THE HIGH COURT ON CIRCUIT

[2022] IEHC 469

[CIRCUIT COURT RECORD No. 2018/00868]

BETWEEN

PATRICK MELODY

PLAINTIFF

AND

JAMES O'CONNOR, DANIEL KELLY AND THE MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

THE HIGH COURT ON CIRCUIT

[CIRCUIT COURT RECORD No. 2018/00832]

BETWEEN

PATRICK MELODY

PLAINTIFF

V

MICHELLE MOLLOY, JAMIE MARSHALL AND THE MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

***Ex Tempore* judgment of Mr. Justice Heslin delivered on 18th day of May 2022**

1. The following is a decision in relation to the first issue in respect of two inter-linked appeals, and it is appropriate to deal with it first (i.e. before the issue of quantum). As to the submissions made by Mr. Downing SC, on behalf of the MIBI, he made clear at the outset that, in a judgment delivered on 29 May 2020 in *Mongan v. Mongan & MIBI* [2020] IEHC 262, McDonald J. determined that the MIBI Agreement 2009 can address negligence and malicious, or deliberately-caused, acts.

2. The argument put forward by the Third Named Defendant in these proceedings is that the MIBI is a (or the) "fund of last resort". It was submitted that the relevant Directives, which I will presently come to, require the putting in place by Member States of a body to process and deal with claims concerning uninsured and untraceable drivers and it is contended that, because the MIBI is a "fund of last resort", it is incumbent on persons to first seek compensation from other sources, in this case, the source being a claim pursuant to the Garda Síochána (Compensation) Act, 1941 ("the 1941 Act").

3. Reference was made during Mr. Downing's submissions to the so–called "1% Rule" (i.e. even if 1% of liability is found to attach to an uninsured driver, the MIBI does not escape liability) being a well-known, but non–statutory rule. It was contended that each incident in the present case was a deliberate and malicious act and that, as such, the plaintiff "had an option to bring a claim under the Garda Compensation legislation". The word used in Mr. Downing's submission, was "option", and this was very appropriate, because I have been unable to find any statutory provision or legal

authority or principle which would require the bringing by a member of An Garda Síochána of their claim under the 1941 Act.

4. Mr. Downing went on to acknowledge, again very appropriately, that time-limits for Garda Compensation scheme claims are limited under the 1941 Act. He also accepted, again very appropriately, that the Minister could have refused an application for compensation, had it been made under the Garda Síochána (Compensation) Act, 1941. His submission was that this issue could and should have been addressed by, where necessary, the issuing of a "protective writ" or protective proceedings.

5. Mr. Downing opened s. 2.1 (c) of the 1941 Act and it is appropriate to refer to that now. Under the heading of "Deaths and Injuries to which the Act applies", s. 2.1 begins: -

> "(1) This Act applies—
>
> . . .
>
> (c) to personal injuries (not causing death) maliciously inflicted after the date of the passing of this Act on a member of the Garda Síochána—
>
> (i) in the performance of his duties as such member while actually on duty. . ."

6. I pause to observe again that the Act does not go to say, for instance, that where any compensation is sought for such personal injuries (as defined) as were sustained by a member of An Garda Síochána, compensation shall be sought by way of an application under the 1941 Act. In other words, the legislation does not explicitly 'rule out' any other route.

7. Reference was made also to other provisions within the 1941 Act, including s. 5 which, under the heading "Applications to the Minister for Compensation under this Act", deals with mandatory provisions insofar as applications made. It begins by stating: -

> "The following provisions shall apply and have effect in respect of applications to the Minister for compensation under this Act, that is to say . . ."

8. I pause here to note that the mandatory term "shall" is used, not in the context of requiring an application to be made under the 1941 Act, but requiring that certain things be done in respect of applications which are made to the Minister. In other words, it does not mandate that someone in the plaintiff's position make an application.

9. The section goes on at s. 5(a) to provide that: -

> "(a) where the application is in respect of . . . injuries inflicted after the date of the passing of this Act, the application shall be made within three months after the day on which such death occurred or such injuries were inflicted . . ."

10. That speaks to a much more restricted regime which is required for an application under the 1941 Act when compared to 'Statute of Limitations' times-limits.

11. Under the heading "Powers of the Minister in relation to applications for compensation", s. 6.1 of the 1941 Act begins: -

> "Whenever an application is duly made to the Minister for compensation under this Act, the following provisions shall have effect . . ."

12. Once again, that phrase plainly admits the possibility that an application is not made, even where the relevant incident might be said to qualify per s. 2.1(c) and that seems to me to be the factual situation in the present case.

13. S. 7, under the heading of "Applications to the High Court for compensation under this Act", begins: -

> "(1) Any person who has applied to the Minister under this Act for compensation under this Act and has been authorised by the Minister to apply for such compensation to the High Court may apply to the High Court in accordance with such authorisation and this section".

14. Once more, the use of the phrase "any person who has applied" plainly admits the possibility that such a person might not have applied.

15. S. 7(2) continues by making mandatory the following provisions: -

> "The following provisions shall apply and have effect in respect of every application under this section to the High Court for compensation under this Act, that is to say: —
>
> > the application shall be made not later than two months after the date on which the authorisation of the application by the Minister was communicated to the applicant."

16. The foregoing speaks to two things, firstly, a relatively limited time-limit of two months after authorisation, but of far more relevance for present purposes, it makes clear that compensation under the 1941 Act is not an entitlement or a right.

17. It is fair to say that the right, but not the obligation, is to make an application for compensation and that plainly emerges from a consideration of the sections I have referred to.

18. In submissions, Mr. Downing for the MIBI also referred to para. 6.3 of a judgment by Irvine J. (as she then was) given on the 15th June, 2020 in the case of *Carey & Ors. v. Minister for Finance* [2010] IEHC 247, wherein (at para. 6.3) the current President stated that: -

> "As to the Court's jurisdiction when assessing compensation, the Court has concluded that, subject to the specific provisions of s. 10 of the Act, it should follow the approach normally

adopted by a court assessing a claim for damages for personal injuries at common law . . ."

19. There can be no issue taken with this principle but it speaks to the question of a common approach being taken by this Court, regardless of whether the assessment of damages for personal injuries arises under what might be called its 'normal jurisdiction' in civil litigation, or insofar as it arises pursuant to a claim brought pursuant to the 1941 Act, wherein the manner examined, the Minister's authorisation is a *sine qua non.*

20. Reliance was also place on the decision in *Kampff v. Minister for Public Expenditure* [2018] IEHC 371. Particular reference was made to para. 2, wherein Twomey J. stated: -

> "This Court concludes that the appropriate amount of compensation is €5,000. While this Court is obliged simply to have regard to the Book of Quantum in civilian personal injury cases (but not in Garda Compensation cases), which means the Book of Quantum is not binding, this Court (and indeed the District Court and the Circuit Court) is obliged to follow the binding principles for the assessment of damages for personal injuries enunciated by the Court of Appeal and the Supreme Court".

21. That authority does no more than make it clear - as the President did in *Carey & Ors*. - that similar principles apply to the approach to compensation for personal injuries, regardless of whether it is (a) under the 1941 Act or (b) in what Twomey J. described as "civilian personal injury claims or cases".

22. It is not in dispute that insurers working in this State contribute to the MIBI. Nor is it in dispute that, pursuant to the terms of the agreement with the relevant Minister, compensation is payable. The 2009 Agreement was referred to, in particular, para. 4.4, which states: -

> "Where a claimant has received or is entitled to receive benefit or compensation from any source including any insurance policy in respect of damage to property, MIBI shall deduct from the sum payable or remaining payable under Clause 4.1 an amount equal to the amount of that benefit or compensation in addition to the deduction of any amounts by virtue of Clauses 7.2 and 7.3".

23. In my view, the plaintiff is not someone who could fairly be said to be "entitled to receive benefit". His entitlement, in the manner I have examined with reference to the 1941 Act, is to make an application.

24. It seems to me that an entitlement to apply is materially different to an entitlement to receive benefit. S. 7.1 of the 1941 Act makes clear that the Minister's authorisation is a prerequisite to which a Garda applicant has no right or entitlement, yet that is a prerequisite before any benefit could be said to be receivable.

25. Mr. Downing also acknowledges, very appropriately, that the 2009 Agreement does not specify that the MIBI is a "fund of last resort". The court is informed that this phrase was included in the prior agreement of 2004, not of course being the relevant agreement when the present proceedings were

issued. Although I want to make clear that that particular point does not seem to me to be determinative of the issue, it does seem nevertheless that, from a first principles analysis, the removal of that express statement would not appear to be something this Court should regard as either, firstly, accidental, or, secondly, of no import, relevance, or consequence whatsoever. I make that observation simply because it seems to me to be consistent with the decision I have ultimately come to.

26. Reliance was also made on the reference to the MIBI as being a payer of last resort in the Supreme Court's 1999 decision in *Bowes v. MIBI* [2000] 2 IR 79. As I say, it is acknowledged that that particular phrase was excluded from what is the most recent agreement.

27. Mr. Downing also referred to a UK Court of Appeal reference in the case of Case C-442 *Churchill Insurance Company Ltd. v. Wilkinson & Ors*. [2013] 1 WLR 1776, with reference made, in particular, to para. 41 where the following is stated: -

> "Second, as noted by the Commission, the payment of compensation by a national body is considered to be a measure of last resort, provided for only in cases in which the vehicle that caused the injury or damage is uninsured or unidentified or has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive".

28. That phrase, which refers to the payment of compensation being considered to be "a measure of last resort", plainly is not authority for the proposition that a member of An Garda Síochána is mandated to bring a claim for compensation under the 1941 Act which, itself, lays down no such mandatory requirement. It does, however, underline that prima facie the plaintiff's claim is one which is within the ambit of schemes by national bodies with regard to injury caused by unidentified, or in this case, uninsured drivers.

29. Reference was also made in the submissions on behalf of the MIBI to certain extracts from Cathleen Noctor and Richard Lyons, *The MIBI Agreements and the Law* (2nd edn, Bloomsbury Professional 2012), in particular, para. 8.16 wherein the learned authors referred inter alia to the *Bowes* and *Churchill* decisions. It does not appear to me that the views expressed by the learned authors take matters materially further than I have already examined, by reference to the caselaw and, indeed, the 1941 Act itself.

30. It is fair to say that the MIBI's core submission is as follows: the plaintiff, because he could have, should have made an application under the Garda Síochána (Compensation) Act, 1941, and he is not now entitled to seek compensation in these proceedings.

31. Mr. Clein BL, counsel for the plaintiff, in his submissions, referred to the *Bowes* decision and whilst acknowledging that Mr. Justice Murphy deployed the phrase "payer of last resort", he opened for the Court the following passage (from the end of p. 87) where that phrase was explained in the context in which it was used, namely: -

> "Moreover, the procedure ensured that the Motor Insurer's Bureau of Ireland would be the payer of last resort. Any persons whose negligence contributed to the injuries could be

made a defendant by the victim either at his election or at the direction of the Motor Insurer's Bureau of Ireland and no matter how small a part the negligence of that defendant played in causing in the accident the fact that the judgment could be recovered against him for the entire amount relieved the Motor Insurer's Bureau of Ireland of any liability whatever".

32. Mr. Clein also submitted with reference to the *Churchill* decision that it includes both a statement of the principle and a definition of it, the definition of payer of last resort being referable to injury caused by the uninsured or unidentified and the compensation payable in that context. He also submitted ,and I entirely agree, that the plaintiff is someone who comes within the remit of persons entitled to be covered by a "payer of last resort" insofar as the authorities in this jurisdiction, and *Churchill* at an EU level, explained that concept, i.e. with reference to the uninsured and untraceable.

33. Mr. Clein also pointed out, just as Mr. Downing had made very clear, that a deliberate act by a driver can give rise to an MIBI claim. He went on to submit that a line of English authority made that clear previously. He also submitted, very correctly in my opinion, that there is simply no evidence before this Court as to what would have happened, had an application been made by the plaintiff to the Minister for authorisation to bring a claim under the 1941 Act. He asked rhetorically, "Would it have been considered that malice was established and would a certificate have been issued?" These are unknown quantities in the present case.

34. It not in dispute that the MIBI Agreement was made pursuant to Directive (2009/103/EC) ("the 2009 Directive") and Mr. Clein referred, in particular, to Article 10 (the 2009 Directive being the one in force at the time these proceedings were issued). Article 10, under the heading "Body responsible for compensation", states: -

> "1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.
>
> The first subparagraph shall be without prejudice to the right of the Member States to regard compensation by the body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident . . ."

35. I pause here to observe that this is plainly a reference to a defendant or concurrent wrongdoers, and it continues: -

> ". . . and other insurers or social security bodies required to compensate the victim in respect of the same accident."

36. Mr. Clein submits that the Garda Compensation Scheme is not an insurer or indemnifier or, for that matter, a social security body. He also submits that deductions, insofar as they can be made, are limited to the manner specified in Article 10. He also referred once more to Clause 4.4 of the 2009

Agreement which I have already quoted from. He submits that this provision corresponds with the second aspect of para. 10 of Article 10 of the 2009 Directive, namely, with regard to the reference to "insurers or social security bodies" and his submission was that there is no creation of an exclusion in respect of a statutory scheme. He also laid emphasis on what is explicitly provided in Clause 7 of the MIBI Agreement, which makes express reference to property damage, and his submission was that, beyond property damage, the combined effect of Clause 4.4 and 7 of the 2009 Agreement, read in the context of Article 10 of the relevant Directive, is that no other deduction arises apart from social welfare.

37. Bringing my decision to a conclusion, I am entirely satisfied that there is no statutory provision or principle or authority which has been put to this Court which makes it explicit that the plaintiff was ever required to make an application under the 1941 Act. He had that right, but he did not have that obligation.

38. I can see nothing in the 1941 Act which is consistent with an interpretation that it was mandatory for a member of An Garda Síochána who might qualify, to proceed to make an application pursuant to the 1941 Act (as opposed to deciding not to make such an application but, instead, to, in this example, issue proceedings).

39. I also take the view that, on the facts of this case, the plaintiff, not having applied to the Garda Compensation Scheme, is not someone entitled to receive benefit.

40. Furthermore, the extent of the entitlement under the 1941 Act is an entitlement, it seems to me, to apply. Furthermore and as I have already observed, s. 7.1 of the 1941 Act makes clear that the first 'hurdle' to be cleared by an applicant is one which he cannot clear as of right. Rather, it is for the Minister to authorise, or not, the bringing of such an application. For that reason, in particular, I am satisfied that the plaintiff is not someone covered by Clause 4.4 of the 2009 Agreement.

41. That seems to be to be determinative of the issue, but before I finish this short ruling and by way of further comment, it seems to me that the position would be materially different had the factual situation been that; (i) the plaintiff had applied under the 1941 Act; and (ii) the Minister had authorised his application; and (iii) he had received compensation. It seems to me that in that theoretical scenario (or if (i) and (ii) represented the facts) the position would be covered by the words in Clause 4.4 of the 2009 Agreement which state: -

> "Where a claimant has received or is entitled to receive benefit or compensation from any source . . . MIBI shall deduct . . .".

42. That is not the position on the facts here and, therefore, I am satisfied that the plaintiff is entitled to bring these proceedings.

43. That determines the first issue. I have already carefully considered all the evidence and all the medical reports which are agreed but, as I would normally do, I would now invite short submissions in respect of quantum. As I understand, the current Guidelines are not applicable to this claim but,

insofar as the 'old' Book of Quantum is of relevance, I would be grateful for short submissions, should the parties wish to make same.

44. [Note – quantum was agreed by the parties].