

THE HIGH COURT

[2023] IEHC 132

[RECORD NO. 2021 5320 P]

BETWEEN

MARY MC HUGH

PLAINTIFF

AND

CHRISTIAN FEROL

DEFENDANT

Judgment delivered on the 1st day of March 2023

1. This is a personal injuries action which comes before the court for assessment of damages. Special damages have been agreed in the sum of €13,000. At issue between the parties is the amount this Court should award by way of general damages for the plaintiff's pain and suffering to date and into the future.
2. The plaintiff is a married woman, who was born on the 9th of March 1958 and is now approaching her 65th birthday. She lives in Dunleer, Co. Louth with her husband, John McHugh. She is a qualified Montessori teacher and worked for many years in the Middle East in that capacity. She has worked as a foster parent to numerous young children. At the time of the accident giving rise to these proceedings, she was working as a full time carer for her elderly mother.
3. On the 21st of December 2019, the plaintiff was driving to an evening memorial mass for her deceased brother. She was driving along a dark and narrow country road when she was involved in a very violent head on collision with the defendant's vehicle. The defendant's vehicle was on the incorrect side of the road at the time of the collision. The

plaintiff's vehicle was a write off. The force of the collision caused both airbags to deploy. The engine of her vehicle was driven back into the footwell on the driver's side, injuring the plaintiff's feet. In the collision, the plaintiff's car was spun around on the road causing her head to strike the head restraint at the top of her driver's seat. The plaintiff managed to crawl out of the vehicle. She was extremely shocked and distressed and was unable to pinpoint her precise location to emergency services.

4. The plaintiff sustained a number of injuries in this collision. It is common case that the most significant injury sustained by her was to her feet and in particular her right foot. She had a head and neck injury with a suspected slight concussion. She suffered injury to her lower back and hips. She suffered a significant psychological reaction to the trauma of the accident which has been diagnosed as post – traumatic stress disorder (PTSD).

5. The Personal Injuries Guidelines adopted by the Judicial Council on the 6th of March 2021 apply to this case. As pointed out by Coffey J. in the case of Nicola Lipinski v. Martina Whelan, s. 99 of the Judicial Council Act 2019 requires that: -

“(1) The court shall, in assessing damages in a personal injury action—

(a) have regard to the personal injury guidelines (within the meaning of s. 2 of the Judicial Council Act 2019), and

(b) where it departs from those guidelines, state the reasons for such departure in giving its decision”.

6. At paras. 8 to 14 of the Lipinski judgment, Coffey J. sets out the process which must be undertaken by a High Court judge when assessing damages for personal injury under the new guidelines. I concur with his analysis and reasoning and gratefully adopt it as my own.

Foot injury

7. In this case, it is not in dispute that the plaintiff's dominant injury is that to her right foot. Happily, the medical reports are ad idem as to the nature and effect of that injury. The

plaintiff suffered complex intra – articular fractures to the base of her right third, fourth and fifth metatarsals which has resulted in damage to the third, fourth and fifth tarsometatarsal joints with resulting incongruity and post – traumatic arthritis. These fractures have healed but have not healed in an anatomical position. The fractures of these lateral three metatarsals have healed dorsiflexed or elevated. This has resulted in the second metatarsal being more prominent and having to bear extra load when Ms. McHugh walks. This in turn, has resulted in irritation and pain in her second MTPJ that is unlikely to resolve. There is a high likelihood that she will develop a stress fracture of her second metatarsal as a result of the overload which may result in it dorsiflexing to reduce the load bearing through the second metatarsal.

8. In Mr.Gary Colleary’s report on behalf of the plaintiff prepared 15 months post – accident, he concluded that: -

“The pain in Ms. McHugh’s right foot is unlikely to improve. It is likely to deteriorate slowly over time. There is no simple surgical solution for her problem as the fourth and fifth metatarsals are designed to be mobile and the only surgical option for her problem would be a fusion of these joints, which is likely to result in a decrease in her function due to the stiffness imparted by the fusion.

In other words, there is no surgical treatment likely to improve Ms. McHugh’s pain and function and it is likely that she will have to continue as she is with ongoing severe right foot pain.”.

9. In addition to the fractures to the metatarsals of her right foot the plaintiff sustained soft tissue injury to her left foot which required bandaging, but which resolved fully within a relatively short period.

10. Prof. Michael Stephens examined the plaintiff on behalf of the defendant, on the 23rd of November 2021 and thereafter consulted with Mr. Gary Colleary, the plaintiff’s treating surgeon and essentially came to the same conclusions in relation to the injury to the

plaintiff's right foot. On examination on the 23rd of November 2021, almost two years post – accident, he found that the tarsometatarsal joint, particularly at the fourth, but also to a lesser degree the third and fifth, are prominent and very tender. This is the site of her foot pain. Also, on weight bearing, it can be seen that the first metatarsal head is prominent, i.e., the fractures of the third, fourth and fifth metatarsals have healed in slight extension, increasing the prominence of the second metatarsal. The plaintiff's difficulty in mobilising has been alleviated by the use of custom made orthotic insoles.

11. Prof. Stephens describes the injury to her right foot as a significant injury to the tarsometatarsal or lis franc joints of the lateral three rays. He confirms that the CAT scan showed that the fracture of the fourth metatarsal was very comminuted at its base. It also showed the prominence of the second metatarsal head. He opined in his original report that an osteotomy or a plantar condylectomy might be required at some stage to try and decrease the load underneath the first metatarsal. In a later addendum of the 15th of March 2022, Prof. Stephens noted that the deformity, with the prominent second metatarsal head, leading to increased loading to that area of her forefoot, would remain permanent unless surgery reconstructing her foot is undertaken. He acknowledged that the surgery would be extensive and would have risks and still would not return her to normality. Prof. Stephens also noted that at one point her treating orthopaedic surgeon, Mr. Gary Colleary, had administered injections for pain in the fourth and fifth tarsometatarsal joints and had also referred the plaintiff to a foot and ankle physiotherapist for the making of orthotic insoles to try and offload the second metatarsal.

12. It is now more than three years post – accident. The deformity and pain in her right foot is permanent. Depending on the level of pain in her foot she may require surgical intervention and/or pain relieving injections. The injury has seriously diminished her enjoyment of life and has led to a significant loss of amenity. In the immediate aftermath of

the accident, the plaintiff was in plaster for a period of ten weeks and thereafter in an air boot for a further six weeks. Because of the Covid pandemic she was unable to fully access rehabilitation treatments. The injury affects her ability to walk and go to the gym and to wear the kind of footwear she likes, all matters that she enjoyed prior to the accident.

The guidelines

13. Relevant foot injuries are dealt with under the heading of orthopaedic injuries at pp. 49 and 50 of the Personal Injury Guidelines. Foot injuries are classified into five separate categories; (a) Most severe foot injuries; (b) Severe foot injuries; (c) Serious foot injuries; (d) Moderate foot injuries and (e) Minor foot injuries. Mr. Mohan on behalf of the defendant submits to the court that the plaintiff's right foot injury properly falls into Category D – Moderate foot injuries, for which a range of €20,000 to €45,000 is prescribed in the guidelines. Moderate foot injuries are described as follows: -

“This bracket will include displaced metatarsal fractures resulting in permanent deformity and continuing symptoms. There may be a risk of long-term osteoarthritis and/or future surgery”.

14. Mr. Mohan contends that this description is on all fours with the evidence as to the plaintiff's injuries. He submits that the plaintiff's injury would be at the upper rather than the mid or lower level of that category. Mr. Byrne on behalf of the plaintiff submits that the appropriate category is Category C – Serious foot injuries, in which the compensation range is €38,000 to €75,000 and he further suggests that having regard to the evidence the court should fix damages at the upper end of the range in C. Category C states: -

“This bracket will include injuries less severe than in (b) above, but which result in continuing pain. Examples would include severe burning to both feet with resultant surgery and significant scarring and traumatic injuries resulting in future arthritis, prolonged treatment and the risk of fusion”.

15. C includes injuries less severe than in (b) but which result in continuing pain. (b) in turn provides for injuries resulting in substantial restriction on mobility or considerable and permanent pain. The plaintiff's injuries are less severe than (b) but they do result in continuing pain. It is now more than three years since the injury and the pain has not resolved, and based on the medical reports, will not resolve. It is a traumatic injury, which has already resulted in arthritis. She has already undergone prolonged treatment. Depending on the pain level, there is a risk of fusion. The plaintiff will have pain and hampered mobility as a result of this injury for the remainder of her life.

16. On the medical evidence, and the evidence of the plaintiff as to the effect on her of these injuries, the court considers that Category C – Serious foot injuries – is the appropriate category in which to place the plaintiff's claim. She has sustained a serious foot injury which has already resulted in arthritis, and which will continue to cause her pain for the remainder of her life. The range for serious foot injuries is €38,000 to €75,000. The court considers that the plaintiff's injury is towards the upper end of that bracket, rather than the middle or lower range. Accordingly, the court proposes to award the plaintiff €60,000 for the injury to the plaintiff's right foot. This award includes the relatively minor soft tissue injury which the plaintiff sustained to her left foot.

Other injuries

17. In addition to the injury to her feet, the plaintiff suffered PTSD arising from the traumatic circumstances of the collision; an injury to her head and neck with a possible mild concussion; injury to her lower back; injury to her right hip, and a broken dental bridge which necessitated a number of trips to the dentist. It is common case that these are lesser injuries than the injury to the plaintiff's right foot. That said, the claimant is entitled to be fairly and justly compensated for all of the additional pain, discomfort and limitations arising from these lesser injuries.

18. The Guidelines themselves acknowledge that:

“the assessment of general damages in cases involving multiple injuries gives rise to special difficulty, given that in these guidelines each injury is valued separately: -

The principal difficulty stems from the fact that there will usually be a temporal overlap in the injuries sustained such that if each injury was to be valued separately, the claimant would be overcompensated to the point that the award would be unjust to the defendant, and disproportionate when compared with other awards commonly made for other greater or lesser injuries.

Each injury will, of course, cause additional pain and suffering which must be reflected in the award, but the question is how to ensure that the award will be just in light of the overlap of the injuries. In a case of multiple injuries, the appropriate approach for the trial judge is, where possible, to identify the injury and the bracket of damages within the guidelines that best resembles the most significant of the claimant’s injuries. The trial judge should then value that injury and thereafter uplift the value to ensure that the claimant is fairly and justly compensated for all of the additional pain, discomfort and limitations arising from their lesser injury/injuries. It is of the utmost importance that the overall award of damages made in a case involving multiple injuries should be proportionate and just when considered in light of the severity of other injuries which attract an equivalent award under the guidelines”.

Unfortunately the guidelines do not provide advice as to the process a court should undertake when assessing the “uplift” to ensure that the claimant is fairly and justly compensated for all the additional pain, discomfort and limitations arising from their lesser injury/injuries. Coffey J., in his Lipinski judgment, did not set out the process whereby he arrived at an uplift in that case of €25,000 in circumstances where the main injury attracted €35,000.

Arguments on the uplift

19. Mr. Mohan has submitted to the court that any uplift to compensate a plaintiff for additional pain and suffering caused by other injuries can never be more than the award given for the dominant injury. Mr. Byrne for the plaintiff takes a different view. He submits that in a case in which a plaintiff suffers multiple severe injuries, the uplift of general damages might well exceed the general damages awarded for the dominant injury. He does not contend that the instant case is such a case but argues that such cases may on the facts arise. He suggests that the process which the court should adopt to assess the appropriate uplift is to place the additional injuries into the appropriate category within the Guidelines and thereafter discount the damages to be awarded to take account of the temporal overlap of injuries so as to fairly and proportionately compensate the plaintiff for all the pain and suffering occasioned to them. In the absence of specific guidelines as to the process to be undertaken in calculating an uplift, this approach commends itself to the court.

20. “Uplift” simply means to raise. The rise in damages for pain and suffering arising from the non – dominant injury in any particular case, could well exceed the award of damages for the dominant or main injury. There is nothing in the Guidelines to suggest that the single uplift is restricted to a proportion of the damages awarded for the main injury. This Court can well envisage a circumstance in which a fair and proportionate uplift would exceed the general damages awarded for the dominant injury. For illustrative purposes, let us consider a situation in which a young man is, to use an inelegant phrase, mangled in a road traffic accident. He has suffered multiple serious injuries. He has established grand mal epilepsy which would attract an award under the guidelines in the range of €120,000 to €180,000. Associated with that head injury he has unremitting tinnitus which under the Guidelines would attract an award of general damages in the range of €35,000 to €55,000. He has suffered the loss of an eye, which under the Guidelines would attract an award of general

damages of between €80,000 and €120,000. In addition to the loss of his eye, he has suffered severe facial scarring which is extremely disfiguring and in respect of which he has had a severe psychological reaction such that he refuses to venture out in public. Such an injury would fall into the category of most severe scarring, attracting an award of general damages of between €80,000 and €200,000. In addition, he suffered a severe back injury which includes nerve root damage and associated loss of sensation, impaired mobility, impaired bladder and bowel function, impaired sexual function, depression, personality change, addiction issues, but without any unsightly scarring. Such an injury would fall into Category (b) of back injuries being Severe and serious back injuries and would attract an award of general damages of €90,000 to €140,000. Finally, to add to his woes, he suffered displaced fractures of both ankles which would fall into the category of serious ankle injuries, attracting an award of general damages of between €45,000 and €70,000 per ankle. Assuming again for the purpose of illustration, that a court deemed the severe back injury to be the dominant injury, as it had the most deleterious effect on the day to day life of the plaintiff, and the court awarded him €140,000 damages in respect of that injury, the court would then be faced with the task of uplifting the value of the award to ensure that that plaintiff was fairly and justly compensated for all of the additional pain, discomfort and limitations arising from his lesser injuries. It would hardly be just or proportionate were the court restricted to awarding him an uplift less than the main award to compensate him for all of the additional pain, discomfort and limitations arising from the lesser, though still extremely severe, injuries. In such a scenario, it might be argued that the court should depart from the Guidelines altogether, but assuming that the court were going to apply the Guidelines, then those injuries valued individually would have attracted between €395,000 and €655,000.

21. If the Court in that scenario, awarded an uplift of €200,000 or even €250,000 , I think it inconceivable that such an uplift could be considered unfair, unjust or disproportionate, even allowing for the temporal overlap and multiplicity of the injuries sustained.

22. In principle therefore, I can see nothing in the guidelines to prevent the ‘uplift’ exceeding the award for the dominant injury, in an appropriate case.

23. Another benefit of the process suggested by Mr. Byrne is that it makes clear to the parties precisely how the court came to its conclusion in relation to the appropriate award of damages in the circumstances.

24. It appears to me that a fair and transparent means of assessing what the uplift should be in any given case is to categorise each of the additional injuries according to the bracket that it would fall into were that the main injury and then discount the award to allow for the temporal overlap of the injuries. In this way, both parties can see precisely how the court arrived at its decision and the level of discount allowed for overlapping injuries. Any other method leaves the plaintiff and the defendant guessing as to how the court arrived at its decision.

PTSD

25. This was an horrific accident on a dark country road. The force of the collision sent her car spinning. The car was full of smoke, and her door was pushed in. She managed to get out of the car and fell to the ground. She called for help, but no one came. She was crying for hours. Her distress was compounded by the fact that she was unable to care for her mother, for whom she had been a full – time carer. She reported very poor sleep with initial insomnia and broken sleep following the accident. She had frequent nightmares and often awoke in terror, reliving the accident. She reported that she would never forget the smell of the airbags. She became excessively vigilant when travelling as a passenger with her husband. She no longer drives at night, nor does she drive long distances. She became very depressed after the

accident. She describes loss of interest and energy. She was excessively tired and could hardly get out of bed. She did not even want to watch television. Her appetite was poor, and she lost weight. She was prescribed the antidepressant Citalopram. She is still on that medication and is afraid to come off it. In addition, the plaintiff is on Stillnoct 10mg to help her sleep.

26. Dr. Denis Murphy, consultant psychiatrist formed the view that Mary McHugh had developed post – traumatic stress disorder following a road traffic accident. He concluded that her depression has improved with treatment over the intervening period, but she is not fully back to normal. She continues to have significant symptoms of PTSD. Possible treatments include further adjustments in her antidepressant medication and psychotherapy. The prognosis is usually for gradual improvement particularly in response to treatment. Were PTSD the dominant injury in this case, the court would place it at the upper end of the moderate PTSD bracket and would award the plaintiff the sum of €35,000.

The plaintiff's neck injuries

27. The court categorises the plaintiff's neck injury as a minor neck injury which had substantially recovered within one to two years of the collision. If it were the main injury, the court would have awarded a sum of €10,000 in relation to that injury.

Lower Back and hips

28. This is an injury which is difficult to categorise. The plaintiff gave evidence that she is suffering from constant back pain since the accident. She now uses a TENS machine to help alleviate the pain in her lower back. However, her GP medical notes indicate that she had considerable problems with her back prior to the accident. The court can appreciate that the plaintiff may not recall the extent to which she was suffering pain in her lower back and right hip, prior to the accident, but her medical notes indicate pre – existing problems. For example, on the 21st of February 2017, a DEXA scan indicated that she had osteoporosis

without pathological fracture. On the 12th of June 2017, she complained of worsening pain in the right hip for a period of months, and the notes suggest that an X – ray taken in 2013 showed degenerative change in the right hip. On the 26th of June 2017, she was complaining of hip and lower back pain worsening for the last three days. . On the 26th of June 2017, she attended her GP complaining of hip and lower back pain which had been worsening for three days. On the 18th of July 2017 she was given Vimovo for hip and back pain. By October 2018, the plaintiff was attending an osteopath for hip pain and despite three sessions had had no relief. An MRI on the 3rd of November 2018 reported bilateral degeneration of the hips, the right more than the left, the plaintiff was also complaining of back pain. She attended for an orthopaedic review on the 29th of August 2019, a few months before the accident. X – rays that day showed osteoarthritis of the right hip and spur of the left hip. The lumbar spine X – ray showed spurs. On the 26th of April 2019, she attended her GP with inter alia complaint of lower back pain after hoovering. The court finds as a fact that the injury both to the plaintiff's back and her right hip are acceleration and/or exacerbation injuries which would place it in the category in each instance of minor back injuries and minor hip injuries. The problem with her hip was resolved by the carrying out of a total hip replacement in July 2021. Were the hip and back injuries the main injury, the court would place them in the minor injury category and would award €20,000 combined for those injuries.

29. Valued individually, the additional injuries would amount to €65,000. Taking into account the roll up factor and the overlap of injuries, the court considers that an uplift of €32,500, represents fair and just compensation for all the additional pain, discomfort and limitations arising from the plaintiff's lesser injuries. The Court therefore will grant a decree in favour of the plaintiff in the sum of €105,500, being General damages for pain and suffering to date and into the future of €92,500 together with special damages in the sum of €13,000.