

## THE HIGH COURT

[2017 No. 9469 P.]

BETWEEN

MAIREAD MOLLY O'BRIEN

PLAINTIFF

AND

MAIREAD O'CONNOR

DEFENDANT

**JUDGMENT of Mr. Justice Barr delivered on the 11th day of July, 2019****Introduction**

1. This action arises out of dental treatment which was given to the plaintiff by the defendant, a dental surgeon, on 9th April, 2016. In the course of receiving treatment to repair a filling to one of her left lower molars, the plaintiff suffered a deep laceration to the tongue when one of the instruments, most probably a polishing disk, was caused to come into contact with her tongue. Liability for causation of the injury has been accepted by the defendant. Accordingly, the only issue before the court is the assessment of damages.

**The Evidence**

2. The plaintiff is a married lady, who is currently 37 years of age, having been born on 13th May, 1982. She has five children ranging in age from twelve years to eighteen months, the youngest child having been born in February 2018. She is a qualified nurse, who has worked in Clonmel Hospital for a number of years. However, she was not working at the time of the incident the subject matter of these proceedings, due to a chronic back injury for which she has required surgery and treatment over a number of years. Her husband works as a foreman for a haulage company.

3. On Saturday, 9th April, 2016, the plaintiff telephoned Callan Dental Practice in Co. Kilkenny, seeking treatment for a tooth that was giving her trouble. She had attended with that practice on previous occasions and had chosen it because they had carried extensive advertisements stating that they dealt with patients who were nervous of receiving dental treatment. The plaintiff stated that even prior to this experience, she was somewhat nervous of visiting the dentist. In addition, she had chosen the practice as it was reasonably close to her home.

4. At approximately, 15:00hrs, the plaintiff attended at the practice where she was seen by the defendant. Having had an x-ray taken of the affected teeth, the defendant proceeded to insert a filling into one of the left lower teeth. The plaintiff recalled that while an instrument was in her mouth, she was not sure whether it was a drill or a polishing disk, the instrument was caused to come into contact with her tongue causing a deep and painful laceration to the underside thereof. The plaintiff stated that she suffered immediate excruciating pain in her tongue. There was also a considerable amount of blood coming from the laceration. The plaintiff stated that she was very shocked by the sudden onset of this pain.

5. The plaintiff stated that the defendant was somewhat dismissive of the injury. She told her that it was like a papercut and that she was going to require a little more treatment than she had initially come in for. The defendant then administered a further anaesthetic and proceeded to insert a suture into the laceration. She told the plaintiff that it would be painful while the cut healed up. She then proceeded to carry out a further small repair to an adjacent tooth.

6. The plaintiff stated that she was in extreme pain, notwithstanding that a further anaesthetic had been administered. She was greatly shocked and upset, not only by the event which had happened, but also by the dismissive response of the defendant thereto. She became quite upset. She had to go across to the bathroom at the other side of the corridor to compose herself. The plaintiff stated that it was only her return from the bathroom when she re-entered the surgery and asked the defendant for an apology, that an apology was proffered by the defendant. The defendant had said words to the effect that the plaintiff knew too much because she was a nurse. She also suggested at one stage that she should suck on a piece of ice and that that would relieve her pain and keep her quiet. She was then allowed to go home. There was no charge for the treatment that day.

7. The plaintiff stated that she made her way home with some difficulty, as she was greatly shocked and upset and in a lot of pain. As her husband and the children were out, she went to bed. When her husband returned, she stated that he was shocked to see her in such a distressed condition. As time went on and the anaesthetic wore off, her pain became considerably more severe. She telephoned the dental practice to inquire whether she should take antibiotics to guard against infection to the laceration. The secretary made inquiry of another dentist who assured her that all the instruments were sterile and that there was no need for antibiotics.

8. However, the plaintiff stated that when her pain continued, they phoned the out of hours Care Doc. She was informed that given the level of her complaints, she should go to the Accident and Emergency Department of South Tipperary General Hospital. She attended there with her husband later that evening. Having reviewed the laceration, the medical staff administered a further anaesthetic and inserted three sutures. She was prescribed analgesic medication and allowed home.

9. The plaintiff stated that over the following days, her pain was particularly severe. She was unable to look after her children. This was done by her mother and other members of the family and they also retained their usual childminder for extra hours. On Monday, 11th April, 2016, the plaintiff attended at her GP practice where she was seen by Dr. Molly Owens. She was complaining of severe pain and reported that she was not able to get any relief even though she had taken Tramadol and Difenine. It was noted that her tongue was sore and tender, but had improved since Saturday. The sutures had fallen out and the plaintiff was concerned about that and had requested a review. Examination revealed that the wound was closed and looked healthy with evidence of healing, but it remained very tender. The GP reassured the plaintiff and prescribed Amoxicillin and Metronidazole. The plaintiff stated that she continued to experience severe pain in the following days. On one occasion, her pain was so severe that she was crouched on her hands and knees on the kitchen floor. Her husband came in and removed her to bed. She was totally unable to look after the family at that time. On 12th April, 2016, the plaintiff telephoned the GP practice as she was in severe pain. She spoke to Dr. Oosthuysen. He spoke to an ENT doctor at University Hospital Waterford, who agreed to see the plaintiff.

10. When the plaintiff's pain continued, she returned to the GP practice and saw Dr. Oosthuysen on Friday, 15th April, 2016. She

complained of severe pain in her tongue, which she described as like a knife stabbing into her tongue. He increased her medication prescribing Lyrica, Stemetil and Difene. The plaintiff had been seen in University Hospital Waterford on 12th April, 2016, where they reviewed the injury and prescribed antibiotic and analgesic medication. At the hearing, the court had the benefit of a number of photographs which had been taken of the plaintiff's tongue. There were four photographs taken on the evening of 9th April, 2016, and two photographs taken one week later. From these photographs, the existence of a deep laceration to the left side of the tongue is clearly visible.

11. The plaintiff was very candid in relation to the duration of her symptoms of pain. She stated that while the symptoms were initially of an excruciating nature, the pain only lasted at that level for a period of a little over a week. Thereafter, the pain diminished over a further three/four weeks. Her evidence in this regard was supported by the evidence of Dr. Katherine Winstone, who has a PhD in Dental Surgery and practices dental surgery in the United Kingdom. While she had not seen the plaintiff, she reviewed the medical notes, the plaintiff's account of the injury and her recovery and had viewed the photographs. She was of the opinion that the distress and pain suffered by the plaintiff over several weeks was consistent with the injury which she had suffered.

12. In terms of physical sequelae, the plaintiff has been left with an area of nerve damage measuring approximately 2cm squared in the area of the laceration. This has left her with a constant burning/tingling sensation in the area. The plaintiff stated that she finds this distressing and she is inclined to rub her tongue against her teeth in an effort to get rid of the sensation. This has led to a phenomenon known as "*tongue scalloping*" as found by Mr. Charles Crawford, Dental Surgeon, who had examined the plaintiff. His evidence was that the nerve damage and the altered sensation resulting therefrom in the plaintiff's tongue would be permanent. He stated that some medication might be able to alleviate the symptoms somewhat, such as Pregabalin. However, in her evidence, the plaintiff stated that when she had had nerve damage in her leg on a previous occasion and had been given Pregabalin, she had had to discontinue the medication after a period of some three months due to the severity of the side effects which she suffered from taking that medication. In such circumstances, Mr. Crawford accepted that she would not be able to take that class of medication. Therefore, the uncontested evidence, leads the court to the conclusion that the plaintiff has suffered permanent nerve damage to her tongue, which has given rise to permanent sequelae in the form of a burning/tingling sensation in the affected area. The court accepts the plaintiff's evidence that she finds this sensation distressing. It would appear that she will have to learn to live with this unpleasant sensation for the rest of her life.

13. A further sequela of the nerve damage, is that the plaintiff's relationship with her husband has been adversely affected. In particular, she finds kissing in the ordinary way somewhat unpleasant. As a result, her enjoyment of the intimate aspects of her relationship with her husband has been diminished. Again, this will be a permanent feature.

14. A second feature of the injury is that the plaintiff maintains that she has suffered considerable psychological sequelae as a result of the dental treatment and the injury caused to her on 9th April, 2016. Initially, she was extremely upset and shocked by the sudden onset of excruciating pain, which she had suffered in the course of receiving the treatment. This was aggravated by what she perceived as being the somewhat dismissive and uncaring attitude on the part of the defendant. She was particularly aggrieved by the fact that no apology was forthcoming from the defendant until she specifically requested one on her return from the bathroom. She stated that overall, she felt that her treatment by the defendant at that time had made her feel very belittled. In the hours and days following the incident, she became very angry at what she perceived was her mistreatment by the defendant both during and after the initial treatment.

15. Whatever about the initial reaction on the part of the defendant to the plaintiff's injury, credit has to be given for the way in which both the defendant and the owner of the Callan Dental Practice subsequently reacted to the incident. The plaintiff accepted in cross examination that on the evening of 9th April, 2016, the defendant attempted to telephone her to inquire how she had been. The plaintiff was in the A&E Department of South Tipperary General Hospital at the time and so she did not pick up the call. The defendant left a message for her on her voicemail.

16. On 11th April, 2016, being two days after the incident, the owner of the dental practice, Dr. Jacqueline Clune, wrote to the plaintiff in the following terms:-

*"Dear Molly*

*I am the practice owner of Callan Dental and I am writing to say how sorry I am to hear what happened to you on Saturday 9th April. An incident like yours is very rare in our practice. Our dentists are highly skilled and continuously train to a high standard. Customer service is also an area that I take very serious and I am sorry that you feel this was not met on the [day] of treatment.*

*Edel has brought to my attention the concerns you had with your care on Saturday 9th April and I want to apologise and look after your after care if you would allow it.*

*At Callan Dental we really care about our patients and their oral health. I would like to offer you two complimentary Scale and Polish with our dental hygienists and a dental health check with the dentist every year for the next five years.*

*I understand if you do not wish to return to the practice, but we would hope to be able to look after you in the future.*

*If there is anything further I can help you with please do not hesitate to call me.*

*Yours sincerely*

*Dr. Jacqueline Clune."*

17. On the following day, Tuesday, 12th April, 2016, the defendant wrote to the plaintiff in the following terms:-

*"Dear Molly*

*I am writing to you to follow up after your visit on Saturday. I was hoping to speak to you on the phone, but I was only able to get your voicemail.*

*I am very, very sorry about what happened on Saturday. Edel, our practice manager, was telling me that you were talking to her yesterday. I completely understand that you are very upset and once again, I would like to apologise for the incident.*

*I would like to have the opportunity to sit down and have a chat with you about what happened. I am in Callan this Friday, 15th April and also the following Friday, 22nd April. I could see you at 5pm either of those days whichever would suit you. If you would like to do this, could you ring the practice and the girls can put you in my book, so I will know that you are coming.*

*Looking forward to speaking to you.*

*Kind regards*

*Mairead O'Connor."*

18. It is only fair to point out that both the defendant and the owner of the dental practice apologised and accepted responsibility for what had happened to the plaintiff. These actions show both a compassion on their part towards the plaintiff and her welfare and were in accordance with best medical practice in relation to how medical professionals should deal with things that go wrong in the course of treatment given by them. The court also notes that when proceedings were issued, the defendant in her defence accepted liability. In addition, the defendant furnished a further formal letter of apology on 3rd July, 2019, when she sincerely apologised for the injury that had been suffered by the plaintiff and also apologised for the fact that her response to her injury so clearly caused the plaintiff upset in addition to her physical injury. It is to the credit of the defendant and Dr. Clune that they took these steps.

19. Unfortunately, the plaintiff suffered significant psychological sequelae as a result of the incident. She described how she was extremely shocked and upset by the incident itself. In the days and months following the treatment, she experienced flashbacks and nightmares of the incident. She had difficulty sleeping and when she did get to sleep she would suffer nightmares. On other occasions, when she would awake due to her unrelated chronic back pain, she would ruminate about the incident and she could not go back to sleep. She developed a phobia about going to dentists. She would only go to the dentist if it was absolutely necessary. She described how she would suffer extreme anxiety prior to going to the dental practice. She would not sleep for the night before the visit, her hands would be sweaty and she would be shaking when getting into the dental chair. On the first occasion that she visited the dentist after the treatment, she had to bring her mother with her for moral support. Thereafter, she used to take a Diazepam tablet, which she had been prescribed for use on an as needs basis following failed back surgery in or about 2013. Insofar as the plaintiff was challenged on her evidence as to whether she did, in fact, have a prescription for Diazepam and/or as to whether she took it before visiting dentists on subsequent occasions, I accept the plaintiff's evidence in this regard. I am satisfied having regard to the GP notes that had been submitted in evidence, that she was prescribed Diazepam by her GP from time to time. I accept her evidence that she did take some of this medication on the occasions that she was obliged to visit the dentist. I also accept her evidence that when she was bringing her children to the dentist, she would experience slightly heightened anxiety.

20. The plaintiff was seen by Dr. Eleanor Neville, Consultant Psychiatrist, in February 2017 on a referral from her solicitor. Having taken a detailed history from her in the course of a three hour consultation, she was satisfied that having regard to the plaintiff's complaints of her disturbed sleep, nightmares, flashbacks of the incident and of the defendant's face and having regard to the fact that she was experiencing a relatively severe dental phobia, the plaintiff met the criteria for a diagnosis of Post Traumatic Stress Disorder. The fact that she had experienced the sudden and unexpected onset of excruciating pain in the course of receiving the treatment and in particular the fact that she perceived that as a threat to her bodily integrity, meant that the incident was of sufficient severity to warrant the onset of symptoms consistent with the diagnosis of Post Traumatic Stress Disorder. Dr. Neville was satisfied that the symptoms being exhibited by the plaintiff at that time complied with the criteria set down in the ICD10 and DSM5 manuals for a diagnosis of PTSD. In particular, the existence of the severe dental phobia was a manifestation of avoidance behaviour, which was a key component of PTSD.

21. In February 2017, Dr. Neville advised the plaintiff that she should go to her GP to get a referral to a therapist practicing cognitive behavioural therapy. However, the plaintiff did not do that, due to the fact that shortly thereafter she became pregnant with her fifth child. That pregnancy was a difficult pregnancy due to the fact that she suffered placenta praevia, for which she had to be hospitalised for approximately five and a half weeks. Thereafter she was confined to bed rest and was unable to work. After the birth of her fifth child in February 2018, the plaintiff stated that she was not in a position to take up the CBT, as she was very busy with her young baby and the other children and she also experienced severe back pain during the summer of 2018, which required further investigation by an orthopaedic surgeon and onward referral from him to a pain specialist. For those reasons, she had not been able to commence the CBT until 2019. She had located a therapist in Clonmel and had had five sessions with her. She found these very helpful in dealing with her ongoing psychological difficulties.

22. The plaintiff stated that her flashbacks to the incident had subsided within approximately two years. At present, she only had very occasional flashbacks, such as when she was travelling up to the Four Courts by car, as she knew that she would have to relive the incident. She no longer had nightmares. However, if she awoke at night due to back pain, she would tend to ruminate on the dental incident. Her dental phobia remained, but she was hopeful that with further CBT, she would learn to become less anxious when receiving dental treatment.

23. The plaintiff was reviewed by Dr. Neville on 7th June, 2019. She noted that the plaintiff remained distressed by the traumatic events that had occurred in April 2016. She remained somewhat bitter and her moods alternated between anxiety, anger and depression. She was of opinion that the plaintiff presented with a moderate adjustment disorder with mixed emotions of anxiety, depression and anger. That diagnosis came under the classification of trauma related disorders in DSM5. It can be as severe in effect and in intensity as Post Traumatic Stress Disorder. She noted that CBT had been helpful for the plaintiff. Some of the acute symptoms of PTSD including nightmares and severe insomnia had lessened and the plaintiff no longer fulfilled the criteria for that condition, although the dental phobia continued to be of a severe degree. She was of opinion that the plaintiff would benefit from continued counselling. She thought that she would require a minimum of five more sessions of CBT. In her report she sounded a note of caution in that if the plaintiff's physical symptoms should persist indefinitely, then it could not be out ruled that she may develop a more severe depressive illness in the future. For this reason, she had advised the plaintiff to continue to attend with her GP and to inform her if her psychological symptoms worsened. For this reason, the future prognosis remained guarded. Dr. Neville noted that the recent letter of apology from the defendant had been most beneficial, because it had included an acknowledgment and apology on her part for the way in which she had initially reacted to the plaintiff's injury. She thought that would be beneficial for the plaintiff's overall recovery.

24. That concludes the brief summary of the plaintiff's evidence. The evidence of her medical witnesses has been incorporated into that summary. The defendant did not go into evidence at the trial of the action.

## **Conclusions**

25. In assessing general damages in a personal injuries case, the credibility of the plaintiff is of paramount importance. Having

watched and listened carefully to the plaintiff give her evidence and having had regard to the evidence of her treating doctors and to the documentary evidence in this case, I am entirely satisfied that the plaintiff has given a truthful account of her injuries and of her recovery to date, both to her treating doctors and to the court. In particular, I am satisfied that she has not in any way tried to exaggerate either her initial symptoms, or her continuing difficulties.

26. The plaintiff was very frank in relation to the duration of her intense symptoms of pain. She candidly stated that she had suffered excruciating pain in the hours and days following the injury, but that the intense pain had subsided over the following three to four weeks. That timespan was accepted as being reasonable by the expert witness, Dr. Winstone.

27. In relation to her ongoing complaint of a tingling/burning sensation in the area of the laceration, that assertion was accepted as being reasonable by the plaintiff's expert, Mr. Crawford, who accepted that she was suffering from lingual dysesthesia. His evidence was that that condition would be permanent. There was no evidence called to contradict that assertion.

28. I accept the plaintiff's evidence in relation to the level of psychological symptoms suffered by her as a result of the incident. While Dr. Neville was challenged in relation to the accuracy of her diagnosis of PTSD, there was no evidence called to contradict her opinion in this regard. I accept her evidence that the plaintiff did suffer initially from PTSD and that more recently, this lessened to being an adjustment disorder. While in normal circumstances, a plaintiff can be criticised for not availing of the treatment that is recommended by a treating doctor at a particular time, in this case, there are extenuating circumstances which excuse her failure to embark on CBT when initially recommended that in February 2017. In particular, I accept that she had a difficult pregnancy with complications during 2017, and that in 2018, as well as having a new baby and young children to care for, she had a further onset of severe back pain which required further investigation by an orthopaedic surgeon and pain specialist during 2018. In these circumstances, it was reasonable for her to postpone getting CBT until 2019.

29. While the plaintiff was challenged in relation to whether she did, in fact, have a dental phobia, I accept her evidence that when she required treatment on a tooth subsequent to the time of the incident, which she was advised would require a number of visits for root canal treatment, she opted instead for the more extreme treatment of having the tooth extracted, as that would not entail as many visits to the dentist for treatment. She has subsequently come to regret that decision, but it was made at a time when her dental phobia was at its height. Her evidence in that regard was further supported by the evidence of Mr. Crawford, who found that when he carried out an assessment in relation to whether the plaintiff would be a person who would require sedation prior to receiving dental treatment due to anxiety on her part, she achieved a score of 23/25, which he said was a very high score. I accept that the plaintiff has a continuing dental phobia and that this is sufficient evidence of avoidance behaviour, which is a significant symptom in the diagnosis of PTSD and an ongoing adjustment disorder.

30. I accept the plaintiff's evidence that she is bothered by the constant tingling and burning sensation in her tongue. Her evidence in that regard is supported by the existence of "*tongue scalloping*" as found by Mr. Crawford. I also accept her evidence that this sequela has had an adverse effect in the intimate aspects of her relationship with her husband. While not preventing intimate relations, it has certainly led to a diminution in her enjoyment thereof.

31. In summary, this plaintiff suffered a very painful and frightening experience as a result of the treatment which she received in April 2016. While it caused her severe physical pain for a relatively limited period, it has left her with an area of permanent nerve damage in her tongue. This causes her to experience a burning/tingling sensation in her tongue which is present on a constant basis. This will be a permanent feature. The plaintiff also suffered psychiatric sequelae in the form of PTSD, graduating to her present condition of a moderate adjustment disorder. It is hoped that with further CBT this condition will improve. In these circumstances, I award the plaintiff general damages for pain and suffering to date in the sum of €40,000. In assessing general damages for the future, I must have regard to the fact that the plaintiff is a reasonably young woman of 37 years. I award the plaintiff the sum of €45,000 in respect of the sequela which she will suffer into the future. Some of these will last for the rest of her life.

32. To this must be added a sum for special damages. While the plaintiff was challenged on some aspects of the childcare expenses and to a certain extent on the relatively modest claim for the loss of earnings suffered by her husband, I am satisfied that these sums were, in fact, either incurred by the plaintiff or were properly chargeable by her in respect of the reasonable cost of providing childcare and/or were the amounts for the losses incurred by her husband in accompanying her to medical appointments. Accordingly, I allow the full sum claimed for special damages of €3,357.00. This gives an overall award in favour of the plaintiff of €88,357.00.