

**THE HIGH COURT**

[2020] IEHC 696  
[Record No. 2018/7854P]

**BETWEEN**

**JAMES THOMAS IAN SMITH**

**PLAINTIFF**

**AND**

**GERARD HANAPHY**

**DEFENDANT**

**Judgment of Mr. Justice Bernard Barton delivered on the 17th day of December, 2020.**

**Introduction**

1. This is an action brought by the Plaintiff against the Defendant for damages for personal injuries and loss arising as a result of a road traffic accident which occurred on the evening of the 30th January, 2017, at Stockhole Lane, Cloughran, County Dublin. Two vehicles were involved, a Vauxhall Astra driven by the Plaintiff, and a Skoda Octavia driven by the Defendant. The cars were travelling in opposite directions along an unlit country road. Driving conditions were poor. It was dark, and the road surface was wet. The cars collided on an S-bend and came to rest proximate to or slightly on the grass verge of the carriageway on which the Defendant was travelling.
2. The Plaintiff sustained serious back injuries as a result of the collision including a fracture of the first lumbar vertebra with retropulsion into the spinal canal which necessitated surgery that included pedicle screw fixation implanted to provide stabilisation of the fracture. The Plaintiff also sustained associated soft tissue injuries involving bruising over his back in the area of the fracture. He did not sustain any other injuries. On the 5th July, 2019, the Plaintiff was readmitted to the Beaumont Hospital for removal of the thoraco-lumbar spine implant. The surgeries were carried out under general anaesthetic. The Plaintiff has made a good recovery from what was undoubtedly a potentially very serious back injury. The medical reports prepared on behalf of the Plaintiff by Dr. Gibbon, dated the 8th August, 2017, and by Mr. David O'Brien, dated the 22nd July, 2018, and 21st October, 2019, and the medical reports prepared by Mr. Frank McManus on behalf of the Defendant dated the 26th February, 2019, and 3rd May, 2019, were admitted and constitute the agreed medical evidence in the case. The evidential contest between the parties centred on the issue of liability. The outcome is dependent upon the establishment of the accident circumstances.

**Background**

3. The Plaintiff was born on the 23rd March, 1998, and ordinarily resides at 96 Screeby Road, Fivemiletown, County Tyrone, Northern Ireland. He is currently reading law at Manchester University and is due to complete his degree in June 2022. He obtained a driving licence in 2015 and was driving his own car at the time of the accident. He had arranged to meet his sister at the Clayton Hotel, Leopardstown, County Dublin but did not realise there are a number of Clayton Hotels located in the county. He ended up driving to the Clayton Hotel at Dublin Airport. He did not have the benefit of a Sat Nav. Realising his mistake, he consulted a map while in the car park of the hotel and set off in an attempt to find his way to the Clayton Hotel, Leopardstown. He left the car park and turned into Stockhole Lane which took him in a northerly direction and thus away from

the direction for Leopardstown. He was unfamiliar with the road. Shortly after leaving the hotel he approached a sharp left-hand bend shown in photographs which were also admitted in evidence. Two yellow and black arrow warning signs, one larger than the other, were erected in the ditch at the commencement of the bend on the opposite side of the road to warn motorists approaching in the same direction as the Plaintiff of the presence of a sharp left-handed bend ahead.

### **Accident Circumstances;**

#### **Plaintiff's Account**

4. The Plaintiff's evidence is that as he came to the bend he was keeping tight to the left-hand side of his carriageway when a car suddenly appeared from the other direction, straddling a continuous white line on the crown of the road, and collided with him. The Plaintiff estimated his speed at 25 to 30 km per hour. On this account his car was entirely on its own side of the road when the collision occurred; he had no time to do anything.

#### **Defendant's Account**

5. The Defendant is an experienced taxi driver. He had dropped off a fare and was driving home. He was very familiar with the road and was unaccompanied. He had just come out of one bend and was about to go into the other travelling on his own carriageway when the lights of a car coming in opposite direction appeared suddenly and there was a collision. On this account the Defendant was at all times travelling wholly on his own side of the road. He did not actually see the Plaintiff's car, just the beams of its lights. In common with the Plaintiff, his evidence was that he did not have time to brake or swerve. Acknowledging that while both vehicles ended up on the verge of Defendant's carriageway, the Plaintiff maintained that when he saw the Defendant's vehicle it was straddling the white line on the crown of the road.

#### **Garda Investigation**

6. The gardaí were called and attended at the scene. Garda Fay took the drivers' details and took photographs of the vehicles on the road in their post-collision positions. His photographs were admitted; he also gave evidence as to the circumstances found by him on his arrival at the scene. He did not prepare a sketch map or take any measurements. He recalled noticing what looked like some fresh mud on the carriageway close to the verge on the Plaintiff's side of the road coming into the bend. He recalled arriving at the scene. He was not sure whether the Plaintiff was still in the car, but he remembered breathalysing both drivers. The results were negative. He did not establish the point of impact but, given the position where he found the cars, formed the view that the Defendant would have just started entering the bend when the collision occurred.

#### **Topographical and Vehicle Dimensions**

7. Consulting engineers were retained on behalf of the parties, Mr. Vincent McBride on behalf of the Plaintiff and Dr. Denis Wood on behalf of the Defendant. The engineers attended the scene, took photographs and measurements, prepared reports of their findings and gave evidence. The total width of the road was measured at 6.4 metres or approximately 3.2 metres for each lane. The width of each car was given at approximately 1.8 metres. Given these dimensions there was no reason why, if the

drivers were correct in their recollections, both vehicles should not have safely passed one another. It is evident from the circumstances that they did not do so. It follows that the assertions from both that they were entirely on their own sides of the road when the collision occurred cannot be correct. One or the other or both are mistaken.

#### **Demeanour of the Witnesses**

8. I had an opportunity to observe the demeanours of the Plaintiff and the Defendant as they gave their evidence. I have no doubt that each truly believes he was at all times on the correct side of the road. The Plaintiff gave his evidence in a truthful and straightforward manner, as did the Defendant. Bearing in mind that the Plaintiff carries the onus of proof to establish on the balance of probabilities the case he makes, the Court is tasked in the circumstances with resolving what, on the accounts of the drivers at least, is a very obvious conflict of evidence in circumstances where, on my assessment of them, both drivers gave credible evidence on which the court may rely.
  
9. Having regard to the engineering evidence, three possible explanations/ scenarios for the cause of the accident and the point of impact on the road between the vehicles emerged from the evidence as follows:
  - (i) The Plaintiff's car was wholly within its carriageway when the Defendant's vehicle crossed partially onto its incorrect carriageway, straddling the continuous white line on the crown of the road;
  - (ii) Both vehicles were straddling the crown of the road; or
  - (iii) The Defendant's car was wholly within its carriageway when the Defendant's car was straddling the continuous white line on the crown of the road.

For reasons which will become apparent, I consider the first option to be the least likely; the real contest being between the second and third options. In relation to option (ii), a submission was made on behalf of the Plaintiff that this option fairly reflected what likely occurred and if so the Court should consider exercising the power vested in it by Section 34 (1) of the Civil Liability Act 1961 by apportioning fault equally between the parties, a proposition which has its attractions in the circumstances of the case.

10. The Court's task in determining which of these options best represents what likely occurred is complicated by the absence of any measurements made by Garda Fay and any evidence as to the location of debris from the vehicles which, given the nature of the impact, was in all probability present on the road surface at or about the point where the vehicles collided. This evidence, whilst not determinative of the issue, would certainly have been of assistance to the Court in its deliberations. There are a number of possible explanations for the absence of this evidence. Apart from anything else it was dark, there was no street lighting, and the road surface was wet; however, in submissions on behalf of the Plaintiff, Mr. Lyons S.C. suggested that Garda Fay simply made an assumption from where he found the vehicles that the accident had happened on the Defendant's side of the road and proceeded on that premise.

11. Whatever the reason for the failure to take measurements or ascertain whether there was debris on the road and, if so, to note the location thereof on a sketch map as is often the case, Garda Fay was not really pressed on the point, the Court cannot assume or infer from the absence of such evidence or from the location of the vehicles found by him where they came to rest post impact that the collision occurred wholly on the Defendant's carriageway, particularly in circumstances where a credible witness, the Plaintiff, maintains that the Defendant's vehicle was straddling the crown of the road when the collision occurred. Accordingly, the Court is thrown back upon the engineering evidence to assist in resolving the conflict of evidence on this question.

**Decision; Engineering Evidence; Accident Locus:**

12. In the course of Mr. McBride's evidence it became clear by reference to photographs of the accident locus taken by him, when compared with photographs taken by Garda Fay immediately after the accident, including photographs of the cars, that he had prepared his report and had formulated an opinion set out therein on the premise that the cars seen in their post-accident rest positions in Garda Fay's photographs were obscuring the view of the yellow and black arrow warning signs evident in the photographs of the scene taken by Mr McBride . In point of fact, it transpired that the post-accident rest position of the cars seen in Garda Fay's photographs was not the reason why the warning signs were obscured but rather was due to the positioning of an ambulance also seen in the photographs which had pulled up on what was the opposite side of the road to the Plaintiff's carriageway before the apex of the bend. As a consequence of this evidence it follows that the rest position of the cars seen in Garda Fay's photographs was further around the bend than seen in photograph 1 taken by Mr McBride.
13. On the basis of this clarification Mr. McBride estimated the rest position of the cars at 4-5 metres to the left of the road signs as seen in his photograph 1, taken from the direction in which the Plaintiff was travelling. It follows the cars would not have been visible from the position of the photographer in Photograph 1 and would only have come into view as shown in Mr. McBride's Photograph 3, i.e. further around the corner. The establishment of this fact has certain consequences. It means that the Plaintiff's evidence, in particular his positioning of his car in the middle of his lane at the moment of impact which he marked with an X on Photograph 1, cannot be correct. Having regard to the damage to the front of the cars and the rest location of the cars, the collision had to have occurred further around the bend than suggested by the Plaintiff. Consequently, the collision occurred while the Plaintiff was coming out of and the the Defendant was entering the bend. While this establishes where relative to the bend the collision likely occurred, and the cars ended up, it does not establish the position of the vehicles on the road when they collided; however, there are other factors material to that question which point the way as follows.

**Speed; Car Damage**

14. Neither driver accused the other of driving too fast. The radius of the bend is 26 metres. Both drivers estimated their speed in the region of 25-35 km/hr. Accordingly, they were both going relatively slowly. Taking this evidence at face value and the evidence that neither driver had any time to react to the emergency, at least not that either

remembers, it follows that the combined speed of the vehicles at the moment of impact was at least 50 to 70 km/hr. Neither driver saw the other until moments before impact; the accident happened "in a flash". Given the topography and the roughly equal vehicle speeds the total sight distance for both drivers was estimated by the engineers at 40 metres.

15. It is clear from their evidence that the resting position of the vehicles, the damage sustained thereto, the estimated speeds, the types of car involved, the roughly of equal weight thereof and the carriageway dimensions on what for the Plaintiff was a sharp left-hand bend, most of which he had negotiated, were significant factors in the calculations and opinions offered by the engineers. The combined speed of the vehicles at impact was estimated by Dr. Wood at 50-70km/hr; the engineers essentially agreed on this proposition having regard to the drivers speed estimates .While Mr. McBride considered the frontal damage to the Plaintiff's car to be almost identical on both sides of a very large V-shaped indent located to the centre of the front bumper and grille and bonnet, Dr. Wood's opinion was that there was more damage evident to the near-side front/ passenger side.
16. I must say that looking at the photographs of the car myself I would concur with Dr. Wood. The headlight cluster on the near-side front is almost completely dislodged and seriously damaged, as is the front near-side wing panel, whereas the cluster on the off-side/ driver's side is relatively intact. The damage to the Defendant's taxi was concentrated on the off-side front corner, extending across the front of the car, and the off-side wing was forced backwards towards the centre of the car. Apart from the engineering evidence in this respect, the damage to the vehicles is also readily apparent from the post-accident photographs of the car. All of these factors were taken into account by the engineers. On my view of their evidence, they were broadly in agreement that the off-side of the Plaintiff's car was at an angle of approximately 20 degrees relative to the front of the Defendant's car at the moment of impact.
17. The question which arises from this evidence is how the vehicles sustained the damage they did given the approximate position on the bend where the collision occurred. Mr. McBride's evidence was that if the Plaintiff is correct in positioning his car in the centre of his carriageway, whether in the place marked X on photograph 1 (which the Court has already found to be incorrect) or more likely further around the bend consistent with the post-accident positions of the cars seen in the photographs taken by Garda Fay, the Plaintiff's car had to have moved or swerved in some way to its right from the position indicated by him. Dr. Wood carried out a computerised assessment of the positions of the vehicles (i) at the time of impact, (ii) immediately post-impact and (iii) where they came to rest. I found this evidence, which is also shown schematically in his report, to be of considerable assistance. His drawings illustrate the positioning and behaviour of the vehicles relative to one another at, during and after the impact.

**Point of Impact on the Road; Engineering Evidence**

18. Both engineers explained the forces involved in and generated by the collision as well as how these would affect the behaviour of the cars relative to one another on the road.

Both agreed that the Defendant's vehicle would have been pushed further over to its left, in an anti-clockwise direction, while the Plaintiff's vehicle would have been pushed to its right, in a clockwise direction. Furthermore, given the width of the carriageways, the equal speed, the final resting places of the vehicles and the nature of the damage to the cars there would have been an element of lateral travel by them immediately on and after the impact. While Mr. McBride explained what was involved in this regard, and did so in broadly similar terms to Dr. Wood, including the possibility that the collision had occurred on the Plaintiff's side of the road, he very fairly accepted that it was not possible for him to say or to express an opinion as to precisely where on the road, as a matter of probability, he considered the collision to have taken place.

19. Dr. Wood on the other hand, while accepting the possibility that the collision could have occurred on the crown of the road, discounted that for reasons he gave in evidence. In his opinion, the strong probability- almost to the point of certainty- was that the collision had occurred on the Defendant's side of the road. A significant factor in reaching this conclusion was the estimated speeds and the relative equality of weights between the vehicles. Greater energy and thus greater speed would have been required to explain a collision occurring on the crown of the road with both vehicles travelling laterally from that position to the place where they ultimately ended up. The engineering evidence establishes that the greater the distance between the point of impact and the final rest position of the vehicles the greater the energy/force required to arrive there. In Dr. Wood's opinion, the estimated speed, the comparative weight of the cars and their ultimate rest position was consistent with the collision having occurred entirely on the Defendant's carriageway.
20. The Defendant gave evidence that the magnets holding the taxi sign on the roof of the car had been dislodged. One of these was broken. He found both after the accident on the left verge a short distance behind the car; he found the taxi sign ten feet or so further back on the road. The significance of this evidence is that in Dr. Wood's view, the Defendant's vehicle would have been travelling faster than the estimated speed but he did not express a view, nor was he asked, by what amount he considered the speed to have increased. He did not offer an opinion, nor was he asked, whether the increase of speed would have been sufficient to generate the kind of forces and energy required to explain a collision on the Plaintiff's side of the road or on the crown of the road consistent with the resting positions and damage seen to the cars.
21. In passing, I should say that in carrying out my assessment and in approaching the task of resolving the conflict of evidence between the drivers as to the accident circumstances, I am satisfied the Defendant was also mistaken in his evidence as to where he thought the collision occurred, marked by him with an X on photograph 4, a position proximate to where the Plaintiff had initially indicated on photograph 1 that the accident had happened. However, given the findings made herein as to where on the bend the collision most likely occurred and the location of the rest positions of the vehicles, four to six metres to the left of the warning signs, it follows that the Defendant is incorrect in his recollection with regard to this matter, as is the Plaintiff.

### **Mud on the Road Verge**

22. There was evidence given by Garda Fay that he found fresh mud on the left-hand verge of the road on the Plaintiff's side of the road. It appeared to me that the relevance of this evidence might have been to explain that perhaps the Plaintiff's car had momentarily struck the verge in an effort to avoid the emergency and then overreacted by pulling to the right, but quite correctly that case was not made since if that is what had happened it could not explain how the cars ended up where they did. As it is, I am quite satisfied, and as has already found for the reasons set out earlier that the collision occurred much further around the bend, that the mud on the road was a coincidental finding which had nothing to do with the cause of the accident; in fairness to the Plaintiff he does not say that he swerved to the left or right or otherwise before the vehicles collided.

### **Conclusion; Point of Impact on the Road**

23. However, we are left with Mr. McBride's evidence that if the Plaintiff's evidence he was at all times in the middle of his own carriageway, albeit further around the bend, is correct, his car had to have altered course to its right before the collision in order to explain and be consistent with the estimated speeds, the damage sustained and the post-collision rest location of the cars. Whether or not this alteration in course would have taken the Plaintiff's car onto the crown or even onto the other side of the road it clearly rules out option 1 that the collision occurred as a matter of probability on the Plaintiff's carriageway, whatever about on the crown of the road, option (ii). As to that option, taking this evidence into account together with the evidence of Dr. Wood, which I accept, the Court is driven to the conclusion that the most likely point of impact between the vehicles was on the Defendant's carriageway.

24. In reaching this conclusion I should observe that I found the evidence of Mr. McBride and Dr. Wood to be very helpful, indeed, it is very refreshing to encounter experts who clearly understand the function of an expert witness in assisting the Court to arrive at its conclusions, particularly in respect of matters on which necessary expert testimony is led. On the matter of the collision locus Mr. McBride very fairly said that he simply could not assist in establishing the point of impact between the vehicles, a matter which he preferred to leave to the Court. He did not want to 'hang his hat' on whether the collision had occurred on the Plaintiff's carriageway or on the crown of the road. Dr. Wood on the other hand, for the reasons to which I have already referred, was satisfied the collision had likely occurred on the Defendant's carriageway. It follows from the findings made and the conclusions reached herein that sole responsibility for the cause of the accident rests with the Plaintiff for what was, in all the circumstances of the case, negligent driving on his part.

### **Miscellaneous Matters**

25. In the interest of completeness I consider it appropriate to make a number of observations in relation to submissions made to the Court in relation to liability and the appropriate ranges of damages set out in the updated Book of Quantum to which the Court is obliged to refer. As to the latter, both parties agreed that the Plaintiff's injuries were serious albeit that he had made a good recovery. Without prejudice to the issue of liability, Mr. O'Scanaill fairly accepted on behalf of the Defendant that despite the level of

recovery made the lower end of damages within the High Court jurisdiction was appropriate for the Plaintiff's injuries. Mr. Lyons on behalf of the Plaintiff thought a higher award was warranted and submitted that this should be assessed in the €75,000 to €100,000 range. However, given the Court's findings in relation to liability, an assessment of damages does not arise.

26. I've mentioned these matters and the Plaintiff's injuries in the course of judgment so that the parties- and in particular the Plaintiff- will be aware that when coming to its decision the Court was very mindful of the serious injuries sustained by him and the potential consequences of the decision on liability for his claim. Nevertheless, this did not nor could it play any part in determining the issue of liability, an issue which fell to be determined impartially in accordance with well settled principles. The law casts on the Plaintiff the onus of proof to establish on the balance of probabilities the case he brings to Court, a burden which, for the reasons already given, he has failed to discharge.
27. As to the issue of liability, Mr. Lyons invited the Court to have regard to the provisions of Section 34 of the Civil Liability Act 1961, particularly the power vested in the Court to apportion liability equally where it is not possible to measure or determine degrees of fault between wrongdoers. I took this submission to be an invitation to find in the circumstances that the collision had occurred on the crown of the road and to apportion liability 50/50 between the parties. Although the proposition was advanced in a very attractive manner, the provisions of Section 34 (1) do not arise for consideration where only one party, in this case the Plaintiff, has been found to be negligent. This concludes the judgment of the Court. I will discuss with Counsel the form or the orders to be made.