

**THE HIGH COURT**

[2017/4064 P]

**BETWEEN**

[2024] IEHC 439

**DAMIEN O'DONOGHUE**

**PLAINTIFF**

**AND**

**TOTAL HIGHWAY MAINTENANCE LIMITED**

**AND**

**BUS ÁTHA CLIATH – DUBLIN BUS**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Micheál O'Higgins delivered on 17<sup>th</sup> July, 2024**

**Introduction**

1. The plaintiff was operating a stop/go sign at a busy set of roadworks when a bus ran over his right foot, causing him a significant crush injury and fracturing a number of bones. The temporary roadworks were managed and designed by the plaintiff's employer (the first defendant) and the bus was being driven by an employee of Dublin Bus (the second defendant). Liability is denied by both defendants and they blame each other for the accident. Dublin Bus also makes a plea of contributory negligence as against the plaintiff. The court's task is to decide liability and, if necessary, assess damages.

The case raises issues of causation and specifically, the interplay of "static" causal factors such as roadway design and maintenance, and driving errors such as speeding and

inattentiveness. In this judgment, I will refer to the first defendant as “Total Highway” and the second defendant as “Dublin Bus”.

### **Summary of evidence**

2. Evidence was heard from the plaintiff, Mr. O’Donoghue, and from Mr. Michael Byrne, Consultant Forensic Engineer. For the second defendant, evidence was given by the bus driver and by Stephen Mooney, Consultant Forensic Engineer. The first defendant did not go into evidence. A report from Cathal Maguire, Consultant Engineer was furnished to the court in the booklet of engineers reports but Mr. Maguire was not called to the witness stand.

3. The circumstances of the accident are largely agreed. The plaintiff was employed by the first defendant as a traffic manager at their site at roadworks near the junction of the Kylemore Road and Oscar Traynor Road in Coolock in Dublin. The accident happened on the 15<sup>th</sup> November 2015 at approximately 3.55pm. The accident was captured on CCTV footage from cameras at the front of the bus. The plaintiff was operating a stop/go “lollipop” sign on the Kylemore Road side of the junction which was the minor road forming the T-junction with Oscar Traynor Road. The two lanes had been reduced to a single lane. The applicable speed limit on the road was 50kph. The bus in question was a dual axle double-decker bus. The bus was 10.7 metres long x 2.55 metres wide. Including the wing mirrors the maximum width of the bus was 2.9 metres. The width of the roadway was the subject of much dispute but was somewhere either side of 3.4 metres (I will come back to the disputed measurements later).

4. The CCTV footage from the bus was played in court a number of times and the court was provided with helpful still photographs which showed the view the bus driver had as he approached the plaintiff. The plaintiff was the supervisor in charge of the traffic control system on the day in question. However, he did not design the system and was provided with

the traffic management plan that he was to follow by his employer. His employer had put in place a concrete barrier which separated a pedestrian walkway from the roadway. The plaintiff was sitting on the concrete barrier operating the stop/go sign which was inserted into a small stack of traffic cones. This was apparently necessary to prevent the stop/go sign turning in the wind.

5. It is agreed that the plaintiff was wearing a high visibility top and pants and would have been clearly visible to motorists including the bus driver as traffic approached. There were two orange “roadworks ahead” signs posted to the left of traffic as the bus driver approached the works area. There were also two orange “flagsman ahead” signs visible as the bus approached the *locus*.

6. It is important to note that the plaintiff’s description of the incident was not challenged by either defendant. The plaintiff said that he was getting ready to turn the lollipop sign to “stop” as the traffic approaching the junction was coming to the end of the flow. He saw the bus approach and he could see the mirror of the bus was going to come close to the sign he was holding so, in order to avoid contact, he pulled the sign towards himself out of the way of the bus. Unfortunately, the front corner of the bus hit the cones on which the stop/go sign was placed and this, in turn, pushed the plaintiff’s feet up into the air and he was caused to fall to the ground, with the sign and the cones beside him. As he hit the ground, and as the bus moved through the gap, the left rear wheel of the bus went over the plaintiff’s right foot. The plaintiff was in severe and immediate pain. He said in evidence he had a strong sense that the bus was “coming too fast”. Thankfully, the plaintiff was wearing steel cap shoes which provided some level of protection. Nonetheless, it is agreed that the plaintiff suffered a significant injury to his foot in the accident.

**Case made on behalf of Total Highway**

7. The first defendant says the accident was caused by Dublin Bus. The CCTV footage and stills show that the plaintiff's position on the safety barrier should have been obvious to the driver as the bus approached the junction. There were a number of visual cues which the defendant ought to have heeded, including the orange cones into which the stop/go sign had been placed and the roadworks and flagsman signs that were visible further back. It was the responsibility of the bus driver to ensure there was sufficient space available to him to pass through the gap safely. Seeing the warning signs and being aware that the roadway was about to narrow at the point where the plaintiff was located, the bus driver should have reduced his speed to a virtual crawl. Instead, the CCTV footage shows his speed remained constant, even at the pinch-point where the plaintiff was positioned.

8. The first defendant submits the cause of the accident was the plain fact that the bus driver did not exercise appropriate care and failed to take the road conditions with which he was presented into account. Everyone agrees that at the time of the accident, the bus was driving through roadworks that had restricted width and tight margins. The bus driver was under a heightened duty to take the roadworks into account and, being aware of the presence of the plaintiff up ahead, to manoeuvre the bus slowly and safely so as not to strike the plaintiff. The mechanism of the plaintiff's fall and the injury itself confirmed that the bus driver failed to do this.

9. While the engineer's report of the first defendant criticises the plaintiff's choice of position whereby he chose to perch himself on the concrete barrier, Mr. Maguire's report was not put into evidence. In point of fact, the plaintiff's employer makes no criticism of the plaintiff, either in cross examination or submissions.

Instead, Total Highway's position was that Dublin Bus was 100% to blame for the accident. The roadworks had been *in situ*, and the plaintiff on site, for three to four weeks prior to the accident, without incident. This indicates, says the first defendant, that the traffic

management layout at the locus was safe and appropriate. All other large vehicles and buses had managed to safely negotiate the roadworks. It was only the negligent actions of the bus driver on the day that caused the index accident.

### **Case made by Dublin Bus**

**10.** The second defendant's engineer, Mr. Mooney, gave evidence as per his report that the width of the temporary traffic lane estimated from the video footage using a process called photogrammetry was c. 3.4 metres. This estimated figure was arrived at by taking the width of the Volkswagen car travelling in front of the bus on the video (c. 1.8 metres) and scaling between the concrete barrier on the left and the traffic cones on the right. This figure of 3.4 metres does not represent the actual gap available to the bus driver because the presence of the plaintiff and the stop-go sign and cones on the roadway reduced the effective width available to motorists to approx. 2.8 metres.

**11.** The Department of Transport "Guidance for the control and management of traffic at road works" 2010 states that the minimum width of the traffic lane for traffic including buses and HGVs should be 3 metres. The desirable minimum should be 3.25 metres. Therefore, says Dublin Bus, the traffic lane was simply too narrow and effectively constituted a trap for the bus driver.

**12.** As to Total Highway's claim that the stepping-back of the cone on the right hand side of the roadway meant that there was sufficient room available for the driver if he had steered the bus safely to the right as he should have done, Dublin Bus says this is unrealistic for a large vehicle such as a bus which has a more limited turning circle than a regular car.

**13.** Taking into account the width of the bus (2.55 metres), there was no more than a total clearance in the traffic lane of approximately 25 centimetres. If the bus was centrally located in the lane there was no more than 12.5 centimetres clearance to the cones to the left which

the plaintiff was holding. This, says the second defendant, was extremely tight and created an unnecessary danger for the plaintiff.

14. Separately, Dublin Bus submits that the 2010 Department of Transport Guidelines require a minimum lateral safety zone to protect workers operating in the midst of moving traffic. There was no lateral safety zone provided on the plaintiff's side of the temporary traffic lane at the time of the accident.

15. Furthermore, Dublin Bus says the plaintiff was guilty of contributory negligence by choosing to locate himself on the traffic side of the concrete barrier, perched on the barrier with his feet effectively dangling in the air. This, says Dublin Bus, was an unstable position for the plaintiff to take up as it meant that the plaintiff, who after all was a supervisor, effectively chose to place himself in the way of danger. There was nothing to prevent the plaintiff standing on the other side of the concrete barrier, within the pedestrian walkway, and from there using his outstretched hand to operate the stop/go sign that was set into the cones on the other side of the barrier. Had the plaintiff taken up a position within the area of the pedestrian walkway, the accident would simply not have occurred. The necessity for the plaintiff to stand in a safe place was all the more important because the design and layout of the traffic management site did not provide any lateral safety zone. Overall, Dublin Bus was critical of the system of work designed by the first defendant, and implemented by the plaintiff, and contends that these features when taken together, caused or at the very least contributed to the plaintiff's accident.

#### **Road measurements and the speed of the bus**

16. There was disagreement between the parties as to the precise width of the traffic lane that was available to the bus driver, and as to whether the first defendant did or did not comply with the minimum width guidelines. The engineers for the plaintiff and Dublin Bus

both maintained that when the dimensions of the cone and the stop/go sign are taken into account, the available roadway fell short of the required minimum width. Counsel for Total Highway contested this position in cross examination and put it to the respective engineers that, at worst, the roadway was only marginally outside the guidelines' minimum width, to the tune of no more than 0.1 metres. It was put to the engineers that, taking account of the disputed size of the traffic cones, the necessity to include the width of the white line on the right hand side, and the fact the cone on the right hand side was stepped back and allowed more room on the diagonal, it could not be said with certainty that the first defendant had breached the guidelines.

**17.** In the report of the plaintiff's engineer Mr. Byrne, it was stated that the width between the cones into which the stop/go sign was set and the cone located on the right hand side on the centre line was less than 3 metres and "perhaps as low as 2.5 metres". However, I think it is fair to record that in cross examination, Mr. Byrne acknowledged that he was not insisting that the estimate of 2.5 metres was inevitably correct. Nonetheless, he stood over the position that the available roadway was less than 3 metres.

**18.** In my view, it is somewhat unsatisfactory that the court was not provided with clear and precise information as to the width of the roadway at the accident locus. It seems to me the party best placed to access this information was the first defendant who, after all, designed the road management plan, had various personnel on site and had overall responsibility for the roadworks. While counsel for the first defendant skilfully explored certain grey areas in cross examining the engineers, it seems to me the furthest the first defendant could put its case was to suggest that the non-compliance with the guidelines was no more than marginal or "*de minimis*". As was its entitlement, the first defendant chose not to call its engineer or offer any positive evidence as to the precise measurements of the

roadway. This has made it difficult for the court to make precise findings of fact concerning the width of the roadway that was available to the bus driver.

**19.** In circumstances where the evidence from the two engineers who gave evidence has not been challenged by way of competing evidence from the first defendant's engineer, I am satisfied to find that the available roadway was less than three metres wide. This is the absolute minimum width permitted by the Guidelines. While it is difficult to be precise as to the extent of the deficit, I am satisfied on the balance of probabilities that the minimum width threshold under the Guidelines was breached by at least 0.1 metres, if not more. While the Guidelines do not have the force of law, it is nonetheless incumbent on the first defendant to justify departure from the minimum standards set by the Department of Transport. I do not regard this as an inconsequential or *de minimus* matter because the scheme of the Guidelines already sets down a range, going from the *desirable* minimum width to the *absolute* minimum width. In my view, therefore, to dilute the Guidelines further by inserting an additional element of "wriggle room" would not be appropriate. In the circumstances, I hold that the first defendant breached the minimum width requirements of the Guidelines.

### **Criticisms in the Design of the Traffic Arrangement**

**20.** It seems to me that the overall traffic management arrangement, as designed and operated by the first defendant, suffered from a number of frailties which, individually and cumulatively, brought about a situation where the plaintiff was placed in unnecessary danger. It is not in dispute that the first defendant owed a duty of care to the plaintiff, one of its employees, whose work environment the first defendant controlled, at least to a large extent.

**21.** It is not the role of the court to be prescriptive as to the precise shape the traffic arrangement should have taken. Issues as to the design and planning of the arrangement, what materials to use, what safeguards to build in, how many personnel to employ, and other



operational calls, are, in the first instance, issues to be considered by the first defendant whose role it was to design and oversee the temporary road works. The court is mindful of the reality that the challenges facing the designer and operator of a traffic management plan are considerable, and that a number of competing objectives have to be balanced in a context where space is limited and the flow of pedestrian and vehicular traffic is considerable. While making due allowance for the undoubted challenges, it seems to me that ultimately the traffic management arrangement that was eventually put in place, failed to provide sufficient protection for the plaintiff who, the first defendant accepts, did everything that was expected of him.

**22.** Since the first defendant has no quibble with the way in which the plaintiff did his job as supervisor, it must be taken to have permitted or “adopted” the various actions taken by the plaintiff on the day. The plaintiff had to work within the confines of the limited instructions given to him by his employer, in the form of the rather uninformative plan that was provided to him, and which appears at p. 170 of the agreed booklet of discovery.

**23.** A number of different design and planning decisions by the first defendant combined to create a situation where the plaintiff was placed in a position of unnecessary and heightened danger, whereby he was required to sit on the concrete barrier, unsupported, with his feet not planted on the ground, holding the stop/go sign and cones, in an area where large and small vehicles were coming towards him. Further, there was no safety or buffer zone around his person, the roadway in question was narrower than the minimum width permitted under applicable guidelines, and the pinch-point where the plaintiff was obliged to position himself was extremely tight, such that he was reliant for his safety on the drivers of large vehicles slowing their vehicles to a virtual crawl in order to squeeze through the available space.

**24.** It seems to me there were several design and planning options open to the first defendant which would have removed or, at the very least, reduced the risk posed to the plaintiff. These options potentially included the following:

- Choosing an alternative type of protective barrier that provided greater flexibility;
- Building in a gap or “break” in the barrier to allow the plaintiff to stand into the gap, out of the way of oncoming traffic;
- Locating the barrier elsewhere within the roadwork site;
- Designing the pedestrian walkway so that it was sufficiently wide to allow the plaintiff stand within it;
- Removing the necessity, in such a tight space, for the stop/go sign to be set into the orange cones, rendering it more feasible for the plaintiff to locate himself within the pedestrian walkway;
- Removing the necessity for the plaintiff to have to operate the stop/go sign from the unsafe side of the barrier;
- Decoupling the stop/go sign from the orange cones that the sign was set into, thereby widening the available width of roadway at the pinch-point, by the width of the cones.

**25.** While I accept that counsel for the first defendant achieved a degree of success in cross examining the second defendant’s engineer on the applicability of a requirement for a “lateral safety zone” within the meaning of para. 4.2.2 of the Guidelines, I am not satisfied that sufficient practical steps were taken by the first defendant to minimise the risks posed to the plaintiff.

**26.** In circumstances where no safety zone was provided by design, where the positioning of the cones and stop/go sign along the barrier narrowed further the already tight roadway, and where the available gap was less than 3 metres, it was incumbent on the first defendant to

either revisit the design and layout of the temporary road works, or provide the plaintiff with additional safeguards such as: instructing him to operate from the safe side of the barrier; instructing him not to sit unsupported on the barrier; allowing him to stand in behind the barrier; staggering the cone further back on the right hand side to give a wider gap on the diagonal for larger vehicles to steer into; widening the roadway by extending out the cones on the right; or placing a line of cones on the left hand side in front of the plaintiff to act as an informal safety zone and/or visual cue to drivers to keep to their right. None of these practical steps were taken.

**27.** I accept the evidence of the two engineers who gave evidence that the overall design of the traffic arrangement was deficient. I also accept that a major difficulty for the first defendant's traffic management plan, in terms of design, was the decision to go with the concrete barrier in question and to locate it in the position where it was put. By its nature, the concrete barrier was a heavy and somewhat immovable fixture within the first defendant's management plan. It had been mechanically manoeuvred into position by personnel of the first defendant and was something that the plaintiff had no control over. The location, dimensions and unbroken nature of the barrier meant that space was particularly tight at the pinch-point where the plaintiff was obliged to locate himself. The choice of this form of barrier also meant that the space left for the pedestrian walkway was less than it might otherwise have been, rendering it less feasible for the plaintiff to place himself within the walkway for fear of blocking pedestrians, parents with buggies and prams and other footfall heading towards the Northside Shopping Centre. I accept the plaintiff's evidence, and find as a fact, that he was instructed by his employer not to position himself within the pedestrian walkway, as this would block patrons using this busy walkway.

**28.** I wish to emphasise I am not finding that the first defendant was legally obliged to take every single one of the design and practical steps identified above. It is not the court's

role to design the traffic arrangement or dictate how specific operational issues should be dealt with, as these are the responsibility of the first defendant. However, I am satisfied that such design and planning choices as were made by the first defendant were, in a cumulative sense, deficient and insufficiently protective of the plaintiff's safety.

**29.** Ultimately, I do not regard it as a safe system of work that a flags man would be exposed to a clear risk of injury in the manner this plaintiff was, at the very least without substantial practical safeguards being put in place. Positioned where he was, in a precarious and unsteady position, perched on a barrier without his feet planted on the ground, exposed to oncoming traffic without any meaningful buffer zone, and required to effectively hold or carry heavy items in this position, on a roadway that was impermissibly narrow, the plaintiff, in my view, was unnecessarily exposed to an increased risk of harm. Viewing matters in the round, the overall arrangement failed to shield or protect the plaintiff sufficiently from the risks posed by large and small traffic.

**30.** Mr. O'Herlihy for Dublin Bus made a valid point that it is a strange state of affairs that, if the first defendant's argument is correct, it was reasonable for Total Highway to expect that a bus driver negotiating this junction would effectively have to bring his vehicle to a virtual stop when proceeding through the gap as designed by the first defendant. After all, this was supposed to be a traffic *management* plan, not a traffic *blocking* plan. Whatever view one might take of the first defendant's traffic arrangement, it presented significant challenges for workers, as well as for the drivers of large vehicles.

**31.** In the light of the totality of the evidence, I accept the evidence of the plaintiff's engineer, Mr. Byrne that the first defendant owed a significant duty to the plaintiff to protect him while he was carrying out what was, on any view, high risk work and that this duty was breached in the circumstances. As set out in the engineer's report, the first defendant failed to

take sufficient practical steps in order to comply with its statutory duties under the Safety, Health and Welfare at Work Act 2005, including the following sections:

- Section 8 – General duties of employer.
- Section 9 – Information for employees in construction, training and supervision of employees.
- Section 15 – General duties of persons in control of places of work.
- Section 17 – Duties relating to construction work.
- Section 18 – Protective and preventative measures.
- Section 19 – Hazard identification and risk assessment.

### **Potential liability of Dublin Bus**

32. Turning then to the potential liability of the second defendant, it seems to me that I should assess the criticisms that have been made of the bus driver's actions and also, insofar as I can, assess the degree to which the driving of the bus caused or contributed to the accident. I should start by saying that in common with all other witnesses in the case, the bus driver in question gave his evidence truthfully and did his best to ensure that his evidence was as accurate as possible. The driver impressed me as an honest witness who, to his credit, made a number of important concessions in cross-examination. He had been driving HGVs and buses for a long number of years, without incident. He acknowledged that, as he approached the roadworks in question, he had a very good overall view from his seat in the front of the bus; that his bus was the last in the line of vehicles going through; that he was aware of the presence of the plaintiff at all times; that as he drove in the direction of the plaintiff, he did not perceive there was a problem *vis-à-vis* the size of his vehicle and the available gap; that this contrasted with the perception of the plaintiff who, apprehending there might be a problem, had pulled in the stop/go sign towards himself; that the still photographs

show, contrary to the bus driver's initial perception, he had not allowed sufficient space for the plaintiff; and that the still photographs appeared to show the bus had collided with the cones on the left hand side which ultimately knocked the plaintiff to the ground. I find as a fact that this is what occurred.

**33.** Again, to his credit, the driver conceded that if he had in fact been driving at a crawling pace, he would have been able to stop the bus in a metre or so, which the CCTV footage indicated had not occurred. Moreover, when it was put to him that in the circumstances, he could not have been keeping a proper lookout, and must have been going too fast, he replied "maybe, I don't know".

**34.** The engineer for Dublin Bus provided the court with the results of certain analyses he had carried out as to the likely speed of the bus at the relevant time. From Mr. Mooney's analysis of the CCTV footage, the approximate speed of the bus as it entered the works area was in the range 28-32kph. I accept the evidence of Mr. Byrne that this was simply too fast in the circumstances. While the applicable speed limit in the area was 50kph, that is a maximum speed limit and does not mean drivers are at large to drive at the maximum speed, irrespective of the road conditions or local dangers.

**35.** The CCTV footage shows that the bus maintained a fairly constant speed as it approached the initial roadworks; did not slow down as it approached the warning sign; and, crucially, did not slow down as the plaintiff came into view and the roadway narrowed. In my view, the bus driver's failure to moderate his speed as he approached what was a narrow pinch-point that was being physically manned by a flags man, was clearly negligent and undoubtedly contributed in a significant way to the cause of this accident.

**36.** I find that, on the day in question, out of keeping with his long and dedicated history of safe driving, the driver of the bus misjudged the situation, failed to tailor his speed to the prevailing conditions, misjudged the dimensions of the bus *vis-à-vis* the width of the roadway

that was available to him, failed to slow down appreciably or at all, and ultimately failed to negotiate the tight space that presented itself to him at this part of the roadworks. I accept the evidence of the plaintiff's engineer that the bus driver did not approach what was a very narrow point in an appropriate manner and, from the CCTV footage, does not seem to have slowed down or moderated his speed, even as the channel narrowed and the plaintiff's position drew closer.

**37.** Much of the emphasis in cross examination was on the bus avoiding the cones on the right-hand side. However, on an overall assessment of the accident, I conclude that the bus driver did not err sufficiently on his *left* hand side, and failed to steer his vehicle accordingly, to make allowance for the fact that the plaintiff was visible on his left, whereas, on his right hand side, there were merely traffic cones. At the end of the day, the decisive failing of the bus driver was to steer his vehicle too close to where the plaintiff was located on the left-hand side.

**38.** Since it is accepted by the second defendant that it bears vicarious responsibility for the acts and omissions of the driver of the bus, it follows from the analysis I have carried out above, that both defendants, for different reasons, breached the duty of care owed to the plaintiff.

### **Causation and apportionment of liability**

**39.** I will now assess what roles the failings of each defendant played in the accident, and apportion liability accordingly. I must also consider the second defendant's argument that the plaintiff's own actions on the day contributed to the accident, and decide whether contributory negligence should be found against the plaintiff.

**40.** The question of causation is primarily a question of fact. Under the traditional "but for" test, an act is deemed to be a cause of an event if the event would not have occurred

without ('but for') the act in question. If the event would have occurred without the act in question, then the act cannot be deemed to be a cause. In McMahon and Binchy, *The Law of Torts*, 4<sup>th</sup> Ed., (Bloomsbury Professional, 2013) at para.2.23, the authors state that the "but for" test is especially useful where one can fairly say that the event in question had only one cause. It is less helpful, and must be moderated in its application, where (as in the present case), more than one cause operates to bring about the same event. Because of difficulties with the "but for" test *Prosser & Keeton* (The Law of Torts 5<sup>th</sup> Edition 1984) favour a different test in determining whether a thing was a cause of an accident or not:

*"The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about."*

**41.** It is beyond doubt in the present case that the negligent driving of the bus was both a material element and a substantial factor in bringing about the plaintiff's injuries. It seems to me that the primary cause of the accident was the collision between the bus and the plaintiff's foot. Viewing matters in the round, the negligent driving of the bus was the dominant causal factor. But what of the liability of the plaintiff's employer? Mr. Sheahan SC for Total Highway submits that there would have been no problem so long as there was reasonably prudent driving by the bus driver. He says that even if the court finds frailties in the system of works (which are not accepted), there would have been no accident if the bus driver had taken care and moderated his speed. Whilst not expressly putting it in these terms, the first defendant's argument was that the later negligence of the bus driver ousted or *overwhelmed* any negligence by the first defendant.

**42.** It can sometimes be difficult to assess what role static or "on the ground" factors play in an accident, versus the more immediate role played by poor driving or excessive speed in a road traffic situation. One way of approaching the issue is to consider whether the static factors, at the point when the driving breaches occurred, continued to operate as substantial



factors in bringing about the accident. One possibility – implicitly urged by the first defendant here – is that the later acts operate to break the chain of causation between the defendant’s earlier acts and the index accident.

### **Concurrent Wrongdoers under the Civil Liability Act 1961**

43. Section 11(1) of the Civil Liability Act 1961 provides:

*“For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.”*

44. In *O’Sullivan v. Dwyer* [1971] 1 IR 275, Walsh J. said:

*“It is quite clear that no question of the apportionment of fault arises at all unless both the plaintiff and the defendant have contributed causatively. If the defendant has not contributed causatively there can be no verdict against him, and if the defendant has contributed causatively but the plaintiff has not then there is no question of apportionment of fault.”* (emphasis added)

45. I hold that in the present case both defendants “contributed causatively” to the accident. The failings and breaches of duty that I have sought to identify as against both defendants were material and substantial factors in bringing about the collision. As to the task of assessing the contribution of each defendant, the court’s function in this matter is governed by s. 21(2) of the Civil Liability Act 1961. As noted by Ryan J. in *Jade Keane (A Minor) v. Health Service Executive & ors* [2011] IEHC 213, the question for the court is what contribution it would be just and equitable for defendants to be ordered to make, having regard to their respective degrees of fault. Ryan J. noted that the concept of fault is key to both the provisions of the Civil Liability Act relating to contribution as between defendants

and also the determinant of whether contributory negligence should be found as against a plaintiff. Ryan J. referenced the decision of the Supreme Court in *O'Sullivan v. Dwyer* which considered fault in the context of s. 34 of the Civil Liability Act which requires that the damages recovered by a negligent plaintiff be reduced as the court thinks just having regard to “*the degrees of fault of the plaintiff and defendant*”. In that case, Walsh J. said as follows:

*“Degrees of fault between the parties are not to be apportioned on the basis of the relative causative potency of their respective causative contributions to the damage, but rather on the basis of the moral blameworthiness of their respective causative contributions. However, there are limits to this since fault is not to be measured by purely subjective standards but by objective standards. The degree of incapacity or ignorance peculiar to a particular person is not to be the basis of measuring the blameworthiness of that person. Blameworthiness is to be measured against the degree of capacity or knowledge which such a person ought to have had if he were an ordinary reasonable person: see the judgment of this Court in Kingston v. Kingston. To that extent the act can be divorced from the actor. In many cases greater knowledge may attract a greater share of the blame or fault, but so also may greater ignorance. Fault or blame is to be measured against the standard of conduct required of the ordinary reasonable man in the class or category to which the party whose fault is to be measured belongs; but both common sense and public policy require that ignorance of the law is not a factor to be taken into account in the diminution of fault.”*

**46.** Arising from this analysis, it is clear that the court’s task in assessing the extent of liability of each defendant, and in assessing the question of whether the plaintiff was guilty of contributory negligence, is to assess the relative blameworthiness of their respective causative contributions to the accident.

**47.** After the hearing in this matter had concluded, the parties requested a further opportunity to put some relevant case law before the court and also make short oral submissions. The court heard further submissions on 4th July 2024. Three relevant authorities were provided to the court, namely *Connolly v. Dundalk Urban District Council and Mahon and McPhillips (Water Treatment) Ltd* (Unreported, Supreme Court, 18 November 1992); the decision of Ryan J. in *Jade Keane (A Minor) v. Health Service Executive & ors* [2011] IEHC 213; and the decision of the Court of Appeal in *Davey v. Sligo County Council & ors* [2023] IECA 39.

**48.** In *Davey*, a lorry veered off a road and collided with a convoy of Council workers as they were working on the hard shoulder of the road. The lorry weighed 15 tonnes; the driver had fallen asleep at the wheel; he left the lorry in cruise control at 88kmh, which was in excess of the speed limit of 80kmh. It was agreed that the employer of the lorry driver was liable for the injuries to the plaintiff by reason of its vicarious liability for its employees. The most immediate cause of the injuries to the plaintiff was the collision caused by the lorry driver. The issue before the Court of Appeal was whether the Council was also liable, at least to some degree, for the injuries caused to the plaintiff. The issue in the case was whether any negligence by the Council caused the plaintiff's injuries, in the sense that they constituted a subsisting legal cause at the time of the collision.

**49.** Separate judgments were delivered by Ní Raifeartaigh J. and Noonan J. Ní Raifeartaigh J. noted that the issues could be framed in two different ways. Using the concept of causation, one could pose the question: did the Council's negligence cause the accident? On the other hand, focusing on the duty of care, one might ask: did the Council's duty of care encompass foreseeing what actually happened and taking reasonable precautions to prevent that eventuality?

**50.** The Council, in foreseeing risks to its employees when carrying out work at the roadside, had clearly envisaged that the behaviour of drivers of cars and other vehicles on the road could pose certain risks to the workers. Hence, the precautionary steps that were rightly taken by the Council: erecting warning signs for cars at staggered distances on approach to the convoy, and the presence of a pickup truck with a large, illuminated sign on the back with flashing lights and an arrow. Ní Raifeartaigh J. posed the question: was the accident which in fact took place “*the very thing*” that could reasonably have been foreseen or, to put it another way, was it within the general category of damage that the Council was required to guard against? Like Noonan J., she found that what had happened in that case was an unusual combination of circumstances, creating a somewhat unique risk: (a) a professional driver subject to mandatory legal resting obligations who is not conscious at the time of the accident, having fallen asleep; (b) the driver had set the cruise control at a speed (88kmh) which was above the speed limit of 80kmh; and (c) was driving a 15 tonne lorry. She held that the combination of events that occurred could not be described as more than a remote possibility and, therefore, could not be described as approaching the standard of the “*very kind of thing*” the Council was bound to expect and guard against.

**51.** Noonan J. was of a similar view. He stated at para. 42:

*“One cannot lose sight of the fact that the fundamental cause of this accident was that Mr. Zachar fell asleep at the wheel of a 15 ton lorry which he had pre-programmed to continue on at its maximum, and unlawful, speed. From the moment he fell asleep, the lorry became in effect an unguided missile heading towards the working group in circumstances where all the traffic signs, lights and cones in the world would have made not the slightest difference to the tragic consequences that ensued.”*

**52.** Accordingly, both judgments held that the sole cause of the damage was the negligence of the driver of the lorry and any negligence on the part of Council was not

causative in the legal sense. Therefore, even though the High Court had found negligence on the part of the Council in a number of distinct respects, the negligent acts of the Council were found not to be causative of the accident. Accordingly, the application for a contribution was dismissed.

**53.** Mr. Sheahan SC for the first defendant in the present case relies on *Davey* and submits that an analogy should be drawn between the position of his client and the County Council in that case, and the position of the Dublin Bus driver and the lorry driver who fell asleep. He submits that it could not have been anticipated by Total Highway that the bus driver would drive his vehicle in the manner he did, at clearly too high a speed, while failing to pay sufficient attention. Counsel urged that the negligent driving of the bus should be regarded as having ousted or displaced any negligence on the part of the employer. Moreover, any breach of duty on the part of the employer was not causative of the accident because, on any reasonable construction, the evidence showed the bus driver was not paying sufficient attention. Counsel submitted that, at the end of the day, the plaintiff was visible for everyone to see, and the bus driver acknowledged that he saw him. In all the circumstances, counsel urged that it would be impossible to inoculate an employee from danger in circumstances where drivers are not paying attention.

**54.** It seems to me that a core part of the first defendant's submission in seeking to escape liability is the contention that the first defendant could not have foreseen that the bus driver would not slow down or might not be paying sufficient attention. In my view, that is an unsustainable proposition which, in point of fact, is not supported by the Court of Appeal's analysis in *Davey*. Whilst the two cases are somewhat analogous, the factual differences are quite telling. At para. 25 of her judgment, Ní Raifeartaigh J. expressly noted that a County Council, in foreseeing risk to its employees when carrying out work at the roadside, should have envisaged that the behaviour of drivers of cars and other vehicles could pose certain

risks to the workers. Hence, the precautionary steps that were rightly taken by the Council in that case, including the erecting of warning signs for cars and other safety steps. Ní

Raifeartaigh J. posed the question of whether the accident which in fact took place was the “*very thing*” that could reasonably have been foreseen. Adopting that as the test, it seems to me that the accident which took place in the present case was precisely the sort of thing that could reasonably have been foreseen and was most certainly within the general category of damage that the operator and designer of the roadworks was required to guard against.

**55.** On any view, the facts of *Davey* case were extreme. The “*consuming negligence*” was found to be that of the lorry driver. That was because, from the moment he fell asleep, the lorry, in effect (to borrow the graphic words of Noonan J.), became “*an unguided missile heading towards the working group in circumstances where all the traffic signs, lights and cones in the world would have made not the slightest difference to the tragic consequences that ensued*”. On the particular facts of that case, the breaches of duty on the part of the Council were found not to be causative of the accident and that, instead, the sole cause of the damage was the negligence of the lorry driver. In my view, the errors on the part of the bus driver here, while serious, are rather more mundane and certainly less outrageous. In *Davey*, the actions of the lorry driver who fell asleep were found to be criminal. Again, that is a feature absent from the present case.

**56.** In *Davey*, Noonan J. observed that, where the act of a third party causing damage ought to have been anticipated by the defendant as would reasonably be likely to occur and would have been prevented had the defendant not been negligent, the law will regard the defendant as having “*caused*” the damage. If, however, the act of the third party and the ensuing damage was not foreseeable by the defendant, the chain of causation will have been broken.

57. Applying the rationale of the Court of Appeal, I find that the breaches of duty that I have identified above on the part of the first defendant were causative of the plaintiff's accident in a material way. The system and design flaws that I have referenced and the failures to build in appropriate safeguards exposed the plaintiff to a risk of injury and exposed him to a greater level of danger that he would otherwise have been exposed to. In that sense, the first defendant's failings constituted a subsisting legal cause at the time of the collision.

### **Conclusions on Liability and Apportionment**

58. Applying this analysis, I hold that both defendants here are concurrent wrongdoers within the meaning of s. 11 of the Civil Liability Act 1961. In accordance with s. 21(2) of the Act, I am required to decide what contribution it would be just and equitable for the defendants to be ordered to make, having regard to their respective degrees of fault. This, in turn, according to the case law, requires that I assess the relative blameworthiness of their respective causative contributions.

59. I accept the evidence of the plaintiff's engineer that Dublin Bus should bear the primary responsibility for the accident. The negligent driving of the bus was the more immediate cause of the collision. This view is reinforced when one takes into account that the roadworks had been operated safely, without incident, for at least three weeks prior to the plaintiff's accident. Weighing the respective levels of culpability of the two defendants, I find that it would be just and equitable to apportion liability 80% as against Dublin Bus, as employer of the bus driver, and 20% as against the first defendant. The concessions made by the bus driver in cross-examination and the findings that I have made in the case render it just and equitable that liability should be apportioned in this manner.

### **Contributory negligence of the plaintiff?**

**60.** I have also considered the question of whether the plaintiff should be adjudged guilty of contributory negligence. On the facts of this case, I hold that it would not be just or equitable to do so. In coming to that conclusion, I accept Mr. Counihan SC's submission that the plaintiff was a supervisor of the roadworks, but not a supervisor of the design. I find as a fact that the plaintiff was sitting in as tight as he could to the concrete barrier. He was sufficiently alert to realise that there was a problem as the bus approached. As he saw the bus approach, he pulled the sign in towards himself in an effort to avoid the collision. I take into account that no engineer has given evidence critical of the plaintiff's position. I also take into account the important consideration that the plaintiff's own employer, who designed the overall traffic arrangement, has made it expressly clear that no criticism whatsoever is made of the plaintiff's actions on the day. Finally, I take into account that the plaintiff was visible at all times to the bus driver who must either not have been paying sufficient attention or completely misjudged the gap that was available to him. I also find that the bus driver committed these errors when driving the bus at a speed which was not appropriate in the circumstances.

**61.** For these reasons, I conclude that the plaintiff is not guilty of any contributory negligence that was causative of the accident.

#### **Evidence as to the plaintiff's injuries**

**62.** The plaintiff was in a state of shock following the accident and was brought by ambulance to Beaumont Hospital. He came under the care of Mr. James Walsh, consultant orthopaedic surgeon. A CT scan was performed which revealed a fracture of his second metatarsal base, a fractured proximal third metatarsal, a fractured base of fourth metatarsal, and a fracture of his lateral cuneiform which was intra-articular, but undisplaced. The impression of the CT scan was that the plaintiff had a complex mid-foot fracture involving



his second to fourth metatarsals and lateral cuneiform. Despite the undisplaced overall alignment of his fractures, the CT reported suspicion of underlying Lisfranc type injury.

**63.** The plaintiff was treated non-operatively for the injury and initially was elevated in a below-knee back slab. He was prescribed analgesia. He was noted initially to have significant swelling and pain in the foot. Mr. Walsh added a foot pump to the plaintiff's plaster cast and maintained him on non-weightbearing for six weeks.

**64.** The plaintiff was discharged on 25<sup>th</sup> November 2015 in a back slab. At that stage, his pain and swelling had improved significantly. He was reviewed on the 13<sup>th</sup> November, 2015 at which point the consultant changed him to a padded cast and advised him to remain non-weightbearing. He was reviewed again on the 14<sup>th</sup> December 2015 and his cast was changed. He was changed to a weightbearing boot on the 4<sup>th</sup> January 2016, where repeat x-rays noted that his fractures appeared to be healing well.

**65.** The plaintiff was in an awful lot of pain in the post-Christmas period and his foot was very sensitive to touch. He was continued on painkillers. He accepted that between January and February 2016 there was considerable improvement. He underwent a lot of physiotherapy and it paid dividends. While the swelling went down, the pain in his foot remained. The plaintiff was clearly a stoic individual because he managed to get back to work in late February 2016, even though his symptoms of pain, discomfort and swelling continued. In addition, the plaintiff said in evidence, and I accept, that he continues to experience occasional cramping in his foot to date with pain in his toes occasionally and intermittent stiffness in his foot. He said, and I accept, that occasionally he has clawing of his toes. This ongoing complaint is borne out by the medical reports from Mr. Walsh.

**66.** In November of 2016 he left his employment with the first defendant and he went to work for a glazing company. This job gave him shorter hours and less travelling and reduced the toll on his feet. He said, and I accept, that his injury contributed to his decision to switch

employment. Toward the spring of 2017, he continued to struggle climbing ladders as the rung of a ladder would place all the pressure on his foot, making things quite uncomfortable. The plaintiff returned to work with Total Highway towards the end of 2017. He still had pain and discomfort by this period. I accept his evidence that there is a level of discomfort there every day since the accident. I also accept that the clawing difficulty with his foot has continued in that his toes are still cramped, especially the first and second toes beside the big toe. Sometimes he finds he has to take his shoe off and stretch out his toes.

**67.** While there has been considerable improvement in an overall sense, he still notices that if he bangs his foot, say when playing with his child, he feels the pain straight away. He does his best to manage it, but the pain is still there. Three years ago, he got a job with the County Council, bringing him closer to home and allowing him to spend less time on the road and reduced time on his feet. He says, and I accept, that he continues from time to time to have to take painkillers. The cold sometimes affects the level of pain in his foot. He is involved in coaching in his child's local GAA club. He is able to manage and get by, but if he kicks a ball hard pain sets in immediately and he has to stop doing the exercise. The plaintiff said, and I accept, that from time to time he continues to have difficulty with his foot swelling. He was on holidays a couple of months ago and had a very long day on his feet. That night his foot was "killing" him, he had to take painkillers and there was a little bit of swelling and discolouration.

**68.** The court was provided with four medical reports from the plaintiff's consultant Mr. Walsh dated February 2016, October 2017, June 2021 and April 2024. The court was also provided with a report from Mr. Brian Hurson, Consultant Orthopaedic Surgeon. Mr. Hurson saw the plaintiff on behalf of the defendant on the 31<sup>st</sup> August, 2017 which was a year and nine months after the accident.

**69.** Mr. Walsh saw the plaintiff for a second report on the 22<sup>nd</sup> September 2017 which was approx. two years post-accident. Mr. Walsh states that the plaintiff sustained a significant crush

injury to his right foot. The plaintiff had made excellent progress and it was felt highly unlikely that the plaintiff will require any surgery in the future or that he will experience any long term problems as result of the injury. However, as this was a significant crush injury, there is a likelihood that the plaintiff will experience some low-grade swelling at the end of prolonged standing or mobilising for the foreseeable future.

**70.** In his third report from June 2021 Mr. Walsh noted the plaintiff's difficulty climbing ladders but that nonetheless the plaintiff was managing to continue working. He needs to wear wide fitting boots to accommodate his injured foot. As to recreational matters, his ability to run has improved slightly. However, at that point he was still getting discomfort in his foot the day after he goes for a jog. Mr. Walsh noted that the plaintiff had normal alignment with no swelling or pain or palpation and no limp. He had slightly flexible clawing of his lesser toes but had full normal power in all tendons about his foot and ankle. There was no evidence of any ligamentous instability or bony tenderness. Mr. Walsh felt at that point that it was highly unlikely the plaintiff will require any further intervention. There is a slightly increased risk of the plaintiff developing degenerative arthritis as a result of his multiple fractures, but this is unlikely to need surgery. He may require further physiotherapy into the future and may also require injection therapy, but this may be unlikely. Mr. Walsh felt that it is likely the plaintiff would continue to have some low-level discomfort going up and down ladders at work.

**71.** In his final report of April 2024, Mr. Walsh noted that the plaintiff was no longer able to jog as he gets discomfort afterwards in his right foot. He continues to assist in coaching GAA and was managing well with this. He sometimes sits on the floor at home and gets paraesthesia in his right foot. The slight clawing of his lesser toes persists and is essentially unchanged from earlier reports. His toes remain passively correctable. The examination was otherwise normal. In his concluding opinion, Mr. Walsh states that the plaintiff will continue to have intermittent low-level discomfort going forward and that this should be managed quite easily with over the

counter analgesia. The consultant feels he is likely to experience some low-level swelling towards the end of a typical day, or following prolonged mobilising.

72. The plaintiff was seen by Mr. Hurson, Consultant Orthopaedic Surgeon for the defendant on the 31<sup>st</sup> August 2017. The plaintiff reported that he continued to have intermittent cramping in his toes. He had discomfort when wearing tight shoes for prolonged periods, particularly when driving. On examination, the plaintiff walked without discomfort and could walk on his tippy toes and on his heels. He had a full range of movement of his toes. In Mr. Hurson's opinion, the plaintiff had sustained multiple fractures of his right foot with associated significant soft tissue swelling. Clinically his fractures had fully healed. In his view, the plaintiff at that examination had made a very good recovery from his significant injuries. Although the fracture was undisplaced, he was still exposed to the risk of developing post traumatic arthritis in his foot.

### **Book of Quantum**

73. This is a "*Book of Quantum*" and not a "*Personal Injuries Guidelines*" case. Mr. Counihan SC for the plaintiff submitted, without objection from either defendant, that the dominant injury was the significant soft tissue crush injury to the plaintiff's foot. The less significant injuries were the fractures to each of the lateral cuneiform, second metatarsal base, proximal third metatarsal and base of fourth metatarsal. Looking at Pg. 66 of the Book of Quantum, Mr. Counihan SC submits the crush injury falls into the "moderate" bracket attracting damages of €14,500 to €73,900. He submits that the injury is towards the top of that bracket. Mr. Sheahan SC for the first defendant accepts that the crush injury is in the "moderate" bracket, but submitted it was in the low to mid-range. Mr. O'Herlihy for the second defendant points out that the plaintiff never went back to a doctor after approximately three months and that the later reports were effectively for medico legal updates and not

treatment. Taking everything in the round, Mr. Herlihy suggests an overall damages figure of €40,000 in circumstances where the plaintiff was largely back on his feet in three months.

74. The notes for the “moderate” bracket in the Book of Quantum say these injuries may include more extensive damage to structures other than soft tissue and may have resulted in a degree of permanent damage. Both consultants describe the plaintiff’s crush injury as a “significant” injury. The plaintiff had a complex mid foot fracture involving his second to fourth metatarsal and lateral cuneiform (inter articular). The plaintiff was very fortunate in that he did not require bony stabilisation and did not develop a compartment syndrome of his foot. Osteoarthritis cannot be ruled out in the base of his metatarsals or his lateral cuneiform into the future.

75. In the light of the agreed medical reports and the plaintiff’s evidence, I take the view that the plaintiff’s (dominant) crush injury falls in the mid-range of the “moderate” bracket. I will assign a nominal value of €45,000. This is appropriate in circumstances where both consultants agree this was a significant injury. While the plaintiff has undoubtedly made very good progress and has largely recovered, he continues to be symptomatic from time to time. I take account of the cumulative effect on the plaintiff of the adverse consequences of the crush injury, both from a vocational and recreational point of view. He will continue to have intermittent low-level discomfort going forward and the clawing difficulty remains. The fact that he has had to give up running is itself a significant loss of amenity. The higher end of the damages bracket would not be appropriate because he has made a substantial functional recovery from his injury.

### **Additional injuries**

76. The consultant, Mr. Walsh, says that the plaintiff had a complex mid foot fracture involving his second to fourth metatarsals and lateral cuneiform. The fractures have healed

well. In my view, each fracture falls into the “minor” bracket for foot fractures on pg. 66 of the Book of Quantum, attracting damages of €18,000 to €34,900. These were non-displaced fractures which ultimately did not require surgery. I will assign a nominal value of €18,000 in respect of each fracture, being the lowest figure mentioned for this range. I will discount the additional injuries by 50% to reflect the anatomical and temporal overlap of the overall symptoms.

**77.** In doing so, I take into account the decision of the Court of Appeal in *Zaganczyk v. John Pettit Wexford Unlimited Company and C. & M. Delaney Ltd* [2023] IECA 223 where Noonan J. considered the correct approach to the assessment of damages in multiple injury cases. Noonan J. noted that a trial judge should strive to take a holistic view of the plaintiff and endeavour to place the plaintiff’s particular constellation of injuries and cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum cap and also awards made to other plaintiffs. Noonan J. emphasised that whatever mathematical approach is to be adopted, it is important not to lose sight of the global impact of all of the injuries on the particular plaintiff. At the same time, however, in a multiple injury situation, it would not be appropriate to assign values to all of the injuries and then simply tot them up in a straight line. Rather, in order to achieve fairness and proportionality, it is necessary to build in a discount in recognition of the fact that the plaintiff’s pain and suffering from each element of his injuries has involved treatment and recovery over the same period of time.

**78.** On the facts of this case and reflecting the reality that all of the injuries were located in the area of the plaintiff’s foot, I will apply a larger than normal discount of 50% to the additional injuries. This means that the “uplift” will be €36,000 and not €72,000 (four times €18,000). That yields a total nominal figure of €81,000 (€45,000 for the dominant injury and €36,000 uplift for the additional injuries).

**79.** That is not the end of the exercise. As the Court of Appeal has made clear in a number of cases, it may be necessary to stand back from the compilation of individual figures in order to assess whether the global aggregate figure for pain and suffering and loss of amenity would be proportionate both to the maximum cap of €550,000 and to awards made to plaintiffs in other cases. Adopting that approach here, I take the view that an overall award of €81,000 for general damages to this plaintiff represents an outcome that is fair to both sides and proportionate in the sense indicated in the caselaw.

**80.** Insofar as the second defendant contended for a damages figure of €40,000 or thereabouts, I reject that as being unrealistic and simply not reflective of the number and extent of the plaintiff's injuries. The defendant's suggested valuation fails to reflect the fact that this was a complex mid foot fracture involving four separate fractures, a risk of arthritis, and a significant soft tissue crush injury. The plaintiff was in hospital for some eleven days after the accident and was for approx.. three and a half months off work (mid-November, 2015 to end of February, 2016). The fact the plaintiff will continue to have intermittent low-level discomfort into the future, continues to have occasional swelling and continues to have the clawing difficulty with his toes are all important features which were borne out in the medical evidence. It should also be remembered this was a pre-Guidelines case and therefore the more generous ranges outlined in the Book of Quantum apply. For all these reasons, I conclude that an overall damages figure of €81,000 – whatever way it is split as between dominant injury and additional injuries - is reasonable and proportionate.

**81.** Special damages are agreed in the sum of €22,968.51. That is made up principally of medical expenses for the eleven-day inpatient stay in Beaumont Hospital (€17,304) and also loss of earnings of €3,674.51. There will therefore be judgment for the plaintiff in the total sum of €103,968.51.

**Signed:**

**Appearances:**

Michael Counihan SC and Derek Dunne BL for the plaintiff.

Philip Sheahan SC and Mark Flynn BL for the first defendant.

Gerard O'Herlihy of M.Roche and Company for the second defendant.