

## THE HIGH COURT

[2017 No. 4565 P.]

BETWEEN

ADELE VOLKOVA

PLAINTIFF

AND

PATRICK DUNNE

DEFENDANT

**JUDGMENT of Ms. Bronagh O'Hanlon delivered on the 30th day of May, 2019**

1. The plaintiff in this action is a Ms. Adele Volkova ('the plaintiff') who is 70 years of age and was born on 27th September, 1948 and has lived in Ireland since 2005. She has four grown up daughters and has been widowed for the last thirteen years. The plaintiff had been a factory worker and cleaning lady and has been retired for the last three years. The defendant is a Mr. Patrick Dunne ('the defendant') who denies any negligence on his part.

**The nature of the accident**

2. The plaintiff's case is that on or about 12.50pm on the 23rd November, 2016, at or near Edenderry, in the county of Offaly, where she was lawfully present as a driver on the public highway in her motor vehicle, the defendant drove his motor vehicle into collision with the plaintiff's motor vehicle, as a result of which she suffered personal injuries, loss, damage, inconvenience and expense.

3. The plaintiff gave evidence to the Court that on the day of the accident she was travelling towards Portlaoise. She told the Court that in terms of weather it was a foggy day around midday when the accident occurred, although some sun appeared when they reached the town of Edenderry. Her passenger, Ms. Yolanta Dumskyte was navigating and giving her directions. The plaintiff's evidence was that she said she was not driving faster than 30km per hour, and that the accident occurred on Fr. John Murphy Road and that she did not know the road previously.

4. Ms. Volkova said there was a pole on the right hand side of the road and that there were two cars parked on the left hand side. One of the cars was parked on the left as in photograph number 8 (which was shown to the Court) and just behind a driveway. The second car was parked on the roadway. This witness said that she was ahead of both of those vehicles and that there was no vehicle on either side of her car. Her evidence to the Court was that she had fully passed both of the vehicles and was ahead of the second vehicle; that she was driving on her left hand side and she was perhaps in the middle of the lane as the second vehicle was fully on the roadway. The plaintiff said there was no indicator on in her car and she did not get to the other side, she said that perhaps her wheel was on the actual lane. The plaintiff's evidence was such that she just drove by very calmly but as she was driving past the vehicles, she felt an impact on her door to the left hand side of her vehicle. Ms. Volkova felt that there was no indication that the vehicle on the left was going to make a turn.

5. This witness took the view that naturally the impact to the left hand door by the defendant's motor vehicle pushed her vehicle on to the road and that she acted in self-preservation in swivelling to the right of the road. She said she stopped her vehicle just behind the pole on the corner which was marked on photograph 10 (which was shown to the Court) where the impact occurred and that she had marked where the defendant's car ended up.

6. This witness gave evidence that the defendant driver was very abusive towards the plaintiff and her passenger, and that he used abusive language in berating the plaintiff and her passenger for being immigrants. Ms. Volkova said she was not feeling well after the accident, but that she offered to exchange details because the damage did not seem to be too extensive. This witness confirmed that her motor vehicle was silver in colour and that the damage on it was caused by this accident. The defendant's vehicle was black in colour and it was damaged in the accident and she took photographs of this.

7. Due to the language barrier at the scene of the accident (the plaintiff's first language is Lithuanian) she put her mobile telephone on loud speaker and her passenger interpreted. This witness said that she indicated to An Garda Síochána what had happened.

8. The plaintiff subsequently received a summons from the same Garda in relation to a charge for dangerous driving. The plaintiff told the Court that she had no solicitor in the District Court, but after two days she entered a guilty plea and was convicted for driving without due care and attention and a €100 fine was imposed against the plaintiff. Ms. Volkova explained that she lives in Navan, Co. Meath and that the court was in Tullamore, Co. Offaly, which is quite a substantial journey.

9. This witness also indicated that it was her first time in the town of Edenderry and she noted that there was a speed limit of 50km/h and that she was not travelling in excess of that speed.

10. It was put to this witness that the defendant indicated to turn his vehicle right, looked in his rear mirror, saw a car and evaluated the distance of the car but was not concerned about it. It was further put to the plaintiff what the defendant used his brakes and his gears and slowed his car down and halted opposite the mouth of the junction. The defendant would say that he stopped his car with the right indicator on the inside but very close to the white line, and that he was front angled close to the right. Further, the defendant would say that his wheels were turned slightly to the right and that the plaintiff collided into the right of his vehicle. The plaintiff's response to this was that the defendant was not telling the truth and that she did not see any other vehicle at that point.

11. It was further contended that Mr. Vincent McDonald, a witness to the accident, would say that he was coming out of the estate, stopped at the junction and saw the defendant's car and that Mr. McDonald intended turning left towards Edenderry. The plaintiff disputed this and told the court that in her view her car was not on the incorrect side of the road and she denied that Mr. McDonald had to reverse back to avoid her hitting his car. She said that there was no vehicle ahead of her and she further denied that her vehicle ended up 20 metres down the road.

12. The plaintiff did accept that her vehicle ended up on the incorrect side of the road, because she said the defendant pushed her off to that side and that instinctively she swivelled to the right to protect her passenger and she said that she has a three door vehicle and there was damage to the right side. The plaintiff's contention was that had the defendant stopped where he said he did, the front of her car and not the side or doors would have shown damage.

13. This witness contended that during the accident both cars were on the left hand side of the road and that a Garda asked her to move the car. She said that she had been using sunglasses at the time.

#### **The plaintiff's injuries**

14. This witness then gave evidence that she returned to her home after the accident and that she was able to drive home and went to her doctor a few days later.

15. This witness was given painkillers by her doctor in terms of treatment and she has ongoing neck symptoms confined to her neck. She attends weekly physiotherapy and can still only sleep on her right side. Her evidence to the Court was that she experiences difficulty in taking medicine for the neck pain because she has a number of heart problems.

16. Under cross-examination this witness said that she was advised to attend hospital. She had scans three days later and she had eleven sessions of physiotherapy in all. She said she had bills in relation to seven of those and she does have a medical card. This witness said that the physiotherapy cost her €30 per session and that she still goes to it every week. She said that while she wasn't counting the number of visits of physiotherapy, financing this was becoming a major problem – however she feels that it is more important that she feel well. She has not kept receipts for all the physiotherapy.

17. This witness confirmed to the Court that any back problems she had have since resolved but that she has ongoing neck trouble. She gave evidence that the back problems took between one and two to clear up, that she saw Mr. Nassar, a Consultant Orthopaedic Surgeon and she told him that she still had back problems at the end of 2018.

18. This witness gave evidence that when she was with the doctor he checked her capacity to bend and that he noticed that she had difficulty straightening up after bending down and that there wasn't much pain there at that time.

19. The claim is confined to neck difficulties and anxiety. This witness confirmed that she no longer suffers from anxiety when driving, but that she was unable to drive for a year post-accident because she felt scared to do so.

#### **Ms. Jolanta Dumskyte**

20. This witness described herself as a music teacher of Lithuanian origin and she identified herself as a passenger in the vehicle at the time of the accident. Ms. Dumskyte said she was holding a telephone during the car journey because neither herself nor the plaintiff were sure of the direction to Portlaoise and that therefore they were using GPS navigation. Ms Dumskyte confirmed that the plaintiff was not going at a speed in excess of 30 km per hour.

21. This witness reiterated that she saw an empty car parked on the corner of the road on the left, and that there was one car further down the road and she confirmed that she remembered when they passed the empty car that she saw that there was another car. Ms. Dumskyte said she felt the impact on the doors where she was sitting and she said herself and Ms. Volkova asked one another were they alright. They then got out of the car and she ran to the other car where the driver of that car was already out of his car.

22. This witness tried speaking to Mr. Dunne in English but her English was not very good and her driver had told her there were only small scratches on the car but the defendant was already angry and she said that she explained that they needed to exchange details of insurance. She said that her driver wanted the other driver to speak to her interpreter but he talked a little and then began shouting and she said her own English was very poor and he was using swear words and insulting behaviour.

23. This witness said that she also offered to the Garda to speak to her interpreter over the phone and that the garda officer asked the driver to move the car and she said she was not present at that moment. This witness said that she did not see the other car moving but that she did remember seeing a car parked on the road and that that car was opposite the junction. Then she remembered an impact. She clarified that the defendant referred to foreigners but she was not quite certain exactly what words were used.

#### **Mr. Robert Burke**

24. Mr. Robert Burke, BSC Building Surveyor, MIEI prepared a report for the Court, and described the *locus* as a very straight line of 160 m and he said one could travel 11.52 seconds to cover 160 m at 50 km per hour. He said that at 80 km per hour it would take 5.22 seconds to cover the same distance and that at 30 km per hour it would take 19 seconds to cover the same distance.

25. The defendant said he was waiting to turn right and Mr. Burke said a person is entitled to overtake on a broken white line if it is safe to do so and that one ought to move out and one can turn if it is safe in terms of the rules of the road. He also pointed out that it is not appropriate to turn the wheels of the car until it is safe to do so. He said there is no impediment to seeing the vehicle behind if one is paying due care and attention.

26. Mr. Burke made reference to the first AXA photograph where there is no damage to the car and there is a suggestion it passed before the impact or that the plaintiff was there first before the impact occurred. Mr. Burke said that had the plaintiff swerved at the last minute there would be more damage to the front of her vehicle but he said she appears to have just gone past before she was impacted on her side and that she would be entitled to keep clear of two parked vehicles and to move over. He said it was more probable that the accident occurred as described by the plaintiff and her witness in terms of the damage to the two vehicles. He said the plaintiff's vehicle had gone past by, even if only by a couple of millimetres and if that were not the case we would see damage to her front. Mr. Burke said that had there been damage to the front bumper and headlights of the car he would take a different view.

27. Mr. Burke made the point that a third party vehicle parked alongside the road must yield to traffic already on the road before entering onto the road. He stressed that it would take the plaintiff 11.5 seconds to travel a 160 metres at 50km per hour. He also made the point that there was no impediment to the view of the third party driver who is experiencing due care and attention to prevent them from seeing the vehicle approaching from behind.

28. In the expert opinion of this witness, liability for this accident rests with the third party driver who attempted to enter onto the road from a parked position without yielding to oncoming traffic.

29. Noting that the damage to the plaintiff's vehicle occurred to the front wing and passenger side door, Mr. Burke found that this damage would indicate that the front of the plaintiff's vehicle had already passed the front of the third party vehicle and that in those circumstances there was nothing that the plaintiff could have done to have avoided this accident. Mr. Burke's evidence was very compelling in this regard.

**Mr. Patrick Dunne**

30. Mr. Dunne confirmed that he was of Ballyheashill, County Offaly but that his ex-wife lived in Greenwood Park, Edenderry and that therefore he knew the area. On the day of the accident Mr. Dunne had just brought his ex-wife and her sister shopping.

31. The defendant retraced his steps from the accident and said that 70 metres from the right hand junction he turned on his indicator, looked in his mirrors, went down on his gears and then went down the slope in that position. and that Mr. McDonald was in a vehicle at the junction and that he himself stopped in position and he would have to turn in to Greenwood Park. In describing the position of his vehicle, he said he was straight on the white line. Mr. Dunne said that he saw Mr. Vincent McDonald who was coming out of the junction and that he himself stopped. He said the junction was very narrow, and he was giving him room to come out.

32. After the impact of the car and he said he got out of his car and was shocked. Mr. Dunne said that a lady came with a phone in her hand and one lady stayed where she had parked. The younger of the women came over to Mr. Dunne and she said she was not good at English. This witness denies abusive and racist remarks allegedly made by him concerning immigrants or foreigners and pointed to the fact that his present partner is Lithuanian.

33. This witness said he waited for the Gardaí to come and he was standing at the back wheel to toe to measure distance, and that he told the garda what distance he had been out from the kerb and the garda asked him to move his car into Greenwood Road.

34. This witness saw the plaintiff's car in his mirror but he had no concern. He was coming out of the junction and he saw the plaintiff's car for a considerable period prior to the accident. This witness was adamant that he did check his mirror and denied never having looked in his mirror prior to the right hand manoeuvre.

35. Mr. Dunne said the plaintiff's car glanced off his car and he said that Mr. McDonald's car was coming out of the junction and that he himself was stopped and that the plaintiff banged into him. The defendant's case was that he was in second gear as he approached Greenwood Estate and that the plaintiff attempted to overtake at the last moment and he collided with her vehicle.

**Vincent McDonald**

36. Mr. McDonald, a witness to the accident, gave evidence on behalf of the defence. He said he knew Mr. Dunne for over 40 years. He admitted that the junction was a dangerous one, and that he saw a car opposite on the wrong side of the road and that he reversed back and that his indicator was on the parallel white line ready to turn right when he reversed back. Mr. McDonald said that he was unable for the Gardaí as he was doing a school run. Mr. Dunne was making a right turn, and Mr. McDonald was looking at him when the collision occurred. He said there was nothing coming from the right there were no cars at all. He also said that there was nothing to stop the plaintiff going straight ahead but that she was going too fast.

**Garda Ivan Kinnane**

37. Garda Ivan Kinnane was the Garda on duty on this day and received a call about the accident. He gave evidence that when he arrived at the scene of the accident there was a blue car on the left lane of the road, slightly moved to the right and very near the white lines in the middle of the road and that the silver Opel was parked to the right side of the road 20 to 30 metres further down the road. He checked to see if the parties were injured. Mr. Dunne informed the Garda that he had indicated into Greenwood Estate, and had stopped the car in order to complete the turning manoeuvre but was slightly at an angle going in towards Greenwood.

38. Garda Kinnane said the plaintiff and Ms. Dumskyte said they saw the other car but that they did not see the indicator and that the driver's eyes were blinded by the sun but this was never put to the plaintiff. This garda said that the plaintiff admitted liability at the scene, but this was never put to the plaintiff. The Garda took it as an admission of liability because he said the plaintiff had said the sun had blinded her and he confirmed that on the 12th December, 2018 there was guilty plea and a fine against the plaintiff for €100 for undue care and attention and that the case was then put back to get a Russian interpreter.

39. Under cross-examination the Garda agreed that the plaintiff had to travel from Navan to Tullamore twice to the District Court and that at Court she had no solicitor and that that Russian was not her first language. The plea came late on the second day with a €100 fine and the time was extended for leave to appeal this conviction. This witness said that it was her passenger who had indicated that the plaintiff may have been blinded by the sun and he said the defendant's car was turning right and he agreed that there was no damage to the front of the vehicle.

**Medical evidence****Mr. J K Nasser**

40. Mr. Nasser, a Consultant Orthopaedic Surgeon noted that the plaintiff suffered neck pain, upper back pain and lower back pain and her General Practitioner had prescribed on 28th November, 2016, non-steroidal anti-inflammatory painkillers and local non-steroidal anti-inflammatory gel and a sleeping tablet. The plaintiff had made five visits to her General Practitioner.

41. The plaintiff had eight sessions of physiotherapy at that stage for her lower back. She attended a Dr. Michael O'Cuill, Consultant Psychiatrist who reported on her on 11th May, 2018. He noted that she suffered from post-traumatic stress reaction but that her symptoms had improved, and also that she had also suffered from phobic anxiety and that these symptoms should improve in time.

42. As of January, 2017 Mr. Nasser found the plaintiff to have intermittent neck pain radiating down to the left shoulder joint. The plaintiff had indicated at that stage difficulty in bed at night and having to sleep on the right side. She confirmed that she had improved by more than 60% since the accident with the help of physiotherapy. Her upper back had improved and her lower back was still bothersome if she sat for long or walked for long. Her low back symptoms have improved by more than 40% since the accident.

43. As of the 31st October, 2018 the plaintiff pointed to pain over the left trapezius muscle. This witness found forward flexion of 25 degrees with the full range being 35 degrees of the cervical spine and extension is 25 degrees where the full range would be 35 degrees. He found rotations to the right and left 50 degrees respectively where the full range would be 70 degrees and lateral flexion was 20 degrees to the right and left respectively where the full range would be 30 degrees. He found a full range of motion of both shoulder joints with no localising neurological signs in the plaintiff's upper limbs.

44. On examination by Mr. Nasser of the thoracic lumbar spine the plaintiff pointed to pain over the disc space at L5 S1 level. He found that the sacroiliac joints were non-tender on stress.

45. In the opinion of this surgeon she had clinical and radiological evidence indicating that she had suffered a mild to moderate whiplash injury to the cervical spine in keeping with a soft tissue injury. He found tenderness over the left trapezius muscle but otherwise good functional range of the cervical spine and no localising neurological signs in her upper limbs. Future treatment

regarding the neck remains conservative. Mr. Nasser hoped that the plaintiff's neck symptoms should continue to improve and hopefully resolve over the coming six months' time. This report found that the plaintiff's upper back difficulties had resolved but that the Plaintiff had tenderness over the L5 S1 level, yet had good functional range of the motion of her lumbar sacral spine.

#### **Dr. Michael O'Cuill**

46. In his report Dr. Michael O'Cuill, Consultant Psychiatrist, noted on 11th May, 2018 the plaintiff's recollection to him that she had twisted her neck and banged her right elbow against the door window when this accident occurred. The plaintiff also experienced soreness to the chest when she was restrained by her seatbelt especially as she had an implant cardiac defibrillator.

47. This witness indicated to her doctor that she was irritable at times and easily startled recalling the accident. Her sleep was disturbed and hypnotic medication helped this.

48. The main complaint this plaintiff had for the psychiatrist was that she had stopped driving for several months due to feeling terrified at the prospect of driving and that while she has resumed driving she remains very anxious and hesitant saying that she feels unsafe when in a motor vehicle.

49. The plaintiff suffered because she had previously transported her grandchildren to and from school daily but became overly concerned about this and was therefore no longer able to do this. The plaintiff also developed difficulties with her friends when she declined to drive them and they could not understand why she would not carry out this task.

50. In summary this doctor found that the plaintiff experienced symptoms typical of post-traumatic stress disorder. He relates this entirely due to (and believes it to be an understandable reaction to) the accident. He found these symptoms to be in the mild range of severity and to have improved with the passage of time. Features of this anxiety included reminders of the accident, avoiding reminders of same, experiencing intrusive recollections, sleep disturbance, feeling generally anxious and on edge, experiencing physical symptoms of anxiety such as palpitations shortness of breath and butterflies in her stomach, irritability and being easily startled and impaired concentration. This doctor found that the patient is likely to continue to experience a degree of phobic anxiety associated with driving for at least of couple of years if not longer. He found however that she shouldn't experience long term psychological sequelae as a result of this accident.

#### **Dr. Christine Sinton**

51. The plaintiff's G.P. Dr. Sinton prepared a reported dated 25th January, 2017 wherein she noted soft tissue injuries to the plaintiff's neck, shoulders and lower back as a result of the accident as well as the anxiety already referred to above and sleep difficulties already referred to.

Mr. Aidan Gleeson

52. The defendants referred to two medical reports of Mr. Aidan Gleeson Consultant in Emergency Medicine dated 16th August, 2017 and 20th February, 2019.

53. This doctor noted that the plaintiff did not drive for six months as a result of the anxiety after the accident and while she did not need to be referred for counselling she did require the use of sleeping tablets and had higher than normal blood pressure after the accident requiring alteration of medication.

54. The second examination this doctor found the rotation of her head and neck to the right as 75% of normal and causes some discomfort on the left side of her neck and that rotation of her head and neck to the left is similarly restricted but not painful and that she complained of tenderness over the mid to lower left cervical para-cervical muscle.

55. The plaintiff at that stage had low grade complaints relating to her neck which this doctor thought were not a cause for clinical concern and that she has improved as an anxious driver over the last eighteen months and this would improve further.

#### **Findings of fact**

56. While this was a heavily contested court hearing, this Court prefers the plaintiff's version of events to that of the defendant. Her reportage of same is borne out by the physical evidence visible on the two motor vehicles and given that the damage to her vehicle was on the front wing and passenger side door, this Court accepts the front of her vehicle had already passed the front of the third party vehicle prior to the impact and that this impact occurred when the third party vehicle moved onto the road without yielding to her vehicle which was already lawfully present on the highway.

57. This accident was reasonably foreseeable and on the balance of probabilities the plaintiff's version represents the correct version as to what occurred and the court rejects the defendant's version of events as less credible.

58. The Court was particularly impressed by the report of Mr. Burke, who upon examination of the *locus*, the damage to both vehicles and the overall road conditions found that there was nothing the plaintiff could have done to avoid the accident. The Court accepts this proposition on the balance of probabilities.

59. Liability therefore rests with the defendant and there is no issue of contributory negligence in all the circumstances.

#### **Amount of damages to be awarded**

60. In terms of quantum the plaintiff suffered mainly an injury to the neck which is still causing her some difficulties. She had difficulty to a lesser extent with her back but does not see that as the focus of her claim. She suffered anxiety and has suffered a loss of the amenities of life between six months and one year when she could not drive following this accident and she remains quite anxious around the issue of driving a motor vehicle.

61. This represents a significant loss of amenity to the plaintiff because prior to the accident she had been obliging her daughter by driving the grandchildren to school and can no longer either do that or give people lifts which causes difficulties for family and friends who cannot understand her reluctance to assist.

62. The judgment of Irvine J., in *Shannon v O'Sullivan* [2016] IECA 93, at para. 43 is particularly instructive when considering quantum and the amount of an award to grant to a plaintiff. Irvine J. held that:

"43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as 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?
- (v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?
- (vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?
- (vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?
- (viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?
- (ix) For how long was the plaintiff out of work?
- (x) To what extent was their relationship with their family interfered with?
- (xi) Finally, what was the nature and extent of any treatment, therapy or medication required?"

63. It is important to recognise that the plaintiff has undergone significant loss of the amenities of life, and the relationship with her daughter, grandchildren and friends has been appreciably impacted in that the plaintiff struggles to drive and to give lifts as she did prior to the accident. The plaintiff also required medication to treat pain for her injuries from the accident and medication to help her sleep. The plaintiff suffered quite seriously from anxiety following the accident which has interfered with her life.

#### **Conclusion**

64. The appropriate award therefore in all the circumstances, and particularly having regard to the Book of Quantum is €65,000 plus items of special damage. Items

of special damage are to include damage to her motor vehicle €813.01 plus VAT giving a total of €1,000, physiotherapy bills €630 to date with a further outstanding bill of €540 given a total of €2,170.