THE HIGH COURT

[2020] IEHC 555

[RECORD NO. 2019 1645P]

BETWEEN

JANVIER TUMUSABEYEZU

PLAINTIFF

AND

DANIEL MURESAN AND THE MOTOR INSURANCE BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 30th day of October 2020

Introduction

1. These proceedings arise as a result of a single-vehicle road traffic accident which occurred on the 26th June 2017 at or near Clonmellon, Lisclogher, Mullingar, County Westmeath. The first Defendant lost control of the car he was driving and collided with a ditch. He was accompanied by the Plaintiff and two other passengers. The Plaintiff sustained serious injuries and loss in respect of which he brings these proceedings. The first Defendant accepts he was in the wrong and has admitted liability. Accordingly, it should be a case of 'game set and match' to the Plaintiff. And so it is against the first Defendant. However, he held neither a driving license nor a policy of motor insurance at the time of the accident, a circumstance that is the genesis of the issue with which this judgment is concerned. The kernel of the issue is whether at the time of the accident the Plaintiff was aware that the first Defendant was uninsured. If he knew this to be the case the second Defendant will avoid liability to meet any judgement obtained by the Plaintiff in respect of the first Defendant's wrongdoing.

Causes of Action;

2. The claim against the first Defendant is brought in negligence and for breach of statutory duty and as against the second Defendant pursuant to an agreement made between the Minister for Transport and the Motor Insurers Bureau of Ireland (the MIBI) 30th January 2009 (the 2009 Agreement), whereby the second Defendant agreed, *inter alia*, to satisfy certain judgments for damages for injuries and loss obtained against uninsured owners/drivers arising from the negligent use of a motor vehicle or vehicles in a public place. The 2009 Agreement encompasses the EU 'Sixth Motor Insurance Directive' 2009/103 EC of the European Parliament and of the Council, which codifies five earlier EC motor insurance directives relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability.

Defence; Clause 5.2 MIBI Agreement 2009

3. On the 9th July 2019 a defence was delivered on behalf of both defendants in which liability was admitted. However, apart from a plea of contributory negligence, the provisions of Clause 5.2 of the 2009 Agreement were invoked by way of defence in order to avoid liability for the payment of damages. The liability of the MIBI to meet unsatisfied judgements obtained against uninsured motorists is made subject to compliance with certain conditions and exclusions. Of these the exclusion of certain passenger claims provided for by clause 5.2 of the 2009 Agreement is material to the issue *in quo*. The

operation of the was uninsured at the time of the accident giving rise to the claim. The terms of the provision merit setting out in full as follows.

4. Clause 5.2 provides:

> *"Where at the time of the accident the person injured or killed or who sustained damage to property voluntarily entered the vehicle which caused the damage or injury and MIBI can prove that they knew that there was not in force an approved policy of insurance in respect of the use of the vehicle, the liability of MIBI shall not extend to any judgement or claim either in respect of injury or death of such person while the person injured or killed was by his consent in or on such vehicle or in respect of damage to property while the owner of the property was by his consent in or on the vehicle."*

It should be noted that in one very significant respect the wording differs from the equivalent clause in the 2004 MIBI Agreement (the 2004 Agreement) which in relation to the passenger's knowledge contained the phrase "…*or ought reasonably to have known…."* This wording is not repeated in the 2009 Agreement.

Applicable Legal Test; Onus and Burden of Proof;

5. The omission is consequential on the decision of the European Court of Justice in *Commission of the European Communities v. Ireland* (case 211/07) [2008] E.C.R. 33 which in effect found that Council Directive 84/5/EEC on motor insurance had not been properly transposed into Irish domestic law by the 2004 Agreement. The revision has the practical effect of raising the bar which must reached before the exclusion becomes operative. Whereas the legal test applicable to a determination under the equivalent clause in the 2004 agreement was objective, with the consequence that the claim could be excluded on the establishment that the passenger "*… ought reasonably to have known…*" the use was uninsured, the test applicable to the 2009 Agreement is subjective. Consequently, the establishment as a matter of fact that the passenger knew the use of the vehicle was not covered by an approved policy of insurance (the user was uninsured) is a *sine qua non* to a successful defence under clause 5.2 of the 2009 Agreement.

6. Subject to certain presumptions and exceptions, the general principle of the Common Law is that the onus of proving an allegation is carried by the party by whom it is made, a proposition the defendants accept is applicable to the determination of the issue herein. The burden imposed on the party making the allegation in civil proceedings is to establish the case made on the balance of probabilities, which in this instance means proving the fact, as a matter of probability, the Plaintiff knew that the first Defendant was uninsured to drive the car at the time of the accident. If at the end of the evidence the balance of probabilities is equal the party against whom the allegation was made is entitled to the benefit, and where appropriate the verdict of the court.

The Issue

7. The case made by the defendants is that a few days before the accident the first Defendant told the Plaintiff he was uninsured to drive and that consequently the Plaintiff knew this to be so at the time of the accident, assertions hotly disputed by the Plaintiff

and, to varying degrees, by two other passengers who were travelling with him in the car at the time of the accident. Consequently, the question at the heart of the controversy between the parties is whether the alleged conversation took place. It was agreed at the outset of the trial that this question should be determined as a preliminary issue.

Consequences of the Outcome

8. The consequences of the outcome for the parties featured in the argument before the Court and may be conveniently mentioned at this juncture. The first observation to be made in this regard is that whatever the result the first Defendant will ultimately be liable to meet any settlement with or judgement obtained by the Plaintiff. This follows because even if the Plaintiff is successful on the issue, thereby obtaining the benefit of recourse against the second Defendant for satisfaction of any unsatisfied judgement, the first Defendant executed a 'mandate' whereby he agreed to repay the second Defendant all monies paid by it to the Plaintiff on foot any settlement or judgement in proceedings arising from the uninsured use of the vehicle.

9. It follows that although the provisions of Clause 5.2 of the 2009 Agreement were invoked on behalf of both Defendants success on the issue by them will inure solely for the benefit of the Second Defendant. Accordingly, whereas the consequences for the first Defendant are essentially the same, they are potentially very different, not to mention significant, for the other parties. By way of example in a scenario where the Plaintiff is unable to execute any judgement he obtains against the first Defendant and, by reason of success on the issue, the claim against the Second Defendant is dismissed, he faces the prospect of being left with a valueless judgment. The advantage to the Second Defendant in that eventuality is obvious. However, if the Plaintiff is successful on the issue he will derive the benefit of being able to recover from the second Defendant any unsatisfied judgement obtained against the first Defendant. The respective advantages and disadvantages are again obvious.

The Accident Vehicle

10. The vehicle involved in the accident was a two-door Mitsubishi Colt, registration number 03 W 1248. The car had been purchased by the first Defendant with the intention of selling it on in the course of a part-time side business to his main employment as a chef. He gave evidence that when he purchased the car he knew it was neither taxed nor insured. Sergeant Bernard Heaney attended at the scene of the accident shortly after its occurrence. He noted three expired discs/certificates on the windscreen of the car as follows; (i) an insurance disc, issued by Liberty Insurance (ii) a road tax disc, expiry date April 2017 and (iii) a National Car Test certificate (NCT), expiry date March 2017. He did not note the expiry date of the insurance disc, however, that cover had lapsed is not in issue

Absence of Insurance; Evidence of Knowledge

11. A few days prior to the accident the Plaintiff travelled in the same car from Waterford to the 'Body & Soul' concert at Ballinlough Castle, Co. Westmeath. The car was driven by the first Defendant. He and the Plaintiff were accompanied on the journey by three other passengers. It follows from the evidence of Sergeant Heaney that it would have been

evident to anyone getting into a two-door car through the front passenger door that the discs had expired and that consequently the vehicle was neither taxed nor insured. However, this circumstance was not advanced by the defendants to establish their case that the Plaintiff knew the first Defendant was uninsured, rather the case made is that he was made expressly aware of the fact by the first Defendant when he first got into the car at Waterford before heading off to the concert.

12. As to that assertion, the evidence given by the first Defendant is that the Plaintiff, three other passengers and himself had just got into his car to set off for the concert when he received a call from his mother. He got out of the car and took the call. He told her about the journey. When the call ended he got back into the car, said a prayer and blessed himself, actions which provoked a laugh or snigger from the Plaintiff and/or one of the other rear seat passengers to which he reacted by saying he did not see what was so funny, especially as he was taking all the risks on the journey; he had no drivers licence or insurance and the car was untaxed. This was portrayed by Senior Counsel for the Plaintiff, Mr Callanan, as nothing more than a malicious invention, an unlikely tale concocted by the first Defendant to get himself out of trouble with the authorities as well as the Plaintiff, whom he knew was likely pursue a claim for damages against him.

13. The Plaintiff and two of the passengers gave evidence to varying degrees that nothing of the sort described by the first Defendant in evidence occurred; there was no mention at this time of his not having a driving licence, tax or insurance, indeed, there was no conversation on the subject at all. The Plaintiff's evidence is that he first became aware insurance was an issue at the scene of the accident. He overheard a conversation between the first Defendant and Mick Feeney during which the first Defendant said he was uninsured. As against this assertion the first Defendant gave evidence that he never mentioned anything about insurance to Mick Feeney.

14. Some post-accident communications, which had purportedly passed between the Plaintiff and the first Defendant concerning the accident and its consequences for them both, was introduced into evidence. No mention is made therein to the subject of insurance or to the first Defendant having told the Plaintiff that he was unlicensed and uninsured. Amongst the documents introduced by the Plaintiff was a post-accident extract from the first Defendant's Facebook page/account dated the 17th July 2017 and an email dated 14th June 2020. It was represented to the Court that these were unsolicited communications which had come from the first Defendant. Of these, the sender / email address for the June 14th email was covered/obscured. This prompted a call for the production of an original unobscured version.

15. It became evident from the version produced subsequently that not only had the email not come from the first Defendant, it had not come from an account or email address in his name or otherwise associated with him. Rather the email purported to come from John Carter, a person whom the first Defendant said in evidence he did not know. He also denied authoring the contents which, in part at least, appeared to be related to the subject matter of the July 17th texts. However, the email contained other information

which had not been mentioned therein as well as references to the first Defendant's personal circumstances that transpired to be wholly inaccurate.

16. The email purported, *inter alia,* to offer the Plaintiff a deal of €350,000 cash from a sale of properties owned by the first Defendant in Romania if the solicitor "…*could give me less years in prison…*". The first Defendant's evidence was that he had never made an offer to the Plaintiff at any time and that the first time he saw the email was in Court. The references therein to his brother's name was also incorrect. The Plaintiff gave evidence that he spoke to his mother about this email, noting similarities with the communication of 17th July 2017. Mr. Callanan acknowledged that the email had been represented to the Court as having come from the first Defendant and that this was his understanding at the time when it was first introduced. I accept that that was so, the sender and address being obscured on the version he had been given.

17. However, it follows from the production of the unobscured version of the email that the Plaintiff cannot but have known when he produced the first version to his solicitor and when giving evidence about it in Court that the sender was someone other than the first Defendant and that the email address appeared to belong to the sender. No satisfactory explanation was offered as to why the Plaintiff had apparently represented to his legal team and gave evidence to the Court that the email had come from the first Defendant in circumstances where it was patent the sender and sender address suggested otherwise.

18. Particularly having regard to the content of the email, and the first Defendant's denial that he had anything to do with it, one possibility which emerges is that it was a concoction fabricated in the belief that it would advance the claim and was produced/ presented for that purpose. It is difficult to conceive an alternate; however, this possibility was not raised nor tested at the hearing. Nevertheless, as will become apparent, evidence was given and tested which otherwise called into question the reliability and veracity of the Plaintiff as a witness, about which more later.

19. The Court is tasked with resolving what is, as stated earlier, an almost complete conflict of evidence. The exercise involved calls for a careful assessment of the reliability and veracity of the witnesses. A conflict of evidence also emerged in relation to immediate post-accident events and circumstances which on my view of it has a significant bearing on the resolution of the conflict of evidence on the issue and thus must also be considered and discussed. However, before addressing this aspect of case it is convenient and appropriate that the issue should be placed in context. To this end the background that follows, and from which the issue emerged, may be found useful.

Background

20. The Body & Soul festival took place over the weekend of the 23rd June 2017. The manager of a security company retained to provide security services for the concert, Mick Feeney, was looking for casual workers to assist with security over the concert weekend. He contacted the first Defendant, who had previously worked for him on one occasion. He asked him to recruit a number of individuals for this purpose. The first Defendant agreed and contacted a number of people whom he knew, including Opeyemi Awe ('Opy'). He

knew a number of people were being recruited so he phoned the Plaintiff with an offer of temporary security work at the concert; the Plaintiff agreed.

21. He in turn invited Cedric Humivamana, (Cedric), a friend who was staying with him in Dublin, to join the group; he accepted. The group ultimately numbered ten people, including the first Defendant. He lived in Waterford and arranged transport for everyone to and from the concert in two cars. The Plaintiff and Cedric travelled to Waterford from Dublin by bus to join up with the other recruits. On arrival, they met 'Opy', Terry Krubu, (Terry) and the first Defendant. All five travelled in his car to New Ross where they met the remainder of the group before setting off for Mullingar. The recruits were each asked to contribute €15 to cover the cost of petrol to and from the festival. There was some debate as to whether the journey from Waterford had taken place on the Thursday or the Friday, more likely the latter, but nothing much turns on which of these days is correct; the journey as such was uneventful. Everyone brought their own tent, provisions and a change of clothes.

Accident Circumstances

22. The accident occurred late afternoon on the return journey the following Monday. The Plaintiff, Terry and Cedric travelled in the same car as they had travelled to the festival. Cedric was the front seat passenger and the Plaintiff sat behind him. Terry sat behind the first Defendant. Driving conditions were bad; it was dark and raining heavily. There was some dispute as to whether the Plaintiff and Cedric were to be dropped to the Red Cow roundabout on the outskirts of Dublin or were to be taken directly to Waterford. Either way, the accident occurred, not long after leaving the concert site, on the Ballivor Road Co. Westmeath.

23. There was also some dispute about whether the car had first stopped at a petrol filling station for fuel and whether or not the first Defendant was uncertain about directions, however, I am again satisfied that nothing much turns on the difference in the evidence on this point. Suffice it to say that the accident occurred when the first Defendant lost control of the car on a bad bend as a result of which it went into and collided with a ditch. The collision caused severe frontal damage to the first Defendant's car and the three passengers were injured. The Plaintiff suffered a number of soft tissue injuries, including a perforation injury to the small bowel, an intraperitoneal haemorrhage secondary to mesenteric tears, a right shoulder injury and an injury to his back. Following the accident, he was taken from the concert site by ambulance and admitted to Mullingar hospital. He underwent surgery for his abdominal injuries. The injuries suffered by Terry and Cedric were less serious though it was obvious at the scene that Terry had suffered a nasal injury and was bleeding from his nose.

Accident Aftermath; Plaintiff's Evidence

24. As mentioned earlier, conflicting evidence was given by and on behalf of the Plaintiff in relation to post-accident events, particularly as to the Plaintiff's movements and behaviour at the scene. He gave evidence that smoke and flames were coming out of the car, that he was trapped in the car by his seat belt and the front seat. Terry had to undo the belt to help him out. However, in cross-examination, he said that he was the first out

of the car and when asked to explain how he had managed to do that in circumstances where he was a back-seat passenger in a two-door car he said the seats had been pushed forwards as a result of the impact. He also gave emphatic evidence that having alighted from the car he had had to lie down on the road because of the pain he was experiencing in his stomach.

25. Under cross-examination he said that as he lay on the road the intensity of the pain caused him to scream, however, in direct examination he said his pain worsened after he returned to the concert site, that as a result he had to lay down in a tent and that his condition deteriorated to the point that he had to be taken by ambulance to hospital. Under cross examination he said he was lying on the carriageway near the car and that neighbours who had come on the scene after the accident were standing across the road from where he was lying. They were the first people to arrive after the crash and were followed firstly by Mick Feeney. The Plaintiff said he remembered seeing a police officer talking to them. He told everyone at the scene that he wanted an ambulance and that a neighbour had called for one.

26. The Plaintiff said he was bleeding from a laceration, most probably caused by his seat belt. There was blood on his stomach, which I took to be blood from the laceration. His first memory of the police at the scene was shortly after Mick Feeney arrived but he agreed on cross-examination that a Garda car was the first vehicle to arrive followed very shortly by Mick Feeney's jeep. He spoke briefly to Sergeant Heaney before promptly taking the four occupants of the car back to the concert site. Although listed as a witness to fact on the Plaintiff's disclosure schedule Mick Feeney was not called to give evidence. Before leaving the scene, the Plaintiff said he had started to spit up blood. When it was put to him that Sergeant Heaney would give evidence that he heard no one screaming in pain or lying on the road the Plaintiff insisted that he was doing both.

27. He rejected the suggestion that he had been found by Sergeant Heaney in the back of the car though he recalled giving his name and address to a police officer. He didn't recognise Sergeant Heaney in Court as the officer who had attended the scene, nor could he recall any other conversation with the officer to whom he gave his personal details, furthermore, he had no recollection of being asked whether he wanted/needed medical assistance or an ambulance, though in direct evidence he said he told everyone at the scene that he wanted an ambulance and gave evidence that a neighbour had called for one. The fact that no ambulance attended at the scene is not in issue.

28. His evidence as to when he first became aware that the first Defendant was uninsured was when he overheard the first Defendant telling Mick Feeney at the scene that he was uninsured. However, he also gave evidence that Mick Feeney and the first Defendant had moved away from the car when they spoke together and that although he could see them talking he couldn't hear the conversation. I will come to the evidence of the passengers presently but in light of the conflict of evidence which emerged in relation to these events, I consider it appropriate at this juncture to refer firstly to the evidence of

Sergeant Heaney who, it is agreed, arrived very shortly after the accident and took the *locus* in charge.

Evidence of Sergeant Heaney

29. The salient aspects of Sergeant Heaney's evidence may be summarised briefly as follows. He was attached to Delvin Garda Station, County Westmeath. Delvin is approximately four miles from Ballinlough Castle, where the concert was being held. Medical services, including an ambulance service, were provided on-site. He was on duty at the concert when he received an internal garda call alerting him to the occurrence and location of the accident. He left as soon as he received the call and drove to the scene. The Gardaí had been notified by Philip Hickey, a local who came on the accident shortly after the crash. His house is located nearby, and he was known to Sergeant Heaney, who arrived at 6.15 pm. On arrival he found the front of the first Defendant's car down in a ditch. He estimated the depth at approximately two feet. There was severe damage to the front of the car.

30. He noted five people standing on the road in the vicinity, Philip Hickey, his wife and three unidentified men. In addition, he found a man sitting in the back of the car, whom he identified as the Plaintiff. He made enquiries about what had happened and the identity of the driver. The first Defendant admitted he was the driver and gave his name and address; Sergeant Heaney noted the details. As mentioned earlier, he also noted details of the expired discs on the windscreen. He did not ask the first Defendant whether he had a licence or insurance. Instead, he followed a formula which consisted of a demand for production of insurance and a driving licence within ten days a Garda station nominated by the driver. The first Defendant undertook to produce at Waterford Garda Station, but failed to do so. Consequently, he was summonsed and, on the 27th November 2017, pleaded guilty to the charges proffered against him.

31. Sergeant Heaney also spoke to Cedric, Terry and the Plaintiff. He asked each of them for their names and addresses, which they gave. He noted the details and invited each, in turn, to say whether medical assistance and/ or an ambulance was required; all four declined the offer, this despite the fact that one of the occupants in particular (Terry) was obviously injured and bleeding from his nose. He was still talking to the occupants of the car when Mick Feeney arrived in a jeep. He spoke briefly to Mick Feeney who told him that the occupants had been working for him at the concert and that he would look after them; he did not elaborate on what was meant by this.

32. Thereafter, he spoke to Philip Hickey and while doing so all four got into Mick Feeney's jeep, which then drove away. The behaviour of the occupants left Sergeant Heaney with the distinct impression that all four wanted to get away from the scene as quickly as possible; they were in a hurry, behaviour which struck him as unusual. He acknowledged under cross-examination that there could be many reasons for wanting to get back to the concert site, including just wanting to get home or to get medical attention. He accepted that it was likely the four would have been aware that medical assistance, including a doctor, was available at the concert site but couldn't comment on what had happened

once the occupants arrived as he did not return to duty there. He estimated the time difference between his arrival and Mick Feeney's departure at no more than ten minutes.

33. While Sergeant Heaney did not notice the Plaintiff getting out of the car, his belief was that he did so without assistance. When the Plaintiff's evidence that he had been lying on the ground screaming in agony was put to him, Sergeant Heaney replied that at no stage did he see anyone on the ground. He was a trained first responder and first aider. If any of the occupants of the car had been lying on the ground, whether or not they were complaining of pain, he would not have allowed that individual to move without first calling for an ambulance. With regard to his vision of the road at the scene, he had an uninterrupted view of the *locus.* He had parked the squad car on the road a short distance from the first Defendant's vehicle. Mick Feeney did likewise, but on the other side, having approached the scene from the opposite direction. Sergeant Heaney estimated the distance between the squad car and jeep at 30 metres.

34. The road verges were overgrown. The only place anyone could have lain down was on the carriageway. While acknowledging anything was possible, he felt sure he would have seen anyone lying on the road and /or screaming; he saw and heard none such. It follows that if Sergeant Heaney's evidence in relation to these matters is accepted the Plaintiff's evidence in a number of material respects cannot be correct, moreover, in so far as his evidence was corroborated by the passengers, acceptance of Sergeant Heaney's evidence has similar implications for that evidence.

Evidence of the Passengers

35. What follows is not intended as a precis of the passengers' evidence but rather a brief summation of what I consider to be salient evidence deserving of express mention. Terry presently resides in Southampton and gave evidence by video link. His family lives in Ireland. He also lived here at the time. He knew the Plaintiff for years, was friendly with him and was also friendly with Cedric. He knew the first Defendant but was not a close friend. On the fateful journey he travelled as a rear seat passenger. He sat behind the driver and was injured as a result of the collision. He struck his head against the back of the driver's seat as a result of which he suffered injuries to his left eye, nose and cheek. He also suffered concussion and shock. He did not make a claim or bring proceedings arising from the accident.

36. Terry gave evidence that the driver was the first to get out of the car. The Plaintiff was restrained by his seat belt and could not physically get out, which is consistent with the Plaintiff's evidence in chief but not with his evidence on cross examination. As to the Plaintiff's positioning in the car he gave evidence that the Plaintiff was in the front and when it was put to him that everybody was agreed the Plaintiff was in the rear the witness answered: "*not to my knowledge*". He did not remember Gardaí at the scene. He was dazed and could not see out of his left eye. The last thing he remembered was talking to a garda at what he thought was the site of the concert. He recollected the Plaintiff lying on the ground after the accident, that he was holding his stomach and was screaming.

37. When asked on cross-examination whether that was something he remembered or something which had been suggested to him, his response was that he was thinking about the accident and was trying to "*puzzle everything together*". When asked whether he was sure about his evidence in this regard his reply was "*I am not sure*". He variously said he did not speak to a police officer and then that he did. In fairness he freely accepted that his memory and recollection of events at the time was poor; he was concussed and dazed. When asked whether the first Defendant had said anything about not having insurance before they left Waterford he replied that he had no recollection of anything being said about insurance. However, he surmised under cross-examination that the reason he had no recollection was because he would not have got into the car with somebody whom he knew was uninsured and unlicensed to drive.

38. In answer to questions from the Court, the witness said the first two people who got out of the car were the driver and the front seat passenger. The reason for this was because it was a two-door car and he remembered the front seats coming up in order to let the back-seat passengers get out, however, he also gave evidence that the Plaintiff had to be aided out of the car. This conflicts with the Plaintiff's evidence on cross examination that he was first out. While he accepted that he had probably refused an offer of medical assistance and had probably given his personal details at the scene to a police officer, he had no recollection of doing either. Significantly, he accepted that if Sergeant Heaney had his personal details it was probable that he must have spoken to him. No explanation was advanced by Terry as to why, given the nature of his obvious injuries, he would have refused an offer of medical assistance and or an ambulance.

39. Cedric is a close friend of the Plaintiff and his family. He was also known to 'Opy'. He had seen the first Defendant around Waterford but was not a friend. He was the front seat passenger in the car on the return journey. He injured his back as a result of the collision. After the accident, he got out of the car immediately. He did not remember how the Plaintiff got out of the car but recalled that he did so "*in the end*". He saw a cut on the Plaintiff's neck from what he took to be the seat belt. The Plaintiff was feeling pain in his stomach. The pain was getting worse and he lay down on the road. He thought Mick Feeney was the first person to arrive on the scene and that a neighbour had called the police and that the police officer arrived after Mick Feeney. The Plaintiff's pain appeared to get worse subsequently; he was screaming with pain after they returned to the festival site.

40. The witness accepted that he was in shock following the accident, though he had not hit his head and was not concussed. He could not remember giving his personal details to Sergeant Heaney nor could he recall being asked whether he needed or wanted medical assistance or an ambulance. He thought the Plaintiff was shocked and did not really know what he was doing at the scene. His impression was that his pain was not so bad that he needed an ambulance, however, he was sure the Plaintiff was lying on the ground at one stage. When it was put to the witness that nobody was lying on the ground screaming with pain at the scene of the accident he responded, "*that is a lie*", however, later in cross-examination he said he did not remember the Plaintiff screaming at the scene.

41. He did not remember which of the two back seat passengers got out of the car and which one remained seated. He rejected as false the suggestion that the reason he and the others were anxious to get away as soon as possible with Mr. Feeney was because they knew the first Defendant's car was neither taxed nor insured. He just wanted to get home. In answer to a question from the Court, he was unsure as to when he had seen the Plaintiff lying on the ground after the accident but had seen him do so at one stage, possibly after he first got out of the car, but he could not really say. On the question of insurance, he was emphatic that nothing had been said about that by the first Defendant a few days before the accident. The subject wasn't mentioned.

First Defendant's evidence

42. The following is a brief summary of the salient evidence given by the first Defendant.

At the time of the events giving rise to the accident, the first Defendant lived in Waterford with his mother, four brothers and an older sister. He worked as an assistant manager with Domino's Pizza for six years until 2016 before taking up employment with Bausch and Lomb. He left that firm after eight months and took up employment as a chef in Tracey's Hotel Waterford. He did not know the Plaintiff before they met in Waterford to travel to the concert, but he knew Opy, Terry and Cedric; they were not close friends. He bought and sold cars as a side-line even though he had neither a driving licence nor insurance. However, he had a partner in the business who did and who was a mechanic; three of his brothers also had licences to drive; he was not buying and selling cars on his own.

43. He bought the car involved in the accident a couple of months prior to the accident, with the intention of selling it on. There was no valid NCT, road tax or insurance on the car when he bought it. He had previously worked for Mick Feeney on one occasion, providing security at a concert. His account of when, where, how and why he told the Plaintiff and the passengers he had no insurance has been set out earlier. His evidence with regard to the return journey was that he intended to drive directly to Waterford. Shortly after leaving the festival site he stopped at a garage to get petrol. It was dark, and it was raining, and he was unsure of his directions. He was trying to find his way to the Waterford road. The accident occurred when he lost control of the car on a bad bend.

44. His account of what transpired immediately after the accident contrasts in several respects with the accounts given by the Plaintiff and the two passengers. According to his evidence, he was first to get out of the car followed in turn by Cedric and Terry. The Plaintiff, however, remained in the back seat, which is consistent with the evidence given by Cedric and the Plaintiff's evidence in chief but conflicts with his evidence on cross examination and the evidence given by Terry who put the Plaintiff in the front. Having got out of the car the first Defendant phoned Mick Feeney. The reason he did this was that he was lost and did not know where he was, so he shared his phone location with him. He did not phone the Gardaí but remembered a garda car arriving very shortly after the accident and assumed this was a result of a call by a neighbour who had arrived on the scene. He did not explain why he could not have shared his phone location with the Gardaí, but that suggestion wasn't put to him.

45. Mick Feeney arrived a short time later. In the meantime, Sergeant Heaney asked for and was individually given the name and address of each of the occupants of the car. Everyone was asked in turn whether they wanted or needed medical assistance; everyone refused. Sergeant Heaney wanted to know what had happened and who was driving the car. He identified himself as the driver. Sergeant Heaney then made a demand of him for the production of a certificate of insurance and driving licence. He replied that he did not have the documents with him but did not volunteer the fact he had neither. He was not asked. He confirmed that Waterford Garda Station had been nominated by him for production of the documents.

46. Otherwise, he said very little to Sergeant Heaney. Mick Feeney arrived around about this time. He spoke with all four occupants of the car. As far as the first Defendant is concerned Mick Feeney had come to the scene of the accident to take everyone back to the concert site; he accepted that medical assistance was available there for anyone who needed or wanted it. He had no discussion with Mick Feeney about not having a driving licence or insurance. All four walked to his jeep before travelling back to the concert site. Following their arrival, the Plaintiff's condition deteriorated over a period of about two hours. He initially refused an ambulance, however, his pain worsened, and he began to lose consciousness. It became clear he needed to go to the hospital. The first Defendant's evidence was that it was he who called the ambulance.

47. With regard to the suggestion that the Plaintiff had been lying on the road after the accident screaming in pain, his evidence was that he did neither, he simply said that he was in pain; one could see he was injured. The first Defendant offered an explanation as to why neither the Plaintiff nor for that matter the other passengers accepted the offer of medical assistance and/ or an ambulance. He said that everyone wanted to leave the scene and get back to the concert site because from day one everyone knew he had no licence. Under cross-examination he said that the reason why the Plaintiff refused medical assistance and did not ask for or call an ambulance at the scene was because he initially thought he would be all right; his injuries only deteriorated later. Moreover, he knew the truth of the situation concerning insurance; calling an ambulance at the scene would possibly result in the involvement of the Gardaí.

48. He attempted to visit the Plaintiff in Mullingar hospital, but his family were upset and objected. However, he did speak to the Plaintiff's mother and admitted responsibility for the accident. He subsequently sent Facebook messages to the Plaintiff on the 17th July 2017 in which he said that as a consequence of the accident he had been badly affected mentally and that he just wanted the Plaintiff to know he cared about what had happened, to explain why he had not been in touch earlier and to enquire about his health. He accepted that the reference to his 'wife' in the Facebook message was incorrect since he wasn't married, though he did have a girlfriend at the time. He was aware of the difference but could not otherwise explain why he had referred to his 'wife'. With regard to the subsequent email, he rejected the suggestion that he had authored or sent it. On the contrary, he had nothing to hide and if he had wanted to have further communications with the Plaintiff he would have simply used his own email/ Facebook

account as he had done previously. He did not know a John Carter and did not ask anybody else to send any email to the Plaintiff.

49. It was suggested to the first Defendant that his explanation for the refusal of medical assistance was a 'cock and bull' story, invented in an effort to exculpate himself because he was aware the Plaintiff would come after him for damages and that he was at the risk of being imprisoned. As to the latter suggestion, the first Defendant's evidence was that while he knew he was in the wrong at the time he did not realise the potential seriousness of the offences. When summonsed he did consult a solicitor, but subsequently attended court without representation and pleaded guilty to the offences with which he had been charged.

50. He also rejected the suggestion that the reason he rang Mick Feeney was because he knew he was in serious trouble. His answer to that was that he was lost. If he had phoned an ambulance or the Gardaí, he would not have been in a position to give a location. Furthermore, he did not accept the suggestion that he had been careful to give the impression to the Court that he was concerned for the Plaintiff whereas in truth he had no such concern and was doing everything he could to minimise his exposure to the consequences of his wrongdoing. Quite the contrary, he cared about what had happened to the Plaintiff. It was he who had phoned the ambulance, who had tried to visit the Plaintiff in hospital and who had sent the July17th Facebook message.

51. By way of further challenge to the assertion that he told the Plaintiff he had neither tax nor insurance, it was put to the first Defendant that making such a statement would jeopardise a commercial interest he was trying to develop with Mick Feeney. The response to this question was that he was not trying to develop a commercial relationship, he was being paid the same as the others, albeit that he had some additional responsibilities towards them. He was paid an awful lot more by way of salary in his ordinary employment. Finally, it was put to the first Defendant that the Facebook message of July 17th, was designed to have the Plaintiff take pity and that it was this self-pitying which had engendered the invention of the story that he was not insured and had no driving licence, all in the hope that the Plaintiff would not pursue him. He rejected this suggestion for the same reasons mentioned earlier.

52. He also rejected the suggestion that the introduction of a prayer, blessing himself and the sniggering as an explanation for mentioning he was uninsured was a fabrication or that this betrayed an element of maliciousness. The first Defendant offered an explanation for the omission of any mention of having told the Plaintiff he had no licence or insurance from the July 17th text; there was no need as everyone was well aware of the fact. He accepted that but for the sniggering in response to his blessing himself and saying a prayer he would probably not have said anything about the absence of insurance or tax; to that extent, the statement was accidental rather than deliberate.

Decision

53. Brief submissions were made on behalf of the parties which it is not intended to summarise. Suffice is to say from the foregoing that two scenarios are offered on the

issue, the account given by the first Defendant as to where, when, how and why he informed the Plaintiff that he was unlicensed and uninsured, or the account given by and on behalf of the Plaintiff that the absence of a driving licence, insurance or road tax had never been mentioned in the manner suggested or otherwise at any time before the accident. The improbability of the former scenario and the explanation for the refusal of medical assistance was variously portrayed by Mr. Callanan as nothing more than an invention, a 'cock and bull' story, a tale deliberately concocted to avoid or minimise the consequences of the first Defendant's wrongdoing.

54. On the other hand, it was submitted by Senior Counsel for the first Defendant, Mr. Mohan, that the Plaintiff was self-interested in the second scenario since this ensured that any unsatisfied judgment would be met by the second Defendant, whereas whatever the outcome the first Defendant would ultimately be liable for damages and the Plaintiff's costs and had nothing to gain from making up a story. Apart perhaps from legal representation he stood to derive no personal benefit. Moreover, the first Defendant's evidence as to the immediate post-accident circumstances was substantially corroborated by the evidence of the only truly independent witness, Sergeant Heaney. The essence of the case advanced was that the behaviour of the Plaintiff, his two passengers and the first Defendant immediately post-accident, in particular the refusal of an offer of medical assistance by those injured and the circumstances in which all four left the scene, was compatible with and more probably explained by the fact that all knew the first Defendant was unlicensed and uninsured.

55. Against this proposition, which the Plaintiff rejected when it was put to him, Mr. Callanan submitted that it was highly unlikely that the passengers in concert, and in particular the badly injured Plaintiff who did not know the first Defendant, acted the way they did in order to protect him because they knew he would be in trouble with the Gardaí. There are many and varied reasons why anyone might refuse medical assistance and/or want to leave the scene of a single-vehicle accident on a strange country road, particularly where there was no reason to linger there. Furthermore, the first Defendant's evidence that after they returned to the concert site the Plaintiff had initially refused an ambulance despite his worsening condition was simply not credible.

Conclusion

56. In assessing the witnesses and the evidence given by them, I have had regard to the fact that with the exception of Sergeant Heaney, English is not their first language. That said their comprehension and command of the language was such as not to necessitate or require the use of an interpreter. I mention this because in a number of instances, including those involving questioning by the Court, there were elements of hesitancy which may have been attributable to comprehension difficulties and/or misunderstanding of the questioning, furthermore, words or expressions were used in evidence which one would not normally associate with or hear from a witness whose mother tongue is English.

57. The Plaintiff, Terry and Cedric were born in Rwanda; the first Defendant in Romania. All were lawfully resident in the State at the time of the accident. The relationships between

those involved, particularly between the Plaintiff, Terry and Cedric is one of many factors which must also be taken into account. Given the nature of the issue Mr. Callanan submitted that it was unusual for the Court to be considering the accident and its immediate aftermath, particularly in circumstances where liability had been admitted. Caution had to be exercised when assessing the evidence of witnesses who had been injured and/or were suffering from concussion and/or shock. He is undoubtedly correct in this observation, however, as mentioned at the outset, it should also be evident from the foregoing exercise why the evidence in relation to post-accident circumstances has a bearing on the outcome and the reason why it has been considered in the way it has by the Court.

58. Sergeant Heaney gave his evidence in a very matter of fact and convincing manner. I am satisfied he gave truthful evidence and that he is a witness on whom the Court may rely. His evidence as to what he noted, to whom he spoke and what was said to him by the four occupants of the car is essentially unchallenged, which is not surprising in circumstances where the Plaintiff, Terry and Cedric have differing degrees of recollection not only as to the time of his arrival at the scene, but also in relation to what transpired there and what conversation passed between them. In addition, some of their evidence in relation to post accident events was confused and/or contradictory.

59. Terry gave conflicting evidence as to whether he spoke to a police officer at all at the scene; he thought he had spoken to a Garda at the concert campsite. His recollection was generally poor, and he gave confusing evidence. As mentioned earlier he surmised that he would not have got into the car if he had been told the driver was unlicensed and uninsured but in fairness to him, when giving his evidence in chief he said he had no recollection of the first Defendant having said that he had no insurance. None of this comes as a surprise. Terry suffered a head injury as a result of the accident, details of which have been mentioned earlier. Significantly in this context, in addition to other injuries he suffered concussion and shock and was dazed.

60. Reference has already been made to the evidence given by the Plaintiff, Terry and Cedric. Suffice it to say at this juncture that although the Plaintiff and Cedric remember speaking to a police officer at the scene they were not able to recognise Sergeant Heaney when he appeared in Court nor did they have any recollection of being asked whether they wanted medical assistance or an ambulance nor the responses which Sergeant Heaney said they had given him. It is the Plaintiff's evidence that he told everybody at the scene that he wanted an ambulance, that a neighbour had called for one and that he was lying on the road screaming with pain, an account which is in stark contrast to the evidence given by Sergeant Heaney. It also contrasts with the evidence of Cedric, particularly in so far as it refers to screaming while lying on the road as well as, *inter alia*, the sequencing and positioning in the car post-accident.

Conclusion; Post-Accident Circumstances

61. For the reasons already mentioned, insofar as there is a conflict between the evidence of Sergeant Heaney and the evidence of the Plaintiff, Terry and Cedric, I accept the evidence of Sergeant Heaney. Accordingly, the Court finds as a fact that Sergeant Heaney was first

to arrive at the scene after the neighbours, that the first Defendant's car had ended up in a ditch and was badly damaged, that on attending the Plaintiff he was still seated in the rear of the car, that the four occupants were asked for and gave their names and addresses, that the first Defendant identified himself as being the driver of the car, that a demand for production of a driving licence and certificate of insurance was made, that the first Defendant nominated Waterford Garda Station for production of the documents, that he was not asked, nor did he volunteer, whether he had a driving licence and insurance.

62. The Court also finds as a fact that the occupants were individually asked whether they wanted medical assistance and/or an ambulance and that all four declined, that they were in a hurry to leave, that that struck Sergeant Heaney as being unusual, that following a short conversation with Mick Feeney the occupants left the scene of the accident with him and that Sergeant Heaney was present at the scene when they did so. Furthermore, the Court finds that the Plaintiff did not get out of the car until after the arrival of Sergeant Heaney, that having done so he did not lie down on the road screaming in pain or otherwise, that if he had done so at any time between the arrival of Sergeant Heaney and the time of his departure in the jeep he would have been seen / heard by Sergeant Heaney and would not have been allowed to move until an ambulance arrived.

63. It follows from these findings that the Court rejects the evidence given by the Plaintiff that he was the first out of the car, that when he got out of the car he lay on the road screaming in pain, that he told everybody at the scene he wanted an ambulance and that an ambulance had been called for by a neighbour. It also follows that in so far as the evidence of Terry and Cedric places the Plaintiff lying on the road and/or was screaming with pain at the accident *locus*, the Court rejects that evidence. As against this, the evidence of the first Defendant on the immediate post-accident circumstances is corroborated to a significant degree by the evidence of Sergeant Heaney and as such the Court accepts his evidence

64. A consequence of these findings and conclusions is that the evidence given by or on behalf of the Plaintiff in relation to material facts is at worst untruthful or at best mistaken. In fairness I should observe the suggestion they were giving untruthful as opposed to mistaken evidence was not put to them directly. Either way, however, their reliability as witnesses is called into question. In addition to the foregoing the Court notes that when pressed on the matter under cross examination the Plaintiff gave definitive evidence that he did not lose consciousness as result of the accident yet he swore an affidavit of verification of the allegations and assertions contained in the Personal Injuries Summons issued herein, one of which is that having been thrown violently forward he felt the seat belt catch his chest and neck and that he "… *suffered a period of loss of unconsciousness*".

Conclusion; Knowledge of Absence of Insurance

65. With regard to the Facebook communication of the 17th July 2017, as mentioned earlier it was suggested that the content betrayed the first Defendant's real intention, which was to have the Plaintiff take pity on him because he knew he was in trouble and that the Plaintiff was likely to pursue him for damages. I am satisfied, and the Court finds that if

there had been any basis for that suggestion it is highly likely the first Defendant would have been keen to remind the Plaintiff that there was no point in pursuing him because he was uninsured and that this fact had been made known to everyone in the car at Waterford before they set off for the concert. As it is no mention was made of the conversation, the explanation offered being that all were aware of the fact from the outset.

66. While there may be many reasons why someone might want to leave the scene of a single-vehicle accident on a remote country road the fact that all four occupants refused medical assistance, even though three of them were injured, and the unusual departure from the scene begs the question as to why in the circumstances all four behaved the way they did. Was it because Mick Feeney offered to take care of them, or that they knew that those needing medical assistance would be able to access it at the concert site, or that they just wanted to get home, or because everyone knew the first Defendant was uninsured, or was it a mixture/combination of these reasons.

67. As to the explanation that it was knowledge the first Defendant was uninsured I consider his evidence to be surmise on his part rather than that the behaviour resulted from any agreed course of action, however, it is consistent with the explanation offered for the absence of any mention of insurance in the texts of July 17th, moreover, it is not incompatible with the other reasons advanced. In my judgment the possibilities suggested do not fall to be considered as mutually exclusive alternatives, rather the question posited by the circumstances is which or what combination of these more likely or best explains the reason for the refusal of medical attention by those injured and the hurry of all four occupants to leave the scene.

68. In considering this question I have not overlooked the likelihood that it was not until after the return to the concert site that the Plaintiff's condition worsened to the point that he developed severe pain and was in need of urgent medical attention and an ambulance. Nor has the fact that Terry refused an ambulance following return to the concert site notwithstanding the nature of his injuries, including an injury to his left eye which resulted in a swelling that temporarily obscured his vision. The suggestion that it would be highly improbable or unlikely the Plaintiff would have disregarded his excruciating pain to protect someone he did not know (the First Defendant) would certainly gain some traction if that had been his medical situation/condition at the scene of the accident, however, I am satisfied, and the Court finds that was not so. Evidence was given on his behalf that at that point he thought he was going to be all right, evidence which is more consistent with Sergeant Heaney's account.

69. The fact, therefore, that his condition did not deteriorate until after he returned to the concert site is a finding consistent with the conclusion already reached that he was not screaming with pain and did not lie down on the road after the accident. In my judgment the refusal of the offer of medical attention and or an ambulance by those injured in circumstances where they must have been aware the person making the offer was a police officer and their hurried/ unusual departure from the scene is compatible and

consistent with knowledge that the first Defendant was unlicensed and uninsured and that this exposed him to the risk of trouble with Gardaí. And so, it proved. However, this conclusion is not determinative of the issue *in quo*.

70. Conscious though I am of the consequences of failure thereon for the Plaintiff, the law requires the Court to approach the determination in the same manner as it would the trial, dispassionately and with impartiality. I had an opportunity to observe the demeanour of each of the witnesses as they gave their evidence. My view of the first Defendant is that he really had nothing to gain by inventing a story, moreover, there was nothing to suggest a motive for such a course of action, such as vindictiveness towards the Plaintiff. On the contrary, he knew he was wrong from the outset and said so. In my assessment of him as a witness I have not overlooked the fact that in telling Sergeant Heaney he did not have his licence and insurance with him and in nominating Waterford for production he was aware both responses were misleading, suggesting as they did that he had both documents and would produce them.

71. In evidence he volunteered to having given that response to Sergeant Heaney and though other answers given in evidence were surmise on his part, addressed earlier or open to question, such as the reason for his not phoning the Gardaí or for an ambulance, my overall impression of him is that he did his best to tell the truth in the knowledge that whatever the consequences for the other parties of the evidence he gave on the issue he would ultimately be liable to meet the judgement of the Court. I should add for the sake of completeness that I am satisfied the effect of the MIBI 'mandate' he signed had been explained to him.

72. In all the circumstances and particularly as the first Defendant's evidence in relation to immediate post-accident events is also substantially corroborated by Sergeant Heaney, I consider it improbable he would concoct a story in the knowledge that would he would likely be required to repeat it under oath and that his evidence to the Court in that respect would be untruthful. In a society where religious practice, not to mention belief, is in decline, it is less likely to be a matter of conjecture that saying a prayer and/or blessing oneself in the circumstances outlined might well provoke a reaction of the type recounted, though this cannot found a conclusion that such occurred, rather such is dependent on the evidence and the inferences, if any, which may properly be drawn from it.

73. In addition to the car having neither a valid NCT, road tax or insurance discs, the first Defendant did not hold a driving licence, nor does he hold one to this day. By travelling to Mullingar and back he was taking a palpable risk of being stopped by the Gardaí with the consequences such would likely entail, never mind the risk of being involved in an accident and what might flow from that eventuality, circumstances which, in my judgment, fortifies the probability that the comment was made about the risks the first Defendant was taking rather than being an invention from which he stood to derive no interest.

74. The Plaintiff on the other hand has a vested interest in the outcome. While the same cannot be said of either Terry or Cedric, they are close friends and were understandably supportive of him, particularly in the assertion that he was lying on the road, at least at some stage after the accident, evidence which the Court has already rejected. For the reasons stated earlier, the unreliability of these witnesses calls into question the weight to be attributed to other evidence given by them, including evidence that no mention was made by the first Defendant that he was uninsured and unlicensed to drive.

75. For all these reasons the Court accepts the evidence of first Defendant on this question and finds, as a matter of probability, that before setting off for the concert he informed the passengers that he had no driving licence or insurance. It follows that at the time of the accident the Plaintiff knew the first Defendant was uninsured, a conclusion as it happens, though it formed no part of the Court's reasoning, which coincides with what would have been obvious to any passenger getting into a two-door car, namely, that the road safety, insurance and tax certificates had all expired. Accordingly, the Court will find for the second Defendant on the issue and will so order.

76. I will discuss with counsel the form of the orders to be made having regard to the conclusions reached.