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Kelly – v – Meegan
Smith – v – Hanaphy

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Two recent decisions of Justice Barton in the High Court have provided some helpful guidance as to the correct approach to be applied to the assessment of liability in RTA claims where there is a dispute between the parties as to the precise circumstances of the accident (in particular in the context of head-on and side-on collisions), as well as the appropriate apportionment of liability by reference to Section 34 (1) of the Civil Liability Act 1961.

Smith –v – Hanaphy [2020] IEHC696

The Facts

The plaintiff sought to recover damages in respect of injuries he sustained as a result of a collision involving the defendant's vehicle, which occurred on an S-bend located at Stockhole Lane, Cloughran, Co. Dublin, on the evening of 30 January 2017.

Fig 1: Google Maps image of what is understood to be the approximate accident locus in *Smith – v – Hanaphy*

Submissions to the Court

Both parties maintained they were travelling entirely on their own side of the road at the time of the accident. Whilst the plaintiff contended that the defendant's car suddenly *appeared from the other direction, straddling the continuous white line on the crown of the road,* the defendant did not make any assertions as regards the precise position of the plaintiff's vehicle on the road, in circumstances where he admitted that he did not actually see the plaintiff's car, just the beams of its lights. However, in common with the plaintiff, the defendant's evidence was that he had no time to brake and/or swerve in an attempt to avoid a collision upon taking notice of the oncoming vehicle. Notwithstanding the parties' assertions, Barton J. concluded that – based on the dimensions involved (i.e. the width of the road and the width of the cars) – both vehicles should have passed one another safely if the drivers were correct in their recollections. He found that '*one or the other or both'* had to be mistaken. Therefore, in order to apportion liability, the precise point of impact needed to be determined.

Having regard to the en engineering evidence submitted on behalf of the parties, Barton J. formed the view that there were three possible explanations/scenarios for the cause of the accident and the point of impact on the road between the vehicles:

(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.

On the basis of the expert and witness evidence option (i) was considered the *least likely*. Rather, a submission was made on behalf of the plaintiff that option (ii) *fairly reflected what likely occurred* and, if that was the case, that the Court should consider exercising the power vested in it by Section 34 (1) of the Civil Liability Act 1961[1] by apportioning fault equally between the parties.

Whilst neither engineer could discard the possibility that the impact was the result of both vehicles simultaneously straddling the crown of the road, having regard to the physics principles at play,[2] the defendant's expert was satisfied that an assessment of the evidence to hand gave rise to the *strong probability – almost to the point of certainty* – that the collision had occurred on the defendant's side of the road. Plaintiff's expert on the other hand refrained from expressing an opinion as to precisely where on the road – as a matter of probability – the vehicles made contact.

Held

Having acknowledged the difficulty faced by the Court in apportioning liability, in circumstances where both drivers gave credible evidence as to their respective innocence, Justice Barton commended the engineers on submitting qualitative expert testimony which allowed the Court to draw conclusions as to the likely point of impact between the vehicles. Stating that "*it is very refreshing to encounter experts who clearly understand the function of an expert witness […] particularly in respect of matters on which necessary expert testimony is led*", the judge went on to summarise the opinions presented, before pronouncing himself satisfied that the engineers' findings established that the sole responsibility for the cause of the accident rested with the Plaintiff for what was – in all the circumstances of the case – negligent driving on his part.

It is of note also that Justice Barton, in addition to liability, as is his practice had considered submissions from both sides in relation to the appropriate ranges of damages set out in the updated Book of Quantum to which the Court is obliged to refer. Although the Court was mindful of the serious injuries sustained by the plaintiff as a result of the incident, and the potential consequences of the decision on his claim, Justice Barton clarified that the law did not allow a Court to take such considerations into account when determining the issue of liability. Consequently, the proposition put forward by the plaintiff's Counsel that Section 34(1) of the Civil Liability Act 1961 ought to be applied, was rejected.

Kelly –v – Meegan [2020] IEHC 698

Facts

The plaintiff initiated proceedings in the High Court in respect of a collision between his Peugeot 307 van and the defendant's Mercedes E320 on 6 May 2014 near Rassan, Hackballscross, Co. Louth. As in *Smith*, the exact point of impact between the vehicles – which was considered relevant for the purpose of assessing liability – was in dispute between the parties.

Fig 2: Google Maps image of the N53 near Rassan

[1] Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant: provided that—

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

(b) this subsection shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the defendant might, apart from this subsection, have the defence of voluntary assumption of risk;

(c) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages awarded to the plaintiff by virtue of this subsection shall not exceed the maximum limit so applicable.

[2] Particularly the interaction of the estimated speeds and the relative equality of weight between the vehicles factored into the expert's calculation.

Submissions to the Court

The plaintiff was travelling northwards on the N53 in the direction of Castleblaney. Upon realising that he passed the junction with the laneway into which he had intended to exit, he drove on for a further 150 metres before executing a U-turn into a minor road to his right and proceeding once more into the direction of Castleblaney. Having completed the U-turn, he allegedly drove a short distance on the hard-shoulder adjacent to the carriageway prior to re-emerging onto said carriageway. As per his own account, he engaged his right indicator and brought his vehicle to a halt in order to allow oncoming traffic to pass. Once he had checked his door mirror and was satisfied that the path was clear, he proceeded to execute his turn. The plaintiff's evidence was that the front of his vehicle had just reached the yellow demarcation line leading on to the southbound carriageway when his van was struck by the defendant's vehicle at high speed.

In contrast to the plaintiff's version of events, the defendant – who was also travelling along the northbound carriageway – submitted that following the execution of the U-turn, he witnessed the plaintiff travelling slowly up the hard shoulder. As the defendant proceeded on his journey the plaintiff suddenly pulled out in front of him onto the carriageway without warning. As regards the point of impact, the defendant maintained the collision occurred on his side of the road, entirely on the northbound lane. Consequently, the defendant sought to defend the proceedings on the basis that the plaintiff had created an emergency by emerging from a hard shoulder without warning into the path of the defendant's vehicle.

Reports and photographs presented to the Court confirmed that the main area of damage to the plaintiff's vehicle was to the driver's door and offside front wing, while the defendant's vehicle sustained severe damage to the nearside front of the car, i.e. the passenger side. It was noted that both engineers agreed that the damage to the vehicles was consistent with the van pulling out from the hard shoulder into the path of the Mercedes. As to where on the road this manoeuvre was probably carried out, the defendant's expert opined that if the van had been in the position contended by the plaintiff (i.e. with the front of the Peugeot at or about the broken yellow line demarking the northbound carriageway from the southbound carriageway), the entire offside of the car ought to have been at right angles to the Mercedes, in which event the damage to the defendant's vehicle would have extended across its full front, rather than being concentrated / confined to the nearside front / passenger's wing. As this was not the case, it was concluded that the collision had to have occurred *wholly* in the northbound lane.

Held

Referencing the burden of proof imposed by law on the plaintiff, Barton J. stated that he was not satisfied the plaintiff had been successful in establishing – on the balance of probabilities – that the accident occurred in the manner alleged by him, namely that he had already turned from the northbound into the southbound carriageway, when the cars collided. It was the judge's view that the location of the main concentration of debris found in the middle of the carriageway, the damage sustained by the vehicles and their post-incident resting place were factors which – if considered holistically – suggested the plaintiff's car must have been struck when at an angle of 40° to 45° to the defendant's vehicle. It followed that, as a matter of probability, the Peugeot van had to have come from the hard shoulder immediately prior to the event, resulting in a collision which occurred solely on the northbound carriageway. Furthermore, the Court accepted that by failing to give a timely warning of an intention to exit the hard shoulder[3] and to yield the right of way in a manner which caused an emergency for the defendant, constituted a breach of the common law duty of care owed by him to the plaintiff, as well as the duty of care he owed to himself. In all the circumstances, the plaintiff's actions were found to amount to negligence.

As to whether there was any causative negligence on the part of the defendant, Justice Barton stated that in circumstances where he had witnessed the plaintiff driving

[3] It is of note in that regard that the judge found that – although the plaintiff and his passenger submitted that the indicator was engaged before any attempt to make the turn was commenced – the Gardaí's evidence, coupled with that of the defendant, suggested that the engagement of the indicator and the moment of collision was almost instantaneous.

slowly down the hard shoulder following the execution of a U-turn, but failed to either anticipate or react to what in the eyes of the court amounted to a reasonably foreseeable attempt by the plaintiff to regain the carriageway, the defendant demonstrated a lack of care. This insufficient regard for his own / other road user's safety was found to have affected his ability to deal with the emergency which had been created for him. On the judge's view of the evidence to hand, the defendant ought to have taken one of the precautions outlined by the Court[4]. His failure to do so was found to have contributed causally to the accident and was thus negligent. In particular, the speed at which the defendant was travelling at the time was considered to be far in excess of what would have enabled him to have a reasonable prospect of dealing with the emergency.

Having found that both drivers were negligent, Justice Barton confirmed that Section 34(1) of the Civil Liability Act, 1961 required that any damages recoverable in respect of the wrong committed, are to be reduced by such amount as the Court finds just and equitable *having regard to the degrees of fault* of the respective parties. In exercising its' power to apportion the degrees of fault, the Court need not concern itself with the *relative causative potency of the respective causative contributions by the parties found guilty of negligence, but rather with the blameworthiness of the respective causative contributions measured objectively*. Specifically, *it was the blameworthiness of the contributions of the Plaintiff and the Defendant to the happening of the accident measured against what a reasonable person would have done in the circumstances, which is to form the basis of the apportionment*.

Applying the principle to the facts at hand, the Court concluded that a far greater degree of fault must attach to the plaintiff, as the creator of the emergency. Consequently, liability was apportioned at 75% against the plaintiff, and 25% against the defendant[5].

Conclusions

The decisions of the High Court in both *Kelly* and *Smith* are in keeping with a consistent series of such decisions over the last few years in public and employer's liability cases by the High Court and, perhaps more particularly the Court of Appeal, concerning the concept of personal responsibility and the common law duty of a plaintiff to have regard for his or her own safety.

In highlighting a court's obligation to focus on the perceived scope of blameworthiness / culpability of the parties, as opposed to the causative effect of their actions when attributing liability, Justice Barton confirmed that plaintiffs are not entitled to compensation for injuries and/or loss suffered as a result of accidents just because another party may have had a hand in the occurrence of such an accident. Defendants should only be ordered to pay damages for personal injury where a court is satisfied that their act operated both as a cause of the loss suffered, and also that it amounted to negligence.

It is in any event clear that these decisions reaffirm the extremely important role of credible expert evidence in assisting the courts to determine questions of liability in cases where the precise circumstances of an accident cannot be determined merely by reference to the accounts provided by the parties and/or when there is a dispute between the parties.

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[4] i.e. sound a horn, flash his lights or slow down further as he drew closer to the plaintiff.
[5] In respect of quantum, the Court considered *that a fair and reasonable award by way of general damages for pain and suffering to date in respect of physical injuries is €40,000, and in respect of the psychological injuries is €25,000, making together the sum of €65,000. The Court considers that a fair and reasonable sum to compensate the Plaintiff for future pain and suffering, which is principally attributable to the psychological sequelae triggered by the accident requiring ongoing treatment, is €35,000, making in aggregate an award for general damages of €100,000. Special damages claimed have been agreed in the sum of €1,575. These awards fall to be reduced in accordance with the apportionments of fault already made herein.*