



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 165

Record No. 2014/699

**Peart J.
McGovern J.
Baker J.**

BETWEEN/

DENISE ROWLEY

APPELLANT

- AND -

BUDGET TRAVEL LIMITED (IN LIQUIDATION)

RESPONDENT

JUDGMENT of Mr. Justice McGovern delivered on the 4th day of June 2019

1. This is an appeal against an order and judgment of Kearns P. delivered ex tempore on the 15th November, 2012. In the proceedings, the appellant claims damages for personal injury loss and damage as a result of an accident that occurred whilst she was on holiday in Gran Canaria on the 18th May, 2008. As the appellant and her sister were preparing to depart for the airport at the end of their holiday, the appellant fell when descending a ramp at her hotel. In attempting to break her fall, she stretched out her hands and suffered an injury to her right wrist. At the same time, she also complained that her back was tender although this is not referred to in the medical reports and only gets a brief mention in the evidence.

2. Although liability was in issue in the pleadings, when the matter came on for hearing liability was withdrawn and the matter proceeded as an assessment of damages. At the trial in the High Court the only witness was the plaintiff. Two medical reports from Mr. Andrew C. Macey, a consultant orthopaedic surgeon, were admitted in evidence. The transcript of the trial (including the ex tempore judgment) runs to just barely over 10 pages which, perhaps, gives some indication that the issues were quite straightforward.

3. Having heard the evidence of the appellant and considered the two medical reports, Kearns P. awarded €20,000 for pain and suffering to date and €5,000 for pain and suffering into the future, and agreed special damages of €1,060 making in all a total of €26,060. This Court has been informed that on the 10th November, 2011 the respondent tendered the sum of €36,500 by way of compensation for the plaintiff's loss and damage. As the appellant failed to beat the tender, the President directed that she was entitled to her costs up to the date of tender. The perfected order does not make clear whether the costs awarded were on the Circuit Court scale or the High Court scale. Neither does the order show whether the respondent recovered costs from the date of the tender or whether there was any differential costs order made.

4. The appeal is against quantum and, in particular, is brought on the basis that the sum of €20,000 awarded for pain and suffering to date and the sum of €5,000 for pain and suffering into the future was inadequate and against the weight of the evidence and that each of those payments was disproportionately low having regard to all of the evidence.

Applicable legal principles

5. There is a large measure of agreement between the parties to this appeal as to the legal principles that apply to this Court's role in reviewing the level of damages assessed by a judge in the High Court. In *Reddy v. Bates* [1983] I.R. 141, the Supreme Court held that:-

"In order to warrant interference with an award of general damages, the disparity between the views of the individual members of this Court and each item of the award, however large it may be expressed in isolation, must be a significant percentage of that item of the award and, as a general rule should not be less than 25 per cent..." *per McCarthy J.* at p. 151.

6. While on its face this might appear a rather crude method of dealing with the issue, it is helpful to the extent that it gives a general view as to what level of disparity might properly begin to attract the attention of an appellate court. In *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 I.R. 578, Fennelly J. stated at p. 583:-

"The more or less unvarying test has been, therefore, whether there is any "reasonable proportion" between the actual award of damages and what the Court, sitting on appeal, "would be inclined to give"..."

7. In *Nolan v. Wirenski* [2016] 1 I.R. 461 at 471, Irvine J. in the Court of Appeal stated:-

"Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in the light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries."

8. In *Shannon v. O'Sullivan* [2016] IECA 93, Irvine J. set out in the judgment of the Court some guidelines that might be of assistance in assessing the severity of any given injury and the appropriate sum to be awarded in respect of general damages. Among the criteria which she mentions are the following:-

- “(i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?
- (ii) Did the plaintiff require hospitalisation, and if so, for how long?
- (iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?
- (iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?
- ...
- (vi) While recovering in their home, was the plaintiff capable of independent living?
- ...
- (ix) For how long was the plaintiff out of work?
- ...
- (xi) Finally, what was the nature and extent of any treatment, therapy or medication required?”

9. Section 22 of the Civil Liability and Courts Act 2004 requires the judge hearing the case to have regard to the book of quantum. In respect of wrist fractures the relevant passage is as follows:-

“FRACTURE

The wrist contains many bones, radius, ulna and eight carpal bones, all of which make up the wrist joint. In view of this complexity and variety it was difficult to provide very specific ranges for each “wrist fracture”. Fractures that involve a joint are usually considered more complicated than others due to the increased impact on movement.

MINOR €19,300 to €36,800

Simple non/displaced fracture to any of the bones of the wrist which have substantially recovered:

In respect of soft tissue injuries such as wrist sprains the figure for a minor injury is up to €27,800.”

10. The figures in the book of quantum are not broken down into general damages for pain and suffering to date and into the future but are global figures.

Discussion

11. The task of this Court is to look at the evidence before the President and see where the appellant’s injury fits into the legal scenario outlined above.

12. The appellant was born on the 20th May, 1984. She was twenty-four years old at the date of the accident and is now aged thirty-five. She sustained an un-displaced fracture of the distal right radius at the very tip of the ulna styloid. She was treated in a hospital in Gran Canaria but was not detained and was able to board her flight home. Her wrist was put in a cast and this remained for a period of six weeks. She then had some physiotherapy. She was not admitted to hospital as an in-patient on her return nor did she require any surgery for her injury. In a medical report dated the 27th July, 2010 Mr. Macey stated that up-to-date x-ray showed an anatomical healing of the fracture including the ulna styloid and the joint appeared normal. When carrying out some pushing exercises against a door, a ganglion appeared. He said in his report “This is a secondary issue rather than the primary cause and given its size today I would not feel any intervention to this specifically is warranted”. It is unclear from this remark whether the ganglion was caused by the fracture or just appeared spontaneously. There was some diminution in her grip strength in the right hand which was her dominant hand.

13. In a second report of the 5th July, 2012, Mr. Macey described how the appellant remained aware of some difficulties, for example, in lifting a kettle and she felt her wrist tired easily with some numbness and tingling. She worked as a dental nurse and receptionist and found her wrist got tired in the course of her job. Her grip strength and pinch grip was lower on the right side than on the left notwithstanding the fact that she is right-handed. At that time the ganglion had enlarged and Mr. Macey felt it might warrant intervention. The appellant declined the offer of intervention as she did not want to have a scar on her wrist or hand. In his second report, Mr. Macey felt that her fracture had healed satisfactorily but she had some ongoing symptoms and loss of function particularly with her grip strength and, he felt that she did have a “clunk” on the scaphoid shift test indicating that the joint was not functioning in a truly congruent fashion. He felt that her current situation was permanent and the incongruity to which he referred carried with it a small risk of post-traumatic arthritis in the future.

14. Although the plaintiff made a claim in respect of a back injury, it was not referred to in the medical reports. At p. 3 of the transcript she stated that her back was tender after the fall but because her wrist was sore she concentrated on that aspect of her injury. At p. 8 of the transcript she was asked at Q. 48 whether her back gave her any trouble and her response was “from time to time”.

15. There is no record of a complaint with regard to her back in either of the medical reports from the consultant orthopaedic surgeon. The President did refer to it briefly by saying “[a]nd she had some initial back pain following the accident but that again seemed to have cleared up”. It is clear that the back pain was not a matter of significance in this case.

16. So far as the wrist injury is concerned, it does not appear to have been very significant and it would seem to fit within the definition of a minor wrist injury as described in the book of quantum above. In my view the award of €20,000 damages for pain and suffering to date, while low, was not disproportionately low having regard to the fact that the fracture was un-displaced, she was not detained in hospital and did not require surgery. Indeed, in the first of his two medical reports the orthopaedic surgeon seemed to be of the view that the x-rays showed that the fracture had largely healed without any problems.

17. Having said that, the second of the two medical reports does establish a situation which involves on-going discomfort with a certain amount of impaired function in the wrist which will be permanent. She also has been left with ongoing diminution in her grip

strength. There is a small risk of post-traumatic arthritis.

18. Kearns P. was a very experienced judge in the area of personal injury litigation. It is important to remember that the plaintiff was the only witness who gave evidence and the President had an opportunity to assess her evidence. An appellate court is always at something of a disadvantage in that regard.

19. However, bearing in mind that note of caution it seems to me that the President was in error in only awarding €5,000 damages for pain and suffering into the future.

Conclusion

20. Applying the legal principles outlined earlier in this judgment to the award made by the President, I am satisfied that the sum awarded for pain and suffering into the future was disproportionately low and that this Court is entitled to substitute its own figure. Taking into account the appellant's age and the fact that she will have on-going symptoms (albeit of a low grade nature) it seems to me that the appropriate figure for pain and suffering into the future is €15,000. Adding that to the figure of €20,000 for pain and suffering to date one arrives at a figure of €35,000 for general damages. That figure approximates to the higher end of the scale in the book of quantum for a minor wrist injury involving a non-displaced fracture and the lower end of this scale for a moderate injury to the wrist. The medical evidence is that her fracture healed satisfactorily and that there is "...a minimal risk of adverse sequelae in the future". By adding the agreed figure for her special damages of €1,060 the adjusted figure for general and special damages should be €36,060. I would therefore allow the appeal and vary the damages to that extent.