

THE HIGH COURT

[2010 No. 5675 P]

BETWEEN

PETER KELLY

PLAINTIFF

AND

GROUPAMA

DEFENDANT

JUDGMENT of O'Neill J. delivered on the 20th day of April, 2012

1. The plaintiff in this case was born in 1937 and is an accountant and economist by profession.
2. Whilst on holidays in Cannes, in France, on 16th June 2009, he was struck by a van, the property of the Municipality of Cannes and driven by a servant or agent of that Municipality. The van was reversed into collision with the plaintiff, striking him on the right side and knocking him to the ground so that he fell on his left side. This caused a fracture of the head of the left femur. He was taken by ambulance to hospital in France and there received appropriate treatment and was then transferred back to St. Vincent's Hospital in Dublin under the care of Mr. Bill Quinlan, a well-known eminent orthopaedic surgeon.
3. I have had the benefit of several reports from Mr. Quinlan which were admitted in evidence by agreement of the parties. These disclose that X-rays taken of the plaintiff when he was admitted to St. Vincent's Hospital confirmed the fracture of the head of the femur. Very unusually, surgery was not necessary because of the excellent position of the fractured bone. It was felt that full recovery would be achieved by a regime of conservative treatment, subject only to the risk of the development of vascular necrosis in the head of the femur. If this did occur, it would require a total hip replacement.
4. Prior to this accident, the plaintiff was a very fit and physically active man who walked four miles a day, most days, cycled, played tennis, engaged in hill walking and was able to fully participate in all of the physical activities associated with his lifestyle as a husband, father and grandfather of several grandchildren, including gardening, lifting and carrying the usual array of heavy objects that are part and parcel of normal domestic activity.
5. I am quite satisfied that the plaintiff's evidence was given in an understated, accurate and truthful manner and it paints a picture of a very significant compromise of his previous range of activity and of considerable pain and discomfort resulting from this fracture. I have no doubt that for several months after this accident, he was very significantly disabled, and whilst he did initially do well, as time went on it became apparent that necrosis had developed in the head of the femur and it is highly probable that he had considerable pain there and an increasing limitation of normal physical activities.
6. It is clear that the plaintiff has been unable to resume cycling or tennis. I am quite sure that the kneeling and bending associated with gardening must have greatly curtailed that activity and the pain and decreasing range of movement in his hip must have significantly limited his walking tolerance.
7. In due course, it became apparent that the necrosis had advanced to a stage where the only viable solution was total hip replacement. This was done on 5th November 2011. The plaintiff has recovered well from this, but by no means has been restored to his pre-accident state.
8. It would seem to me to be probable that even with the success of the hip replacement, it is unlikely that the plaintiff will recover his pre-accident level of activity and is likely to experience some pain and discomfort, particularly in activities such as gardening. It is difficult to envisage him playing tennis again and the agility needed to manage a bicycle safely will probably elude him in the future.
9. This case is unusual because the defendant, as insurer of the van that injured the plaintiff, is sued directly under the provisions of the European Communities (Fourth Motor Insurance) Directive, incorporated into our domestic law in Statutory Instrument No. 651 of 2003. It is common case that the driving of the van on the occasion in question was tortious and imposes a liability on the defendant to compensate the plaintiff. Thus, the case proceeds as an assessment of damages only, but with a difference to the normal assessments encountered in this Court.
10. It is common case, by virtue of Regulation 864/2007 EC, better known as 'Rome II' which came into force on 11th January 2009 and which introduced general principles applicable to non-contractual obligations, that the substantive law applicable to the assessment of damages in this case is French law, the law of the place where the damage occurred. I have heard evidence from a French legal expert, Monsieur Franck Poindessault, called on behalf of the defendant, and I have the benefit of a report of another expert in French law, Madame Marie Albertini, commissioned for the plaintiff and admitted into evidence by agreement.
11. It is apparent that there is little or no material difference between the opinions of these legal experts in French law as to the way that French law requires an assessment of damages of this kind to be carried out.
12. For the purposes of formulating his opinion, Monsieur Poindessault submitted what are described as "*the documents in evidence*" in the case which I assume to be the pleadings and the reports of Mr. Quinlan to a French medical expert who would ordinarily be asked in a French case, either by order of the Court or agreement of the parties, to conduct the requisite medical examination in accordance with French law as laid down by the Cour de Cassation.
13. The approach required under French law is that the injuries suffered and the consequences of them be assessed under a number

of headings and that the medical expert assess the degree of deficit or disability in each category expressed in percentage terms. The next step in the exercise is for the judge hearing the case to apply an amount of compensation to each deficit or loss.

14. For this purpose, there is available to all judges in France a book which is a compilation of the awards made in the courts throughout France from which a judge can select a comparable case or comparable cases to ascertain the appropriate level of damage to ascribe to each category of loss or deficit.

15. It is clear from the evidence of Monsieur Poindessault that the judge retains a full discretion in deciding on the amount of compensation to be awarded in each category so that the individual features of every case can sound in damages, but nevertheless, it is the invariable practice of judges throughout France to consult or have regard to this book in making awards of damages so that awards are consistent throughout France and thereby, ultimately, to maximise fairness and consistency in awarding of damages.

16. It is apparent that in assessing damages for tortious events under French law, the purpose of damages in French law is to restore the victim of the tort to the position they were in prior to the tort occurring, but no more; in other words, compensatory damages and punitive or aggravated damages do not arise. In this regard, there seems to me to be little or no difference between Irish law and French law. Unlike Irish law, where damages are assessed up to the date of trial and thereafter for the future, under French law, damages are assessed initially up to what is described as the "setting" of the injuries which means the point in time when the temporary consequences of the injuries cease. Damages for permanent consequences are assessed from that point onwards and the time of trial is immaterial. It is common case that the plaintiff, having recovered from his hip replacement surgery, has now reached the "setting" point.

17. I am of opinion that whereas the methodology of assessment of damages is prescribed by French law and therefore must be adhered to in this assessment of damages, the choosing of the amount of compensation, as a matter of French law remains a matter of judicial discretion. The practice of French judges to have regard to a book of previous awards is no more than a practice and is not an obligation of French law. This book is a tool or a guide and does not fetter the discretion of the judge in deciding what is a fair amount of compensation. Apart altogether from the fact that French law permits the exercise of that discretion, the use in the French courts of a Book of Quantum is merely a non-obligated practice, and as matters of practice are governed by the *lex fori*, therefore this Court, in choosing the amounts of compensation to be ascribed to each category of loss as discerned in accordance with French law, in addition to enjoying an unfettered discretion under French law, in a matter of practice, should apply the *lex fori*, i.e. Irish law, and thus can have regard to levels of compensation awarded in the Irish courts in respect of similar losses.

18. Turning to the specific categories of damage identified by the medical expert with whom Monsieur Poindessault consulted, the first of these is described as 'Déficit Fonctionnel Temporaire' which compensates for temporary disablement before "setting". Under this heading, the medical expert broke up the plaintiff's period of recovery into four periods starting with total disability for 55 days during his hospitalisation and going on to one to two years of partial temporary disablement measured at 10%. Whilst respecting the obvious sense of this overall approach, there appears to me, based on the undisputed evidence before me, a failure to give due weight in this scheme to the deterioration over a protracted period of time of the plaintiffs condition resulting from the advancing necrosis in the head of his left femur and the undoubted effect this must have had on the plaintiffs functioning.

19. Accordingly, doing the best I can within the methodology prescribed by French law, I would depart from the suggested award of €6,506 under this heading, and would substitute a sum of €12,000.

20. The next head of damage prescribed is described as 'Pain and Suffering'. Under French law, this is measured on a scale of 0 to 7. The medical expert selected a mid-figure of 4 and this resulted in a suggested compensation of €7,800 under this heading.

21. Having regard to what the plaintiff suffered initially after the occurrence of the fracture; then in the rehabilitation phase; then in the deterioration of his condition with necrosis and finally the pain and suffering resulting from the total hip replacement and ensuing recovery and rehabilitation, and finally the residual pain and discomfort that will continue to affect him to a certain extent for the future, I cannot subscribe to the view that the sum of €7,800 is fair compensation for all of that pain and suffering and I would substitute a figure of €15,000 under this heading.

22. The next heading identified is described as 'Prejudice D'Agrément'. Under this heading, compensation can be awarded under French law for the deprivation or disruption of specific practices or activities. This is obviously a much narrower concept than the loss of amenities of life concept with which we are familiar. Nevertheless, it is clear that the plaintiff was an unusually physically active man before this accident and as a result of that accident, a number of activities have been totally lost or significantly curtailed; tennis and cycling are gone completely, hill walking and gardening greatly curtailed. Whilst the success of the hip replacement will ensure a return to an active life, it is very probable that there will be a permanent loss of some of these activities, particularly tennis and cycling and a permanent reduction in others. The figure chosen from the French Book of Quantum to compensate for all of this is the sum of €6,000. I cannot agree that this would represent an adequate compensation under this heading and I would substitute the sum of €15,000 under this heading.

23. The next heading mentioned is described as 'Déficit Fonctionnel Permanent' or permanent non-pecuniary loss. The plaintiff's loss under this heading is assessed in the range of 8% to 13% and the mid-figure of 10% was chosen leading to an award of €14,000. As this is clearly a residual-type category, care needs to be taken to ensure no overlap occurs with other more specific heads of damage. Nevertheless, bearing in mind the reality of the non-specific interference that the plaintiff's injury has had and will have on the plaintiffs overall functioning, on a permanent basis since the "setting" of his injury, I am of the view that the sum of €17,500 should be substituted for the sum of €14,000 suggested.

24. The next heading mentioned is of 'Aesthetic Injury'. In this respect, the only aesthetic injury is the operative scar in the hip area. Because of its location and the plaintiff's age, I would agree that the figure suggested of €2,400 represents reasonable compensation.

25. The final item of loss is under the heading of 'Sexual Damage'. In this respect, evidence was given to me of interference with the plaintiff's sexual life, but having regard to his age, I would agree that the sum of €2,000 suggested under this heading is reasonable.

26. In total, damages to the plaintiff comes to €63,500, plus €24,262 being the agreed medical expenses.