though of itself prohibited does not automatically render the driver to be negligent. What is required is that the driver be alert to the possibility of danger. Mr. J McN and Mr. O'S state and I will accept for the purpose of this judgment that conversation had ceased between them by 16.53:38, however, even if conversation had ceased, both their faces maintained smiles (which suggest that a joke had been exchanged) almost up to the accident. In the case of Mr. O'S the smiling is continued up to 16.53:41 and in the case of Mr. J McN up to 16.53:43, it seems clear that the previous if terminated conversation was of such a nature as to have distracted Mr. O'S from what was in front of him.

4.15 No other explanation can present itself for Mr. O'S not seeing the boys until he was approximately one second away from the plaintiff running out onto the road and Mr. D McC noticing them a number of seconds earlier. The boys were there to be seen at least five or six seconds back from the accident and were in fact not noticed by Mr. O'S until approximately one second from when Carlos ran out.

4.16 Mr. D McC had no reason to be concerned for any incident in the roadway and has stated that the actions of the boys on the pavement did not cause him any particular concern.

4.17 The concerns of a disinterested passenger, however, are not identical with those of an alert driver.

4.18 The film at camera 8 showing the driver's view is, unfortunately, in this case, somewhat contaminated by the fact that at the critical point of the view there is a glare from the camera itself which obscures from the camera's view the position of the boys.

4.19 The boys came on to Herbert Road from the green patch on the left and apparently crossed the entrance to Killarney Heights and then moved around the corner where they saw the youths who had previously caused the fight. It is suggested by Mr. Fox on behalf of the defendant that for a considerable portion of their walk they would have not been visible in front of the driver because they were walking on the green area or on the Killarney Road entrance.

4.20 This does not seem to be the case.

4.21 Camera 8, at 16.53:38, the point where Mr. J McN and Mr. O'S state their conversation had stopped and which I accept to be the case gives the picture of the road ahead and that you can see on the right hand side coming towards the driver, the lights of two cars and around the entrance to Killarney Heights. On the pavement, two figures are walking away from the camera who would later turn into Killarney Heights. The court accepts that at that point, the bus would have had to have been travelling partially in the cycle

lane as its width was greater than that of the carriageway because there were cars coming against it. I also accept that the two persons who would enter Killarney Heights would have in all probability obscured the view of the driver of the boys at that point.

4.22 At 16.53:39, it is clear that as well as the two adult who moved left into Killarney Heights, you can see the outline of what would be the group of boys in front of them. The cars coming against the plaintiff are still there.

4.23 Unfortunately the camera's view at 16.53:40 is blurred at the point where the two individuals are turning to their left but what will become the boys including the plaintiff are visible on the pavement beyond the junction. It is approximately at this point that they would have become visible to Mr. D McC.

4.24 By 16.53:41, the boys are clearly visible and one of the two cars approaching has passed and there is a second car just beyond the junction and a third car, lights can be seen in the distance. It is probable that this is the car being driven by Mr. J.

4.25 By 16.53:42, (certainly by the second frame at that time) the second car has now passed the bus and the boys though their position is obscured by the blur of the camera are clearly there to be seen. The bus has still some way to go before it enters onto the junction.

4.26 There is a image taken by camera 8 at 16.53:42 and again Mr. J's car is in the distance and boys are now clearly visible. Mr. O'S indicated that there was some point between the last frame of 16.53:42 and the frame of 16.53:43 that he first noticed the boys.

4.27 It is noteworthy that as far as can be deduced from the position of the boys on Herbert Road, they do not seem to have made much progress southwards down the road from where they are first clearly visible on the film. Mr. Land on behalf of the defendant stated that the apparent lack of progress of the boys may be attributable to the camera angle but I hold that the evidence of the camera supports the evidence of the Spanish boys that on seeing the older boys on the green, the Spanish boys were altering their positions in the group and also supports the evidence of Mr. D McC that the boys were "bobbing" about.

4.28 At 16.53:44, you can see the plaintiff stepping onto the roadway and in the second frame of 16.53:44, the impact has occurred.

4.29 At this stage, Mr. J's car is still some distance away.

4.30 Mr. O'S was a very careful and safe driver. Had he noticed the boys acting boisterously, and changing position on the pavement from about 50 yards back, I would have no doubt but that he would have slowed down. The bus was being slowed as it approached the bus stop but not by application of the brakes but rather by leaving his foot off the accelerator. I have no doubt that Mr. O'S could have and should have applied his brakes from about 50 yards back. Mr. O'S said had he apprehended a possible danger, he would have moved his foot onto the brakes and I accept that. I also believe that he could have and would have and should have moved the vehicle out towards his right and in this regard after 16.53:42 it was quite safe for him to do so.

4.31 I further accept that had he seen the boys acting boisterously, as they were, he would have and should have blown his horn.

4.32 It is, of course, a matter of degree and a matter for the driver's judgment as to how he should interpret the actions of schoolboys on a pavement. The difficulty with Mr. O'S was that because of the distraction of his conversation with Mr. J McN, or otherwise, he did not see the boys for a number of seconds after they were available to be seen and he had not the time to make the judgment that he ought to have been able to make as to the potential hazard presented by the boys earlier and to have alerted them to his presence. He had not the time to be conscious of the fact that they were indeed acting boisterously. As far as he was concerned, the boys were doing nothing amiss at all until the plaintiff stepped out onto the road.

4.33 In the circumstances, I must hold that the plaintiff has established negligence against the defendant.

5 Contributory Negligence

5.1 Contributory negligence is similar to but not identical to negligence. Negligence is a breach of duty of care owed towards others whereas contributory negligence involves the lack of reasonable care for ones own safety. It is accepted on behalf of the plaintiff that he is of an age, 12 (nearly 13) to be capable of contributory negligence. It is submitted that no contributory negligence should be found against the plaintiff essentially because the plaintiff is a stranger to this land and would have been used to traffic travelling on the other side of the road and in particular the plaintiff was agitated and distressed by the presence to his left hand side in a green area of older youths who had previously been involved in a altercation with the plaintiff and his friends. It is submitted that the plaintiff's act of impulse in running across the road ought not to be judged to be contributory negligence at law.

5.2 When proof of contributory negligence afforded an absolute defence, the courts developed a doctrine known as "the agony of the moment" whereby a plaintiff acting reasonably in an attempt to extricate himself from a sudden emergency for which he or she was not responsible or had no reason to anticipate was held not to be guilty of contributory if he or she unintentionally aggravated the situation. McMahon and Binchy (op cite), para. 20.18 indicated that this rule was applied with more leniency towards plaintiffs before an apportionment of damages was allowed.

5.3 In this regard, I do hold that an emergency existed as far as the plaintiff was concerned and that indeed it was a real emergency because of previous threats to the plaintiff and his friends. I am not, however, of the view that the existence of this emergency was sufficient to excuse in its entirety the actions of a boy of nearly 13 years of age who runs across the road.

5.4 Similarly the fact that the plaintiff was a visitor to this country and would not have been used to traffic travelling on the left hand side of the roadway is a factor but cannot of itself exclude contributory negligence.

5.5 Accordingly, I hold that the plaintiff also must be guilty of contributory negligence.

6 The Apportionment of Damages

6.1 Section 34(1) of the Civil Liability Act 1961 provides that:-

"(1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff... and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant:..."

6.2 It is important to note that the apportionment is made having regard to the "degrees of fault" of the plaintiff and the defendant

not to the potency of the causative factors moving from each side. In *Shields v. Boyle* (Unreported, High Court, 6th November, 1991), O'Hanlon J. reduced a pedestrian's damages by 33.3% on the basis of comparison of the parties degree of blameworthiness and indicating that had he been apportioning causation he would have trended towards a different figure.

6.3 Degrees of fault must be understood in terms of the duties of care the law imposes on all parties. A worker who put his hand in an unguarded saw may be to a layman's eye the prime cause of an accident, especially if scores of employees had safely used the same machine hundreds of times. If a court were assessing degrees of fault and excluding any considerations of breach of statutory duty, the duty of careful employer owes to his employee not to have an unsafe system of work or unsafe plant and machinery compared to the momentary inadvertence of the worker who puts his hand in the machine would be the factors the court would have to consider.

6.4 In *O'Sullivan v. Dwyer* [1971] I.R. 275 at 286, Walsh J. (with whose judgment Ó Dálaigh C.J. and Fitzgerald J. agreed) equated degrees of fault with "the moral blameworthiness of their respective causative contributions". It was accepted in *O'Sullivan* (above) that it falls to be measured by objective rather purely subjective standards. In *Carroll v. Clare County Council* [1975] I.R. 221 at 226/227, Kenny J. in the Supreme Court was properly concerned as to the effects of references to "moral" blameworthiness on juries and stated:-

"I think that 'fault' in s. 34... means a departure from a norm by a person who, as a result of such departure, has been found to have been negligent and that 'degrees of fault' expresses the extent of his departure from the standard of behaviour to be expected from a reasonable man or woman in the circumstances. The extent of that departure is not to be measured by moral considerations, for to do so would introduce a subjective element while the true view is that the test is objective only. It is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contributions of the plaintiff and defendant to the happening of the accident which is to be the basis of the apportionment. I think that the use of the word 'moral', when addressing a jury in connection with blameworthiness, is likely to mislead them."

6.5 With respect I will accept the law as expressed by Kenny J. in *Carroll v. Clare County Council* (above).

6.6 In truth no system of morals could, I think, hold either the plaintiff or Mr. O'S to be morally culpable for what they did. The negligence of Mr. O'S was his failure to keep alert and notice what was developing in front of him. The negligence of the plaintiff was his dashing across the road in the agony of the moment.

6.7 The defendants were the owners and driver of a large bus larger than 50% of the available carriageway which required great effort to bring to a stop. The owners had an obligation through their servants or agents to ensure that the driver of the bus was at all stages alert and in the event of the presence of children would be able to comply with the requirements of the law as stated in *McDonald v. CIE* (above). The plaintiff was a 12 year old boy who felt under threat and who dashed across the road probably not anticipating traffic would be on his side of the road coming from behind him.

6.8 Whereas the plaintiff may well have been the greater causative factor of the danger, the degrees of fault must be assessed preponderantly against the defendant.

6.9 Taking all matters into consideration, I hold that the just and equitable conclusion is that the degrees of fault ought to lie 70% of the defendant and 30% against the plaintiff and that the plaintiff's damages accordingly should be reduced by 30%.