THE HIGH COURT

[2020] IEHC 702

Case No: 2017/00654

BETWEEN

MARK FEGAN

PLAINTIFF/APPELLANT

AND

MOTOR INSURERS BUREAU OF IRELAND

AND

JASON WARDE

DEFENDANTS/RESPONDENTS

Case No: 2017/00534

BETWEEN

LEE FEGAN

PLAINTIFF/APPELLANT

AND

MOTOR INSURERS BUREAU OF IRELAND

AND

JASON WARDE

DEFENDANTS/RESPONDENTS

Judgment of Mr. Justice Bernard Barton delivered on the 11th day of December, 2020.

Introduction

1. This is the judgment of the Court in two circuit appeals taken by the Plaintiffs from orders of the Circuit Court on foot of which the proceedings in both actions were dismissed. As the circumstances and the evidence relating to the matters in controversy between the parties are common to both actions, the appeals proceeded together and were heard *de novo* in accordance with the provisions of s. 38 (2) of the Courts of Justice Act 1936; accordingly, a single judgment governing both cases is delivered as follows.

2. The proceedings are brought in negligence and for breach of statutory duty to recover damages for personal injuries and loss sustained by the Plaintiffs as a result of a road traffic accident which is alleged to have occurred at approximately 8.30pm on the 13th January, 2016 at a T-Junction between a minor road and the Ballynamona Road, near Roskeagh, County Louth; the locus is just south of the border with Northern Ireland. Two vehicles were involved: a 2005 Ford Focus driven by Mr. Aiden Rice, in which the Plaintiffs travelled as passengers – Mark in the front and Lee in the rear – and a Ford commercial van owned by the second Defendant the driver of which remained unidentified and untraced. It is alleged in the Personal Injury Summonses that the second Defendant's van collided with the rear of the Ford Focus.

The Issues

3. The first Defendant (the Bureau) delivered defences putting the Plaintiffs on full proof of their claims. The second Defendant did not appear. It follows that in respect of their claims against the Bureau the Plaintiff's carry the onus of proof. The burden placed upon them by law is to establish the case they bring to the satisfaction of the Court on the balance of probabilities. While neither fraud nor any other assertion is pleaded the defences from which the claims might be impugned, the thrust of the cross examination

of the Plaintiffs and their engineer on the case made called into question the very occurrence of a collision between the two vehicles in the manner alleged or otherwise.

4. The omission of an express plea of fraud is understandable in circumstances where the evidence available or likely to be available, if accepted, is insufficient or may be insufficient to sustain the plea. It is a grave allegation to make against any one not to mention a litigant, hence the rule of practice that counsel should only sign pleadings incorporating an allegation of fraud if satisfied that there is evidence upon which, if accepted, the plea would be sustained; the Bureau did not go into evidence.

5. Instead, no doubt having regard to its role pursuant to the agreement between the Minister for Transport and the Motor Insurance Bureau of Ireland, dated 29th January 2009, (the MIBI Agreement 2009) in meeting uninsured motor claims, the first Defendant put the Plaintiffs on full proof. It follows from the defences delivered and from the terms of the 2009 agreement that if the Bureau is to have any liability the Plaintiffs are required to prove the occurrence of an accident as alleged and that this arose as a result of negligence on the part of the driver of the second Defendant's van. In this regard the Defendant contends that the background to the alleged accident, the circumstances thereof-- particularly the rest position of the two vehicles and subsequent events—were suspicious to the point of calling the veracity of the Plaintiffs' claims into question. It follows that these constituents require separate/ individual examination.

Background

6. On the evening of the accident Aiden Rice drove the Plaintiffs to a farmyard premises just across the border with Northern Ireland at or near Killeen, where Mark Fegan had arranged to meet a man from whom he had agreed to buy a car for a small sum of money; the car was referred to in evidence as 'a banger'. The seller did not keep the appointment. Mark Fegan attempted to contact him by mobile phone but without success, due it was said to poor reception in the area. In these circumstances the party waited for approximately twenty minutes in the hope that the seller would turn up, but he failed to show. In the event the party decided to leave and travel home. The return journey took them to the T-junction where the accident is alleged to have occurred. The questions asked under cross examination on behalf of the Bureau raised the suggestion implicitly if not expressly that this account was an unlikely story.

Accident Circumstances

7. Aidan Rice drove up to the T junction along the minor road. It was dark. He was driving on full lights. There was no public lighting in the vicinity nor was there any other vehicle travelling in front of him, however, as the car approached the junction Lee Fegan recalled seeing headlights some distance behind them. Aiden Rice stopped his car at approximately where the minor road meets the major road, just past a stop sign. He looked left and right to make sure it was safe to proceed onto the major road. He intended to take a left turn and signalled his intention by turning on the indicator. Consequently, the driver of any vehicle in view travelling from behind in the same direction should have been in a position to see the rear lights and left-hand indicator light

of the car and that it was stationary. Within moments of stopping the car was struck violently from the rear by the second Defendant's van.

Two Collisions

8. As a result of the impact involved in this collision the car was shunted from its stop position on to the carriageway of the main road, coming to a halt in a position which required traffic to alter course and pass around it by partially driving into the mouth of a laneway to a farm located on the opposite side of the junction. Consequently, the rest position of the car was causing an obstruction on the main road. The van came to rest immediately behind the car. The Plaintiffs and Mr. Rice gave evidence that there was only one collision; they were unaware of a second collision. They got out of the car without delay; Lee Fegan was the last to get out. They were shocked. It was suggested to them that if there had been a collision as described there ought to have been a gap between the vehicles whereas none such was visible in the post-accident photo graphs of the vehicles where they came to rest, a position inconsistent with the Plaintiffs' accounts.

Immediate Post-Collision Events

9. After getting out of the car, the occupants gathered themselves and went around the back of the car to ascertain what had happened. They saw the second Defendant's van on the road behind the car; the driver's door was open. There was no sign of the driver and there were no keys in the ignition. On looking through the rear door into the back of the van all three described seeing large cubes of diesel sludge. Mr. Robert Burke, a Consultant Engineer called on behalf of the Plaintiffs, estimated the weight of the sludge to be in the region of two tonnes. The Court is aware, and it was clear from the evidence, that there is a serious problem with diesel-washing along certain areas of the border with Northern Ireland and that one of the by-products of this illegal activity is the production of diesel sludge.

10. The Plaintiffs and Mr. Rice gave evidence that the illegal disposal of diesel sludge was 'a problem' in the area of the accident. In the circumstances neither the Plaintiffs nor Mr. Rice were surprised to discover that the driver of the Ford commercial van had apparently fled the scene. Under cross-examination by Mr. McArdle, counsel for the Bureau, all three were asked why none of them had given chase to the driver. The response of all was that there were various directions in which the driver could have fled, and it was dark. It is clear from the Google Maps extract of the locus provided in evidence, which included aerial images, that the driver would have had a number of escape options in different directions.

Rest Position of Vehicles Inconsistent with Accident

11. For these reasons and in these circumstances Mr. Rice called the Gardaí. They arrived at the scene shortly afterwards and on their arrival spoke with the members of the party. Mark Fegan took photographs of the vehicles with his mobile phone; these were admitted in evidence. It is clear from the photographs that the van came to rest in contact with the rear of the car. As mentioned above, the Plaintiffs and Mr. Rice gave evidence that there had only been one impact between the two vehicles. As mentioned above, it was suggested by Mr. McArdle that the post-accident position of the vehicles seen in the

photographs was inconsistent with the type of accident described; on the Plaintiffs' scenario when they came to rest there ought to have been a gap between the van and the car, a general proposition with which the engineer agreed. There was no gap. Nevertheless, the Plaintiffs and Mr. Rice were adamant that the collision occurred in the way recounted by them.

Engineering Evidence

12. On cross-examination Mr. Burke agreed that in the ordinary way when a stationary vehicle is hit from the rear with force by a moving vehicle the vehicles separate and come to rest with a gap between them, the size of gap depending on a number of variables; he explained the physics involved. However, in the particular circumstances pertaining at the time it did not follow that the absence of a gap between the vehicles in their rest position did not mean that a gap had not been created as a result of the initial collision. He offered a number of reasons to explain the final rest positions of the vehicles consistent with the creation of a gap on first impact.

13. Firstly, it was clear from his photographs of the vicinity that there was an uninterrupted view of approximately 80 metres along the minor road to the T junction and that over the last 60 to 70 metres the minor road gradient falls gradually towards the major road. The main explanation postulated by Mr. Burke was that after the initial impact between the vehicles, the incline on the road was sufficient to cause the van to roll forward and make contact with the rear of the car. In this scenario, the second impact would have been of an entirely different nature to the first and would most probably have been almost if not entirely imperceptible to the occupants, at least to the point of leaving them with the impression that there a single impact.

14. Secondly, a significant factor in this scenario was the disparity in weights between the car and the van; the disparity was such that the weight of the car would have been insufficient to dissipate the forces necessary to halt the foreword momentum of the van following the impact. The disparity in weight was further accentuated by the weight of the sludge cubes in the back of the van. In Mr. Burke's opinion, unless the handbrake had been engaged (there was no evidence to suggest this had been done) the ultimate rest position of the vehicles was attributable to a combination of factors, including the incline, which meant that the van would not have been brought to a stop as a result of the initial impact but would have continued to move forward, albeit slowly, until coming into contact again with the rear of the car which had been shunted forward as a result of the first collision.

15. Another scenario postulated by Mr. Burke to explain the final rest position of the cars was that they had in some way become entangled in the collision. In this regard he noted a tow bar was fitted to the rear of the car; the van could have been caught by the tow bar. However, it is clear from the photographs that the van is free of the tow bar in its final rest position, although it was undoubtedly involved as collision forces were sufficient to cause deformation damage by pushing the tow bar forward. In Mr. Burke's opinion, entanglement between the van and the tow bar was the less probable of the two postulated scenarios to explain the final rest position of the vehicles

Police investigation

16. While it appears that measurements were taken, and a sketch map was drawn by the police officers who attended at the scene, the officer or officers involved were not called to give evidence on the appeal. Accordingly, it would be inappropriate to draw any inferences or make any findings in this regard. Suffice it to say that the Gardaí were called by Mr. Rice for the reasons already mentioned, that they attended at the scene promptly, that they spoke to the Plaintiffs and Mr. Rice, that they obtained the personal details of the party and took an account from them of what had happened

Subsequent Events

17. Subsequent to the accident, the second Defendant, Mr. Ward called to Aiden Rice's house where a heated exchange concerning the accident circumstances ensued. Aiden Rice gave evidence that he understood the purpose of the second Defendant's call was to complain about Mr. Rice having involved the Gardaí in the accident and that this had seriously annoyed him. This begged the question as to how, if they hadn't known one another previously, the second Defendant knew Mr. Rice's address and that he was the driver of the car at the time of the accident. It transpired that the second Defendant was identified as the owner of the van by the Gardaí at the scene. Mr. Rice and the Plaintiffs gave evidence that they ascertained this information as a result of overhearing radio conversations between one of the officers and the Garda control station in which the identity of the registered owner of the abandoned van was sought and given.

Conclusion:Subsequent Events

18. In the circumstances, it appears probable that it was as a result of subsequent Garda investigations that the second Defendant learned that Mr. Rice was the owner of the car into which his van had collided. The Plaintiffs and Aidan Rice denied any knowledge of him otherwise. I accept their evidence in this regard. Although the second Defendant was identified as the registered owner of the van the Plaintiffs did not attempt to contact him otherwise than by issuing proceedings, even though they were aware of his identity from the evening of the accident; the explanation offered in evidence for not doing so was that as far as they were concerned he was involved in criminal activity.

Approach of the Defendant to the Claims

19. As mentioned at the outset, the circumstances of the accident and the credibility of the Plaintiffs were called into question by the Bureau in the context of the onus of proof carried by them, no doubt to test the veracity of their testimony, the testimony given on their behalf and the weight to be attached by the Court to the evidence adduced. Particularly having regard to its function under the MIBI agreement the Bureau, like any defendant, is quite entitled to put a claimant on proof of his or her claim. While it is not directly alleged or asserted that the Plaintiffs and Mr. Rice were in some way involved in a conspiracy to defraud the Bureau by contriving an accident, as mentioned earlier the proposition advanced is that their credibility, the circumstances surrounding the accident and the accounts of the accident itself are so suspicious that the Court cannot be satisfied the Plaintiffs have discharged the onus of proof required to warrant judgment in their favour. Either way, however, from the perspective of the Bureau the object is the same: to defeat the Plaintiffs' claims.

Conclusion: The Accident Circumstances; Engineering Evidence

20. In the circumstances outlined above it is necessary, when determining whether the Plaintiffs have met the bar that would entitle them succeed in their claims, that the proposition advanced by the Bureau is put to the test. The approach to be taken by the Court in undertaking this task is ordained by law. At the centre of the task is the assessment of the veracity of the witnesses and the weight to be given to their evidence since it is upon the execution and completion of this exercise that the conclusions of the fact-finding tribunal will be founded. In light of the contention advanced by the Bureau, the expert engineering evidence adduced on behalf of the Plaintiffs is critical to the outcome.

21. As mentioned earlier, the Bureau, as was its entitlement, chose not to go into evidence. It follows that in reaching its conclusions on the issues raised, the only engineering evidence available to the Court is that of Mr. Burke. I am compelled to accept Mr. Burke's evidence, particularly the telling scenarios given in response to questions put to him by Mr. McArdle. I am satisfied, and the Court finds, that the most probable explanation for the final rest position of the vehicles is a combination of a number of contributory factors, most particularly the disparity of vehicle weights and the downward gradient of the minor road.

22. As a result of these the van rolled forward from the initial point of impact until it came to rest on contact with the car, which had been shunted forward as a result of the initial collision; a gap would have been created at that point but closed again for the reasons given. This conclusion happens to be consistent with, and most probably explains, the perception of the occupants of the car that there was only one collision. If they were not already out of the car when the collision occurred, the second impact would have been almost imperceptible to the occupants, all of whom were in any event suffering from shock.

Conclusion: Background;Credibility of the Plaintiffs and Mr. Rice

23. Mr. Rice is a commercial/ public vehicle instructor. He says everybody in the area knows him well. He is in a reputable business with his sister and brother-in-law. Considering the approach adopted by the Bureau to the claims the Court was compelled to consider the possibility that there was something suspicious in the accident circumstances as described. In so far as this position is dependent upon the involvement of Mr. Rice, I consider it highly unlikely, having observed his demeanour when giving evidence, that he would have risked becoming collaterally involved in a venture with the Plaintiffs that had the potential to damage his personal and business reputation. Indeed, there is no evidence to suggest that either he nor the Plaintiffs were anything other than law-abiding citizens. On my view of the evidence the background circumstances were entirely plausible.

24. I should add that in over 30 years of practice as a barrister at the provincial sittings of the High Court at Dundalk, particularly during what is euphemistically referred to as 'the Troubles', litigation emanating from contrived accidents, often organised by terrorist/ criminal elements operating in the region, was unfortunately not infrequent. While I have little doubt that criminal activities, such as diesel-washing for monetary gain continue, I

am satisfied and the Court finds that although the owner/driver of the van may well have been involved in such activity there is no convincing or for that matter any cogent evidence that the Plaintiffs were parties to this or any other unlawful activity, or that the collision was anything other than a regular road traffic accident.

Conclusion; Cause of the Accident; Liability

25. I accept the evidence of the Plaintiffs and Aiden Rice and the Court finds that the accident occurred in the way, manner and circumstances alleged in the pleadings. Consequently, the driver of the van was guilty of negligence in failing to keep a proper look out while driving, in failing to see that the car in which the Plaintiffs were travelling was stopped at the junction, in failing to slow down, to stop in good time and in colliding therewith. Unless shown to the contrary, the driver of the second Defendant's van is deemed by s. 118 of the Road Traffic Act, 1961, as amended, to have been driving with the second Defendant's consent. There is no evidence to the contrary.

26. The lights of a vehicle travelling some distance behind, seen by Lee Fegan shortly before the collision, were in all probability the lights of the second Defendant's van. The evidence in this regard is that the impact occurred within seconds of Aiden Rice stopping at the junction. The straight line of sight distance along the minor road to the junction is 80/85 metres; accordingly, as the only other vehicle on the road was the second Defendant's van, the Court finds as a matter probability that the lights seen moments before the collision were those of the van. As the lights of that vehicle were visible to Lee Fegan, the driver of the van ought to have been able to see the rear lights and flashing indicator lamp of the car stopped in front of him at the junction and to have avoided a collision; the failure to do so was the sole cause of the accident. It follows that the Plaintiffs have discharged the onus of proof cast upon them and have therefore succeeded on the issue of liability.

Quantum

27. The medical evidence in both sets of proceedings is comprised in a number of medical reports prepared on behalf of the Plaintiffs which were admitted. Reports in respect of Mark Fegan were prepared by Mr. H. Thakore, Orthopaedic Surgeon, dated the 8th March, 2016 and a supplemental report dated 31st May, 2016 which were followed by medical reports dated the 23rd February, 2017 and 12th October, 2019 prepared by Mr. J.K. Nasser, Consultant Orthopaedic Surgeon. I have read and considered these reports. As the medical evidence is agreed, suffice it to say that the Plaintiff, who was born on the 5th July, 1970, and is a mechanic by occupation, sustained soft tissue injuries to his neck, his lower back and left elbow. His neck pain radiated into both shoulders. He developed a small olecranon bursa over the olecranon process of the left ulna.

28. While the sequelae from the neck injury resolved relatively quickly, the Plaintiff continued to be symptomatic in respect of his left elbow and lower back. X-ray examination of the neck left elbow and back out ruled any bone injury, however, x-rays of the lumbar spine confirmed age related pre-existing degenerative change at the L5/S1 level. The Plaintiff attended his GP, Dr. Shane Gleeson who prescribed pain killing medication and physiotherapy. The injury to the left elbow gradually settled down but the lower back

injury continued to give trouble and he was still symptomatic when seen by Mr. Nasser on the 31st January, 2017.

29. The principle sequela at this time was of intermittent back pain accompanied by morning stiffness. Certain activities such as bending, stooping or lifting, sitting or standing for long periods of time provoked symptomology. The Plaintiff did not find physiotherapy to be of any great assistance. He experienced constant low back pain for some time following the accident but this gradually became more intermittent and by the end of January 2017, he was reported by Mr. Nasser to have considered himself well on the way to recovery. He continued to improve with time and when reassessed on the 13th September, 2019 considered himself to have almost fully recovered. At that stage Mr. Nasser's prognosis was for a full recovery within a further six months. His prognosis was borne out.

30. Medical reports in respect of Lee Fegan's injuries were prepared by Dr. Giby Vettiankal dated the 4th April, 2016 and by Mr. J.K. Nasser, dated the 24th April, 2017 and 27th November, 2019. I have read and considered these reports. The Plaintiff sustained soft tissue injuries involving his mid and lower back which resulted in mid back pain extending from below the right shoulder blade into the lower back. He attended his GP and was prescribed pain killing and analgesic medication. On physical examination he had mid and lower back tenderness with a restricted range of movement. He developed left leg pain when sitting or driving for long periods of time.

31. His back pain was initially constant and aggravated by certain activities. Left leg pain radiating to the left knee was provoked by sitting or driving for long periods. He continued to take medication and underwent a course of physiotherapy. Clinical examination in March 2017 showed a restricted range of lumbar spinal movement with tenderness on stressing the left sacroiliac joint. He was still symptomatic in his lower back when seen by Mr. Nasser for a follow-up review in November 2019. He considered himself as having improved by about 50% when compared to his symptomology experienced in the post-accident period. His back symptoms were protracted but with time continued to improve and by the time of the hearing, the Plaintiff's evidence was that he had essentially recovered fully from his injuries.

32. In addition to the medical reports, the Plaintiffs gave evidence in relation to the injuries sustained and how they had been affected by them. Having regard to the requirement that the Court should have regard to the revised Book of Quantum by virtue of s. 22 of the Civil Liability and Courts Act, 2004, it has always been my practice to invite counsel to make submissions to the Court in relation to the applicable range of damages where provided in the Book relevant to injuries sustained. For a discussion in this regard see *Murphy v. The Minister for Public Expenditure and Reform* [2015] IEHC 868.. Counsel accepted the invitation and made submissions. Mr. Kenneally, on behalf of the Plaintiffs, suggested that awards in the region of €25,000 or thereabouts would be appropriate for each Plaintiff,whereas Mr. McArdle on behalf of the Bureau suggested a somewhat lower

figure was appropriate given that both Plaintiffs had completely recovered from their injuries.

33. It is quite clear on the agreed medical evidence that these claims fall within the jurisdiction of the Circuit Court and that the claims were appropriately brought in that jurisdiction; however, jurisdiction is not a factor to be taken into consideration by a court in determining the measure of damages, whether at first instance or on appeal. Rather, the court must approach that exercise in accordance with well settled principles. In this regard the damages to which the Plaintiffs are entitled are compensatory; their object beingso far as it can be achieved by an award of money, to restore the Plaintiffs to the position in life enjoyed or likely to be enjoyed at the time when the wrong was committed.

34. Compensatory damages are awarded for pain and suffering to date and, where appropriate, for any pain and suffering that will or may probably occur in the future. Compensation for pain and suffering extends to embrace not only the neurological experience of physical pain and psychological suffering but also the impact which the injuries have had and, in an appropriate case, are likely to have on the enjoyment of the amenities associated with the living of life. The damages to be awarded must just to both parties and to be just must be fair and reasonable. A fair and reasonable award is one which is proportionate to and commensurate with the injuries and the consequences thereof sustained or likely to be sustained. For a more comprehensive discussion on the subject see *B.D. v. The Minister* [2019] IEHC 173.

35. Having considered the medical evidence together with the evidence of the Plaintiffs, I am satisfied that they have recovered fully from their injuries. Accordingly, damages fall to be assessed for pain and suffering to date only. The sequelae suffered by Lee Fagan are marginally more significant and lasted longer than those suffered by a Mark Fegan. In the event, the Court considers that a fair and reasonable award to compensate Mark Fegan for pain and suffering is €20,000 and in respect of Lee Fegan the sum of €25,000. Claims for special damages were agreed at €625 in respect of Mark Fegan and €1725 in respect of Lee Fegan, with the same to be added to the respective awards for general damages.

Ruling

36. Having regard to the findings made and conclusions reached, the Court will allow the appeals against the orders of the Circuit Court and will make orders for the awards of damages in accordance with the terms of this judgment. I will discuss with counsel the final form of the orders to be made.