

THE HIGH COURT

2004 2106 P

BETWEEN:

PATRICK QUINN

PLAINTIFF

AND

STEPHEN DUNNE AND THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 27th day of March 2009:

At about 2am on the 9th February, 2003 the plaintiff was a rear seat passenger in a taxi being driven by the first named defendant when that vehicle was in collision with another vehicle. The plaintiff was wearing a seat-belt but nevertheless sustained serious personal injuries. Liability is not in issue.

The plaintiff was aged twenty five years on the date of the accident and worked as a printer. He claims that as a result of these injuries he is no longer able to work as a printer, and now owns and drives a taxi himself. Part of his claim arises from what he considers a reduction of earning capacity as a taxi-driver compared to what he would have expected to earn if he had been able to continue his career as a printer. I will come to that.

The injuries:

The plaintiff has a vague recollection of the impact, and recalls somebody speaking to him at the side of the road thereafter. The medical reports note that he suffered a period of unconsciousness and that as a result of the impact he was thrown out of the rear window of the vehicle.

The plaintiff's injuries are noted to have been life-threatening and consisted of a fracture of the neck of the right femur (Garden grade 3), fracture of the surgical neck of the right humerus, minimally displaced fracture of the medial epicondyle of the right elbow, and a right parietal haematoma. The head injury was treated conservatively, the hip fracture was treated with open reduction and internal fixation, the shoulder was treated conservatively with manipulation under anaesthetic, and the fracture of the medial epicondyle was also treated conservatively. He has a scar on his head and other scars incidental to the surgery which he underwent.

The plaintiff remained in hospital for twelve days and spent a further two weeks in Clontarf Rehabilitation before being discharged home in a wheelchair.

While the plaintiff has made a satisfactory recovery from these injuries he has restricted function of his right shoulder and right arm with activities such as dressing and shaving, and it is noted by Mr Jack Phillips, Consultant Neurosurgeon in September 2007 that he has some post-traumatic difficulties with concentration, mild dizzy spells, light-headedness and insomnia.

Mr. James Colville, Consultant Orthopaedic Surgeon, has reported in December 2007 that while there is nothing to suggest at the moment that there is any significant arthritis in his hip joint, there are indications of the possibility of arthritis developing arthritis, but not in the short or medium term. There is no risk of arthritis developing in his right elbow, and while there is some loss of movement in that joint, it has no adverse functional implications.

The plaintiff's evidence in relation to his injuries and work:

Following the plaintiff's discharge home he was wheelchair bound for four of five weeks, and thereafter he mobilised, but was able to use only one crutch because of the injury to his right arm. He was unmarried at this time and was living in his parents' house. Upon his return home he felt generally disoriented after the shock of the accident. He was unable to use the stairs for about six weeks and a downstairs room was adjusted to enable him to sleep there. When he began to walk again he did so with the aid of a crutch, but was limping and spent some time regaining his strength. He had a good deal of pain in his hip, and to a lesser extent in his arm. He continued to experience difficulty in bending his arm, and had a significant loss of grip strength. He attended at Beaumont Hospital for exercise and physiotherapy once a week for a number of months. Subsequently he has attended a private physiotherapist in order to assist his ongoing improvement.

During his recovery period he had difficulty sleeping comfortably, and found that his concentration was poor, and he suffered from dizziness. He was constantly tired even though he had not returned to work.

The plaintiff returned to work as a printer after about six months, but worked only two to three days per week. His employers were very understanding in relation to his injuries, but after a couple of weeks he found that he was exhausted after a day's work, and was not able to work around the machinery in the workplace as he had been previously. He did not feel up to the job. There was some heavy work involved in his duties such as loading machines with paper, cleaning printers, maintenance and so forth, and he was unable to do these tasks as well as before. He estimates that he was under-functioning at this time to the extent of about 50%. Having discussed the situation with his employer, he left the job again and remained at home to continue his recovery.

He returned to work again about six months later which would have been about one year after the accident in February 2004. At first he was put on light duties only but returned to normal duties after the first week. At this time his hip is still

very sore, and he continued to be not as flexible as previously and was very tired in the evening when he returned home. His elbow was still sore and he had not, and still has not, regained full movement. He was conscious that he was not fully up to the job and was unable to do his job to the fullest extent, although he tried hard. He stated that at this time his work colleagues helped him out to an extent.

Around May 2004 he moved to a different company. The salary was somewhat better there, and in addition the new company used more modern machinery, which, according to him, was one of the reasons why he moved to that firm. He found the work there somewhat easier, but nevertheless he experienced some difficulties such as climbing onto catwalks, loading paper, moving heavy pallets of paper, and moving around and under machinery. He found that he was managing but still not as well as he felt he ought to.

By the end of 2004 he was still attending regularly for physiotherapy, but felt that he had improved as much as he was ever going to. He was still tired in the evenings after work and still experienced some pain. He felt that he still was not able to do his job as well as he ought. Again, his employers seem to have been understanding of his difficulties and were aware that he had had this accident.

By May 2005 he decided that he would have to leave the print business because of the effects of the injuries on his capacity to do that type of work. He decided to become a taxi driver, since that would enable him to be self employed so that he could choose his hours of work and could take breaks from work during the day when he felt the need to do so. He did not seek advice at that time about the advisability or necessity to change his occupation to that of taxi-driver. This was a decision which he made for himself since he felt that it would suit his physical condition better. He was still having pain in his hip and his shoulder and arm, and even when driving a taxi he needed to take a break of twenty minutes or so from time to time in order to relieve his hip pain by walking around. He has been driving a taxi from that time to the present. But he states that his shoulder and arm problems affects his ability sometimes to help passengers with their luggage, and even to turn around in the taxi when taking fares from passengers. These difficulties, according to his evidence, cause him to work less hours than he would otherwise be able to do, since he needs to take breaks. I will return to the question of his earning capacity in due course.

The plaintiff has described how even in mid-2005 he continued to feel light-headed from time to time, his concentration was poor, and this affected him even at home if he was reading a book or magazine or watching television. He finds that very annoying and feels that it has an effect on others as well, though he tries hard to let it affect his life too much. He has suffered from depression as a result of these difficulties, although he has not sought any professional help in that regard. He feels angry and frustrated about the effects of the accident on his life. He has a permanent injury, and has been told that he may need a hip replacement in the future. He still suffers pain and discomfort when in bed, and his hip continues to be sore, even when sitting. The Court has been provided with a report dated May 2004 from Niall Pender, Neuro-psychologist, and he expresses the view in that report that the plaintiff did not appear to be depressed at that time and that he was functioning well albeit with increased fatigue, distractibility and occasional emotional lability. He stated also that the plaintiff had some elements of post traumatic reaction with avoidant and intrusive thoughts related to the accident, but that this did not appear to have a significant impact on his daily life. He did not feel that it was necessary to see him again unless the plaintiff himself saw such need. The plaintiff did not apparently feel such a need and has not sought further help in this regard.

By 2006 his shoulder was still quite sore with a loss of full movement. He finds it difficult to put on a jacket or even wash himself in a shower. He finds that he has restricted movement in his forearm, and feels that his shoulder and elbow are now as good as they are ever going to be.

He has stated that his social life is badly affected by his injuries. Prior to the accident he had played indoor football and has had to cease that activity, and he has difficulty running. If he out socialising he is conscious of his injuries when in a crowd as he fears that somebody might bump into him and cause further injury. He attends a gym for exercise but confines his activity in the gym to cycling or walking. He does not use weights. He tries to go to the gym about twice per week.

He is of the view that he will continue to drive a taxi for the foreseeable future. He left school with a modest Leaving Certificate, but the only training he has is as a printer. When he left school he completed a four year apprenticeship as a printer which included a course at Bolton Street College of Technology. But he is of the view that he cannot return to that trade because of the physical demands of that job. The plaintiff's vocational assessor and that consulted by the defendant each consider it reasonable that the plaintiff should decide to cease being a printer given the demands of that job, and decide to become a taxi-driver.

Was it reasonable for plaintiff to leave printing job?

One issue which arose in this case is whether it was reasonable for the plaintiff to decide that he could no longer continue his career as a printer because of the physical demands of that job, and the pain and loss of strength and mobility which he was experiencing. The plaintiff accepted that he had not sought professional advice, medical or otherwise, before deciding for himself that he could not continue and before deciding to purchase a taxi plate and becoming a taxi driver. He stated that he was aware himself that he was unable to do the job as a printer as he ought to and could not continue into the future with that job. It was suggested to him in cross-examination that this change of career was not necessary, and that this was simply a voluntary change of career on his part, and that no doctor or even his employer at the time had suggested that he could not continue. The plaintiff accepted that he had not asked any doctor to prescribe painkillers and had not sought advice in that regard. He stated in any event that he does not like to take painkillers.

On this issue, having heard the plaintiff giving his evidence, I am satisfied that the plaintiff has not exaggerated his pain symptoms in any way. I am satisfied also that he has not sought to exaggerate the difficulties which he experienced after he got back to work as a printer. It seems reasonable to me based on the evidence that the physical demands of his work as a printer were such as to cause him ongoing difficulties. The work was, in part, physically demanding. It involved moving heavy pallets of paper, moving around heavy machinery related to both loading paper, maintenance work and so on, as he has described. I am satisfied that he did the best he could, and that while he tried to resume his job as a printer his work colleagues were good enough to help him. But I accept that the plaintiff genuinely felt that he was not performing as well as he had previously. His employers were understanding of his difficulties, but nevertheless they were also of the opinion that he was not performing at 100%. In these circumstances it was reasonable for him to make a decision to seek an alternative career, and that the decision to drive a taxi was a reasonable one in the circumstances.

The plaintiff has no vocational or other training for any other trade than as a printer. It was suggested to him in cross-examination that in recent times there were lay-offs in the printing industry with the arrival of new technologies and more modern machinery, as well as downturn in the need for hard copy printing, since much of the material previously available in hard copy, such as training manuals, were now available and accessible on-line, and that this was more likely the reason why he decided to leave the printing business and take up an alternative occupation. But he denied that this was the case. I accept his evidence in that regard. His injuries and ongoing symptomology are entirely consistent with the decision which he made at the time that he made it.

The plaintiff's previous employer has given evidence that had he continued in his employment as a printer his salary would now, including a shift allowance, be about €53,000 per annum. The basic pay is paid at the rate of €19 per hour and on the basis of a 39 hour week the annual basic salary would be €38,352, and on top of that there would be overtime available. She estimated that the plaintiff's salary would be in the order of **€46000 per annum**, based on €19 per hour for a 39 hour week plus some overtime on top of that, but without any shift allowance.

She stated that at the present time there is no shift work available. She stated that her company has not replaced some staff who have left the company because of a downturn in the business which appears to have resulted from the loss of a Government contract. But there have not been any redundancies as such. They have simply not replaced staff who left for whatever reason. She stated that at the time of the plaintiff's accident there may have been fourteen employees and that there are now eleven employees.

A former printer colleague of the plaintiff who still works as a printer in the firm with whom the plaintiff did his apprenticeship and who still works with that firm gave evidence that his current basic earnings are €62,000 gross, and that there would be overtime on top of that when available. This man has been with the company since the early 1990s, and has obviously become a senior person at that company, and I think that he is not a fair comparator in relation to what this plaintiff might be earning as a printer, had he remained in the job he left at a different company, when he did so. If the plaintiff was still working with his previous employer, he would in my view be earning something in the region of €50,000 per annum, particularly given the evidence that his employer is suffering something of a downturn in business.

The plaintiff started driving his taxi around June 2005. An issue arises as to whether his earning capacity as a taxi driver is less than he could have earned had he continued to work as a printer. The evidence appears to be that at the time he left his job as a printer he was earning something in the region of €750 per week before tax. That figure would have included some overtime, depending on the need for overtime to be worked. It has not been possible for the plaintiff to establish how much of the average wage of €750 per week gross comprised overtime. The plaintiff has stated that he works about fifty hours per week as a taxi driver. He works about eight hours each Tuesday, Wednesday and Thursday, about ten hours each Friday and Saturday, and about six hours each Sunday. He states that as a printer he would have worked on average more hours per week than that, and that he is at a loss accordingly.

However the plaintiff has also stated that as a taxi driver he aims to earn €800 per week in fares, and that once he has reached that target he stops. He accepts that he works less hours than some other taxi drivers. In so far as he is claiming that he now earns less than he did as a printer, it was put to him that if he did not cap his earnings by stopping driving his taxi once he had reached his €800 target there would be no shortfall. He accepted that he usually reaches this target. From that figure of €800 per week gross, expenses such as petrol, insurance, road tax must be deducted to arrive at a taxable income.

I have heard evidence also from a lady who works with the National Taxi Drivers Union. That body provides an accounts service for taxi drivers. She assists taxi drivers, including the plaintiff, in the preparation of their accounts for the Revenue Commissioners. She has given evidence that the plaintiff's gross income for 2006 was shown in his accounts as €34117 before expenses were deducted. Following that deduction he had a taxable income for that year of €20150. For the tax **year 2007** his gross income was shown as €37684 before deduction of expenses, and the nett taxable income was shown to be **€25945 (€498 per week)**. After tax, this figure, according to the plaintiff's actuary's report dated 1st April, 2008 is **€20,008 (€384 per week)**.

The salary which he would have earned as a printer had he remained with his previous employer was stated to be **€53,000 gross** which has been calculated to produce a nett after tax sum of €39988 per annum (**€769 per week**). On these figures there is a loss differential of €271 per week. I consider it fair to both parties to proceed on the basis of the 2007 nett earnings figure for taxi earnings, and to disregard the lower figure for 2006 which was the first year in which the plaintiff operated his taxi.

I should refer to the fact that there has been evidence adduced that in every taxi car there is a machine fitted which can produce a printout of exactly what fares have been taken in a given period. The plaintiff has stated that he was not aware that the machine in question could produce that information in order to give an exact account of what he has earned in a given period. The only evidence given in this case is the plaintiff's own estimate of what his average earnings are, and what was contained in the annual tax accounts submitted to the Revenue Commissioners. Nevertheless I am satisfied that the plaintiff has been truthful as to his estimate in this regard, and there is no question of disbelieving the figures which he has produced as to his earnings, or the hours that he works.

I feel that a reasonable approach to the question of future loss of earnings arising from a differential between what he could have earned as a printer and what he will earn as a taxi driver into the future is to take the gross figure of €53000 per annum which was the figure given by his previous employer as what the plaintiff's salary would now be with that company and round it down to €50,000 gross (€961 per week) given the absence of shift work and reduction of overtime at present. The nett income figure based on €50,000 is approximately €750 per week. If one then takes his nett income after tax for 2007 as a taxi driver as a yardstick of his present nett income, he is earning about €385 per week nett of expenses and tax paid as a taxi driver. In doing so, I am conscious that the plaintiff himself has stated that when he reaches a weekly fare gross of €800 he stops working. But he has also stated that he does not reach this target every week, though he stated that he might reach it most weeks. If he reached it every week his gross income before expenses could be about €41000 per annum before expenses and tax are deducted. In my view it is reasonable for the plaintiff to cease working after he reaches €800 in any given week, in view of the ongoing difficulties which he continues to experience as a result of his injuries. It is impossible in a case such as this to be mathematically precise and to arrive at a nett weekly income after expenses are deducted, and then to calculate an after-tax income. It is fair in all the circumstances to take the figures based on the 2007 after expenses and tax figure as set forth.

The figures produce a nett weekly loss of €365. Applying the multiplier of 1174 (on basis of tax paid @ 20%) that figure capitalises to age 65 in the sum of **€428510**. It is reasonable to take age 65 for the purpose of this calculation.

I do not intend to make any reduction to take account of *Reddy v. Bates*, but in that context I should say that neither am I taking account of the evidence which has been given to the effect that during 2009 taxi fares are due to be increased. In my view a reasonable and fair balance is struck in this way.

Based on these figures and by reference to the plaintiff's actuary's figures for income earned post-accident, I calculate the plaintiff's loss of earnings to date to be in the order of €95000 nett, from which is to be deducted a sum of €7000 in respect of Social Welfare payments received, giving a loss of earnings figure to date of **€87000**.

In relation to general damages for past pain and suffering is concerned, I assess a sum of **€100,000**. The plaintiff suffered a serious injury to his hip and his arm and he has suffered significant pain and discomfort particularly in the years immediately after the accident. He suffered a head injury which caused him problems as outlined. He has a scar which is not of any serious cosmetic significance, but it is there and he is conscious of it.

For future pain and suffering from now (age 31), including the probability of two hip replacement at some later date, I assess further sum of **€50,000**, making a total sum for general damages in the sum of €150,000. He is likely to continue to experience pain in his hip from time to time, and he has some difficulties as outlined in relation to his arm which are likely to continue to cause him some ongoing problems.

Given the age of the plaintiff it is reasonable to presume that he may require two hip replacements later in his life. The capitalised cost of two hip replacements in the future, including two recuperation periods of three months each is put at **€25000**.

Special damages have been agreed in the sum of **€29475**.

The total of these figures is **€719,985**. I will give judgment to the plaintiff for this sum against the defendants.