

THE HIGH COURT

[2022] IEHC 239

[Record No. 2016/1575 P]

BETWEEN

CAROLINE O'BRIEN

PLAINTIFF

AND

OLIVER NUZUM

DEFENDANT

JUDGMENT of Mr. Justice Coffey delivered on the 26th day of April, 2022

1. This is a fatal injury action which arises from the tragic death of Cara Leah O'Brien ("the deceased"), a 23 years old mother-of-one, on 3rd October 2013. Her death occurred shortly after a two-vehicle collision between a Honda Integra, which she had been driving, and a Saab Convertible which was then being driven by the defendant on the main road between Wexford to Gorey near Raheenaskagh, Co. Wexford.
2. The deceased is survived by her son Jason who is eleven years old and living with his maternal grandmother, Caroline O'Brien. She has been Jason's primary carer since his mother's death and is the plaintiff in these proceedings. On behalf of Jason and the deceased's statutory dependants, she seeks *solatium* in the applicable statutory amount of €25,400 together with damages for loss of dependency and cost of care, both retrospective and into the future.
3. There were no witnesses to the accident other than the deceased and the defendant. It is not in dispute that, as a result of the collision, the defendant sustained serious injuries and has no memory of the incident. Insofar as there is evidence available to assist the court in determining the issue of liability, it arises primarily from the findings that were made at the scene in the aftermath of the accident and to a lesser extent from antecedent observations of the manner of driving of both cars before the deceased and the defendant came into view of each other at the accident location.
4. It is common case that the evidence from the scene of the accident discloses that the collision occurred after both drivers had driven into the middle and straight section of an 'S' bend from opposite directions whereby the deceased was driving in a northerly direction to Gorey and the defendant was driving in a southerly direction to Wexford. It is agreed that the collision between the vehicles consisted of two impacts both of which occurred on the defendant's side of the road. It is not in dispute that immediately prior to the collision the deceased's car was rotating in a clockwise fashion such that it approached the defendant's car in a sideways position in the middle of the defendant's carriageway. It is accepted that the material damage to the vehicles is consistent with an initial impact whereby there was a collision between the front driver's side of the Saab and the front passenger side of the Honda following which the Honda further rotated causing a further impact whereby the passenger side of the Honda collided with the driver side of the Saab. It is not in dispute that after the collision, the Honda was found in the grass margin to its left and that the Saab was found adjacent to a concrete fence in a grass margin to its left.

5. The driving of the deceased was last seen by Carmel O'Brien who was driving in the same direction as the deceased towards the bend that preceded the deceased's approach to the accident location. Ms. O'Brien gave evidence that about two seconds before she turned into the bend and came upon the scene of the collision, she was overtaken by the deceased. She estimated her own speed to have been about 45-50 miles per hour and said that the deceased passed her at "reasonable speed". When cross-examined, she agreed that after she was overtaken the deceased's car went out of sight in a relatively short distance.
6. The driving of the defendant was last observed by Oliver Power who was driving a vintage tractor in the same direction as the defendant towards Wexford. Mr. Power gave evidence that the defendant's Saab Convertible passed him with the roof down on what he described as a "lovely day". He said the defendant was not going fast and was "not flying". When cross-examined Mr. Power stated that he was about 6, 7 or 8 kilometres back from the accident locus when the Saab overtook him.

The accident locus

7. Detailed and unchallenged evidence of the approach to the accident locus that both drivers had to negotiate was given by Jack O'Reilly, Chartered Civil Engineer, who was retained to investigate the accident on behalf of the plaintiff. Mr. O'Reilly stated that both drivers approached the accident locus from opposite directions by entering left-hand bends of differing lengths whereby the deceased had to negotiate a bend the total length of which was 225 metres whilst the defendant had to negotiate a bend the total length of which was 360 metres. He described the two bends as being in an 'S' arrangement with a 100 metre straight stretch in the middle where the accident occurred. He found that the relevant section of roadway was 7 metres wide, divided by a continuous white line and controlled by a speed limit of 80 kilometres per hour. He stated that adjacent to the accident location there was a grass margin on the defendant's side of the road which had a width of approximately 3m and a grass margin on the deceased's side of the road which had a width of in or about 5m.
8. He characterised the bends that both drivers had to negotiate as long but not particularly severe starting with a transition section where the curvature got tighter as one goes into the bend and then finishing with a transition section where the curvature diminished to zero at the end of the bend. He emphasised that the most severe part of the bend was at the centre of the bend where the radius is tightest. He stated that the sight distance available to both drivers was in the order of a little over 200 metres so that if they negotiated their respective bends at the same time and drove at the prescribed speed limit of 80 kilometres per hour, each driver would have seen the other's vehicle from a distance of 200 metres and would have been separated by a driving time of about five seconds.

Garda investigation

9. The accident was investigated by Garda Tom Bolger, a forensic collision investigator of fifteen years standing. In his Report, which was handed into court without objection, Garda Bolger found that the evidence from the scene suggested that the cause of the

collision “lay with the (deceased)” and further found that the defendant had “no options available to him to avoid the collision”. It is not in dispute that his conclusions arose from a speculation based on his findings at the scene that the deceased’s Honda started to oversteer as it negotiated the bend which caused the rear of the car to “fishtail” whereby the rear of the car kicked out and rotated in an anti-clockwise direction as it travelled whereupon deceased endeavoured to correct the fishtailing by oversteering to the right thereby causing her car to further fishtail and thereby to rotate but in a clockwise direction which led to the car travelling passenger side first when it collided with the oncoming Saab.

10. Mr. O’Reilly sought to discount the suggestion that the deceased lost control of her car at the bend on the basis that, if it were to occur due to excessive speed, fishtailing was likely to have occurred towards the centre of the bend where the curvature was most severe or “sharpest”. He said that if it did occur at that point, it would have been dramatic and not something that a normal everyday driver could control over a long distance of in excess of 120-130 metres from the centre of the curve to the accident location. He further stated that there was no evidence that the deceased sought to overcorrect such fishtailing as had occurred. He further commented that if the deceased had fishtailed in the manner speculated by Garda Bolger, then this would have all have happened in the full view of the defendant who he said had a sight distance of 200 metres and a road that was sufficiently wide with a grass margin to take evasive action but had failed to do so.
11. Mr. O’Reilly stated that because the Saab was still sliding towards its eventual resting place when Carmel O’Brien came upon the accident, the deceased must have overtaken her at a distance that was “very, very close to the accident” which he suggested was no more than 300 metres from the accident locus. He further suggested that the deceased entered the bend at the same speed at which she overtook Ms. O’Brien which he characterised as being “moderate”. His evidence was that fishtailing does not occur in the absence of speed so that, unless the deceased had bizarrely accelerated significantly when entering into the bend, there appeared to be no evidence to suggest that speed could have caused fishtailing. He further stated that it struck him as being very unusual that the defendant on seeing the deceased’s vehicle did not take some evasive action to try and protect himself, either by breaking hard and stopping or by more preferably veering into the grass verge on his left to get him out of serious harm’s way.
12. Mr. O’Reilly said that there might be a “counter-speculation” that on his emergence from his bend the defendant drifted across to the incorrect side of the road. This, he suggested, would have created an emergency for the deceased as a result of which she “might well” have taken evasive action by veering across to the right as the defendant tried to correct his position so that the two vehicles ended up on the defendant’s carriageway thereby creating the rather peculiar impact pattern between the parties.

The plaintiff’s case

13. When opening his client’s case to this Court on 30th November 2021 senior counsel for the plaintiff candidly and very properly admitted that because of the deceased’s death and the fact that the defendant has no recollection of the accident, he was not in a

position to state what happened or to exclude the possibility of wrongdoing on the part of the deceased.

14. Against that background, he advanced two cases on behalf of the plaintiff. First, a case based on hypothesis or the "counter-speculation" of Mr. O'Reilly. It was contended that the collision came about because the defendant veered onto his incorrect side of the road as a result of which the plaintiff was compelled to take evasive action by driving onto the defendant's side of the road in circumstances where the defendant thereafter veered back onto his correct side of the road resulting in the collision of which the plaintiff complains. Secondly, and in the alternative, it was contended that even if the deceased's driving had created an emergency for the defendant, there was no evidence that the defendant had taken any evasive action, notwithstanding the fact that he had a sight line of at least 200 metres and a reaction time of in or about 5 seconds if he entered the straight section of road in or about the same time as the deceased. Specifically, it was contended that the defendant had ample room to pull over to his left to avoid the collision and that his failure to do so constituted a breach of s.67(2) of the Roads Act, 1963 which imposes on road users a statutory duty to take "reasonable care" for the safety of any other person using a public road. It was further submitted that if the court found partial wrongdoing on the part of the defendant but was unable to establish different degrees of fault on the part of each driver, then that liability should be apportioned equally as between the parties pursuant to the provisions of s.34(1)(a) of the Civil Liability Act, 1961.

Amended case based on telephone records

15. In the course of opening his case, senior counsel for the plaintiff flagged that the defendant's mobile telephone records had been procured by the Gardaí and were of potential evidential value to his client's case. Having been requested to do so, this Court made an order directing the Commissioner of the Garda Síochána to make the relevant records available to the plaintiff. On the second day of the trial, senior counsel for the plaintiff informed the Court that the records disclosed that the defendant had used his mobile phone on at least two occasions proximate to the time of the accident which he suggested was in or about 10 am. Specifically, he stated that there was *prima facie* evidence that the defendant had received an incoming call at 09:52:48 of about five minutes duration and that he had thereafter made an outgoing call at 09:58:33 of nineteen seconds duration.
16. Following legal argument, this Court acceded to the plaintiff's application to allow the plaintiff to amend her pleadings to make the case that the defendant was using his mobile phone and was thereby distracted at the time of the accident. The application was acceded to on terms that the trial would be adjourned for a short period to allow both sides a full opportunity to identify the persons who had made or received the relevant calls to establish whether the calls were in fact made at the time of the accident.
17. When the trial resumed on 22nd March 2022, John Murphy was called to give evidence on behalf of the defendant. Mr. Murphy said that he has known the defendant for years and confirmed that the number that was called by the defendant at 09:58:33 on the day of the accident belonged to him. He said he recalled receiving the call because he had heard

of the accident later that night. His evidence was that the defendant's purpose in making the call was to inform him that he was going to Wexford and "not to bother calling over". He was asked whether he heard anything strange on the call and his evidence was "not a thing, no". The witness was cross-examined and accepted that the call was made at 09:58:33. There was no challenge to his credibility or to the reliability of the evidence that he gave.

18. The unchallenged evidence of John Murphy strongly suggests that the accident did not occur while the defendant was on the relevant outgoing phone call to Mr. Murphy which concluded at 09:58:52. The circumstantial evidence relating to the timings of the relevant calls which were made to alert the emergency services of the accident is consistent with and tends to support the evidence of Mr. Murphy.
19. It is agreed that Carmel O'Brien, who had been travelling in the same direction as the deceased, came upon the scene of the accident in its immediate aftermath and at a time so proximate that she was able to observe the Saab "skidding" towards and hitting a concrete fence in the green margin to its left. It is not in dispute that the first thing Ms. O'Brien did at the scene was to use her mobile phone to call the emergency services who put her in contact with the Gardaí at Wexford who informed her that they would call the Gardaí at Enniscorthy in whose district the accident had occurred. According to Ms. O'Brien's undisputed witness statement, the Gardaí at Enniscorthy "promptly" rang her back and took details following which it is agreed that the Gardai at Enniscorthy then rang the ambulance service at 10:05.
20. Ms. O'Brien gave evidence that she was overtaken by the deceased at "roughly ten o'clock". Whilst there was no evidence as to when Ms. O'Brien made the initial call to the emergency services in the immediate aftermath of the accident, there was unchallenged evidence from Garda Brian Kinsella, who investigated the incident, that when a call is made to the Gardaí about a serious accident, the details will be taken from a caller following which the Gardaí will immediately contact an ambulance, if an ambulance is required. His unchallenged evidence was that the lapse of time between the initial call to the Gardaí and the call to the ambulance service would depend on how experienced and quick the call taker was but that it should not take more than a minute.
21. I am satisfied that, when looked at in the round, the evidence before the court suggests that all of the relevant calls were made in immediate succession with little or no delay very shortly after the accident occurred. I am further satisfied on the balance of probabilities that the initial call made by Ms. O'Brien was made not earlier than three minutes before 10:05 which would suggest that the accident occurred after the defendant had concluded his outgoing telephone call to Mr. Murphy at 09:58:52 and probably at in or about 10:02.
22. In coming to this finding of fact, I have not relied on the defendant's exculpatory evidence to which I attach no weight not least because he fully accepts that he has an unreliable recollection as to where and when the relevant calls took place.

23. It follows from my findings of fact that I am satisfied on the balance of probabilities that the defendant was not using his mobile phone to make an outgoing call to John Murphy at the time of the accident. Absent any suggestion that he used his mobile phone thereafter for any other purpose in or about the time of the accident, I am further satisfied that the defendant was neither using nor distracted by the use of his mobile phone at the time of the accident. Having so found, the issue of whether the defendant had a hands-free kit in his car and all other issues relating to its use and functionality do not require determination by this Court.
24. What is left is the plaintiff's original case consisting of the "counter speculation" of the plaintiff's consulting engineer that the accident was caused by the defendant veering onto his incorrect side of the road and creating an emergency for the plaintiff, and the plaintiff's fall back contention, that the defendant wrongfully failed to take evasive action in order to avoid the collision.

The plaintiff's "counter speculation"

25. The plaintiff's "counter speculation" was advanced by Jack O'Reilly, Consulting Engineer, in response to the speculation advanced by Garda Bolger. His evidence was that "if we are speculating" the court must look at "all the speculative possibilities" in which context he contended that his speculation was "as valid a speculation" as that of Garda Bolger.
26. The "counter speculation" of Mr. O'Reilly was put to Garda Bolger in cross-examination. Garda Bolger accepted that the accident could theoretically have happened in the way suggested by Mr. O'Reilly but he suggested that in his experience the scenario which he contended for was "more common", not least because the exact same collision had occurred a year ago on the same stretch of road. Whilst he conceded that the hypothesis advanced by Mr. O'Reilly was "possible" he rejected the suggestion that it was equally plausible.
27. Absent direct evidence as to how the accident occurred, it is entirely proper for Mr. O'Reilly to fall back on hypothesis. Proof by hypothesis is exceptional, however, and cannot arise in civil proceedings unless the circumstantial evidence available demonstrates that the hypothesis contended for is either the only reasonable explanation for what has occurred or is at least the more probable of two explanations where the evidence has established that the decision maker has a binary choice.
28. In this case Mr. O'Reilly's "counter speculation" is not advanced either as the only or even as the more probable explanation for the accident. It is therefore incapable in law of proving the plaintiff's case to the civil standard of proof which requires the plaintiff to satisfy the court that the hypothesis which is contended for is at least the more probable of two hypotheses that are in controversy. It is also a speculation that is wholly unsupported by any circumstantial evidence tending to suggest that the defendant veered onto his incorrect side of the road or that he otherwise created an emergency for the deceased.

29. I am in any event satisfied that the "counter speculation" of Mr. O'Reilly is the less probable of the two accident scenarios that were canvassed before the court. I am so satisfied because unlike Mr. O'Reilly's counter speculation, Garda Bolger's speculation is at least consistent with and supported by such circumstantial evidence as is available in the case.
30. There is evidence of excessive speed on the part of the deceased. The driving of the deceased was last seen by Carmel O'Brien, who was driving in the same direction of the deceased towards Gorey. She gave evidence that at approximately two seconds before she turned "the corner" and came upon the scene of the accident, she was overtaken by the deceased. She said that she was driving her car at 45-50 miles per hour and that the deceased passed her at "reasonable speed". When cross-examined Ms. O'Brien stated that after she was overtaken, the deceased's car disappeared out of sight over a relatively short distance.
31. Mr O'Reilly stated that because the Saab was still moving when Carmel O'Brien came upon the scene of the accident, the deceased must have overtaken her at a distance that was "very close" to the accident which he suggested was no more than 300 metres from the accident locus. He further suggested that the deceased entered the bend at the same speed at which she overtook Ms. O'Brien. When cross-examined, he agreed that Ms. O'Brien was doing between 45 and 50 miles per hour and therefore was effectively driving at in or about the speed limit of 80 kilometres per hour. He further agreed that if a vehicle overtook her, it had to, in effect, break the speed limit and further agreed that this took place very close to the accident locus. He accepted that having overtaken her vehicle, the deceased's car had pulled out of sight of Ms. O'Brien and therefore gained at least 200 metres on her over a short distance. He accepted that all of this would suggest that the deceased was going "a good bit faster" than Ms. O'Brien. Whilst he said that he did not know the speed at which the deceased overtook Ms. O'Brien, Mr. O'Reilly agreed that normally "one would want to be driving at 20-25 miles per hour faster" than the vehicle that was being overtaken.
32. Absent any evidence to suggest that she slowed down as she entered the bend, I am satisfied on the balance of probabilities that the deceased entered the bend at a speed that was likely to have been in excess of the speed limit which I am further satisfied is a circumstance that could have contributed to the deceased oversteering and thereby losing control of her car as she negotiated the bend.
33. More critically, however, there is unchallenged evidence that the deceased had in fact lost control of her car immediately prior to the collision, such that it was being driven passenger side first on its incorrect side of the road towards the defendant's oncoming Saab. There is no evidence that the defendant had lost control of his vehicle at this point. Insofar as it may be necessary to make a choice, I am satisfied that the hypothesis advanced by Garda Bolger is the more probable of the two accident scenarios contended for in this case and I therefore reject the counter speculation advanced on behalf of the plaintiff.

34. I will now turn to consider the plaintiff's remaining contention that the defendant wrongfully failed to take evasive action when confronted with the emergency of the deceased's car rotating towards him sideways-first on its incorrect side of the road.

Failure to take evasive action

35. Mr. O'Reilly's evidence was that at a distance of 200 metres and if travelling at a speed of 80 kilometres per hour, both drivers would have been separated by a driving time of about five seconds. He said that it struck him as being very unusual that the defendant, on seeing the deceased's vehicle, did not take some evasive action to try and protect himself, either by braking hard and stopping or by, more preferably, veering into the grass verge on his left to get him out of serious harm's way. When cross-examined, Mr. O'Reilly agreed that the impact occurred when the deceased's car was approaching the defendant's car in a sideways position in the middle of the defendant's carriageway. It was put to him that it was entirely unrealistic to criticise the defendant for his reactions in those circumstances because the deceased's car was rotating in front of him such that the defendant would not know whether to go to his right or to his left or straight on. In reply, Mr. O'Reilly stated: -

"I would have thought that Mr. Nuzum, if he had the time to think about (it) ... well, *he didn't have time to think about it* (emphasis added) ... but he would have moved his vehicle off the road so as to get out, to try and get out, to try and get away."

36. Mr. O'Reilly was then asked as to how the defendant was to know if it would get him out of the way if the car was rotating as it came towards him to which Mr. Reilly replied: -

"Yeah, *I take your point ... yes, I take your point* (emphasis added)."

37. Mr. O'Reilly then went on to suggest that if the deceased's car was spinning, it was spinning in a certain direction and that direction could be determined so that the defendant had the option of evading away from that direction. It was then put to him that the reaction of a normal driver would have been just one of "horror" and that a normal driver would simply "freeze".

38. Mr. O'Reilly suggested that the sight distance of 200 metres and a separation time of five seconds were such as to give the defendant adequate opportunity to take evasive action. It was then put to Mr. Reilly that all of that assumed the fact that the deceased's vehicle was out of control and manifested itself when the deceased's car first came into sight. Mr. Kelly suggested that the deceased's car was spinning towards the concrete fence against which the defendant's Saab ultimately came to rest, which was an identifiable path of spin such that the defendant should have availed of "evasive spaces available to his right".

39. When giving evidence on this issue Garda Tom Bolger stated that travelling at 80 kilometres per hour, each driver would have had a line of sight of less than 200m and would have approached each other at a rate of 44 metres per second if they were travelling at the speed limit of 80 kilometres per hour. He said he did not know what

reaction time was available to the defendant because it could not be known as to when the defendant's car fishtailed.

40. He said he was very familiar with the location and had driven it about ten thousand times over the last twenty years. He said that the deceased had just completed her turn into a left bend and the deceased had come around a very slight left hand bend. He agreed that the deceased would have been visible on the bend but he said that it was not possible to say how far the cars were away from each other at the time or to tell when the fishtailing would have become noticeable to the defendant. He said that two seconds was required in order to react but that it could be longer or shorter.
41. His evidence was that the deceased would have fishtailed in the middle of the bend but not on the approach. He said that depending on the speed of the Honda, the fishtailing could have become noticeable to a "normal, everyday driver" four or five seconds out or that it could have become apparent a second or a second and a half away. He accepted that the defendant could have taken evasive action by driving into the grass margin but said it depended on his realisation that there was something wrong with the approaching car.
42. I am satisfied that there is no reliable evidential basis upon which this Court can make a finding of fault against the defendant. There is no evidence that the defendant and the deceased were driving at the same speed as they approached the accident location or that they drove into sight of each other at the same time. There is, therefore, no evidence to warrant an inference that the defendant must have seen the deceased's car from a distance of at least 200 metres or that he had a reaction time of five seconds. There is no evidence as to precisely where the defendant was or what reaction time was available to him when he first ought to have appreciated that the driving of the deceased had created an emergency for him. I am satisfied that the emergency so created was also a life threatening situation for the defendant such that his initial reaction as a normal driver was likely to have been one of raw terror which would undoubtedly have dulled his speed of reaction. What is critical in this case, however, is that the unfolding emergency that suddenly confronted the defendant, whereby the deceased's car was coming at him sideways whilst also fishtailing and thereby rotating, was of such an unusual and terrifying nature as to leave him with no clear and obvious path to safety or, at least, an escape route that he was likely to have worked out in the time that was available. This is reflected in the evidence of Mr. O'Reilly who in his direct evidence suggested that the defendant ought to have turned to his left but when cross-examined suggested that he ought to have turned to his right. Indeed Mr. O'Reilly appears to have accepted in the earlier part of his cross-examination that the defendant had no way of knowing what would get him out of the deceased's way and no time to think about it. If the defendant had driven to his right, as was eventually suggested by Mr. O'Reilly, then he would have had to have driven on to his incorrect side of the road and into the path of oncoming traffic coming around the bend which Ms. O'Brien was then driving. For all of these reasons, I am satisfied that in the evidential context of this case it would be wholly unrealistic and unfair to make a finding of wrongdoing against the defendant.

Conclusion

43. This is a very sad case in which through the noble efforts of the plaintiff's legal team, everything that could have been done has been done to try and secure some benefit for the deceased's statutory dependants and, in particular, the deceased's son Jason. Whilst I have every sympathy for Jason and the deceased's family, I am compelled as a matter of law to find that the evidence falls short of establishing any wrongdoing on the part of the defendant which caused or contributed to the death of the deceased. I, therefore, dismiss the claim.