THE COURT OF APPEAL

Court of Appeal Record Number: 2021/290
High Court Record Number: 2017/10321P
Neutral Citation Number: [2022] IECA 164

Noonan J.
Haughton J.
Allen J.

BETWEEN

THOMAS RONAN

PLAINTIFF/APPELLANT

AND

ELIZABETH WALSH

DEFENDANT/RESPONDENT

JUDGMENT (*Ex Tempore*) delivered on the 11th day of July 2022 by Mr. Justice Noonan

1. The appeal before the Court today arises out of a road traffic accident that occurred on the 13th December, 2016. The appellant ("the plaintiff") was born on the 20th May, 1965 and was accordingly 51 years of age at the date of the accident. On the date in question, he was driving his motor car when it was involved in a collision with another motor car owned and driven by the defendant. Liability was not in issue before the High Court and the court ultimately awarded general damages of €26,000 to the plaintiff. It is against that award that the plaintiff appeals on the essential basis that it is inadequate. Although the trial judge said in her judgment that the plaintiff was travelling at a speed of 25 km/h at the time of the accident, in fact the plaintiff's undisputed evidence was that he was travelling at 28 to 29 mph, equivalent to approximately 45 km/h.

2. It was suggested to the plaintiff that the damage to his car was relatively light and he agreed that the airbags did not deploy. However, he said that the engine in his car blew up later as he drove it because of damage to the radiator and while this was not contradicted, the trial judge appears to have rejected this evidence on the basis that there was no reference to it in the motor assessor's report which had been handed in. The assessor's report showed that the bumper brackets on the plaintiff's car were bent, which, together with the uncontradicted evidence of the speed, was consistent with a significant enough collision, as was the fact that the defendant's car was deemed an economic write off.

Although the plaintiff did not immediately appreciate that he had suffered an injury in the accident, he attended a doctor and the hospital later on the same day with complaints of pain in his left shoulder, and the left side of his neck which radiated into his back.

3. The plaintiff had worked in the past as a lorry driver and the case as pleaded suggested that he had not worked since the accident due to, primarily, the injury to his shoulder and this resulted in a claim for loss of earnings to date of some €90,000 and, on an actuarialised basis, into the future of €390,000. However, when the case opened before the trial judge, counsel for the plaintiff told the court that the plaintiff was no longer pursuing the claim for future loss of earnings, which appears to have come as a surprise to the defendant. This was the subject of considerable adverse comment by counsel for the defendant, particularly during cross-examination of the plaintiff who was pressed to explain how this apparently unjustified claim had been advanced right up to the morning of the hearing.

4. Apart from the claim for loss of earnings, the special damages were modest and agreed between the parties. All the medical reports on both sides were also agreed and no medical witness gave *viva voce* evidence to the court. Apart from the plaintiff himself, a vocational rehabilitation consultant and an actuary were called, together with a witness who had allegedly offered at a job as a lorry driver to the plaintiff on the day of the accident shortly before it occurred. The loss of earnings claim both to date and into the future appears to have been entirely premised on the evidence of this witness.

5. The plaintiff's major injury by far was to his left shoulder and all medical experts concerned appear to have agreed that there was clear evidence from MRI scans of the shoulder which indicated that the plaintiff had degenerative changes evident in the shoulder which had been asymptomatic prior to the accident but caused to become painful and troublesome as a result of it. While this was not seriously in dispute, as I have said, what was in dispute was the extent to which the injuries affected the plaintiff and the defendant's doctors suggested that the plaintiff had exaggerated his symptoms when examined by them. As I have said, however, it was common case between the doctors on both sides that the MRI scans of the plaintiff's shoulder showed adhesive capsulitis and tendinopathy.

6. Before looking at the medical reports, I pause here to note that the jurisprudence establishes clearly that where findings of fact are made by the High Court on the basis of oral evidence, this court will not interfere with such findings unless unsupported by any credible evidence. The position however is different where findings are made on foot of agreed documents such as medical reports where this court is in as good a position as the High Court to assess those documents and come to conclusions.

7. I propose accordingly to briefly review the medical reports that were put in evidence before the High Court in chronological order.

8. The first report is from the plaintiff's general practitioner, Dr. Forde, who reviewed the plaintiff on the 31st March, 2017, some three months post-accident. When the plaintiff attended her initially immediately following the accident, he was complaining of left shoulder pain in particular and had a limited range of movement. An MRI scan of the

plaintiff's shoulder taken on the 24th February, 2017 showed, as noted above, adhesive capsulitis and tendinopathy. The plaintiff was also complaining of pain in his back. Dr. Forde completed the standard PIAB medical report template and in the section dealing with the degree to which the plaintiff's condition affected his ability in terms of reaching, manual dexterity, and lifting/carrying, she identified the severe category as appropriate. She noted that rotation of his neck was limited to 30° and his shoulder movements were very painful.

9. Mr. Chhabra, consultant orthopaedic surgeon, reviewed the plaintiff on the 22nd February, 2018, 14 months post-accident, and again referred the MRI findings. He described these as being degenerative changes in the acromioclavicular joint. He noted that the plaintiff had difficulty driving or lying on his left side. On examination he had a reduction of internal and external rotation of the shoulder with a markedly reduced range of movement. He planned to inject the shoulder.

10. The next medical examination of the plaintiff was carried out on behalf of the defendant by Mr. Michael O'Riordan, consultant orthopaedic surgeon, on the 16th April 2018, 16 months post-accident. Mr. O'Riordan comments adversely on the plaintiff's presentation and on examination, saying that everything was accompanied by huffing, puffing and groaning. He noted that the plaintiff complained that he was unable to tie his shoelaces, and when cross-examined about how this had anything to do with his shoulder, the plaintiff responded that it was difficulty with his back that gave rise to this issue.

11. Mr. O'Riordan felt it was difficult to give a prognosis having regard to the fact that there was significant exaggeration of the plaintiff's symptoms. While he accepted what was shown on the MRI scan, he felt that this would not be responsible for the degree of disability demonstrated by the plaintiff. On more than one occasion, Mr. O'Riordan commented on the fact that the airbags in the plaintiff's car did not deploy and at the end of his report, says that the degree of disability exhibited by the plaintiff was way in excess of anything to be expected from the type of collision in which he was involved.

12. It is not clear to me what Mr. O'Riordan meant by this beyond the fact, recited in the report, that two cars collided. Insofar as Mr. O'Riordan purports to suggest that because the airbags were not activated in the plaintiff's car, he cannot have suffered a significant injury, that appears to me to be well outside Mr. O'Riordan's area of expertise and accordingly, is not something to which the High Court should have attached any weight. While the trial judge did not expressly indicate in her *ex tempore* judgement that she was placing particular reliance on Mr. O'Riordan's comments, she does note that two of the defendant's doctors were very sceptical about the nature of the claims made.

13. The trial judge also observed that since none of the doctors gave oral evidence, insofar as there was any conflict between their reports, the result had to be that the plaintiff would be found not to have discharged the onus of proof. I'm not entirely certain what the trial judge had in mind in making this comment, but insofar as it appears to suggest that any difference of opinion between the doctors on either side must be resolved in favour of the defendant, I do not believe that to be a correct statement of the law. It is certainly true to say that where there are disputed statements of fact contained in documents such as

affidavits, those cannot be resolved by a court in the absence of oral evidence and cross-examination. That, however, is quite different from suggesting that a difference of expert opinion, where it arises, must mean that the plaintiff has not discharged the onus of proof and thus the opinion of his doctors is not to be accepted.

14. There may well be other factors to be weighed in the balance in considering which evidence the court should be inclined to act upon, such as for example the relative expertise of the experts concerned. Where orthopaedic injuries are concerned, the fact that a general practitioner might disagree with a consultant orthopaedic surgeon could not of course provide a basis for suggesting that it is in effect a "nil-all draw" and the onus of proof has not been discharged. There may be other reasons for preferring the opinion of a doctor who has treated a plaintiff over an extended period over one who has examined the plaintiff on one occasion only. However, in fairness to the trial judge, it is not clear to me that there was, in reality, any significant difference of opinion between the doctors on both sides, beyond a suggestion of exaggeration by the defendant's doctors based, as I have said, on the somewhat doubtful premise of minor accident means minor injury.

15. Mr. Chhabra examined the plaintiff again at 17 and 25 months post-accident when he noted that there had been little change in the plaintiff's presentation and accordingly, he proposed to manipulate his shoulder under general anaesthetic and carry out an injection at the same time. This was done on the 1st November, 2018 but unfortunately appears to have had only short-lived success, leading Mr Chhabra to opine that the plaintiff may require capsular release surgery.

16. The plaintiff was subsequently referred for further assessment to Mr. David O Briain, consultant orthopaedic sports and upper limb surgeon, who initially assessed the plaintiff on the 18th December, 2019, 3 years post-accident. Mr O'Briain noted that the plaintiff had pain in his shoulder on movement and carried out a further injection into the shoulder on that day. The injection however only gave limited and partial relief of the plaintiff's pain. On examination, Mr O'Briain found that the plaintiff had reduced range of movement in his neck and pain on the left side, particularly the trapezius. He had a reduced and painful range of motion in his shoulder. Importantly, Mr O'Briain offered the view that the plaintiff's injuries were consistent with the accident but would require further investigation.

17. The defendant arranged a second medical examination of the plaintiff by a different consultant, Mr. Colin Riordan, a hand and plastic surgeon, who saw the plaintiff shortly after Mr. O'Briain on the 31st December, 2019. Given that the defendant had previously arranged a review by an orthopaedic surgeon, it is not clear why it was felt that a review by a plastic surgeon was appropriate. On examination, Mr. Riordan found that the plaintiff had markedly reduced movements in the left shoulder and also reduced rotation, flexion and extension of his neck, restricted by pain. Unlike Mr. O'Riordan, Mr. Riordan does not appear to have concluded that the plaintiff was deliberately exaggerating his symptoms. However, in his opinion and prognosis, Mr. Riordan says: –

> "…[I]t would appear from the pictures of his car that the damage was relatively minor and it is therefore difficult to understand how it could cause such ongoing disability."

18. It would appear from the foregoing that when referring the plaintiff for medical examination by Mr. Riordan, the defendant's solicitors furnished him with photographs of at least the plaintiff's vehicle and perhaps also the defendant's. One assumes that the purpose of this was to suggest to Mr. Riordan that the ostensible damage caused in the accident was minor and as with Mr. O'Riordan, it should follow that the plaintiff's injury equally was minor.

19. I do not consider that this is a proper basis for inviting a doctor to give a medical opinion on a person's injuries or medical condition. A doctor is not a forensic engineer or accident investigator and it is, in my view, entirely inappropriate for a doctor to be invited to reach conclusions about a person's injuries and medical condition based on photographs of vehicles. Here again, this is something entirely outside a medical professional's expertise and should properly be disregarded by the court as of any materiality to the issues in the case. Having said that, Mr. Riordan does make the observation that the plaintiff's complaints of disability with his shoulder may make returning to his pre-accident occupation as a lorry driver difficult.

20. Mr. O'Briain saw the plaintiff again on the 2nd December, 2020, 4 years post-accident, when he administered a further injection which worked initially, but only for a while. A further MRI scan was carried out in February 2020 in which findings similar to the previous scan were evident. It also showed that there was a greater than 50% tear of the plaintiff's supraspinatus tendon. Mr. O'Briain considered at this stage that the plaintiff would benefit from surgery. That surgery was carried out on the 5th May, 2021 and appears to have been quite a complex procedure which involved a left subacromial decompression, a distal clavicle excision, a bicep tenotomy and supraspinatus tendon repair. The operation took some four hours in total.

21. Mr. O'Briain's final report is dated the 30th August, 2021, at some 4 years and 8 months post-accident. He notes that the plaintiff achieved excellent pain relief from the surgery and his neck pain was now resolved. Mr. O'Briain anticipated that the plaintiff should be able to return to most normal activities within about six months after surgery as tolerated. The plaintiff expressed concern to him about his ability to return to driving a HGV which was described as a very physical activity requiring extensive amount of overhead reaching, pulling and dragging. Mr. O'Briain's view in this respect was that while he may be able to return to these activities if he made a full recovery from his surgery, it would be reasonable to reduce his exposure to strenuous overhead activity to improve the longevity of his rotator cuff. The plaintiff advised him that he was able to return to driving smaller lorries that did not require much physical work.

22. There is one further report to which I should refer, obtained by the defendant. This is the report of Professor Peter McMahon, clinical Professor of Radiology at UCD and a consultant radiologist in the Mater Hospital. On the 14th May, 2020, Prof. McMahon reviewed the plaintiff's x-rays and MRI scans in particular with regard to his left shoulder. In commenting on the first MRI scan of February 17th, being some two months post-accident, Prof. McMahon offers the view that the appearances on that scan relate, on the balance of

probabilities, to a recent injury rather than to other more chronic conditions such as adhesive capsulitis. Other changes in the shoulder may have been more long-standing.

23. It would appear clear therefore that there was no dispute between the medical experts on both sides about the fact that the plaintiff suffered a very significant injury to his shoulder in the accident complained of which caused significant symptoms for a period of some five years post-accident. During that time, he underwent physiotherapy, multiple injections and two operations under general anaesthetic, one of which was very significant. Although the plaintiff confirmed in evidence that he had resumed driving a lighter type lorry in the few years prior to the trial, his evidence was that he was unable to resume long-distance driving in a HGV.

24. In the course of the hearing of the appeal this morning, counsel for the defendant for the first time suggested that the medical evidence demonstrated that the extensive surgery undergone by the plaintiff was a consequence of the progression of the degenerative changes in his shoulder and was unrelated to the accident. I am quite satisfied that this case was never made in the High Court and it is accordingly impermissible to make it now. Had such a suggestion been advanced before the trial judge, I am quite certain that the plaintiff's approach to the medical evidence would have been significantly different and it is likely that Mr. O'Briain would have been called to give evidence to deal with this issue.

25. It is, in any event, quite clear from Mr. O'Briain's first report of 18th December, 2019, which pre-dates the second MRI showing the alleged progression of degeneration, that Mr. O'Briain anticipated that the plaintiff may require precisely the kind of surgery that ultimately proved necessary as a direct consequence of the accident, rather than natural progression of his condition. It is also clear to me that this did not feature in any way in the trial judge's assessment of damages as she was evidently of the view that the surgery was consequential on the accident. She expressly notes that everything resulting from the triggering of the underlying condition, which must include the surgery, is something for which the plaintiff is entitled to be compensated.

26. The report of Prof. McMahon that there was evidence of injury on the first MRI in that regard appears to have been broadly supported by Mr. O'Briain and there was no countervailing evidence to any significant extent called by the defendant. While the plaintiff was accused of exaggerating his symptoms, as the trial judge recognised, it was not in dispute that he suffered an injury and there were more than ample objective indications of such injury identified in the medical reports. Nor was it suggested at any stage that the plaintiff was exaggerating his injuries to the extent of making the claim a fraudulent one, such as might give rise to an application under Section 26 of the Civil Liability and Courts Act, 2004, to have the claim dismissed.

27. The principles to be applied in the assessment of general damages have been restated on a number of occasions by this Court in recent times. Most recently, a very brief summary of those principles is to be found in the judgment of this Court in *Whelan v. Dunnes Stores* [2022] IECA 133 at para. 97: -

> "The appropriate principles to be applied in the assessment of damages for personal injuries have been discussed and repeated in a series of judgments of this court in recent years and I think there is little to be gained by reiterating those in detail yet again. They are, when distilled to their essence, that the award must be proportionate to the maximum that may be awarded at €500,000, it must be proportionate to awards given by the courts for comparable injuries, it must be fair to both parties and finally, if the Book of Quantum is relevant, the Court is obliged to have regard to it."

28. In considering the appropriate level of damages to award in this case, the trial judge did have regard to the Book of Quantum insofar as she expressly mentions it, but does not refer to any specific category beyond saying that the plaintiff suffered a moderate whiplash or soft tissue injury. Section 4B of the Book of Quantum deals with shoulder/upper arm injuries. The moderate category is stated to comprise: -

> "Moderate sprains are caused by a partial tear in the ligament. These sprains are characterised by obvious swelling, extensive bruising, pain, and reduced function of the shoulder with a full recovery expected."

The range of damages for this category is €22,000-€60,900.

29. The next category of severe and permanent conditions is stated to comprise: -

> "…injuries will be the most severe and will include where the movement of the shoulder is restricted due to ligament or muscle damage. Extensive surgery may have been required."

The range for this category is €34,700 to €67,700. Perhaps surprisingly, there is very considerable overlap between these two categories with the maximum figures being separated by less than €7,000.

30. While it is perhaps arguable whether the injury falls into one or other of the categories, were it to be in the moderate category, I would regard it as towards the upper end of that category, whereas it would be towards the mid to upper end of the severe and permanent category.

31. In terms of comparable cases, it seems to me that the judgment in *Nolan v. Wirenski* [2016] IECA 56 provides quite significant parallels to this case. The plaintiff in that case was 46 years of age when she suffered soft tissue injuries to her right shoulder, the case coming to trial some four years later when she was then 50. She had undergone a lot of physiotherapy but in particular, the plaintiff had her shoulder manipulated under general anaesthetic and an injection administered as in this case. She had surgery in the form of a subacromial decompression and rotator cuff repair, not dissimilar to the surgery undergone by the plaintiff in the instant case.

32. Although as of the date of trial, the plaintiff in *Nolan* continued to complain of severe symptoms, her evidence in that regard was undermined to a very significant degree by

video surveillance footage taken covertly which showed her using her arm in a manner inconsistent with her alleged limitations. In another parallel to the present case, she advanced a claim for the cost of future care amounting to €350,000 or thereabouts, which was withdrawn without explanation on the morning of the hearing. The High Court awarded general damages of €120,000, being €90,000 to date and €30,000 for the future. This was reduced on appeal by this Court to €50,000 per pain and suffering to date and €15,000 into the future, making a total of €65,000.

33. I think when one takes account of the figures set out in the Book of Quantum to which I have referred, and more particularly the very closely analogous injuries in *Nolan v. Wirenski*, in my view damages at a similar level should obtain in the present case. I do not of course overlook the fact that the plaintiff suffered relatively minor injury to his neck and back and bearing all factors in mind, at I think an appropriate figure for general damages to date the present case is €50,000. However, I would put the damages in the future at a somewhat lower level than *Nolan* of €10,000 to take account of the fact that the plaintiff surgery was largely successful, albeit that he is subject to a certain level of limitation in his chosen occupation in the future.

34. I am quite satisfied that the damages assessed by the trial judge were so significantly below the proper level as to amount to an error of law – see *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] IESC 85, per Fennelly J. While the judgment of McCarthy J. in *Reddy v. Bates* [1983] IR 141 is often cited in support of an argument that error should be assumed where the discrepancy exceeds 25%, that, while only a broad rule of thumb not to be invariably applied, is very comfortably exceeded in the present case. I would accordingly assess the plaintiff's general damages for pain and suffering to date and in the future in the sum of €60,000.

35. Turning now to the claim for loss of earnings, the judge described herself as very unimpressed by this claim and it is easy to see why. Unlike the objective medical findings in relation to the plaintiff's complaints, there was a very large subjective element to this claim which turned in large measure on both the evidence of the plaintiff himself and that of the witness who allegedly offered him a job on the day of the accident, Mr. Walsh. It was squarely put to Mr. Walsh in cross examination that this job offer was no more than a concoction designed to buttress an enormous claim for loss of earnings to date and into the future. The trial judge had the advantage of hearing the plaintiff's evidence and that of Mr. Walsh on this issue before pronouncing herself unimpressed. There were a significant number of inconsistencies in the evidence and it is clear that the plaintiff purported to suggest at various occasions that he had not worked at all since the accident when this plainly was untrue.

36. To put it benignly, there was at a minimum very significant confusion about who was going to employ the plaintiff and on what basis. It emerged during the course of the evidence that the company which was supposedly about to employ the plaintiff, Sotodo Limited, had in fact stopped trading a few months after the plaintiff's job was allegedly due to commence. Furthermore, it became clear during the course of Mr. Walsh's cross examination that when

the plaintiff found himself unable to take up this job, in fact nobody else was employed in his place, again casting very considerable doubt on the *bona fides* is of this purported job.

37. Two of the grounds of appeal in the notice of appeal, that the judge failed to take proper account of the evidence of Mr. Walsh in relation to the offer of employment and that she failed to take account of the evidence of Ms. Susan Tolan, Vocational Assessor, suggested that the plaintiff was appealing against the rejection of his claim for loss of earnings to date but in his written submission the plaintiff acknowledged, quite rightly, that he had failed to establish his claim for loss of earnings.

38. I think the trial judge was perfectly entitled to reject this claim in its entirety, as now appears to be accepted by the plaintiff, and I think it is clear from the judgment, although she does not say so in so many words, that she simply did not believe the evidence that this was a real job offer. This was a finding of fact arrived at by the trial judge having had the benefit of seeing and hearing the relevant witnesses being cross-examined and is accordingly one with which this Court could not interfere even if it were still in issue. The casual abandonment of such a huge claim on the morning of the trial without any real explanation as to why it was made and persisted in, when it was known that the plaintiff's surgery had been successful 6 months earlier, was another justification for regarding the claim for lost earnings to date with considerable suspicion.

39. Having said that however, as I have mentioned previously, the undisputed evidence of Mr. O'Briain was that, even following the successful surgery, it was reasonable for the plaintiff to reduce his exposure to activities of the kind that would be necessitated by HGV driving and to that extent, it seems to me that he has suffered some degree of loss of employment opportunity, albeit one that is relatively modest. Having regard to the plaintiff's age, I would allow an additional sum of €10,000 in respect of the loss of opportunity claim, bringing the total claim for general damages to €70,000.

40. Adding the agreed special damages to that figure gives a total of €72,561.43 and I would allow this appeal and substitute judgment in that amount for the order of the High Court.

41. [Haughton J.]: I have listened carefully to the judgment just delivered by Judge Noonan and I agree with it

42. [Allen J.]: Yes, I have also listened carefully to the judgment just delivered by Judge Noonan and I agree.