THE COURT OF APPEAL

Ryan P.
Irvine J
Peart J.

Court of Appeal no.: 2015/67

Margaret Payne

Plaintiff/Respondent

and

John Nugent

Defendant/Appellant

Judgment of the Court (ex tempore) delivered on the 10th day of November 2015 by Ms. Justice Irvine]

1. This is an appeal against the decision and judgment of High Court (Cross J.) dated 15th January 2015. The proceedings before him on that date concerned a personal injuries claim brought by the plaintiff in respect of a road traffic accident which occurred on 19th December 2012 at Sundrive Road, Dublin. On that occasion the plaintiff was travelling as a back seat passenger in the car which was rear ended by the defendant's motor vehicle.

2. The trial judge having heard the evidence over two days assessed general damages for pain and suffering to date in the sum of €45,000, pain and suffering into the future in the sum of €20,000 and he then awarded agreed special damages of €2,985. It is against that award that the defendant appeals. The appeal made before the court today is a little different from that which was set out in the notice of appeal.

3. To summarise, Mr. Declan Doyle S.C on behalf of the defendant makes the fairly straightforward argument that the general damages awarded both in respect of pain and suffering to date and into the future were simply excessive and were not within the permissible range having regard to the evidence. In support of that submission he has drawn the court's attention to a number of factors.

> (i) The plaintiff's medical condition was entirely managed by her general practitioner, Dr. Donoghue and her treatment, from an active perspective, had ended in March 2004 –fifteen months post accident.
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> (ii) Between March 2004 and the date of the trial the plaintiff did not receive any treatment for her back injury.
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> (iii) He refers to the fact that while the plaintiff also sustained a neck and shoulder injury this was one which, having regard to the evidence, had cleared within a period of seven months.
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> (iv) Insofar as the trial judge compensated the plaintiff for a psychological injury, the only evidence available to the court apart from that of the plaintiff herself, was that contained in the report of Dr. Cumiskey, consultant psychiatrist, who was retained by the plaintiff's solicitor not to treat the plaintiff but merely to advise on her condition.
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> (v) Insofar as there was any ongoing symptomology at the date of trial, and he does not dispute that the plaintiff was still then symptomatic, he submits that taking all of the medical reports into account the plaintiff injuries were relatively minor given that she was not receiving any ongoing treatment
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> (vi) He concluded his submission by asserting that notwithstanding the plaintiff's own evidence and taking into account all of her expert reports, the award made was well outside that which would be acceptable for a soft tissue injury.

4. In response to these submissions, Mr. Finbar Fox S.C on behalf of the plaintiff makes the following arguments. He states that the trial judge listened to the evidence given by the plaintiff and accepted her evidence that she had an ongoing chronic back complaint up to the date of the trial and that this had interfered with her quality of life. He referred the court to the fact that the transcript shows that her evidence in this regard was not seriously challenged.

5. In response to the emphasis that Mr. Doyle had placed on the fact that the plaintiff had not been referred to any medical experts for treatment and that all of the expert reports had been obtained by her solicitor, Mr. Fox submits that even though these were obtained by the plaintiff's solicitor's they were requisitioned to better explain to the court the extent of her injuries. In these circumstances the court was obliged to consider the content of the reports and to ignore their provenance. The reports were there to guide the court and it would be wrong for the court to dilute the diagnoses and conclusions contained therein just because they were from experts to whom the plaintiff had been referred by her solicitor as opposed to her general practitioner.

6. Mr. Fox submits that the injuries sustained by the plaintiff were significant and that the award made by the trial judge for pain and suffering to date was well within the appropriate range. Likewise he maintains that the award for pain and suffering into the future was appropriate. The later, he contends, was proportionate to the award made for damages for pain and suffering to date and reflected the conclusion of the trial judge that the plaintiff was still symptomatic and would likely be symptomatic into the future.

Discussion.

7. The first matter to be considered is the role and jurisdiction of this court when engaged upon an appeal of this nature. As the parties are well aware, the oft quoted judgment of McCarthy J. in *Hay .v. O'Grady1992* ILRM sets out the principles which guide the court when exercising its appellate jurisdiction. I will just briefly refer to a number of the paragraphs from his judgment. He advised and cautioned as follows:-

> 1. Firstly, that an appellate court does not enjoy the opportunity of seeing and hearing the witnesses unlike the

trial judge who hears the substance of the evidence and also observes the manner in which it is given and the demeanour of those giving it. The arid pages of transcripts seldom reflect the atmosphere of the trail.

2. Secondly, if the findings of fact made by the trial judge are supported by credible evidence this court is bound by those findings regardless of how voluminous and apparently weighty the testimony against them may be given that truth is not, he advised, a monopoly of any majority.

3. Thirdly, insofar as inferences of fact are drawn by a judge at first instance, it is open to an appellate court to substitute its own inferences. However, he cautioned against such an approach where those inferences were drawn from the judge's assessment of the oral evidence.

8. It is important in the context of the role of the appellate court on this appeal to mention one particularly important factor namely and that is that the evidence before the trial judge, with the exception of the plaintiff's own evidence, was all to be found in the medical reports which were produced by the parties and were given to the trial judge to be taken into account in coming to his conclusions.

9. To this extent, this court is in just as good a position as the trial judge to assess the weight to be attached to the evidence contained in those reports while remaining conscious of the fact that, while it has the transcript of the plantiff's evidence, it it not have the benefit of hearing that evidence.

Judgment of Cross J.
10. I will refer to what are perhaps some of the more salient findings of the trial judge because, in assessing whether or not his award was within or outside the acceptable range, the court clearly is bound by his findings in so far as they are supported by the evidence.

11. I can summarise these in the following manner:-

(i) He said that there was very little conflict in the evidence.

(ii) He found the plaintiff to be a truthful witness who did not exaggerate.

(iii) He accepted that she was dazed as a result of the accident and that soon after she developed shoulder, neck and back pain.

(iv) He concluded that her shoulder rapidly cleared and that her neck throughout 2013, whilst troublesome, had, in effect, cleared before the trial even though he accepted her evidence she said that at times it had "its moments".

(v) As to the plaintiff's back, this had troubled her during 2013 and has caused her some sleep deprivation. He accepted the evidence in Dr. Thakore's report that her back was fifty per cent recovered in 2014. However, that leaves open to this court a need to assess how severe the trial judge considered the plaintiff's back problem was at the outset. That is a matter which is clearly relevant to any appraisal of the award made by the trial judge. Some guidance as to the severity of the plaintiff's back problem from inception is to be found in the expert reports which this court has seen. From these it is clear that the plaintiff's general practitioner initially prescribed some pain killers and anti inflammatories. Her own evidence was that she also used heat pads on her back in the initial phase and that she attended for two or three sessions of physiotherapy after which she carried out a home exercise programme. The only other medication she was prescribed was a trial of Lyrica which she took for a week in 2013 and for four weeks in 2014.

(vi) It should however be notes that the plaintiff was due to have an epidural injection in January 2014 but that was cancelled. Mr. McQuillan in his report said that it was to be re-scheduled shortly but it had not happened twelve months later.

12. Relevant to the assessment of the severity of the plaintiff's back problem is, I believe, the fact that while she attended her general practitioner on a number of occasions during the first fifteen months up to 7th March 2014, there was no attendance thereafter. Every subsequent appointment was solely for the purpose of medical legal review. There was no medical intervention of any nature post March 2014 *i.e* fifteen months post accident.

13. It is clear from the judgment of the trial judge that apart from finding that the plaintiff had an ongoing back problem, the severity of which I have just discussed, he also accepted that she had developed an adjustment disorder and had suffered from low mood. Dr. Cumiskey, in her medical report advised that she first saw the plaintiff sixteen months after her accident and had diagnosed her as having developed a type of adjustment disorder of a moderate nature.

14. Based upon the combination of the physical and psychological injuries to which he referred, the trial judge went on to conclude that the plaintiff's injuries, whilst significant, were not as severe as those suffered by many involved in accidents of a similar type. From that statement it is to be inferred that the judge, in terms of his assessment of the severity of the plaintiff's injuries, was satisfied that they were certainly not in the upper range of injuries of a soft tissue nature with some psychological component.

15. Mr. Fox is correct however that it is not for the court to trim or tamper with the damages awarded by a judge at first instance unless it is satisfied that the award was significantly outside that which it might consider to be appropriate.

Decision.
16. Needless to say it is regrettable that people get injured due to the negligence of others given that an award of damages for pain and suffering cannot restore the victim to the physical or mental status they enjoyed prior to the infliction of their injuries. In this context it is important that compensation, when awarded by the court, in respect of pain and suffering should be reasonable and proportionate in all of the circumstances.

17. I am mindful of the fact that while it cannot be stated that there is a cap on general damages for pain and suffering, from the awards made in recent times there is at least a perception that the very upper range for compensation of this type rests in or around the €400,000 mark. The most catastrophically injured members of society who suffer great pain and distress and who may never work or enjoy the benefits of a loving relationship and who may remain dependant on the care of others for fifty or sixty years or indeed for the whole of their lifetime are regularly awarded general damages for pain and sufering in the region of €400,000. So one of the questions I ask myself when considering whether the award made in this case was reasonable or proportionate is whether the trial

judge could have been within the appropriate range when he awarded the plaintiff a sum that placed her injuries in terms of value approximately one sixth of the way along an imaginary scale of damages for personal injuries which ends at €400,000 for the catastrophically injured plaintiff. In my view, thus assessed, the award which he made to the plaintiff was not reasonable or proportionate. That is not to say that this is a formula that must be applied by every judge when assessing damages for pain and suffering but for me at least it provides a type of benchmark by which the appropriateness of the award made may helpfully be evaluated.

18. For my part I fear there is a real danger of injustice and unfairness being visited upon many of those who come to litigation seeking compensation if those who suffer modest injuries of the nature described in these proceedings are to receive damages of the nature awarded by the trial judge in this case. If modest injuries of this type are to attract damages of €65,000 the effect of such an approach must be to drive up the awards payable to those who suffer more significant or what I would describe as middle ranking personal injuries such that a concertina type effect is created at the upper end of the compensation scale. So for example the award of general damages to the person who loses a limb becomes only modestly different to the the award made to the quadriplegic or the individual who suffers significant brain damage and in my view that simply cannot be just or fair.

19. So for my part, while I accept that the damages awarded for pain and suffering must be reasonable having regard to the injuries sustained they must also be proportionate to the awards commonly made to victims in respect of injuries which are of significantly greater or lesser import. Modest injuries should attract moderate damages. Thus I regret to say I consider the award made by the trial judge in this case was unduly generous to the point that it has strayed outside the parameters which I would consider appropriate for the injuries concerned.

20. This being so I would propose a reduction in the award of the general damages for pain and suffering to date to €30,000. I would further propose that the award for damages for pain and suffering into the future, which on any view of the medical reports was considered likely to be very modest, would be confined to a sum of €5,000.

21. Accordingly I would allow the appeal and, having regard to the agreed special damages would substitute an award of €37,985 for that made in the High Court.