

APPROVED

[2023] IEHC 128



THE HIGH COURT

[2016 10437 P]

BETWEEN

SUSAN HEALY

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment delivered on 24 February 2023 by Mr. Justice Tony O'Connor

1. Before the Court is an assessment of damages claim for a slip and fall in the shredding room of the defendant's hospital at Mulgrave Street, Limerick on 7 November 2013. The principal injury now relates to the plaintiff's shoulder, with residual complaints of intermittent pins and needles on the middle three fingers of her left hand, and with continuing discomfort and restriction in the left knee. The defendant focused its defence of the claim at trial on: -

- (i) Whether the plaintiff's injuries may be attributable in whole or in part to the subsequent rear impact road traffic collision on 30 December 2013, ("The RTA"), following which she issued separate High Court proceedings on 23 November 2016 which were settled last year for €10,000 to include costs. The personal injury summons for that claim had record number 2016 10438.
- (ii) Whether the "... possible slight reduction in the height of the disc and slight broadening of the disc bulge at C5/C6" detected from examining MRI scans taken in May 2014 and April 2019 has caused the ongoing symptoms in the left shoulder, as opposed to coming from the fall or the RTA.
- (iii) The weight to be given to the oral evidence of Mr. Michael Gilmore who was requested by the plaintiff's solicitor to examine the plaintiff, as opposed to having been requested by the plaintiff's general practitioner.

Medical reports

2. At the beginning of the trial, I ruled that the defendant could call Mr. Kapoor, who had furnished a report to the Personal Injuries Assessment Board ("PIAB") in December 2015. Following the plaintiff's evidence and the oral evidence of Mr. Gilmore, counsel for the parties informed the Court that the following medical reports could be admitted as evidence: -

- (i) Report of Mr. Kapoor, consultant orthopaedic surgeon, dated 13 December 2015;
- (ii) Report of Mr. Cormac Tansey, consultant trauma and orthopaedic surgeon to the defendant's solicitors dated 30 April 2020 and 7 November 2022;
- (iii) Report of Dr. Michael Griffin, the plaintiff's general practitioner, dated 29 July 2014 to the plaintiff's solicitor;
- (iv) Reports of Mr. Hannan Mullet, consultant shoulder and elbow surgeon (who had treated the plaintiff), dated 1 May 2015 and 20 May 2021 to the plaintiff's solicitors.
- (v) The report of Dr. Gillian Daly, the plaintiff's general practitioner, dated 23 May 2022, to the plaintiff's solicitor.

3. Counsel clarified at my request that the issues of opinion in dispute between Mr. Kapoor and Mr. Tansey on the one hand, and Mr. Gilmore as supported to a large extent by Mr. Mullet on the other, was a matter for the Court to decide upon, having regard to the questioning of Mr. Gilmore. In other words, the Court is asked to have regard to the written reports of those practitioners who did not give oral evidence "in the context of the evidence [the Court has] from Mr. Gilmore". Counsel for the defendant did not object to the adducing of evidence from Mr. Gilmore but emphasised that regard could be had by the Court to the fact that Mr. Gilmore had only been requested to review the plaintiff by her solicitor.

Issues opined upon by Mr. Gilmore

4. Counsel for the defendant put to Mr. Gilmore that he did not have the records of the plaintiff's general practitioner or more particularly those records of attendances on 22 November 2013 and 15 January 2014. Mr. Gilmore so confirmed, and counsel put the contents of those records to him. Mr. Gilmore confirmed that he had elicited the relevant details from the plaintiff and that the contents did not cause him to change his view which I

will summarise now. Mr. Gilmore explained that the delayed onset of the shoulder symptom and particularly those attributable to 23 December 2013 by the plaintiff was understandable. Mr. Gilmore stated that the plaintiff had explained to him that she had pain following the fall, including during her two – week visit to her sister in San Francisco which commenced the day after her fall. The pain-relieving medication which she obtained over the counter, and which was taken by the plaintiff, worked and the onset occurred in the manner described by the plaintiff. Mr. Gilmore was brought through the reports of Mr. Kapoor and Mr. Tansey during cross – examination in a methodical way.

Prognosis

5. It is common case that most soft tissue injuries with which this Court is now concerned settle within 18 to 24 months. I shall refer later to the contentious issue about whether the plaintiff's shoulder and knee sequelae can be attributable to the fall in November 2013. At this stage, suffice to say, that Mr. Gilmore was always guarded about the prognosis compared to the rather trenchant views of Mr. Tansey. Further, Mr. Gilmore only stated that the plaintiff "might have" escaped the effects of degenerative changes but for the fall.

Attribution to fall or RTA

6. Mr. Gilmore explained how he disagreed with Mr. Tansey about whether it was the fall or the RTA which caused the shoulder sequelae. There can be no dispute that the low impact RTA could not have caused the knee complaint. Mr. Gilmore said that the account given by the plaintiff to him, which was confirmed in sworn evidence to this Court, was the basis of his disagreement with Mr. Tansey on the issue of attribution. Mr. Gilmore did indeed clarify that the plaintiff had not mentioned to him that she had also issued High Court proceedings following the RTA. He was not aware that she had referenced the RTA to her own GP who she had attended on 14 January 2014. Mr. Gilmore had regard however to the RTA in his initial report of 18 April 2016.

Mr. Mullet

7. The two reports from Mr. Mullet detail the sub – acromial steroid injections administered by him to the left shoulder for therapeutic and diagnostic reasons. Although the plaintiff could not recall whether she had mentioned the RTA to Mr. Mullet, it is curious to note that the reference in a second report, 21 May 2021, refers to the date of the RTA as the date of the accident before giving details of the fall. He had indeed correctly cited the date of the fall in his first report. Again, suffice to say that Mr. Mullet, being the plaintiff’s treating orthopaedic surgeon, opined in May 2021 that the plaintiff still complains of left shoulder pain which requires analgesia. He also stated that the plaintiff had signs of rotator cuff tendonitis which will not need surgical intervention. Mr. Gilmore agreed with that summation.

Dr. Gillian Daly

8. The report of Dr. Daly dated 23 May 2022 merely corroborates the plaintiff’s account of ongoing discomfort and restriction without mentioning the effect of the RTA.

Mr. Cormac Tansey

9. The two reports of Mr. Tansey, consultant orthopaedic surgeon, who was not made available to the Court for questioning, was apparently not afforded the opportunity to take account of Mr. Gilmore’s views on attribution, causation and prognosis. So, the Court is left with the task of weighing the evidence of Mr. Gilmore, which logically outlined the grounds for his disagreement with Mr. Tansey.

Mr. Kapoor

10. The report dated 13 December 2015 of Mr. Kapoor, consultant orthopaedic surgeon, to the PIAB confirmed that the injuries complained of by the plaintiff were consistent with a fall. Under “General comments and observations” Mr. Kapoor, who did not have the benefit of subsequent MRI scans or reports thereon, opined that the “soft tissue impact would have

aggravated and brought forward the onset of her symptoms by about 18 to 24 months on the balance of probability”.

Weight of the evidence

11. Submissions were made to the Court about the regard which the Court should have to the evidence of Mr. Gilmore, as opposed to the admissibility of his evidence. Rather than embarking on an excursus of comments made by learned judges of the High Court in other personal injury actions as cited by counsel, I summarise this Court’s understanding of the law. I preface that summary by acknowledging the professional approach taken by counsel and the solicitors in the conduct of the assessment hearing earlier this week. Solicitors and counsel have training, experience and skills which derive from established duties and principles. The legal profession is considered by the Court to be a noble profession; it assists in upholding and protecting the law. Law preserves the moral sanctity which binds society. In short, no question was asked or arose during the assessment hearing about the propriety of the referral of the plaintiff by each firm of solicitors to some of the medical practitioners, followed by the delivery of medico – legal reports.

Court of Appeal

12. The evidence of a general practitioner and sports injury specialist (Dr. McCarthy) who had been identified to the claimant by her solicitor, as opposed to having been referred by a medical practitioner, was accepted in the High Court and the Court of Appeal in *Fogarty v. Cox* [2017] IECA 307 (unreported, 29 November 2017). Irvine J. as she then was, stated at para. 43: -

“Neither was it for the High Court judge to justify his acceptance of the evidence of Dr. Sean McCarthy even if it was Mr. Fogarty’s solicitor who had made the referral. Dr. McCarthy was subject to intense cross – examination during the trial. It is to be inferred from the fact that the trial judge accepted his evidence on causation that he

considered the circumstances in which Dr. McCarthy became Ms. Fogarty's treating doctor immaterial to his conclusion. Nonetheless, I would caution against a practice whereby any solicitor would repeatedly refer clients who have personal injury claims to the same doctor who would then take over the management of their care with a view to later coming to court to give evidence on their behalf. Those are circumstances likely to place the doctor in a conflict-of-interest situation and are likely to expose them to a risk of being considered less than fully independent when giving their evidence".

Summary

13. There is currently no rule to prevent a solicitor for any party from referring a claimant in a personal injuries action to a medical practitioner. Such referrals may interrupt the normal flow of communication within the medical profession, which is also considered a noble profession. Further, the admissibility of evidence from a medical practitioner is a matter for each trial judge. Lastly, the weight to be attached to evidence from a medical practitioner to whom a claimant was only referred by a solicitor is a matter for each trial judge. Expert witnesses who may colloquially be called "guns for hire" can be exposed through cross – examinations or questions from a trial judge. A passing reference was made in submissions to this Court to a recently published article which had asserted that: -

"In the UK and Australia, treating doctors are prohibited from giving evidence".

14. In the limited time available to research that assertion, I read the "Civil Justice Council Guidance for the instruction of experts in civil claims", on complying with Part 35 of the Civil Procedure Rules in England and Wales. I have not identified a blanket prohibition in England and Wales against the adducing of expert evidence from treating doctors. However, it appears to be the case that before experts are appointed, there can be an assessment of the potential for conflict, possible vested interest or effect on ongoing patient/doctor

relationships. Applications to court for permission to appoint named experts in personal injury litigation has not been a feature in Ireland to date. No evidence was adduced and no questions were asked about the necessity or desirability for the plaintiff's solicitor to refer the plaintiff to another orthopaedic surgeon without reference to the plaintiff's general practitioner or Mr. Mullet. Further, the propriety of the referral was not discussed before this Court. I was not asked to determine, whether it was necessary or desirable for the plaintiff's solicitor to refer the plaintiff to Mr. Gilmore.

Weight of Mr. Gilmore's evidence

15. There was no challenge to the credibility, competence, impartiality or independence of Mr. Gilmore. He merely confirmed in cross – examination that it was the plaintiff's solicitor who had referred the plaintiff. Furthermore, there was no objection to the admission of his evidence before he gave evidence. This contrasts with the unsuccessful application made on behalf of the plaintiff to exclude the evidence of Mr. Kapoor.

Conclusions

16. The plaintiff, even on the defendant's evidence, suffered soft tissue strains in a fall at work. Responding to each of the questions posed at the beginning of this judgment: -

- (i) I accept Mr. Gilmore's explanation of how the plaintiff's left shoulder, left knee and paraesthesia were attributable to the fall. In fairness, Mr. Tansey was not given the opportunity to comment on Mr. Gilmore's reasoning. In the context of the principal injury, the shoulder, he is supported by the account and views expressed by the plaintiff's treating shoulder and elbow surgeon, Mr. Mullet.
- (ii) The plaintiff's degenerative changes as identified in the MRI scans have indeed influenced the sequelae. Mr. Gilmore's answers to counsel and the Court were consistent in opining that the plaintiff "could of course have

developed” her current symptoms because of the changes without the fall at some stage since 2013. Unfortunately, Mr. Tansey was not made available to the Court to opine on the effects of the scenario which he had discounted and which the Court now accepts as described in the immediately preceding paragraph of this judgment. None of the other reporting medical practitioners helped to pinpoint if and when the plaintiff would have encountered her current shoulder problems or problems similar to those.

- (iii) The description given by Mr. Gilmore and Dr. Gillian Daly about the sequelae for the plaintiff’s left knee are accepted by the Court as they correspond with the plaintiff’s own account in evidence. While hoping that I am not trivialising the plaintiff’s complaints, I consider that the plaintiff’s knee injury has been more of a discomfort giving rise to some restriction which she has admirably learned to manage.

Quantum

17. The plaintiff on the day following the fall went on her long – planned visit to her sister in California. She got the worst bout of pain on her return before Christmas 2013 and has not suffered any loss of earnings. The injections administered by Mr. Mullet gave relief, albeit limited, and the plaintiff minimises her use of medication for good reasons. The principal sequelae emanate from the shoulder. I am satisfied on the balance of probabilities that she was going to have some difficulties in that area later in life without the fall ever occurring. The left knee complaint, intermittent pins and needles sensation in three left fingers which may emanate from the shoulder and the initial back injury will be taken into account by the Court. It is difficult to pigeonhole the injuries into the categories set out on p. 38 (Shoulder) and p. 59 (Knee) of the Book of Quantum. However, the figures in the Book of Quantum assist in the proportionality exercise. It is fair to say that the injuries fall more into

the minor range as opposed to the moderate range. In that way, and having regard to the evidence of the plaintiff, which was relatively clear despite the elapse of over nine years since the fall, I will assess damages. Before doing so I clarify that I am satisfied from the evidence of Mr. Gilmore that the minimal impact in the RTA had little or no effect on the principal complaints. The defendant was more psychologically traumatised by the RTA, and it is indeed regrettable that yet another set of High Court proceedings followed that incident.

18. I assess general damages for the period from November 2013 to February 2023, noting that the plaintiff has not satisfied me that all of her shoulder complaints can be attributed to the fall at €30,000. The plaintiff's ongoing knee discomfort and potential restriction on lifestyle merits some recognition for future general damages, which I assess at €7,000. Special damages were agreed at €4,588.38, and therefore I can make an order directing the defendant to pay the sum of €41,588.38 subject to what counsel may submit or agree now or at a later stage.

Postscript

19. Following delivery of this judgment, the parties agreed the terms of the order for the costs of the proceedings.

Mr. Downing SC, Mr. McMahon SC and Ms. Finn BL for the Plaintiff.

Holmes O'Malley Sexton Solicitors for the plaintiff.

Mr. Tuite SC and Mr. Lehané BL for the defendant.

Harrison O'Dowd Solicitors for the defendant.