THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 111

Record No. 2016/578

Hogan J.
Whelan J.
Gilligan J.

BETWEEN

PAMELA PHOENIX

PLAINTIFF /

RESPONDENT

- AND -

DUNNES STORES

DEFENDANT /

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st day of March 2018

1. This is an appeal brought by the defendant, Dunnes Stores, against an award of damages for negligence in a personal injuries action in which liability has been conceded. In his judgment delivered on the 21st November 2016 Haughton J. awarded the plaintiff, Ms. Pamela Phoenix, some €70,000 in respect of general damages for pain and suffering to date and a further €35,000 for damages and pain and suffering into the future. It was also agreed special damages of €929 making the overall total award the sum of €105,929.

2. The defendant appeals essentially on the grounds that the sums awarded were excessive and disproportionate.

3. Ms. Phoenix was injured in an accident in a cold room on the 18th September 2006. At the time she was a twenty-six year old university student who was working part-time for Dunnes Stores. She was using a pallet truck to move stock. As she tried to manoeuvre the pallet truck backwards she slipped and fell heavily on her bottom and on her back. She needed assistance to get up and was clearly shocked. She was taken by ambulance to St. Lukes Hospital, Kilkenny where she had pain in her lower back. While x-rays were taken, these fortunately did not show any bone damage and she was discharged home with some pain relieving medication and with medical advice to take some time off work. In the immediate days after the accident Ms. Phoenix was on crutches.

4. The immediate prognosis from her general practitioner at the time, one Dr. O'Carroll, was that she had recovered and fit for work. These notes were recorded a week after the accident. It is, however, accepted that she was unable to cope with the same store work which she had been doing in Dunnes. Ms. Phoenix accordingly obtained some lighter sales assistant work in the Elverys sports shop starting on the 19th October 2006. The plaintiff was, however, unable to cope with the continuing pain, particularly as it entailed standing around in the shop and she ultimately lost that job in January 2007.

5. After that period the plaintiff suffered persistent low back pain which became chronic and she became increasingly depressed. She went on a course of physiotherapy in the first half of 2007 but found that the treatment did not help. She had acted on the medical advice to exercise and to swim. She attended a new general practitioner from October 2007 onwards, a Dr. Reynolds. He found that she had chronic pain and her mood was depressed. She was prescribed an analgesic and Amitriptyline for her depressive condition Although there was some improvement by January 2008 there was still chronic pain and her mood was depressed. Dr. Reynolds referred her to a back clinic for an MRI.

6. Haughton J. accepted that as a result of the accident: "the chronic back pain and depressive symptomology the plaintiff put on a lot of weight, such that by October 2007 she was at 96 kgs." This has not surprisingly added to the cycle of back pain, restricted movements, fatigue, loss of sleep and low mood. The plaintiff found herself unable to work in 2007. She had ongoing struggles with her education at Maynooth University where she did ultimately obtain her Diploma in Drama and Theatre Studies. Ms. Phoenix had hoped to go to UCD to study for a Masters in Drama and Therapeutic drama, but as she endured pain, lack of mobility and lack of relief from her condition. She felt she was unable to cope with the requirements of a full time course or its physical demands. In February 2008 Dr. Reynolds noted that the plaintiff had suffered a reactive moderately severe depression which she felt on the whole had improved with some treatment. It is accepted that the accident significantly exacerbated a pre-existing underlying depressive condition leaving here significantly more psychologically vulnerable and more susceptible to emotional upheaval and depression on an on-going basis.

7. This has not surprisingly added to the cycle of back pain, restricted movements, fatigue, loss of sleep and low mood. The plaintiff found herself unable to work in 2007. She had ongoing struggles with her education at Maynooth University where she did ultimately obtain her diploma in drama and theatre studies. She had hoped to go to UCD to study for a Masters in Drama and Therapeutic Drama but she endured pain, lack of mobility and lack of relief from her condition. She felt she was unable to cope with the requirements of a full time course or its physical demands. In February 2008 Dr. Reynolds noted that the plaintiff had suffered a reactive moderately severe depression which she felt on the whole had improved with some treatment.

8. In March 2008 the plaintiff obtained work in the U.K.. A few months later she unexpectedly became pregnant but found that the father offered her no support. She suffered a miscarriage three months into the pregnancy in October 2008. These were obviously very difficult times for the plaintiff. Her consultant psychiatrist, Dr. Alan Byrne, concluded in a report dated the 2nd January 2010 that

the miscarriage had "tipped her over the edge" and had exacerbated considerably this depressive illness. He stated that "her reactions and limitations produced by the back problem were understandable."

9. I pause here to observe that at the hearing of the appeal, counsel for Dunnes Stores, urged strongly that this Court should treat this most unfortunate incident as in effect a novus actus interveniens which broke the chain of causation so far as the exacerbation of the depressive conditions was concerned. For reasons which will later become clear, I do not find it strictly necessary to resolve this issue because I think that the award can be upheld even if this question is resolved in the defendant's favour.

10. In April 2012 she was referred to the pain clinic of Dr. Camillus Power at Tallaght Hospital. He noted her current pain was located in her lower back on both sides with the right greater than the left. She scored a pain of six out of ten on a visual analogue scale. She chose the words "hurting, penetrating, nagging, dull, tender, stabbing and miserable" to describe her pain. She said that the swimming and the exercise make the pain better, but that walking for long periods and washing dishes exacerbated the pain. Dr. Power decided to carry out a series of lumbar facet joint block. She received some benefit from the first set but the second gave no relief. He therefore recommended that she go on a full cognitive pain management programme. She was unable, however, for financial reasons to attend this programme at Tallaght Hospital.

11. In 2013 the plaintiff emigrated to Canada where she obtained work in a retail outlet and settled in Edmonton and where she married in September 2015. In April 2016 she gave birth to a baby boy. While life now seems better and more promising for Ms. Phoenix, she is still affected by the accident.

12. Finally, it is important to stress that Haughton J. found that the plaintiff was a credible witness who did not exaggerate her injuries

The guidance given in Nolan v. Wirenski
13. In *Nolan v. Wirenski* [2016] IECA 56, [2016] 1 I.R. 461, 473-474 Irvine J. gave valuable guidance in respect of any assessment of the proportionality of the awards in personal injuries cases of this kind by posing a series of critical questions which I propose to adopt and apply to the present case, supplying the answers as appropriate.

14. First, was the incident which caused the injury one which was traumatic and caused distress? Answer: It cannot be said that the injury in the present case was particularly traumatic or upsetting in itself. The plaintiff was admitted to hospital, but was quickly discharged after being examined.

15. Second, did the particular plaintiff require hospitalisation and if so, for how long? Answer: It is clear that the hospitalisation required was rather short – at worst just a few hours.

16. Third, what did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period? Answer: It cannot be said that the plaintiff suffered a lack of dignity by reason of the accident in any real sense. She did not, for example, suffer any disfigurement and nor was she required to endure intrusive medical examinations.

17. As Haughton J. found, the plaintiff has nevertheless suffered significant, chronic back pain since the accident. She became depressed as a result and this entire episode affected her very badly. She has had to endure this chronic back pain over a long period of time which has greatly and significantly affected her quality of life. Dr. Power concluded that the plaintiff's disablement in terms of lifting and carrying and bending and kneeling were all "severe", with "moderate" impacts in terms of walking, climbing stairs, standing, sitting and manual dexterity. The plaintiff as a result often suffers from a sense of general fatigue.

18. Fourth, what type and number of surgical interventions or other procedures did they require during that period? Answer: The plaintiff did not require any surgical intervention, but she did attend a course of period of physiotherapy between March and June 2007. She also required painkillers and anti-depressants over a long period of time.

19. Fifth, did the plaintiff need to attend a rehabilitation facility at any stage and if so, for how long? Answer: In addition to physiotherapy that she undertook for a short time the plaintiff underwent a series of lumbar facet joint blocks. However, she said she was not able for financial reasons to put arrangements in place to attend a pain management programme in Tallaght Hospital, which, as Haughton J. found, would have probably improved her predicament.

20. Sixth, while recovering in their home, was the plaintiff capable of independent living? Was she, for example, able to dress herself and otherwise cater to all of their personal needs or were they dependent in all or some respects? Answer: The plaintiff was always capable of independent living, so this question does not arise in the present case.

21. Seventh, was the plaintiff, for example, wheelchair bound, on crutches or did they have their arm in a sling? Answer: The plaintiff was required to use crutches for a relatively short period of time, but otherwise was not obliged to use a wheelchair or a sling.

22. Eight, what, if any limitations had been imposed on her activities such as leisure or sporting pursuits? Answer: While the plaintiff liked swimming and exercise, it cannot be said that these activities were, as such, significantly interfered with by the accident: she was actually encouraged to continue this exercise by a physiotherapist in order to rehabilitate herself.

23. Ninth, how long was the plaintiff out of work and to what extent was her relationship with family and friends interfered with? Answer: The plaintiff's overall quality of life was appreciably interfered with. She had to give up her job with Dunnes Stores after the accident and then lost her job with Elverys due to the fact that she could not cope with the pain associated with standing up. She was unable to continue with her ambitions in respect of a Masters' programme with UCD. It is true that she obtained another job in retail in Canada shortly after emigrating there, but at the same time her life has been affected in a significant fashion by this incident.

The approach to damages in the light of this analysis
24. If one reviews the present case on a *Nolan* analysis, it is clear that the injury in question was a routine, unexceptional soft tissue injury, save in three important respects. First, the plaintiff has suffered continuous and persistent chronic back pain for over a decade, as a range of medical reports over a ten year period clearly demonstrate. Second, the plaintiff became depressed as a result, a factor which greatly complicated her rehabilitation. Third, the injury has significantly impacted on the quality of her life: she lost two jobs and was unable to complete her coveted Masters' programme at UCD.

25. In this regard it is worth comparing the plaintiff's injuries with those suffered by the plaintiff in *Nolan*. In that case the plaintiff suffered soft tissue injuries as a result of the vehicle she had been travelling in rear-ended in a traffic accident. Irvine J. summarised the plaintiff's injuries thus ([2016] 1 I.R. 461, 479-480):

"It is without contest that the plaintiff required extensive physiotherapy and assistance from pain killing medication for some unascertained period, but the restriction on her day to day activities up to the date of trial, a period of somewhat more than three and a half years, was very modest in the context of the type of restrictions faced by many plaintiffs who sustain personal injuries. As already stated, the medication she was taking as of the date of the trial was no different to that which she had been taking in respect of her back condition as at the date of her accident, a good indicator for the purposes of assessing damages for pain and suffering to date and indeed into the future.

On the evidence the plaintiff was not in any major way restricted by her injuries. She was mobile from the outset and she remained able to enjoy normal family life and leisure activities, facts readily ascertainable from the video which this court had the benefit of viewing and in which she is shown engaging fully with her family in the context of a day out on the beach.

While the plaintiff asserted that she had difficulty carrying out certain household activities and that she had recruited the help of friends and family to help her with these because they would otherwise have caused her discomfort, it must be remembered that the plaintiff did not carry out these activities herself and thus was not placed in a position of experiencing the pain and discomfort she might otherwise have experienced if she had done so. It seems likely that the claim advanced for past care and which she withdrew for reasons that remain somewhat unclear, in all likelihood, encompassed such assistance.

At trial the plaintiff advised the court and the trial judge proceeded to find that she was capable of carrying out all of the normal activities of daily living even if these caused her some discomfort. It must be assumed that the plaintiff's discomfort in this regard will be no more than minimal. If the position were otherwise she would hardly have withdrawn the entirety of the claim she had made for future care. The only logical inference to be drawn from that decision is that she is capable of doing all that is required with no more than minimal discomfort.

As to her future in respect of her shoulder and arm function, the plaintiff's own doctors advised that she would improve further even if she was unlikely to fully return to her pre accident status. It was not in dispute that she would continue to have reduced internal rotation but this was not expected to interfere with her day to day activities. Such a restriction, as was advised by Mr O'Riordan, was usually only relevant in the context of sporting activity, a matter to which the plaintiff did not refer in the course of her evidence.

The trial judge accepted that the plaintiff had suffered a significant injury and awarded her a total sum of €120,000 in respect of pain and suffering (€90,000 to date and €30,000 into the future). In all the circumstances that sum was wholly disproportionate to her injuries. Although they might have been characterised as significant in so far as they reflected a departure from the state of health which she had enjoyed prior to the accident, they are undoubtedly at the lower end of the scale ranging from the minor to the most severe. For my part I am satisfied that the award was disproportionate and excessive to the point that it should be set aside.

Conclusion:

To conclude, this is a case concerning injuries which can at best be described as relatively modest when considered in the context of the entire spectrum of personal injury claims. Adopting the approach set out above and thus giving all credit to the plaintiff for the credibility finding in her favour, the reasonable and proper award is in my judgment €50,000 in respect of pain and suffering to date and a sum of €15,000 in respect of pain and suffering into the future."

26. If the injuries in the present case are bench-marked against those at issue in *Nolan*, it will be seen that these injuries are appreciably more severe and have had significantly more adverse consequences for the plaintiff's quality of life: she has suffered chronic and on-going back pain, fatigue, and the loss of significant life opportunities. It is accepted that she also suffered from depression as a result of this accident.

27. It may well be, as Mr. Fox S.C. submitted, that the majority of soft tissue injuries would comfortably fall within the jurisdiction of the Circuit Court in personal injuries claims (namely, €60,000), even if a minority of such claims would also hover somewhere between the upper range of the Circuit Court jurisdiction and the lower range of the High Court jurisdiction. There are, however, also a further minority of cases where the plaintiff's rehabilitation is very slow and incomplete and where the injury exacerbates an underlying vulnerability or condition, in this instance, depression.

28. For all the reasons I have mentioned, this is one such case which comes within that small category of cases. It is interesting to note that the High Court award matches exactly an award for general damages made by this Court in a case where the plaintiff was, in the words of Edwards J., one "of the small percentage of persons with soft tissue injuries who has been unfortunate enough to develop chronic symptoms": see *Cronin v. Stevenson* [2016] IECA 186. This was also a case where the plaintiff suffered extensive soft tissue injuries as a result of a car accident from which she did not make a complete recovery (although she recovered to some degree) and there was on-going pain in her neck and shoulders.

Conclusions

29. It must, of course, be acknowledged that each case is different and there is no neat, linear progression between the injuries at issue in *Nolan* and *Cronin* and those at issue here. One can admittedly say that at one level the High Court award is generous as compared with *Cronin* because the soft tissues injuries suffered by the plaintiff in that case seemed to have been somewhat more severe than the present case. At the same time the plaintiff in that case did not lose time of work or lose her job and nor was an underlying depressive condition exacerbated by the accident, all of which happened to the plaintiff in this case.

30. One could equally say that, as counsel for Dunne Stores, Mr. Fox S.C. submitted, the onset of the further and more acute depression in the wake of the tragic miscarriage in October 2008 amounts to a *novus actus interveniens* which breaks the chain of causation.

31. Even if all of this is admitted in the defendant's favour, nevertheless, in view of the other considerations I have just mentioned regarding the general impact of the accident on the plaintiff's quality of life, I cannot say that either the award of €75,000 in respect of pain and suffering to date or the €30,000 in respect of future loss and damage is so disproportionate that it should be interfered with by this Court having regard to the general Nolan principles and the wider statement of principle in respect of the function of an appellate Court contained in the judgment of Fennelly J. *in Rossiter v. Dún Laoghaire. Rathdown C.C.* [2001] IESC 85, [2001] 3 I.R. 570.

32. In summary, therefore, while the sums awarded are probably on the upper range of what is appropriate in the present case, nevertheless given the role of an appellate court outlined in *Rossiter* (and the earlier case-law) this Court cannot interfere. In these circumstances, I would accordingly dismiss the appeal.