

THE HIGH COURT**2003 14880 P****BETWEEN****MARTIN VERNON****PLAINTIFF****AND****GARY COLGAN****DEFENDANT****Judgment of Miss Justice Laffoy delivered on the 20th day of February, 2009.**

Liability is not in issue in these personal injuries proceedings which arise out of a road traffic accident which occurred on 12th August, 2003. On that occasion, the plaintiff was driving his employer's van while out on a work call when the defendant's vehicle, while overtaking another vehicle, came around a bend on the incorrect side of the road and collided head-on with the plaintiff.

The plaintiff, whose date of birth is 15th February, 1954, suffered some physical injuries as a result of the collision but the long-term sequelae are of a psychiatric and psychological nature.

The only evidence of the plaintiff's physical injuries before the Court are the reports of Dr. Dominick Cooke, Consultant Physician and Rheumatologist, dated 16th October, 2003 and Dr. Edel Twomey of the Abbey Medical Centre, the plaintiff's general practitioner, dated 21st January, 2004, and the plaintiff's testimony.

Following the accident the plaintiff was taken by ambulance to University College Hospital, Galway. He was treated for a head injury and detained for observation for three days and subsequently discharged. Dr. Cooke described his physical injuries as extensive bruising, an abrasion on his scalp, bruising across his chest, where he was restrained by the seat belt, and generally stiff and sore all over.

The plaintiff was re-admitted to University College Hospital on 26th August, 2003 and detained for a further nine days for further investigation. Both Dr. Cooke and Dr. Twomey in their respective reports refer to the prognosis as being "very guarded", but that opinion clearly relates to the post-traumatic stress disorder which was diagnosed early on during the plaintiff's treatment in University College Hospital. On the evidence, the plaintiff appears to have received no medical treatment for his physical injuries after January 2004, although his own evidence was that he received physiotherapy for eighteen months. Therefore, I conclude that, as described by his psychiatrist, Dr. Hugh Nalty, who first saw the plaintiff on 5th September, 2003, his head and neck injuries were "superficial". I am satisfied that the plaintiff's physical injuries cleared up within a short time after the accident and that he is physically fit and has been for the bulk of the period since the accident.

In relation to the plaintiff's psychiatric and psychological injuries, two reports of Dr. Nalty were admitted in evidence, the earlier dated 23rd January, 2004 and the later, dated 12th February, 2009, which coincided with the hearing of the assessment of the damages to which the plaintiff is entitled at the High Court sittings in Galway. The Court has also had the benefit of four psychological reports from Ms. Deirdre O'Donnell, Senior Clinical Psychologist with Clare Mental Health Service which is operated by the HSE, who has been treating the plaintiff since he was referred to her by Dr. Nalty in September, 2003.

Dr. Nalty, in his first report stated that the plaintiff had serious psychological symptoms following the accident. He became depressed, anxious, agitated and emotionally labile. He exhibited increased arousal, suffered from flashbacks and he appeared frightened and suspicious when re-living the event. Irritability and insomnia were also present. Dr. Nalty stated that the plaintiff had no previous history of psychological problems, but major life events occurred in 2003 prior to the accident which left him vulnerable, in that he lost his job, his home was seriously damaged by fire and his father died in April of that year. Dr. Nalty diagnosed the plaintiff as suffering from post-traumatic stress disorder precipitated by the collision. He referred the plaintiff to Ms. O'Donnell for psychological assessment and treatment. He also prescribed medication, including an antidepressant, Lustral, and an anxiolytic, Xanax. Dr. Nalty also reported that the plaintiff was removed from his home situation and placed in a psychiatric hostel in Ennistymon. The plaintiff was in the hostel, Prague House, which I understand is operated by the HSE, for four months from September to December 2003. While there, he attended a day centre in Ennistymon for support. Ms. O'Donnell referred to the plaintiff's placement in Prague House as being unusual, which I have no doubt points to the severity of his condition. On the plaintiff's own evidence I am satisfied that his stay in Prague House was a very distressful experience.

In concluding his first report dated 23rd January, 2004, Dr. Nalty stated that the plaintiff had gradually improved on the treatment but he still had some psychological problems. He anticipated that the plaintiff would continue attending the psychological and out-patients services of Clare Mental Health Service, as post-traumatic stress disorder could be very slow to respond to treatment and might be subject to relapse.

As I understand the position, Dr. Nalty's primary involvement with the plaintiff thereafter was primarily concerned with prescribing medication for the plaintiff. The plaintiff has remained on Lustral and Xanax to date and, in fact, the prescribed dosage of both medications has increased. Ms. O'Donnell's evidence was that an attempt to reduce the dosage of Xanax in April/May 2008 had adverse consequences. Her evidence was that if the plaintiff was off the medication he would not be capable of functioning.

In his final report, Dr. Nalty highlighted the changes which the post-traumatic stress disorder have wrought in the plaintiff's life: his admission to Prague House and his attendance at the day centre; the fact that he lost his job; the fact that he is unable to drive, which was an essential element of the job he had prior to the accident; the fact that he was unable to get a mortgage to build a new house as he had planned before the accident; the fact that his symptoms prevented him from working except to a limited extent and he is currently unemployed; the fact that his relationship with his partner broke up and they are separated for three years; and problems with his children for which the plaintiff feels responsible.. Dr. Nalty concluded his final report by stating that, at the moment, some symptoms still remain, e.g. panic attacks, startled response and depression accompanied by low self esteem. He commented that the plaintiff had been suicidal in the past and he suffers from insomnia. He has constant nightmares, but not as bad as they were. The plaintiff continues under Dr. Nalty's care.

The plaintiff has had very frequent and intense treatment from Ms. O'Donnell since she first saw him on 23rd September, 2003. Between that date and 26th January, 2006 she saw him on 47 occasions. Thereafter up to the present time she has seen him on average once a fortnight. She described the sessions, which last for one hour, as intense. Initially her attempts to engage the plaintiff in therapy were difficult because he arrived in a distressed state and it could take ten to fifteen minutes to calm him down.

The plaintiff's progress over the five and a half years during which he has been receiving treatment from Ms. O'Donnell can be traced as follows:-

(1) Her initial assessment of the plaintiff was on 23rd September, 2003. His scores on the Beck Depression Inventory (B.D.I.) placed him in the severely depressed range of functioning. His score on the General Health Questionnaire (G.H.Q.), which measures current levels of emotional distress, placed him in the severe range of emotional distress. His scores on the Impact of Event Scale (I.E.S.), which measures current levels of emotional distress in relation to past trauma, indicated strong avoidance behaviour and intrusive thoughts in relation to the accident on 12th August, 2003. Ms. O'Donnell's diagnosis was that the plaintiff was suffering from post-traumatic stress disorder. At that stage, due to the severity of his presenting problems, the plaintiff was seen on a weekly basis for Cognitive Behavioural Therapy and Eye-Movement Desensitization and Reprocessing. In all he had nineteen sessions up to 8th April, 2004.

(2) The plaintiff was re-assessed on 8th April, 2004. His scores on the B.T.I. placed him in moderately depressed range of clinical depression, indicating a slight improvement in his overall effect from September. On the G.H.Q., his scores placed him in the borderline range of emotional distress and indicated a significant improvement. His scores on the I.E.S. showed only a minor improvement. At that stage Ms. O'Donnell categorised the plaintiff's post-traumatic stress disorder as moderately severe.

(3) Over the succeeding 22 months, the plaintiff was seen by Ms. O'Donnell on 27 occasions. On assessment on 26th January, 2006 his scores on the B.D.I. were in the moderately depressed range, but indicated an improvement on the scores obtained in 2004. His scores on the G.H.Q. indicated a significant improvement on previous scores obtained in April 2004 and were in the normal range of functioning. His scores on the I.E.S. remained elevated but were less intense than they had been in 2004. In summarising the plaintiff's condition at that stage, Ms. O'Donnell stated that he was making slow, but steady, progress in his recovery. He was exhibiting fewer negative symptoms of post-traumatic stress disorder and was more positive in his outlook towards the future. She identified the only remaining negative issues in relation to his condition as hypersensitivity to noise and his specific anxiety towards car travel. At that stage she envisaged that overall he would make good recovery from his condition.

(4) Ms. O'Donnell next reported on the plaintiff on 28th September, 2007. In the interim he had attended for psychological intervention on an ongoing basis. At that stage Ms. O'Donnell's assessment was that there was no evidence of depression and the plaintiff's anxiety levels were improved. However, she noted that he still remained on both antidepressant and anxiolytic medication and would remain on such medication for the foreseeable future. His feelings in relation to the accident were still negative, although she noted that his confidence had been boosted because of his occupational activities, to which I will return later.

(5) Ms. O'Donnell next reported on the plaintiff on 25th August, 2008 in what she optimistically described as her final report. At that stage, the plaintiff's case was due for hearing during the October 2008 sessions in Galway. However, it was not heard. In August 2008 Ms. O'Donnell assessed the plaintiff on the B.D.I., on which his scores placed him in the moderate range of clinical depression, and on the I.E.S., on which his scores remained elevated.

Ms. O'Donnell's opinion at that stage was that the plaintiff's self esteem had improved somewhat due to occupational opportunities. However, against previous expectations and prognosis, there had been no observable improvement in his hypervigilance to noise, or in his attitude to car travel. Given that he had five years of therapy, she considered this to be a very disappointing outcome. Her opinion was that he was suffering from chronic post-traumatic stress disorder and his overall prognosis is poor.

(6) Ms. O'Donnell's final communication to the plaintiff's solicitors was a letter dated 20th January, 2009, in anticipation of the hearing of the plaintiff's case in February 2009. In that letter she stated that the plaintiff's psychological status remained unchanged and that he was unlikely to improve for the foreseeable future.

Ms. O'Donnell's evidence was that she hopes to continue to resume the plaintiff's therapy at the conclusion of these proceedings. In relation to his hypersensitivity to noise and to sudden movement, she proposes to try some different techniques. In relation to the plaintiff's inability to drive, her evidence was that while she has succeeded in desensitizing him to the extent that he will sit behind the driving wheel in a car, driving on the main road is not possible because of fear of oncoming traffic. In general, in relation to the plaintiff's ability to work in the future, Ms. O'Donnell's evidence was that full-time employment was not a viable option. He is only capable of part-time employment in a sheltered environment where noise is controlled and there is little intrusion from other people. In relation to his complaints of fatigue, which he experienced while in part-time work, she ascribed that to the fact that he is taking Xanax.

The defendant did not adduce any evidence and, in particular, the defendant did not adduce any expert evidence on the plaintiff's psychiatric condition and prognosis, although, at the behest of the defendant he was seen on two occasions by

a Consultant Psychiatrist, Dr. Mary McInerney.

During the course of the hearing there were two unusual outbursts by the plaintiff in Court which it is necessary to comment on. There was an outburst from the plaintiff shortly before the lunch adjournment on 12th February, 2009 while he was being cross-examined by counsel for the defendant. There was nothing provocative about the cross-examination, which was being conducted in a restrained and proper manner. Ms. O'Donnell, who observed the outburst, put it down to the fact that, at that stage, the plaintiff had been in the witness box for two hours and was overwhelmed by questions and was exhausted. Ms. O'Donnell was not present for the more extreme outburst on the following day which occurred while the plaintiff was sitting at the back of the Court while Mr. Peter Byrne, Actuary, was giving evidence, after a previous noisy walkout. After a break of over one hour, the Court was informed that the plaintiff was happy for the case to go ahead without him being in Court. As I understand the position, no question has ever been raised by his treating practitioners or anybody else that the plaintiff does not have capacity to give instructions in relation to the conduct of this case or the management of his affairs generally. However, because of those episodes, I am taking more care in this judgment to outline the basis of my decision than I would normally consider necessary.

I have already set out Ms. O'Donnell's evidence as to the plaintiff's ability to work in the future. Evidence as to his qualifications, his work record and his employment prospects in the future was given by Michael J. Bruen, Occupational Assessor.

The plaintiff, who is English, lived in England until 1995. He obtained a Diploma in Speech and Drama in 1976, which qualified him to teach speech and drama. He worked in community theatre on and off until 1984, when he decided on a career change. He then took up employment as a trainee electrician. In 1987 he got City and Guilds Certificates in Electrical Engineering and Installation. Thereafter, until 1995, he worked as an electrician in England, first on a self employed basis and later as an employee of a local authority providing electrical maintenance and repair services to elderly and disabled tenants of the local authority.

The plaintiff came to reside in Ireland in 1995 with his partner, who is Irish, and his two children who are now aged 18 and 16. Until 1999 the family lived in the Dublin area and the plaintiff was involved in electrical maintenance work on a self employed basis. The family moved to County Clare in 1999. Until 2002 the plaintiff continued to work on a self employed basis but had difficulty in making a living. In fact, in the tax years from 1997/1998 to 2002 the plaintiff, who was self assessed for tax purposes, made nil declarations in each year.

In 2002 the plaintiff took up employment with the Lynch Hotel Group as an assistant to the regular maintenance operator. He was employed in Haydens Hotel, Ballinasloe, for nineteen weeks from October 2002 to February 2003, during which his gross earnings for tax purposes were €12,619.00. He had a further four week period of employment at the West County Hotel, Ennis, during April and May 2003, during which his gross earnings were €2,646.00. In both instances, the plaintiff had been employed because refurbishment works were being carried out in the hotel in question. He was laid off in each case after the refurbishment work had completed. The plaintiff was then unemployed until he took up employment with Michael Murray, trading as Elektro Spares and Service Centre, Galway. That business is involved in the maintenance and repair of domestic appliances, white goods, manufactured by major electrical manufacturers such as Electrolux. The plaintiff was employed as the maintenance engineer on a three to six months' probationary period. He had been employed for about five weeks when the accident occurred. After the accident his employment was terminated. His former employer, Mr. Murray, testified. His evidence was that he could not remember any problem in relation to the plaintiff which would suggest that he would not complete his probationary period.

Unlike many businesses, Mr. Murray's business is thriving due to the economic downturn, because customers are more inclined to repair an appliance rather than replace it.

Since the accident the plaintiff has made genuine efforts to rehabilitate himself. He has attended various courses sponsored by FAS and other organisations. In 2004 he achieved an E.C.D.L. certificate in computer applications. He has also attended courses in disability awareness and training. Since the accident the plaintiff has had some gainful employment. Between April 2006 and July 2007 he worked in a toy shop, World of Wonder, in Ennis, assembling children's bicycles, swings and suchlike. This employment was under a supported employment programme for disabled persons for sixteen hours per week at minimum rates. Thereafter, from October 2007 to December 2008 he worked in drama workshops under the aegis of various charitable and public organisations such as The Brothers of Charity Services, Clare Education Centre and Enable Ireland. That work has, unfortunately, come to an end because public funding has been cut. In the five and a half years since the accident, the plaintiff's total earnings have been €21,927.00.

Mr. Bruen's evidence was that the plaintiff, who is now 54 years of age, is restricted occupationally. He did not see him as being able to resume his pre-accident employment, because of his psychiatric and psychological symptoms and his lack of capacity to drive, to deal with customer complaints and demands and to work under pressure. His opinion was that the plaintiff could probably engage in work activity of a physically and psychologically undemanding nature in a noise free environment for a period of up to sixteen hours per week. He put the plaintiff's earning capacity for the foreseeable future at between €173.00 and €193.00 per week gross. Understandably, he was not optimistic of the plaintiff getting regular work in the area of "process drama" because of current economic conditions and, in any event, he did not think that such work would be available on a full-time basis.

Special damages, apart from loss of earnings, have been agreed at €3,771.00.

The difficult aspect of this assessment is measuring the compensation to which the plaintiff is entitled for loss of earnings, because of his poor earnings record in the eight years leading up to the accident and the fact that he had been in employment for Mr. Murray for only a few weeks at the time of the accident. The computation of the loss of earnings to date and Mr. Byrne's actuarial calculations of loss of earnings into the future have been based on the assumption that the plaintiff's current earnings would be in the region of €35,500.00 gross per annum, equivalent to €580.00 per week net, based on the current average earnings of a service engineer derived both from basic pay and productivity bonus, and that he would have been, and would continue to be, in permanent employment at that level of remuneration.

The crucial questions on the assessment of the loss of earnings are, first, what the plaintiff's earnings would have been if he had not suffered the injuries he sustained in the accident and, secondly, what is his capacity to work and earn in his post accident state.

Having regard to the psychiatric and psychological evidence, I am satisfied the plaintiff suffered a very severe life changing injury, which has resulted in the loss of his partnership of twenty years and the break-up of his family, and has affected his capacity to earn. In my view, on the basis of the "eggshell skull" principle that injury is wholly compensatable by the defendant. Since the accident the plaintiff has done as much as could reasonably be expected to earn a living. As regards to the future, Ms. O'Donnell acknowledged that there should be some improvement in his condition when his financial position improves and these proceedings and the associated stress are behind him. However, Ms. O'Donnell's assessment that his condition is chronic and that his overall prognosis is poor and her opinion as to his capacity to earn a living in the future have not been contradicted. My assessment is based on her evidence.

On the basis of his pre-accident history, I think it improbable that, had he not been involved in the accident, the plaintiff would have remained in employment earning wages at the level which underlie Mr. Byrne's calculations (€580.00 per week net currently) continuously from the date of the accident to date and continuously into the future until, say, retirement at age 65. That is the crucial factor in the assessment of loss of earnings. Apart from his personal circumstances, the Court is required to take into account in assessing his loss of earnings the type of contingencies recognised by the Supreme Court in *Reddy v. Bates* [1983] I.R. 141, for example, ill-health, economic downturn resulting in redundancy, unemployment and suchlike. The fact that, for the moment, the domestic appliance maintenance sector may be recession proof does not carry much weight against those factors.

As is frequently stated, assessment of damages in personal injuries actions is not an exact science. The Court's function is to reach a fair and reasonable overall assessment. In relation to loss of earnings to date, I think the appropriate figure is €70,000. In relation to future loss of earnings, I consider the figure should be €120,000. In relation to general damages, in my view, the appropriate figure is €175,000 made up of €100,000 for pain and suffering to date and €75,000 for pain and suffering in the future.

Accordingly there will be an award in the sum of €368,771.