Neutral Citation [2013] IEHC 22

**THE HIGH COURT**

**[2009 No. 2442 P]**

**BETWEEN**

**EMMA DONOHOE**

**PLAINTIFF**

**AND**

**DAVID KILLEEN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Hogan delivered on the 24th day of January, 2013**

1. A collision between two motor vehicles on the Malahide roundabout of the Dublin-Swords section of the N1 in the evening of 9th May, 2008, has given rise to a personal injuries case of acute difficulty. Perhaps reflecting this difficulty, while the parties have nonetheless managed to agree the quantum of damages, they have not been able to agree liability. It accordingly falls to me to determine liability.

2. On the evening in question the plaintiff, Ms. Donohoe, accompanied by her then boyfriend, Mr. Simon Morrissey, had visited a major cinema and shopping centre, the Pavilion Shopping Centre, which is situate on the Malahide Road close to Swords. Ms. Donohoe was then aged 19 years of age, but she had obtained her full driving licence a short while earlier. In order to return home, Ms. Donohoe, was required to turn left from the shopping centre and then to enter the roundabout and make a full circuit of the roundabout before driving home in the Dublin direction.

3. It is important to state that the roundabout is a complex one. It is bisected by a dual carriageway at the north and south entrances, but three other roads also intersect with the roundabout at this point. There are also three sets of traffic lights on the junction. The traffic light system in operation on this roundabout is a sophisticated one which is determined by factors such as the number of queuing vehicles, so that it is not possible precisely to anticipate the light sequences. There is an 80km speed limit in operation.

4. The evening in question was a bright and sunny one, so weather conditions played no role in the collision. Having exited from the shopping centre, Ms. Donohoe then travelled north on the dual carriageway where she encountered the first of the traffic lights. At this point the lights were red. Following a change in the lights Ms. Donohoe then proceeded to the second set of lights which are at the Swords road exit and are some 55m. distant from the first set of lights. The second set of lights were amber and Ms. Donohoe proceeded through where she then encountered the third set of lights which - she maintains - were green in her favour.

5. At this point there is a dispute about what happened. The defendant, Mr. Killeen, was then driving a black Volkswagen Golf along the former Belfast road. Mr. Killeen was aged 21 at the time of the accident and was also the holder of a full driving licence. He was very familiar with the road and on that evening he was coming from training with the Fingallions Football Club.

6. Mr. Killeen accordingly approached the roundabout from the northern side of the dual carriageway. The road rises slightly as one approaches the roundabout from that side and Mr. Killeen was originally travelling at about 50km per hour as the particular traffic lights for that entrance onto the roundabout (which were adjacent to but separate from the traffic lights confronting Ms. Donohoe which were actually on the roundabout) came in view. Mr. Killeen decelerated, but - he says – the lights suddenly changed in his favour and he accelerated onto the roundabout. The vehicles then collided shortly afterwards. While the Garda who attended the scene of the accident, Sergeant Kevin Toner, agreed in evidence that it was probably impossible to determine the exact point of contact, there was general consensus – based in part on the very helpful sketch map which he prepared - that the collision probably took place in the outer lane of the roundabout some 8m to 9m from the respective set of traffic lights.

7. As I have just noted, both parties maintained that they had green lights in their favour. While I am perfectly satisfied that all witnesses gave honest and reliable evidence, their respective experts, Mr. Romeril and Mr. Terry, also agreed that one of the parties has to be mistaken in this respect. For unless the traffic light system was malfunctioning - and neither party suggested that this was so – the different sets of traffic lights could not have been simultaneously green in both parties' favour. It is also clear from the evidence of Mr. Terry that the vehicles in question were both travelling at relatively modest speeds – perhaps in the order of 40km to 50km. per hour – at the time of the impact, so that the speed, as such, did not play any role in this accident.

8. While this is so, the accident was nonetheless an unpleasant affair, although mercifully nobody suffered acute injuries. It was particularly frightening for Mr. Morrissey: he had been sitting in the passenger seat of Ms. Donohoe's vehicle where he had been concentrating on repairing her mobile phone. He then looked up to see the defendant's car just a moment before the collision and he assumed in that instant that he would be killed. But given that his concentration was elsewhere in the preceding few seconds, he was not in a position to have formed a clear view of the state of the lights.

9. The vehicles were subsequently written off. Both vehicles had careered off the roundabout and the defendant's car ended up on a traffic island, while the plaintiff's car came to a halt close to a traffic stop a few metres beyond that traffic light. An ambulance arrived and both Ms. Donohoe and Mr. Morrissey to hospital. While all parties were sore and shocked, as no direct evidence of injuries suffered were given – the parties having agreed the measure of quantum – I am not in a position to chronicle their injuries. Nevertheless, Ms. Donohoe, Mr. Morrissey and Mr. Killeen gave evidence before me and (happily) appeared to have made a full recovery.

**The evidence of the missing witness**

10. Before proceeding further, it must be recorded that the defendant maintains that a foreign national accosted Ms. Donohoe immediately after the accident and contended that she had broken the lights. It appears that the Gardaí asked this witness to stay behind to make a statement, but that he vanished from the scene without having done so. Counsel for the defendant, Mr. Maher

S.C., sought to elucidate this information in cross-examination by asking her what the foreign national had said to her. Her own counsel, Mr. Hussey S.C., naturally objected and I disallowed the question on the basis that this was prejudicial hearsay.

11. The present case presents almost a textbook example of why such a question not only amounts to hearsay, but why this would be in itself prejudicial. The classical exposition of the law of hearsay in this jurisdiction is, of course, that offered by Kingsmill Moore J. in his judgment for the Supreme Court. in *Cullen v. Clarke* [1963] I.R. 368, 378:-

> "In view of some of the arguments addressed to the Court, it is necessary to emphasise that there is *no* general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; .... This is the rule known as the rule against hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible."

12. Here it may be observed that the defendant did not seek to elicit this information for the purposes of showing that the plaintiff had a conversation with the foreign national immediately after the accident. Such a line of questioning would have been permissible in order to show, for example, that she was sufficiently composed in the aftermath of the accident to have had a conversation of this nature. But the evidence was not sought to be tendered to prove that a conversation actually took place, but rather - impliedly – to prove the *truth* of what the missing witness had contended, *i.e.*, that the plaintiff had gone through the red light. This is clearly inadmissible hearsay in the sense outlined by Kingsmill Moore J. in *Cullen*.

13. If I may venture to repeat here my own comments on this general topic in *Clarke v. Governor of Cloverhill Prison* [2011] IEHC 199:-

> "The legal system's general lack of enthusiasm for hearsay evidence does not arise by reason of an embedded historical prejudice for which there is no modern rationale or because of the habitual and unthinking application of familiar technical rules. It is rather because as Hardiman J. pointed out in *McLoughlin*, the reception of such evidence tends to frustrate the right of effective cross-examination. This latter right is absolutely central to the truth-eliciting process, without which right no accused could effectively challenge his or her accusers: see, *e.g.*, the comments of Ó Dálaigh C.J. in *Re Haughey* [1971] I.R. 217 at 264 and those of Hardiman J. in *Maguire v. Ardagh* [2002] 1 I.R. 385."

14. In the present case, were the court to admit this hearsay evidence it would be tantamount to admitting such evidence without having the witness available to run the gauntlet of cross-examination. Yet this would be manifestly unfair for all the reasons advanced by Henchy J. in *Kiely v. Minister for Social Welfare (No.2)* [1977] I.R. 267, 281:

> "*Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination…..Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence in writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence."

15. . Yet the reliability of any such testimony from the missing witness might have been entirely undermined by cross-examination. It could have been shown, for example, that he was in no position to make such a judgment or that his line of vision was obscured or that he was simply confused or mistaken.

16. It was essentially for these reasons that I disallowed this line of questioning.

**How did the collision occur?**

17. The absence of independent third party evidence is one of the reasons why the determination of the cause of the accident in this cause is one of considerable difficulty. Both highly experienced forensic engineering experts gave very helpful evidence, but both were agreed that it was almost impossible to determine by reference to some objective facts – such as, for example, an examination of the collision damage to the vehicles – which of the vehicles collided into the other. Nor can the precise sequence of events be reconstructed so as to lead to the identification of the particular vehicle which did, in fact, break the lights.

18. In these circumstances, the task of the Court is not an easy one. Avoiding mere conjecture or speculation, one is then forced to ask which the most likely sequence of events actually was. We know that one of the drivers broke the lights. Given, however, that Mr. Terry gave evidence that both vehicles were travelling at modest speed, this strongly suggests that the driver who broke the lights did so inadvertently. The present case is, accordingly, very far removed from the classic case of the speeding vehicle which carelessly and recklessly careers through the traffic lights. All of this means that the driver who broke the lights probably did not realise that they were doing so.

19. If forced to choose, unaided by other objective evidence, one must say that it is less likely that Mr. Killeen was the driver responsible, if only by reason of his location on the road. He had a very clear, unobscured view of these traffic lights for the best part of 50m as he approached them and his line of vision was not compromised by other traffic. It was, moreover, a road with which he was thoroughly familiar. It seems unlikely that a driver could inadvertently break the lights in such circumstances.

20. By contrast, Ms. Donohoe was driving on a complex roundabout with awkward traffic sequences. She had just come through an amber light at the second stop and was now facing a third set of traffic lights within the space of about 120m. The engineering evidence established that Ms. Donohoe was not in the inner lane immediately adjacent to the core of the roundabout, but was (at least) in the middle or even outer lane. One can readily understand how a driver in that situation might easily be confused by different signals and by the location and visual orientation of those signals, especially if she is not very familiar with this particular roundabout. In these circumstances, one may more readily conjecture that a driver in this situation might well break the traffic light sequence through inadvertence as compared with the driver in the position of Mr. Killeen who had the benefit of a straight road and a clear view of the traffic lights confronting him.

21. It is thus unhelped by independent evidence that I am obliged to draw such an inference, based admittedly on such slender evidence as there is. Faced with this unpalatable choice, I am driven to conclude that a driver in Ms. Donohoe's position on the roundabout was more likely to be the driver who broke the lights as compared with the driver (such as Mr. Killeen) with the more straightforward task of driving on an open approach road with crystal clear visibility of the oncoming set of traffic lights.

22. This, however, does not quite determine the case. The fact that the traffic lights may well have been in Mr. Killeen's favour does

not mean that he could altogether dispense with the obligation to keep a proper lookout, even if the "care expected will naturally be less than at an uncontrolled crossing": see, McMahon and Binchy, *Law of Torts* (Dublin, 2000) at 433 and the comments of Budd J. in *Doyle v. HF Murray Ltd*. [1967] IR 390 at 403-404. This obligation may nonetheless be regarded as more elevated in the case of traffic signals on a roundabout (as opposed to other forms of controlled crossing) where vehicles are moving in different directions in very close proximity to each other.

23. It is, I think, significant in this regard that the collision came about as a result of a front rear impact in the case of both vehicles. The inference here in turn is that if Mr. Killeen had kept a complete and proper look-out, he would – or, at least, might – have seen Ms. Donohoe's vehicle approaching and could have used the available few seconds to sound the horn or otherwise take evasive action. In that respect, therefore, there was, objectively speaking, a degree of fault on the part of the defendant, even if, again, objectively speaking, the degree of fault attributable to Ms. Donohoe is greater than that applicable to Mr. Killeen

**Conclusions**
24. Given that she has established fault on the part of Mr. Killeen, Ms. Donohoe is entitled to succeed. But this must be tempered by the very high degree of contributory negligence on her part in breaking the lights, even if this was inadvertent on her part. In these circumstances, I measure that contributory negligence at 65%.

25. It follows, therefore, that Ms. Donohoe has established liability, but that she will be entitled only to 35% of the agreed measure of damages.