Neutral Citation No. [2014] NIQB 132 | *Ref:* **OHA9409**

Judgment: approved by the Court for handing down | *Delivered:* **19/12/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2012 No. 088917

BETWEEN;

STACEY McCAUGHEY

Plaintiff;

-and-

BRIAN MULLAN

Defendant.

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O'HARA J

[1] At approximately 1.40 am on Sunday 26 September 2010 the plaintiff was walking along the Carrickmannon Road towards Ballygowan, County Down. She was very drunk. She was accompanied by Ashleigh Massey and Gavin Blair and probably 2 or 3 others. This group had been drinking in the Chestnut Inn on the Carrickmannon Road.

[2] The plaintiff was struck and injured by an oncoming car driven by the defendant as she walked along. She herself has no recollection of what happened. In fact she says she has no memory of anything between being in Ms Massey's house earlier in the day getting ready to go out and then preparing to leave hospital 10 or 11 days later after spending 4 days in the Intensive Care Unit. This loss of memory is partly because she was drunk but mainly because she suffered a moderately severe brain injury when she struck by the defendant's car in the accident which has given rise to her claim.

[3] At the point where the accident occurred the Carrickmannon Road is 18 feet wide, unlit and has a 60 mph speed limit. The defendant was travelling from the Ballygowan direction and was entirely sober. If his lights had been on full beam his

estimated view of pedestrians on the road would have been about 90 metres. If he was travelling on dipped headlights, the view would have been about 30 metres unless the pedestrians wore bright colours to make them visible earlier.

[4] All of the independent evidence such as the damage to the defendant's car and the evidence left on the roadway itself is consistent with the defendant having been travelling on his own side of the road at the time of the accident. As a result the only allegation which is made on behalf of the plaintiff is that the defendant was travelling too fast in all the circumstances which prevailed that morning.

[5] The defendant's case is that there were two oncoming cars which passed him as he reached and then went over the crest of a hill. As he continued down the hill, going at between 40-45 mph, he noticed a group of 5-6 pedestrians walking in the middle of the road. He states that he immediately turned left towards the hedge to avoid them. His stopping position at an angle partly off the road on a narrow grass verge is agreed to be consistent with that description.

[6] Blood was found at five points on the road. Four of those points were at the middle of the road or on the right hand side as the defendant drove towards the pedestrians. The damage to his car was primarily at the front driver's side and wing. The blood and the damage to the car are consistent with the pedestrians having been where the defendant described them. One blood mark (the largest) was a short distance behind the stopping position of the defendant's car. It was agreed by Dr Wood and Mr Wright, engineers who gave evidence for the plaintiff and the defendant respectively, that this mark is explained by the defendant having struck the plaintiff as he was trying to turn to his left and avoid the impact. The likelihood is that as he did so he hit the plaintiff with the result that she was thrown over his car and landed behind it or that the force of the car hitting her made her spin and fall behind the car after it had passed.

[7] It is not disputed that the plaintiff contributed greatly to the accident by being drunk in the middle of the road or on the defendant's side of the road. For the defendant Mr Ringland QC put her contributory fault at up to 90%. For the plaintiff Mr McNulty QC conceded that she was at fault but submitted her fault could not exceed 50%. The real dispute was whether the defendant was at fault at all and whether any criticism of his driving would be excessive and unfair.

[8] I found the defendant to be an honest witness, doing his best to recollect what had happened that morning. He had gone into Belfast to collect two couples (friends of his) who had gone out for the night. As a favour he was taking them home. They all had some drink taken but he did not. In his evidence-in-chief he volunteered the fact that after the second of the oncoming cars had passed him he had switched his lights from dipped to beam. Almost immediately he saw the pedestrians including the plaintiff. They were strung across the road in front of him. He swerved to his left as quickly as he could react but saw and felt an impact with one of them. This

was most likely the plaintiff but there was also a second less severe impact which caused injury to Mr Blair.

[9] In cross-examination by Mr McNulty the defendant said that he knew the Chestnut Inn was nearby and that there might be people outside it looking for taxis. He said that he assumed that he was going at between 40-45 mph because that was his normal speed and that he had not slowed down as he came over the crest of a hill which was about 200 metres from the Chestnut Inn and about 100 metres from what turned out to be the area of impact.

[10] It is not possible to say from the defendant's description of the accident exactly how far away he was from the plaintiff when he first saw her and others on the road. The best he could describe it was that as he drove down the hill and passed the second oncoming car he put his lights on full beam and saw them. Rule 126 of the Highway Code states:

> "**Stopping distances**
>
> Drive at a speed that will allow you to stop well within the distance you can see to be clear."

The fact that this honest sober driver was unable to stop leads me to conclude that he was driving too fast – otherwise it is probable that he would have been able to stop within the distance he could see to be clear. The view which he would have had on dipped headlights of dark objects would be 30-33 metres. On full beam the view would be around 100 metres. Whatever the precise time sequence, the fact is that when he did see the plaintiff he could not stop in time. For this purpose it matters little whether she was a drunk woman in the middle of the road, an old lady crossing the road or a driver changing a flat tyre. The onus is on the oncoming driver to follow the Highway Code by stopping in time to avoid any obstruction on the road ahead.

[11] Article 51(6) of the Road Traffic (NI) Order 1995 provides:

> "A failure on the part of any person to observe any provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under the Road Traffic Orders) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

This provision is relevant because for the defendant Mr Ringland emphasised the evidence which had been given by Mr Trevor Wright, engineer, that this provision

in the Highway Code is unrealistic and a counsel of perfection which should be disregarded in the circumstances of the present case. In this context he relied on Lord Denning's dictum in Qualcast (Wolverhampton) Ltd v Haynes (1959) AC 743 at 759 in which he stated that it would be a mistake to elevate into propositions of law the good sense provisions of the Code. His submission was that it would be wrong and unfair to find that the defendant was negligent for driving at 40-45 mph at night on a country road when his driving was otherwise beyond criticism.

[12] For the plaintiff Mr McNulty challenged the suggestion that the Highway Code should be disregarded in this way. He submitted that driving on a damp, unlit road without footpaths approaching a public house at a speed in excess of the driver's visibility and stopping distance was negligent even if many or most drivers do the same.

[13] In his evidence Mr Wright suggested that the Highway Code does not differentiate between daytime and night time driving. That is not correct – it does so at Rule 125 which advises drivers to reduce speed when weather conditions make it safer to do so and when driving at night "as it is more difficult to see other road users". The direction is a general one which every driver understands – whatever the weather, whatever the time of day or night, we should drive at a speed which allows us to stop well within the distance we can see to be clear.

[14] Mr Wright illustrated his argument by suggesting that if the Highway Code was followed to the letter, drivers on the M1 or A1 would have to slow down to 30 mph at night. I reject his contention for two reasons. The first is that the lighting on those roads gives greater visibility than is found on a narrow unlit country road. The second is that drivers are less likely to come across people walking down the middle of the A1 than they are on the Carrickmannon Road or any other road which has a public house on it.

[15] Beyond those arguments there is a more fundamental point – people drive too fast at night if they drive at a speed which does not allow them to stop within the distance they can see ahead. To say that it is unrealistic to expect people to drive as the Highway Code expects them to is to accept driving which will cause injury and death to drivers, passengers and pedestrians. It may be that many other drivers would have gone at the same speed on the Carrickmannon Road as the defendant. That does not make what he did right and it does not mean that he wasn't driving too fast. I find against the defendant on the issue of liability.

[16] Having done so, I turn to the plaintiff. In Froom v Butcher [1975] 3 All ER 520 the Court of Appeal considered contributory fault and the reduction of damages. At page 524 Lord Denning said:

"Negligence is a man's carelessness in breach of duty to *others*. Contributory negligence is a man's carelessness in looking after *his own* safety. He is guilty of

contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself."

Until 1948 a plaintiff who was guilty of contributory negligence was disentitled from recovering anything if his own negligence was one of the substantial causes of the injury. That was changed in Northern Ireland by section (2) 1 of the Law Reform (Miscellaneous Provisions) Act (NI) 1948 which provides:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…"

The plaintiff was a road user with responsibilities to herself as well as other road users including the defendant and his passengers. She failed to look after her own safety by walking in the middle of a dark unlit road while drunk and incapable of being alert to traffic. For these reasons I reduce her damages by 60%.

[17] The plaintiff's injuries were described in a series of agreed medical reports. They do not need to be repeated in detail in this judgment. At the time of her accident she was 20 and is now 24. Her main injuries were a left frontal lobe contusion with subsequent headaches, a possible frontal bone fracture, a pneumothorax at the apex of her left lung, a possible C1 fracture, a fracture of her left fibula and soft tissue injury to her lumbar spine. She also had several lacerations including one which has left a clearly visible scar on her forehead above her left eyebrow and one within the hairline at the back of her head.

[18] The plaintiff has had headaches, mood upsets and memory disturbance. She has a significantly increased lifetime risk of developing post-traumatic epilepsy, perhaps as high as 15-20%, as a result of her severe traumatic brain injury. Despite this she returned to employment when she was fit to do so in July 2013 and continued to work until September 2014. Her latter job was in a café but she found it to be too arduous with pain in her back, hips and knees for which she takes painkillers. This led her to stop work last month. The fact that she was able to work for more than a year is of course a positive sign. Mr McNulty submitted that she carries a handicap in the employment market, though to a limited degree, whereas Mr Ringland contended that her on-going complaints are not supported by the findings in the medical reports or what she told the consultants. It is also to be noted that in the period between the accident and trial she was involved in a Crown Court prosecution which ended with her being convicted of perverting the course of justice in connection with a murder.

[19] Given the severity of the accident in which the plaintiff was involved her recovery is remarkable. It is to her credit that at a difficult time economically she

found two jobs and worked for more than a year in them. It is not in the least surprising that she has some limited on-going symptoms but I do not regard her as carrying a handicap in the labour market. She should be able to work again in the future with no marked difficulties. The only real risk to her in the future comes from the possible development of epilepsy.

[20] In all these circumstances I assess the plaintiff's general damages at £110,000. On the basis of her contributory fault I award her £44,000 with 2% interest from the date on which the writ was issued.