

## THE HIGH COURT

[2015 No. 9417 P]

BETWEEN

ELAINE SHORTALL

PLAINTIFF

AND

TARA ACTON

DEFENDANT

**JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 18th day of January, 2017.**

1. This is an action brought by the Plaintiff against the Defendant for damages for personal injuries and loss arising as a result of a road traffic accident which occurred on the 4th of February 2014 in the car park of the Omni Shopping Centre, Santry, Dublin 9.
2. The Plaintiff had been shopping in the centre with her mother and was attempting to exit when her car was involved in a collision with a vehicle driven by the Defendant. Liability for the accident has been admitted; the case is one for assessment of damages only, however, that was not always so.
3. The uncontroverted evidence of the Plaintiff concerning the circumstances of the accident is that there was a significant impact involved between the two vehicles as a result of which her car was pushed sideways and shunted into another traffic lane. The force involved in the collision was transferred through the steering column into the steering wheel which the Plaintiff was holding with her right hand as a consequence of which she sustained an injury to her right wrist and thumb. The Plaintiff also struck her right elbow against the driver's door. It was the nature and extent of the injury to the right elbow that was at the centre of the controversy between the parties in respect of the Plaintiff's physical injuries.
4. Immediately following the collision an unseemly altercation took place between the respective car drivers. The Defendant sought to blame the Plaintiff for the accident and adopted an abusive attitude towards her especially when she attempted to photograph the insurance disc on the windscreen of the Defendant's vehicle. The abusive language and attitude adopted by the Defendant during the exchange with the Plaintiff contributed to the shock which she experienced as a result of the collision and which developed in the days following.
5. There was evidence of a propensity in the Plaintiff's family towards migraine; the Plaintiff had suffered from migraines since her youth. Subsequent to the accident the frequency and intensity of the migraine's increased quite significantly peaking in August/September 2014 at which stage the plaintiff was admitted to hospital for treatment. Prior to the accident the Plaintiff had suffered from approximately four migraines per month generally associated with menses but at their peak post accident she had experienced migraines for some 44 days. The treatment afforded to the Plaintiff was successful and by late 2014 the migraine frequency had settled back to pre accident levels. Medical notes disclose that the Plaintiff also suffered from Crohn's disease and that in 2012 she had developed drug induced pancreatitis which responded appropriately to a reduction in over the counter pain killing medication which had caused medication overuse headache.
6. The shock and upset felt immediately after the accident caused the Plaintiff considerable stress and anxiety which was noted and reported upon by her GP, Dr. Byrne, whom she attended in the aftermath of the accident and in respect of which analgesic and neurolytic medication was prescribed. The Plaintiff's GP also prescribed a topical anti-inflammatory for application to the right elbow the injury to which was noted to be the cause of soreness and pain.
7. As has already been alluded to it was clear from the medical notes, records and correspondence admitted in the course of the trial that the Plaintiff had a number of medical problems which were not caused or otherwise affected by the accident and for which she attended her GP from time to time. She had also attended her GP for medical attention in respect of her children. These attendances and the medical reporting of the Plaintiff's complaints are significant in the context of the causation issue between the parties concerning the right elbow injury.
8. It was common case that the injuries to the Plaintiff's right wrist and thumb gradually settled over a period of some three months and subsequent to which the Plaintiff experienced no further sequelae.
9. Psychologically the Plaintiff became worrisome and nervous, especially when driving a car. She developed anxiety for which her GP prescribed Zanax and Valium to relax her. Dr Byrne considered these problems to be a consequence of the accident and noted that the Plaintiff's anxiety levels were increased when driving especially on approaching junctions and in car parks. A practice of going to school earlier than was actually necessary was adopted by the Plaintiff in order to reduce the risk of something untoward occurring as a result of an accumulation of cars during usual drop off and pick up school times which Dr Byrne also noted, however, she did not consider it necessary to refer the Plaintiff for psychological assessment or psychiatric treatment.
10. However, in 2016 the Plaintiff was referred by her solicitor to Professor Fitzgerald, Consultant Psychiatrist, for a medical assessment and report. He took a medical history from the Plaintiff on the basis of which, and on his own assessment, he made a diagnosis of post traumatic stress disorder with ongoing anxiety. As to that he made a recommendation that the Plaintiff attend a counsellor for ten sessions and expressed the opinion that if she did so the psychological prognosis for the Plaintiff would be good.
11. The Plaintiff was unable to secure an appointment with a counsellor prior to commencement of the trial but has made an appointment which is due to take place in the near future. She intends to complete the recommended counselling course and claims the cost of doing so in the sum of €80 per session; however, Professor Fitzgerald accepted on cross examination that the average fee per session was more usually €50. No significance other than a reduction in the amount claimed is attached by the Defendant to the difference in the figures although the necessity of counselling is in question and in this regard, unlike the reports of other medical

practitioners whom the Plaintiff had attended, the admission of Professor Fitzgerald's report was not agreed.

11. Professor Fitzgerald's evidence to the Court was that the Plaintiff's presentation and reporting satisfied the DSM 5 diagnostic criteria for diagnosis of post traumatic stress disorder. However, it became apparent during cross examination that he was unaware of and had not sought or elicited from the Plaintiff any pre or post accident medical history relevant to his expertise and to his opinion.

12. In this regard the Plaintiff had been involved in a road traffic accident in 2002 as a result of which she suffered injuries to her neck, lower back and left temple in respect of which she had brought a claim and had recovered approximately €28,000. The Plaintiff claimed that she had fully recovered from those injuries prior to the accident giving rise to these proceedings.

13. Subsequent to that accident the Plaintiff was involved in a further road traffic accident which involved a collision with another vehicle. She described that accident as one involving a minor impact, which she categorised as nothing more than a bump in respect of which a material damage claim only had been brought by the other driver. Although she did not suffer any physical injury as a result of that accident her evidence was that it had caused an aggravation to some extent of the ongoing psychological sequelae arising from the accident the subject matter of these proceedings.

14. Professor Fitzgerald accepted that this increase in symptoms following the subsequent accident was relevant and properly to be taken into account in the context of his diagnosis though he was unable to comment further upon this as he had not been aware of it at the time of his assessment and reporting on the Plaintiff. In the same way he was not aware when reporting that the Plaintiff had suffered from post natal depression in the past and for which she had been treated with antidepressants.

15. The Plaintiff's GP, Dr. Byrne, who prepared reports and also gave evidence, described the Plaintiff as being a totally genuine individual and a very good and caring mother. It was not suggested otherwise during the trial.

16. With regard to the right elbow injury, she had prescribed a topical gel to be applied by the Plaintiff when needed. The initial complaints concerning the elbow were of soreness and pain. The Plaintiff described how the soreness gradually resolved and that the pain progressed from being sharp to being dull in nature, however, this was followed by the development of a tightening sensation in the forearm on use and was accompanied by a sensation of pins and needles in the ring and little fingers. This was a gradual process which on her evidence had taken place over the course of about a year.

17. These symptoms are mainly experienced on active and repetitive elbow movement such as when carrying out household chores or on lifting and carrying; the condition gradually developed to the point where it is now affecting the use of the right arm. She tends to favour her left arm in order to reduce right arm activity thus reducing the symptoms; it is to be noted that when sleeping or at rest she is not bothered by symptoms of tightness or paraesthesia. The controversy between the parties in respect of the development and presentation of this condition which now falls to be considered is concerned with the issue of causation

17. The Plaintiff has been extensively investigated for the complaints of tightness in the forearm and parasthesia in the ring and little fingers of her right hand. She was referred by her GP to Mr. Stefan Byrne, Consultant Orthopaedic Surgeon, who reported in August 2016 that EMG nerve conduction studies were normal; he did not think that surgery would benefit the Plaintiff and expressed the view that the outcome of decompressing a nerve against a background of a normal EMG result was variable and that there was a high chance that the Plaintiff would be no better off following decompression surgery.

18. The Plaintiff was also examined and reported upon by Mr. John Rice, Consultant Orthopaedic Surgeon, who prepared reports and gave evidence at the trial. A history of the development and onset of the symptoms was given to him by the Plaintiff; he recorded a time line of eighteen months rather than that of a year referred to by the Plaintiff in evidence, however, he did not think this difference to be significant in light of the explanation and opinion on the nature and cause of the Plaintiff's complaints which he gave in evidence.

19. In his view the initial injury resulted in a medial epicondylitis of the right elbow. This condition involved an inflammation of the soft tissues in and around the cubital tunnel. When the injuries gradually settled down a certain amount of scar tissue was left which although insufficient to "squash" the ulnar nerve was sufficient enough to cause irritation during the normal stretching of the nerve which occurs on movement of the elbow. The Plaintiff's complaints of symptoms on elbow movement and of abatement in the absence of use, such as when resting or sleeping are consistent with this medical explanation linking as it does the original insult to the elbow in the accident with the current symptoms which developed over time in the right forearm little and ring fingers.

20. The Plaintiff was examined and reported upon for the Defendant by Mr Robert F. Mc Quillan, Accident and Emergency Consultant. Both he and Mr. Rice were in agreement that the Plaintiff's problem stems from an irritation of the right ulnar nerve. When Mr. McQuillan last examined the Plaintiff in September 2016 he noted continuing tenderness overlying the ulnar nerve as previously observed during his medical examination in December 2015; he also noted reduced sensitivity on the ulnar side and increased sensitivity on the radial side of the little finger. He categorised the Plaintiff's complaints as low grade and not requiring any surgical intervention. Accepting the Plaintiff's complaints and based on the results of his own examination he classified the level of irritation as being minor particularly against a background of normal EMG studies.

21. The Plaintiff had been referred for MRI examination following the first medical review and report of Mr. Rice in October 2015 pending which he made a preliminary diagnosis of golfers elbow or medial epicondylitis. He subsequently reported on the MRI scan in November 2016 noting that this showed minor inflammatory changes in relation to the tenderness found around the elbow joint. He also noted then that the Plaintiff's symptoms, particularly of pins and needles in her right little and ring fingers, had become more prominent with the passage of time.

22. Clinical examination on the 7th of November 2016 involved palpating the ulnar nerve in the cubital tunnel just behind the medial epicondyle which appeared to provoke local pain. His opinion and prognosis for the Plaintiff is that as a result of the injury to her right elbow she will have a long term problem in relation to the right ulnar nerve. It was unlikely, however, that there would be any further progression or deterioration in the condition.

23. Mr Rice shares the view of both Mr. Byrne and Mr. McQuillan, that the condition does not warrant and that the Plaintiff would likely derive no benefit from decompression surgery. The risks attendant on such surgery outweigh any possible advantages; there is no cure, the condition is permanent and the Plaintiff will have to learn to accommodate and live with the symptoms such as they are.

24. In Mr. McQuillan's evidence he expressed the opinion that it was possible that the symptoms described by the Plaintiff developed spontaneously and quite independently of any injury. He had not previously heard of an explanation such as that expounded by Mr. Rice though he accepted that it was sound anatomically; in either case the presentation was rare.

25. Considerable emphasis was placed by the Defendant on the absence of reporting in the medical notes and records of the GP, particularly in relation to complaints concerning the right elbow injury, the onset of symptoms referable to irritation of the ulnar nerve and the prescription of medication. I understood the purpose of the emphasis on these apparent absences in the notes and records was to establish support for Mr McQuillan's opinion that the problem was spontaneous was of more recent origin and was therefore not causally related to the accident.

26. As against that view the Plaintiff gave evidence that she had in fact made complaints about her elbow, forearm and fingers from time to time when attending her GP in connection with other medical problems and/or when bringing her children to the doctor for medical attention. That the Plaintiff did mention her ongoing problems, including those relating to her elbow, was confirmed in evidence by Dr. Byrne who explained that she did not always make a note of everything that the Plaintiff had told her on any given visit and that this was especially so when the main purpose of the visit related to another unconnected condition or to the medical treatment of the Plaintiff's children.

#### **Decision on Causation**

27. I understood from Mr. McQuillan's opinion, that he would not expect the symptoms of medial epicondylitis to persist for such a long period after the accident, to be the principle basis or reason for the view expressed in his first report that the cause of the irritation to the ulnar nerve was spontaneous and most likely recent in origin and although the spontaneous onset of such a condition was rare it was not unknown.

28. I am quite satisfied that the Plaintiff is a truthful witness and that her evidence should be accepted, evidence which is, in any event, corroborated by the evidence of her GP, which I also accept. The Court is satisfied that she made complaints about her elbow and the development of symptoms referable to an irritation of the ulnar nerve which were not recorded in the medical notes for the reasons already given.

29. Having heard and considered the evidence of Mr. Rice, which I accept, it is the finding of the Court that the explanation offered by him for the cause and development of the Plaintiff's condition is more likely referable to and explained by the initial elbow injury sustained at the time of the accident than as the result of the spontaneous occurrence of a rare condition of recent origin. Accordingly, the decision of the Court on the issue is that the condition in the right forearm and in the ring and little fingers of the Plaintiff's right hand was caused by the accident.

30. I accept the evidence of Mr. Rice that the irritation of the ulnar nerve resulting from the accident and giving rise to the symptoms of tightness in the forearm and paraesthesia in the ring and little fingers experienced on movement of the right elbow is permanent, that surgery has nothing to offer by way of cure or abatement, that the condition is unlikely to deteriorate further and that the Plaintiff will accommodate herself and learn to live with the symptoms. It follows that she will have to live with the consequences for the rest of her life.

31. The symptoms are undoubtedly the cause of annoyance as well as discomfort and impact indirectly on the use to which the Plaintiff puts her right arm such as when carrying out household chores or any other activity involving significant bending of the elbow that occurs as a result of tasks which require the use of the arm. Although the condition is not disabling it does, nevertheless, interfere with the comfortable performance of right arm function due to symptoms tightness and paraesthesia which are provoked by bending of the elbow.

32. I am satisfied that the Plaintiff is already adapting to the situation by favouring her left arm and by reducing, at least in respect of some tasks, the use of her right arm where that is feasible and practicable.

33. With regard to the psychological sequelae, I find the evidence of Professor Fitzgerald to be of limited assistance particularly given his very fair acknowledgment that the plaintiff's pre and post medical history relevant to his expertise but of which he was unaware at the time of reporting is relevant to his diagnosis and opinion, accordingly, the Court is not satisfied that the Plaintiff suffered a post traumatic stress disorder as a result of the accident. That is not, however, the end of the matter. I accept the Plaintiff's evidence and that of her GP in relation to the shock, upset, and distress which she suffered leading to the subsequent development of nervousness and anxiety and for which she was treated but the symptoms of which are still extant to some extent.

34. So far as these ongoing symptoms are concerned it is likely these will be substantially abated if not completely resolved by the proposed course of counselling sessions. It is clearly in the Plaintiff's interest that she undergoes the proposed course of counselling and in assessing general damages the Court will proceed on the premise that she will do so and that as a result the current residual sequelae will in all likelihood be resolved.

35. Having due regard to the well settled principles of tort law to be applied to the assessment of general damages, applying those principles to the findings made and conclusions reached, and having regard to the revised Book of Quantum as required by the Civil Liability and Courts Act 2004, the Court considers that a fair and reasonable sum commensurate with the injuries sustained to compensate the Plaintiff for pain and suffering to date is €45,000 and in respect of future pain and suffering the sum of €30,000 making a total award of €75,000 added to which will be a sum of €400 special damages agreed between the parties together with €500 which the Court will allow in respect of the cost of future counselling. And the Court will so order.