

THE HIGH COURT

[2021] IEHC 649

Record number 2012/3342p

BETWEEN

CATHERINE MCKINNON

PLAINTIFF

AND

FRANK MULLEN

DEFENDANT

Judgment of Mr Justice Michael Hanna delivered on the 12th day of April, 2021.

1. This case comes before the court pursuant to an order of Ryan J. (as he then was) dated 17 June 2013 whereby judgment for the plaintiff was given against the defendant by reason of default of appearance on his behalf. The said order, *inter alia*, directed that the plaintiff's damages be assessed by a judge of this court sitting alone and that the defendant pay the costs of these proceedings.
2. In ordinary times this case would have been disposed of by the court after a comparatively brief oral hearing: *ex tempore* judgement would quickly have followed. However, three factors set this case apart. Firstly, the current coronavirus pandemic and the resultant restrictions prevent this case from being heard in the ordinary way. Secondly, the venerable years and frailty of the plaintiff, a resident of Prince Edward Island in Canada, give rise to significant, self-evident logistical problems in the current circumstances. Thirdly, the defendant has become engaged in person and without legal representation albeit late in the day.
3. In view of the foregoing circumstance it was agreed between the parties that this case should be heard "online". This hearing was conducted on the afternoon of Thursday, 18 March 2021. The plaintiff gave evidence from home in North Wiltshire, Prince Edward Island, Canada. She was assisted by her daughter Michelle who also gave evidence to the court. The plaintiff was represented by Mr. Quirke SC who appeared with Mr. Kearny BL instructed by Messrs. Tiernan & Co. Solicitors. The defendant, Mr. Frank Mullen, appeared in per—It is worth noting that the hearing proceeded satisfactorily apart from a brief break in transmission which quickly resolved.
4. In the circumstances I considered it appropriate that a written judgement should be handed down in this case.
5. The plaintiff was born on the 26 June 1937. She is a retired schoolteacher. She is presently 83 years of age. She is a widow lady whose husband passed away in 2012. She has 5 grown children, 3 daughters and 2 sons. She took early retirement from teaching at the age of 56. Both before and after retirement, she led an active life. She walked a lot, cycled, gardened and was a very enthusiastic dancer. She enjoyed swimming. After taking early retirement, she and her husband used to "winter" in Florida for 2 months every year. Prior to the accident, I am satisfied that she led an active and pleasant life with her late husband and enjoyed frequent, close contact and involvement with her extensive nuclear family.

6. In 2011, after having spent many years wondering about her Irish roots, she decided to do something about it; she had never been to Ireland in her life and it was a "bucket-list" imperative. Her main ancestral enquiries centred on the McMahons whose roots lay in the Monaghan/Armagh area and adjacent counties. In May 2011 she travelled to Ireland with her daughters and one son, Patrick. They set about their holiday with gusto, *inter alia*, wearing customised T-shirts.
7. On the last evening of their holiday, they decided to celebrate with a family meal. This brought them to Mr. Mullen's restaurant premises, the "Thai Orchid", in Navan, Co. Meath; they had rented accommodation in or near Navan and this was the chosen venue for a gathering of friends and relatives. After an excellent meal, the party decided to make their way to Carberry's pub in nearby Dunshaughlin to round off the evening. The plaintiff made her way down a number of flights of stairs. While endeavouring to negotiate an ornamental bridge she fell heavily, striking the left side of her body off the side of the bridge. She was initially shocked, discommoded and, no doubt, embarrassed by the experience and was helped to her feet by other members of the party. At that stage, she can't recall experiencing much pain and was more concerned about whether or not she had damaged her watch. She was assisted from the premises into a mini-van with sliding doors; this vehicle had been rented by the plaintiff and her children. The party then headed off to Dunshaughlin, not suspecting anything particularly untoward about Mrs. McKinnon.
8. When they arrived at their destination, the plaintiff dismounted from the mini-van and walked into the pub. As she was proceeding across the floor way suddenly, her left side gave way and she collapsed to the floor in considerable pain and distress stress. Her daughter, Michelle, described vividly the immediate impact of this event upon her mother, so much so that her mother lost control of her bowels. Fortunately, a qualified nurse was socialising in the premises and immediately came to the plaintiff's aid. She made sure that the plaintiff was kept still and an ambulance was summoned.
9. The plaintiff was then taken to the James Connolly Memorial Hospital in Blanchardstown. There she was examined shortly after midnight and was operated on later that day: she received a partial hip replacement on the left side. It appears that she also suffered an injury to her left shoulder which was diagnosed subsequently after she returned to Canada. She was detained in hospital and 13 June 2011 and subsequently flew home with 2 of her daughters who had remained with her throughout her stay in hospital in Ireland. They were accompanied by a nurse to ensure the plaintiff's well-being during the course of the flight and to watch out for any problems such as embolism.
10. The following reports and records were agreed between the parties and relied upon as constituting the medical evidence in the case.
 - a) Medical report of Peter Keogh dated 17 November 2011.
 - b) Medical report of Stephen H Miller dated 12 March 2016.

- c) A collection of documents described collectively as Medical Records Queen Elizabeth Hospital.
 - d) Correspondence from John M. Campbell, orthopaedic surgeon.
 - e) Correspondence from Dr. Adrianna Veer.
11. The plaintiff suffered a sub-capital fracture of the neck of the left femur. On 2 June 2011, she underwent a left hip hemi—arthroplasty. A subsequent X-ray in the Queen Elizabeth Hospital on Prince Edward Island in Canada revealed a suspected previous fracture of the plaintiff's left shoulder. This was diagnosed as a non-displaced fracture which was likely healed. Some degenerative changes also were noted. It appears likely that this injury was overlooked when attention was focused in hospital on the much more significant injury to the plaintiff's left hip.
 12. The plaintiff underwent a right hip replacement operation in 2016, having previously suffered pain, discomfort and restriction of movement in her right hip and groin area. Previously, the plaintiff had undergone a course of injections in this area which had afforded her some, albeit temporary, relief. She had been diagnosed as suffering from bursitis. She has made a good recovery from her right hip surgery. Not surprisingly, the plaintiff relates her right hip problems to the consequences of her accident in 2011. She felt that her difficulties in that area arose because of having to overcompensate for the injury on her left side. This is unsupported by the medical evidence.
 13. The plaintiff underwent extensive physiotherapy and medication to deal with her ongoing pain and discomfort. She describes herself as having plateaued. She complained of discomfort with ambulation as well as standing. According to Dr Veer her right hip has done well post operatively and does not cause her pain.
 14. The plaintiff currently lives in an apartment. She is able to live on her own but is quite restricted what she can do. She can mop the floor and manage on her own from day to day. She receives home help and is looked after by her children. She needs help with scrubbing and cleaning the bathroom and doing the heavier household chores. She used to be an active churchgoer and enjoyed social life. This activity is now greatly curtailed. She is able to manage on her own and is ambulatory with the assistance of a walking frame and walking stick. Her mobility varies and she can often tell what way she will be for the day when her feet hit the ground first thing in the morning. She has ongoing problems with her shoulder in that she cannot elevate her left arm above shoulder height. This causes some difficulty in opening cupboards and so forth. However, she doesn't suffer pain or discomfort in the shoulder other than when she tries to perform this manoeuvre.

15. Michelle said that her mother had changed significantly. She had been a strong matriarch and had instigated the trip to Ireland. Now her adventurous spirit had disappeared. She had been a very active and agile person and all of that changed. They have to keep an eye on her. Her younger sister brings her mother meals perhaps 3 times a week. Sometimes the plaintiff has to come and stay with Michelle if, for example, stormy weather causes a power supply outage; this is an apparent feature of life where they live and Michelle, conveniently, has a generator to deal with the problem. She says that her mother is very much the uncomplaining type.
16. I am satisfied that this injury has impacted very significantly upon the plaintiff. I accept that she was an active and involved person before the accident and that her entire life has been significantly altered because of injuries. She is now greatly diminished in her mobility and independence. Her enjoyment of life has been substantially diminished. So, too, I take account of the fact that she was 73 years of age when this accident occurred and is now 10 years older. She was suffering from osteoporosis and required a right hip replacement unconnected with the injury in 2016. Such matters inevitably would have impinged significantly upon her activities and lifestyle in any event.
17. Mr. Mullen, the defendant represented himself and did so courteously and fairly. He did raise certain issues with regard to the plaintiff's injuries with particular reference to the undiagnosed shoulder injury, the pre-existing condition of osteoporosis and the subsequent right sided hip replacement. I have dealt with these issues above. Fundamentally, judgment having been given in this case against him, he was precluded from raising and relying upon issues which were essentially matters of defence.
18. He explained in some detail the difficulties which he was experiencing in his restaurant business around the time the plaintiff suffered her injuries. This presumably related to the financial difficulties that so afflicted businesspeople around that time. It is most unfortunate that Mr. Mullen, having got himself back on his feet, found his business closed down as a result of the current pandemic.
19. In assessing damages, I must be blind to the means of the negligent party. As required by law, I have due regard to the Book of Quantum. The recently approved judicial guidelines on damages are not yet in effect and, thus, should not form part of my determination.
20. Of the 2 fractures which the plaintiff suffered, that to her left lower limb is, by far, the more significant. This was, and remains, a serious injury and has given rise to considerable pain, discomfort and has greatly debilitated the plaintiff. The impact of this injury upon the plaintiff and her everyday living is permanent and will remain so. This situation will not alter or improve. I regard this as a serious injury. Her shoulder injury, although not insignificant, does not bear as seriously on the plaintiff's day-to-day life. In the overall context of the plaintiff's injuries, I regard this as moderate in character.

21. Taking the plaintiff's advanced years into account and having regard to the fact that nearly 10 years have elapsed since she suffered her unfortunate injuries, I feel it appropriate that I should apportion damages for pain and suffering in equal measure to date and in the future. Accordingly, I propose to award her the sum of €50,000 damages for pain and suffering to date and a further sum of €50,000 for damages in the future. I am informed that no items of special damage arise. Therefore, the total award is a sum of €100,000 in damages.
22. At the conclusion of the hearing of this matter I directed that the case be listed within 7 days of the electronic delivery of this judgment. The parties will be notified of the date and time of such hearing. This hearing, too, will be dealt with remotely and I will deal, then, with all outstanding matters including the question of costs.