

THE HIGH COURT

[2012 No. 1946 P.]

BETWEEN

YVON MCCARTHY

PLAINTIFF

AND

GERALDINE ROWLAND

AND

ROWLANDS CIVIL ENGINEERING AND PLANT HIRE LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered the 5th day of February 2014

1. The plaintiff in these proceedings was born on 18th September, 1985, and she is the mother of two children, aged 4 and 2 years respectively.
 2. This claim is an assessment of damages arising from a road traffic accident that occurred on 15th December, 2008, at the Nine Mile Stone roundabout in Ashbourne, Co. Meath. At approximately 5pm, the plaintiff's vehicle was struck head on by the defendant's jeep when its driver lost control of the vehicle.
 3. The plaintiff claims damages in respect of the injuries which she received in the aforementioned collision. She also maintains a claim for loss of earnings from the date of the accident up to the date of the hearing and further damages in respect of future loss of earnings based on her contention that she will not be in a position, by reason of her injuries, to return to full time work for many years to come. Finally, a sum of €10,000 has been agreed in respect of other items of special damage including car damage, medical and travel expenses.
 4. In respect of her injuries, I heard evidence from the plaintiff herself and also from her general practitioner, Dr. Nuala O'Farrell. The balance of the medical evidence was that contained in the medical reports of both parties, which it was agreed could be admitted into evidence without the necessity for the clinicians to be called to support their respective opinions. In this regard, on the plaintiff's behalf, I received reports from Mr. Peter Keogh and Mr. Paul Nicholson; Consultant Orthopaedic Surgeons, Dr. Nuala O'Farrell, General Practitioner; Dr. Emily O'Connor, Consultant in Emergency Medicine; Mr. Kevin Cronin, Consultant Plastic Surgeon; and Dr. Roy Browne, Consultant Psychiatrist. On the defendant's behalf, I received medical reports from Mr. Robert McQuillan and Mr. Brian Hurson, both of whom are consultant orthopaedic surgeons.
 5. I do not intend to recite in any great detail the extent of the evidence given by the plaintiff. However, it is relatively important to record that prior to the accident, she was a fit young woman who enjoyed robust good health. She had been a competitive swimmer as a student and had worked as a lifeguard during holiday periods. She had also competed in cross country running and had played rugby when in college in Galway. At the time of the collision she was working as a legal secretary with a Dublin firm of solicitors. She had taken up employment with them on a temporary basis at the start of 2008 and in October of that year had been made permanent salary of €25,500 gross per annum. She had hoped, with the assistance of her employers, to pursue a diploma in legal studies some later time in her career.
- Injuries**
6. It is undoubtedly the case that the plaintiff was involved in a frightening car accident. Her forehead hit the steering wheel and her knee impacted with the dashboard of the car. She did not have the benefit of protection from an air bag because her car was relatively old. Blood ran into her eyes from a laceration to her left eyelid. She was trapped in the car for over 20 minutes before being cut out by the emergency services following which she was taken to Blanchardstown Hospital where a number of injuries were diagnosed.
 7. In the accident and emergency department the laceration to the plaintiff's left eyelid was cleaned and closed with the use of surgical glue. X-rays to the left knee revealed a chip fracture to the medial portion of the patella and this was treated initially with a back slab plaster of Paris cast. She was given crutches, advised not to weight bear and discharged home some hours later on pain killing medication. The plaintiff also sustained a soft tissue injury to her neck and low back and a psychiatric injury to which I will later refer.
 8. I will try to deal with the progress of each of the plaintiff's injuries in turn.
- As early as 4th March, 2009, Mr. Kevin Cronin, Consultant Plastic, Reconstructive and Hand Surgeon, was asked by the Plaintiff's solicitor to prepare a medical legal report in respect of her facial injuries. He reported that the laceration to her left eyelid had been closed with surgical glue. He described the scar as a little red and thick but expected that it would dissipate over the following year. He also noted a small area of hyper-pigmentation on the lower lid. Mr. Keogh's report makes no mention of any other ocular symptoms such as the gritty sensation which the plaintiff reported to her GP in October 2012 and which caused Dr. O'Farrell to refer her to a different plastic surgeon, Mr. Dylan Murray, who found no abnormality or corneal abrasion.
9. Dr. Emily O'Connor, Consultant in Accident and Emergency Medicine, who was asked by the plaintiff's solicitors to report on her condition on 25th March 2009, refers to the plaintiff having a faint 2cm scar on the left eyelid. She did not report the plaintiff as having complained of any ocular symptoms.
 10. It is in Mr. Cronin's second medical legal report, referable to an examination in July 2010, that ocular symptoms are mentioned for

the first time. He diagnosed what he described as a mild post traumatic ptosis, which is a twitching of the muscles around the eye lid. It is not clear from his report whether these symptoms were merely reported by the plaintiff or whether he was actually able to observe them. The plaintiff in her evidence also advised the court that in the early stages of her recovery that her eye drooped although I did not see this symptom mentioned in any of the medical reports.

11. While I have some concerns regarding the plaintiff's apparent delay in the reporting of the ocular symptoms to which I have just referred and of accepting a diagnosis of an ocular defect made by a plastic surgeon, I am prepared on the balance of probabilities to conclude that the plaintiff did experience some ocular symptoms such as those she described to Mr. McQuillan and that her delay in reporting them was probably because of their low grade nature.

12. In relation to the plaintiff's claim that she suffered from psychiatric disturbance following the collision, I was furnished with a very helpful report from Dr. Roy Browne, consultant psychiatrist, to whom the plaintiff was referred in March 2009. I also had the benefit of the oral and written evidence of Dr. O'Farrell. From the various medical reports, it is clear that shortly after the collision, the plaintiff developed certain signs of Post Traumatic Stress Disorder. She experienced a high degree of anxiety and was having regular nightmares regarding the collision. She was prescribed Lexapro as early as 9th January, 2009. In May 2009, the plaintiff was not sleeping well, was tearful and had lost her job. At that stage she was still on Lexapro and was prescribed sleeping medication. She was then referred to Dr. Browne, who reported to the court following his assessment of the plaintiff on 27th July, 2009. He felt that she had symptoms associated with Post Traumatic Stress Disorder and that she also had limited depressive symptoms. He described the plaintiff as tearful, irritable, impatient and upset at her loss of independence. Contrary to the evidence she gave to the court, the plaintiff told Dr. Browne that she had been living on her own in Malahide prior to the collision as opposed to with her boyfriend in his flat in Ashbourne. After the accident she had had to move home to be cared for by her mother. She appears to have told Dr. Browne, again in conflict with her evidence to the court, that she was not in a relationship at the time she discovered she was ten weeks pregnant in May 2009 and his report makes no mention of her having any support from a partner or boyfriend over this early post accident period.

13. In view of the plaintiff's persistent symptoms, Dr. Browne felt that the plaintiff required help from a psychologist. She was having difficulty in travelling in a car and had not returned to driving. Also, she was ruminating about the consequences that her injuries were having on her life and was particularly upset as to the extent to which these had impacted upon her interests, hobbies and job. In October 2009, Dr. Browne found the plaintiff to be much more positive. Her mood was improving, however, he felt she might benefit from intervention from a psychologist particularly in view of her ongoing difficulty with getting back to driving. He felt her long term prognosis was good and that she was coping well even though her condition was complicated by her pregnancy.

14. Somewhat unusually, I was not furnished with any report from the Plaintiff's psychologist Dr. Turley, who apparently counselled her in relation to her psychological injuries during 2010 and part of 2011. Perhaps this was because there were matters dealt with in the course of counselling that the plaintiff did not wish to bring to the attention of the court. However, regardless of whether I am correct in this regard, there is a lacunae in the medical evidence regarding the plaintiff's psychological health post 2009 and I have no supplemental report from Dr. Browne to complete the picture. I have been left with no expert evidence to enable me to determine the severity and duration of the plaintiff's psychiatric injuries beyond the end of 2009. In these circumstances, having regard to the plaintiff's own evidence, that of Dr. O'Farrell and that of Dr. Browne, I feel it appropriate to conclude that the plaintiff suffered significant Post Traumatic Stress Disorder for approximately twelve months following the collision after which she had some ongoing but less severe psychological symptoms for a possible further six to twelve months.

15. The plaintiff also maintains that she sustained soft tissue injuries to her neck and back. She readily accepts the soft tissue injury to her neck abated within weeks. In relation to her back, the plaintiff told Dr. O'Connor in March 2009 that her back was painful all of the time. Three and half months post accident the plaintiff advised Mr. McQuillan that she had ongoing pain and discomfort. However, on examination he found the plaintiff's back to be normal. Mr. Keogh, in his report of July 2010, refers to the plaintiff complaining of back pain in April 2009 as a result of which an MRI scan was carried out. This was effectively normal even though it identified the presence of some mild disc disease.

16. In his report of 1st November 2010, Mr. Keogh makes no mention of the plaintiff reporting back discomfort when she attended his clinic in July and October of 2009. Likewise he does not report the plaintiff as complaining of back symptoms on her visit on 28th May 2010 when he personally reviewed her. Accordingly, on the balance of probabilities, I am satisfied that the plaintiff sustained a soft tissue injury to her back which caused her a lot of discomfort for approximately twelve months particularly in the context of the pressure put on her back due to her use crutches until November 2009, following which I believe she made a relatively uncomplicated and complete recovery.

17. The precise nature of the injury sustained by the plaintiff to her left knee was a small chip fracture to the patella. She was also noted to have bone oedema in an MRI scan of the knee carried out in January 2009.

18. While it is clear that the plaintiff's knee sustained a significant impact at the time of the collision, it has not been established to my satisfaction as a probability that she sustained a crush injury as was mentioned many times in the course of the evidence. No such injury is referred to in any of Mr. Peter Keogh's reports and neither is such an injury referred to in Dr. O'Connor's report. No damage to the underlying structures was reported in the scan of 20th January, 2009, or indeed in any scan thereafter. Further, the articular surfaces of the knee joint were all in tact and the joint was described as normal save for the bone oedema and chip fracture.

19. While Mr. Paul Nicholson in his report of 11th November, 2013, refers to the plaintiff as having been treated by Mr. Keaveney, Consultant Anaesthetist and Pain Specialist, due to the presence of hyper sensitivity complex pain syndrome, I have no report from Mr. Keaveney to the effect that any such diagnosis was made. Further, Mr. McQuillan specifically advised the court that he did not believe that the plaintiff suffered from this condition.

20. The plaintiff's knee injury was initially treated with a cast which was replaced by a Donjoy brace on 19th December, on which date she was also referred to physiotherapy which she had regularly for many months. The plaintiff was advised to commence partial weight bearing on 23rd January, 2009 and the brace was removed in April 2009. She told the court that she was dependant on crutches for the greater part of 2009 and was only able to fully abandon a walking aid in November 2009.

21. Due to ongoing pain, the plaintiff received an injection from Mr. Keogh into her knee in June 2010, which she found unpleasant and of little benefit. She had a repeat injection in January 2011, again without much improvement. She was referred to Mr. Keaveney and in August 2011 and he prescribed a lignocaine patch which the plaintiff maintains again gave her very limited relief.

22. Insofar as the investigation of her ongoing knee symptoms are concerned, no stone has been left unturned by the plaintiff and her advisers in seeking to identify whether there are any objective or underlying reasons for her slow recovery. The plaintiff herself

attended Mr. Ray Moran, Consultant Orthopaedic Surgeon for second orthopaedic opinion in April 2009. He, according to Dr. O'Farrell's report, advised that her condition should resolve without complication and that he did not see any need for further intervention by way of arthroscopy or other treatment. However, the plaintiff said that all Mr. Moran had said to her was that he didn't want to treat her because she was involved in litigation and that she was in good hands in the care of Mr. Keogh.

23. A further orthopaedic opinion was sought, as is referred to in Mr. Keogh's report of 1st November, 2010, from Mr. Paddy Kenny. He has not reported to the court and I assume in these circumstances that he didn't identify anything new to explain the plaintiff's ongoing symptoms. Yet another orthopaedic opinion was sought from Mr. Paul Nicholson in November 2013 whose report I have taken into account in reaching my conclusions.

24. The plaintiff's ongoing complaints over the period leading up to this hearing include knee pain and discomfort, especially when she is going up and down stairs. She has advised most of her doctors that she is unable to squat or run and that she has difficulty walking any significant distance. The plaintiff has also reported night time discomfort and an inability to get back to the sporting activities which she formerly enjoyed, including cycling. In addition she said that she was not in a position to breastfeed either of her children for as long as she would have liked because it meant that she had to give up all of the painkilling medication which she was otherwise able to avail of and this was a matter of some concern to her. She told the court that at various times during the last four years she has been taking one or more of the following drugs, namely; Zydol, Solpadol, Difene and Lyrica, all for the purposes of dealing with her knee pain.

25. On a more positive note, the plaintiff advised Mr. Keogh in November 2013 that she was able to do her job and mind her children. She also told Mr. Nicholson that she had no significant difficulty looking after her two children. She told Mr. Hurson in May 2012, that she had knee symptoms which were intermittent and that these occurred three to four days every three to four weeks. Mr. Hurson described her in August 2013 as greatly improved upon the condition in which she presented some three months earlier. He also felt that her quadriceps bulk on the left side was fully restored by December 2013, indicating that she was regaining fitness and engaging in physical activity. She was able to carry out her shopping and push a buggy without difficulty. The plaintiff has also returned to swimming and is currently keeping herself fit by engaging in this activity three days a week.

26. Having considered all of the medical evidence in this case, I am comfortable in concluding that the plaintiff has continued to experience some pain and discomfort in her knee up to the present point in time. It is the extent of her pain and disability that have caused me significant concerns. Her own treating consultant, Mr. Keogh has stated on several occasions that it is difficult to explain her ongoing symptoms and in the absence of obvious objective signs on MRI scanning, he has speculated that it is possible that she has an undiagnosed chondral defect. Mr. Nicholson believes she may have irritability of the patellar femoral joint. Mr. McQuillan is of the view that the plaintiff could have an osteochondral not seen on MRI scanning while Mr. Hurson opts for a possible abnormality of the femoral condyle. These are all mere possibilities rather than probabilities and appear to me to be efforts on the part of the various doctors to reconcile the plaintiff's ongoing complaints with an absence of objective signs of underlying damage. These divergent views place the court in a great deal of difficulty in trying to assess whether the plaintiff has any significant ongoing discomfort which is likely to interfere with her day to day activities on an ongoing basis.

27. Taking all of the medical evidence into account, I satisfied that the plaintiff still has some ongoing but very low grade discomfort in her knee and, it will gradually improve further as has been advised by Mr. Hurson and Mr. McQuillan and will ultimately settle without complication within the next year or two.

Loss of Earnings

28. The plaintiff returned to part time work in May 2013. She works from 9am until 1pm five days a week in DCU. This is essentially a clerical job which does not involve much by way of psychical activity. She maintains that she not currently fit to return to full time work because of her knee injury but that she is very anxious to do so as soon as she can. The plaintiff he told the court that she did a week of full time work in September 2013 but was not able to cope. She said that during that week she had experienced a lot of pain in her knee and that when she returned home she then had to attend to a range of domestic duties as a result of which she was simply exhausted. She does not know if she will ever be able to return to full time work because of her injuries and her general practitioner, Dr. O'Farrell said that she thought that the plaintiff's ability to return to full time work might be ten years away.

29. In relation to the plaintiff's claim for loss of earnings to date, the parties have agreed the figures that go to make up this claim and these are set out in a table at para. 6 of the report of the Actuary, Mr. Joseph Byrne. She claims a full loss of earnings up to the date of her return to work in May 2013 and thereafter a differential is claimed between her actual part time income and that which she would have received had she been working full time. The figures furnished have taken into account the fact that the plaintiff would, in any event, due to the birth of her two children have been out on maternity leave twice during the relevant period. Further, the illness benefit received by the plaintiff has also been deducted as per the provisions of the Social Welfare (Consolidation) Act 2005.

30. Having heard all of the evidence, I am satisfied that as a matter of probability that the plaintiff would have stayed in full time employment up to the present point in time, subject to maternity leave, were it not for the injuries sustained by her in December 2008. I am satisfied that it was reasonable for her, in the context of her ongoing knee discomfort, to return to part time work in the first instance in May 2013. However, had the plaintiff been in a position to return to full time work after the birth of each of her children, I think it is highly probable, notwithstanding the support she has from her mother, that she would have had some additional child care costs. In this regard, I got the impression that the plaintiff's personal circumstances at the time of her first pregnancy as advised in Dr. Browne's report and from the fact that she was in receipt of loan parents allowance for some time that she would likely have incurred additional costs in respect of childcare if she had been able to return to full time work. Taking these circumstances and also the exigencies referred to in *Ready v. Bates* into account, I will reduce the sum claimed for loss of earnings to date to a sum of €60,000.

31. In respect of the plaintiff's claim for future loss of earnings, I am not satisfied from the medical evidence that the plaintiff is precluded, by reason of the injuries sustained by her in the road traffic accident, from returning to full time work. The injury to the plaintiff's knee has been investigated by a vast number of consultant orthopaedic surgeons including Mr. Keogh, Mr. Ray Moran, Mr. Peter Kenny, Mr. Paul Nicholson, Mr. Brian Hurson and Mr. Robert McQuillan. There is nothing in any of their reports which suggests that she should not be in a position to work full time in a secretarial or administrative job. Their view as to plaintiff's capacity to work full time in such employment, having regard to her ongoing complaints, was never canvassed with them and the only reference to her capacity for work is referred to in Mr. Peter Keogh's report of 28th November, 2013, wherein he reported that she advised him that "she can do her job and mind her kids".

32. It also seems to me that the restrictions that the plaintiff complains of in respect of her knee are ones which would be more likely to affect her in the domestic setting than in a work environment. Activities such as kneeling, squatting, crouching down, going up and

down stairs, are activities that immediately spring to mind. Further, insofar as the plaintiff maintains that it is the pain in her knee and that is the reason she feels she cannot work full time, I have no evidence to suggest that her knee would be anymore painful if she worked in a secretarial or administrative position every afternoon rather than returned home to care for her children and carry out other domestic activities over the same period.

33. I think it is highly probable that the plaintiff's inability to cope with full time employment is not much different from the colossal burden faced by so many young mothers who are obliged to try to cope with the demands of full time employment and the rearing of small children, particularly in difficult personal and financial circumstances.

Conclusion

34. Having regard to the significant and disabling injuries which the plaintiff has had to cope with up to the present point in time and which were particularly severe over the first two years post accident I will award a sum of €85,000 in respect general damages to date. She has as yet not made a complete recovery but is likely to do so in the next year or so and in these circumstances I will award a further sum of €15,000 in respect of pain and suffering into the future. Finally I will award a sum of €60,000 in respect of past loss of earnings and will also direct that the defendant pay to the plaintiff, the sum of €10,000 in respect of the other agreed items of special damage. The total award will be €170,000.