

THE HIGH COURT

Record Number: 2009 No. 11214P

Between:**Gerard Richardson****Plaintiff****And****Andrius Premimionas, Jonusas Gintautas,
and The Motor Insurers' Bureau of Ireland****Defendants****Judgment of Mr Justice Michael Peart delivered on the 14th day of December 2012:**

On the 17th January 2008 the plaintiff was in his VW Cabby Van waiting at a junction to make a right turn when a car being driven by the uninsured first named defendant came through a red light and collided with the plaintiff's van. Fortunately he was wearing his seatbelt. It was a severe impact. He had been on his way to do a small painting job in his sister's apartment.

However, having called the Gardai who took relevant details from both drivers, the plaintiff went straight home. In the aftermath of the accident the plaintiff was shaking, and his neck and back started to "lock up" and go into spasm. He had never had any problems of this kind previously. He went to his GP, Dr Barrett, that afternoon who found no evidence of any fracture and the plaintiff had a good range of movement. Dr Barrett prescribed painkillers and anti-inflammatories for what he considered to be soft tissue injuries.

A week later the plaintiff attended again for review when he complained of a grating sensation in his neck, and still had both neck and back pain. He was referred for x-ray of his cervical spine in view of the grating in his neck and he continued on the pain killers and anti-inflammatories. That x-ray was normal.

The plaintiff attended his GP again on the 1st February 2008 and again on the 11th February 2008. It appears that on the 10th February 2008 he had had an acute episode of severe pain down the right side of his neck, with associated pain down his right arm and also leg pain, while attending Mass. On examination he had markedly reduced neck extension, right turning was reduced but other turning was normal. Back movement was normal. His treatment continued to be conservative with painkillers and anti-inflammatories. At that point Dr Barrett thought that the plaintiff would recover completely and that there should be no long-term sequelae.

Over the following months the plaintiff continued to be symptomatic with pain in his neck and with some unusual sensations in his leg. He continued to attend Dr Barrett who adjusted his tablets as was considered appropriate.

During this time the plaintiff was not able to work. While the plaintiff's trade is as painter and decorator, he has worked in a rather niche trade over many years, namely as a scenic artist. In other words, most of his work up to that time was a painter on film sets. That job is not confined to simple painting but has a creative element whereby special effects will be created by the plaintiff as part of his painting job. A simple example would be to paint a wall or building in such a way that it appears older than it really is. He is very skilled in that area of work. He is passionate about it, and it has upset him greatly that he may not be able to pursue that work in the future because of the ongoing problems which he has with his neck and back.

I should add that the scene painting work which the plaintiff does is sporadic work. Whether or not the plaintiff has work to do depends upon whether he is contacted about some film or TV programme which requires that kind of work to be done. It means that there are times when there is no work available for him, even if he was in a position to do it. That is an aspect of this case which makes it more difficult than usual to make a calculation in relation to past loss of earnings and earnings into the future. I will come to that aspect of the case in due course.

The plaintiff was also attending a physiotherapist who had recommended that the plaintiff use a TENS machine. The plaintiff also wore a battery drive belt-brace which he found gave some mild relief.

It appears that at the end of March 2008 the plaintiff attempted to work on a job he was offered, but his neck had completely locked up on the 3rd April 2008 and he was unable to do it. On examination by Dr Barrett, he was very stiff in his neck with poor extension and poor right and left turning. Flexion was normal and he was tender in the trapezius. He was prescribed further muscle relaxant medication as well as a neuropathic painkiller called Lyrica. But Dr Barrett also referred the plaintiff to Mr Peter Keogh, Orthopaedic Surgeon. Mr Keogh saw him on the 15th April 2008. Following that examination, Mr Keogh opined that the plaintiff had a soft tissue injury to his neck and to his lower back and he felt able to reassure the plaintiff that he should be able to return to work. He did not think that an MRI scan was necessary at that point, and at this point in time he considered that there would be no long-term sequelae.

I should add that I accept that at all relevant times this plaintiff was most anxious to return to the work that he was so passionate about. He is not a malingerer in any way whatsoever in my opinion which I have formed from hearing his own evidence. This is also the view formed by his medical professionals.

The plaintiff has said that by mid-2008 and autumn of that year he was getting very despondent and depressed about his ongoing difficulties. He was very unhappy about not being able to get back to the work he loves and having to live with a level of pain was getting him down. He has also described how his mood has had an adverse effect in the home since he has been inclined to be short-tempered and stressed. He gets upset about the effect that this had on his relationship with his wife. At some point they went to marriage counselling. He has also been to counselling for himself in order to help him come to terms with the fact that he may have to live with pain on a long-term basis and may not be able to return to the painting work which he loves so much.

The plaintiff had been referred to Dr McCrory, a pain specialist, who he attended for the first time on the 3rd November 2008 in relation to his neck pain. Dr McCrory considered that he had soft tissue injuries and offered trigger point injections. These were carried out on the 10th November 2008. The plaintiff cannot recall if these gave him any relief at the time. He went back to Dr McCrory for review in January 2009 and while the plaintiff is noted as having reported some improvement in his neck, he was complaining by then of severe low back pain. This low back pain had resulted from an acute incident in early November 2008 which occurred when the plaintiff was engaged upon painting a wall in, I think, St. Anne's Park.

A lot is made of this incident by the defendant because from that date the plaintiff has had increased difficulties with his low back. The defendants consider that the lapse of time between the accident in January 2008 and this onset of low back spasm in November 2008 is sufficiently lengthy to indicate that the low back problems which the plaintiff continues to suffer from are not as a matter of probability a consequence of the January accident. However, Mr Ashley Poynton, Consultant Orthopaedic Surgeon, is satisfied that whereas the discectomy which the plaintiff underwent in 2009 cannot be attributed to the accident, the remaining back pain can be so attributed. The discectomy resulted in the plaintiff's radiating leg pain disappearing (which is what that procedure's purpose is), but the back pain itself has remained, and in Mr Poynton's opinion is related to the January 2008 accident.

But to return to November 2008 – the plaintiff has stated that when he was painting a length of wall at St. Anne's Park he suffered an acute muscle spasm, resulting in his back 'locking up'. He went to his GP, Dr Barrett, on the 11th November 2008 complaining of severe back pain radiating into his left side. He told Dr Barrett that he was hardly able to walk. Coincidentally, as already referred to, he had been to see Dr McCrory, Pain Specialist, on the 3rd November 2008 for the first time having been referred by Dr Barrett in relation to his ongoing neck pain. Dr McCrory saw the plaintiff again in January 2009 when he was still complaining of neck stiffness, but notes also in his report that in January 2009 the plaintiff was complaining also of severe low back pain, and had told Mr McCrory that he had undergone an MRI Scan at the Hermitage Clinic which had revealed some disc bulging compressing nerve roots bilaterally at L5/S1. Dr McCrory opined that this pain was likely to emanate from his facet joints, as the plaintiff was not reporting any radicular pain.

The plaintiff attended Mr Peter Keogh, Orthopaedic Surgeon on the 25th November 2008 and told Mr Keogh about the acute episode of back spasm and low back pain which had occurred at the beginning of November 2008. Mr Keogh notes that he had attended with his GP at that point and had been referred for the MRI scan just referred to. Mr Keogh's report dated 8th December 2008 notes that the plaintiff was due to go back to Dr McCrory in early January 2009, and that he was experiencing discomfort when driving, and was using a TENS machine and also a lumbar cushion when driving his van. He opined also that there was minimal degenerative change in the L5/S1 disc and that there was no significant thecal sac or nerve root compromise.

On the 19th January 2009 the plaintiff attended Mr Ashley Poynton, Consultant Surgeon, for a second opinion, according to Dr Barrett. According to Dr Barrett's report dated 4th October 2012, Mr Poynton was of the view that the degenerative disc disease at L5/S1 was a long-standing problem, but one which had been rendered symptomatic by the accident. Mr Poynton's report is dated 8th August 2009. He states that he reviewed an MRI of the lumbosacral spine dated 14th November 2008 which showed degenerative changes as described therein. He also referred the plaintiff for an MRI scan of his cervical spine which disclosed degenerative changes at the level C5/6 and C6/7 with mild root impingement particularly at C5/6. He referred him back to Mr McCrory, Pain Specialist. Mr Poynton in this report has stated that it is likely that the plaintiff's symptoms will continue to be symptomatic *"as perpetuation of symptoms is usually associated with these underlying degenerative changes"*. He opined that although he would not recommend spinal fusion surgery at that time, he may be a candidate for such surgery at some later stage should his symptoms deteriorate.

Dr Poynton gave another report in June 2010, when he stated that he had seen the plaintiff again in late 2009 after the plaintiff had undergone various forms of treatment in the meantime including injections. But in late 2009 the plaintiff attended and reported increasing right sided sciatica. This was a new finding and Mr Poynton arranged for a new MRI scan, and this revealed at that stage a disc protrusion at L4/5 on the right side which was consistent with the reported pain. In those circumstances a micro-discectomy was performed at the Mater Private Hospital on the 23rd December 2009 which eliminated the right sided sciatica and leg pain. However his back pain persists, and while Mr Poynton is satisfied that the discectomy cannot be attributed to the accident, the continuing back pain is so attributable. He expressed his concern for the plaintiff's long term prognosis in that report.

Following the lumbar discectomy in December 2009, the plaintiff continued to see Dr McCrory and attended him in February 2010. He reported to Dr McCrory that he had obtained no benefit from the discectomy and continued to have back pain radiating down the right leg as before, and was continuing to have neck pain. Dr McCrory carried out a right cervical rhizolysis on the 31st March 2010, and this was noted to be positive at C5/6 and C6/7. He had undergone also an L5 Dorsal Root Ganglion, and in addition given his ongoing symptoms, a spinal cord stimulator was implanted in December 2010. The plaintiff has found the latter to be helpful in relation to removing his leg pain, and he uses it constantly, but low back pain remained.

The plaintiff has had a cervical rhizolysis and a lumbar rhizotomy. He has done everything which has been recommended, yet he remains in great difficulty with his low back. Dr McCrory opined in his last report dated 2nd October 2012 that given all the treatments which the plaintiff has had and the efforts he has made to recover, and the continuing nature of his symptoms *"the chances of complete resolution of his symptoms are slim"*.

I should add at this point that all his treating clinicians are satisfied that the plaintiff is utterly genuine in relation to his complaints, is highly motivated as far as wanting to recover is concerned, and is not in any way exaggerating his difficulties.

I have considered all the evidence which I have heard and have considered the reports which have been admitted into evidence, and am satisfied firstly that the plaintiff is not exaggerating the difficulties which his injury continues to cause him. His doctors agree with that view. He is a well motivated individual, and is not malingering.

I am satisfied also that the problems which he is having both in relation to his personal life and his work life are directly attributable to the injuries sustained in this accident. In particular I am satisfied that on the balance of probabilities the onset of back pain which occurred at the beginning of November 2008 while he was doing some painting work at St. Anne's Park is attributable to this accident, despite the fact that this onset is some ten months thereafter.

Impact on plaintiff's capacity to work:

The plaintiff, as already described, is a painter and decorator by trade, but for many years now has worked in a very specialised area, namely as a scenic artist on films and TV programmes. Occasionally he will do some work as a traditional painter and decorator, and he has given examples of such activity, such as when he has assisted in the painting of his sister's apartment, but these small jobs are in the nature of 'nixers', and cannot be considered to be part of his remunerative work to any meaningful extent. As far as his loss of earnings claim is concerned, it is his specialised work as a scenic artist which must be considered. It is an unusual type of work, and there are not many people in this country who are skilled in that area of work. Not only is the plaintiff skilled in the area but is

passionate about his work, and it has been a very important part of his life. He loves the work, and the fact that he is now very restricted in the amount of that work which he can do is a cause of great upset to him. He is a relatively young man (aged 46 years), and but for this accident would have looked forward to many years of gainful and fulfilling work in this unusual area.

His work is usually outdoor work. It is irregular work both in terms of its sporadic nature and in terms of how long any particular contract may last. He is self-employed and basically waits for the phone to ring about a forthcoming film or TV programme where his services are needed. It can be heavy and tiring work, and he may be required to work very long hours in any one day in order to get work done in time for film shooting to commence. There are serious deadlines imposed upon him, and he accepts that as part of the work regime. But it is not constant work. I have received evidence of the number of weeks which he has worked over a number of years and it is clear that there has been no year in which he has worked every week in the year. In 2007 (the year prior to this accident) he had a gross income of €55,000 according to his P21 form (PAYE Balancing Statement). In 2008 his gross income was €35,000. In 2009, the figure was €40,000, and for 2010 €40,000. On the other hand, the figure for 2011 is only €8500.

On the evidence which I have heard, it is probable that the plaintiff will be unable to do as much of this film work as he has been able to do in the past. His back problems are not improving as he would like and, while he would very much want to try and do any such work that comes along, and while his work mates are helpful and understanding and help him out, he inevitably will be restricted as far as future work is concerned.

In arriving at a fair methodology for calculating a loss, I must take into account the sporadic nature of the work concerned. In other words it has never been the case that the plaintiff has had all year round work. But when he gets it, it can be quite well paid to take account of the long hours sometimes involved. One way of approaching the income earned is to take an average for the years for which I have received evidence, and to apply some sort of reduction in the average for the purpose of estimating as best I can how much the plaintiff will lose each year to age 65 by reason of not being able to work 100%. I am certainly satisfied that if the plaintiff's phone rings and he is offered a job on a film he will jump at the opportunity to work, as he loves the work, and he will do his best to complete the job. But there will be jobs, according to his evidence, which he will simply know that he cannot do any longer no matter what help he gets, and he may have to turn them down.

But in considering future loss of earnings, I will have to consider also the undoubted question that the film industry in Ireland is no longer as strong as it was, and even for that reason the amount of work which would come the plaintiff's way may well be less in any event, even if this injury had not occurred. Such a calculation cannot be a precise science, and the Court will simply have to do its best to be fair to both sides in some sort of reasonable way. The plaintiff has in no way attempted to inflate the amount which is sought by way of loss of earnings. I have been impressed by his candour and honesty in this regard. It was put to the plaintiff that he could return to the more conventional work as a painter and decorator even though his preference is to work as a scenic artist on film and TV work. However, he considers it unlikely that he could start working fully in that occupation given the fact that he has difficulty going up and down ladders and carrying heavy equipment on account of his injuries. My view is that while the plaintiff is well motivated and will try and do his best to do any work that may come his way, he cannot be expected to set up a new business as a traditional painter and decorator given his limitations. He may get some work falling into the general category of 'nixer' occasionally but not so much that it will materially affect the calculations which I propose to make in respect of future loss of earning.

The plaintiff has considered getting into another niche area which might give him an outlet for, and satisfy his creative talents. He described that as being Ornamental Signwriting such as one sees on mirrors in the bars and lounges of licensed premises. He actually undertook a course in that skill in Drogheda, and was searching for online courses or digital courses as much of that work is apparently based on digital work. He is currently waiting to hear back from the Dublin Institute of Technology to hear whether they have a course in a particular software relevant to that design work. But I have heard the evidence which he has given as to the specialist nature of that work. Most of it is done in the United Kingdom at the moment for companies such as Jameson. Mary Feeley, a Vocational Rehabilitation Consultant gave evidence and was of the view that the prospect of the plaintiff being able to get into that line of work was at this stage at least highly speculative, and that he would need to undertake a number of courses over a couple of years perhaps. She was also doubtful about the amount of work that would be available for the plaintiff in that area even if he succeeded in establishing himself.

John Byrne, Actuary, gave evidence in relation to the calculation of past and future loss of earnings. His report and calculations are predicated on the plaintiff's earnings in 2007 and on an assumption that these earnings would have increased annually in line with national wage agreements. However I am not satisfied that it is right and fair to the defendant to have these calculations based on 2007 earnings. Firstly, in that year the plaintiff's earnings were the highest of a number of years; and secondly, the plaintiff accepts that the work available in the film industry has reduced since those days. I have concluded that in order to arrive at a headline level of earnings from which to calculate future loss, it is fairer and more appropriate to firstly average out the earnings per year from 2007 to 2011. That calculation produces a headline average figure of gross earnings of €36,000. Given the downturn in the work that would in any event be available to the plaintiff in film work and TV work due in part to the downturn in the economy and changes in the tax regime for the film industry, it is reasonable that the plaintiff's income would be significantly reduced, even without reference to his injuries. But on the other hand I believe that without the injury sustained, the plaintiff would have been motivated enough to pick up other work in the painting and decorating line. I still believe that he will be able to take on a certain amount of work, but nothing like he would have if the injury had not occurred. As I have said already this calculation is not one of mathematical accuracy, but rather is one which reflects a certain reality and is fair both to the plaintiff and to the defendant.

Accordingly I intend to begin from a headline annual average earnings of €36,000, rather than take the best of the years 2007-2011. Mr Byrne was asked to do some calculations based on a number of different levels of reduction of earnings, depending on various scenarios, and also to provide calculations based on an earnings figure of €36,000. Using that headline figure of €36,000, and assuming that the plaintiff was only to be in receipt of the minimum wage in the future, his capitalised nett loss to age 65, by the application of the appropriate multiplier, is the sum of €207,507. A similar calculation based on an expectation that the plaintiff would earn €10 per hour yields a capital sum for future loss of €177,525. If one was to work on the basis that in the future the plaintiff was likely to be able to earn a figure of €25,000 per annum, the capitalised loss to age 65 is €114,405. Similar calculations were given by Mr Byrne for where the plaintiff might earn both €30,000 and €35,000 per year. In the case of €35,000 per year, there would be no actual loss at all based on the headline average figure of €36,000.

I am satisfied that it is reasonable to expect that the plaintiff would earn €25,000 in spite of his injuries and the limitations which they impose upon him. He is very well motivated and I am satisfied that he will try his utmost to get back to some sort of regular work, wherever he can pick it up. I sincerely hope that he can continue to find satisfaction and fulfilment by still getting some work in the area of films and TV. Taking that figure and Mr Byrne's calculations, I assess future loss of earnings in the sum of **€114,405**.

I have been informed that special damages to date have been agreed in the sum of **€28135**, which I am assuming for the moment to include agreed loss of earnings to date.

What remains is the assessment of general damages for past and future pain and suffering. I am satisfied that the plaintiff suffered a very significant injury in this accident in his neck and back. He has tried everything. He has had a cocktail of medication, trigger point injections, procedures such as cervical rhizolysis and lumbar rhizotomy. He has had a discectomy. He has tried physiotherapy. Not surprisingly he is slow to agree to undergo a spinal disc fusion. He has on the other hand got considerable relief from the spinal cord stimulator inserted by Mr McCrory. Not only has the injury impacted on his worklife, but it has also caused great upset in his personal and private life. He became depressed and it caused him to become irritable at home, which in turn led to difficulties between him and his wife. He went to counselling in an effort to improve things in that area of his life. He is a man to whom work is very important and who, without it, has suffered depression. I have for obvious reasons not recited the entire of the evidence given by the plaintiff and his doctors. But I have considered it all carefully.

I consider that a figure of **€65,000** is an appropriate figure to reflect the degree of pain, discomfort and distress caused to the plaintiff for his physical and emotional injuries in the past.

I am also satisfied that unfortunately there is no probability that the plaintiff's problems will ease even when these proceedings are now concluded, as can sometimes occur. He hopefully will continue to receive some amelioration of pain by use of the spinal cord stimulator, but I am satisfied that generally speaking the plaintiff will continue to have significant problems into the future and for the remainder of his life, in spite of his best efforts to keep going and get the most out of his life, both personal and work. He is only 46 years of age. I assess damages for future pain and suffering in the sum of **€75,000**.

The total of general damages is therefore €140,000. Agreed special damages as above and future loss of earnings amount to €142,540, making a total for general damages and special damages of **€282,540** for which there will be judgment in favour of the plaintiff.