

THE HIGH COURT
PERSONAL INJURIES

[2013 No. 4766P]

BETWEEN:**HELEN BOLAND****PLAINTIFF****-AND-****REARDENS OF WASHINGTON STREET LIMITED****DEFENDANT****EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 14th day of October, 2016****Background**

1. The plaintiff is a 36 year old woman who fell down four or five steps in Reardens Bar, Washington Street, Cork on the 19th September, 2010. She was accidentally knocked over by doormen who were ejecting a person from the pub. At the time of the accident, she worked in a call-centre, having previously spent several years in the Irish Naval Service.
2. After the incident, she took a taxi to the Mercy Hospital in Cork, a short distance away, where she was x-rayed and sent home with crutches, having being diagnosed as having an ankle sprain. She remained out of work for that week.
3. At the end up of the week, she woke up with severe neck injury, which she initially assumed arose from her having slept at an awkward angle. She went to her GP where she was prescribed pain relief medication and recommended physiotherapy for her neck pain.
4. She was off crutches within 10 days and her ankle injury cleared up. However, her neck injury remained for some time and she underwent several physiotherapy sessions and an MRI scan of her neck on the 3rd November 2010 (which was normal). As a result of an injection into her neck on the 18th August, 2011, by Dr. Harney, Consultant Anaesthetist, her neck pain cleared up.
5. However, the plaintiff's claim in this case is for special damages of in the region of €750,000, much of it related to future loss of earnings due to her inability to work. This claim arises from what has been termed by the defendants' medical experts, as a minor fall leading to a sprained ankle.
6. However, the nub of the plaintiff's case is that within a period of about one month after the accident, she began to complain of lower right back pain which went down her right leg. It is first recorded in a note that her GP took on the 2nd December, 2010, (some 10 weeks after the accident) where she complains of a lower back pain which arose after a visit to a physiotherapist, the last physiotherapy treatment prior to that GP appointment was the previous day (the 1st December, 2010)
7. It is this lower back injury which is the main focus of this trial. The plaintiff has outlined that she has not been able to work since the accident as a result of the lower back pain. This back pain resulted in her having, *inter alia*, a discectomy, which did not relieve the pain, and she maintains that she will not be able to work again. In 2012, the plaintiff commenced a four year degree, part-time, in Human Resource Management at CIT, which she recently completed and is expected to graduate with a 2:1 degree shortly. Nonetheless her claim for damages is based on her belief that she was not able to do any work, not even part-time work, since 2010 and will not be able to work again due to her chronic back pain.

Medical evidence

8. Dr. Kaar, a Consultant Neurosurgeon engaged by the defendants, records in his Medical Report that when he saw the plaintiff on the 28th November, 2013, she told him that '*after a number of weeks, possibly 2 months*' there was a pain in her lower back. Similarly, Professor Harty, a Consultant Orthopaedic Surgeon engaged by the defendants, records in his Medical Report that, when he saw her on the 3rd May, 2016, she told him that '*approximately one to two months later* [i.e. after the accident] *the pain moved* [from her neck] *to her lower back and to her right leg.*'
9. In support of the plaintiff's claim for damages for chronic back pain, she has outlined how she underwent unsuccessful lower back surgery in 2012. She also outlined details of the several unsuccessful back injections and back procedures both before and after the surgery that she has undergone. She has been on, and continues to be on, high dosages of morphine patches and opiate drugs to provide pain relief. In 2015, she was diagnosed with depression arising from her absence from work and her chronic lower back pain and she is now also on anti-depressants.
10. Prior to her back surgery in 2012, two MRI scans of her back were done on the 14th April, 2011 and the 30th September, 2011, which showed that one of the discs in her lower back was protruding. The back surgery on the 18th July, 2012 removed this disc and an MRI scan taken after the surgery, on the 5th November, 2012, showed that there was no disc protrusion in her back. Yet, as previously noted the chronic back pain continued for the plaintiff. Also, as noted, subsequent injections and procedures have failed to eliminate the chronic back pain.
11. She underwent nerve conduction studies and concentric needle electromyography (EMG) in June of 2016 which, according to the plaintiff's medical evidence, suggests that she has nerve injury in her lower back. Professor Harty, a consultant orthopaedic surgeon engaged by the defendant, was of the view that this EMG is of limited value in establishing whether this nerve damage was caused by the accident, since the EMG was done some five and a half years after the accident and in any case nerve damage was not surprising in view of the various surgeries and interventions which the plaintiff has had over the years.

The defendant's medical reports

12. Before considering the issue of causation, reference should be made to the medical reports in this case.
13. Dr. Hogan, an occupational physician engaged by the defendant, examined the plaintiff on the 19th November, 2014. He noted that there was an apparent decreased range of movement when the plaintiff was asked to do an activity, but much less when she

was not actually being examined. He noted the inconsistency between her ability to perform straight leg raising of 20°, which is very limited and indicative of chronic back pain, when supine and when being examined, but straight leg raising of 90°, which is normal, when distracted and when seated. .

14. When Dr. Hogan examined the plaintiff for a second time on the 23rd June, 2016, he noted that the straight leg raising when she was supine was 15°. He also noted that the plaintiff complained of pain in the lower back when pressure was applied to the head (the axial compression test), even though such compression should not cause any pain. He also noted exaggerated reaction to relatively gentle leg raising.

15. Professor Harty, an Orthopaedic Surgeon engaged by the defendant, noted that when he examined the plaintiff on the 3rd May, 2016, she could do straight leg raising to about 70° on her right side when supine and when being examined. However, when distracted and sitting on the couch she could do it to 90°, which would be normal.. He also felt that she feigned restriction when being examined around the lower back, but when distracted moved better than expected. He also stated that when he did an axial compression test by pressing his hand on her head, she indicated a pain in her lower back, when such compression does not cause such pain. Professor Harty stated that he could find no relation between the pain which the plaintiff exhibited and his clinical findings. He concludes that:-

"My impression is that this lady sustained a soft tissue injury. The discectomy that she has had in the lumbar back for pain that she has had bares no temporal relationship to the injury she has sustained. I expect this lady to make a full recovery. I strongly suspect that there is an underlying history or diagnosis of depression here, which is driving most of this. Once this lady's medico-legal case is completed, I expect her to make a full recovery."

16. Dr. Kaar, a Consultant Neurosurgeon engaged by the defendants, examined the plaintiff on the 28th November, 2013, and he found that having heard severe descriptions of pain, he could not find evidence of it. He notes in his Medical Report that '*there was no acute pain or discomfort evident during the examination*'. He concluded that:-

"there does not appear to have been an injury to the lower back in the incident on 20 September 2010. Ms Boland did not complain of symptoms in the low-back initially."

He concluded that the palintiff was fit to work.

17. When Dr. Kaar re-examined the plaintiff on the 20th November, 2014, he again found no evidence of acute pain or discomfort during the examination and on this occasion he found that straight leg raising was not reduced and so was normal. It is to be noted that only the previous day (19th November, 2014) the plaintiff had been examined by Dr. Hogan, yet her straight leg raising that day was very significantly reduced, i.e. to 20°. Dr. Kaar concluded that the plaintiff '*continues to adopt an illness role and her personality, the nature of her claim and the prospect of compensation are implicated in this*' and that '*disability in the clinical setting may be exaggerated*'.

18. On his final examination on the 14th April, 2016, Dr Kaar again found there was no evidence of acute pain or discomfort during examination. He concluded that:-

"Ms Boland continues to develop increasing pain symptoms over 5 years following a minor incident in September 2010. The incident in 2010 is unrelated to progressing symptoms. The symptoms relate to the ongoing legal case, personality issues and possible exaggeration with a view to compensation."

The plaintiff's medical reports

19. Dr. Harney, a Consultant Anaesthetist engaged by the plaintiff, examined her on the 29th March, 2011. He noted that the straight leg raising on the right leg was 90°. However, when he examined her on the 27th May, 2014, her straight leg raising of the right leg was 40°. He was however of the view that:-

"Ms. Boland suffered a severe whiplash associated disorder as a consequence of the incident at O'Riordan's on the 19th of September, 2010."

Dr. Marks, a Consultant Neurosurgeon engaged by the plaintiff, examined her on the 24th January, 2012, and he found that her straight let raising was at 40°. As part of his medical report, he refers to the MRI scan been taken in 2011 which noted that a disc in her lower back was protruding and he refers in his report to the fact that he had removed this disc on the 18th July, 2012. An MRI scan taken after the surgery showed that the disc was no longer protruding. As previously noted, the plaintiff continued to feel pain, which may be due to scar tissue from the operation and/or as a result of nerve damage, which appears to be present, as evidenced by the EMG.

Dr. Marks stated in his report that:-

"Since the large majority of lumbar disc protrusions come on spontaneously, for no good reason, it is very hard to state categorically that the fall was the sole cause of her lumbar disc prolapse, but it is very likely that the fall was a major cause".

20. It is worth noting that, although Dr. Marks was engaged by the plaintiff, he did remark in a letter to the plaintiff's GP dated 18th December, 2012, that:-

"I think that [the plaintiff] is going to be a compensation client which always makes surgical results for discs much worse".

21. When Dr. Lim, a Consultant Neurosurgeon engaged by the plaintiff, saw her on the 23rd April, 2015, he found that she had a straight right leg raising of 50° and he stated that it was '*likely that accident triggered-off her symptoms of neck pain associated with low back pain and right leg pain*.'

22. In all of these examinations and reports, it is to be noted that although the plaintiff suffered from severe back injury from December 2010 which has prevented her from working for any time in the past six years, there is a considerable degree of inconsistency in the reported effects of the back injury from no restriction to severe restriction, since:

- on the 29th March, 2011, she could perform normal straight leg raising, namely 90°;
- on the 24th January, 2012, it was 40°;
- on the 19th November, 2014, it was 20°;
- the following day on the 20th November, 2014, it was normal, which would be around 90°;
- on 3rd May, 2016, it was 70°;
- and on the 23rd June, 2016, it was 15°.

Some of the straight leg raising was done while lying down and some while seated and it was accepted by the medical experts for both sides that while these two tests are very similar, they are not exactly comparable and so could lead to some slight discrepancies. Even with this caveat however, the differences exhibited are quite stark.

Causation and the lower back pain

23. This Court has noted the comments of the plaintiff's Consultant Neurosurgeon, Dr. Marks that in his view the lower back pain which arose from the disc protrusion, (which protrusion was removed by his surgery), was most likely the result of the fall. However, significantly, he also points out that the majority of disc protrusions come on spontaneously.

24. In determining whether the disc protrusion which the plaintiff suffered in this case was caused by the fall in the defendant's premises, and in particular when considering the evidence of the defendant's Consultant Orthopaedic Surgeon, Professor Harty, this statement of Dr. Marks needs to be borne in mind.

25. In his oral evidence, Professor Harty was firmly of the view that the plaintiff's lower back problems could not have resulted from the fall in the defendant's premises. As he expressed it, he could not see how the fall could have caused the disc protrusion which manifested itself as pain in the lower back some one to two months after the incident. This is because, in his strongly held view, if the incident in the bar was the cause of the protrusion, the plaintiff would have presented with acute pain in the back within 48 hours of the incident and she did not do so. This is because, in his view, if the fall had caused the subsequent protrusion, there would have been internal bleeding and inflammation which would have caused acute pain within 48 hours of the fall. He stated that this inflammatory process is a necessary part of such severe whiplash and in his view it was not possible to override the inflammatory process. In his opinion, the plaintiff has, like a significant portion of the population, even of people of the plaintiff's age, degenerative changes in her back which caused this disc protrusion and there could be no causal link between the fall and the lower back pain.

26. This Court found the evidence of Professor Harty to be persuasive and determinative of this causation issue, particularly in light of the evidence by the plaintiff's medical expert that the large majority of lumbar disc protrusions come on spontaneously and for no good reason. Therefore, based on Professor Harty's conclusions that the absence of any acute pain within 48 hours of the accident was evidence that the fall could not have caused the subsequent lower back pain, this Court finds that on the balance of probabilities the plaintiff's lower back problems, and the depression which resulted therefrom, were not caused by the fall in Reardens bar.

Treating with caution a plaintiff's evidence regarding the extent of their pain

27. Although not determinative of the causation issue, this Court also relied upon the judgment of the Court of Appeal in *Anthony Shannon and Rita Shannon v O'Sullivan* [2016] IECA 93 to the effect that Courts should treat cautiously the extent of a plaintiff's pain, since the Court only has his or her evidence in this regard. At para 53, Irvine J states:

"Because the court usually has only the plaintiff's evidence as to the extent of their pain, [it] is important that their evidence be carefully evaluated and consideration given to factors that might assist with the court's assessment."

In this case, one of the factors that assists the Court in this regard is the fact that all three of the medical experts engaged by the defendant (Dr. Kaar, Dr. Hogan and Professor Harty) could find little or no medical evidence for the pain which the plaintiff exhibited and all of them also noted inconsistencies in her medical examinations, pain responses which were not justified by the alleged injury and exaggeration of injury over a period of years. Indeed, even one of the plaintiff's own doctors, Dr. Marks, appeared to cast some doubt on the true extent of the plaintiff's injuries when he suggested that her likelihood of improving was decreased because she was a compensation client.

Causation and the neck injury and the ankle injury

28. As regards the neck pain, the plaintiff complained about a pain in her neck some six or seven days after the incident, which she initially thought might have been related to the manner in which she had slept.

29. While Professor Harty was adamant that the lower back injury could not have been caused by the fall, he was prepared to acknowledge the possibility that the fall caused the neck injury, since in his report he states *'To give her some benefit of the doubt, one could suggest that she has a soft tissue injury of her neck, which did not become present for about a week after the injury.'*

30. In these circumstances and in view of the view of the medical evidence of the plaintiff's doctors that the neck injury was caused by the fall, this Court concludes that on the balance of probabilities, the injury to the plaintiff's neck was caused by the fall.

31. As regards the ankle injury suffered by the plaintiff, it is clear that this was caused by the fall.

General damages and having regard to the revised Book of Quantum (2016)

32. In relation to general damages, this Court is obliged by s. 22 of the Civil Liability and Courts Act, 2004, to have regard to the Book of Quantum. The previous Book of Quantum was issued in 2004 and so was somewhat out of date. Accordingly the damages awarded by the High Court in recent years tended to be greater than those set out in the Book of Quantum. However now that the Book of Quantum has been updated, it is this Court's view that it is important that this Court does have regard to the Book of Quantum 2016, as it is obliged to do under the 2004 Act. This is because, if this Court does not do so it would mean there would be less certainty regarding likely outcomes in personal injury cases before this Court. This uncertainty lessens the likelihood of personal injury cases being resolved without the need for court hearings (whether before the Personal Injuries Address Board or by settlements out of court). This uncertainty leads to unnecessary litigation, which leads to unnecessary and significant costs for defendants and critically also significant costs and risks for plaintiffs seeking damages for their injuries.

33. Achieving greater consistency and proportionality in High Court awards would also seem to be an aim of the Court of Appeal in

light of its recent decisions regarding personal injury awards, which decisions are binding on this Court. See for example *Anthony Shannon and Rita Shannon v O'Sullivan* [2016] IECA 93 where general damages were reduced from €90,000 to €40,000 for the first plaintiff and general damages were reduced from €130,000 to €65,000 for the second plaintiff; *Cronin v Stevenson and Russell* [2016] IECA 186 where general damages were reduced from €180,000 to €105,000, *Payne v Nugent* [2015] IECA 268 where general damages were reduced from €65,000 to €35,000 and *Nolan v Wirenksi* [2016] IECA 56 where general damages were reduced from €120,000 to €65,000. While in *Shannon v O'Sullivan* [2016] IECA 105, counsel suggested that this line of cases was evidence of a decision by the Court of Appeal to recalibrate damages downwards, Irvine J clarified that these decisions simply applied the proper approach to damages in a series of cases, which resulted in those damages being more just, equitable and proportionate.

34. In light of the foregoing, this Court concludes as follows. The plaintiff suffered a neck injury, which lasted for a period of one year and she has now fully recovered. Her neck injury was not the sole factor to her being out of work during this one year period, but it was a contributory factor, along with her back injury. As such, this Court would classify the neck injury as minor and one which substantially recovered. Accordingly, and having regard to the Book of Quantum, this Court would award her €15,700 in damages for pain and suffering for this injury.

35. As regards the ankle injury, this led to the plaintiff being on crutches for 10 days and was the sole reason she was out of work for a week and it was a contributory factor to her being out of work for the second week. However, she fully recovered shortly thereafter. Accordingly, and having regard to the Book of Quantum, this Court would award her €10,000 in damages for pain and suffering for this minor soft tissue injury to her ankle.

Special damages

36. As regards special damages, a schedule with a figure of €5,702.66 was presented to the Court regarding medications, medical fees *etc.* incurred by the plaintiff. This schedule was not objected to by the defendant. However, this Schedule does not easily distinguish between those costs which are associated with the ankle and neck injury, as distinct from the back injury and depression. If the defendant wishes to make submissions regarding which costs are associated only with the ankle and neck injury, the Court will hear them. If not, the Court will make the award of special damages in the full amount.

37. As regards other special damages, the plaintiff's ankle injury had cleared up within a matter of weeks and her neck injury had cleared up completely within a year of the accident. As her failure to return to work during this first year would have been due in part to her neck injury, but also in part due to her back injury, for which the defendant is not liable, this Court will award her damages in respect of lost earnings for 75% of that year, which come to €15,525, based on her salary at that time.

Conclusion

38. Therefore, subject to submissions regarding special damages for medical expenses or the treatment of social welfare payments, this Court would award the plaintiff general damages of €25,700 and special damages of €21,227.66 a total of €46,927.66.