

THE HIGH COURT
IN THE MATTER OF AN GARDA SÍOCHÁNA (COMPENSATION) ACTS, 1941 AND 1945
[2018 No. 368 SP]

BETWEEN

NIALL MCCORMACK

APPLICANT

AND

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 9th day of December, 2019

BACKGROUND

1. On 17th October, 2013 the applicant, Garda McCormack, sustained a fracture to his dominant right wrist and cuts to his lips during an arrest of an intoxicated suspect. During the struggle to arrest the suspect, the suspect fell on top of Garda McCormack's right wrist.
2. Garda McCormack attended the Emergency Department following the incident where the cuts to his upper and lower lips were cleaned and they healed shortly thereafter. An x-ray was taken of his right wrist. This x-ray revealed an undisplaced transverse fracture to his right ulnar styloid bone. A partial plaster cast was applied to the right wrist and Garda McCormack was referred for follow-up at a specialist orthopaedic outpatient clinic. He was given a tetanus injection and he was advised to treat his pain with over-the-counter painkillers.
3. Garda McCormack attended at this orthopaedic outpatient clinic on 24th October, 2013 and the plaster cast was removed and a splint applied to his right wrist and forearm. He was reviewed at this clinic on the 21st November, 2013 and the splint to his right arm was removed. At subsequent review at the clinic almost one year later, on 6th November, 2014, it was noted that x-rays taken of the right wrist showed that the fracture had healed and Garda McCormack was referred for an MRI scan of the wrist to confirm this prognosis. Garda McCormack attended one session of physiotherapy to aid recovery of his injured right wrist. He was on sick leave for a period of 9 weeks following the incident and he reported ongoing weakness in his wrist in the year after the incident. Garda McCormack was subsequently referred to a Consultant Orthopaedic Surgeon and attended for appointment on 14th January, 2017 but received no treatment from this Consultant and the medical reports advise that Garda McCormack fully recovered from his injury with no long-term sequelae.
4. This Court will award special damages in respect of medical expenses of €394.05 as these have been agreed between the parties.

CALCULATION OF GENERAL DAMAGES/COMPENSATION

5. As regards how a court calculates how much compensation should be paid for this fracture to Garda McCormack's wrist, the case of *O'Connell v. Martin; Ali v. Martin* [2019] IEHC 571 is the most recent judgment in which this Court considered how a court goes

about assessing general damages (i.e. for pain and suffering) and special damages (i.e. for out of pocket expenses).

6. In *O'Connell v. Martin*, this Court referenced the need for solicitors, barristers and doctors to be alive to the possibility that their professional services might be used to facilitate fraudulent claims. In *Daly v. HSE* [2014] IEHC 560, Noonan J. made similar comments at para. 43:

“All lawyers, and particularly those involved in personal injuries litigation on a regular basis, are perfectly well aware of the potential risks for their clients of mounting exaggerated claims and the draconian sanctions available to the court under s. 26 of the Civil Liability and Courts Act 2004. Accordingly, it behoves them to exercise considerable care in the analysis of claims for special damage before advancing them.”

7. It is however crucial to realise, although not expressly stated by Noonan J. in *Daly v. HSE* or by this Court in *O'Connell v. Martin*, that it goes without saying that, in any comment about lawyers exercising care in presenting claims, that the lawyer cannot be criticised simply because the claim turns out to be fraudulent or exaggerated.
8. Lest there be any doubt therefore, it should be noted that the solicitor and counsel involved in the *O'Connell v. Martin* case were not criticised by this Court in any way for how they represented their clients. This is because they both have a duty to act on the instructions of their clients. The truth or otherwise of those claims is a matter for the Court and not the lawyers.
9. In *O'Connell v. Martin*, this Court noted that the Book of Quantum is not binding on the courts in assessing what is a fair and reasonable amount for general damages for personal injuries. Instead, what is binding on this Court's assessment of damages in personal injury cases are the principles of the Court of Appeal and the Supreme Court. It is clear that these principles are equally applicable to the assessment of compensation under the Garda Compensation Acts (*per* Irvine J. in *Carey & Or. v. Minister for Finance* [2010] IEHC 247 at para. 4.24 *et seq.*). Accordingly, the following non-exhaustive principles set down by the Court of Appeal and Supreme Court bind this Court in the assessment of damages for Garda McCormack in this case.
 - (i) The damages awarded must be fair to the plaintiff/applicant and defendant/respondent:
 - *Nolan v. Wirenski* [2016] IECA 56,
 - (ii) Modest damages should be awarded for minor injuries, moderate damages for middling injuries and severe injuries should attract damages which are distinguishable from catastrophic injuries:
 - *M.N. v. S.M.* [2005] 4 I.R. 461; *Nolan v. Wirenski*; *Fogarty v. Cox* [2017] IECA 309.

- The Supreme Court does not normally deal with modest damages (for minor injuries) or moderate damages (for middling injuries), whether on the District Court scale (0 to €15,000), the Circuit Court scale (up to €60,000) or otherwise. For this reason, although not a personal injuries case, the Supreme Court decision in *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81 is of relevance, since it is one of the few cases handed down by the Supreme Court which considered the appropriate amount of compensation for a person who cannot be said to have '*sustained significant injuries*' (at para. 118). In doing so, the Supreme Court applied, *inter alia*, the same restitutionary principles, of seeking to put a claimant in the same position as before the incident, as apply in personal injury cases. On this basis, the Supreme Court determined that the sum of €7,500 was appropriate compensation for a prisoner who was forced to stop out for seven and a half months. MacMenamin J. described the sum of €7,500 as 'moderate compensatory damages' for a prisoner who felt '*deeply humiliated, alienated from support and denigrated*' as a result of his exposure to conditions which were '*distressing, humiliating, and fell far below acceptable standards*' (at para. 116 et seq.),
- (iii) Damages awarded should be proportionate to the cap ('in or around €450,000' *per* Irvine J. in *Nolan v. Wirenski*) for general damages in order to avoid the concertina effect:
 - M.N. v. S.M.; *Gore v. Walsh* [2017] IECA 278; *Payne v. Nugent* [2015] IECA 268,
- (iv) The award of damages is to be reasonable in light of general after-tax incomes [which are in the region of €35,000 at present, per CSO statistics]:
 - *Sinnott v. Quinnsworth Ltd* [1984] I.L.R.M. 523; *McDonagh v. Sunday Newspapers Ltd* [2018] 2 I.R. 1,
- (v) Appropriate scepticism should be applied to litigants' claims:
 - *Rosbeg Partners v. LK Shields Solicitors* [2018] I.L.R.M. 305,
- (vi) Common sense should be applied to the parties' claims:
 - *Byrne v. Ardenheath* [2017] IECA 293,
- (vii) Caution should be taken by the Court when relying on expert reports:
 - *O'Leary v. Mercy Hospital* [2019] IESC 48; *Byrne v. Ardenheath*.

Application of these principles to assess compensation for Garda McCormack

10. Having set out the principles which bind this Court in its assessment of damages, the next step is to consider the application of these principles to Garda McCormack's injuries.

Conclusion

11. As general damages/compensation, for the cuts to his lips but primarily for the fracture sustained to Garda McCormack's dominant right wrist which required treatment with a plaster cast and splint for approximately 6 weeks and one session of physio and which led to nine weeks of sick leave but which has fully healed, this Court concludes as follows: in light of the foregoing Court of Appeal and Supreme Court principles for assessing damages, and in particular the Supreme Court decisions regarding the relevance of the average income after tax in this country (circa €35,000) and the recent Supreme Court award of €7,500 as moderate compensatory damages in the *Simpson case*, the appropriate level of the award in this case should be €20,000.