

THE HIGH COURT

[2021] IEHC 689

[Record No. 2018/2371 P]

BETWEEN:-

JOHN RYAN

PLAINTIFF

AND

PATRICK O'SULLIVAN AND FIONNUALA O'SULLIVAN

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered extempore on 27th October, 2021.

Introduction

1. This action arises out of a road traffic accident that occurred at approximately 16.15 hours on 13th May, 2017. There were three vehicles involved in the accident. Both the plaintiff's vehicle and the vehicle driven by the first defendant were driving eastbound on the M7 motorway going in the direction of Dublin. The third vehicle, which was owned by a Mr Healy, was stopped on the hard shoulder, as it had broken down.
2. The accident occurred approximately 750 m beyond junction 23 on the motorway. It is common case between the parties that it had rained very heavily earlier in the day and that it was raining lightly at the time of the accident. It was common case that there was a considerable quantity of surface water on the road at the locus of the accident.
3. In essence, the plaintiff's case is that he was travelling at approximately 110 km/h in the left-hand lane, when the defendant overtook his vehicle and when he had got a short distance of perhaps one or two car lengths in front of the plaintiff's car, the plaintiff says that he saw the defendant's car "shimmy" or go into a wobble and lose control. The plaintiff states that the defendant's car came over into his lane and a collision occurred in that lane, when the rear passenger door and wheel arch of the defendants vehicle struck the right wing and wheel arch area of the plaintiff's car.
4. The defendant's evidence was totally different. He stated that he had been travelling behind the plaintiff's vehicle, when he decided to overtake it. He glanced at his speedometer and noted that he was travelling at approximately 115 km/h. Having checked that the overtaking lane was clear, he proceeded into that lane and was in the course of overtaking the plaintiff's vehicle, such that half of his car was in front of the plaintiff's car and the rear passenger side of his vehicle was abreast with the plaintiff's vehicle. He states that suddenly he felt a bang on the rear of his car on the passenger side which had been caused by the plaintiff veering into his lane. The defendant states that this sent his vehicle into a spin in an anticlockwise direction. He stated that it had spun at least once or twice and had moved left across the motorway when it collided into the rear of Mr Healy's vehicle and shunted it some 200 m down the hard shoulder.
5. Thus it can be seen that there is a considerable conflict in the accounts given by the respective drivers. For that reason it will be necessary for the court to examine closely the areas of evidence on which there is little or no debate. In relation to the locus of the accident, this was shown clearly in the photographs taken by the plaintiff's engineer. It was agreed by all parties that the width of each carriageway on the motorway was 3.5 m.

The width of the left hand hard shoulder was circa 2.5 m. Beyond the right hand lane the concrete barrier in the centre of the motorway was a further 1.5 m from the outer edge of the right hand lane.

6. The locus was most clearly shown in photographs six, seven and eight of the booklet of photos taken by the plaintiff's engineer. It can be seen that on the extreme left side of the left hand hard shoulder, there was a steel barrier to prevent vehicles leaving the road and crashing into the rock embankment on the left. That barrier came to an end but restarted again some distance further on where there was a danger that cars might leave the road and fall down a steep embankment. The locus of the accident is most clearly shown in photograph number eight. Mr Healy stated that his car had broken down and was parked just at the beginning of the steel barrier as shown in that photograph.
7. There was a slight incline in the road leading to the locus and it was also part of a bend turning to the right. The evidence of the Garda witnesses was that this stretch of road was very dangerous in wet weather due to the fact that surface drainage was very poor and as a result a large accumulation of surface water would occur. They stated that when the weather was particularly wet, they would be awaiting the inevitable phone calls that a serious road traffic accident had occurred at that locus. The locus has changed since that time, in that the local authority has placed a barrier all along the left-hand section and they have also taken steps to prevent the accumulation of water on the road surface. However, there is no doubt but that the locus was a particularly dangerous stretch of road in the weather conditions that presented on the day of the accident.
8. The plaintiff was driving his 161 registered Volvo XC90 car. On the day of the accident he was accompanied by his wife and four children, aged seven years to 4 months. The unladen weight of the Volvo was circa 2000 kg. This vehicle had the benefit of a warning system for when cars would enter one's blind spot when overtaking. It is known as a blind spot information system (BSIS). It causes a light to flash on the wing mirror whenever a car is approaching ones blind spot area in the course of overtaking the vehicle. It also had lane assist, whereby the steering wheel would vibrate if the car veered out of its lane.
9. The defendant was driving his wife's 08 registered red Ford Focus hatchback. The defendant was accompanied by his wife, the second named defendant. She was sitting directly behind the driver's seat in the rear of the vehicle. To the defendant's left in the front passenger seat was his mother-in-law and his daughter was sitting behind her in the rear left passenger seat. The unladen weight of the Ford Focus was circa 1350 kg.
10. The third vehicle, was a Skoda Octavia owned by Mr Healy. It was a 161 registered car. It's unladen weight was in the region of 1280 kg.
11. As already noted, after the impact between the plaintiff's vehicle and the first defendant's vehicle, the first defendant's vehicle proceeded to its left across the motorway where it struck Mr Healy's car, which was stationary on the hard shoulder. According to Mr Healy, his car was struck with such force to the rear and from the left, that it was caused to be propelled to its right crossing the two carriageways where it hit the centre median and

then bounced back across the two carriageways and came to rest on the hard shoulder facing towards the fields to the left of the motorway. It was some 200 m beyond the first defendant's vehicle on the hard shoulder. The defendant did not accept that his vehicle had shunted Mr Healy's vehicle across the motorway and that it then came back onto the hard shoulder, but he did accept that it had shunted Mr Healy's vehicle a considerable distance up the hard shoulder.

12. After the impact between the plaintiff's vehicle and the defendant's vehicle, the front and side airbags on the plaintiff's vehicle operated, meaning that he was not able to see what happened thereafter. It is common case that his vehicle left the motorway to its left and went off the motorway completely at a point just before the re-commencement of the steel barrier as shown in photograph number eight and it then rolled a number of times down the embankment coming to rest on the passenger side of the vehicle. Fortunately there were no fatalities as a result of this road traffic accident. After some short time, the plaintiff and his wife were able to extricate their children from their car seats and were able to remove both themselves and the children from the car.
13. The court has been greatly assisted by the technical evidence given by the engineers and the motor assessor retained by both sides. The court also had the benefit of a large number of photographs showing the damage to the respective vehicles. The court will return to this evidence later in the judgment.
14. The court also had the benefit of hearing evidence from Mr Healy and from the second named defendant and from her daughter. Both Mrs O'Sullivan and her daughter recalled the impact between the plaintiff's car and the car in which they were travelling. They recalled the car being put into a spin, rotating in an anticlockwise direction. They both said that as a result of the impact on the car going into a spin, they were caused to be shunted to their right. Mrs O'Sullivan stated that she was wedged tight against the rear driver's side passenger door. Her daughter, Ella, stated that she was thrown over against her mother.
15. The critical part of Mr Healy's evidence was that he glanced up into his rear view mirror; he saw the defendant's car and the plaintiff's car both in the slow lane coming towards him and he stated that they seemed to be very close together. He stated that there was then a very severe bang as his car received a rear end impact from the front of the Ford Focus driven by the defendant. He stated that he did not see the defendant's car spinning when he first saw it. He felt that the Ford Focus hit his car somewhat at an angle from the left.
16. The court also had the benefit of the evidence of two Gardaí who attended at the scene. Garda Amanda Flynn stated that that section of road was "horrific" when wet. She stated that in such inclement weather conditions, it was common for vehicles to aquaplane and lose control. She had drawn up a sketch of the scene of the accident in her notebook. While the court finds that some of the details in her sketch are not accurate, the court is satisfied that these inaccuracies can be explained by the fact that she was doing the sketch in a very small space, being a page in her notebook. The court finds that the

sketch is inaccurate in two respects: firstly, it shows all of the vehicles in their resting position pointing eastwards in the Dublin direction, when in fact Mr Healy's car was facing northwards into the fields on the left-hand side of the motorway; secondly, it appears to show the plaintiff's car coming to rest at or about the hard shoulder, when in fact it is common case that his car had rolled down the steep embankment.

17. However, the court is satisfied that these inaccuracies were caused by the lack of space and also by the fact that she was in the course of investigating a multiple vehicle accident in which there were numerous injured parties. The court is satisfied that in its essential details, the sketch is accurate. In particular, the court is satisfied that there was a very substantial distance between the resting positions of the defendants vehicle and Mr Healy's vehicle after the impact between those two vehicles.
18. The court also heard evidence from Garda David O'Connor. He stated that he had a conversation with the first defendant at the scene of the accident. The first defendant told him that he had overtaken the Volvo motorcar and had then lost control of his own vehicle. In cross-examination, Garda O'Connor accepted that all occupants of the vehicles were probably in shock after the accident. In re-examination, he confirmed that the first defendant had not alleged that the Volvo car had caused him to lose control of his vehicle, nor that it had left its lane at any stage.
19. Some four days after the accident, a number of the parties made statements to the Gardaí. In his statement made at Roscrea Garda station to Garda Amanda Flynn on 17th May 2017, the first defendant gave the following account of the accident:

"I remember passing the Obama plaza. I was travelling in the slow lane and went to overtake the vehicle in front of me, I'm pretty sure it was a black car. As I was passing out the car, just before I came to the car it wobbled. I hit the brakes and the car veered off to the left. I don't think I had passed out the car. I think that car kept driving. The next thing I remember was hitting something and the car went into a spin. I was scared at that moment. The car kept spinning doing 360° movements and landed in the ditch (hard shoulder) facing forwards Dublin."
20. The first defendant was clearly wrong in that statement in relation to the colour of the plaintiff's vehicle, as it was a silver Volvo. It was not black in colour. It is also noteworthy that that was the second admission that the defendant had lost control of his vehicle after he had "hit the brakes". When it was put to the defendant in cross-examination that he had admitted on two occasions having lost control of his vehicle, at the scene of the accident and in his statement four days later, he stated that he had been in shock in the immediate aftermath of the accident and in the days thereafter. He stated that he only came to recall the exact circumstances of the accident as recounted by him in his evidence to the court "some time later".
21. The plaintiff also made a statement to the Gardaí four days after the accident. In that statement he stated that he had been travelling at approximately 110 km/h. He described the accident in the following way:

"I remember being overtaken on the fast lane. I remember it was a red car, I remember the spray of the car when it overtook me. The red car overtook us; it had passed us and was ahead of us in the fast lane, we were still in the slow lane. I noticed it started to weave in the fast lane. The rain was moderate at the time. I could see a dark coloured car ahead of us. When the red car passed us out I did observe that it was travelling significantly quicker than us. It was only gone a couple of lengths ahead of us when it started to weave. I remember thinking the red car was going to hit the black car I could see ahead. But I can't say for definite I saw the red car hit the black car. I remember thinking it was going to hit us. The red car had spun into our lane out of control and hit us on the front driver's corner side. The red car hit us. I immediately felt our car go sideways to the left and drift. The airbags had went off in the car so visibility was poor. I remember the car hopping around first and we went up over the bank. The car rolled a number of times and stopped on its side."

22. In his evidence to the court the first defendant was very clear that he had been travelling at 115 km/h. However, in his statement to the Gardaí he had stated: "I don't know what speed I was travelling at". When giving instructions to his engineer some months later, he told him that he had been travelling at 115/120 km/h. In his evidence he was certain that he had been travelling at 115 km/h, because he stated that he had glanced at his speedometer prior to commencing the overtaking manoeuvre.

Conclusions.

23. Having considered all of the evidence in this case the court has come to the conclusion that the version of the accident as put forward by the plaintiff is the true account of how the accident occurred.
24. The court has reached this conclusion for a number of reasons. Firstly, the court cannot ignore the fact that the defendant made two statements to the Gardaí, one a verbal statement at the scene of the accident and the other, a formal written statement some days later, wherein he stated that he had "hit the brakes" and had lost control of his vehicle. While the defendant attempted to distance himself from these statements by alleging that he was in shock in the immediate aftermath of the accident and in the days thereafter; the court does not think that that is a sufficient excuse for giving an account of the accident that is so inconsistent with his version of the accident some years later at the trial of the action.
25. The court can well understand that in the immediate aftermath of a multi-vehicle collision, a party may well be mistaken in relation to certain aspects of the accident. However, that does not mean that a party would take responsibility for the accident and effectively admit that his vehicle went out of control, but leave out the most important point, being that he allegedly lost control of his vehicle due to being struck by another vehicle. While the defendant may have omitted to give the correct version at the scene of the accident, it is stretching credibility to say that he was still in shock at the time when he gave his detailed written statement four days after the accident. It also has to be noted that while he was injured in the accident, he only suffered a sprained ankle. Thus his comments

cannot be seen as having been made at a time when he was in severe pain, or was otherwise incapacitated.

26. Secondly, the court has been unimpressed by the defendant's evidence in relation to his speed. His evidence at the trial, to the effect that he was going at 115 km/h and that he knew that because he had looked at the speedometer just prior to overtaking the plaintiff's car, does not sit well with his statement to the Gardaí on 17th May, 2017 that he was not aware of what speed he was doing at the time of the accident; nor does it sit well with his statement to his own engineer some months later, that he was doing between 115/120 km/h.
27. Thirdly, the court prefers the evidence given by the plaintiff's experts Mr Flynn and Mr Sullivan to the effect that if the plaintiff's car had veered to its right and crossed into the right-hand lane on the motorway and there collided with the defendant's vehicle, as alleged by the defendant, one would have expected to have found more evidence of tyre impact with the side of the defendant's vehicle. While there was some evidence of tyre marks on the defendant's vehicle, it was agreed that this was a very glancing blow and would only have represented approximately 2/5 of a rotation of the wheel coming into contact with the side of the vehicle. The court prefers the evidence of the plaintiff's experts that had the car been turned into the defendant's vehicle, the wheels would have been protruding substantially from the wheelarch and there would have been much more evidence of tyre marks on the defendant's vehicle.
28. In essence, all the experts were of the view that the impact between the vehicles was of a brief and glancing nature. This indicated that the cars were probably travelling almost parallel at the time of impact. The court is satisfied that that can be explained by the fact that when the defendant's vehicle lost control and veered into the plaintiff's lane and was breaking, the plaintiff must have veered somewhat to his left to try and avoid the collision. It is common case that the collision ensued and both vehicles then proceeded to their left, where the plaintiff's vehicle left the motorway altogether and went down the embankment and the defendant's car struck Mr Healy's car in the hard shoulder.
29. Fourthly, the court prefers the evidence of Mr Sullivan that, given the point of impact between the defendant's car and Mr Healy's car, and the evidence of the occupants of the defendant's car that it had been spinning prior to the impact with Mr Healy's car, that it is more probable that the defendant's car was spinning in a clockwise direction. Had the car been spinning in an anticlockwise direction, as alleged by the defendant, it is difficult to see how it could have shunted Mr Healy's car such a distance up the hard shoulder.
30. The court is further supported in that view by the fact that the two rear seat occupants of the defendant's car were thrown to their right which would tend to indicate that the car itself was spinning in a clockwise direction, because due to the effect of centrifugal forces, the occupants of the car travelling slower than the car itself, would normally be thrown in the opposite direction to the direction of travel of the car.

31. Fifthly, the photographs of the car damage to both the defendant's car and the car owned by Mr Healy, indicate that the impact between those vehicles was very severe. This is supported also by the fact that Mr Healy's car ended up some 200 m further down the hard shoulder. The court finds that this is indicative of very considerable speed on the part of the defendant's car at the moment of impact between it and Mr Healy's car.
32. Sixthly, given that the plaintiff's vehicle was considerably heavier than the defendant's vehicle, if the plaintiff's vehicle had veered to its right and come into the overtaking lane and there struck the defendant's vehicle, as alleged by the defendant, it would have driven that car to its right. However, all the evidence is that after the impact, both cars moved towards the left side of the motorway. There is no evidence that the right of the defendant's car struck the centre median, which would have happened if it had been struck forcibly from its left by a much heavier vehicle.
33. Finally, having paid close attention to the manner in which both the plaintiff and the first defendant gave their evidence and having regard to the consistency of their accounts over time, the court is satisfied that the plaintiff's account is more probable, than that given by the first defendant.
34. The court is of the view that on the balance of probability this accident occurred because the first defendant was impatient with the speed at which the plaintiff was travelling at the time. The first defendant elected, in spite of the inclement weather conditions and perhaps not knowing that the road was very dangerous when it had excess surface water on it, to undertake the overtaking manoeuvre and possibly due to the level of spray that was being emitted from the wheels of the Volvo, he may have been blinded by excess water coming onto the windscreen and for that reason he braked. That had disastrous consequences due to the speed at which he was travelling and due to the presence of excess water on the surface of the road. He commenced aquaplaning and lost control of his vehicle. I am satisfied that when that happened his vehicle did veer into the slow lane, as alleged by the plaintiff, and the impact between the vehicles happened in that lane and both vehicles proceeded on to the left side of the motorway and beyond.
35. Section 8 of the Rules of the Road states:

"As a driver you must always be aware of your speed and judge the appropriate speed for your vehicle taking into account the driving conditions and other users of the road, current weather conditions, all possible hazards and speed limits."
36. The court is satisfied that in this case, even if the defendant was driving within the speed limit of 120 km/h, he was driving far too fast for the weather conditions and the treacherous nature of the road surface at the locus. As a result he lost control of his vehicle and the accident happened in the way described by the plaintiff. Liability for this accident must rest entirely with the first defendant and with the second defendant, as the owner of the vehicle.

Quantum.

37. Turning to the issue of damages, the court was impressed by the candid way in which the plaintiff described his injuries. The court is satisfied that he did not try to exaggerate either the circumstances of the accident, or the injuries that flowed therefrom.
38. There was no medical evidence called at the trial. Instead, the court was furnished with two medical reports from the plaintiff's GP, Dr Aisling Wallace and a report from his physiotherapist, Miss Elaine Carey. The court was also furnished with two medical reports from Mr Thomas Burke, consultant orthopaedic surgeon, who had examined the plaintiff on two occasions on behalf of the defendant. It is not necessary to set out the content of those reports in detail in this judgment.
39. In summary, the plaintiff suffered multiple physical injuries in the accident, primarily in the form of soft tissue injuries to his neck, upper back and shoulder. There was also some bruising to his knees. The physical injuries caused him considerable pain and discomfort in the immediate period after the accident.
40. He was taken from the scene of the accident by ambulance and was treated in hospital where he had x-ray, MRI and CT scans carried out. These were all negative. He was discharged from hospital later on the day of the accident. He first attended with his GP on 18th May, 2017. He was given analgesics and Valium. He saw his GP on three occasions in the first four months after the accident.
41. The plaintiff's primary physical injury was to his neck and shoulders. For this he came under the care of Miss Carey, chartered physiotherapist, who he saw on approximately 10 occasions. By the time of the subsequent review by his GP on 19th April, 2021, some four years post accident, he had made an almost full recovery from his physical injuries.
42. It is also of note that the plaintiff had suffered a fall while carrying out his home exercise programme, when he fell off a chin up bar and landed on his shoulder. An MRI scan showed acute right sternoclavicular joint sprain injury with minimally displaced right anterior costal cartilage fracture. The plaintiff was referred to an orthopaedic surgeon, who advised conservative management and physiotherapy.
43. The plaintiff had suffered from migraine headaches prior to the accident. These had occurred 3/4 times per year. This condition was aggravated as a result of the accident. He was commenced on medication, which he continues to take to the present time. While the frequency and severity of the migraine headaches has diminished, he still requires medication and the number of migraine attacks remains elevated from its preaccident level.
44. The plaintiff also suffered considerable psychological sequelae after the accident. In particular, he suffered from flashbacks, anxiety when driving, anxiety when having to travel abroad by aeroplane, loss of concentration, and difficulty coping with the demands of his job. He also experienced "floaters" in his eyes, which could precipitate the onset of a migraine attack.

45. The plaintiff required treatment for his psychological difficulties. He attended with a psychotherapist/councillor, Ms Deirdre Fay, on approximately 10 occasions in the first year after the accident. The plaintiff continues to experience anxiety, particularly when driving on the motorway and when having to travel abroad, although that has not been a feature during the Covid-19 pandemic, as he was largely working from home.
46. The plaintiff took time out from work due to his psychological difficulty in coping with the demands thereof. However, rather than bringing this to the attention of his employer, he took the time off as annual leave. In total he took approximately 15 days off work.
47. The plaintiff also stated that in 2017 he had put his name forward for appointment to a more senior role in the company, which would be based in Denmark. However, when the accident occurred, and when he had particular difficulty coping with the demands of his work, he discussed the matter with his wife and they decided that it would not be a good idea for him to make the move to another country; so he withdrew his name from the promotion process. The plaintiff very candidly admitted that another factor in the decision, was the fact that one of his children was receiving excellent medical treatment in Ireland for her injuries arising out of the accident and they did not want to jeopardise that.
48. When examined by Mr Burke on behalf of the defendant on 4th June, 2021, the doctor noted that the plaintiff had substantially recovered from all physical aspects of his accident. He still had a degree of mental turmoil which he was coping well with. The doctor was of the view that there was a good chance that his psychological symptoms would further abate over time once the litigation was concluded.
49. Thus, this plaintiff was involved in a very traumatic accident from which he suffered physical symptoms that appear to have settled reasonably well over a reasonable period of time. However, there are two aspects that have continued; his migraine condition has been aggravated to such an extent that he requires medication and the frequency of his migraine attacks has been increased. He has also suffered psychological injury in the form of anxiety, loss of concentration and difficulty sleeping. The plaintiff has made a determined effort to deal with these issues and it is hoped that a full resolution will be achieved in due course.
50. Taking all the circumstances into account, court awards the plaintiff €35,000 as general damages to date, together with €10,000 for general damages into the future.
51. To this must be added the sum of €2,869.67 as agreed special damages. The plaintiff also claimed the sum of €5,447.80 in respect of the periods that he took off work due to his injuries, but these have been taken by way of annual leave. The plaintiff stated that he did not want to take them as sick leave, due to the fact that he did not want to alert his employer to the fact that he was having psychological difficulties after the accident. He stated that he feared that such state of affairs if known to his employer, might have had adverse consequences for him in the work aspects of his life.

52. While the court can readily understand that people may be reticent or afraid to mention the fact that they have, or have had psychological difficulties, for fear that that may be held against them in relation to promotion or other aspects in their worklife, the court does not feel that it can allow damages in respect of a notional loss of earnings, which was not in fact incurred by a plaintiff, due to the fact that he took the time off as annual leave rather than sick leave. If the plaintiff had sought the time off as sick leave, he would have had to have obtained a medical certificate from his doctor stating that he was unfit for work for the relevant period. It is only if he was not paid during that period when he was off work, that he could mount a claim for loss of earnings. Accordingly, the court declines to award this sum as special damages.
53. Finally, the plaintiff sought the sum of €35,687.64 as loss of earnings allegedly suffered by him due to the fact that he was unable to obtain promotion to the position that was advertised within the company in Denmark. The court is of the view that it cannot award this sum as damages for a number of reasons. Firstly, it is not clear from the evidence whether the plaintiff was actually offered the job in Denmark at a particular salary, or had merely removed his name from the promotion process prior to the appointment having been made. If it was the latter, then his only loss was a loss of opportunity to be considered for the position, rather than actually losing the post itself.
54. Secondly, the court was not furnished with any evidence, either oral or written, as to how this sum was computed. Presumably, it was based on a net differential in salary that would have occurred had he been promoted and been in a position to accept the job in Denmark.
55. Thirdly, the court has already noted that the plaintiff very candidly stated that one of the reasons that he did not take up the position in Denmark was due to the fact that one of his children was receiving medical treatment in Ireland at the time. The plaintiff and his wife made the decision that they did not want to interrupt that treatment. That was an entirely reasonable position for them to adopt, but it cannot be said that his reason for not taking up the position was entirely due to the injuries he sustained in the accident.
56. Finally, there was no evidence from a doctor that the plaintiff was incapable of taking up the position due to his injuries, nor even that such a course was medically contra indicated.
57. In the circumstances, the court proposes to award a modest sum to compensate the plaintiff for the loss of opportunity in relation to this promotion, which decision the court accepts was caused to a large extent by the injuries sustained by him in the accident. The court awards the sum of €5,000 in respect of loss of opportunity in this regard.
58. Adding the various heads of damage together, the plaintiff is entitled to judgment against the defendants and each of them in the sum of €52,869.67.