

THE HIGH COURT

[2008 No. 139 SP]

IN THE MATTER OF THE GARDA SÍOCHÁNA (COMPENSATION) ACT 1941 AND 1945

BETWEEN

MICHAEL CONROY

APPLICANT

AND

THE MINISTER FOR FINANCE

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 30th day of May, 2016

1. The Applicant was born on the 8th September, 1955, is married with four children, and resides at 44 Westbrook, Barna Road, Galway. He joined the Gardai in 1974 and served until he retired from the force on the 24th September, 2009. Having passed out of Templemore training college he was posted to Donegal where he spent 3 years before being transferred to Galway and Salthill where he served from 1978 to 1992. He was then promoted to the rank of Sergeant and transferred to Carna. In 1995 he was reassigned to Salthill and served there until 2004 when he was transferred to his last posting before retirement at Spiddal.
2. The Applicant was authorised to bring these proceedings by the Minister on the 1st February, 2008, in respect of an incident which occurred on the 21st February, 1998, at Salthill.
3. The 21st February, 1998, was a motor rally weekend in Salthill and, at about 5.30 pm, a large number of people had converged on the main public car park across from the Eglington hotel to watch rally car stunts being performed by some of the rally drivers.
4. A significant number of people in the crowd had been drinking excessively. Garda Paul Keane, who had arrested an individual for drink driving, was being assisted by the Applicant when they were surrounded by some 300 to 400 hundred people near the Rockland hotel. Some of the crowd started to throw bottles and stones towards the Gardaí. Enticed by other members of the crowd, one individual confronted the Applicant shouting abuse at him and, as a result of which, he was arrested under the Public Order Act. The Applicant was in the process of escorting the prisoner to a patrol car when he was attacked from behind by some members of the crowd.
5. In his evidence, the Applicant recounted how he had sustained a number of kicks to his left leg, particularly around the left knee area, and that he was thrown or pushed onto the bonnet of the patrol car on which he landed heavily. Despite being in pain the Applicant remained on duty to assist his colleagues. Reinforcements were called to deal with what had become a very hostile crowd; it took a baton charge to bring the crowd under control.
6. Later that evening the Applicant brought a prisoner to Galway University Hospital for medical attention and whilst there was himself seen by Dr. Eamonn Faller, a colleague of his GP. At this stage the Applicant was in significant pain; extensive bruising of the left leg and around the left knee was becoming apparent. He was prescribed pain-killing medication and analgesics to deal with his symptomology. Although the bruising gradually resolved, the painful symptoms in the leg and knee persisted. During a visit to his GP, Dr. London, on the 16th March, 1998, tenderness was noted on the upper outer aspect of the left knee joint area as well as in the area of the neck of the left fibula. The Applicant was referred for x-ray examination; this was reported as normal. He was also referred for physiotherapy under Dr. Aofaine Walsh. She noted a lump-like swelling and tenderness over and below the head of the left fibula, and tenderness over the collateral ligament of the left knee and in the left calf muscle. Some discomfort was also noted on flexion and extension of the left knee.
7. When reporting on the 16th January, 1998, Dr. Walsh concluded that whilst the Applicant had recovered to some extent, he was still complaining of residual discomfort in his left knee and noted that this was preventing him from returning to playing golf. Her prognosis at that time was guarded due to the physical nature of the Applicant's work duties. She recommended further physiotherapy.
8. Despite ongoing treatments, the Applicant's painful left knee symptomology did not resolve and this was noted in a medical report prepared by Dr. London dated the 13th April, 2000. He complained to Dr. London that he was unable to run due to the pain that he was experiencing and that he was also experiencing pain after walking which was accompanied by a sensation of tightness. Dr. London also noted a complaint of radiating back pain. Concerned about the persistence of the symptoms, Dr. London referred the Applicant to Dr. Dominic Cooke, who first saw him on the 13th March, 2000.
9. Although the Applicant complained to Dr. Cooke that his left knee and calf were stiff and sore, and that if he walked for more than a hundred yards he would get a tightening or stiffness in those areas, clinical examination by Dr. Cooke was normal. Nevertheless he expressed the opinion that the Applicant was suffering from a compartment syndrome of the left calf and ordered a MRI of the left knee but this too showed no abnormality.
10. It appears that Dr. Cooke then thought that the pain might have been referred from the lumbar spine and so ordered an MRI scan of that area. This was reported as showing extensive degenerative changes in the lumbar spine which led Dr. Cooke to conclude that the symptoms could have been due to a lumbar spinal stenosis. The other possibility he considered at that time was that the Applicant might have sustained superficial nerve compression at the site of the kick to the left calf/knee and so he injected that area with Kenacrot and Lignocaine – these medications gave substantial symptomatic relief.
11. This response to that treatment suggested that the problem was caused by the kick and that as a result a haematoma had

developed, leaving a swelling and compression of the superficial nerve in the left calf. A repeat injection was administered on the 16th February, 2001, again with some effect. Although the injections gave some temporary relief at the time, the symptoms persisted and so Dr. Cooke referred the Applicant to Mr. Michael Gilmore, Consultant Orthopaedic Surgeon.

12. On the 1st February, 2003, Dr. Cooke noted that the Applicant was then complaining of significant ongoing pain in his lower back with radiation into the left leg and left calf area accompanied by a numbness of the left calf. The Applicant had tried to return to golf but had to give that up because it provoked painful symptomology. Dr. Cooke expressed the opinion that the symptoms were referred from a compression of the left L5/S1 nerve root shown in the MRI scan which had been taken previously, and that the problem was one which would require surgical treatment.

13. The Applicant subsequently developed other problems including a right lateral humeral epicondylitis – for which he required injection therapy – as well as neck pain and stiffness. These problems were unrelated to the assault. His back pain with radiation continued to affect him and this was commented upon at some length in Dr. Cooke's subsequent report of the 10th October, 2008. Clinical examination at that stage showed that the Applicant's lower back muscles were "wasted" and accompanied by painful restriction of forward flexion of the lumbar spine. Dr. Cooke also noted that the Applicant had attended his GP because of depression and strongly advised him to attend a psychiatrist.

14. The Applicant was further reviewed and reported upon by Dr. Cooke on the 2nd December, 2011 and the 22nd March, 2013. These reports show that the Applicant continued to complain of chronic pain in his lower back but then with bilateral radiation into both legs, and that the deterioration in symptomology was having a profound affect on mobility.

15. Mr. Gilroy's reports are dated the 19th April, 2005, 5th May, 2009, 8th July, 2009, 21st November, 2011, and 4th April, 2013. The progressively deteriorating back condition and the effect that this was having on the Applicant's ability to perform his duties as well as on his personality and physical mobility is set out in some detail in these reports. Mr. Gilmore noted that the Applicant was on a concoction of medication for severe physical pain as well as antidepressants to treat depression.

16. He decided to refer the Applicant to a spinal surgeon, Mr. McCabe who wrote to Mr. Gilmore on the 20th February, 2012, following a medical review. According to that report, Mr. McCabe was given to understand that the back pain with radiation had been present since the time of the assault in 1998 and that his condition had deteriorated since that time, especially in the eighteen months or so prior to the date of that medical assessment. Mr. McCabe reviewed the MRI taken on the 26th February, 2011. This showed gross degeneration of the L5/S1 disc with associated bilateral foraminal stenosis. He recommended treatment in the form of an instrumented spinal fusion and decompression because of the significance of the stenosis. He did not think that spinal injections and medication would result in significant benefit. In his view, surgery was probably the best hope for a more permanent relief of pain.

17. In his report of 4th April, 2013, Mr. Gilmore, referring to the letter he had received from Mr. McCabe, expressed the opinion that without medical intervention in the form of the surgery suggested by Mr. McCabe the Applicant would be left with significant continuing pain and discomfort. As to the future, he prognosticated that without the surgery the Applicant would not make progress in terms of recovery and that, indeed, his medical situation might deteriorate further.

Relevant past medical history.

18. The Applicant undoubtedly had degenerative changes in his spine prior to the date of the incident giving rise to these proceedings. He told both Dr. Cooke and Mr. Gilmore that he did have some back trouble prior to the incident but that that was always right-sided and was mainly symptomatic in 1994. At that time he said that he did have some quite significant back symptoms in respect of which he was referred for x-ray which had disclosed degenerative changes. His evidence in this regard was that his symptoms gradually resolved, that he had returned to full duties and was asymptomatic long before the assault giving rise to these proceedings.

19. Under cross-examination, it was suggested to the Applicant that he had been hospitalised in 1985 between March and June in respect of back difficulties. However, his evidence was that he had had surgery for his neck following an accident in 1984 and that, subsequent to that, a disc in his neck had played up from time to time and as a result of which his recollection was that he had been admitted to the Mater – possibly in 2001 – because of neck pain. He rejected any suggestion that these hospital admissions had anything to do with his back. Accepting that he had hurt his back when stacking turf in 1994 and subsequently when making hay, and that he had had scans taken at that time, his back pain was predominantly right-sided. Moreover, it had completely cleared up and he had returned to full policing duties.

20. The Applicant gave evidence consistent with his reporting to the physicians and described the treatments which he had had, including the injection and nerve blocks therapies which he accepted had given him temporary relief.

21. While conscious that both Mr. McCabe and Mr. Gilmore had advised that the only treatment option left open was back surgery, the Applicant's evidence was that he was very wary of going down that road despite the disabling nature of his back condition. He explained his reticence to do so by a reference to two previous failed back operations which had been performed on his wife.

22. When it was put to the Applicant that there was no mention in the earlier medical reports of back pain following the assault, his evidence was that, while he had hurt his back at the time of the assault, the pain which he was experiencing in his left knee and leg was by far and away his main problem. It was really only when the symptoms in his left leg and knee started to settle down that he became more conscious of his back. Initially he just experienced back discomfort which was relatively minor and he thought that it would clear up. That did not happen and painful symptoms in his back developed and worsened. He had mentioned that to his GP when this happened.

23. The report from Dr. Lundon dated 2nd October, 2000, confirms this history. It also confirms that at the time of the assault giving rise to these proceedings the Applicant was asymptomatic in respect of his back, and, in terms of the pre-accident medical history, the Applicant had had no problems with left-sided back pain, particularly pain radiating into his left lower limb.

Psychological sequelae.

24. The Applicant became depressed as a result of his ongoing problems. Medical reports from Dr. McInerney and Dr. Meehan, Consultant Psychiatrists, were prepared for the benefit of the Court. Dr. Meehan also gave evidence. She disagreed with Dr. Devitt's assessment of the Applicant's psychological status. In her opinion the Applicant was depressed and his depression was referable to the chronic pain which he was suffering as a result of the assault. She had seen him on about 20 to 25 occasions over the previous six years. In her view he would need to remain on anti-depressant medication. She also gave evidence that when the Applicant tried to come off that medication it caused a relapse in his symptomology. He would need continuing psychological support and medication for the foreseeable future. She had also referred the Applicant to Dr. Brian McGuire, Consultant Psychologist, for treatment.

25. The Applicant attended Dr. McGuire for several sessions and was treated with cognitive behavioural therapy and was given advice in relation to relaxation strategies for anxiety and symptoms of post traumatic stress disorder, which he found useful. By the time of the hearing of this application Dr. Meehan's evidence was that the Applicant's post traumatic stress disorder symptoms had, in the main, gradually improved and, indeed, some of the symptoms had resolved. However, this progress had been achieved as a result of therapeutic intervention and compliance by the Applicant with the medication regime prescribed for him.

Vocational implications.

26. The Applicant's evidence was that, because of the deterioration in his symptomology, he had been forced to apply for a transfer to Spiddal Garda station where his duties meant that he could be more mobile and as a result of which he felt that he would experience some relief of symptoms in his back and leg. He remained very depressed at that time and ultimately he felt unable to cope. Although he retained the rank of Sergeant he was no longer a Sergeant in charge and considered his final posting to be a step backwards in terms of his career.

27. With regard to retirement, the Applicant's evidence was that, because of his ongoing debilitating physical and psychological sequelae, he decided to retire and that this was the basis upon which he had made application. His intention had been to serve in the force until he was 60. However, he felt that because of his problems he could no longer perform his duties. Psychologically he described himself as being in a bad place. He rejected the suggestion made on behalf of the Respondent that the reason he had retired was nothing to do with the assault but because he was entitled to do so having served for 35 years.

28. A letter dated the 2nd April, 2009, written by the Applicant giving notice of his intention to retire as and from the 3rd July, 2009, was introduced into evidence by the Respondent. The Applicant accepted that he had written that letter and that he had deferred his retirement date until September 2009. He also accepted that he did not seriously consider the pros and cons of retirement on grounds of ill health or on the basis of age and time served when he wrote the letter, but rejected the suggestion that the reason he retired was more to do with his age and time served rather than because of the problems in respect of which he had brought these proceedings.

29. When it was put to the Applicant that he had never mentioned his medical problems as a reason for his retirement, his evidence was that this was well known to local management. He accepted that he was not medically examined at the time and had not sought to have a medical examination carried out so as to enable retirement on ill health grounds. As far as he was concerned, local management knew that he had medical problems. Indeed, he had referred to these in an application form which he had completed when requesting a transfer to Spiddal. The Applicant also accepted that, since retirement, he had inherited a small farm of 30 acres near Maam Cross which he was now farming with the help of one of three sons who lived locally.

30. As far as arranging a medical examination in relation to retirement on the grounds of ill health, the Applicant's evidence was that he had proceeded on the assumption that local management was aware of his medical problems, that they would have discussed these with the Chief Medical Officer and would have arranged an examination in due course. He accepted, however, that a medical examination had not been arranged and that he had not queried the absence of an examination by the CMO with local management. He said he was depressed and that he really wasn't sure what his position was with regard to retiring on the grounds of ill health.

31. It is not insignificant that the Applicant had been authorised to commence these proceedings and was still a serving member of the force when he swore his initial grounding affidavit on the 12th March, 2008 – being little more than a year prior to the date on which he had given written notice of his intention to retire. If there had been any doubt about his rights and entitlements, legal advice was available to him.

32. Mr. Joseph Byrne, a consulting actuary, gave evidence in relation to the Applicant's claim in respect of loss of earnings from the 24th September, 2009, until the 8th September, 2015. The net capital loss allowing for actual net pension received for the same period is €142,280.

33. Mr. Byrne accepted that from his experience in providing actuarial services in Garda Compensation cases it was usual for Gardai with the requisite 30 years of service, particularly during the recent recession, to retire on reaching the age of 55. This view was corroborated in evidence given by Officer Fleming, who was called by the Respondent and who serves in the Garda Payroll Department.

34. Medical evidence was given on behalf of the Respondent by Dr. Devitt, Consultant Psychiatrist. Medical reports prepared on behalf of the Respondent by Dr. DL Murphy, Dr. Richard Quigley, Dr. John Walsh, the CMO and Mr. Joe Sparks, Orthopaedic Surgeon, were also admitted.

35. With regard to the physical injuries, Mr. Sparks in his report dated the 19th September, 2013, expressed the opinion that it was not possible for him to distinguish between whether the Applicant's symptoms were the result of degenerative changes directly caused by the assault or whether the symptoms represented a progression of known and previously symptomatic degenerative changes in the lumbar spine.

36. Insofar as the psychological sequelae were concerned, Dr. Devitt did not accept that the Applicant suffered from post traumatic stress disorder as a result of the assault. In his opinion, the likely cause of the symptoms of depression was secondary to physical pain and immobility. He accepted the Applicant was a stoic "old school" individual who was likely experiencing more emotional discomfort than he was prepared to admit for a number of years. He accepted that the Applicant was experiencing painful symptoms and that he had been emotionally affected by the ongoing nature of these. Moreover, he noted that the Applicant felt that he had not been supported by the Garda authorities and that he resented the way he had been treated in this regard.

37. Dr. Devitt's view was that the Applicant regretted his decision to retire for a number of reasons: amongst other things he missed social interaction and the camaraderie which he had enjoyed whilst a serving member of the force. In his opinion, the Applicant did not qualify for a diagnosis of post traumatic stress disorder and that even if he had suffered symptoms warranting such a diagnosis, they had long since resolved by the time he was first seen by him. He accepted that there was an inter-relationship between the Applicant's physical and psychological problems. He did not agree with Dr. Meehan's conclusions though he did accept that if the Applicant remained in pain he was likely to continue to have feelings of irritability and frustration. In his view, if the pain could be controlled then he would have a better psychological prognosis.

38. Dr. Devitt referred to the fact that in 2008 the Applicant had attended a retirement course. He also noted that the Applicant had worked a lot of overtime which he thought was not consistent with the diagnosis of severe physical sequelae. He felt that there were many other factors in the Applicant's decision to retire; that decision was voluntary and, in his view, not motivated by reason of ill health referable to the assault on him. The basis and reason for retirement and the claim for loss of earnings was a central issue

between the parties.

Decision.

39. I accept the evidence of the Applicant that he was asymptomatic in respect of his lower back and that he was medically fit to perform full policing duties at the time of the assault on the 21st February, 1998. Having regard to the radiological and MRI scan findings, as well as the Applicant's pre-accident medical history concerning his back and the medical evidence which has been led in this case, it is clear that at the time of the assault degenerative changes in his lumbar spine were already well established. It is also clear that the Applicant had suffered intermittent right sided symptomology some years prior to the assault, but this had essentially resolved and in this regard I accept the evidence of his GP, Dr. London.

40. I am satisfied that as a result of the assault the Applicant sustained soft tissue injuries to his left leg and knee which were treated initially by his GP and subsequently by Dr. Cooke, and that he also suffered a soft tissue injury to his lower back superimposed on pre-existing but at the time asymptomatic degenerative changes.

41. It is not entirely clear from his report whether Mr. Sparks considered the Applicant's pre-accident lower back symptomology to be present at the time of the assault or prior to that time. On the basis of the information available to him and on the basis of his examination of the Applicant, he accepted that the Applicant's symptoms of constant lower back pain with intermittent leg pain were in keeping with the radiological findings and were consistent with the significant degenerative changes present in the lower lumbar spine. What he was unable to say, however, was whether or not the symptomology was caused by injuries sustained during the assault or as a result of a progression of pre existing degenerative changes. He could not envisage, from the description of the assault given to him, the mechanics of how the Applicant's lower back could have been traumatised to such an extent so as to cause what he accepted were severe degenerative changes. However, such a case is not made on behalf of the Applicant. Rather, the Applicant's case is that in the course of a violent assault he was thrown or pushed in such a way that he landed heavily on the bonnet of the patrol car.

42. On the evidence, the Applicant did not sustain any significant muscular damage to his back as a result of the assault – otherwise he would have experienced more serious symptoms than he did. What he did notice was some discomfort developing afterwards which he described as piling into insignificance when compared with the pain which he was experiencing in his left leg and left knee. Those injuries, insofar as they were caused by the kicks, gradually resolved but those which had initially manifested as discomfort and had been dismissed as being relatively minor became progressively more symptomatic.

43. Given that the Applicant was asymptomatic in respect of his pre-existing degenerative changes at the time of the assault and that the assault involved him in being pushed or thrown with the result that he fell or landed heavily on the bonnet of the car, and accepting the medical evidence offered on behalf of the Applicant, I find as a matter of probability that the assault rendered symptomatic the pre-existing degenerative changes present in the lumbar spine.

44. Having regard to the degree and significance of the degenerative changes reported upon by Mr. Gilmore and Mr. McCabe, and the time which has elapsed since the assault, as well as to the fact that the Applicant had had some episodes of back pain in the mid 1990s, it is in the view of the Court reasonable to conclude that the degenerative changes were such that as they progressed, even if there had not been an assault, these would, as a matter of probability, have become symptomatic in time. In this regard I accept the evidence of Mr. McCabe that the degenerative changes are so severe and have progressed to a point where significant symptomological relief is unlikely to be achieved otherwise than by surgery. Mr. Gilmore agrees with that opinion. Whether or not the Applicant will have surgery is, in the end, a matter for him. He has expressed his reticence in this regard by reference to two failed back operations performed on his wife.

45. Without trespassing into the realm of speculation concerning the likely progression and level of deterioration of degenerative change in the absence of the assault, it is the view of the Court that the assault is, as a matter of probability, responsible for aggravating the underlying degenerative changes in such a way as to accelerate progression and render the degeneration symptomatic.

46. In addition to physical injuries, the Applicant also suffered and continues to suffer from significant psychological sequelae which, although well-improved, will require continuing support and medication for the foreseeable future.

47. Having due regard to the time which has already elapsed since the date of the assault and the nature of the Applicant's physical and psychological injuries properly attributable to that event, the Court considers that a fair and reasonable sum to compensate him for pain and suffering to date is €75,000, as well as a further €30,000 in respect of future pain and suffering.

48. With regard to the Applicant's claim for special damages, the Court will allow the amount claimed to date insofar as that sum is referable to the assault and in that regard I will discuss with Counsel the appropriate figure to be included in the order of the Court. It would appear that the agreement which has been reached between the parties on this aspect of the claims is limited to a period from the date of the assault until 2001; being the year in which the injuries directly attributable to the kicking are said to have resolved. Having regard to the findings made in relation to the back injury, that limitation no longer applies.

49. Finally, with regard to the claim for loss of earnings from the date of his retirement to date and into the future, the onus of proof rests on the Applicant. The pecuniary loss which is claimed under this heading depends in the first instance on a finding that the retirement, although voluntary and on the face of it by reason of age and years served, was in point of fact due to ill health attributable to the injuries suffered as a result of the assault. The Court is not satisfied on the evidence that the onus of proof has been discharged in respect of that claim.

50. The Applicant had been working a lot of overtime; this was cut back during the recession. He attended a retirement course in 2008. He was reaching 55 years of age and by late 2009 would have served 35 years in the force. Whether or not there would have been a differential between the pension and other pecuniary benefits payable depending on whether retirement occurred on the grounds of ill health or voluntarily having qualified by reason of age and service, is not a matter which, on his own evidence, the Applicant considered, let alone investigated.

51. He was not medically examined in the context of an application to retire on the grounds of ill health and, although he was no doubt correct when he said that local management were aware of his medical problems – having transferred him to Spiddal on that basis and at his request – if he seriously thought that his local superiors would on their own initiative arrange for a medical examination to facilitate retirement by reason of ill health, especially when he had written giving notice of his intention to retire voluntarily, then one would have expected him to have made enquiries in relation to an appropriate medical appointment. He did not do so. Moreover, the Court is not satisfied on the medical evidence offered by the Applicant that this can be explained by reference

to his psychological status at that time.

52. The Applicant served in the force for 35 years; a good portion of which with the rank of Sergeant. That he would not have known about his rights and entitlements, particularly those concerning remuneration and other pecuniary benefits payable in service and on retirement, is simply not tenable. Even if there had been a doubt about whether or not he should retire voluntarily or seek to do so by reason of ill health, it is clear that when the Applicant wrote the letter of the 2nd April, 2009, giving notice of his intention to retire, being a date after the commencement of these proceedings, legal advice was available to him in relation to that matter as it was otherwise.

53. In my judgment, particularly if he had had a continuing intention to serve until 60 at that time, it is highly unlikely that the Applicant would not have made enquires and sought both financial and legal advice concerning his retirement options. It is also of some significance that at about the time of or shortly after retirement he inherited a small farm which he works with the assistance of one of his sons.

54. I accept the medical evidence common to both sides that the Applicant regrets having retired when he did. However, that does not go to the reason for retirement which I am satisfied was voluntary, made on the basis of age and time served, and consistent with his own evidence that he did not consider and made no enquiries as to his retirement options.

55. I will discuss with counsel the form of the final orders to be made having due regard to this judgment.