Neutral Citation Number: [2011] IEHC 35

THE HIGH COURT

[2008 No. 6203 P]

BETWEEN

MICHELLE MURPHY (NÉE CONDON)

PLAINTIFF

AND

TOM ROCHE

DEFENDANT

JUDGMENT of Mr. Justice McMahon delivered on the 26th day of January, 2011

Introduction

1. The plaintiff was a front seat passenger in a car driven by her husband on 13th November, 2006, when the car she was travelling in was hit broadside, on the passenger side by a vehicle driven by the defendant. The car in which the plaintiff was travelling was driven into a third vehicle. The plaintiff is now thirty-six years of age and is married with two children, one of whom is sixteen years of age and the other, three years old.

2. The collision was a serious one and the plaintiff was frightened and was taken from the car to Cork University Hospital immediately after the accident. The defendant has admitted liability and the case is one of assessment of damages only.

The Injuries

3. The physical injuries which the plaintiff suffered are all of a soft tissue nature. In particular, the plaintiff was injured in her right shoulder, her neck, her back and her chest (ribcage) area. Recovery has been slow and the plaintiff has not been in a position to fully return to work since the accident. The problems for the plaintiff were complicated by the fact that she was in the early stages of pregnancy at the time of the accident. Initially, there was some uncertainty as to whether she was pregnant, but when it was subsequently confirmed, it naturally caused some apprehension and anxiety for the plaintiff during the pregnancy. Thankfully, however, the baby went full term and was born in good health.

4. The plaintiff claims damages for:

(i) her physical injuries;

(ii) loss of earnings;

(iii) anxiety for the fear and apprehension during her pregnancy and for depression which followed the accident.

Previous Injuries

5. In the course of cross examination, counsel for the defence drew attention to two previous accidents, which the plaintiff was involved in, and which the defendant suggested caused similar injuries to the plaintiff, and for which, it was claimed, the defendant should not be responsible.

6. The first of these incidents occurred in January 1996, when the plaintiff fell down a stairs in rented accommodation because of a defective banister rail. In that accident, she injured her neck, her right shoulder and her lower back. The plaintiff was compensated in the sum of €10,000 for those injuries. The plaintiff claims that they were minor injuries and gave evidence that she had fully recovered long before the present accident. Having heard her evidence and having read the documentation discovered to the defendant relating to this accident, I have come to the conclusion that any injuries which the plaintiff suffered in that accident had fully resolved shortly after it and have no bearing on the injuries which the plaintiff suffered in the present case. I refer, in particular, to medical reports from that time, discovered to the defendant, and which were compiled by Dr. Derek O'Connell, and forwarded to Peter Fleming, the plaintiff's solicitor at that time.

7. The second accident which the defendant drew attention to was a road traffic accident which occurred in July 2006, some four months before the accident the subject of these proceedings. The plaintiff's evidence in that matter is that it was a minor rear-ending of her husband's car while she was a passenger in it. No claim was made in respect of that accident, as it was a minor one. The cost of repairing her husband's bumper was paid by the insurance company. The plaintiff said that she had no injuries. She was, however, pregnant at the time and she took two weeks off from work. Dr. Susan Hill, a specialist in occupational medicine, gave evidence that because of the plaintiff's pregnancy problems at the time, and the tests associated with it, a two-week absence from her work was warranted. I accept the evidence of the plaintiff on this matter, namely, that she suffered no physical injuries in this accident, and that the loss of her baby at that time was not caused by this minor incident.

8. My conclusion, therefore, is that neither of these incidents has any bearing on the injuries which the plaintiff received in the accident, the subject of these proceedings and which occurred on 13th November, 2006.

The Plaintiff's Evidence

9. The plaintiff's main complaints initially related to a bruising and soreness in her pelvis area, soreness to her right shoulder, soreness and bruising in her chest (ribcage) area and to a lesser extent soreness in her neck and back.

10. When it was confirmed, however, that she was also pregnant when this accident occurred, it caused her great anxiety which ultimately developed into a depression after the baby was born. The fact that she was pregnant also restricted the medications and

the investigations (especially, the x-rays) which could be undertaken after the accident. With regard to the plaintiff's complaint about being depressed there was some suggestion by the defendants that this was normal postnatal depression and was unrelated to the accident which occurred in November 2006. I will deal with the evidence of Dr. Campbell (the Psychiatrist) on this issue later, but it is appropriate to say at this juncture that Dr. Derek O'Connell (the plaintiff's G.P.) testified (a) that the plaintiff was only some weeks pregnant at the time of the accident and (b) that he was treating the plaintiff for depression during the period after the accident and before the birth of the baby in July 2007. This clearly suggests that the plaintiff's complaint in this regard was not totally connected or due to the birth of her baby. There can be little doubt in any event that after the accident the plaintiff was "anxious" for her unborn child and I am not convinced that her subsequent depression was solely of the postnatal kind. Her natural anxiety after the accident may have provided a foundation for subsequent depression due partly to her physical injuries, the slowness of her recovery and to her natural "low" after the baby was born. I will address this more fully in the context of Dr. Campbell's evidence later in this judgment.

11. The plaintiff's injuries are apparently all of soft tissue variety. Various x-rays and scans have confirmed this. Normally one would expect such injuries to resolve within a reasonable period (frequently estimated to be between 12 and 24 months), but such progress is dependent on the nature of the trauma suffered and the vulnerability of the injured party.

12. After the accident, the plaintiff went to her G.P., Dr. Derek O'Connell, and when the prescribed medication was not having the desired effect she was referred to various specialists. Dr. O'Connell treated her conservatively with medications initially but he had to strengthen the dosage over the years when the plaintiff was not getting obvious relief. He referred her first to Dr. Mark Phelan because of her persistent problem with her right shoulder.

Dr. Phelan
13. When Dr. Phelan saw her first on 7th September, 2007, the plaintiff was complaining of a number of issues relating to her neck, her right shoulder and her chest area, which at that time according to Dr. Phelan was the most serious problem in his view. The plaintiff found the 12 hour shift at work very difficult for her and complained of pain in that area when she exercised and when she was lying down. He gave her some nerve blocking injections which gave the plaintiff some good relief for a couple of months. The witness indicated that the chest area was a difficult area to treat because of the constant movement of the chest. Scans did not help to identify the problems although a mild bulging of the disc showed up which Dr. Phelan said was not abnormal in a woman of the plaintiff's age.

14. The other complaint that the plaintiff had at that time related to her right shoulder and Dr. Phelan referred the plaintiff to Mr. Mahalingam, an Orthopaedic Surgeon, for this problem. Dr. Phelan also recommended to the plaintiff opium patches which were designed to control the pain by slow release of the drug through the skin. Dr. Phelan expressed the view that the plaintiff was genuine and was very anxious to get back to work, but was depressed because of her inability to do so. He said that it was difficult to give an accurate prognosis for her chest problems at the moment. The patch treatment had to be discontinued as the plaintiff developed an allergy which according to Dr. Phelan was not unusual. By April 2009, Dr. Phelan felt that the plaintiff's neck, back and shoulder were getting better. At that time, it was his view that the problems relating to the chest wall were beginning to dominate as the long term issue. In July 2009, Dr. Phelan felt it would be beneficial if the plaintiff could go back to work. The social contact would help the plaintiff and alleviate guilty feelings she had because her husband had to work longer hours while she was forced to stay at home. Dr. Phelan, however, was concerned about the 12 hours shifts and the nature of the plaintiff's job which involved twisting and lifting of repetitive nature. In cross examination, Dr. Phelan explained that the chest problems related to the internal mechanics of the wall of the chest which he asserted can be difficult to treat at the best of times.

Mr. Mahalingam (Orthopaedic Surgeon)
15. Mr. Mahalingam treated the plaintiff principally for her shoulder pain. He diagnosed a frozen shoulder and intervened (arthroscopy) through keyhole surgery with some success. The plaintiff reported good relief for a period of about two months. As Mr. Mahalingam explained, however, his intervention addressed a condition that was secondary to the main problem and pain could recur if the primary problem did not resolve. He gave the opinion that eventually the shoulder should fully recover and there would be no arthritis. He did not treat her neck or back. He confirmed that the plaintiff had a frozen shoulder and that she was genuine in her complaints.

Dr. Susan Hill (Occupational Physician)
16. Dr. Susan Hill is an Occupational Physician and a specialist in that area. She was engaged by the plaintiff's employer to examine and report on the plaintiff in relation to her ability to carry out her job, which as already noted involved some repetitive lifting and twisting over shift periods of 12 hour duration. She first saw the plaintiff on 7th December, 2006, in relation to the injuries which the plaintiff suffered in this accident. Prior to this, the plaintiff presented as a healthy girl with a good working record and Dr. Hill's practice had seen very little of the plaintiff except for the mandatory annual check-up ordered by the employers for all employees. Dr. Hill gave evidence that the plaintiff was genuine and was anxious to get back to work. The plaintiff's efforts to return to work, however, were not successful and Dr. Hill had reservations about the nature of the work, the 12 hour shift and the increased targets being imposed on the people in the plaintiff's shift at the time. Having described the various attempts by the plaintiff to resume her old job without success, Dr. Hill concluded that the main issue for the plaintiff is that she cannot now tolerate the work involved in her old job. The plaintiff's decision to go part-time in an effort to re-engage was fully justified. Dr. Hill was positive about the plaintiff accepting the new job now on offer as it involved no shift work (it was 8.30am to 5.30pm, four days a week and 8.30am – 1.00pm on Fridays) and was a lighter job. It was less well rewarded, however. She was hopeful that the plaintiff would recover fully in time and hoped that this might be within the next 12 to 24 months, but could not be certain in the plaintiff's case given her history. In cross examination, she confirmed that she had a note of chest pain in February 2007 and further notes of "anxiety about pregnancy" in December 2006 and January 2007, and one of "depression" in October 2008 following "the birth of the child".

Dr. Aisling Campbell
17. Dr. Aisling Campbell, Consultant Psychiatrist also gave evidence to the court. Dr. Campbell was first engaged on behalf of PIAB to assess the plaintiff and later, after the file was released back to the courts, she was engaged by the plaintiff's solicitor to furnish a medico-legal report. She recorded the plaintiff's medical complaints after the accident and gave evidence to the effect that the plaintiff in early 2007 was very anxious about the well being of her unborn baby; she was having nightmares of a small white coffin and her sleep pattern was broken. These understandable apprehensions, which could be described as "quite marked anxiety", continued after the child was born and later developed into what might properly be called depression by October 2007. Her medication increased from painkillers, to sedatives to anti-depressants over time. Although postnatal depression occurred in one in eight women, Dr. Campbell was of the view that the anxiety for her unborn baby and the chronic pain associated with her ongoing physical ailments contributed to the onset of the depression that manifest itself at this time. It could not be attributed solely to post-natal issues. She was further of the view that the depression resolved sometime later, after perhaps 8 – 12 months, and that her difficulties now were more properly described as anxiety and frustration at the slow recovery of her physical injuries and her inability to resume her work. There was no doubt that the plaintiff benefited from the social aspect of the workplace and it also improved her self-esteem. Dr. Campbell felt that the plaintiff needed to undergo an intensive pain management programme to address her ongoing physical problems,

but that such programmes were not readily available. An early return to suitable work would undoubtedly benefit the plaintiff. Dr. Campbell was of the view that while the plaintiff was "a poor historian" in her ability to recount her medical problems, she was genuinely trying to record her difficulties at all times. She found no element of exaggeration in the plaintiff's complaints.

Prof. Michael G. Molloy (Consultant Physician/Rheumatologist)
18. Prof. Molloy examined the plaintiff and reported on her on 6th November, 2009, 3rd February, 2010 and 26th August, 2010.

19. He was fully aware of the history when he first examined her in 2009. At that time he was concerned particularly about the injury to the chest wall and he ordered CT Scans, something he said he would not do unless he was seriously concerned. The scans were clear. The plaintiff clearly had soft tissue problems around her chest which he considered were induced by trauma. He said that it was very difficult to predict how long these problems would persist since the lung is a mobile organ and the injuries occur at the junction between the bone and cartilage. He also said that the shoulder injury may well persist into the future. He too felt that the nature of her job and the long shifts would be a problem and he recommended shorter and more socialable hours. He said he advised the plaintiff to go back to part-time work. He noted that the plaintiff was engaged in exercises and in particular had been swimming. In December 2010, the plaintiff complained of back and leg pain of a significant nature. He said that there was a spasm in her back and restriction of leg movement. He had ordered an MRI Scan but this had not yet been done. He confirmed that this would effect her gait. This was relevant because a private investigator's report dated 6th January, 2011, commented on the restricted walking movement of the plaintiff, feigned in his view, as she went to visit her solicitor on that day.

20. Prof. Molloy anticipated in the future that the plaintiff will have to resort to painkilling drugs when required and that the shoulder may continue to give problems into the future. She should engage with an active rehabilitation programme.

21. In cross examination, Prof. Molloy confirmed that what was involved was soft tissue injuries but he had a guarded prognosis. Nevertheless, he would encourage the plaintiff to re-engage with light work. He said he would hope for a resolution in a reasonable period but he continued to have a reservation in relation to her right shoulder. When it was put to him that the plaintiff had an incident 14 years ago and another minor road traffic accident 4 months before the accident in these proceedings, he said that these had not been mentioned to him, but if it had not caused a problem for the plaintiff she might not tell him. He confirmed that in his view the plaintiff was not exaggerating her complaints in any way.

Mr. Desmond White
22. Mr. Desmond White, a Vocational Rehabilitation Consultant also gave evidence. He saw the plaintiff in May 2010 and gave her advice relating to her work position. Taking into account the plaintiff's ongoing medical problems and the strain the former job was putting on her and on her family, he advised her to retrain for less physical employment. The problem was that even if she did retrain there were few suitable opportunities available now or in the foreseeable future. Mr. White recognised that the plaintiff's employers were one of the best in Cork and he acknowledged that the new job opportunity on offer to her now with these employers was "a perfect opportunity" for her to get back to work.

Dr. Brian Mulcahy (Consultant Physician and Rheumatologist, Clinical Senior Lecturer, UCC)
23. Dr. Brian Mulcahy examined the plaintiff on behalf of the defendant on 19th May, 2010. He confirmed that the plaintiff undoubtedly suffered soft tissue injuries as a result of the road traffic accident. He said that nothing unusual turned up on the MRI Scans. His evidence was that the plaintiff did not tell him of the fall she had on the stairs 14 years earlier and he would have expected that she would have disclosed this to him. When it was put to him that the plaintiff had said that she was only asked about previous road traffic accidents, he said that he would invariably ask about all previous accidents not only road traffic accidents. Of the recent road traffic accident (4 months earlier) he said that the plaintiff indicated it was only "a tip" and that her back stiffened but it resolved in a couple of days. He agreed that some soft tissue injuries are slow to recover and the recovery time is difficult to predict on occasions. A resolution might normally be expected within 12 to 24 months, but in a person as young as the plaintiff, he estimated "that within ten years after the accident most would have recovered".

24. On examination of her, he felt that the plaintiff might have been exaggerating in her forward bending movements which he felt should not have been as stiff as the plaintiff indicated. Because of this remark in his report, the question of whether the plaintiff was genuine or not was put to the plaintiff in cross-examination. She vehemently denied feigning her injuries. Each of the other treating doctors was asked by the court to comment on this suggestion and unequivocally and unhesitatingly they declared that the plaintiff was genuine in her complaints and was most anxious to return to work.

25. I found Dr. Mulcahy's evidence was measured and reasonable and his comment that he felt the plaintiff was exaggerating when she was asked to do her forward back movement should not be taken out of context. It must be recalled that Dr. Mulcahy only saw the plaintiff once in an examination that lasted approximately 20 minutes. The plaintiff herself indicated that she had good days and bad days.

Michael Kelleher (Private Investigator)
26. Mr. Kelleher was engaged by the defendants to observe the plaintiff and he did so on two occasions. The first observation occurred on 22nd December, 2010, when the plaintiff was observed outside her house. Mr. Kelleher said he saw the plaintiff's husband and her young child as well as the plaintiff in the front garden of the plaintiff's house and that the husband was playing with the child but that on one occasion the plaintiff made a snowball and threw it at her daughter. Mr. Kelleher did not observe any restriction in the movement of the plaintiff on that day. The plaintiff in her evidence when it was put to her said on that occasion it could have been her daughter that was observed as the investigator was some 300 yards away from the scene and there were no photographs of that incident before the court. After that, the plaintiff and her husband went in a car to the shopping centre at Blackpool where she walked around the shops for approximately an hour and fifty minutes. The plaintiff was observed as she walked from shop to shop and Mr. Kelleher said that she did not seem to have any restriction in movement. She did not sit down as far as the investigator was concerned during that period. Photographs of this incident were before the court. The plaintiff said in her evidence that she would probably have taken medication before she went on the shopping outing and that on that day she was wearing new MBT shoes which her husband had just bought her.

27. The second occasion where the plaintiff was observed was on 6th January, 2011, and in this instance, Mr. Kelleher said he followed the plaintiff as she and her husband drove to town. After they parked the car he followed the couple as they made their way to her solicitor for a consultation. He said that he noticed a marked restriction in the plaintiff's movements on that day and the insinuation was that as she prepared to go to her solicitor in connection with this case she adopted a more restricted gait. Photographs of this incident were also exhibited to the court. Having carefully examined the photographs, eighty six in all, I am of the view that the photographs disclose nothing which would detract from the plaintiff's version of events. As to the allegation that the plaintiff was seen linking her husband as they walked to the solicitor's office, this could hardly something to be held against the plaintiff, as married couples frequently link each other for no other reason than to display affection and solidarity. Sometimes they

might even do so for support. That some other photographs from 22nd December, show the plaintiff smiling does not warrant any adverse conclusion either. The photographs on their own are of no assistance to the court and certainly do not compel an adverse conclusion in relation to the plaintiff's veracity. Neither is the evidence of Mr. Kelleher such that it would lead me to conclude that the plaintiff was not genuine in her complaint. There were no photographs or evidence of the plaintiff bending or lifting or running or jumping or stooping or carrying heavy shopping bags or engaging in any activity that would contradict the case she makes in these proceedings. In any event, as already mentioned, since the issue was raised, the court asked each of the medical practitioners who treated the plaintiff as to what their view was in relation to the genuineness of the plaintiff and each unreservedly affirmed that she was a genuine person who suffered injuries and who was very anxious to return to work.

Conclusion on the Plaintiff's Injuries at Present
28. With regard to the plaintiff's injuries which have been outlined above, I note and accept the following in relation to her present condition:

> (1) Neck: The plaintiff indicates that her neck is a lot better now although she does get spasms now and then if she moves quickly. She can deal with this, however.
>
> (2) Back: She said her back was bad in September but it has improved since then.
>
> (3) Shoulder: She said her shoulder is better now and she is sleeping on it and it has shown an improvement in recent months.
>
> (4) Chest area: She said her chest area is giving her some problems still.

29. Bearing in mind, the reservations which Prof. Molloy had about the plaintiff's right shoulder and her present chest complaints, I have formed the view that the plaintiff will continue to recover and I estimate that on the evidence before me she will have made a good, if not full, recovery within a period of approximately two and a half years, by which time her pain and suffering will have eased considerably. I am not satisfied, however, that the plaintiff will be able to go back to her old job then, or at anytime after that. Given her history now I think it unlikely that her old job would be available to her with her present employers. The evidence of Mr. Desmond White, the Vocational Rehabilitation Consultant, which I accept, is relevant in that regard. I address below the appropriate multiplier that should be applied in relation to future earnings.

30. Damages
31. Based on the medical and other evidence before me, I make the following awards in favour of the plaintiff:

> (a) Pain and suffering to date: €45,000
>
> (b) Pain and suffering into the future: €25,000
>
> (c) Medical expenses incurred by the plaintiff to date have been agreed in the sum of €9,563.

32. Loss of earnings to date have been set out in a schedule compiled by the plaintiffs. These are calculated on the basis of lost wages while the plaintiff was out of work because of injuries suffered in the accident and the reduction in pay she received when she re-engaged on a part-time basis. The evidence of the plaintiff's absences from work, including the dates and the reduced payments, given by her employers, were accepted by the defendant. The defendant did, however, contest the sum of €7,728 which the plaintiff claimed when she availed of an extension to her maternity leave from the 9th January to the 30th March 2008. I am satisfied that the plaintiff is not entitled to this sum in the circumstances and I disallow it. I do not accept the defendant's objection to the plaintiff's decision to stay out of work from 26th May to the 4th of July 2007, when the baby was born. In view of the anxiety and apprehension caused by the accident during the pregnancy the plaintiff was entitled to exercise caution at that late stage of her pregnancy. The amount due under this heading therefore is €77,353.

Future Loss of Earnings
33. Mr. John Logan, an actuary called on behalf of the plaintiff made some calculations taking into account the likely loss of income which the plaintiff will suffer into the future. The evidence, which I accept, is that the plaintiff will not be able to go back to the job which she held before the accident. The nature of this employment involved the repetitive physical exertion which the plaintiff has tried to resume without success since the accident. Her former position also involved 12 hour shifts which she admits she is no longer capable of doing for the foreseeable future.

34. Fortunately, in the present climate at least, her present employer can make two other positions available to the plaintiff at lower remuneration. Her former job carried an annual salary of €44,873 whereas the other jobs on offer, a part-time (likely to become permanent in the future) and a new fulltime post (referred to as "the innovation position) carry gross annual salaries of €22,436 and €32,293 respectively.

35. Given the plaintiff's history of employment with the current employer, her undeniable wish to return to some form of employment, preferably with her current employer, and the undisputed medical evidence of the benefits for the plaintiff of re-engaging in the workplace, especially for her self-esteem and her general psychological well being, I am of the view that the plaintiff will be back in the workforce with her old employer in the near future. The evidence from her employer was that she was to start back last Monday in the part-time position, but did not do so presumably because of her case being listed in this Court for hearing. Ms. Julia Kelleher (Human Resources Department) for her employer also confirmed that the plaintiff is an applicant (seemingly the only applicant) for the "innovation position" and indicated to the court that she is likely to be successful. I take this to mean that it is reasonably probable that she will be engaged in this post. The appointment is probationary only for 12 months, but again the evidence of Ms. Kelleher was that given the plaintiff's history with the company, her experience and her good record, it is likely she will be made permanent in that position after the probationary period has expired. Nothing, of course, is certain, but I hold, given this evidence, and all the circumstances referred to above, that this is likely to be the eventual outcome and I base her future losses on this conclusion.

36. This, of course, means that the plaintiff's new salary will be somewhat lower than her previous salary: the old salary was €44,873 and the new salary will be €32,293 *per annum*. The difference therefore is €12,580 *per annum* or €119 net *per* week. This last figure has been advanced by Mr. Logan and is accepted by the defendants.

37. I am not prepared to conclude, in the present uncertain economic climate, at national and international levels, that the plaintiff could, had she not been injured, fairly assume that her employment, even with her current supportive employers would be guaranteed until she reached 65 years of age. Given the unprecedented economic uncertainties, I am of the view that the court should apply the

appropriate multiplier as if the plaintiff's continued employment in her own job would only have continued for a further 10 years from 7th January, 2011. The appropriate multiplier, according to Mr. Logan and not contested by the defendant, for such a period is €468 for every euro lost *per* week which I have determined above to be €119. On these figures, therefore, I calculate the plaintiff's loss of future earnings to be €55,692. I have no reason to make any further deduction from this sum since the evidence in relation to the plaintiff's health prior to the accident was not such that her ability to work for the next 10 years was in question. The difference in the plaintiff's pension entitlements when she reaches 65 years, based on the difference between her old salary and her new salary, was not significant according to the evidence of Mr. Logan, the actuary called by the plaintiff. I have borne it in mind (as well as the reduced future gratuity on retirement) when I was making the earlier assumptions and so I make no separate award in respect of these. There are no other *Reddy v. Bates* considerations which would cause me to reduce this sum further.

38. The total due to the plaintiff therefore comes to €212,608.