Neutral Citation: [2014] IEHC 242

THE HIGH COURT

Record No. 2011/10995P

BETWEEN

ALAN HUGHES

PLAINTIFF

AND

DEREK CARTER, DAMIEN CRINNEGAN AND ANTHONY COCOMAN

DEFENDANTS

JUDGMENT of Ms. Justice O'Hanlon delivered on the 9th day of April 2014

Introduction
1. In this case, the matter of liability was clarified at the commencement of proceedings and was conceded by the first named defendant preserving the issue of contributory negligence. There was no issue as to liability outstanding in relation to the plaintiff and the second or third named defendants. The first named defendant agreed to indemnify all three defendants. This case involves a tragic accident where the plaintiff was gravely injured when the cherry picker he was invited to stand on toppled over.

The Plaintiff's Background
2. The plaintiff gave evidence to the Court that he was 45 years of age, originally from Edenderry, County Offaly, and worked as a general operative at Intel for 13 years. Before that, he worked as a butcher for a year. He did metal fabrication work for approximately seven years before that. He confirmed that he had been a sports fanatic.

3. When asked about the accident, he said that he remembered right up to the time he hit the ground and he thought that after that he blacked out but he could remember the fire brigade and the ambulance and then nothing. He was asked by the first named defendant to get into the basket of the cherry picker to hold a branch for him while he was cutting it, to hold it away from the ESB wire. He remembered when he was in the basket, just before it tumbled over; the first named defendant said to him "this thing's going to go".

4. The plaintiff said that he did an average Leaving Certificate and was the youngest of his family and that his mother was widowed. When he got his redundancy from Intel, he intended applying to NUI, Maynooth for a degree in Science and he was accepted to do the foundation course. If he had done well in that, he would have been accepted into the degree course. The foundation course would have started in September 2010.

5. The plaintiff confirmed that if he is nervous of tired, he has shaking of the right arm and right hand which is worse at those times but confirmed that his hand is moving all the time. The plaintiff gave evidence that his hand is not so bad if he is holding something, *e.g*. the pen he uses is chunky and weighted and he usually eats using heavy cutlery. The plaintiff explained that his writing is getting better but is slow in comparison to the way he used to write. He confirmed that he can move his head to a degree but found he had gotten into a habit of turning around his body as well because it was not as uncomfortable. He said his neck is not as painful as it was at the beginning, but is constantly uncomfortable. He confirmed that if he moves to the front, he can get his arm up, but out to the side, he could not move it past a certain point. He gave evidence that he could touch his nose, if he does it slowly, but if he does it quickly, he could miss it could go anywhere. He described his difficulty with mobility and balance *e.g*. tasks like going upstairs. He said it is uncomfortable if he stands for a long time. He described the tiredness in his arm and pain not being as bad as before, but that the constant movement in the right arm was constant and worse when he was nervous or tired.

6. The plaintiff then described doing exams, some in 2011, and Junior Cert English and Mathematics in 2012. He also did English History and Physics in 2012 and got an A1 in Physics at Ordinary Level Leaving Certificate. He would like to continue towards Science teaching.

7. The plaintiff described tiredness after an hour's study, headaches at the back of his head, problems with sleeping, and turning a lot trying to find a comfortable position. He is unable to cope with more than a one-to-one conversation, and that he has to go to another room when overburdened. He had a happy marriage and family life but it means he does not spend as much time with his family.

Mr. O'Brien's evidence
8. Mr. David O'Brien, consultant neurosurgeon, gave evidence on behalf of the plaintiff in relation to the treatment of the plaintiff at Beaumont Hospital. The plaintiff was described as an emergency admission to the Department of Neurosurgery at Beaumont Hospital on 13th July 2010. Mr. O'Brien described the plaintiff as having complex spinal disorders with an acute non-haemorrhagic infarct in the right cerebellar hemisphere. He described surrounding cerebellar oedema or swelling which was increasing in size on serial CT brain scans. He indicated that the initial CT scan revealed a Hangman's fracture *i.e*. a complex fracture of the C2 (second cervical vertebra of the neck). He described significant fractures of the thorax with a medistinal haematoma, a sternal fracture and an anterior lip fracture of the L3 vertebral body (the third lumbar vertebra). He described a clinical deterioration such that the plaintiffs Glasgow Coma Score (level of consciousness) was reduced and he required intubation and ventilation. The Glasgow Coma Score was initially 12-13/15 but deteriorated to 8/15 which required the aforesaid interventions. Mr. O'Brien described the insertion of a drain to reduce pressure on the skull. An MRI scan on 13th July 2010 confirmed significant compression of the posterior fossa and this led to his transfer to Beaumont Hospital. The plaintiff was reviewed on 14th July as a complex case, and because of an external ventricular drain having been inserted; anti-coagulation/anti-platelet medication which would normally be considered had to be deferred.

9. On 18th July 2010, the complex cervical fracture was fixed with a C1/C2 transarticular screws with C4 lateral mass plates and a C2/C3 anterior cervical discectomy and fusion. Post-operatively, he was weaned off ventilatory support and he was obeying commands on 20th July 2010. He was subsequently extubated that day. Having been seen by consultant neurologists, nutritionists, speech and language therapists, physiotherapists and occupational therapists and neuro-rehabilitation specialists, the plaintiff was

transferred back to Tullamore Hospital on 4th August 2010.

10. Three months after the accident, the plaintiff was reviewed by Mr. O'Brien. At that stage, he was found to be able to ambulate independently but had significant right cerebrellar signs of his upper limbs and lower limb *i.e*. problems with coordination of the right upper and lower limb. He had 80% to 90% restriction of rotation of his cervical spine secondary to the fixation. He also had coarse ataxia (imbalance) on his right side and mild ataxia dysarthria (some difficulty with speech) and a limited range of movement of the neck accompanied by pain. He had a tremor in the right upper limb which was improving and he was independent of personal care and of feeding but using adapted weighted cutlery. He was independent in all transfers including floor to stand. Mr. O'Brien gave evidence of the plaintiff having a serious balance issue at that stage. The areas of difficulty included tandem standing, single leg stance and dual stance.

11. When reviewed by Mr. O'Brien on 30th March 2011, there was significant improvement in his cerebellar function. His gait had improved immensely as had his speech. He still had moderate right cerebellar signs. He was on Tramadol and Neurontin and it was his intention to slowly wean him off the Tramadol medication. It was noted that he had pain on passive movement of the right shoulder, particularly in abduction. He was referred to his GP and asked that he be referred to a local orthopaedic surgeon in Tullamore.

12. In relation to his summary and conclusion, Mr. O'Brien felt that the plaintiff had suffered a complex fracture to his upper cervical spine as well as significant trauma to his thorax resulting in a fracture to his sternum with an underlying haematoma of his mediastinum. He had a fracture of his TH vertebral body and L3 vertebral body. He had initially been transferred from hospital in Tullamore to the Mater Hospital where his cervical and thoracic injuries were treated conservatively. He was transferred back to Tullamore Hospital where he subsequently deteriorated. It was at that stage that the right cerebellar infract was noted. When reviewed by Mr. O'Brien on 30th March 2011, nine months after the accident, he had made significant physical recovery but still had a neurological deficit. The doctor gave evidence that on 11th May 2012, when the plaintiff's wife was present at the assessment, the finger to nose test proved difficult and the plaintiff could not walk fast, it was unsafe for him and he had jerking eye movements and imbalance. His speech was affected and he found him to have significant neurological deficit. It was unlikely that there would be any real improvement. He felt that he would be unable to return to unassisted employment. He referred to the fact that Mr. Lung treated the plaintiff for his right shoulder. Stairs were proving a problem as was balance and he had to have a handrail. He had significantly slow gait. He had to think about his steps and there was a basic problem of coordination on the right side in particular. He also indicated that surgery regarding the right shoulder might be required in accordance with Mr. Lunn's assessment. The doctor specifically indicated in his second report that he did not think that the accident would reduce life expectancy.

13. Ms. Susan Tolan, occupational therapist and vocational assessor, produced a vocational assessment report dated 23rd July 2012. She had assessed the plaintiff on the 23rd of July 2012. She had the benefit of a GP's report of 11th July 2011 from Dr. Philip Brady, both reports from Mr. O'Brien dated 23rd June 2012 and 29th June 2012, and a report from Mr. Lunn, dated 11th May 2011. Ms. Tolan described the plaintiff as unlikely to work again because of the nature and severity of his injuries. She described him as a highly motivated man determined to regain the function he had lost. She felt that his present level of functioning falls short of what would be required in an open employment setting and set out a number of significant difficulties he would have in terms of attempting to rejoin the workforce. She described him as having an invalidity pension paid to people regarded as permanent incapable of employment.

14. Ms. Feely, vocational rehabilitation consultant, gave evidence on behalf of the defence in relation to the future employment prospects of the plaintiff. She did not feel he was a marketable candidate given the level of disability he has. She agreed with the conclusions of Ms Tolan as to the type of problems the plaintiff would encounter in his daily life in terms of the loss of amenities of life as a result of this accident. Cognitively, she felt his concentration is impaired and that he was frustrated and finding it difficult to adapt to such a changed life. Even thought she considered the plaintiff to be a well motivated and determined person, she was satisfied that he was never going to be fit for employment in the open market.

15. As to the plaintiffs contention that but for his accident he would have retrained and become a science teacher, neither occupational therapist was satisfied that this was a likely scenario. Reference was made to high unemployment in the Midlands area. Ms Feely stressed the fact that it would take six years before a teaching graduate obtains a permanent position. That would have left the plaintiff aged 54, and would make it difficult for the plaintiff to have a substantial career as a teacher.

The issue of contributory negligence

16. The plaintiff's son gave evidence. He is repeating his Leaving Cert and is 18 years of age. He confirmed that the first named defendant approached the plaintiff to ask him to hold back a branch because there were electrical cables. He and his father had been working at turf at the back of the house. He saw the basket going up and he heard something like a machine falling. The whole machine fell on its side with its claw in the air. It was falling when he heard the noise and his father was still in the basket. There was hedge bordering the Tyrrell's land. Once it reached Tyrrell's, the plaintiff's son could not see but he ran to his father and heard him groan and there was no eye contact.

17. Mr. Keenan, who had been in the basket, cutting branches, accepted that he had no training nor had the plaintiff in relation to the use of this basket. He accepted that neither he nor the plaintiff had used a safety harness. Mr. Keenan was shown a photograph, taken shortly after the accident, showing the stabilisers on the machine up and not in place as they should have been. From this, I find that the plaintiff was not guilty of contributory negligence.

18. The plaintiff's engineer, Mr. Conor Murphy, gave evidence that it was a non integrated machine known as a cherry picker with a basket. It could not be used with the basket without the stabilisers being down. If properly set up with stabilisers it should not move. He also said that training was mandatory for this machine for it to operate successfully. It was gross negligence to have the stabilisers up. He confirmed that there was no attachment in the basket itself.

The Actuarial evidence

19. Mr. Lynch, Actuary of Seagrave Daly Lynch Actuaries, gave evidence in relation to a report prepared by Mr. Nigel Tennant, an actuary of that firm. Mr. Lynch calculated that he might have a net weekly loss of €564 as calculated for a 17-year period between 2016 (when ordinarily he would have been in a position to compete for employment as a secondary school teacher) and aged 65. On a 3% actuarial basis and using the latest Irish population mortality statistics, the capital value of each Euro per week of loss during those 17 years is €589. He indicated that a loss of€564 per week had a capital value of €327,600. I think it preferable to rely on the figures in respect of second level teaching as opposed to employment as a laboratory technician, given that second level teaching was what the plaintiff wished to do.

20. Mr. Peter Byrne, Actuary of Joseph G. Byrne & Sons Consulting Actuaries, gave evidence on behalf of the defence in relation to the financial loss into the future taking 3% as the average rate of interest in excess of the future annual rate of increase that would

have occurred in the plaintiffs income should he not have been injured. Mr. Byrne gave loss of future earnings as a capitalised figure by multiplying the future net loss per week by the appropriate multiplier. He indicated that if the plaintiff had not been injured, he could have earned €400 or €500 gross per week

21. On reading the actuarial evidence adduced before the court, I prefer the analysis produced by the defendant's actuary, as equating more closely to the reality of the plaintiffs situation had this accident not occurred.

The deductibility of social welfare benefits
22. The question arises as to the deductibility of any social welfare benefits available to the plaintiff prior to the trial since the date of the accident. The agreed illness benefit figure is €54,838, the figure itself being agreed between the parties as applicable in terms of what the plaintiff received from 10th July 2009 to 10th July 2014, being a 5-year period. The issue is whether or not this is deductible under s. 2 of the Civil Liability Act 1964.

23. Section 2 of the Civil Liability (Amendment) Act 1964 sets out at s. 2 as follows:

> "2.-In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of-
>
> (a) any sum payable in respect of the injury under any contract of msurance,
>
> (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury."

24. Under the Social Welfare Consolidation Act 2005, s. 286(1) sets out:

> "286.-(1) Notwithstanding section 2 of the Civil Liability (Amendment) Act 1964 and section 285 , in assessing damages in any action in respect of liability for personal injuries not causing death relating to the use of a mechanically propelled vehicle, there shall be taken into account the value of any rights arising from those injuries which have accrued, or are likely to accrue, to the injured person in respect of disability benefit or invalidity pension under Part 2 for 5 years beginning with the time when the cause of action accrued."

Sub-section (3) sets out:

> "(a) in assessing damages in any action in respect of liability for personal injuries not causing death relating to the use of a mechanically propelled vehicle, which is required to be covered by an approved policy of insurance, where the action is instituted on or after 30 March 1984, and
>
> (b) in assessing damages in any other action in respect of liability for personal injuries not causing death relating to the use of a mechanically propelled vehicle, where the action is instituted on or after 4 April 1990."

25. It is contended on behalf of the plaintiff that the monies should not be deducted as it is in the form of an invalidity pension which precludes work and is a substitute for earnings. On the basis of commonsense, it makes no sense to reduce personal injuries general damages by the value of a pension which is given to provide income in substitution for earnings.

26. It is further submitted that to do so would confound with s. 2 of the Civil Liability Act. It confounds common law principle regarding the deductibility of compensating benefits. Reference is made to a text by Mr. Whyte S.C[1] at p. 206, para. 4.10.02 in which the case of *Parry v. Cleaver* [1970] AC 1 is discussed. In *Parry*, Lord Reid observed that the common law has treated the deductibility of compensating benefits in the context of personal injury actions as "depending on justice, reasonableness and public policy". It is submitted that the general rule should be of non-deductibility of such benefits. Counsel further sets out that there is no absolute standard of compensation for non-pecuniary loss in personal injuries actions. An award in respect of pain and suffering and loss of amenities of life consequent upon injury is, in the view of the court, making the award a reasonable satisfaction for the injuries sustained.

27. As is set out at para. 4.10.03, the general rule at Irish law is that compensating benefits are not taken into account in reduction of the plaintiff’s damages for loss of earnings or other pecuniary benefits in a personal injuries action. Section 306A of the Social Welfare Consolidation Act 1981 is now s. 286 of the Social Welfare Consolidation Act 2005.

28. It was submitted on behalf of the defendants that the court has to take an overall view of matters in terms of general damages. While it is conceded that there were serious injuries in this case, the cap applies to catastrophic injuries. This is not a case of catastrophic injury. There has to be proportionality between awards. It was submitted that the plaintiff in this case is not a stretcher case and is able to ambulate. The defendants' case is that the specific amount for invalidity pension for the 5-year period should be deducted and that a deduction from past and prospective earnings is in order.

29. I would distinguish Section 286 as having no effect on the facts of this case. When examined in a commonsense manner it fails to be seen on a logical basis how Section 286 could be utilised to deduct the plaintiff’s disability pension. While the cherry picker was indeed a mechanically propelled vehicle in the technical sense, it was not the property of the plaintiff, it was not being operated by the plaintiff, and any insurance attached to the picker was not held in the name of the plaintiff. It was not in motion in any direction and was not in use on any public roadways. The plaintiff was merely standing in the basket of this mechanically propelled vehicle, at the request of the defendant.

30. Furthermore, it is plainly obvious that the cause of the plaintiff’s injuries was not the mechanically induced propulsion of the cherry picker, but rather instability and toppling caused by a negligent disregard on the part of the defendant by not utilising the stabilisers on the cherry picker. The accident would not have occurred had the vehicle been secured.

31. In this regard, I would reject the Section 286 argument for the above reasons.

Conclusions
32. After hearing the evidence placed before the court, a number of findings have to be made. With regards to whether the plaintiff would have become a science teacher after his accident, on the balance of probability I find that, arising out of his dedication and motivation towards his goal, I find that it would be probable he would have achieved this, but for the accident.

33. Furthermore, it is clear from the medical evidence and the plaintiff’s submissions on the severity of his condition that the plaintiff

will never really be able to work again in the labour market, arising out of his unemployability which stems from his various physical and neurological problems.

34. I find as a fact that it is probable that the plaintiff would have obtained parttime teaching hours at least, had this accident not occurred, earning between €400-500 gross per week until retirement and would make an award of €228,600 for future loss of earnings. I deduct a total of 25% from this figure and allow an award in the sum of €228,600 for future loss of earnings. I have reached this figure by taking an average gross figure of €450, which works out at €400 net, which works out at €304,800 when a multiplier of 762 is applied. I am allowing for a discount of twenty percent owing to the contingencies as set out in the judgment in *Reddy v Bates* [1984] IRLM 197. I am allowing a further five percent reduction regarding earnings from now into the future which would be low paid entitlement and would inevitably have work associated costs.

35. I hereby award the plaintiff general damages for pain and suffering to date of €250,000 with further damages of €125,000 in respect of future pain and suffering.

36. I also award special damages of €37,333.89, as agreed between the parties

Orders
37. The total award to the plaintiff is therefore €640933.89

38. An order for costs in favour of the plaintiff against the first named defendant, for all costs including reserved and discovery costs, to be taxed in default of agreement.

39. There will also be an order allowing a stay of 21 days after perfection in the event of an appeal, subject to payment out to the plaintiff of €450,000.

[1.] Cousins, "Social Security Law in Ireland", Kluwer Law International