THE HIGH COURT

[2021] IEHC 707

[Record No. 2016/7818 P]

BETWEEN

DAMIEN DAVEY

PLAINTIFF

AND

SLIGO COUNTY COUNCIL, M.D.S. DISTRIBUTION LIMITED AND VLASTIMIL ZACHAR

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Paul Coffey delivered on the 29th day of October 2021

1. At 11.18am on 13th August, 2015 an unladen Scania HGV weighing approximately 15 tonnes owned by the second named defendant and then being driven at 88 kmph by the third named defendant veered off the northbound single carriageway on the N4 at Whitehill near Castlebaldwin, Co Sligo thereby entering the hard shoulder in which Sligo County Council was then carrying out maintenance works where it collided with the rear of a Mitsubishi pick-up truck and thereafter a Caterpillar digger thereby injuring the drivers of both vehicles and three pedestrian workers who were struck by the digger, including the plaintiff and Padraig Noone who was pronounced dead at the scene. It is not in dispute that both impacts were of

massive force and directly caused by the negligence of the third named defendant who it is accepted fell asleep at the wheel of his vehicle for which his employer, the second named defendant is vicariously liable. At issue at this stage of the case is solely the issue of the concurrent liability, if any, of Sligo County Council against whom the second and third named defendants have claimed indemnity and contribution on the basis that the road authority wrongfully failed to take due or proper precautions by way of temporary traffic management control measures to address the risk of a driver falling asleep and crashing into its works area. On the tenth day of this trial all relevant parties agreed that the determination of liability in this case will bind the defendants in respect of seven other claims that have been brought arising from the same accident.

2. Prior to this case coming to trial the Health and Safety Authority which has a statutory duty to investigate serious accidents and to monitor compliance with health and safety laws, carried out an investigation into the accident. Arising from its findings, a criminal prosecution was brought on indictment against the third named defendant before the Circuit Criminal Court for the County of Sligo. On 12 February 2019 and following a trial before a judge and jury, the third named defendant was convicted of the offence of careless driving causing the death of Padraig Noone and causing serious bodily injury to the Plaintiff and Anthony Feighney all of whom were struck by the digger whilst working in or close to the grass verge adjacent to the hard shoulder at the time of the accident. As the relevant elements of the verdict of the jury are both manifest and specific both as to wrongdoing and causation, the criminal conviction is admissible in these proceedings as *prima facie* evidence of negligence and causation on the part of the third named defendant. No adverse findings were made by the HSA against the Council and the evidence of its inspector, Mr Murphy to

this court was that the accident that occurred was “very unlikely” and that the precautions taken by the Council were reasonable. The verdict in the criminal proceedings appears not to have been appealed notwithstanding which the third named defendant maintained a denial of any liability in these proceedings until the third day of this trial when both he and his employer also withdrew what appears to have been an utterly gratuitous and evidentially unfounded allegation of negligence against the deceased Padraig Noone in a fatal injury claim and nervous shock action brought by his widow which were then before this court.

3. The trial of the issue of liability before this court has taken fourteen days. As the parties are most anxious to have a unitary trial I do not have the luxury of reserving judgment or rehearsing in extensive detail the evidence relied upon by both parties which is in any event recorded and set out in the transcript.

4. Although the defendants are sharply divided on the issues of negligence and causation, there is much in the case that is not in dispute. Specifically, there is little controversy as to the layout, nature and course of the works that were being carried out by the road authority immediately prior to the accident, all of which were being carried out on the hard shoulder and in the grass verge adjacent to it without any encroachment on to the live carriageway. Similarly, there appears to be little or no dispute as to the clear visibility of the warning and guidance signage that were in the third named defendant’s line of vision as he approached the initial point of impact with the pick up truck. Furthermore, there appears to be little contest as to where the initial point of impact was or how the accident developed all of which are the subject of a report prepared by Sergeant PJ Gallagher whose findings and conclusions appear to be accepted by all parties.

5. In summary, the case made by the second and third named defendants is that the temporary traffic management plan which was designed and adopted by the road authority was inadequate in that it failed to take account of what was characterised by their senior counsel as the reasonably foreseeable but unavoidable risk of a driver falling asleep and encroaching into the works area which it is contended resulted in precautions not being taken which might have avoided or ameliorated the consequences of the two impacts that occurred.

6. Before analysing the case so made, it is necessary that I summarise the facts that appear not to be in dispute. In so doing I will where relevant refer to the interviews which the Gardai conducted under caution with the third named defendant in the course of the criminal investigation into the accident which also form part of the evidence in this case.

7. Immediately prior to the accident and having completed similar works on the opposite side of the road, the Council had begun carrying out maintenance work in the northbound hard shoulder of the road that were intended to proceed in a continuous movement at a rate of 333m an hour along a 500m section of the northbound carriageway of the N4. The maintenance works had commenced three days before the accident and had been observed by the third named defendant who admitted to the Gardai when being interviewed that he had driven the same road three times earlier in the week and had seen people cutting grass. The maintenance work consisted of three activities- verge trimming and strimming, litter picking and drain clearing, all of which were being carried out in a convoy that was approximately 55m in length and which had progressed about 100m along its intended route when the accident occurred. To the front of the convoy were two tractors to which were attached flail cutters which were being used to trim the adjacent grass verge at two different

distances from the hard shoulder. Both tractors were operated by independent contractors who were driving forward in a northbound direction at walking pace. Behind the verge cutters were three pedestrian litter pickers all of whom were standing in or in close proximity to the grass verge from which they were removing litter or strimming in the area that had been mown by the two tractors. Behind the pedestrian workers was a caterpillar digger also facing in a northbound direction and therefore parallel to the road which was operated by an independent contractor who was opening water inlets which were at irregular intervals in the grass verge immediately beside the hard shoulder at a rate of approximately one inlet every 5 to 7 minutes. At the rear of the convoy was a stationery Mitsubishi pick-up truck which served both as a transport and as a warning vehicle upon whose rear was mounted a large 1.5m x 1.2m reflective red/yellow sign which included a “road works ahead” and a “keep right sign” and four flashing lights at each corner all of which were working and facing oncoming traffic.

8. Preceding the works area at three different locations was a sequence of three further signs to warn approaching traffic of the presence and proximity of the work site. At approximately 6.2km from the accident location, a VMS or variable messaging sign had been placed which gave three warnings in the following sequence- “verge trimming ahead/ for next 10km/no hard shoulder”. The third named defendant admitted to the Gardai when being interviewed that he had passed and seen this sign on the morning of the accident.

9. At approximately 270m from the accident location, a “road works ahead” sign with supplementary “2km ahead” sign and a traffic cone had been placed. At approximately159m from the accident location a further “road works ahead” sign with a supplementary “verge trimming” sign and traffic cone together with a “keep right”

sign had been placed. All the vehicles on the work site including the digger and the tractors had flashing beacons and were within the area of the hard shoulder as were all seven operatives on site who were also wearing high viz vests and trousers. There appears to be no dispute as to the clear visibility of the signs or as to their adequacy to warn approaching motorists of the presence and location of the works area in the hard shoulder. Sgt Curley who attended the scene shortly after the accident had occurred stated that the signage was "clearly visible" whilst another witness in his agreed statement, James Horan pithily observed that the signs were "plenty adequate to warn motorists". It was in any event accepted by senior counsel for the second and third named defendants that the third named defendant should have seen both the signs and the warning vehicle. Whilst the third named defendant told the Gardai when being interviewed that he did not remember seeing the signs or the warning vehicle, he did not deny actually seeing them. When asked about whether he saw the warning vehicle, his response was – "its not that I didn't see it. I don't remember".

10. It is further not in dispute that the third named defendant was driving in optimal driving conditions in that he was driving on a road that was relatively straight, flat and wide on a summer's day that was dry, sunny and warm with good visibility and good sight lines. An agreed witness Kevin Cogan described "the day as the best day of the year". The road itself was described by the third named defendant to the Gardai as "top class" and described by Sgt Curley as being "like a runway". An agreed witness Linda Farren described the road as "the last place you would expect an accident to occur". It is common case that the third named defendant approached the accident location on a section of the roadway that consisted of, first, a long gentle bend followed by, secondly, a straight section of road that began somewhere between 150m and 100m from the accident location. It is not in dispute that the third named

defendant successfully negotiated the bend and was therefore as a matter of probability awake when he came onto the straight section of road. As he approached the accident location, his HGV was observed by an oncoming motorist Kevin Cogan whose agreed evidence was that before he heard a bang and when he last observed it, the HGV was not in the hard shoulder and was the only vehicle in the northbound lane. He further stated that he did not see anything unusual about the manner of the driving of the vehicle. When interviewed by the Gardai, the third named defendant stated that he drove the HGV at a distance of 30cm from the line of the hard shoulder. This would suggest that as he approached the accident location, the third named defendant was not travelling in a busy flow of traffic or driving behind a vehicle which might have impeded his view of the signage and works area in front of him.

11. The traffic count for the relevant section of road on the morning of the accident was measured at 400 vehicles between 8-11am which would suggest that traffic passed the works area at a rate of 1 vehicle every 27 seconds or at a rate of one vehicle passing in the northbound carriageway every 54 seconds. This would suggest that the traffic on the road was not particularly busy on the morning of the accident and certainly not at a level to warrant an abandonment of the works.

12. Sergeant PJ Gallagher gave unchallenged evidence that the pick-up truck would have been “very visible” from 300m and that he would “definitely” expect an alert driver who had driven to the end of the bend and who was coming into the beginning of the straight section of road to have seen all the vehicles and all the workmen in the hard shoulder including the lights flashing on the roofs of the digger and the tractors. There appears to be little dispute that the works area, vehicles and crew in the hard shoulder would have been clearly visible to the third named defendant as he came out of the bend at 150m to 100m from the point of impact. It is

also not in dispute that the live carriageway in which the third named defendant was travelling was free from any obstruction and of ample width to allow the HGV to pass the works area without any difficulty and in complete safety.

13. When interviewed by the Gardai the third named defendant accepted that a speed limiter was fitted to the HGV which was set at 88 kmph so that he was at all material times driving the vehicle at its maximum speed of 88kmph on cruise control which is at 8kmph in excess of the permitted speed limit for such vehicles on a national road. Dr. Jordan gave unchallenged evidence that at a speed of 88kmph the third named defendant would have travelled the final stretch of straight road which he measured to be 150m to the point of impact in six seconds and therefore at a speed of 25m per second. The same stretch of road was measured at 100m by Mr Romeril and at a distance of between 150m and 100m by Mr Rowan. When initially interviewed by the Gardai, the third named defendant whilst admitting that he had previously nodded off or had microsleeps on "highways but not this type of road", stated that it was "impossible" that he could have fallen asleep on the morning of the accident. In a subsequent interview, however, he admitted that he "might" have had a microsleep. Although he was not called as a witness in this trial, it was accepted on the third day of the hearing that he did in fact fall asleep. It is further not in dispute that as he must have been awake to the point that he had successfully negotiated the preceding bend, the third named defendant must have fallen asleep at some time during the six, five or four seconds, depending on its actual length, that it took him to drive along the straight stretch of road to the point of impact with the pick up truck. There was no evidence that the third named defendant braked or took any evasive action prior to the collision.

14. It would appear from what was stated by the third named defendant at interview with the Gardai and from the finding and conclusions of Sergeant Gallagher which are not in dispute that at some unknown time after the third named defendant had entered the final straight stretch of road and had fallen asleep, the HGV must have veered from a position where the left side of the vehicle was at some distance and probably approximately 30cm from the line of the hard shoulder to a position where the left side of the tractor unit was approximately 600mm to 500mm inside the line of the the hard shoulder at which point the left side of the tractor unit struck the right rear of the pick up truck which was then stationary and 100m inside the line of the hard shoulder. The trajectory of the tyre marks made by the tractor unit of the HGV after the impact prima facie suggest that the HGV had veered into the hard shoulder in a linear and gradual fashion but not necessarily at the same angle as the tyre marks because the projection of the HGV would have changed slightly after the massive force of the impact. It would nonetheless appear from his answers at interview together with the evidence of Mr Cogan and the physical evidence at the scene that having fallen asleep, the HGV had to veer for such time and for such distance as brought the left front of the tractor unit from a steer that was inside the live carriageway to the line of the hard shoulder and from there and for such time and such distance as brought the left front of the tractor unit of the HGV into contact with the right rear of the pick up all of which would suggest that the HGV crossed the line of the hard shoulder in relative close proximity to the point of impact. It is not in dispute that as its weight was in or about 15 tonnes and approximately five times greater than the weight of the pick up truck, the HGV is likely to have continued in a linear fashion into contact with the digger whereby the right hand front corner of the HGV struck the right rear side of the digger which was roughly four inches inside the line of

the hard shoulder. It would further appear likely that if the pick up truck had been 1.2m in from the line of the hard shoulder, the HGV would not have collided with it but would if travelling at an angle of 2 degrees or more struck the digger. At interview with the Gardai, the third named defendant stated that he had no memory of the impact with the pick up or the digger and further stated that he only awoke after the second impact with the digger. There is no medical or other evidence to suggest that the third named defendant suffered concussion or any other injury to his head which might have impaired his ability to be awoken by the first impact with the pick up truck.

15. Having carefully considered the evidence in the case that appears not to be in dispute, I make the following findings of fact. all of which I make on the balance of probabilities.

16. Absent medical or any evidence to the contrary, I am satisfied that although his driving was already impaired by drowsiness, the third named defendant must nonetheless have been awake in order to negotiate the curve of the long but gentle bend that preceded the straight stretch of road that began at a point that was at least 100m but not greater than 150m from the point of impact. I am further satisfied that whilst awake and probably from a distance of at least 300m, the third named defendant had a clear and uninterrupted view of the Council's works area. I am further satisfied that at the point when he drove out of the bend the third named defendant had not only passed but seen the two clearly visible warning signs which were at 270m and at 162m from the point of impact together with the warning vehicle with its keep right sign and in all probability the digger with its flashing beacon that was working behind it. I am further satisfied that as he negotiated the bend and whilst therefore awake and probably from much earlier, the third named defendant must

have been aware that he was feeling drowsy from which it can be inferred that he made a conscious decision to continue driving and not to pull in and take a rest. I am further satisfied that he was at this critical time aware that he was at risk of falling asleep not least because he knew that he had experienced previous episodes of falling asleep whilst driving in the past. Instead and with tragic consequences, the third named defendant recklessly chose to ignore his drowsiness and the risk of falling asleep and persisted in driving thereby crashing into the pick up truck and thereafter the digger whose presence and location he must have seen when he negotiated the bend.

17. I must now turn to consider the adequacy of the precautions that were taken by the Council to protect its workers from the risk of the accident that in fact occurred. Although there are three guidance manuals that explicitly seek to promote clarity and consistency of approach to the design and layout of temporary traffic systems, there is in fact no guidance given as to how the risk of a drowsy driver falling asleep is to be assessed and managed. Instead the expert engineering evidence in the case was for the most part directed to the issue of the proper classification of the relevant works and the guidance applicable thereto. I am satisfied that at the time of the accident the Council was carrying out works in the verge of the hard shoulder of a busy single carriageway with good sight lines which involved short duration stops of considerably less than 30 minutes for minor maintenance operations where the work zone was 500m in length. Insofar as it provides guidance for the carrying out of mobile operations that are only stationary for short periods on single carriageways, the preeminent guidance manual, Chapter 8 of the Temporary Traffic Measures and Signs for Roadworks otherwise known as the TSM, is wanting in clarity in that it appears to make such works prima facie classifiable as work of a type that are suitable

both for semi-static and mobile lane closures. The guidance given is directive but confusing and of little value to this court. The only guidance that is clear and readily applicable to the facts of this case is to be found in the NRA Dashboard Manual which gives specific guidance for continuously moving and short duration works of less than 30 minutes that are carried out in verge of a single carriageway with a hard shoulder for which it prescribes the schematic TS23. It is to be noted that the schematic shows what is an effective lateral safety zone to the road side of the works vehicle shown in the relevant illustration. For the reasons given by Mr Rowan which are recorded and set out in the transcript, I am of the view that the precautions that were taken by the Council afforded an equivalent if not greater level of protection to that required by TS23 save that the Council ought to but failed to provide an effective lateral safety zone to ensure that the the pick up and whatever mechanical digger was being used were placed at least 1.2m in from the broken line of the hard shoulder. I am of the view that the mandatory risk assessment carried out by the Council ought to have considered not only the three activities that were to be carried out but also the safe location of the vehicles that were to be used in the works area. I find, therefore, that in failing to provide for such a safety zone, the Council was negligent and in breach of duty to the drivers of both vehicles. I am nonetheless satisfied that the precautions taken by the Council were otherwise adequate and reasonable having regard to the remoteness of the risk of the index event, the geometry of the road and the exceptionally good sight lines that were available.

18. This, however, is a most singular case in which due solely to running the risk of driving while impaired by drowsiness an adequately forewarned driver fell asleep and crashed into the very vehicle that had forewarned him. Being so satisfied, I am of the view that such negligence as there was on the part of the Council in failing to

operate a 1.2m lateral safety zone was overwhelmed and made irrelevant by the negligence of the third named defendant who in the knowledge of where the pick up and digger actually were and being further aware that he was drowsy and at risk of falling asleep nonetheless recklessly chose to drive into the area of danger that he solely thereby created. The recklessness of the third named defendant therefore constitutes a novus actus interveniens for which he and his employer must bear sole responsibility (See Conole v Redbank Oyster Co and Anor(1976) I.R 191). I am in any event of the view that the true purpose of a lateral safety zone is to protect foot workers and the operators of plant and machinery from inadvertently straying on to the live carriageway. The mere fact that a precaution which could be considered necessary to prevent a different type of accident would by pure coincidence have also possibly prevented or ameliorated injuries from the accident that did in fact occur, is not a good reason for finding that there was a breach of duty on the part of the Council that should enure to the benefit of the second and third named defendants. Even if I am incorrect in so holding, I am nonetheless satisfied that the Regulations upon which the second and third named defendants rely are not designed to reduce the liability of, still less to confer an immunity on, an errant driver who wrongfully drives off the live carriageway into the hard shoulder and collides with a vehicle which he or she has already seen merely because the vehicle is a work vehicle which is located within 1.2m of the line of the hard shoulder.

19. I am further satisfied from the findings of fact that I have made and from careful consideration of the relatively scant expert evidence that was offered on the issue that even if the Council was negligent in failing to provide a longitudinal safety zone in advance of the work site, there is no evidence before me which demonstrates as a probability that contact with cones would have awoken the third named

defendant. If contact at 88 kmph with a pick up truck weighing 1.5 tonnes failed to wake or even register in any meaningful way with him, I cannot accept that the third named defendant would as a matter of probability have been awoken by mere contact with a series of plastic objects weighing no more than 7.5 kilos each. I accept as a proposition of common sense that cones do have the capacity to alert errant drivers who are awake but not concentrating on the road in front of them because, for example, the driver is checking his or her phone or is distracted by a child in the back seat. There is a difference, however, between alerting and awaking an errant driver and the capacity of a cone to alert a driver who is distracted but awake and its capacity to awake a driver who is asleep and unconscious. There was a want of expert evidence before me whether by way of statistical evidence or otherwise to demonstrate that cones have any effectiveness at all in waking drivers who have fallen asleep. Even assuming without deciding that contact with cones was likely to have awoken him at some point prior to impact with the pick up, I am nonetheless satisfied that the third named defendant would in all likelihood have awoken in a soporific and therefore impaired state such that it can only be a matter of pure speculation as to whether whilst driving at 25m a second, the third named defendant was likely to have reoriented himself and reacted in sufficient time to avoid the collision that occurred.

20. A vehicle whose driver has fallen asleep has no driver and is impervious to visual cues. I reject therefore the suggestion that a stop/go system would as a matter of probability have prevented the accident that occurred in this case. The effectiveness of such a control measure in the evidential context of this case depends on an entirely speculative calculation that an already drowsy driver who is only seconds away from falling asleep would have encountered the system when it is showing a red light and would have remained awake both as he approached it in order to stop and/or that he

would not have fallen asleep as he was driving through it on a green light. As the N4 is a relatively busy road, the use of such a system is also likely to have led to accumulations of traffic. If, as happened in this case, a drowsy driver can fall asleep and crash into a warning vehicle in the hard shoulder that he has already seen from a distance of at least 150m and probably 300m, it seems to me to be distinctly possible that he could also plough into a line of traffic that had gathered at the red light of a stop/go system in advance of the works area. Far from ameliorating the particular risk of injury that arose in this case, the use of a stop/go system would have extended the risk of potential injury from the works area out onto the live carriageway where road users would have been required to gather in potentially large numbers and remain stationary. I therefore reject the suggestion that such a system was appropriate having regard to the facts of this case or that the Council was negligent in failing to adopt such a system. Insofar as it is advocated that such a system would have been made more effective if it was combined with speed reduction measures, the evidence allows me to have little confidence that speed reduction signs would have had any effect on the third named defendant who was at all material times exceeding the speed limit and thereby failing to comply with the speed reduction measure to which he was already subject. Based on the agreed evidence of Thomas Cogan I also reject any possible suggestion that there was traffic immediately in front of him which might have slowed him down.

21. What is left is the suggestion that the accident could have been avoided by the use of a Lorry Mounted Crash Cushion or LMCC. If deployed a LMCC must be placed at a shunting distance of not less than 50m from the works area. In this case there is no evidence to demonstrate as a probability that the HGV travelled to the line of the hard shoulder and encroached into it at a point that would have brought it into

contact with the LMCC even if such a vehicle was there. On the contrary, and indeed as was put by senior counsel for the second and third named defendant to Sgt Gallagher, all the evidence including the evidence of Thomas Cogan would suggest that the encroachment was at a point much closer to the point of impact. At all events, I am satisfied in any event that the Council was not negligent in failing to use a block vehicle as the unchallenged evidence of the second and third named defendant's own expert Mr Romeril is that such vehicles are used only on motorways and dual carriageways.

22. I therefore dismiss the action for indemnity and contribution against the Council and apportion full liability against the second and third named defendants.