Neutral Citation [2015] IEHC 401

THE HIGH COURT

[2011 No. 7761 P.]

BETWEEN

KATE FLYNN

PLAINTIFF

AND

ANTHONY LONG

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 15th day of May, 2015

1. This action arises out of a RTA which occurred on 26th October, 2009. At the time, the plaintiff was travelling in a car with her fiancé and another couple. They were on their way to Cork Airport for the purpose of going on a short holiday to Amsterdam. The plaintiff was sitting behind the driver of the car, her friend, Laura. The plaintiff's fiancé was beside her in the back seat and Laura's boyfriend, Brendan, was sitting in the front passenger seat. While driving on the main road to the airport, a drunken driver brought his vehicle onto the wrong side of the road and a head on collision occurred between the vehicles. Both of the male passengers in the car were killed as a result of the impact. Liability for causation of the accident is not in issue between the parties.

2. The plaintiff suffered very serious injuries in the accident. She suffered a severe head injury, which caused a loss of consciousness at the time of the accident. It is unclear for how long she was unconscious. She suffered a fracture of the left occipital condyle at the base of the skull at the junction of the skull and the C1 vertebra. In relation to the fracture, she came under the care of Mr. George F. Kaar FRSCI. He was of opinion that the plaintiff had suffered a serious fracture of the upper cervical spine/skull base on the left side. There was compression and rotation with the fracture of the left occipital condyle. The forces involved were severe and there was a risk of serious spinal cord or brain stem injury. Fortunately, these did not occur.

3. The plaintiff required immobilisation of the fracture for five months. She wore a hard collar and then a soft neck collar during this period. At the time of the initial review, Mr. Kaar was of opinion that the acute physical symptoms following the spinal and skull based fractures would last for three to six months. It was not unusual for more chronic mild symptoms to persist for a number of years. Some restriction in neck rotation to the left will continue long term.

4. The plaintiff was reviewed on 15th December, 2011. She continued to experience stiffness and soreness on the left side of the neck and in the interscapular area. There was always a constant background ache and at times more severe pain. Approximately once every six weeks, the neck and shoulders locked up with severe pain and muscle spasm. It took approximately one hour for this to resolve with medication. She was taking Tylex as required.

5. She was gradually undertaking more housework and was looking after her two year old daughter. She experienced pain and stiffness in the left side of the neck on lifting her daughter and when bending and twisting. Power had improved in the left hand. Her sleep remained disturbed and she generally woke two times in the night with pain and discomfort. There were still some variable headaches. These had not worsened. She remained anxious when travelling and had not returned to driving. She continued to live with her parents and had a good relationship with them. She had not returned to work.

6. Examination revealed restricted rotation to the left in the cervical spine by 20 degrees with discomfort. She localised the majority of pain to the posterior and lateral upper neck on the left. Shoulder movements were full. There was no neurological change in the interim.

7. Mr. Kaar confirmed a diagnosis of fracture of the left articular condyle of the occipital bone and multiple soft tissue contusions to abdomen, left arm and legs in the road traffic accident on 26th October, 2009. His conclusion at that time was that the ongoing symptoms were caused by the accident. Some symptoms were likely to continue in the long term. He was of opinion that the symptoms would wax and wane but the plaintiff was likely to experience ongoing symptoms with exercise, driving and when relaxing. She will require intermittent medication. There was a 10% risk that her symptoms would increase in the future. He was of opinion that it was likely that the plaintiff would be able to return to light office-based work. The psychological disturbance from the accident was slowly easing and the headaches and anxiety were likely to continue to resolve over one to two years.

8. The plaintiff also suffered severe bruising to the entire left side of her body. This caused her severe pain in the months following the accident.

9. The plaintiff also suffered serious psychological sequelae in the form of depression and PTSD. In this regard, the circumstances of the accident were relevant. At the time of the accident, the plaintiff's fiancé was killed and was lying on top of the plaintiff. The other male occupant in the car was also dead. The plaintiff was extremely shocked and traumatised by the circumstances of the accident. She broke the car window and managed to climb through it. However, the driver of the vehicle, her friend Laura, could not get out of the vehicle. The plaintiff then climbed back into the car. After some time, a passing motorist stopped and gave assistance. The plaintiff knew by this time that her fiancé had died.

10. In the months following the accident, the plaintiff was very distressed and traumatised by the circumstances of the accident, particularly relating to the death of her fiancé. She was particularly traumatised and described significant guilt feelings as she had swapped seats at his request prior to setting off on the journey. She came under the care of Dr. John Dennehy, consultant psychiatrist. When seen by him on 7th April, 2011, she described feeling depressed, with diminished pleasure in normal activities and less interest in engaging in social activity. She had diminished motivation, she cried a lot and had poor sleep pattern. Her appetite was poor and she lost weight after the accident. She was limited in terms of what she could do in exercise. She experienced thoughts that life was not worth living and thought about harming herself after the accident and indeed took an overdose of medication. Initially, she had wanted to die though she seemed to have changed her mind in the course of taking the medication. She stated to

the doctor that she was glad that she had not died.

11. Dr. Dennehy was of opinion that these symptoms were consistent with a depressive disorder. In his opinion, this was clearly related to the accident and the consequences thereof. In particular, the death of her fiancé and her friend, her guilt in relation to the specifics of changing seats along with the significant and quite symptomatic injuries which she suffered, all contributed to the development of her depression.

12. Dr. Dennehy was of opinion that she had been appropriately treated with antidepressant medication at a quite high dosage along with referral for counselling. She had tried to do the counselling, but found that it was too distressing and she gave it up after a number of sessions. The doctor was of the view that the plaintiff will continue to require an antidepressant along with sleep medication for the foreseeable future and may require counselling in relation to her depressive symptoms from time to time. Given the loss of her fiancé and as she was now a single parent, he was of opinion that she would be at risk of depressive episodes from time to time, particularly if her function is affected and perhaps also around significant milestones in her daughter's life.

13. The plaintiff also stated that she suffered nightmares after the accident including dreaming that her daughter had been killed in the accident. In April 2011, she still occasionally experienced nightmares. The doctor noted that the plaintiff continued to experience flashbacks particularly relating to the noise and smoke along with the smell of burning rubber. She thinks about the accident every day and will always be reminded of it by her daughter, who lost her father. She remained very nervous as a passenger and had not returned to driving.

14. The doctor noted that she was worse at night which probably related to the fact that the accident happened during the early hours of the morning. The plaintiff described hyper arousal with somatic anxiety symptoms including sweating, palpitations and abdominal upset. She also described hyper vigilance e.g. constantly checking her seatbelt and being extremely vigilant about other traffic. She constantly warns the driver about various matters and is generally very agitated in the car. She experienced increased startle response and significant numbing of her emotions. This continues to persist and overall the accident has had a significant impact on her life.

15. Dr. Dennehy was of opinion that the plaintiff had suffered severe Post Traumatic Stress Disorder and is on appropriate medication in terms of high-dose SSRI antidepressant. She has already had some cognitive behavioural therapy, but was unable to cope with it at the time, although she hopes to return to it. This would be a suitable therapeutic input and hopefully she will be able to reengage with it. The doctor was of opinion that it is likely that she will continue to experience ongoing symptoms over approximately the next two years. He thought it was likely that she will also have a certain degree of anxiety in cars.

16. The plaintiff was reviewed by Dr. Dennehy on 24th June, 2014. She stated that she continued to feel quite distressed and experienced frequent periods of feeling depressed in her mood. This was more likely to occur at emotionally significant times around birthdays or the anniversary of the crash. She described periods of depressed mood for up to six weeks at such times.

17. She had poor sleep and had experienced nocturnal seizures. Her energy levels were poor and she had little interest in things outside of her daughter and her activities. At times she felt that life was not worth living, but had not engaged in self harm.

18. Dr. Dennehy was of opinion that she continued to experience a recurring depressive disorder. He was of opinion that this related to the accident and the attendant sequelae especially the death of her fiancé, her guilt in relation to having changed seats, along with her various injuries. She continued on antidepressant medication and will continue to require that along with intermittent use of medication to improve her sleep. She also remained at risk of further depressive episodes from time to time, especially around significant milestones in her daughter's life and when her own function was adversely affected.

19. The plaintiff stated that she still had nightmares and distressing dreams along with flashbacks. She had intrusive memories and was inclined to ruminate on them. It distressed her to drive past the scene, or to be reminded of the accident. She has somatic anxiety symptoms, e.g. palpitations. She described some depersonalisation, related to anxiety and especially about her daughter. She tried to avoid reminders of the accident and car travel insofar as possible. She was not able to remember the first six months after the accident. She described negative thinking, e.g. about her daughter's safety and irrational thoughts of something happening to her. She had little interest in her previous pursuits and was detached from others. She had numbing of her emotions. She is irritable at times and feels on edge and vigilant. She startles easily. Her concentration can be poor.

20. Dr. Dennehy was of opinion that the plaintiff continued to exhibit symptoms consistent with Post Traumatic Stress Disorder. He was of opinion that the plaintiff was likely to continue to experience her current symptoms for the foreseeable future, but that hopefully this would be ameliorated by therapy. As the symptoms had persisted for almost five years since the accident and as the plaintiff remained quite symptomatic, in these circumstances, future progress was likely to be slow.

21. The plaintiff felt sad and distressed at times when talking to her daughter about her father. Dr. Dennehy was of opinion that this would be likely to cause the plaintiff emotional distress in the long-term future as her daughter grows up. He stated that it was likely that as her daughter becomes independent in the future that the plaintiff's aforementioned anxiety regarding her daughter's safety was likely to remain a pressing concern. The doctor was of opinion that the plaintiff suffered severe distress as a result of having to relive aspects of the accident in her legal action. He expressed the view that a rapid conclusion to this action would be of benefit to her.

22. The plaintiff also developed seizures in 2012. There is a conflict between the medical experts in relation to this aspect. The plaintiff's doctor, Dr. Brian Sweeney, is of the view that the seizures are likely to be epileptic in nature. Whereas the defendant's doctor, Dr. Widdes-Walsh, is of the view that they are psychogenic in origin.

23. Dr. Sweeney stated that he saw the plaintiff in March 2013, when she was having multiple episodes of loss of consciousness. She had had a loss of consciousness at the time of the accident. She had a fracture of the occipital condyle. There was no evidence of brain injury, but there was a fracture of the skull.

24. In August 2012, she had an epileptic type seizure. She had a seizure aura, being an unpleasant taste and smell in her mouth, followed by a loss of consciousness. She had bitten her tongue while having a seizure. She was treated in 2012 at Cork University Hospital. Dr. Sweeney stated that tongue biting was a well known sign of epileptic seizures, as was incontinence.

25. In addition, it was common for people having epileptic seizures to complain of severe headache after the attack. In the second episode, the plaintiff complained of blurred vision and of a foul taste in her mouth and a foul smell. Dr. Sweeney stated that if there was a strange smell or taste, this can be a feature of an initial aura before an epileptic seizure.

26. An MRI of the brain and an EEG can show up signs of epilepsy. In 50 per cent of epileptics, they can have a normal EEG between seizures. The plaintiff had normal MRI and EEG results. However, Dr. Sweeney stated that this does not mean that she was not an epileptic.

27. Also of significance was the fact that the plaintiff described a "stare" before the seizure. This would be relevant. The fact that she was incontinent during the seizure pointed to the seizure being epileptic in origin. It was also relevant that some seizures occurred at night time. The plaintiff was managing her medication. In March 2013, she was on an adequate dose of medication and they decided to switch to another anticonvulsant known as Keppra. Finding the right medication is achieved by trial and error of various types of medication.

28. If the drugs were not working, one would have to ask is this truly epilepsy? There was a possibility that the plaintiff was suffering psychogenic non-epileptic seizures. They can be very like epileptic seizures. At that stage, they were keeping an open mind. In this case, it was possible that there had been bruising of the brain in the accident. This would not show up on CT scan. The plaintiff had had a significant head injury. A person could develop seizures years later after a head injury but the seizures are caused by that injury. Dr Sweeney stated in his first medical report that the seizures which started in 2012 were caused by the head injury received in the RTA.

29. At review on 26th June, 2013, it was noted that they had done a sleep EEG. Sometimes abnormalities can be shown up at night time. The plaintiff's sleep EEG was normal. However, things had improved on taking the drug, Keppra. Dr. Sweeney was of opinion that it was unlikely that the seizures were psychological in origin.

30. Dr. Sweeney reviewed the plaintiff on 22nd May, 2014. At that time, the Keppra was not being that successful. They increased the dose of Keppra and added in a short term drug for a number of months.

31. Dr. Sweeney stated that seizures are serious events. A person can fall and injure themselves and there can be sudden death even in young people. Dr. Sweeney noted that the plaintiff's seizures were still present and he was unhappy about this as it posed risks for the plaintiff and her daughter.

32. He stated that the next step was to do a video EEG which would be done over a period of seven to ten days. The person is monitored and they try to catch a seizure on video. This can indicate which part of the brain is affected. If they can locate the part of the brain affected, they might be able to perform surgery to remove that part of the brain. If the video EEG is negative, then they cannot proceed to operative treatment. If she had a seizure they can try to see it and see what options are open to her.

33. Even with a video EEG, they may not be able to do surgery to the part of the brain that is affected. The operation only has a 50% success rate after ten years. Surgery was not a guarantee of success.

34. Dr. Sweeney was concerned that the attacks continue given what they had seen up to that time and they were concerned for the future. Spontaneous recovery from epilepsy is very rare. She does not have any family history of epilepsy. She says that she takes the medication and he has no reason to doubt this.

35. Dr. Sweeney stated that their next line of inquiry was that they intended to do a video EEG and take it from there. However, there was a long waiting list currently standing at 160 people. The cost was in the region of €10,000/€15,000.

36. There is a stronger risk of depression among people who suffer from epilepsy. There is a strong link between epilepsy and depression. The fact that the plaintiff continued to experience seizures did not help the plaintiff getting back to normal. She would not be allowed to drive. In terms of air travel, short flights would be permissible, but long haul flights are a worry. The plaintiff could have an attack while on board. It may be necessary for her to take bridging medication prior to the flight.

37. In relation to work, the plaintiff could never be a driver or an airline pilot. It would be difficult for her to be a doctor or a nurse and it would be unwise for her to work from heights and with machinery. It would also be difficult for her to be a childminder, due to the risk of seizures.

38. However, Dr. Sweeney noted that the plaintiff was keen on photography. She had tried a photography course but had to stop it due to seizures. She thought that this was caused by flash photography. However, Dr. Sweeney could not find any link between the seizures and flashing lights. In the circumstances, he thought that she would be fit from a medical point of view to undertake photography.

39. He was of opinion that it was likely that the plaintiff has epilepsy but they could not prove it definitively. She continues to require medication. As she is living alone, it would be ideal to have another adult there.

40. In cross examination, Dr. Sweeney accepted that the video EEG was the gold standard in relation to diagnosis of true epilepsy. Without this test, there was an element of opinion. In this case, there was a fairly major head injury, leading to a skull fracture with a loss of consciousness. The risk factor was 15 per cent of people who suffered head injuries would go on to develop epilepsy.

41. Dr. Sweeney was of opinion that the plaintiff had epilepsy. She should continue on anticonvulsant medication. He accepted that there was still a diagnostic question mark, which had not yet been resolved. It would be necessary to do a video EEG to be definitive in the diagnosis. She would need to keep taking the medication until the doctors were sure that they were not epileptic seizures. Dr. Sweeney had opted for the diagnosis of epilepsy because there had been a beneficial reaction to the Keppra medication. He stated, however, that if an anticonvulsant medication works, one cannot say that this definitively proves epilepsy. Also, the fact that the second drug ceased to work after a period of time does not mean that the plaintiff does not have epilepsy. It is necessary to try a number of different drugs before you get the one that works. The fact that she did react beneficially to the second drug was an indicator of epilepsy even though that improvement was not maintained.

42. Dr. Sweeney stated that 60 per cent of people would be well controlled by the first two drugs administered to them. But if this is not successful, then the chance of being successfully treated for epilepsy diminishes greatly. So the 40 per cent are unlikely to respond positively to the medication. If a person does not respond to the first two or three anticonvulsant medications, then there is only a 5 per cent chance that she would benefit from further medication.

43. He stated that the surgery only arises for true epilepsy. Dr Sweeney accepted that if she had successful counselling and the seizures diminished, this could suggest that the attacks are psychogenic in nature.

44. In re-examination, Dr. Sweeney stated that they were concerned having tried two types of drugs that the plaintiff still had seizures. It may be necessary to try other drugs. It would appear that the plaintiff is in the 40 per cent who are unresponsive to medication. He stated that with the video EEG, if the plaintiff had multiple sites of brain injury, then surgery would be ruled out.

45. The defendant's expert, Dr. Widdes-Walsh noted that the plaintiff had severe seizures prior to 2012. He stated that she had features of epilepsy and psychogenic seizures. It can be difficult to tell them apart. It was for that reason that a video EEG would be done to assist diagnosis.

46. Dr. Widdes-Walsh stated that the plaintiff had had an EEG and brain MRI and her recounting of the history of the injury led him to the view that her seizures were more likely to be psychogenic seizures, but it would be necessary to have a video EEG to be definitive. He stated that she had a mild head injury at the time of the accident, i.e. there was a loss of consciousness for less than 24 hours and no contusion shown on the scan. In such circumstances, the risk of developing epilepsy was low. The nature of the injury leads to the conclusion that the seizures are psychogenic in nature. Also, non-response to medication supports this diagnosis. Here, the plaintiff reacted well to Keppra, but then ceased to respond to the drug. A lack of response to epileptic drugs leads to the view that the seizures are psychogenic in origin.

47. Dr. Widdes-Walsh conceded that the level of frequency of attacks which were very frequent in this case can be seen in psychogenic seizures, but can also be evidence of severe epilepsy. He was of the view that the seizures were psychogenic, but he accepted that one cannot exclude epilepsy. It would not be possible to give a definitive diagnosis until a video EEG was done.

48. He stated that if one were to assume that the plaintiff was epileptic, then this is a drug resistant post traumatic epilepsy. If psychogenic in origin, then the anti-convulsant medication could be withdrawn and the seizures could be controlled by therapy such as cognitive behavioural therapy.

49. The doctor noted that the plaintiff lives with her daughter, who is five years of age. As the seizures had happened at night, there was support for the view that another adult should be present to look after the child when the seizures occur.

50. In cross examination, the doctor stated that it was necessary to look at all facets to decide if the plaintiff was suffering from true epilepsy. Dr. Sweeney noted that the attacks tended to be at night time, there had been a significant head injury and there were no hysterical features. Dr. Widdes-Walsh conceded that there were features of epileptic seizures. He stated that while the plaintiff had had a skull fracture, this was mild in nature; it would need a depressed skull fracture to be at higher risk of epilepsy. If there was a very strong impact in the accident, the brain can cause injury against the inside of the skull. The doctor accepted that it was possible to have both epileptic and psychogenic seizures at the same time. To be definitive on the diagnosis, it would be necessary to have a video EEG. If there was a seizure during the test, then it was possible for the doctors to proceed to make a final diagnosis. He accepted that this test was very expensive. He also accepted that Dr. Sweeney may be in a better position to give an opinion on whether the plaintiff had epilepsy as he had treated the plaintiff over a number of years.

51. Where there is a conflict on the evidence between Dr. Sweeney and Dr. Widdes-Walsh, I prefer the evidence of Dr. Sweeney. He is of the view that, having regard to the following factors, the seizures are likely to be epileptic in nature: the existence of a foul taste and smell in advance of the seizure; the biting of the tongue during the seizure; becoming incontinent during the seizure; having a bad headache after the seizure; the fact that the plaintiff made good improvement (although this was not sustained) on the anticonvulsant drug, Keppra; and the fact that the plaintiff had suffered a significant head injury at the time of the accident. Taking all of these factors into account, Dr. Sweeney was of opinion that the seizures were likely to be epileptic in nature and were caused by the RTA in 2009.

52. This being the case, the future does not look bright for the plaintiff. Dr. Sweeney has stated that it is rare for there to be a spontaneous recovery from epilepsy. Where a patient had not had benefit from the first two anticonvulsant drugs, the likelihood is that she will not gain a lasting benefit from other anticonvulsant medication.

53. Thus, the picture for this 25 year old woman, would appear to come down to the choice that she either remains as an epileptic and tries to live with the condition as best she can, or if it is possible to locate the part of the brain that is affected by means of a video EEG, it might be possible to remove the affected part by surgery. This, of itself, would be fairly major surgery. Even with surgery, the plaintiff would not be guaranteed a successful outcome. Dr. Sweeney has stated that approximately 50% of patients who undergo surgery had a successful outcome after ten years. He stated that surgery was not a guarantee of success.

54. In the circumstances, I prefer the evidence of the treating consultant, Dr. Sweeney, that it is likely that the plaintiff suffers from true epilepsy as a result of the RTA. This has had a far reaching effect on the plaintiff's life. I accept the plaintiff's evidence that she continues to experience seizures on a fequent basis. She stated that last year, seizures were a weekly occurance. She stated that she had had a seizure on the night before giving her evidence and that the previous seizure had happened four days earlier.

55. The epilepsy has restricted the opportunities for employment that are open to her. She cannot drive a car, or operate dangerous or unguarded machinery. She cannot work from heights, and she would not be fit for employment involving looking after children. The plaintiff is also very concerned about the psychological effect that her seizures are having on her daughter. She described one occasion where she had a seizure and fell over at home. Her daughter put cushions around her and was quite distressed calling out for someone to help her mother.

56. Dr. Sweeney is also of the view that as the plaintiff has not had sustained relief from seizures from the first two types of anticonvulsant medication, she is unlikely to have a satisfactory outcome from other anticonvulsant medication.

57. In summary, therefore, this young lady has suffered significant physical, psychological and neurological injuries as a result of this RTA. She continues to have pain and limitation of movement of her neck. She continues to suffer from depression and PTSD. She requires counselling in the form of CBT in respect of her psychological symptoms. She has developed epilepsy which seriously interferes with all aspects of her life. Given that she has failed to respond to the anti-convulsant medication prescribed to date, this condition is likely to be permanent.

58. I award the plaintiff the sum of €150,000 for pain and suffering to date and the sum of €200,000 for pain and suffering and loss of amenity into the future.

59. It is appropriate now to look at the loss of earnings claim put forward by the plaintiff. At the time of the accident, the plaintiff was working in a call centre for a company called Rigney Dolphin. She was paid the hourly rate of €8.90.

60. The plaintiff was on maternity leave at the time of the accident. She has stated that but for the accident, she would have gone back to work part-time with the company. Her mother would have looked after her baby. If she was working for a 20 hour week, this would have given her a weekly income of €178.00.

61. A certificate has been provided by Rigney Dolphin which shows the plaintiff's loss of earnings from November 2009 to February 2015, as being €51,818.88. Given that her annual loss of earnings for each of the years 2010 to 2014 is stated to be €9834.24, this would suggest that the plaintiff was only ever employed on a part-time basis. There was reference in the course of the hearing to a P21 form for 2008 which showed that for a period of fourteen weeks the plaintiff received €3071.00, giving a weekly wage of €219.00. This further supports the view that the plaintiff was on a part-time contract prior to the accident.

62. The situation in relation to future loss of earnings is more complex. Ms. Susan Tolan, the Vocational Assessor, has stated that in her opinion, the plaintiff is unlikely to be able to secure employment in the open market. This is due to the fact that she continues to have mental health issues and has epilepsy. In these circumstances, there are a range of jobs from which she would be precluded. This includes jobs where driving is required, working with unguarded machinery, working from heights, working with tanks of chemicals or water, and working minding young children. In relation to the areas where she could manage the work, she would be competing against other young job seekers who did not have epilepsy.

63. Ms. Tolan has stated that in such circumstances many employers would opt for the candidate who did not suffer from epilepsy. In addition, the plaintiff can experience incontinence during seizures. This would be a cause of great embarrassment to her in the workplace.

64. Ms. Tolan has suggested that as the plaintiff did well in her school exams in art and English, she might consider doing training to become a website designer or a graphic designer. This would enable the plaintiff to work from home, where her epilepsy would not be an issue. If the plaintiff went along this route, she could set up a business on her own. She could hope to earn in the region of €25,000/€45,000 per annum.

65. The plaintiff's actuary has provided figures for the capital value of a loss of earnings for life of €45,000 per annum. It seems to me that the actuary may have misinterpreted Ms. Tolan's report in this regard. Ms Tolan was not saying that due to the plaintiff's epilepsy and psychological difficulties she would not be able to pursue a career as a website designer or graphic designer. In fact, she was saying the opposite. She was saying that given the plaintiff's flair for art and English as evidenced in her school reports, the areas of web design or graphic design are areas she could pursue, despite her epileptic condition. In these circumstances, it is not appropriate to assess the plaintiff's future loss of earnings on the basis of a loss of €45,000 per year.

66. The option of website or graphic design would require the plaintiff to do further computer training and then go on to do training in website design. If she completed the required training, she would then have to set up on her own and obtain work in the marketplace. This would require considerable entrepreneurial and marketing skills on the part of the plaintiff. It is unrealistic to expect that the plaintiff could take on this level of training and business activity in her present condition.

67. Another alterative would be to pursue a career in photography. The plaintiff likes photography and has tried this since the accident. However, she had to give it up due to suffering a number of seizures while working in the photographic laboratory. The plaintiff thought that it may have had something to do with the use of flash photography. However, Dr. Sweeney has formed the opinion that she does not suffer from photosensitive epilepsy.

68. Ms. Tolan was of the view that photography would not be an option for the plaintiff, due to the fact that she would have to carry heavy equipment in the course of the work and would have to climb a ladder on occasion to take photographs of groups of people. In addition, she would not be able to drive to various locations. In these circumstances, I cannot see the plaintiff being able to pursue a career in photography on a professional basis.

69. The plaintiff's actuary provided figures for the loss that would arise on the basis of the plaintiff earning €25,000 per annum. The figures provided were on the assumption that the plaitiff would never obtain gainful employment for the rest of her life. The court does not share the view that the plaintiff will never be able to work again. In these circumstances, it is not appropriate to take the capital value of the loss of €25,000 per annum for the rest of the plaintiff's life.

70. In the course of the hearing the court was invited to consider a third option. It was proposed that the court might adopt the proposition that the plaintiff would be unfit for part-time work earning €178 per week for a further seven years. Mr. Lynch gave the example that if the plaintiff remains unfit for work for a period of a further seven years and if she would have worked part time during that period but for the accident, then the capital value of her loss would be €59,274.00. I think that this is a reasonable approach to the question of the plaintiff's future loss of earning claim. Accordingly, I award the plaintiff €59,274.00 for future loss of earnings.

71. The medical evidence was to the effect that it would be desirable both from the point of view of the plaintiff's own health and from the point of view of the safety of the plaintiff's daughter, that there should be another adult in the plaintiff's home at night.

72. Ms. Tolan gave evidence that the agency rate for a night support worker was €12.92 per hour. It was also possible to enter into a private arrangement with a suitable adult, where the rate of pay would vary between €8.65 and €10.00 per hour. Taking the average between €8.65 and €10.00 and adding 8% PRSI, this gives an average rate of €10.12 per hour, or a weekly total of €566.72, as against the agency rate of €723.52 per week.

73. It seems to me that in the circumstances of this case, it is appropriate to take the lower figure as the level of expenditure in this regard. Mr. Lynch calculated on a 2.5% rate of return, the relevant figures to the time when the plaintiff's daugher will reach the age of 14 years, come out at €566.72 x 385 giving a capital value of €218,187.00. This is the appropriate figure to allow as the capital value of the cost of providing this level of night care until the plaintiff's daughter reaches the age of 14 years.

74. In summary, the plaintiff is entitled to the following damages: general damages to date: €150,000.00; general damages into the future: €200,000.00; past loss of earnings: €51,818.88; future loss of earnings: €59,274.00; the cost of night care worker: €218,187.00; and agreed special damages: €6,368.27. This gives a total award of €685,648.15.