

## THE HIGH COURT

[2008 No. 3727 P.]

## BETWEEN

FRANZ SAVINO

PLAINTIFF

AND

WILLIAM SNOW

DEFENDANT

**JUDGMENT of Ms. Justice Irvine delivered on the 20th day of April, 2012**

1. The plaintiff in these proceedings is a married man and the father of four small children who was born on 9th September, 1969. He lives with his wife and children at Drynam, Swords, Co. Dublin.

2. The within claim is an assessment of damages arising from a road traffic accident which occurred on 18th December, 2004 at Pinnock Hill, Swords, Co. Dublin. Regrettably, as the plaintiff was driving at a modest speed on his way to work, a horse ran out in front of his car making it impossible for him to avoid colliding with it. The horse was then thrown up on the bonnet of the plaintiff's vehicle causing the front of his vehicle to be pushed back in his direction.

3. As a result of the collision, the plaintiff sustained significant physical and psychological injuries. It is the extent and severity of those injuries and their consequences that is in dispute between the parties. In this regard, the court's assessment of the plaintiff's claim has been complicated by a number of factors which include:-

- (a) a history of back pain experienced by the plaintiff in the three years leading up to the collision;
- (b) an incident wherein the plaintiff was assaulted by a neighbour in March 2005; and
- (c) injuries sustained by the plaintiff when he caught hold of a pram to stop it rolling out onto the public roadway in July 2005.

I will deal with each of these issues in the findings of fact set out later in this judgment. Prior to doing so, I will highlight some of the more significant features of the plaintiff's injuries and treatment.

**Injuries**

4. As a result of the collision the roof of the plaintiff's vehicle collapsed and the steering column was shunted in against his knees. He immediately experienced a crunching sensation in his back and felt physically sick. When he got out of the car, he was shocked and shaking but felt lucky to be alive. He feared that a rider might be under the car as he seen the reins of the horse trail across his windscreen at the point of impact. His clothes were covered in blood and somewhat inappropriately at the locus, he cradled the head of the horse in his arms.

5. The plaintiff refused to go to hospital in an ambulance. He did not want to worry his then pregnant wife. Instead, he took a lift with a work colleague to the nearby D.I.D. electrical store where he worked as a sales representative. His wife then came to collect him and took him home.

6. The plaintiff attended his general practitioner, Dr. Twomey, twice the following week. He had pain in his shoulders, knees, left hip and pelvis. The plaintiff also complained of having difficulty sleeping, was highly emotional and was unable to lie on his shoulder. He was prescribed Difene, Zydol and Valium and was also advised to attend for physiotherapy.

7. The plaintiff managed to return to work in January 2006 but the pain in his left hip, groin and pelvis continued. In March, due to the plaintiff's poor progress, Dr. Twomey had X-rays carried out. Because of continued pain he decided to refer the plaintiff for review by a consultant orthopaedic surgeon. However, before that review took place, two further events occurred which are some relevance to these proceedings.

8. On 28th March, 2005, the plaintiff was assaulted by one of his neighbours. He had complained to gardai about local children causing damage to his car. One of his neighbours resented this complaint and attacked the plaintiff by grabbing him by the throat and throwing him up onto his wife's car. His ribs and right elbow took the brunt of the assault. He attended his general practitioner three days later with evidence of bruising on his face and right arm. He made no mention of any injury to his back.

9. Whilst Dr. Twomey wrote a referral letter to enable the plaintiff obtain an orthopaedic review in May 2005, this had not occurred when he further injured his back on 5th July, 2005. On that date, a pram with a small child in it, rolled out of a driveway towards the Walkinstown road. The plaintiff stretched out his arm to restrain the pram and in doing so wrenched his back. He did not feel much by way of discomfort at the time but the following morning he was in acute pain. He had to lie down on the bathroom floor and his general practitioner had to come to give him a painkilling injection.

10. Perhaps expedited by the aforementioned incident, the plaintiff was seen by Mr. McNamee, Consultant Orthopaedic Surgeon, on 13th July, 2005, at which time he was complaining of low back pain with sciatica which had been getting worse. He had pain in his shoulder and also in his hip. Mr. McNamee felt that the hip pain was referred pain from the patient's low back. He advised the plaintiff to take Difene, Lioresal and to undertake physiotherapy.

11. The plaintiff took the medication as advised by Mr. McNamee and had two sessions of physiotherapy. When seen by Mr. McNamee six weeks later, he pronounced himself feeling 40% better and was considered overall to be much improved. His hip pain had settled

but strenuous exercise was causing him continued back pain. He was advised that his injuries were soft tissue in nature and that he should continue exercising.

12. Regrettably, the plaintiff's problems continued. He had difficulty with prolonged sitting and standing and he was not able to lift heavy goods. These restrictions made it difficult for him to cope with his work. Because of these ongoing problems, the plaintiff was referred to St. James's Orthopaedic Unit which he first attended in August 2006. There, an MRI scan of the back showed a postero lateral disc protrusion at the L5/S1 level with compression of the first sacral nerve root. An MRI scan of his left shoulder demonstrated minor rotator cuff tendonitis.

13. Because of the duration of the plaintiff's symptoms and their failure to respond to ongoing medication, the plaintiff was referred to the Pain Management Clinic at St. James's Hospital where he came under the care of Mr. McCrory, Pain Physician, in January 2007. He advised a series of interventions which took a significant toll on the plaintiff's physical and mental health and also interfered with his capacity to work. In particular, he had a selective nerve root block at L5/S1 in March 2007 which gave him some improvement. This was repeated in May 2007. He also had trigger point injections into the left trapezius muscle in June 2007. In July 2007, he underwent a right lumbar rhizolysis and what is described as a quadratus lumborum injection. In October 2007, he had a further injection into the left shoulder and a repeat quadratus lumborum injection. The plaintiff received further injection for neck and back pain in March 2008. Because of the limited success of that treatment, Mr. McCrory sought a second opinion from Mr. Fitzgerald, also a pain specialist in St. James's Hospital. Together they came to the conclusion that the plaintiff's problems at that stage were not related to the disc or nerve irregularities seen on the MRI scan but were probably muscular in nature. For this reason, the plaintiff was given botulinum toxin injections in early 2008.

14. Regardless of the all of the aforementioned treatment, the plaintiff continued to experience significant pain in his shoulder and back throughout 2008 and 2009. The plaintiff's employer was sympathetic to his plight as he was a valued member of staff. He was initially transferred to the Tallaght branch to give him lighter work and a shorter distance to travel. Thereafter, he was given a six month trial as an assistant manager in the D.I.D. offices in Crumlin in 2007. However, he was out of work for approximately 30 - 40 days during that year and his employer was not in a position to absorb absences of that nature. Consequently, he was told that he would either have to go back to work as a sales representative in Tallaght or leave the organisation. The plaintiff opted to return to work in Tallaght in August 2007 but he found the work too arduous. Shortly following his return to work in Tallaght, his legs went from under when he was struggling to make his way home. At that stage, he decided he could not continue working.

15. At the time the plaintiff discontinued his employment he was walking with a stick and taking high doses of analgesia. The interventions of Mr. McCrory had failed to achieve a permanent improvement in his condition and a trial of a Tens machine proved unsuccessful. In these circumstances, it was decided that the plaintiff was probably a good candidate for a spinal stimulator.

16. In April 2010, a spinal stimulator was implanted under general anaesthetic and since that time, the plaintiff has been using it on a 24 hour a day basis. It is affording him significant pain relief and it has allowed him to reduce his medication from approximately twenty to eight tablets a day.

17. Apart from the physical difficulties to which I have earlier referred, the plaintiff also developed significant psychological problems as a result of the collision. His general practitioner first prescribed antidepressant medication for him in 2007. However, notwithstanding counselling and ongoing medication, the plaintiff demonstrated suicidal ideation in late 2008 as a result of which he was referred to Dr. McMonagle, Consultant Psychiatrist in 2009. He diagnosed Post Traumatic Stress Disorder and depression and was of the opinion that the plaintiff was suffering from low mood. Dr. McMonagle concluded that the preponderance of the plaintiff's psychological symptoms could be ascribed to ongoing chronic pain and lack of sleep. Thankfully, the plaintiff's psychological problems have abated somewhat due to the reduced levels of pain and increased levels of activity which he has been able to enjoy since the insertion of a spinal stimulator.

### **Findings of Fact**

18. Having heard and considered all the evidence in the present case, I am firstly satisfied that the back pain complained of by the plaintiff in the three years prior to the road traffic accident are irrelevant to the court's conclusions. Those symptoms I am satisfied were entirely related to kidney problems which affected the plaintiff over that period of time. Ultimately, the plaintiff had kidney stones removed endoscopically and once the final fragments or gravel, as it is referred to, were passed by the plaintiff in November 2004, he became entirely asymptomatic.

19. I am also satisfied, having heard the evidence of the plaintiff and that of Dr. Twomey, that the assault which was perpetrated on the plaintiff by his neighbour in March 2005, had no effect whatsoever on the injuries sustained by him in the road traffic accident. His attendance with his general practitioner some three days after this assault, and the notes of that examination, would appear to support this finding.

20. Based solely on my assessment of the plaintiff's evidence and that of the medical records, I was initially inclined to the view that the incident with the pram had substantially changed the nature of the plaintiff's back injury causing him to develop acute and intractable pain which he would never otherwise have had to contend with had it not been for this entirely independent event. However, the defendant did not adduce any medical evidence to suggest that, but for the pram incident, the plaintiff was on his way to an uneventful recovery from his road traffic accident. Indeed, the defendant called no medical evidence to challenge that introduced on the plaintiff's behalf. The only medical evidence introduced by the defendant were the reports of Dr. John Stack, Consultant Radiologist, which are not critical to the court's decision. Accordingly, it seems that the defendant accepts, as per the medical evidence led on the plaintiff's behalf, that a substantial portion of the plaintiff's ongoing problems relate to the car accident.

21. I have tried to weigh and evaluate the plaintiff's medical evidence to determine the true extent of the injuries caused by the car accident rather than the pram incident. This was not an easy task as the medical evidence adduced on the plaintiff's behalf on this issue was very inconsistent. Further, when dealing with his medical advisers, the plaintiff was not always an accurate historian. By way of example, a number of the plaintiff's doctors laboured under the belief that he had in fact undertaken much more physiotherapy by way of rehabilitation than in fact was the case.

22. In coming to my conclusions, I have been substantially influenced by the evidence of Mr. Hugh Smith, Consultant Orthopaedic Surgeon, who was clear in his opinion that the incident with the pram was responsible for much more than a temporary exacerbation of the plaintiff's prior symptoms. He was satisfied that this incident has had a significant ongoing effect on the level of the plaintiff's pain and the treatment required to deal with it.

23. Taking all of the evidence into account, I feel that the correct approach to be adopted in this case is to apportion 35% of the plaintiff's pain and suffering to date and into the future to the incident with the pram. I propose also to apportion the vast

preponderance of the special damages on a like basis.

## Conclusions

24. It is undoubtedly the case that the plaintiff's life has been very significantly affected by the injuries sustained by him in the road traffic accident in December 2004. At that stage, he was only 35 years of age. In the last seven years, his ability to enjoy normal family life has been seriously effected. In particular, his ability to enjoy his children and participate in all of their activities has been adversely affected. Likewise, his relationship with his wife has at times been difficult because of the ongoing level of his pain and the limitations which have been set in terms of his ability to participate in family life.

25. At the time of the road traffic accident, the plaintiff was a competitive cricketer. He has been unable to play cricket since the collision. Initially, he withdrew entirely from the cricket world but since 2009, has reengaged with Railway Union Cricket Club albeit in an administrative sense. He has been made vice president of the club and has also been appointed its honorary secretary. In addition to his social involvement in the club the plaintiff has recently, because of the alleviation of his symptoms following the insertion of the spinal stimulator, been in a position to train as a junior umpire. He hopes to progress further with this training in the expectation that he may ultimately qualify to become an international cricket umpire.

26. The plaintiff has not worked since he left D.I.D. in October 2007. It is clear that he was a valuable and highly thought of sales representative. I heard evidence to the effect that if he was well and could pass a medical examination that there would be an equivalent position to that which he formerly held available to him albeit at a lesser salary than he previously enjoyed due to the present economic circumstances.

27. While the plaintiff is still taking what can only be described as an intimidating battery of medication, it is the expectation of Mr. McCrory, Pain Specialist, that ultimately the plaintiff will be weaned off all of this medication to the point that he ought to be in a position to live a relatively normal life subject to his need to continue using the spinal stimulator indefinitely. The battery will need to be replaced every five to seven years.

28. Whilst the court heard evidence from Mr. Paul Connolly, Consultant Orthopaedic Surgeon, which was quite negative as to the plaintiff's future medical and occupational prospects, I am satisfied that I should prefer the evidence of Mr. McCrory in this regard. Mr. McCrory has been treating the plaintiff for a number of years. By way of contrast, Mr. Connolly saw him on one occasion only and then solely for the purposes of medical legal review. Accordingly, insofar as the evidence of these two witnesses differed, I prefer the evidence of Mr. McCrory.

29. The evidence of Ms. Mary Feely, Vocational Rehabilitation Consultant, was to the effect that the plaintiff is presently unemployable. His absence from work over the last six years when combined with his medical problems make him unemployable in today's economic climate. Ms. Feely told the court that even if the plaintiff was now fit for light work or office duties that he would have no prospect of gaining employment until he had involved himself in a substantial retraining programme which would prove his ability to work consistently on a day-to-day basis. He would need to demonstrate the ability to engage in structured activity outside of the home which as yet he has not undertaken.

30. Ms. Feely was of the opinion that, assuming the plaintiff was in a position to attend a rehabilitation programme over perhaps the period of eighteen months and follow that up with another eighteen months to two years of some type of work which would not necessarily be remunerative, he would then be in a position to gain employment. However, at that stage, regardless of his past work record, he would probably re-enter the work market at an entry level in a job paying something between €22,000 - €28,000 per annum. He might hope to improve on that salary depending on performance over subsequent years.

31. While the defendant tried to make the case that the plaintiff, if he had complied with the rehabilitation and physiotherapy advised by his doctors, would now be well on his way back into the employment market, I tend to favour the plaintiff's evidence on this issue. Accordingly, subject to the apportionment of liability, I propose to deal with a future loss of earnings claim on the basis that in three years time, the plaintiff ought to be back in some type of employment. However, I am satisfied that it will take him approximately five years to catch up in terms of earnings with the salary he might otherwise have enjoyed had it not been for the events the subject matter of these proceedings.

32. Taking the evidence of Mr. Byrne, Actuary, there seems to be little dispute but that the sum in respect of loss of earnings to date, making an allowance for the deduction of disablement benefit, is a sum of €121,256.

33. Assuming that the plaintiff will return to work at a net weekly sum of €434 per week in three years time, his future loss of earnings up to the date of his return to work will be €64,666.

34. Following the plaintiff's return to work he will continue to suffer a differential loss of earnings probably for a further five years and this sum has been capitalised by Mr. Byrne at €18,656.

35. To the aforementioned loss of earnings figures, based on my conclusion that the plaintiff should be in a position to return to work in three years time, he has sustained a future pension loss which Mr. Byrne has stated amounts to €12,069.

36. The battery in the plaintiff's spinal cord stimulator will have to be replaced every four to five years and accordingly, I will allow a sum of €95,000 in respect of this head of claim.

37. I have to decide whether the injury benefit should be deducted under s. 286 of the Social Welfare Consolidation Act 2005. I read that section and in particular s. 286(3) as covering a liability generated by the use of a mechanically propelled motor vehicle which is required to be covered by an approved policy of insurance i.e. where the damage is caused by that vehicle which is required to be insured. Therefore, I do not think it is appropriate to deduct the injury benefit.

38. Regardless of the fact that I have limited the plaintiff's claim in respect of future loss of earnings, I must nonetheless make some adjustment to take into account the types of exigencies as are referred to in *Ready v. Bates*.

39. There is also a claim of €16,481 in respect of interest which has accrued on the plaintiff's mortgage due to the fact that he was unable to pay his mortgage from 21st January, 2008, until 21st June, 2010, thereby adding a liability of €16,481 to his capital balance. As I understand it from the evidence since June 2010, Mr. Savino's family and that of his wife have been paying the mortgage payments.

40. There are other special damages being items No. 1 - 8 on a schedule of special damages handed into court at the conclusion of

the evidence. Those special damages are as follows:-

MRI Scans €1,072

St. James's Hospital Bill €1,093

Professional Medical Consultations €435

Osteopath/Acupuncture €85

Psychotherapy €150

Pharmacy €4,720.89

Car damage €3,500

Car hire €150.73

**Total €11,205**

The parties advised the court that they had agreed that a sum of €10,860 should be allowed in respect of these items. This creates a minor difficulty for the court insofar as its apportionment is concerned insofar as the sums claimed in respect of car damage and car hire would clearly be recoverable in full regardless of the liability apportionment. Consequently, for the purposes of apportioning these eight items of special damages, I will deduct from the €10,860, the total sum claimed in respect of car damage and car hire which is €3,650.73.

41. The following is the total sum which I will allow in respect of the various heads of special damage claimed subject to apportionment, namely:-

(a) Past loss of earnings €121,256

(b) Loss of earnings from now until the plaintiff's

return to work in three years time €64,666

(c) Differential loss for five years following return

to work €18,656

(d) Future pension loss €12,069

Total €216,647

Deduct €10,000 in respect *Ready v. Bates*

considerations referable to items (b), (c) and (d) - €10,000

€206,647

(e) Replacement of spinal cord stimulator

battery €95,000

(f) Interest on plaintiff's mortgage €16,481

(g) Miscellaneous

Special Damages i.e. €10,860

In respect of car damage and car hire -€3,650

€7.210

**Total €325,338**

42. Having regard to my conclusions on the liability issue, I will allow 65% of the aforementioned sum which amounts to €211,469.70. I will allow the sums in respect of car damage and car hire in full i.e. €3,650 bringing the total sum in respect of special damages to €215,119.70.

43. In respect of pain and suffering to date, prior to any apportionment of liability I will allow a sum of €120,000, I will allow a further sum of €80,000 in relation to pain and suffering into the future, making a total award in respect of general damages of €200,000. Applying the relevant apportionment to this figure, the sum to which the plaintiff is entitled in respect of pain and suffering is €130,000. Accordingly, the overall award will be in the sum of €345,119.70.