Neutral Citation [2014] IEHC 372

THE HIGH COURT

[2011 No. 4928 P]

BETWEEN

TONY SMYTH

PLAINTIFF

AND

C&M CONSTRUCTION LIMITED AND BEHAN QUARRIES LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hedigan delivered on the 21st day of July 2014

1. This case proceeds as an assessment of damages sustained in an accident at work by the plaintiff on 6th October 2008.

2. What seemed, at first, a fairly minor accident has had consequences for the plaintiff that few could have foreseen at the time. He sustained a fracture dislocation of the radial head of his left elbow. Following immobilisation in a sling for three weeks, he had an open reduction internal fixation. His elbow was immobilised in a hinged brace for four months and he had extensive physiotherapy. Subsequently, he developed ulnar nerve compression. This resulted in further (21st February 2011) surgery by Mr. Mullett in which he had ulnar nerve decompression and transposition of the nerve. He also developed left neck and left shoulder pain in his upper arm, radiating down to his hand and his little and ring fingers. He also developed numbness of his left hand. He had and has decreased power in his upper left limb with the result that he can drop things. His grip is unreliable. Medication was of little help. The plaintiff described his pain at this stage as excruciating. Mr. Mullett states he has done all the surgery that he can. Any further surgery may do more harm than good. Mr. Mullett is not surprised the plaintiff cannot work. Mr. Walsh, consultant on behalf of the defence, says that he thinks the plaintiff has had a poor outcome. He said in evidence that he found the plaintiff to be a complaint and genuine patient. His subsequent symptoms are, he says, unusual but well recognised. His grip deficit is unsurprising. Pain is the most troubling symptom.

3. Due to his continuing severe symptoms, the plaintiff was referred to Dr. Keaveney, the pain specialist, on 14th February 2012. He diagnosed a Complex Regional Pain Syndrome (CRPS). He prescribed a course of injections. Although they gave temporary relief, the plaintiff regressed quickly after them and pain returned. Some improvement was achieved but he remained symptomatic. The injections failed to break the cycle of pain. Mr. Keaveney decided upon treatment that he described in Court as the last resort in such cases. He sees about six such cases a month. This treatment is the insertion into the patient's body of a Spinal Cord Stimulator (SCS). It is done in an invasive surgical procedure which involves the placing of a battery under the surface of the skin at an abdominal location and the internal fixation of an electrical stimulator at the top of the spine. It requires hospital admission and anaesthesia for placement. So, also, do the two replacements that most people need in their lifetime. It involves running wiring between battery and stimulator and down the spine. It is uncomfortable. Upon sudden movement, it can precipitate electric shocks to the patient. It interferes with sleep. On being asked to describe his sleep pattern, the plaintiff said he had no sleep pattern. It is, however, capable of reducing pain levels and has done so for the plaintiff according to his pain consultant to a mild to moderate level. He, still, however, has pain. If the SCS is taken out, he will likely return to his previous pain levels of up to 10 out of 10. He has very noticeable scarring at shoulder and abdominal level as a result of the implantation of the SCS. He must be careful of moving his neck. In his left arm, down to his left hand, movement is limited. He has numbness there. His skin in this area is very sensitive to any touching or banging. Unpleasant paresthesia continues. His grip is very unreliable and he drops things quite frequently.

4. The plaintiff presented as a remarkably genial and resigned person. He struck me as a completely honest witness. He has dealt with his unfortunate problems over the last six years with great fortitude, and the fact that he could do as much as he can, although this is very limited, is a credit to this positive approach. The medical advisers, including the defendants, consider him to be a genuine patient. I have no doubt of that either. He is, unfortunately, a poor victim of the kind of injury he has sustained. He had a job to which his talents seemed well suited. He is a bright and helpful person and had developed skills in work described as of the semi-skilled engineering type. It is for this reason that he was highly paid and earning, according to employer records, approximately €914 per week gross. This approximated to just under €50,000 per annum. He worked in the construction industry. He seems to have been very much a team worker, cooperating well with others. He enjoyed his work and the camaraderie of his fellow workers. He is now quite isolated and lonely as a result of no longer working. However, he has had a very limited education. He does not have a Leaving Certificate. He has a significant literacy problem which he has been recently tackling in adult learning classes. Mary Feely, his vocational assessor, whilst acknowledging his commitment to this learning class, does not think that he can improve enough to help his job prospects. He cannot, for instance, read a delivery docket. Thus, from being very well situated in good employment, he is now in a situation where, Ms. Feely says, I think with justification, that no major employer will touch him. His employability level, thus, is poor. He has shown motivation and Ms. Feely thinks that if there is work to be found he will find it. She is not, however, optimistic. I think her assessment is probably correct.

5. There is a considerable difficulty in trying to make any kind of scientific assessment of his loss of earnings. In future terms, pay rates such as he had in 2008, are unlikely to be matched for the foreseeable future, even were he capable and available for his pre-accident work. His chances of finding any kind of work are very hard to assess. The value of any such work is even harder to assess. Looking back at loss of earnings to date- these also give rise to some difficulty. He was out of work just over six months post-accident. In early 2010, he was made redundant. He has not worked since. Mr. Byrne has assessed his potential net earnings to date at €154,519. Since, save for a few weeks, he was on illness benefit and then invalidity pension all the time, none of the social welfare he received is deductible pursuant to s. 286 of the Social Welfare Consolidation Act 2005. However, the above figure is predicated on his being in employment at his pre-accident pay level all that time. This is an improbable proposition in the light of his redundancy and the recession that caused it, together with the continuing difficulties in the construction industry. It is, again, not possible to make any kind of scientific assessment of the income he might have earned during those six years. Thus, the Court is forced to make some general assessment of his loss of earnings to date and into the future.

6. The six months he was off work should have yielded the plaintiff an income of half of his annual net earnings which, at that time,

were approximately €36,000. Thus, his loss in this regard, on the basis of Mr. Byrne's report, should be €18,000. From 2010 onwards, when he was made redundant, is very difficult to assess. The recession in the construction industry and the economy in general was then in full swing and continues today, albeit that some relief seems to be emerging. His chances of employment had he not been injured are hard to assess. Certainly, it would have been difficult to find work. Yet, as Ms. Feely stated, and which, on my assessment of the plaintiff, I accept, if there was work to be found, he would have found it. The four and a half years from January 2010 to date, at his full earning capacity, would have been €81,000. Doing the best that I can in assessing his probable loss during this period, taking account of the chance he might not have found work for all or part of the period, I would allow half this amount *i.e.* €40,500. Thus, taking account of the six months he was off work from the accident to mid-2009, and adding this to the above, I assess the plaintiff's loss of earnings to date in the amount of €58,500.

7. All the same variables as to the availability of work and pay rates, were he uninjured arise again, but not in quite so marked a fashion in relation to future loss of earnings. I think the plaintiff would probably have been able to find work in the future. What the pay level would be is difficult to assess. Less than during the boom times is obvious, but how much less is not so clear. Any such assessment must, however, be measured against his chances now in his injured state of finding work, whether in employment or as a self-employed man. Again, doing the best that I can, I assess his future loss of earnings in the amount of €200,000. Thus, the plaintiff's total loss of earnings to date and into the future I assess in the amount of €258,500.

8. The plaintiff has had a very hard time of it since this accident. I consider that none of his problems are attributable to himself. I am satisfied that he was a genuine patient and a truthful witness. His positive, genial philosophy has been a great credit to him and was most impressive throughout this lengthy and difficult hearing. He has met his problems with great fortitude and good grace. He has suffered very considerably since this accident, and regrettably, will suffer more pain and difficulty for the rest of his life. I will allow an amount of €75,000 to date and €75,000 into the future in terms of his pain and suffering.

9. To summarise, I will award damages as follows:

Agreed specials to date: €42,500

Future medication: €39,237

SCS replacement x 2: €34,080

Future GP visits: €2,378

Loss of earnings: €258,500

Pain and suffering: €150,000

10. This all adds up to a figure of €526,695. I have considered this figure in order to decide whether I should not round it down to some lower amount on the basis that that, taken globally, it is excessive. I do not, however, think that that is the situation in this particular case. There will, therefore, be a decree in the amount of €526,695 in favour of the plaintiff.