



**THE COURT OF APPEAL**

**Neutral Citation Number [2020] IECA 296**

**Record Number: 2019/311**

**High Court Record Number: 2018/1304P**

**Noonan J.  
Haughton J.  
Murray J.**

**BETWEEN/**

**ROBIN LEIDIG**

**PLAINTIFF/RESPONDENT**

**-AND-**

**IAN O'NEILL**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Noonan delivered on the 2nd day of November, 2020**

1. This appeal is brought by the appellant ("the defendant") against the quantum of an award of damages made by the High Court (Eager J.) sitting in Kilkenny on the 6th June, 2019.

**Facts**

2. The respondent ("the plaintiff") was born on the 24th April, 1993. His evidence was that on the 20th August 2015, when the plaintiff was aged 22 years, he was driving his motorcycle along Main Street, Goresbridge, County Kilkenny when the defendant's motor car emerged without warning from a side road to the plaintiff's left. This resulted in a relatively low speed accident with the plaintiff's motorcycle colliding with the right front wheel of the defendant's car. This caused the plaintiff to be thrown upwards and forwards out of his seat and back down onto the seat. He absorbed most of the force of the impact through his arms and wrists. His head struck the motorcycle's windscreen. The defendant admitted liability and the case proceeded as an assessment of damages.
3. The plaintiff said that he attended his General Practitioner on the evening of the accident complaining of pain, in particular, in his non-dominant left wrist which was swollen and tender and had limited movement. He was referred to St. Luke's Hospital in Kilkenny for an x-ray which was reported as negative for a fracture. His wrist was placed in a splint and he was given painkiller medication. He also suffered a laceration over his eye which was treated with an adhesive strip. The plaintiff again attended his General Practitioner on the 28th September, 2015 still complaining of severe pain and was referred to Aut Even Hospital in Kilkenny for an MRI scan, which showed a fracture of the scaphoid.

4. The plaintiff's wrist was placed in a plaster cast and he was referred to Mr. Eamonn Kelly, Consultant Orthopaedic and Hand Surgeon, at the Beacon Clinic in Dublin. He saw Mr. Kelly on the 6th November, 2015 who applied a new plaster cast to the fracture which was described as undisplaced and accordingly it was hoped might heal with a further period in a cast. The cast was ultimately removed on the 21st December, 2015 and he was advised to commence physiotherapy. However, a CT scan on the 21st March, 2016 showed that the fracture was persisting. Ultimately the fracture did not heal naturally and the plaintiff underwent surgery on his left wrist on the 2nd September, 2016 by Mr. Kelly.
5. This comprised an open reduction with an internal fixation using a screw and also a bone graft harvested from the plaintiff's right iliac crest. He was again in a cast for some eight weeks. An x-ray taken in January 2017 suggested that the fracture had now united. Mr. Kelly reviewed the plaintiff again in September 2017 when in addition to his wrist, he had some complaints of symptoms in the area from where the bone had been harvested. The plaintiff's treatment was by that time concluded and he had a number of residual complaints arising from his injuries which he outlined to the trial judge.
6. At the time of the accident, the plaintiff had just graduated from the University of Wales with a degree in mechanical engineering. The plaintiff had for many years been interested in motorsport and his ambition was to work in that area when his education concluded. However because of the accident, he was unable to pursue that career, at least at that stage. The plaintiff complained of ongoing pain and discomfort in his wrist, particularly in cold weather, which affected a number of his previous hobbies including fishing, hunting and playing the violin.
7. His ability to carry out mechanical work and metal fabrication on motor vehicles was affected. Coming from a farming background, he experienced difficulty in operating farm machinery. He commenced a job on the 22nd January, 2018 with a company called Autolaunch in County Carlow, a tool and dye company. This was a desk job, unlike the type of employment he had hoped to pursue in the motorsport area but for the accident. He complained of difficulty performing fine movements and repetitive tasks with his left hand and indicated to the judge his concerns for the future.

#### **Expert Evidence**

8. The plaintiff himself was the only witness to give *viva voce* evidence to the court. The expert reports on both sides were agreed. For the plaintiff, these consisted of three reports of Mr. Kelly, Consultant Orthopaedic and Hand Surgeon, three reports from his General Practitioner, Dr. Canning, and one report from Mr. O'Dwyer, Consultant in Emergency Medicine. A report from Ms. Ciara McMahon, Vocational Consultant, was also submitted. For the defendant, two reports were put before the court, one from Mr. Colin Riordan, Consultant Hand and Plastic Surgeon, and one from Mr. Marius Cassidy, Vocational Consultant.
9. Mr. Kelly's first report is dated the 21st April, 2016, some eight months after the accident. The plaintiff was first seen by Mr. Kelly on the 6th November, 2015. The MRI of the

plaintiff's left wrist showed an undisplaced fracture at the waist of his scaphoid. Mr. Kelly felt that it was possible that it might heal following a further period in a cast, and a new cast was applied on that date. That remained in situ for about six weeks and was removed on the 21st December, 2015. At that stage, the x-ray appeared to suggest that the fracture had healed.

10. However, his difficulties persisted and on the 21st March, 2016, Mr. Kelly advised the plaintiff that a CT scan of the left wrist demonstrated a persistent fracture. It was explained to the plaintiff that his options were to undergo surgery to fix the fracture, or wait and see if it went on to unite. The plaintiff was more inclined to the latter option. Mr. Kelly described the injury to the plaintiff's left wrist as severe, and the non-union of the fracture was related to the violence of the original impact. Such fractures often have ongoing symptoms but it was too early to assess the outcome.
11. Mr. Kelly's second report is dated the 6th September, 2017, at two years' post-accident. The conservative treatment had not been successful and accordingly, the plaintiff was admitted to hospital on the 2nd September, 2016 for open reduction and internal fixation of the left scaphoid using a screw and a wedge graft harvested from his right iliac crest. He again had a plaster cast applied. This was removed at eight weeks' post-surgery and when seen by Mr. Kelly on the 16th November, 2016, the plaintiff said his wrist felt better and was non-tender. A further review on the 11th January, 2017 showed him to be improving although with some ongoing loss of extension. X-rays suggested the fracture had united.
12. On the date of that review, 6th September, 2017, the plaintiff was two years' post-accident and one year post-surgery. He complained of tenderness and hypersensitivity in the right iliac crest where the bone graft was harvested. Because of his prolonged treatment, he had not been able to fully return to farm work or his leisure pursuits. He was on no medication and complained of no sleep disturbance. He complained of difficulties with fine activities and reduced lifting capacity. He was sensitive to vibration driving the farm machines. His hand got stiff after a while and was stiff upon waking. The operation scar on the volar or palmar side of his wrist was tender in the distal area. Examination showed him to have regained all but the last of his extension. His scar was quite florid.
13. Mr. Kelly's opinion was that the plaintiff still had significant symptoms in his wrist which were appropriate to his injury. Patients with such injury often have ongoing symptoms and such injury can lead to degenerative arthritis over a longer period but it may take many years to develop. Overall patients with fractured scaphoids are likely to be aware of some symptoms on an ongoing basis.
14. Mr. Kelly's final report is dated the 26th March, 2019, now some three and a half years' post-accident. The plaintiff told Mr. Kelly that because of the prolonged period of time he was out of action, he never really got back into race car engineering. He was now working for a tool and dye company at a desk job. He was working long hours and the combination of that and ongoing wrist symptoms have reduced his leisure activities. He

complained of some pain in the wrist on waking in the morning, worse if he had been involved in physical activity the previous day.

15. He was aware of tingling in his fingers. Physical activity and using tools and machinery caused pain in the wrist. Physical examination showed that the plaintiff appears to have a Reynaud's phenomenon, which is sensitivity to the cold, apparently unrelated to the accident. He had an operation scar of five centimetres which was well healed and now non-tender. His extension was almost full and the rest of range of movement in his wrist was normal. There was no swelling or deformity. X-rays showed the scaphoid to be fully healed with no evidence of degeneration or malalignment. There was no sclerosis of the scaphoid.

16. Mr. Kelly's final opinion was in the following terms: -

"He is now [three and a half] years since the accident and his fracture has healed and the scaphoid looks normal on x-ray. There is no evidence of sclerosis or deformity. The wrist is not swollen or tender. He has an almost full range of motion.

He continues to complain of pain on use of his wrist. He states that he has not returned to many of his leisure activities including country sports and working with his motorbike since the accident.

It is not unusual for someone with this sort of injury to complain of some ongoing symptoms. This is related to the nature of the injury, the impact force and the fact that the scaphoid is integral in the functioning of the wrist. However, one would expect his symptoms to gradually improve, although he will most likely always have some fatigue pain and episodic ache in the fracture area."

17. In his previous report, Mr. Kelly had said that scaphoid injuries can lead to arthritis and other symptoms. However, this concern is not repeated in his final report.

18. The defendant's expert, Mr. Colin Riordan, Consultant Hand and Plastic Surgeon, issued one report only dated the 13th January, 2019 based on an examination on the 28th August, 2018. Mr. Riordan outlined the history in similar terms to Mr. Kelly. He documented the plaintiff's current complaints as sporadic discomfort in the wrist, pins and needles occasionally in the left hand and the left wrist feeling weaker than the right. Occasionally movements with his left hand could be uncomfortable. He noted wrist extension was reduced to 45 degrees compared to 70 degrees in the right wrist. He noted the scar on the wrist as well as a 4.5 centimetre scar over the iliac crest from the bone graft.

19. It would appear that the most up-to-date x-ray available to Mr. Riordan was the 16th November, 2016 which showed that the fracture line was still evident and thus not fully united. However, it is clear from Mr. Kelly's subsequent report that full union in normal alignment occurred subsequently. Mr. Riordan's opinion was that scaphoid fractures

which unite in a reasonable position and do not involve the articular margin, as here, are not normally associated with the later development of degenerative changes.

20. Some ongoing symptoms of discomfort as well as weakness of grip strength occur and persist into the long term. His opinion was that the plaintiff's present disability is not severe but amounts to a loss of about 5% of the function of his hand. The late development of degenerative changes is unlikely and no other late complications are to be expected. He remains fit for his present occupation.
21. Three reports were submitted to the court from Dr. Michael Canning, the plaintiffs' General Practitioner. The first of those sets out the initial history. The second report is dated the 5th June, 2018. It describes his complaints regarding his wrist, already covered in the consultant reports to which I have referred. He also notes that the plaintiff suffered post-traumatic stress disorder after the accident which disturbed his sleep. This appears to have resolved by the time Mr. Kelly saw the plaintiff in September, 2017 as he notes that the plaintiff had no sleep disturbance.
22. Dr. Canning's final report is dated the 17th July, 2018 and appears to be a letter in response to correspondence from the plaintiff's solicitor. In that report/letter, Dr. Canning says that it seems unlikely that the plaintiff will ever do physical work again. He says that it does not seem possible that he will ever work as an automotive engineer again. He says that his wrist injury has not improved at all in three years and is likely to get worse rather than improve. These observations by Dr. Canning are entirely at odds with the views of both Mr. Kelly and Mr. Riordan and do not appear to have been advanced or relied upon by or on behalf of the plaintiff at the trial.
23. The plaintiff was seen by Ms. McMahon, the Vocational Consultant, on the 13th May, 2019, some three weeks before the trial. She sets out his education, family and work history and his interests and hobbies, and details the injuries sustained. Ms. McMahon had access to the medical reports to which I have already referred. Under the heading the "Current Situation", Ms. McMahon catalogues a large number of complaints made by the plaintiff to her which do not feature in any of the medical reports or indeed the pleaded case. She noted that the plaintiff's lengthy rehabilitation impacted on his motivation to pursue his previous career ambitions to work in the motor racing industry. She notes that the plaintiff reports some slight improvement at the area of the bone graft, although still has loss of sensation and is conscious of the scars there.
24. She observes that the plaintiff's reported ongoing difficulties suggest that he would have difficulty coping with the demands of hands-on work in the motorsport industry, as he is unlikely to cope with repetitive or prolonged hands-on work on engines or bodies of vehicles. She accepts that if the plaintiff is to return to the engineering environment, he may need to update his training and the plaintiff in his evidence, spoke of considering pursuing a master's degree in that regard. The conclusion in the final line in Ms. McMahon's report is "he is however unlikely to be capable of employment in his original area of choice..."

25. I am not entirely certain that this is a conclusion that is supported by the medical evidence and insofar as it is based on complaints by the plaintiff that are not reflected in that evidence, is one that is somewhat difficult to sustain. However, there is no doubt that the plaintiff was prevented from pursuing his career, initially at any rate, as a result of the accident, and his career had taken a different path when he eventually entered the employment market. The plaintiff himself perceives his injury as a career impediment as noted in the report of the defendant's vocational assessor, Marius Cassidy who states (at p. 5): -

"Mr. Leidig reports that he envisaged himself in a 'hands-on' role in his career as an automotive engineer, which from his view would include significant amounts of fabrication (i.e. use of both hands together to carry out welding and assembly work) so he considers that the injury to his left hand has closed off the opportunity of following this chosen career."

26. In that regard, the court was invited by counsel for the plaintiff to award damages based on a loss of opportunity to pursue his career of choice.

#### **Submissions to the Trial Judge**

27. Counsel for the defendant referred the trial judge to the Book of Quantum and in particular, the part dealing with upper limb injuries to which I will refer further below. Counsel submitted that the injury falls within the category of moderately severe for which the Book of Quantum provides a range between €54,200 and €70,100. With regard to the claim for loss of the plaintiff's intended career, counsel submitted that the only evidence of this was speculative anecdotal evidence from the plaintiff himself which did not discharge the burden of proof.

28. Counsel did however concede that a sum could be awarded to take account of the "vocational upset" and it should be built into the general damages as a claim for loss of opportunity. Counsel further submitted that such an award would have to be commensurate with the general damages and appeared to suggest that it should not exceed one third of the general damages.

29. Counsel for the plaintiff in reply, submitted that the injury in terms of the Book of Quantum was within the severe and permanent condition category. With regard to the plaintiff's career, counsel submitted that his difficulties were self-evident and were covered in Ms. McMahon's report. The trial judge then proceeded to deliver an *ex tempore* judgment.

#### **Judgment of the High Court**

30. Eagar J. proceeded to set out the background facts and to summarise the medical reports. The trial judge does not appear to have referred specifically to the plaintiff's own evidence or made any particular findings in relation to it. The judge referred to Mr. Kelly's reports and read through sections of each of them. The judge then turned to Ms. McMahon's report and again read through sections of that report. The judge did not refer to any of the defendant's medical reports.

31. He then proceeded to assess damages in the following terms (at p. 57 of the transcript): -

“The court, in awarding damages, has to have regard to the Book of Quantum and the court does have its views in relation to and has considered the Book of Quantum. This is clearly a severe and permanent condition and it’s at the top end of that scale and the court is proposing to award for the injuries to the wrist the sum of €70,000; in respect of his loss of his career the court awards him a further €40,000; and for the loss of his hobbies a further €15,000; in respect of pain and suffering for the future the court awards him a further €30,000; making in all a total sum of €175,000 (sic), and plus the €8,574.55 by way of general damages.”

32. The final figure mentioned by the trial judge was in fact an agreed sum for the special damages. The total of the general damages awarded was €155,000 rather than the €175,000 referred to by the trial judge, and that was subsequently corrected.

### **Discussion**

33. The proper approach to the assessment of general damages for personal injuries was most recently discussed by this court in *McKeown v. Crosby* [2020] IECA 242. In brief summary, the award of damages must be proportionate in the context of the cap for general damages for the most serious injuries, set at €500,000 by the Supreme Court in *Morrissey & Anor. v. HSE & Ors.* [2020] IESC 6. It must also be proportionate in the context of awards given by the courts for comparable injuries. It must be fair to the plaintiff and to the defendant. If the Book of Quantum is relevant to the particular injury or injuries that are in issue, the court is obliged to have regard to it as a guide to the ultimate award.
34. Before an appellate court can interfere with an award of damages, it must be satisfied that no reasonable proportion exists between the award and what the appellate court would be inclined to give – see *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 IR 578. A court of appeal should only interfere with an award of general damages where it considers that there is an error in the award which is so serious as to amount to an error of law. Where the expert evidence is given by way of agreed reports, as here, the appellate court is generally in as good a position as the trial judge to assess that evidence, while recognising that the trial judge is undoubtedly in a better position to assess that evidence in the context of its impact on the particular plaintiff concerned.
35. In the present case, both parties in their submissions accepted, as indeed did the trial judge in his judgment, that the Book of Quantum was a relevant consideration particularly as the primary injury suffered by the plaintiff was well defined and categorised in the Book. Both parties made submissions on which category the injury fell into. Wrist injuries are dealt with at pages 43-44, and the last type of injury, and the one that is relevant in this case, is “Fracture” on p. 44.
36. In that regard, the book provides as follows: -

“The wrist contains many bones (radius, ulna, eight carpal bones) all of which make up the wrist joint. In view of this complexity and variety it is difficult to provide very specific ranges for each ‘wrist fracture’. Fractures that involve the joint are usually considered more complicated than others due to the increased impact on movement.

Minor - €19,300 - €36,800

Simple non-displaced fracture to any of the bones of the wrist which has substantially recovered.

Moderate - €35,000 - €45,000

Simple or minimally displaced fractures with a full recovery expected with treatment.

Moderately severe - €54,200 - €70,100

Multiple fractures that have resolved but with ongoing pain and stiffness which impacts on movement of the wrist.

Severe and permanent conditions - €68,400 - €78,000

Complex and multiple fractures to the bones within the wrist which required extensive surgery and extended healing and may result in an incomplete union and the possibility of having or has achieved arthritic changes and degeneration of the wrist and may affect the ability to use the hand.”

37. Counsel for the defendants submitted that the injury fell within the “moderately severe” category while counsel for the plaintiff suggested it was in the “severe and permanent conditions” category, which the trial judge accepted. I would respectfully disagree with the trial judge that this injury fell into the severe and permanent conditions category and agree with the submission of the defendant that the moderately severe category is more appropriate. Severe and permanent conditions are illustrated in the context of, for example, incomplete union, which may ultimately lead to an arthrodesis or fusion of the wrist.
38. In the present case, there is no doubt but that, after a somewhat protracted course, the plaintiff achieved a good result. The fracture healed in normal alignment. At three and a half years’ post-accident, there was no evidence of degeneration nor was it suggested by the expert consultant on either side that this was likely to occur. There was no sclerosis or stiffening of the wrist’s soft tissues. There was no swelling or tenderness. The plaintiff had an almost full range of movement subject to a slight limitation of the extension of the wrist. He was on no medication and had no sleep disturbance.
39. Mr. Kelly’s view was that the plaintiff’s symptoms would continue to improve but he was likely to always have some fatigue pain and episodic ache in the fracture area. It must be



borne in mind also that the injury was to the plaintiff's non-dominant wrist. It does not appear to me therefore that on any realistic assessment that this could be categorised as a severe and permanent condition.

40. However, it must be accepted that the plaintiff was left with a five centimetre scar on the volar/palmar aspect of his wrist which this court had the opportunity of seeing in recent photographs. Although there is an obvious scar present, I do not think it could realistically be regarded as cosmetically disfiguring to more than a minimal degree. Similarly, although the plaintiff suffered a wound to his eyelid, that had healed without any obvious trace. I have already referred to complaints referable to the bone graft site.
41. As I have said, it would appear that the trial judge intended to consider and apply the Book of Quantum but he appears to have done so on a misapprehension as to its correct application. Clearly the figures provided for in the Book of Quantum encompass the entirety of the damages appropriate to a particular injury. However, the trial judge appears to have fallen into error in awarding a sum of €70,000 based on the Book of Quantum, but evidently only for pain and suffering to date as he went on to award a further sum of €30,000 for pain and suffering into the future.
42. In my view, he also erred in awarding a separate heading of damage for loss of the plaintiff's hobbies in the amount of €15,000. That is clearly to be encompassed within the range of damages for pain and suffering. In *Shannon v. Shannon* [2016] IECA 93, in giving a judgment with which the other members of the court agreed, Irvine J. set out (at para. 43) a number of questions that the court might consider having regard to in reaching its assessment of damages for pain and suffering. This list of questions, at item (viii), expressly included a consideration of the limitations imposed on the plaintiff's activities such as leisure and sporting pursuits, as here.
43. The award for general damages therefore amounted to €115,000 before the addition of any sum for loss of opportunity. In *Rossiter*, the Supreme Court held that it was appropriate to award a sum for loss of job opportunity even where it had not been clearly established that the plaintiff's future income may not be adversely affected, albeit that the range of jobs open to him would be reduced. As Fennelly J. noted (at page 582): -

"Undoubtedly, the effects on future employment prospects are an element that must be taken into account in assessing the plaintiff's damages. However, in my view, it should be considered as an element of the general damages."
44. In the present case, it might on one view be argued that the plaintiff had not established, on the medical evidence, that his job opportunities were in fact, limited in the future by virtue of the injury he suffered, although the trial judge seems to have accepted the plaintiff's own evidence and that of Ms. McMahon that this was so. In fairness however to the plaintiff, counsel for the defendant in closing submissions appears to have broadly accepted the proposition that it was open to the court to take account of the vocational upset, as it was described, and an award of damages for loss of opportunity not greater than one third of the overall award could be considered by the court.

**Conclusion**

45. I am satisfied that the award of general damages in this case was excessive to a degree that rendered it disproportionate and an error of law. That seems to have arisen to some extent by an erroneous interpretation of the Book of Quantum by the trial judge in considering that it merely referred to damages for pain and suffering to date. That error was compounded by the trial judge treating the plaintiff's loss of hobbies as a head of damage separate from pain and suffering. In my view, the plaintiff's wrist injury fell at the mid range of the "moderately severe" category.
46. Having regard to the Book of Quantum range for this category, and to the other injuries suffered by the plaintiff I have described above, I consider that the appropriate figure for pain and suffering to date is the sum of €50,000 together with a further sum of €15,000 for pain and suffering into the future, making a total of €65,000. Having regard to the trial judge's acceptance of the plaintiff's evidence concerning his work limitations and the concession properly made by counsel for the defendant to which I have referred above, I would propose adding an amount for loss of job opportunity, both to date and into the future of €25,000. The total award for general damages will therefore be €90,000 to which shall be added the special damages of €8,574.55.
47. I would therefore allow the appeal and substitute for the order of the High Court judgment in the sum of €98,574.55.
48. With regard to costs, the plaintiff will have a period of 14 days to make written submissions not exceeding 2,000 words and the defendant will have the same period to respond.
49. As this judgment is being delivered electronically, Haughton and Murray JJ. have indicated their agreement with it.