Neutral citation No. [2005] IEHC 140

THE HIGH COURT

[Record No. 2002/2704P]

BETWEEN

MARY IRIS DALY

PLAINTIFF

AND

DESSIE MULHERN AND THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANTS

Judgment O'Sullivan J. delivered the 22nd day of April, 2005

1. The plaintiff sustained whiplash type injuries when her car was hit from the rear by a car driven by the first defendant on 21st July, 2001.

2. The only evidence in the case has been the evidence of the plaintiff and her consultant physician and rheumatologist, Dr. Dominic Cooke. The plaintiff is aged 55, is separated and has three grown up children and lives on her own at Ballyshannon, Co. Donegal. At the time of the accident she had been working for nine years as a cleaner in a bakery at Ballyshannon. This was heavy manual work and her shift on each of five days in the week was from 2am to 2pm. The accident happened on a Saturday morning as she was driving towards Ballyshannon. The car in front of her stopped blocking her progress so she stopped. As she was about to pull away she was hit from the rear by the first defendant's car. She got a severe shock.

3. Her unchallenged evidence was that the first defendant came out and said "I'm really sorry" and pointed to the fact that he was wearing flip flop shoes, that these were unsuitable and that he had hit the accelerator instead of the brake. He told her there was no need to call the police and that they would sort it out if she called out to him. They were at the scene between ten and twenty minutes outside McNulty's Garage. Later she went to his house and he said he would see her right but nothing happened and she ultimately went to her solicitor and the instant proceedings were initiated. There is a claim for aggravated damages arising out of the manner in which the defence was conducted and I will therefore return to the facts relating to this at a later point.

Injuries

4. The plaintiff felt very sore the next morning in her back and neck. She went to her general practitioner who advised painkillers which were effective but the effect wore off. The injury affected her ability to move and to do housework. However, because she was self supporting she had to return to work which she did within two weeks and continued working but in Autumn she reduced her work load to three shifts a week. She had headaches, relied on some friends to help her with her housework and has been working three shifts a week ever since. Her symptoms of soreness, pain and stiffness and reduced mobility continued beyond the normal period of 18-24 months and still persist at the date of hearing. Her doctor (Dr. Cooke) advised physiotherapy but she only tried this a few times and gave it up because of the pain. Sometimes her back gets really bad and there is also pain in her neck. She has a lot of bending, carrying and moving heavy buckets at work. She has to use a high pillow for sleeping; if she does not she wakes in the morning with pain. She suffered pain going down her arms first about two months after the accident. She has this pain and pins and needles especially in the morning every day for an hour or two and it has been constant for the last few years. She saw her general practitioner for perhaps a total of six times in the years since the accident. She was advised to take painkillers and anti-inflammatories and she has been taking paracetemol and panadol.

5. She has suffered loss of earnings but has made no claim for this because, as her counsel put it, of the manner in which she was paid.

6. She also gave evidence that she heard from her solicitor of a letter from the first defendant written on 5th December, 2002 in response to a letter to him of 28th November saying:

> "Your client has already come to my door enquiring as to whether she had an accident with myself or any of my drivers, while she had drink taken I was unaware she was in any doubt as to the clarity of my answer, which was an unambiguous no."

7. She said that when her solicitor told her about this letter she suffered an awful lot of stress, she couldn't believe that he denied the accident, she was most particularly hurt about the allegation that she was drunk – as she understood it at the time of the accident. She was hurt about the implication that she had fabricated the accident.

8. Dr. Cooke gave evidence that the plaintiff first visited him on 31st August. He gave a history consistent with her evidence in court and complained of headaches, severe neck pain and stiffness going out into both arms, pins and needles and numbness in arms and fingers of both hands and severe back pain radiating to both thighs. On examination she had marked restriction of all movements of the cervical spine but no gross neurological deficit in the upper limbs. She had marked painful restriction of all movements of the lumber spine, hips and knees. Her injuries he described as still very acute. Over two years later on 21st November, 2003 she came to him again and told him that she had improved but still had a lot of neck pain and stiffness with pain and numbness in both hands particularly in the mornings and occasionally during the night but rarely during the day. She gets some back pain as well. On examination he found full movement of the neck shoulders and arms with pain at the extremes of movement of the neck but no restriction or spasm. He was concerned that the parasthesia and numbness in both hands had been present since the accident and is related to the neck injury and advised an MRI scan. This was done and on 1st February, 2004 Dr. Cooke reported that the scan showed degenerative disc disease at the C6/7 level and some degree of narrowing of the spine at the C4/5 level. These degenerative changes of the cervical spine were giving rise to some degree of nerve root irritation and that was responsible for the parasthesia and numbness. Her symptoms were predominantly soft tissue injuries but occurring on a background of cervical degenerative disc disease which had been aggravated by the accident and rendered painful and also nerve root irritation. The symptoms were likely to be prolonged.

9. The last time Dr. Cooke saw the plaintiff was on 4th December, 2004 and she told him she had not improved to any great extent and continued to have a lot of pain and stiffness in her neck, down into the shoulders, between the shoulder blades and parasthesia and numbness in both hands. She also experienced low back pain radiating down both legs. She finds the work in the bakery difficult and has to take pain killers virtually ever day. They help her and enable her to do her work. He then considered that she would have neck pain for at least six to twelve months but in evidence said that he thought that this pain would last even longer. He said that if she had not had the accident she would have remained symptom free until well into her sixties notwithstanding the pre-existing degeneration shown on the MRI. She has had all the treatment that she could be given and her reaction to physiotherapy was what he described as the standard reaction. He has what she described as a "half good neck" and he would not agree under cross-

examination that her description of her pain was exaggerated.

10. Special damages have been agreed at €1,808.29.

11. In my opinion in light of the foregoing the plaintiff is entitled to ordinary compensatory damages of €25,000 to date and €10,000 further for pain and suffering in the future.

Aggravated damages
12. There is, in addition, however, a claim made on her behalf that she is entitled to aggravated damages. This is put upon the basis that

> 1. There was a clear admission made personally by the first defendant at the scene of the accident and at his house that he was responsible for the accident and would see the plaintiff right (there being no need to have the police involved in the circumstances);
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> 2. That when the first defendant was written to, he wrote back in terms of the letter already quoted effectively accusing the plaintiff of fabricating the accident. (Her understanding of the letter was that he was alleging that she was drunk at the scene of the accident but my reading of it is that he was alleging that she was drunk when she turned up at his house some days later);
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> 3. This stance of the first defendant was maintained throughout the conduct of the case and in particular
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> > (a) notwithstanding the submission to the first defendant's solicitors of a list of three independent witnesses to the accident which was furnished in early 2004, and
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> > (b) in the context of an application by the plaintiff for discovery against the first defendant brought before the master of the High Court in late 2004 when again an affidavit was sworn on behalf of the first defendant to the effect that his position was that the accident never occurred. (It should be explained in this context that the plaintiff had not at any point identified the car allegedly being driven by the first defendant and I am told the Master of the High Court refused discovery unless she did so on affidavit)
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> 4. Reliance is also placed on two letters from the first defendant's solicitors dated respectively 11th November, 2004 and 7th March, 2005. The first states with reference to the defence (which denies the existence of the accident, or that the first defendant's vehicle collided with the plaintiffs' and put the plaintiff on full proof) and said "the first named defendant is a stranger to the allegation contained in the statement of claim.

13. This matter will be contested at the hearing..." and it was stressed that an order for costs against the plaintiff would be sought if the defendant succeeded. It stated that "we are at a loss to understand your request for confirmation re insurance cover given the nature of the defence."

14. The second letter of 7th March, 2005 said, in the context of the striking out by the master of the plaintiff's motion for discovery

> "…we hereby call upon you to confirm in writing the plaintiff no longer intends proceeding as against the first defendant. In the event that we should fail to receive such confirmation by return of fax, this letter will be tendered to the court to have the plaintiff fixed with all costs incurred by the first named defendant…"

15. In response, counsel for the first defendant submits that these are typical repostes to be found in many cases where the plaintiff is put fully on proof. Even in cases where a defendant's denial that the accident occurred is found to be wrong and the plaintiff's allegation succeeds no question of aggravated damages arises: the matter simply falls to be covered by compensatory damages in the ordinary way.

16. I have been referred, by Mr. Cooney S.C. to authority on aggravated damages as follows:

> 1. The judgment of Finlay C.J. in *Conway v. INTO* [1991] 2 IR 305 and especially at 317;
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> 2. The judgment of Keane J. (as he then was) in *Cooper v. O'Connell* (unreported: High Court: 5th June, 1997); and
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> 3. The judgment of Keane C.J. in *Swaine v. Commissioners of Public Works* [2003] 1 IR 521 at 528

17. In *Swaine*, O'Neill J. in the High Court had awarded the plaintiff £45,000 for general (compensatory) damages and £15,000 by way of aggravated (compensatory) damages for a condition of chronic anxiety neurosis caused by the defendant's negligence in exposing him to the risk of contracting mesothelioma (a relatively uncommon disease which when contracted is fatal). The plaintiff had been required to work in the Leinster House Complex and during this work he was exposed over a lengthy period of time to very large quantities of asbestos dust. Whilst this had no immediate consequence to his health it did expose him to a risk of mesothelioma. As a result of becoming aware of this risk a plaintiff of suffering from "a chronic reactive anxiety neurosis". The defendant's negligence was described by the trial judge as "negligence of the grossest kind" a description with which Keane C.J. concurred. In doing so he pointed out that the defendants were seriously remiss in not taking elementary precautions for the plaintiff's health; they did not even have the excuse that they were not aware at the time of the dangers associated with asbestos dust – rather, they were fully aware of those risks and when they employed contractors their workers unlike the plaintiff were given protective clothing and head gear. The plaintiff had been given no warning whatever of the dangers to which he had been exposed. Keane C.J. did not think it possible in those circumstances to dissent from the trial judge's finding that it was "negligence of the grossest kind". He went on to say:

> "However, whether that entitled the trial judge to award an additional sum of £15,000 by way of aggravated damages is another matter entirely. It was agreed in this court that the generally accepted statement of the law as to the circumstances in which a court can award aggravated damages is to be found in the judgment of Finlay C.J. in *Conway v. Irish National Teacher's Organisation*…He said at p. 317:-
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> > 'Aggravated damages…are compensatory damages increased by reason of
> > (a) the manner in which the wrong was committed, involving such elements are oppressiveness,

arrogance or outrage, or

(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) the conduct of the wrongdoer and/or his representatives in the defence of the claim of the wrongedplaintiff, up to and including the trial of the action

Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in anyway finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in particular also a recognition of the cavalier or outrageous conduct of the defendant.'

….although the then Chief Justice in the passage which I have quoted emphasises that the list of circumstances in which aggravated damages may be awarded is not intended to be exhaustive, those circumstances which he has identified do not typically arise in cases of negligence and, if they do, are not a ground for increasing the amount of compensatory damages."

18. Keane C.J. then proceeded to take the three categories one by one. In regard to the first category he observed that the consequences for the victim will often have little or no relation to the degree of moral culpability associated with the negligent conduct. With regard to the second category dealing with the conduct of the defendant after commission of the wrong, he observed that people involved in a road traffic accident may not apologise, for example, because they are too shocked and when they recover the matter is out of their hands. In regard to the third category he said:

"The same considerations apply to the third category, i.e., the conduct of the wrongdoer in the defence of the claim of the wronged plaintiff: most parties leave the subsequent conduct of the action entirely to their solicitors or their insurers."

19. In further support for his tentative conclusion that aggravated damages may not be available under our law in cases of negligence or nuisance he suggested that one would more likely expect to find such awards in cases where damages are traditionally described as being "at large" and where the intention of the defendant to commit the wrong is frequently a precondition to liability – typically defamation or malicious prosecution. He referred to the judgment of Woolf J. in *Cralj v. McGrath* [1986] 1 AER 54 at p. 61 where Woolf J. emphasised the compensatory role of damages as distinct from the suggested role to reflect the degree of negligence or breach of duty involved. Keane C.J. had pointed out that the negligence by the defendant consultant obstetrician was described as "horrific" and "completely unacceptable".

20. Keane C.J. also referred to *A.B. v. South West Water Services Limited* [1993] 1 AER 609 where the plaintiff suffered ill effects as a result of drinking contaminated water from the defendant water undertaker's drinking water system. Exemplary and/or aggravated damages were claimed on the basis that the defendants had acted in an arrogant and high handed manner by ignoring complaints made by their customers and also had deliberately misled them by telling them that the water was safe when they knew otherwise. Nonetheless the court of appeal held the plaintiffs could not recover exemplary damages. Nor could they claim aggravated damages for their anger and indignation at the defendant's high handed conduct because they could only claim compensatory damages, anger and indignation not being proper subjects for compensation.

21. Sir Thomas Bingham M.R. said at p. 532, emphasised that the plaintiffs were entitled to be fully compensated for all they suffered and that the ordinary measure of compensatory damages would cover everything suffered as a result of the breach, physically, psychologically and mentally. Full account would be taken of the distress and anxiety which such an event necessarily causes. He went on, however:-

"To the extent that any of these effects was magnified or exacerbated by the defendant's conduct, the ordinary measure of damages will compensate them. The question is whether, in addition to that full compensatory measure, the plaintiffs have pleaded a sustainable claim for additional compensation by way of aggravated damages…. I know of no precedent for awarding damages for indignation aroused by a defendant's conduct."

22. Sir Thomas Bingham M.R. went on to state his opinion that defamation cases in which a plaintiff's damages are increased by the defendant's conduct of the litigation (such as by aggressive cross-examination or persistence in a groundless plea of justification) was not a true exception because injury to the plaintiff's feelings and self esteem is an important part of the damage for which compensation is awarded.

23. Having referred, in addition, to a further judgement "which is not at first sight easy to reconcile with the decisions to which I have just referred" namely *Appleton v. Garreth* [1996] P.I.Q.R. 1 (where a dentist carried out unnecessary treatment deliberately concealing this fact from the patient to ensure continued consent for financial gain) and where the plaintiff was awarded aggravated damages, Keane C.J. commented that that case was framed in trespass which might explain why aggravated damages were thought appropriate. Accordingly, in *Cooper v. O'Connell* which was a case framed in negligence only, Keane C.J. distinguished *Appleton* from *Cooper*.

24. Accordingly, Keane C.J. reached a tentative conclusion in *Swaine* as follows:

"Those authorities were not cited in the present case either and, in those circumstances, it would not be appropriate for the court, in my view, to hold that there are no circumstances in which, in actions for negligence or nuisance, aggravated damages may be awarded. That question can be left for a case in which it is fully argued."

25. He continued, that in the present case, the fact that the defendants were unquestionably guilty of "the grossest negligence" did not of itself entitle him to aggravated damages, but went on to add,

"…in the absence of circumstances such as those referred to in the judgment of Finlay C.J. in *Conway v. Irish National Teacher's Organisation*… or factors of a similar nature."

26. From the foregoing, it is clear that the Supreme Court in *Swaine* (all four other judges agreed with Keane C.J.) has not decided that there are no circumstances in actions for negligence where aggravated damages may be awarded. On the contrary in referring to

the possibility that such a conclusion might be left for a case in which the matter is fully argued the Chief Justice concludes his judgment in *Swaine* by indicating that the plaintiff in that case was not entitled to aggravated damages because of "the absence of circumstances" such as those indicated by Finlay C.J. in *Conway*.

27. Furthermore, it is striking that the authorities considered by Keane C.J. in *Swaine* appear to be considering primarily categories (a) and (b) of the three identified by Finlay C.J. in Conway rather than, specifically, the conduct of the wrongdoer…in the defence of the claim of the wronged plaintiff up to and including the trial of the action. Whilst this latter category was considered by Sir Thomas Bingham M.R. in *A.B. v. South West Water Services Limited*, this consideration, so far as cited by Keane C.J. was confined to cases of defamation as distinct from cases where the defendant after the commission of the wrong actually misled and deceived the plaintiff as to his proposal to make good and compensate the wrong to the plaintiff, or where a defendant added insult to injury by completely denying the incident (having apologised and promised not once but twice to compensate her) thereby implying that the plaintiff had fabricated it.

28. These latter features of the present case seem to me to fit squarely into the third category identified by Finlay C.J. in *Conway's* case namely the:

> "…conduct of the wrongdoer…in the defence of the claim of the wronged plaintiff, up to and including the trial of the action."

29. The plaintiff gave evidence that she suffered stress, upset and hurt when her solicitor made known the defendant's letter to her denying the existence of the accident and referring to her drunkenness (albeit, as I read his letter, at the time she visited his house rather than at the scene of the accident itself). In my view this hurt is an additional element of distress, upset, anxiety and humiliation arising out of the accident which would not have been suffered by the plaintiff had the defendant made good his promise given to the plaintiff at the scene of the accident and a few days later when she first called to his house. I see nothing in the authorities referred to in *Swaine* nor, indeed, in the observations of Keane C.J. in that case to indicate that an award of aggravated damages in these circumstances is not available to the plaintiff under our law and it is clear that insofar as the judgment of Finlay C.J. in *Conway's* case is concerned this conduct on the part of the defendant does justify the making of an award of aggravated damages.

30. Finally, this conclusion is entirely consistent with the recent decision of the Supreme Court in *Philip v. Ryan*, a negligence case, (unreported: 12th December, 2004), where McCracken J., speaking for the court said:-

> "In reviewing the law at the beginning of this judgment, I pointed out that some doubt had been expressed as to whether aggravated damages should be awarded in negligence claims. I have no doubt that this is a classic example of a case where such damages can and should be awarded."

31. Aggravated damages were awarded by the Supreme Court in that case on the basis of what it found to be the manner in which the defence had been conducted, just as I do also in the present case.

32. In the circumstances, I think the plaintiff is entitled to an additional award of aggravated damages in the amount of €10,000, and is accordingly entitled to a decree in total of €46,808.29.