

THE HIGH COURT

[2016 No. 3534P]

BETWEEN

ROBERT SIENKIEWICZ

PLAINTIFF

AND

NOEL WALL

DEFENDANT

**Ex Tempore JUDGMENT of Mr Justice David Keane delivered on the 8th November 2018**

**Introduction**

1. On the evening of 3 September 2014, a road traffic accident occurred on the N5 (Longford-Westport) national primary road at Cloondara, County Longford, when the plaintiff, Robert Sienkiewicz, a pedestrian, and the motor car that was being driven by the defendant, Noel Wall, collided.
2. In this running down action, tried in Sligo over three days between 5 and 7 November, Mr Sienkiewicz claims damages for the personal injuries that he suffered in that accident, which he attributes to the negligence and breach of duty of Mr Wall.

**Mr Sienkiewicz's injuries**

3. The parties broadly agree about the nature and extent of Mr Sienkiewicz's injuries.
4. Mr William J. Gaine, the consultant orthopaedic surgeon who examined Mr Sienkiewicz on behalf of Mr Wall on 4 May 2018, noted the injuries that he had sustained as; a laceration to his right forehead that required approximately eight stitches (and which has left a visible scar); a fractured molar tooth; bruising around the right eye; contusions to the right side of his face, and to his nose, right shoulder and lower back; and a soft tissue injury to his neck. He was treated in Mullingar Regional Hospital, though not admitted, and was prescribed analgesics. He later visited his G.P. and, on reporting the onset of panic attacks and insomnia, was prescribed anti-depressants and sleeping tablets. He attended his dentist who treated his fractured molar tooth. When examined by Mr Gaine, his neck symptoms had settled, but he was still suffering from intermittent back pain, depression and listlessness. He had not attended a physiotherapist, nor had he undertaken counselling or cognitive behavioural therapy, although each would have benefited him, in the view of Mr Gaine.
5. On 30 April 2019, more than four years after the accident, Mr Sienkiewicz was examined by a psychiatrist, Dr Mary Maguire, more obviously in preparation for trial than for the purpose of treatment. Who referred Mr Sienkiewicz to Dr Maguire is unclear. Dr Maguire's report, dated 3 May 2019, was admitted into evidence by agreement between the parties.
6. Dr Maguire recorded that Mr Sienkiewicz had described to her the onset of a fear about electricity and electrical appliances since the accident. Both Mr Sienkiewicz and his wife (who was present when Dr Maguire conducted her assessment) denied that he done any such thing, claiming instead that that there must have been a miscommunication or

misunderstanding in the course of that assessment. The couple are both Polish nationals and each gave evidence at trial through an interpreter. It is thus difficult to know what to make of Dr Maguire's conclusion that '[e]ven though electricity was not involved in [Mr Sienkiewicz's] accident, feelings of anxiety have spilled over to such appliances, and these feelings are indicative of his underlying Anxiety Disorder.' In any event, Dr Maguire attributed Mr Sienkiewicz's reported symptoms of sleep disturbance, mildly depressed mood and anxiety to the stress of his impending court case, before expressing the view that those symptoms should abate when that stress ends.

7. Mr Sienkiewicz's GP, Dr S. Ali, did not give evidence.
8. The sum of €1,255 in special damages – comprising €715 in treatment fees for Dr Ali; a €200 assessment fee for Dr Maguire; and miscellaneous and travel costs of €340 – has been agreed.

### **The pleadings**

9. In the personal injuries summons that issued on Mr Sienkiewicz's behalf on 21 May 2016, he pleads that the collision was caused by the negligence or breach of duty of Mr Wall in the care, control, management or driving of his motor car, providing (largely generic) particulars of that negligence and breach of duty that run to thirty-two enumerated paragraphs. Those particulars include: driving without due care and attention; failing to keep a proper lookout; driving at an excessive speed; failing to sound his horn; failing to apply his brakes in sufficient time; and driving with two front tyres that were excessively worn to the extent that 'the canvas and wire of the tyre canvas were visible and protruding.'
10. The personal injuries defence delivered on behalf of Mr Wall on 12 October 2012 admits the occurrence of the collision but denies any negligence or breach of duty on Mr Wall's part, before alleging that the accident was caused by the plaintiff's own negligence and breach of duty. The particulars of that negligence include: failing to keep a proper lookout; failing to allow Mr Wall's vehicle to pass before crossing, or attempting to cross, the road; walking into the path of oncoming traffic; placing himself in danger; causing the accident; being the author of his own misfortune; and, as was to become a significant point at trial, walking on the public highway, failing to wear appropriate reflective clothing, and failing to carry a torch 'during hours of darkness.'

### **The background**

11. The following facts are not in dispute. On the day in question, Mr Sienkiewicz went fishing with his friend Sebastian Kasprzyk on the banks of the River Shannon at Cloondara. Earlier that day, Mr Sienkiewicz's wife, Elzbieta Aienkiewicz, had driven them there from Longford town, dropping them off at a point on the N5 national primary road just outside the village of Tarmonbarry, County Roscommon, which is directly across the River Shannon from Cloondara. The Shannon lies on the same side of the road as the westbound carriageway heading towards the bridge into the village, so it wasn't necessary for the two men to cross the road to access the river on disembarking from the car. Some hours later, they telephoned to ask Ms Aienkiewicz to collect them at the

same spot. She duly drove back from Longford but could not see them there. She then performed a U-turn on the N5 and drove a short distance back along the eastbound (Longford) carriageway, before parking on the hard shoulder a little further from the village than the point on the other side of the road where she had dropped her husband and his friend off earlier. There she began texting her mother while waiting for the two men to return to the car. The accident occurred behind her and she did not see it.

12. Meanwhile, Mr Wall, accompanied by his 92-year-old mother, was driving through Tarmonbarry on the eastbound (Longford) carriageway of the N5. They were returning to Dublin in Mr Wall's 2002 model Volvo V70 motor car from a funeral service they had attended in Strokestown, County Roscommon. At the end of the village, on the Cloondara side of the River Shannon, there are road signs indicating that the speed limit beyond is 100 km/h. The applicable speed limit before that sign is 60 km/h. Street lighting extends only a short distance to the east beyond the speed limit sign.
13. The section of the N5 where the collision occurred is approximately 163 metres beyond the 100 km/h speed limit sign, travelling in the direction of Longford. At that point the road consists of a single carriageway in each direction, divided by a broken white line for eastbound traffic and a continuous white line for westbound traffic, side by side. There is a continuous white line for westbound traffic because the road curves to the left in that direction before crossing the Shannon and entering the village. On each side of the roadway there is a hard shoulder, divided from the carriageway by a broken yellow line. Beyond the hard shoulder on each side, there is a grass verge and then a hedge. There is no street lighting there.

#### **The evidence**

14. Mr Sienkiewicz gave evidence on his own behalf, through an interpreter. He stated that, when he returned from the river to the roadway with Mr Kasprzyk at around 8 p.m., he saw his wife parked on the other side of the N5. It wasn't dark, but it was getting dark; it was, in his words, greyish. He looked left and right and then started to cross. He didn't see or hear any vehicle coming towards him. He didn't hear any car horn or see any vehicle flashing its lights at him. In his words, he marched across the road. He did so at a slight rightward diagonal. Mr Kasprzyk was directly behind him, carrying their fishing gear. Mr Sienkiewicz had almost reached the broken yellow lines on the far side of the road when he was struck by Mr Wall's vehicle. He believes that he was briefly knocked unconscious by the collision because he has only a very fragmentary recollection of subsequent events.
15. Under cross-examination, it was put to Mr Sienkiewicz that, in making a statement concerning the accident to Garda David Gibbons on 29 September 2014; in providing instructions to Tom O'Brien, the independent expert engineer retained on his behalf; and (it might have been added, but wasn't) in replies to particulars, he had stated that the accident happened at about 9 p.m. Mr Sienkiewicz insisted that the accident had occurred between 8 and 9 p.m., when it wasn't dark but was getting dark, certainly before dusk. Mr Sienkiewicz attributed his description of the time, as separately recorded

by Garda Gibbons, Mr O'Brien, and his own solicitor, to the fact that he did not speak good English.

16. Mr Sienkiewicz accepted that he crossed the road at an angle (and, thus, with his face slightly averted from the oncoming vehicle), at a point where there was no street lighting, wearing faded denims and a dark jumper, and without any reflective clothing or a torch but insisted that none of this should have mattered because the evening was still bright. Mr Sienkiewicz insisted that he did look both ways before crossing the road, as he had been taught since childhood, and that Mr Wall's vehicle was nowhere in sight when he started to march across the road. Mr Sienkiewicz did not explain how Mr Wall's vehicle could possibly have struck him in those circumstances.
17. Mr Kasprzyk was called as a witness on behalf of Mr Sienkiewicz and gave evidence through an interpreter. He testified that, when crossing the road, Mr Sienkiewicz was about two steps ahead of him. They were both walking fast. Mr Kasprzyk checked the road in both directions before crossing and was satisfied that it was clear. As he approached or reached the centre line in the road, he heard a squeal of brakes and jumped backwards. He had not seen any lights or heard any horn. He saw Mr Wall's car strike Mr Sienkiewicz at a point on the eastbound carriageway quite close to the broken yellow line and saw Mr Sienkiewicz land on the hard shoulder, at a point just beyond that line.
18. Under cross-examination, Mr Kasprzyk stated that, while he was fishing, another fisherman gave him a can of beer from which he took a few sips. Mr Sienkiewicz did not drink any beer. Mr Kasprzyk acknowledged that, the statement on the incident that he gave to Garda David Gibbons on 29 September 2014, includes the assertion that, when the two men crossed the N5, it was dark. Mr Kasprzyk said that this was a mistake that he did not know how to correct in English when he was speaking to Garda Gibbons. He had been trying to explain that, when they crossed the road, it was after sunset but not yet dark. Mr Kasprzyk accepted that neither of the men had been wearing high visibility clothing, although he thought there was a 'flashing belt' - by which perhaps he meant a reflective strip - on the fishing bag he was carrying. Mr Kasprzyk stated that he was not so mentally ill that he would walk out in front of an oncoming car. Of course, it is not necessary to be mentally ill to do so. All that is required is a moment's recklessness, carelessness, heedlessness, inattentiveness or, indeed, distraction. As with Mr Sienkiewicz's accident, it is difficult to see how Mr Kasprzyk's near miss could have happened, if he had been paying proper attention or keeping a proper look out for oncoming traffic while crossing the road. Mr Kasprzyk acknowledged that he had shouted angrily at Mr Wall before leaving the scene of the accident with Mr Sienkiewicz, who he dragged to the parked car in which Ms Aienkiewicz was waiting, and in which they then drove to a doctor's surgery in Longford.
19. Tom O'Brien is a chartered civil engineer who was called to give independent expert evidence on behalf of Mr Sienkiewicz. He stated that, from 200 metres on the Tarmonbarry side of the locus in quo, there is a view of the width of the road at the locus.

This means that it would have been possible for Mr Wall to see Mr Sienkiewicz and Mr Kasprzyk from that distance and, equally, that it would have been possible for those two men to see the approach of Mr Wall's vehicle, which had right of way, over that entire distance, prior to the collision.

20. I pause here to note that, from the perspective of Mr Sienkiewicz and Mr Kasprzyk, the road was not clear for as long as Mr Wall's approaching vehicle was visible upon it. From Mr Wall's perspective, the road was not clear only from the moment it became evident that, despite not having the right of way, Mr Sienkiewicz and Mr Kasprzyk were nonetheless intent on crossing in front of his vehicle, thereby creating an emergency for all.
21. Under cross-examination, Mr O'Brien stated that, at the locus in quo on 3 September 2014, sunset was at 8.16 p.m. and dusk, which is to say the commencement of 'lighting up hours', was at 8.52 p.m. While I did not have the benefit of any legal submissions on the point, I found that evidence slightly confusing because, according to my understanding, under Reg. 3 of the Road Traffic (Lighting of Vehicles) Regulations 1963, "lighting-up hours" means the period commencing one half-hour after sunset on any day and expiring one half-hour before sunrise on the next day. Under Reg. 20(1)(b) of those Regulations, the headlamps of a vehicle that is being driven in a public place during lighting-up hours must be shown duly lit.
22. Garda Jamie Rosney was called as witness on behalf of Mr Sienkiewicz. He testified that, at approximately 8.50 p.m. on 3 September 2014, he was off-duty and driving between Longford and Tarmonbarry on the N5 national primary road. He observed Mr Wall standing on the roadside in a distressed state. He observed Mr Wall's Volvo motor car parked on the hard shoulder facing into the ditch. It had a damaged windscreen. He observed the SEAT motor vehicle, containing who we now know to be Ms Aienkiewicz, Mr Sienkiewicz and Mr Kasprzyk, driving off in the direction of Longford.
23. Sergeant David Gibbons was called as a witness on behalf of Mr Sienkiewicz. He confirmed that, on the evening of 3 September 2014, he was on duty as a member of An Garda Síochána, attached to Longford Garda Station. At approximately 8.55 p.m. on 3 September 2014, he received a report of the accident and immediately made his way to the scene. There, he breathalysed Mr Wall who passed that test. He then completed a rough sketch of the scene. He also confirmed that all of Mr Wall's motoring documentation was in order and that the depth of each of the tyres on his vehicle was within the legal limit.
24. Ms Aienkiewicz was called as a witness on behalf of her husband Mr Sienkiewicz. She stated that her husband had phoned her at about 8 p.m. on the evening of the accident to ask her to collect him and his friend Mr Kasprzyk. Under cross-examination, Ms Aienkiewicz acknowledged that, in the statement that she made to Garda Gibbons on 1 November 2014, she had said that it was dark when she arrived at the locus but insisted that what she had intended to convey was that it was getting dark, not that it had become dark.

25. That concluded the plaintiff's case.
26. Mr Wall gave evidence as a witness on his own behalf. He testified that, on 3 September 2014, he was driving with his elderly mother in his Volvo motor car, returning from a funeral service in Strokestown, County Roscommon. He was familiar with the N5 from Strokestown because he had cousins and an aunt there and would have travelled the road approximately 10 times.
27. He thought it was dusk at the time of the accident but could not recall whether he had turned his dimmed headlamps on. His car did have daytime running lights, which turn on automatically and cannot be switched off. He had travelled through Tarmonbarry at a speed of less than 60 km/h and, having passed the 100 km/h speed limit sign, had begun accelerating to reach that speed. He did not know whether he had done so before the emergency arose.
28. Suddenly, he saw two males come across the road. He hit the brakes and swerved to the left to avoid them. He could do that because his car had an anti-lock braking system ('ABS'). One male stopped in the middle of the road and the other continued to cross. He almost managed to miss the second man and would have done so if that man had stopped like the first man. The second man, who we now know to be Mr Sienkiewicz, went up on to the bonnet of Mr Wall's car and his head struck the windscreen on the driver's side. Mr Wall's car stopped at an angle a short distance (approximately 5 metres) beyond the point of impact. His nearside front wheel was at the broken yellow line, but he did not think it had crossed it on to the hard shoulder. He stopped the car, put on the handbrake and switched off the engine. He may have put on the hazard lights. He got out and tried to call 999 but had difficulty in doing so because he was in shock. Garda Rosney then arrived on the scene. Mr Wall's car was in very good condition. The tyres were fairly new. He changes his car tyres every 25,000 miles.
29. Under cross-examination, Mr Wall conceded that he did not know why the phrase 'during the hours of darkness' had been used several times in the defence delivered on his behalf, when in his sworn evidence he had used the word 'dusk'. He did not remember what gear his vehicle had been in at the time of the collision. He confirmed that he had no recollection of using his horn prior to the collision. He could not recall whether he had turned on his dipped headlights at the time of the collision. He acknowledged that, in a statement that he made to Garda Gibbons on 14 November 2014, he had stated that his wife held the insurance policy on the Volvo and that he was a named driver, whereas in his sworn evidence he had stated that he held the policy. He also acknowledged that, in the same statement, he had stated that, when his car stopped immediately after the accident, the front of the vehicle was over the broken yellow line whereas, in his evidence to the court, he had testified that he did not think that his nearside front wheel had crossed the broken yellow line before his vehicle halted. He acknowledged that, on the night of the accident, he might have said to a guard that the two men had run across the road, whereas his evidence was that they had been walking quickly.

30. Mr Donal Terry, a consultant forensic engineer, gave independent expert evidence on behalf of Mr Wall. He confirmed that it is his understanding that Volvo motor vehicles of the model and vintage that Mr Wall was driving are equipped with daylight running lights.

### **Analysis**

31. The first question I have to consider is at what time the accident occurred. It is a very peculiar feature of this case that each of the parties reversed his previous position on that question at trial.
32. For example, in his evidence, Mr Sienkiewicz was anxious to repudiate the various statements that he made that the accident occurred at approximately 9 p.m., and to suggest instead that it had happened closer to 8 p.m., when it was not yet dusk. Similarly, Mr Kasprzyk and Ms Aienkiewicz sought to resile from their earlier statements that it had been dark at the time of the accident, insisting instead that it had merely been getting dark. It would be idle to speculate on whether this had anything to do with the claim raised in Mr Wall's defence that Mr Sienkiewicz had failed to comply with the advice to pedestrians in the *Rules of the Road* that, when walking on the public road at night, they should wear reflective clothing and – outside built-up areas - carry a torch.
33. Conversely, Mr Wall who had advanced that claim (*i.e.* that the accident had happened during the hours of darkness, when, as a pedestrian, Mr Sienkiewicz should have made himself more visible), stated in his evidence to the court that he thought it occurred at dusk. Of course, if the accident had occurred during 'lighting-up hours', then Mr Sienkiewicz would be entitled to rely on the compelling argument, canvassed at significant length on his behalf with the experts Mr O'Brien and Mr Terry, though never specifically pleaded, that Mr Wall had failed to comply with the appropriate legal and practical requirements governing the use of his headlamps, in circumstances where he candidly conceded that he could not be sure whether he had turned on his dimmed headlamps before the collision occurred.
34. In my judgment, the best evidence on that issue is that of Garda Rosney and Mr O'Brien. Garda Rosney stated that he arrived at the scene of the accident at approximately 8.50 p.m. Mr O'Brien stated that 'lighting-up hours' at Cloondara on 3 September 2014, commenced at 8.52 p.m. It follows that I cannot not be satisfied that the accident occurred during those hours on that date when the headlamps of a vehicle being driven at that place had to be shown duly lit.
35. As in so many running down actions, this case seems to me to turn on the appropriate application of the relevant requirements and exhortations contained in the *Rules of the Road*. As Hogan J explained in *Carr v O'Las & Anor* [2012] IEHC 59, (Unreported, High Court, 15 March 2012) (at para. 49):

'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.'

36. Mr Sienkiewicz was a pedestrian. He was wearing dark, rather than high visibility, clothing. It was, on the balance of probabilities, after sunset and shortly before dusk, a period of notoriously difficult visibility for motorists. He was on a portion of a national primary road that was not covered by street lighting, although a much safer portion of that road covered by street lighting was only a little over 100 metres away. He crossed the road on a diagonal, with his face slightly averted from traffic approaching on the eastbound lane. He did this even though there was a bend in the road to the east. He did not have right of way in attempting to cross the road.
37. *The Rules of the Road* exhort a pedestrian who wishes to cross the road to: look for a safe place to cross; look right and left and listen for traffic, let any traffic coming in either direction pass, then look right and left again; walk briskly straight across the road when it is clear; and continue to watch and listen for traffic while crossing. Pedestrians are advised not to cross at a corner or bend in the road. In my judgment, if Mr Sienkiewicz had followed that advice, the accident as both he and Mr Kasprzyk have described it could not have occurred. Thus, I find the proximate cause of the accident was the negligence of Mr Sienkiewicz.
38. I am satisfied from the evidence I have heard that Mr Wall was driving within the speed limit, with his daylight running lights on, and without any evident defects in his vehicle (in particular, I am satisfied that the tyres on his vehicle were in good condition). In crossing the road as he did, Mr Sienkiewicz presented Mr Wall with an emergency. In both applying his brakes and swerving in attempting to avoid colliding with Mr Sienkiewicz, I am satisfied that Mr Wall responded reasonably. I am reinforced in that view by the fact that he was able to bring his vehicle to a halt within five metres of the point of collision on a portion of a national primary road with a speed limit of 100 km/h. *The Rules of the Road* explain that the total minimum stopping distance under dry conditions at that speed is 70 metres. I was not persuaded by Mr O'Brien's suggestion that Mr Wall should have commenced braking as soon as Mr Sienkiewicz and Mr Kasprzyk became visible on the roadway. Pedestrians on the side of the roadway are a common sight and may reasonably be expected to obey the *Rules of the Road*. In my view, it was only when it would have become apparent to a reasonable and appropriately cautious motorist keeping a proper lookout that there was an appreciable risk that a pedestrian was going to cross in front of his vehicle, thereby creating an emergency, that the obligation to consider and, if necessary, implement a braking manoeuvre to avoid a collision could arise. I cannot be satisfied – indeed, I very much doubt – that that occurred in this case before the distance between Mr Wall's vehicle and Mr Sienkiewicz was less than 70 metres. I do not accept that Mr Wall can be faulted for failing to use his vehicle's horn or to flash its headlights either before or while he was braking and swerving in an unsuccessful attempt to avoid Mr Sienkiewicz.
39. Accordingly, I find that Mr Sienkiewicz has failed to establish any negligence or breach of duty on the part of Mr Wall.

#### **Decision**

40. Mr Sienkiewicz's claim against Mr Wall is dismissed.