Neutral Citation [2015] IEHC 473

HIGH COURT

IN THE MATTER OF AN GARDA SIOCHANA (COMPENSATION) ACTS 1941 TO 1945

[2013 No. 368 SP)

BETWEEN

JOSEPH TREACY

APPLICANT

AND

THE MINISTER FOR FINANCE

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 13th day of July 2015

1. The applicant was born on 29th day of November 1962, is a married man with two grown up sons aged 17 and 19, and resides at Camas, County Tipperary.

2. Having completed his schooling the applicant left Ireland and went to work in Canada. He spent a year there before returning home to join An Garda Siochana on the 24th of June 1983.

3. After passing out at Templemore, the applicant was stationed in Monaghan town for six months, followed by Emyvale for two years and finally Clones where he served for twelve years until 1997. At that time he was transferred to Cashel where he served until 2009 when he was transferred to Thurles serving there until his retirement in June 2013. Subsequently, he obtained qualification in the security industry and holds a licence to provide security services.

4. The applicant was authorised to bring these proceedings on the 5th of June 2013 in respect of three separate incidents each of which involved assaults, the first of which occurred on the 8th of October 2004 : the second and third occurred on the 11th and 13th of November 2007 respectively.

5. The applicant has a distinguished sporting career, particularly in hurling. He was an under 18 all Ireland hurling medal winner and played for his local club. In his twenties he developed a passion for golf, a game which he played as often as he could, generally twice a week, ultimately progressing to the point where he held a handicap of ten.

6. During his career as a member of the force the applicant attended all training courses open to him including training for the road traffic corps, principally riding motor cycles, as well as courses in firearms and search and rescue.

7. The applicant has a relevant past medical history. In November 2002 he was seen by Mr. Kaar, consultant neurosurgeon, as part of an investigation into complaints of weakness, numbness, and paraesthesia in his left arm and leg. The symptoms had been intermittent for a period of two years at that time but had become more frequent in addition to which the applicant developed discomfort in his neck. In terms of his favourite sport, golf, his ability to drive a golf ball in terms of distance was affected and the grip in his left hand was weaker than it had been previously.

8. The clinical medical diagnosis made at that time was of mechanical neck pain as a result of degenerative changes in the applicant's neck, particularly at the level of C5-C6. The clinical diagnosis was confirmed by x-ray and MRI scans. The applicant was advised on exercising and maintenance of fitness levels; advice which he followed. He had been able for his full duties as a police officer and had continued to engage in his sporting and recreational hobbies albeit not completely free of symptoms when he was involved in the first of the three assaults the subject matter of these proceedings.

9. As to these, the first of the assaults was particularly violent as well as being prolonged. The assailant was over six feet tall, heavily built, strong and very aggressive. It took twenty minutes and two police officers, including the applicant, to subdue the assailant.

10. During the assault the applicant had been punched and kicked repeatedly. He sustained significant soft tissue injuries to his ribcage with a suspected rib fracture. Those injuries resulted in excruciating pain as well as contusions of the ribcage which took nearly three months to resolve.

11. In addition to his chest injuries, the applicant also sustained soft tissue injuries to his neck, his right shoulder and his back with radiation of symptoms into his left leg. The applicant was discharged from the emergency department of the hospital which he attended following the assault into the care of his GP, Dr. McCarthy, who subsequently referred him to Professor Molloy, consultant physician and rheumatologist. MRI scanning was arranged and this showed the presence of the pre-existing degenerative changes in the applicant's cervical spine. The MRI scan of the applicant's back was reported as normal.

12. The significance of the applicant's ongoing injuries is evidenced by his inability to return to full work duties until November 2005, having returned to light duties the previous July.

13. A further medical review was undertaken by Professor Molloy in September 2007, shortly before the second assault, and at that stage the applicant was described as being back on full duties with which he was coping. Clinical examination disclosed that neck movements were full but with some tenderness in the right supraspinatus muscle. Examination of the back showed the applicant to have a normal range of movement albeit that he was still experiencing intermittent pain and discomfort. Subsequent to the first assault the applicant underwent physiotherapy which had been prescribed and also took pain killing medication and analgesia.

14. Although he had complained about his neck and shoulder injuries as well as his back when reported upon by his GP, Dr. McCarthy, in September 07 his complaints as recorded by Prof. Molloy were confined to stiffness and discomfort with some intermittent painful symptoms in the lower back; apart from some tenderness in the neck no specific complaints of neck or right shoulder pain are recorded by Prof. Molloy.

15. With regard to the pre assault medical history, the applicant's evidence was that some of the symptoms of paraesthesia which he had experienced in 2002 had returned after the assault but not to the same level as had been experienced when he had first attended Mr. Kaar in 2002.

16. The second assault, which occurred on the 11th of November 2007, was also violent. The assailant was known to be a drug addict and in the course of this assault the assailant started to bleed having head butted the applicant. After the assault the applicant was aware that his tunic and shirt were covered in the assailant's blood, moreover, the assailant had also spat on him. He was described by the applicant as being as high as a kite and definitely on drugs at the time when he and another officer were trying to subdue him. The applicant was aware that the assailant had a violent propensity which was exacerbated by drugs, that he knew his identity and where he lived. Accordingly the assailants treat to kill the applicant was taken seriously.

17. The applicant was also worried that he may have been infected with AIDS because he had been spat upon and had been sprayed with the assailant's blood as a result of a head butting by the assailant when the applicant was attempting to put him into a squad car. Fortunately a blood sample given subsequently by the assailant proved to be negative. Understandably he suffered some anxiety whilst waiting for the results of the test and in that regard had been advised to desist from unprotected sexual intercourse.

18. Despite what had happened to him the applicant continued to perform his duties and although worried about infection he performed those to the best of his ability until two days after the second assault, he was again involved in a harrowing incident which was the culmination of a high speed chase of a car which had been stolen in Cork and during which several other vehicles had been struck.

19. The applicant went to the aid of a colleague who was trying to arrest to driver of the stolen car. It transpired that he was also known to the applicant to have been addicted to heroin.

20. The applicant's evidence was that the driver had to be wrestled to the ground and during which he said he would kill the officers in question as well as their families. This was another threat which was taken seriously, the assailant having a well known record and propensity for violence which included a previous kidnap.

21. In the course of restraining the assailant the applicant and his colleague had had to drag him along the road for about 40 to 50 metres in order to get him into a squad car. When they got to the car the assailant kicked out and struck the applicant with great force in the groin which resulted in immediate and excruciating pain. In addition he had also suffered injuries to the ribs, neck, chest and back as well as to his left wrist.

22. These injuries rendered the applicant unfit for any work. Clinical examination at the time showed that the applicant had significant bruising to his testicles and chest which took five to six weeks to settle down, moreover, he was experiencing pain in his left leg, right shoulder, left arm, neck and back. He recalled in evidence what he described as a change in his personality; becoming very moody irritable and suffering from continuous flashback including flashbacks to the incident in 2004. He experienced cold sweats, became socially withdrawn and depressed and ultimately required anti depressant medication including Lyrica and other painkilling medication. He gave evidence of developing headaches and that the other painful symptoms being experienced were such that he could not turn easily in bed in addition to which there was significant radiation of pain into his left arm and leg and all of which resulted in his going back to see Mr. Kaar.

23. In January 2010 the applicant underwent carpal tunnel surgery. He was off work until the 16th of March 2009. He was still symptomatic at that stage. Psychological advice was to return to work albeit in an indoor and non confrontational environment. The applicant's evidence was that when he returned to work he was assigned duties in the divisional communications room dealing with alarm and emergency calls and that he was no longer eligible for overtime as a result. Although working full time, he was still physically symptomatic and psychological sequalae were quite pervasive and in respect of which he was treated by Dr. Morrissey, consultant psychiatrist, who prepared reports for the assistance of the court.

24. It appears that the medication being taken by the applicant was such that it caused him to develop reflux symptomology which ultimately led to the applicant having to undergo a hiatus hernia operation.

25. The applicant described how even though he had returned to work, he was experiencing a lot of tension, fear and strain. He felt his carpal tunnel problems were causally related to the assaults and that he never really got back to full time duties at a level which he had enjoyed prior to the assaults.

26. Under cross examination the applicant accepted that he had not disclosed his pre-accident medical history to Prof. Molloy. His explanation for this was that as far as he was concerned he was essentially out of the woods and had been assured by Mr. Karr concerning his future. The applicant also accepted that he did not refer in his grounding affidavit to the fact that he had just retired or that that had anything to do with the particular incidents. His evidence was that he felt that he needed to retire because of his ongoing symptoms and that as a consequence he could not go on any longer. His explanation as to why he had not gone through the procedure appropriate for a member of the force applying to retire on health grounds was because it was too complicated and that in any event his plan was to retire at 56 or 57.

27. Subsequent to the accident the applicant did engage in some security work at a self employed level in Clonmel Hospital. He has not, however, been vocationally assessed. His was still playing golf occasionally but his handicap had gone out from ten to thirteen. The applicant's evidence was that at best he was able to play once a week and even then, he suffers from neck stiffness and discomfort.

28. Mr. Tennant, consulting actuary, gave evidence that the applicants past loss of earnings amounted to €16,900 together with €4,400 in respect of Courts Act interest to the date of retirement. This claim is in addition to loss of earnings which have been agreed for the periods when the applicant was out of work.

29. Insofar as the applicant's claim for future loss of earnings is concerned the actuarial figures given in that regard by Mr. Tennant were €20,500 to age 60 and 13,550 to age 57.

30. The applicant's claim in respect of loss of earning relates to loss of overtime to the applicant which he claims was not available to him in respect of the duties to which he was assigned after the second and third assaults.

31. With regard to the applicants injuries the medical reports prepared on behalf of the respondent by Dr. John Walsh, chief medical officer, Dr.Patrick Devitt, consultant psychiatrist, and Dr. Pat O'Neill, sports and orthopaedic specialist have been agreed and have been considered by the court as have the medical reports prepared on behalf of the applicant by Dr. McCarthy,, Prof. Molloy, Dr. Morrison, Dr. O'Connell and Mr. Kaar.

Decision.
32. It was accepted by the applicant in his evidence that he had a relevant past medical history. In that regard it is clear that since in or about 2002 the applicant was developing some form of weakness and intermittent paraesthesia in his left arm together with stiffness in his neck. Those symptoms gradually worsened to the extent that Dr. Gerard Barrett, the applicant's then GP, referred the applicant to Mr. George Kaar, consultant neurosurgeon, in October 2002 for assessment. Mr. Kaar wrote to Dr. Barrett on the 7th of November 2002 describing the symptoms as reported to him by the applicant, namely, of being increasingly conscious of a weak numb and tingly sensation in the left arm and leg, that those symptoms had been present intermittently for a number of years but that over the past two years had become more constant, and that he had experienced some discomfort in his neck with an inability to hit the ball as far as previously when playing golf. He felt that the grip in his left hand was not as good as it used to be.

33. Clinical examination showed mild tenderness of the cervical spine but otherwise with a good range of movement. There was some sensory blunting throughout the left upper limb and a slightly diminished power of plantar flexion in the left lower limb. Degenerative changes were seen on x ray at C5-6.

34. A further letter dated the 16th of January 2003 reported on the results of an MRI scan of the cervical spine which confirmed these clinical findings. Following further radiological review Mr. Kaar wrote again on the 10th of February 2003 expressing the opinion that the symptoms being complained of by the applicant in the left upper limb represented referred symptoms from the C5-6 disc and that "…*There is mechanical pain at the root of the symptoms*".

35. Although the applicant had had neck x-rays and MRI scans in the period 2002 to 2003 in respect of the symptoms complained of by him in his neck, left arm and left leg and which had been reported by Mr. Kaar, the applicant did not disclose that history to Dr. John Walsh nor to Dr. Devitt nor to Dr. O'Neill when they were examining and reporting on behalf of the respondent. I note, however, that that history was known to Dr. Walsh as a result of other medical notes and records made available to him at the time when he first reported on the 31st of May 2012 in respect of the assault which occurred on the 8th of October 2004. That previous history is referred to in subsequent medical reports from Dr. Walsh.

36. Although Dr. Pat O'Neill examined on behalf of the respondent in April 08 and October 09, whilst other medical pre-accident history had been disclosed, the applicant's prior medical history with regard to 2002 /2003 was not made known to Dr. O'Neill whom, it appears, first became aware of it at the time of his medical examination and report in July 2012.

37. As to that Dr. O'Neill had expressed the opinion that the ongoing symptoms effecting the neck shoulder girdle and left upper limb were essentially due to degenerative spondylosis with mild left sided cervical radiculopathy due to the underlying degenerative conditions affecting the cervical spine.

38. In his opinion the applicant may have suffered some transient accelerated progression and deterioration of the degenerative condition of the neck as an indirect consequence of the musculoskeletal strain injuries sustained. He gives a similar opinion in relation to ongoing symptoms complained of by the applicant in relation to his lower back.

39. Insofar as the left wrist is concerned Dr. O'Neill was not convinced of any causative relationship between the carpal tunnel symptomology and any sprain sustained to the left wrist as a result of an assault.

40. In his most recent medical report of July 2012 Dr. O'Neill makes it clear that any ongoing symptomology in the neck or shoulder girdle area is essentially due to an underlying degenerative condition.

41. Mr. Kaar thought that the symptoms in the plaintiff's cervical spine were likely to gradually decrease over a period of one to two years, an opinion expressed by him in March 2010.

42. Whilst Mr. Kaar wrote an addendum to his report on the 30th of April 2010 in which he refers to having previously reviewed the applicant at the request of his GP in 2003 and also refers to the symptomology investigated at that time as well as the medical investigations undertaken, it is noticeable that under the heading "*previous medical history*" in his report of the 8th of March 2010 Mr. Kaar states:

> *"Mr. Treacy had not experienced any symptoms prior to October 2004 and there was no previous accident or injury. He had played golf up to four times per week and had a handicap of eleven."*

43. When one reads his report dated the 8th of March 2010 it is quite clear that at the time when he expressed his opinion Mr. Kaar unaware of the applicant's pre-accident relevant medical history and had also clearly forgotten, understandably, that he had examined and reported on the applicant in 2003. As to the relevance of the pre-accident medical notes and records ,Mr. Kaar expressed no further opinion in his letter of the 30th of April 2010. His previous opinion was that a neurapreaxia or contusion to the left median nerve had been induced as a result of the assaults and that the symptoms of pain and paraesthesia following the injuries may have been partly due to nerve and muscle stretching. He went on to express the view that those symptoms were likely to be "… *mainly secondary to carpal tunnel syndrome as this was confirmed electrophysiologically*."

44. Mr. Kaar's opinion then was that the severity of the strains, the circumstances of the injuries which occurred in the line of duty, the pre-existing degenerative change in the spine and the referral of symptoms to the limbs were all factors in the persistence of the applicant's symptoms.

45. It is also clear from the medical reports in this case that the applicant had a normal MRI scan in relation to his back in 2003. It was only as the year's progressed and further scanning took place, that he developed degenerative changes in that area.

46. I think it is also of some significance that neither Dr. McCarthy nor Prof. Molloy appear to have been aware or to have been aware by the applicant that he had a relevant pre-accident medical history.

47. In relation to the question as to the significance or otherwise of the applicant's relevant pre-accident medical history and which was laterally made available to and commented upon by the respondent's physicians , the court will accept their opinions, since ,unlike those of the applicant , they were ultimately informed by that history .

48. The court is satisfied that the applicant was at all times aware of the procedure which would have enabled him to apply for early retirement on the grounds of ill health. He appears to have made no attempt to investigate in any serious way the possibility of early retirement on such grounds. The fact that he took early retirement on a voluntary basis is not in dispute. The applicant now asks the court to hold that his early retirement was in fact attributable to his ill health arising as a result of the assaults and that but for the injuries and their ongoing consequences sustained as a result of those assaults he would have continued to serve until a planned retirement at the age of 57/58.

49. Having regard to the medical status of the applicant at the time of his retirement the court is satisfied that he would most likely have been permitted to retire early, however, there is a real issue as to causation and whether the respondent should be fixed with the responsibility for the future loss of earnings claim made in this case.

50. For reasons which have already been stated ,the court accepts the evidence of the respondent's medical witnesses in relation to the question of causation and duration of the injuries consequent upon the assaults, accordingly, any ongoing symptomology in the plaintiff's neck and back in particular are most likely attributable to degenerative changes which were not caused by the assaults.

51. Those changes in the applicant's neck were well established prior to the first assault and those in the applicant's back developed much later without any pathology associated with the assaults. There is no doubt but that these degenerative changes were aggravated or exacerbated and that this most likely prolonged and increased symptomology for a number of years but that thereafter any such symptoms were referable to the underlying degenerative changes rather than to any soft tissue injuries sustained as a result of the assaults.

52. It is entirely questionable on the medical evidence as to whether there is any causal link between the assaults and the applicant's carpal tunnel syndrome and in respect of which he had to have surgery under Mr. Kaar. The court accepts that the underlying condition reported upon by Mr Kaar in 2002/2003 resulting in the symptomology experienced before the assaults, and which the applicant said had returned after the first assault in 2004, was aggravated by the assaults. However, in the absence of full disclosure of his pre assault relevant past medical history to his own physicians there is no convincing evidence which the court could accept causally connecting the development of the carpal tunnel syndrome and subsequent surgery by Mr. Kaar with the assaults or any of them.

53. The court accepts that the applicant did suffer psychological sequelae as a result of the second and third assaults in particular . Whilst the applicant was counselled and treated for depressive type symptoms neither the applicant's consultant psychiatrist, Dr. Morrissey, nor Dr. Devitt, consultant psychiatrist reporting for the respondent, diagnosed post traumatic stress disorder.

54. Quite the contrary, Dr. Devitt has firmly expressed the view that the applicant's symptomology does not qualify for such a diagnosis. In fact Dr. Devitt concluded in 2012 that the applicant had not suffered an independent depressive disorder of any clinical significance.

55. The applicant was prescribed Cymbalta 60 milligrams daily as well as Lyrica following the second and third assaults. Dr. Dineen, consultant psychiatrist , to whom the applicant had been referred by Dr. Morrison, was of the opinion that the applicant was moderately depressed However, any symptoms arising as a result, such as acute anxiety or loss of confidence were, as stated by Dr. Morrison in his report of the 24th April 2004, no longer present at the time when the applicant retired in June 2013. Accordingly, the court finds that such psychological sequelae as the applicant developed after the second and third assaults could not have been contributory to the applicant's decision to take early retirement.

56. The law on this question is clear. It is for the applicant to prove his case on the balance of probabilities. Whilst the court accepts that the assaults were violent in nature, that the applicant suffered physical injuries as a result of those assaults, and that as a result of the second and third assaults the applicant also developed psychological sequelae for which he was treated, the court cannot overlook the fact that the applicant appears not to have disclosed his relevant pre-accident medical history to the physicians treating him and reporting on his behalf for the purposes of these proceedings.

57. Furthermore, the court is not convinced by his explanation that the failure to do so was founded upon certain assurances which he had received from Mr. Kaar. Whether or not he received any such assurances, the fact that he had a relevant pre-accident medical history and of which he was aware, was something which he was bound to disclose since it was material to be known to his own physicians not only in terms of any opinion and treatment as might likely be afforded by them to the applicant but also in respect of any expert opinion to be offered by them to the court in relation to diagnosis, prognosis and causation of the injuries.

58. For these reasons and further by reason of the applicant's decision to take early retirement voluntarily, the court is not satisfied that the applicant is entitled to succeed in respect of his claim for future loss of earnings.

59. As to the applicant's claim in respect of general damages for injuries sustained by him as a result of the assaults the court is satisfied that ,to the extent that these were caused or contributed to by the those assaults ,the applicant is entitled to succeed.

60. Having carefully considered all of the evidence adduced, the findings made and the submissions of counsel, the court will award the applicant the sum of €60,000 in respect of general damages together with the sum of €19,822.82 which the parties have agreed in respect of special damages, and the court will so order.