

THE HIGH COURT

[2014 No. 658]

BETWEEN

CONCEPTA (OTHERWISE CONNIE) COLLERY

PLAINTIFF

AND

EAMON CLOHESSY

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 13th day of January, 2016**Introduction**

1. The plaintiff is a single lady, who was born on 2nd December, 1965. At all material times, the plaintiff was a tenant to the defendant of the premises situate at 10 Peter's Street, Clonmel, Co. Tipperary.

2. It is common case between the parties that on 29th June, 2013, a portion of the ceiling in the kitchen in the said premises was caused to break off and fall to the ground. It is accepted on behalf of the defendant that there was a duty on him to keep the said premises in good repair.

3. The essential dispute between the parties is in relation to the question of whether the plaintiff suffered any personal injuries as a result of this incident. The plaintiff states that a portion of the plaster work fell down and struck her on the head and on the back of her neck. The defendant's version is that the plaintiff stated to him both in a telephone message on his voicemail and subsequently to him in person, that luckily she was putting her dinner in the microwave, otherwise she could have been injured by the falling plaster.

Liability

4. The plaintiff stated in evidence that some six months prior to the date of the incident, she had made complaints to the defendant concerning cracks which had appeared in the ceiling in the kitchen. She said that she made this complaint to the defendant when he had delivered a new fridge-freezer to her. She stated that she had also made similar complaints earlier in 2011 and 2012. The defendant accepted in evidence that on one occasion she had made complaint to him concerning cracks in the ceiling. He stated that the cracks were not that great at the time the complaints were made to him. He said that he told the plaintiff to keep an eye on the cracks and, if they got any worse, to let him know. He stated that the plaintiff never came back to him on the matter.

5. As already noted, the defendant accepted that he was responsible for the repair of the interior of the premises.

6. The plaintiff was able to submit in evidence a number of photographs showing the cracks in the ceiling before the date of the incident.

7. I am satisfied that complaint was made by the plaintiff to the defendant concerning the cracks which had appeared in the kitchen ceiling. Once these were brought to the attention of the defendant, it was his responsibility to ensure that the premises was put into repair and made safe.

8. It is clear that no steps were taken to render the ceiling safe. As a result, the plaster work fell from the ceiling on the evening of 29th June, 2013. In these circumstances, I am satisfied that liability must rest with the defendant for any injuries that may have been caused to the plaintiff as a result of the incident on 29th June, 2013.

9. On the night of the incident, the defendant and his daughter called to the premises in response to a telephone call from the plaintiff. The defendant examined the ceiling and removed some further pieces of plaster work, which looked in imminent danger of falling. He tidied up the debris and stored same in black plastic bags in the rear yard of the premises. There was some debate between the parties as to whether the defendant offered to have repairs to the ceiling carried out immediately. The defendant stated that such an offer was made, but that the plaintiff refused same, due to the fact that her family were coming to stay for a few days and were due to arrive on the following day. For this reason, the defendant states that the repairs were postponed. The plaintiff denies that that was the reason why the repairs were not carried out immediately.

10. In any event, on 8th July, 2013, prior to the carrying out of any repairs to the ceiling, further plaster work fell from the ceiling. The plaintiff was in an adjoining room and was not injured as a result of this second incident.

Quantum

11. The plaintiff stated that at approximately 19.40hrs, she was preparing her evening meal. She had taken an item out of the fridge, when suddenly a piece of plaster fell from the ceiling and struck her on the head and neck. She said that she was extremely shocked by the incident and had a bump on her head. She telephoned her friend, Sandra Hallanan and asked her to come around immediately. She then telephoned the defendant, but did not get through to him. She left a message on his answering machine.

12. The plaintiff stated that at approximately 21.30hrs, the defendant and his daughter arrived at the flat. She said that she was sure about the time, as she recalled looking up at the clock just before they arrived.

13. The plaintiff stated that she said to the defendant, *"I hope you are proud of yourself"*. She says that the defendant replied, *"Stop wrecking my head, leave me alone. I know it is my fault"*. To which she replied *"Yes, it is your fault"*.

14. The plaintiff stated that the defendant and his daughter left at approximately 22.00hrs. In cross examination, she accepted that she did not mention any injury to the defendant on that evening. The plaintiff stated that the defendant never inquired of her whether she was all right or whether she had been injured. The plaintiff further stated that earlier in the evening she had telephoned

her former solicitor. He advised that she should ask her friend to take some photographs of the damaged ceiling. The plaintiff did this and a series of photographs were taken, showing the condition of the ceiling on the night of the incident. The plaintiff further states that after the collapse of the ceiling on 29th June, 2013, she had put some ice in a tea towel and was holding it against the area of her head which had been struck by the plaster. She stated that the defendant would have seen this, when he came to the premises that night. The plaintiff also stated that she took Neurofen that evening.

15. The defendant's version of the events of that day, was quite different to the account given by the plaintiff. The defendant stated that the plaintiff had left a message on his telephone answering machine indicating that a portion of the ceiling had fallen in the kitchen. The defendant stated that this telephone message was left during the afternoon. He stated that from the detailed phone bill which he had received, it was shown that the telephone call was placed to him at 15.04hrs. This was contradicted by the plaintiff, who was adamant that the incident had occurred during the evening at approximately 19.40hrs.

16. Of more importance, is the alleged content of the telephone message. The defendant stated that in the phone message, the plaintiff was quite annoyed and stated that portion of the kitchen ceiling had fallen. According to the defendant, the plaintiff went on to say in the course of the message, that she could have been injured. He said that the plaintiff said *"Luckily I was putting a dinner in the microwave, otherwise I could have been injured"*. The defendant alleged that she said the same thing to him, when he returned her call later in the evening.

17. The defendant stated that when he and his daughter attended at the flat that evening, the plaintiff was somewhat stressed and upset, but made no mention of having suffered any injury. The defendant stated that he asked her whether she would like to be brought to A&E or to a doctor, but she declined this offer.

18. The defendant stated that the first intimation that he got that there was going to be any claim brought by the plaintiff, occurred on 16th July, 2013. By this time, the second incident had taken place and the repairs had been carried out to the ceiling. The plaintiff had made complaint that a Hoover which she had was not working. The defendant took the Hoover away and when he brought it home, he discovered that the only thing wrong with the Hoover was that the filters needed to be replaced. The defendant's wife then returned to the flat and returned the Hoover to the plaintiff. The defendant states that in the course of the conversation with his wife, the plaintiff complained about the dust and dirt which had accumulated in the kitchen following the repair works, she complained about all the cleaning she had to do and indicated that she had consulted her solicitor in relation to the above complaints and the stress that she had experienced due to the collapse of the ceiling. She indicated that she would be claiming compensation from the defendant.

19. The defendant stated that he was shocked when his wife recounted this conversation to him. He stated that during the period when he had carried out the repairs to the kitchen ceiling, the plaintiff had been most friendly. She had left tea and biscuits out for them while the works were being carried out. She did not make any mention of having suffered any personal injury.

20. In support of his assertion, the defendant submitted a copy of a letter dated 29th July, 2013, that he had sent to his insurance broker, upon receipt of a letter of claim from the plaintiff's former solicitor. In the course of the letter to the broker, the defendant stated that the plaintiff had given the following account of the incident on the night of 29th June, 2013:-

"Connie informed me that the plaster had fallen near the cooker while she was standing at the microwave oven (approx 6 or 7ft apart in distance). She said that she had got a fright and was upset and could have been injured. My daughter was with me and heard her say that also."

21. The defendant stated that unfortunately he had deleted the telephone message which had been left by the plaintiff. At the time, his mother-in-law was very ill and he did not want to leave the message, which was somewhat angry in tone, on the answering machine as it would have upset his wife. However, he was adamant that the message was left by the plaintiff on his answering machine stating that she could have suffered injury as a result of the falling plaster. He said that he had tried to retrieve the deleted message from the machine. To this end, he had written a letter on 6th August, 2013, to a representative of Meteor, to see if they could assist in retrieving the message. However, it was not possible to retrieve the deleted message.

22. The defendant submitted that if the court accepted his evidence as to the content of the telephone message and as to what she had relayed to the defendant in the subsequent telephone call, the court should be satisfied that the plaintiff had made an admission that she was not injured at the time of the incident.

23. The plaintiff denied that she had made any such statement to the defendant. She stated that after the second fall of plaster, the defendant subsequently came to her flat and said *"Stop this with solicitors and photographs, how much did I want?"*. The plaintiff replied that the defendant would have to go through her solicitor. In support of his case, the defendant also referred to the medical records which had been made available from the plaintiff's GP. This indicated that she had attended with Dr. Brian Morrissey on 8th July, 2013, to obtain renewal of her prescription for Xanax and Amitriptyline. There was no mention made of any neck injury at the time of that attendance with the doctor. The defendant also pointed to the fact that the first mention of any injury caused due to the ceiling falling down was in a letter dated 16th July, 2013, sent by her GP to South Tipperary Mental Health Services. This letter was in relation to stress that the plaintiff had suffered as a result of the incident with the falling plaster. It indicated that she had been on anxiolytic medication for a number of years. The GP was attempting to wean her off this medication. An urgent assessment was required from the mental health team.

24. In the medical records, there was a note made by Dr. Maria Kelly on 2nd August, 2013, to the effect that the plaintiff still had back pain since the previous incident. She reported low back pain and neck pain and reported that she had poor sleep due to pain. The GP recommended taking anti-inflammatory medication along with her other medication.

25. I accept the evidence of the defendant that on the night of the incident, the plaintiff while complaining about the collapse of the ceiling, said that she could have been injured. In her evidence, the plaintiff accepted that she did not make any mention of the head or neck injury on the night in question. She also stated in evidence that while she had some pain in her neck, she thought that it would resolve quickly. In these circumstances, I do not find that the statements made by the plaintiff to the defendant on the night of the incident constituted a clear statement that she had not received any injury as a result of the collapse of the ceiling.

26. It is clear from the medical records furnished by the plaintiff, that she did not make any mention of neck pain when she attended with Dr. Morrissey for a renewal of her medication prescription on 8th July, 2013. Indeed, while the letter already referred to dated 16th July, 2013, makes mention of the collapse of the ceiling, this is referred to in the context of an increase in her anxiety state, thereby necessitating a review by the South Tipperary Mental Health Services. As far as I can make out from the medical records, it would appear that the first reference to neck pain occurs in the note made by Dr. Maria Kelly on 2nd August, 2013.

27. In a medical report dated 17th February, 2014, the plaintiff's former GP, Dr. Carey (since retired) stated that he had been consulted by the plaintiff after the incident. It is not clear when she was first seen by this doctor. The plaintiff reported that the ceiling came crashing down and hit her on the top of the head, the back of her head and also hit her shoulders, thoracic area and lower lumbar area. Dr. Carey noted that prior to the date of the medical report, she had attended at his surgery and complained about headaches, dizziness, low back pain, neck pain and shoulder pain. She had been attending physiotherapy and found that beneficial. In evidence, she stated that she had had approximately ten sessions of physiotherapy treatment.

28. Upon the retirement of Dr. Carey, the plaintiff came under the care of Dr. Bernadine Rochford, who saw her for the first time on 19th September, 2014. On 29th October, 2014, the plaintiff attended at the surgery complaining of low back pain radiating to both of her legs which required an injection for pain relief. She attended again on 28th November, 2014, complaining of pain; her anti-inflammatory medication was changed in an effort to get some pain relief.

29. On 29th December, 2014, the plaintiff presented with shortness of breath and pain in her left arm. The GP was concerned that there may have been a cardiac problem and also felt that her symptoms would fit with a cervical disc problem. The plaintiff was admitted to hospital for various tests in relation to possible heart complaint. Her neck showed small osteophytes and loss of normal cervical lordosis. As a result of these tests, she was referred to Cork for a myoscan of her heart and they also referred her for an MRI scan of her neck.

30. On 9th February, 2015, the plaintiff contacted her GP to say that she had been in pain all weekend, with tingling in her fingers. She reported that she got no relief from her current medication. She was referred back to the medical assessment unit in South Tipperary General Hospital in the hope that they would expedite further tests investigating her pain. On 13th February, 2015, the GP made contact with the plaintiff by phone, when the plaintiff complained having had a lot of pain. Her medication was changed at this point. The dosage of the new medication was increased on 16th February, 2015.

31. The plaintiff re-attended at the surgery on 14th March, 2015, when she was seen by a different doctor and was prescribed more Palexia for left sided neck and arm pain. An MRI scan was carried out on 31st March, 2015, which confirmed that there was a broad based disc at C5/6 which was impinging on the cord and also a disc at C6/7.

32. On 17th April, 2015, the GP referred the plaintiff to Mr. George Karr, Consultant Neurosurgeon, for the purpose of reviewing the plaintiff and the MRI report. She increased the dose of Amitriptylene to help treat the nerve pain.

33. On 11th May, 2015, the plaintiff attended the surgery suffering from stress. The myoscan report from 20th May, 2015, was reported as normal, which was very reassuring. This suggested that all the plaintiff's symptoms were coming from her neck and not from her heart. The plaintiff was seen by Mr. Karr on 11th June, 2015. Having reviewed the plaintiff and her MRI scan, he felt that there was no clinical myelopathy or radiculopathy. He did not recommend surgery at that stage. He recommended spine care and exercises. He also stated that an EMG would be useful to clarify her arm and hand symptoms. On 16th June, 2015, the GP referred the plaintiff for physiotherapy treatment.

34. In relation to her current symptoms, the GP noted that the plaintiff complained of left arm pain which was constant. It got worse as the day progressed and was worse in bed. This affected her sleep pattern. She was not able to get into a comfortable position. She stated that she only gets two to four hours' sleep at a time. There are no pins and needles, but she had pain shooting down to her fingers on the left side. She has pain at the base of her neck and left shoulder. She had no headaches and she gets relief by shaking her arm. Her low back pain was intermittent and was chronic. It is no worse and no better since the accident. It should be noted that she had had some back pain since working in Clonmel Chilling in 1997. In addition, the plaintiff had suffered with anxiety for a number of years.

35. At present, the plaintiff used anti-inflammatories/analgesics. She took Neurofen and Palexia as and when required. Her other medications include Nebulit Plus for hypertension, Diazepan and Amitriptylene for anxiety and Mirtapazine for insomnia and depression and Atorvastatin to lower cholesterol.

36. The GP noted that the plaintiff's activities were limited by the injury. At home, she was just able to do light housework. She could not do any hoovering. She could not lift her shopping bag when full of groceries. She was able to live independently, but felt that she was not well enough to look for a job.

37. On examination, the plaintiff had reduced movement in her neck in all directions, with reduced side flexion. She had normal range of movement of her shoulders with normal sensation, reflexes, tone and power. Examination of her back was normal, with normal range of movement, and she had normal straight leg raising at 90 degrees in both legs, with normal reflexes.

38. Dr. Rochford gave the following opinion in her medical report dated 6th July, 2015:-

"Ms. Colliery is a 49 year old lady who was injured at home when part of the ceiling fell down on top of her on 29th June, 2013. MRI scan confirms that she has two broad based discs at C5/6 and C6/7, which are encroaching on the spinal cord and the nerve roots. Her symptoms are consistent with referred pain from her neck. Surgery is not indicated at present. I feel she would benefit from a course of physiotherapy and a home exercise programme and together with analgesia, I expect she will get relief with time."

39. I am satisfied that the plaintiff suffered an injury to her neck as a result of the collapse of the ceiling on 29th June, 2013. While symptoms may not have been immediately apparent, it would appear that she suffered the onset of symptoms in the weeks following the incident. She went on to experience significant pain in her neck. This injury was confirmed by MRI scan on 31st March, 2015, which confirmed a broad based disc at C5/6 which was impinging on the spinal cord and a disc at C6/7 in her neck. I note that the plaintiff had a reasonable amount of physiotherapy treatment in the past. The most recent medical opinion which is from Dr. Rochford on 6th July, 2015, is that surgery is not indicated at present. The doctor is of opinion that the plaintiff would benefit from a further course of physiotherapy and a home exercise programme and together with analgesia, she expects that this will provide the plaintiff with relief in time.

40. In the circumstances, I award the plaintiff general damages for pain and suffering to date €30,000; and general damages into the future in the sum of €10,000; together with agreed special damages in the sum of €615.