

## THE HIGH COURT

[1999 No. 3892 P]

BETWEEN

PATRICIA EGAN

PLAINTIFF

AND

ATHLONE INSTITUTE OF TECHNOLOGY

DEFENDANT

**Judgment of Mr. Justice Gilligan delivered on the 31st day of July, 2007.**

1. The plaintiff's claim is one for assessment of damages only.

2. The plaintiff was born on 11th day of March, 1958. She resides at Bellair, Ballycumber, in the County of Offaly and her husband is a self employed mechanic. The plaintiff has four children ranging in ages from approximately 18 to 27.

3. Having completed her Leaving Certificate the plaintiff attended at the Regional Technical College in Athlone and successfully completed a certificate course in science/applied biology with credit. She subsequently commenced the applied biology/fine chemicals pharmaceutical course in the Institute of Technology Galway successfully qualifying in 1978. She took up employment initially in 1978 with Cadburys in Coolock where she worked as a laboratory technician and in 1980 she commenced employment in the Regional Technical College, now the Institute of Technology, in Athlone as a laboratory technician. The plaintiff initially experienced the onset of respiratory symptoms in 1994 with these symptoms gradually increasing. The plaintiff underwent a hysterectomy in July 1996 following which she availed of sick leave until May 1997. During this intervening period her previously mentioned respiratory symptoms resolved. On returning to work the plaintiff experienced a recurrence of these symptoms and attended with her General Practitioner. She was eventually diagnosed with upper respiratory tract burning and was referred for specialist opinion and attended with Dr. Conor Burke Consultant Respiratory Physician. The plaintiff worked on until October 1997 and has not returned to work since.

4. During the course of the plaintiff's employment as a laboratory technician with the defendant I am satisfied that in the period immediately prior to October 1997 she was exposed to inhaling/ingesting a cocktail of chemicals in circumstances where noxious fumes from the chemicals being used in the laboratory were inadequately ventilated from the area of work and brought back into circulation through an air condition system into the laboratory where the plaintiff worked and as a result of which the plaintiff complains of having suffered personal injuries loss and damage.

5. Initially a full defence was delivered on the defendants behalf denying liability and pleading contributory negligence alleging that the plaintiff was entirely the author of her own misfortune alleging that any injuries as sustained by the plaintiff arose in circumstances which were wholly unforeseeable to the defendant and accordingly did not give rise to a liability in law on the part of the defendant. This defence was delivered on 26th October, 1999 and remained in place thereby putting the plaintiff on full proof both in respect of liability and of the personal injuries as sustained by her until a point in time within two weeks of the case actually being listed for hearing liability was conceded by the defendants and it was accepted on their behalf that the case proceed as an assessment of the plaintiff's damages only.

6. It is of some significance against the background circumstances of this case that an exchange of expert reports took place pursuant to the provisions of S.I. 391 of 1998 on or about the 31st day of January 2007 and this put the defendants on notice of the nature and extent of the allegations that were been made by the plaintiff in respect of noxious fumes from the particular chemicals which she alleged she had been working with and to which she was exposed as a result of the defective ventilator/air conditioning system that was provided by her employers the defendants herein.

7. In my view the nature and extent of the plaintiff's injuries can be divided into the categories of respiratory injury and physical/psychological injury.

8. It has been agreed between the parties that a book of medical reports and expert reports as agreed both on the plaintiff's and the defendants behalf be handed into court and in this regard I have received some 18 reports as contained in the book of medical reports and I deem these reports commencing with the first report from Marina Elliot Optician of the 31st day of February, 1998 and culminating with the eighteenth report from Dr. John Rice of the 3rd day of May, 2007 read into the record. I have read and considered the content of each of these reports.

9. Dealing with the respiratory injuries I am satisfied on the basis of the content of the medical report and the evidence of Dr. Conor Burke Consultant Respiratory Physician who treated the plaintiff that she suffered chronic rhinitis and chronic asthmatic bronchitis.

10. As of the 1st day of October, 1998 Dr. Conor Burke indicated that the plaintiff was not fit to return to work as a laboratory technician where she would be exposed to working with chemicals but in his view she was fit for all work on a regular and ongoing basis provided undue exertion or undue pollution was not an integral part of such work. Dr. Conor Burke does refer to the fact that the plaintiff had improved significantly since cessation of exposure in October 1997 but in his view as of October 1998 the plaintiff had borderline asthma.

11. Dr. Conor Burke reviewed the plaintiff in September 2003 and took the view that she had very significantly improved and her asthma was fully resolved but she was left with symptoms of mild bronchitis. He took the view that her prognosis in terms of lung function was excellent and he believed her lung function was likely to remain normal but she would be left with a somewhat lowered cough threshold permanently which would have some impact on the quality of her life and her employment prospects. Dr. Conor Burke reviewed the plaintiff again in April 2007 and again he indicates that the plaintiff was much improved, her breathing capacity was normal and she was on no medication. She was however attending with Gerry O'Flynn her General Practitioner on a number of occasions for upper respiratory tract and throat symptoms and has required antibiotics on a number of occasions.

12. The plaintiff was seen by Dr. Brendan Buckley Consultant Physician in December 1998 and at that stage the plaintiff was complaining of recurring sensitivity with the sensation of burning in her mouth and throat recurring respiratory tract infections and extreme sensitivity to respiratory stimuli such as cigarette smoke which make her feel very unwell, gave her a headache and occasionally make her sick.

13. The plaintiff as early as December 1998 was worried that she would suffer long term damage to her immune system.

14. Dr. Buckley was of the view that the plaintiff may well have some residual respiratory sensitivity as a result of exposure to corrosive chemicals and it is plausible that she will continue to have an increased tendency to respiratory tract infections. However he was confident that the plaintiff's worries about long term immunological effects are without any foundation and he reassured her strongly of this. He suggested that she should strongly consider getting back to work as her respiratory disability is little more than that to which many people in the general population who have chronic mild allergic rhinitis or chronic sinusitis are subject.

15. Dr. Brendan Buckley took the view that the plaintiff maybe significantly affected by post traumatic stress disorder a very common phenomenon when people are exposed at work to what they believe is a poisoning incident and he was satisfied that this may require further evaluation.

16. The plaintiff was seen in May 1999 by her general medical practitioner Jeremiah O'Flynn and on examination the plaintiff was complaining of tiredness all the time but admitted to being in good sprits and denied depression. She expressed anger with her work situation and felt that she had been left in limbo and had loss of social contact and was unable to participate in her hobbies of card games because of the irritating effect of cigarette smoking at these events would have on exacerbating her nasal and eye symptoms. The respiratory examination at that point in time was clear.

17. The plaintiff was referred to Dr. Siobhan Barry Consultant Psychiatrist and reference is made to the fact that the plaintiff in 1996 was having medical problems by way of vaginal infections uterine prolapse and also polyps. Surgery was carried out in July 1996 but post operatively the plaintiff recovery was somewhat complicated which required further surgical intervention and ultimately the plaintiff was not able to return to work until May 1997.

18. The plaintiff advised Dr. Siobhan Barry that she was subjectively miserable, was constantly exhausted had poor concentration and was forgetful. She indicated that she was no longer interested in matters which had previously captivated her and she spent a great deal of time ruminating on events of the previous few years. Her mental condition was largely one of pre-occupation with the fact that developments had taken place to the building which had housed the laboratory where she worked and she ruminated on the callous and uncaring attitude of her employers the defendants herein and their secretive and unhelpful attitude when she has attempted to learn the truth about safety procedures in the laboratory.

19. Dr. Barry took the view that it was difficult to speculate whether the plaintiff's mental condition pre-dated or was a consequence of events of October 1997 but medication was prescribed.

20. The plaintiff was reviewed in October 2003 by Dr. Barry and it is of some significance that on two previous occasions the plaintiff had been advised to commence a course of anti depressant medication which she did for a short period of time but then ceased taking the medication and did not return for any subsequent out patient appointment.

21. Dr. Barry took the view that the plaintiff was suffering from depression which appeared to be running a chronic course that the onset of this condition may be associated with work related events that had their onset in 1997.

22. When the plaintiff was seen in August 2005 by Dr. Jerry O'Flynn she was complaining of feeling unwell, of lethargy, ear discomfort, aches and pains, cold peripheries and thirst. Her appetite was normal and her bowels were working normally. She had ongoing vaginal symptoms. She complained of sleep disturbance with early morning wakening and of low mood and was weepy, had decreased concentration, was suffering anxiety, and had loss of libido.

23. Dr. O'Flynn who was the plaintiff's treating general practitioner noted in particular that the plaintiff felt very angry and let down that following 19 years of working with the defendant institute her complaints and issues had been totally disregarded. This was having a detrimental effect on her psychological well being and she was having great difficulty in dealing with the psychological consequences of this and she has been poorly responsive and poorly compliant with anti depressant medication. One of the issues in his view which may help to move matters on is a resolution of the legal proceedings.

24. Dr. O'Flynn sums up his medical examination by indicating that the plaintiff had ongoing low mood and clinical depression had a chronic fatigue type syndrome and lethargy had unresolved grief in relation to the way management had dealt with issues, does not enjoy family life and her effectiveness of doing housework is greatly curtailed. He felt that the prognosis must be very guarded and that it would be unlikely that the plaintiff would make a return to her previous employment and he recommended that the current legal proceedings be brought to a quick conclusion and that this should assist in returning the plaintiff to a normal level of activity.

25. Dr. Siobhan Barry reviewed the plaintiff in July 2007 and took the view that the plaintiff was depressed and was quite pessimistic about her future. She remains very ruminative about the changes in her life and the part her employers have played in the deterioration in the quality of her life. It is of some significance that Dr. Barry points out in the report that the plaintiff had last been reviewed by her in October 2003 and the report as prepared and dated 6th July, 2007 was prepared at the request of the plaintiff's solicitors and arises out of a review of the plaintiff on 4th day of July, 2007.

26. Professor MX Fitzgerald Consultant Respirator Physician saw the plaintiff on the defendants behalf in December 1999 and he was of the view that by that time the plaintiff's asthmatic condition had subsided and she was no longer on any medication. He took the view that her lung function tests and physical examination of the chest were entirely normal and was of the view that the plaintiff's asthmatic condition was transient and would not return. However as regards the complaints of recurring sinus infections he took the view that these would be a source of continuing irritation.

27. He took the view that it was clear that the plaintiff perceived herself as a victim of circumstances a person who had had to suffer the attitudes of an uncaring management and that she felt abandoned to her own devices. As a result she became extremely depressed and had required anti depressant treatment from a consultant psychiatrist and required ongoing counselling.

28. His overall assessment was that the plaintiff was suffering an emotional overlay due to the uncertainty that has surrounded everything and the fact that she perceived that she had been rejected and was a victim of the system.

29. Professor Fitzgerald reviewed the plaintiff in March 2000 and again was of the view that the symptoms of stress and anxiety which had persisted were related to the plaintiff's anger and resentment with the way she had been treated.

30. On further review in March 2004 Professor Fitzgerald found on physical examination that the plaintiff's lungs were clear and there was no evidence of any wheezes or crackles. Her nose was slightly sniffy and he could find no evidence visually of inflammation in her mouth tongue lips or the skin of her face.

31. Overall the plaintiff was complaining of irritant symptoms in her lips mouth throat and sinuses but in Professor Fitzgerald's opinion there were no physical findings in any of these areas. The plaintiff complained of generalised tiredness which was non specific and which in the opinion of Professor Fitzgerald was related to stress anxiety and depressive symptoms and these all related to her worries that she had been seriously damaged by the chemical inhalations, that her immune system had been impaired and that there may be further consequences of her original exposure.
32. On physical examination the plaintiff's lung functioning testing showed that she had no abnormalities of any kind. Reassuringly Professor Fitzgerald took the view that the plaintiff had perfectly normal lung function with no evidence of asthma.
33. In Professor Fitzgerald's view the plaintiff's main problem related to her psychological mal-adaptation to what occurred. She is convinced says Professor Fitzgerald that despite all evidence to the contrary she has been seriously damaged and also that there maybe future consequences such as serious damage to her immune system. In his opinion there is no evidence whatsoever of a deficiency in her immune system and there is no evidence of any kind that such problems will occur in the future and in his opinion such consequences are not recognised sequelae of simple chemical inhalation.
34. Professor Fitzgerald reviewed the plaintiff in April 2005 and in his overall opinion the situation was much the same as previously. He makes the interesting comment that generally individuals cannot be convinced that their belief that they had been severely chemically poisoned does not have any basis in fact. As a result they not uncommonly spend years seeking alternative opinions and fall prey to all kinds of quacks and alternate medicine practitioners.
35. The prognosis is even worse when active litigation is in train for lengthy periods and the prognosis for the psychological and physical health of such individuals is depressingly poor in that their convinced belief in the physical basis for their symptom prevents them from adopting the mindset and the willingness to participate in psycho therapy that is necessary for resolution of such issue or at least partial amelioration.
36. O'Sullivan and Devine Rehabilitation Consultants assessed the plaintiff on the defendants behalf on 10th August, 2006 and they took the view that the plaintiff should consider participating on a training course with a view to returning to paid employment as a matter of urgency in light of the fact that she had not been cleared medically to return to her pre October 1997 position with the defendant. The assessors were of the view that the plaintiff needed a job that would challenge her intellectually and at the same time satisfy her need for socialisation. They took the view that the plaintiff presented well and was neat in appearance and was alert and demonstrated an ability to concentrate while completing the 128 questions as asked of her. They took the view that the plaintiff should work from her knowledge base and use all her transferable skills to secure alternative employment.
37. Dr. John Rice examined the plaintiff on the defendants behalf on 7th February and 2nd May, 2007 and he took the view that the plaintiff was unfit to return to work with the defendant in her capacity as a lab assistant in the science area which was her previous employment but was fit to return to work in an administrative capacity but would need strong reassurance about the safety of her environment and he felt that with appropriate management and support her sensitivity about her return to work with the defendant should ease through the course of time.
38. I am satisfied accordingly on the medical evidence that the plaintiff suffered respiratory damage but has made a very substantial recovery. She has some ongoing problems with her nasal area and has some recurrent infections but I do not consider that these are of any major significance.
39. The principal aspect of injury is the plaintiff's multiplicity of non specific complaints and I am satisfied to accept the views of Professor Fitzgerald that these symptoms are related to stress anxiety and depression following the plaintiff's strong belief that she has been chemically poisoned and that she could develop further illness in the future, and further as a result of the anger which she has held since October 1997 and continues to hold as regards the very fact of having been exposed to chemical fumes at her place of work and as to the manner in which she has been treated and further due to the stress of the litigation, the nature of the full defence as filed, the pleas of contributory negligence against her and the length of time that the case has taken to come on for hearing.
40. Having had the benefit of assessing the plaintiff in the witness box I am satisfied that the reality of the situation that exists in this case is that the plaintiff a relatively short period of time after October 1997 was not fit and was never going to be fit to return to work as a laboratory assistant working with chemicals but was perfectly fit to return to alternative employment in an administrative capacity with the defendant.
41. I am also satisfied that the plaintiff certainly as of November 2001 was anxious to return to work. Her employment gave her considerable enjoyment and she derived an attractive remuneration package therefrom. It clearly would have been in the plaintiff's best interest and I would have thought the defendants best interest also if the plaintiff could have been facilitated in some way with her wish to return to suitable employment within the defendant organisation especially against her pre-existing significant period of service and the fact as was eventually conceded that she was not in anyway responsible for what occurred and the responsibility was in fact that of the defendants. Without going into significant detail as regards various meetings that were held correspondence that passed and the eventual failure to come to any resolution of the plaintiff's employment position it is reasonable to conclude that the issue of the plaintiff's return to employment was quite simply very badly handled.
42. The correspondence on this issue is of importance.
43. It is clear from the letter from the defendant's solicitor of 21st December, 2001 that following an extremely good meeting with the plaintiff she indicated that she was not keen on returning to her previous employment and the defendants were actively looking at alternative positions which may be available for her and they hoped to be in a position to revert in this regard early in the new year. The plaintiff followed up this situation with a letter through their solicitors on 5th February, 2002 and by way of a letter of 21st March, 2002 Mr. McKenna on behalf of the defendants wrote offering the plaintiff her original post as a laboratory technician or alternatively an administrative role. It was patently apparent as of March 2002 that the plaintiff could not return to her pre-accident employment working with chemicals as a laboratory assistant.
44. What is significant is that as against the background where the plaintiff was still an employee of the defendant although not being paid by them Mr. McKenna was indicating that he was looking forward to resolving the matter of the plaintiff's return to gainful employment in a mutually acceptable way.
45. By July 2002 Mr. Shay Ellis on behalf of the defendant was regretting any distress or annoyance the delay process in finding alternative suitable employment was causing to the plaintiff and was indicating that it was the defendants wish to reach an optimum

solution for the plaintiff and the defendant institute.

46. In September 2002 a formal offer to work in an administrative position subject to the completion of a medical examination was indicated and in October 2002 the plaintiff attended with Dr. Deirdre Murphy a nominated Occupational Physician who carried out a medical examination of the plaintiff on the defendants behalf to assess her fitness to take up administrative employment with the defendant.

47. It then appears that Dr. Deirdre Murphy failed or declined to provide a medical report arising out of her examination of the plaintiff other than that Dr. Murphy herself appeared to indicate to the plaintiff that she was not going to pass her as medically fit to take up the administrative position as offered. Mr. McKenna in evidence confirms that in fact the defendant never ever received a medical report and apparently no effort was made by the defendant to arrange an alternative medical examination against a background where throughout 2002 the plaintiff was indicating her willingness to return to the administrative position.

48. It then appears that from January 2003 onwards there was little or no communication with the plaintiff until a further meeting was arranged in 2006 and the plaintiff was offered alternative employment as an administrator subject to medical assessment.

49. In my view on the totality of the evidence and having had the benefit of assessing the plaintiff as a witness she was effectively at all times fit to go back to work in an administrative capacity wanted to do so and the defendants failure to take her back in an alternative capacity is difficult to comprehend.

50. In any event as a result of the offer as made by Mr. McKenna in evidence and of his accepting the content of the recent report from Dr. John Rice it is now agreed that the plaintiff will return on 1st October, 2007 to recommence her work with the defendants in an administrative role. I take the view that a fair benchmark as to the plaintiff's capacity to earn is the salary that has presently been offered to her by the defendant in the administrative position which is €37,642 per annum together with appropriate pension and lump sum entitlements.

51. As regards the position to date the court is left to try to resolve the situation whereby the plaintiff probably relatively soon after October 1997 was pressing to get back to a suitable position with the defendant company and they were unable to facilitate her due to whatever reason was found by Dr. Deirdre Murphy or no reason as the case maybe but which reason is unknown to the court unknown to the defendant company and unknown to the plaintiff other than that the plaintiff has indicated that Dr. Murphy told her that she was not going to certify her as fit for employment with the defendant company. Against the totality of the medical evidence I find it difficult to comprehend how Dr. Deirdre Murphy could have advised the plaintiff herein that she was not fit to return to employment in any capacity with the defendant company. But the solution to this aspect remains unknown by virtue of the fact that Dr. Deirdre Murphy never supplied a report and the defendant failed to arrange for an alternative medical examination or alternatively failed to have the plaintiff herself present a medical report indicating that she was fit to return to work in a particular capacity.

52. It is in my view of significance that the defendants against this background failed to take any other steps to try to assist the plaintiff to return to work, kept her on as an employee of the defendant and on their books and at all times the defendant were in essence assuring the plaintiff that something would be worked out for her and those reassurances eventually culminated in an email of 12th July, 2007 whereby the defendants were confirming that the plaintiff could resume her duties either as a technician or in a role at Grade IV in the Administration Department, and when subsequently clarified, subject to medical examination. Mr. McKenna in evidence has indicated that there is a chance that the plaintiff may be able to return to work as a laboratory technician in a different field not working with chemicals but I would be reluctant to make a finding that on the balance of probabilities the plaintiff will subsequent to her return to work on 1st October next secure such employment on the basis of the evidence adduced before me.

53. In approaching the assessment of damages I am satisfied to come to a conclusion that on the balance of probabilities on the basis of the evidence adduced and as a result of the injuries sustained by the plaintiff following her exposure to chemical fumes in the period prior to October 1997 she was no longer fit to return to her pre-accident employment as a laboratory technician working with chemicals. She was however in my view as previously indicated herein within a relatively short period of time of October 1997 fit to return to alternative employment such as in an administrative capacity but due to the manner in which the matter was handled by the defendants she was kept on the books of the defendant company, given reassurances as regards a return to employment and in the circumstances I take the view that it was reasonable for the plaintiff not to have resigned her employment with the defendant company and to have sought out alternative remunerative employment and this view is borne out by the situation that has now arisen whereby it is agreed that the plaintiff can start work on 1st October, 2007 in an administrative capacity with the defendant institution.

54. I take the view that the plaintiff's respiratory injury is not of very significant consequence although I do accept that on the evidence that the plaintiff may have ongoing respiratory tract infections which will require treatment by antibiotics.

55. I take the view that as regards the plethora of complaints as raised by the plaintiff these symptoms relate to stress anxiety and depression following the plaintiff's strong belief that she has been chemically poisoned and that she would develop further illness in the future and in addition I am quite satisfied that the plaintiff's condition has not been assisted by the manner in which the defendants have treated the entire situation and in particular the circumstances that pertained at the time of the plaintiff's exposure to chemical fumes the nature of the full defence as filed on the defendants behalf and the allegations that in effect the plaintiff was either responsible for what occurred or was the author of her own misfortune the lengthy delay in the proceedings coming on for a hearing and most significantly in this case the defendants failure to support the plaintiff as their employee by getting her back to work in an alternative capacity when at all times it was self evident that the plaintiff could not return to work in any position which involved contact with chemicals.

56. The vast majority if not all of these stressors have now been removed or significantly ameliorated and the plaintiff will receive as is her lawful right damages which the court considers fair and reasonable in all the circumstances to compensate the plaintiff and I take the view that on the balance of probabilities the plaintiff will make a reasonable recovery in respect of the various complaints which she advances before the court.

57. I am influenced in this view particularly by virtue of the fact that the plaintiff attended on several occasions with Dr. Siobhan Barry a Consultant Psychiatrist but failed to take her advice and then did not go to see her between 2004 and 2007 when a further medical examination was arranged.

58. This accordingly brings about a situation whereby the plaintiff is entitled to recover her net loss of earnings from October 1997 up to the present time and this figure is agreed in the sum of €202,225.00. The plaintiff is also entitled to compensation for the diminution of her pension by reason of the lost years of employment which figure has been agreed in the sum of €212,058.00. There is

a claim for interest on the agreed loss of earnings to date in the amount of €57,287.00 which is calculated at Courts Rate Interest. In the exercise of my discretion I take the view that the plaintiff is entitled to fair and reasonable compensation for the actual loss to her of her income to date but a calculation at 8% per annum in accordance with Courts Rate Interest from October 1997 would in my view be inappropriate and in the circumstances I take the view the appropriate figure for loss of interest is a figure of €20,000.00.

59. Accordingly there shall be an award of damages to date in respect of loss of earnings loss of pension and interest of €434,283.00.

60. The agreed differential in respect of future loss of earnings based on a differential between what the plaintiff would have earned if she was continuing on as a laboratory assistant and the work which in my view she is fit to undertake in an administrative capacity to normal retirement age has been agreed at €127,696.00. I am satisfied that the plaintiff is entitled to recover a differential in respect of her loss of Pension entitlement and lump sum, but in my view in the particular circumstances of this case it is appropriate that these figures be reduced by 10% to allow for the various factors as set out in *Reddy v. Bates*.

61. Accordingly in respect of future loss of earnings pension and lump sum the plaintiff will be entitled to an award of €212,259.00 made up as to €114,926.00 in respect of future loss of earnings €77,249.70 in respect of loss of pension and €20,084.00 in respect of loss of lump sum.

62. I have already outlined the nature and extent of the personal injuries as sustained by the plaintiff and my view on the nature of the evidence as adduced as to the future outcome. I take the view in all the circumstances that the plaintiff is entitled to the sum of €100,000 in respect of general damages broken down as to €80,000 to date and €20,000 in the future.

63. The plaintiff is entitled to her agreed special damages in the sum of €7,995.00.

64. Accordingly there will be an award of damages in the plaintiff's favour in the sum of €754,537.00.