

THE HIGH COURT

[2017 No. 2369 P.]

BETWEEN

PATRICK MURPHY

PLAINTIFF

AND

MALONE ENGINEERING SERVICES LTD AND FRANCIS CLEARY

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 14th day of June 2018

1. These proceedings are brought by the Plaintiff in negligence and breach of statutory duty for damages for personal injuries and loss arising as a result of a road traffic accident which occurred at approximately 3.15 am on the 29th March, 2014. The accident occurred at the junction of James Larkin Road and Howth Road, Dublin. Two vehicles were involved, an SUV driven by the Plaintiff and a van driven by the second Defendant. The accident circumstances are not in issue. The Second Defendant created an emergency by executing a right hand turn across the Plaintiff's path of travel. Realizing that an accident was momentarily inevitable the Plaintiff stood on the brake pedal and braced himself by gripping the steering wheel with both hands.

2. The forces involved in the collision were considerable and caused the airbag in the First Defendant's van to deploy. The Plaintiff had had to exit his SUV via the passenger door. The damage to the vehicles was so extensive that neither was drivable and both had to be written off by the insurers concerned. Liability for the accident was admitted by the Defendants. Given that there was no claim for loss of earnings and other special damages were agreed in the sum of € 2067, the case proceeded as one for an assessment of general damages only.

Background

3. The Plaintiff is a taxi driver by occupation who was born on the 26th February, 1956 and resides at 15 Cranfield Place, Sandymount, Dublin 4. He and his wife have five children and five grandchildren. He has an impressive work ethic. Before becoming a taxi driver in 2008 he had worked as a self-employed haulage contractor for approximately 30 years until his business became a casualty of the economic recession which followed the crash in financial markets. Physically very fit, the Plaintiff was a keen sportsman who jogged twice week, played golf and enjoyed walking. He had played competitive football into his mid-forties before taking up golf, a sport in which he became relatively proficient, attaining a GUI handicap of 13. He also enjoyed DIY and could turn his hand to almost anything.

4. Apart from one hospital admission in 2012 for investigation of a neurological complaint which transpired to be negative for pathological cause and did not reoccur, the Plaintiff had no relevant pre accident medical history of injury or illness. Post-accident he was unfortunate enough to be given a diagnosis of prostate cancer for which he is currently receiving treatment.

Preliminary finding

5. Although on formal proof of his injuries and loss, during the hearing it was fairly accepted by the Defendants that as a result of the accident the Plaintiff had suffered physical and psychological injuries. As to the latter, he was assessed by Dr. Denis Murphy, Consultant Psychiatrist. His reports, dated the 2nd November 2016 and 14th March 2018 respectively, were admitted in evidence during the trial, the content of which was uncontested. Accordingly, I accept the findings and opinion of Dr. Murphy and find that the Plaintiff suffered a Post Traumatic Stress Disorder as a result of the accident. This condition manifested with symptoms of depression, anxiety, tension, insomnia and nightmares, nervousness, low mood and irritability together with flashbacks to the accident.

The Issues

6. The controversy between the parties centred on the extent of the physical injuries and in particular the cause of a significant and serious condition present in the Plaintiff's elbows which is attributed to the accident. The essence of the Defendants case was made abundantly clear from the cross examination of the Plaintiff and his witnesses and from the evidence of Mr. McQuillan, namely, that the Plaintiff has advanced pre accident generalised osteoarthritis particularly affecting his hips, neck, back and elbows, a disease which is progressive and responsible for any ongoing symptoms. Accepting that there may have been some symptomatic aggravation of that condition as a result of the accident, the contributory affect would most likely have abated within about twenty four months or so of that event and by now would have long since subsided. It followed that any ongoing symptomology was not causally related to the accident.

7. The Plaintiff's case is altogether different. While it was accepted that the generalised osteoarthritis had developed prior the accident the existence of the disease was entirely unknown to the Plaintiff. No complaint of injury to either of his hips was made by the Plaintiff; significantly, the osteoarthritis, which Mr McQuillan says is advanced in both, the right more than the left, remains asymptomatic. On the other hand, the injured areas, the neck, back and elbows, are symptomatic to a greater or lesser extent, the back and in particular the elbows being the most significant.

8. In so far as the source of the ongoing symptoms is attributable to osteoarthritis rather than the soft tissue injuries, the accident was the most likely trigger, a consequence which may otherwise have never occurred and certainly not in the short or medium term. The accident had rendered symptomatic what was otherwise a quiescent underlying condition; significantly, the osteoarthritis in other uninjured areas of the body remains quiescent.

Onus of proof on the issue

9. With regard to the matters in issue between the parties, the law casts on the Plaintiff the onus to establish his case; the burden he bears is to so on the balance of probabilities, accordingly, it was necessary to call medical evidence in respect of the physical injuries. Dr. Corboy, the Plaintiff's GP, and Mr. Eamonn P. Kelly, Consultant Orthopaedic and Hand Surgeon, both of whom examined and treated the Plaintiff, were called on his behalf. Mr. Robert F. McQuillan, Accident and Emergency Consultant, who examined and reported for the Defendants, was called on their behalf. The reports prepared by all of these witnesses were admitted as an *aide memoire* for the Court. In the course of the trial other medical reports (dated the 19th May 2016 and 25th September 2017) prepared by Mr. Seamus Morris, Consultant Orthopaedic Surgeon, to whom the Plaintiff had also been referred, were also admitted in evidence by the Defendants.

10. Given the matters in controversy and the Defendants challenge, based in part on the clinical complaints recorded by his physicians, particularly in the two years following the accident, I consider it pertinent to observe at the outset that I found the Plaintiff to be a truthful witness upon whose evidence the Court can rely. I had an opportunity to observe his demeanour as he gave his evidence and am quite satisfied that the emotion which became apparent from time to time as he did so was entirely genuine and reflected the ongoing physical and psychological impact which the accident has had on him. I am fortified in my impression by what I thought was a very fair acknowledgement on the part of Mr. McQuillan when giving his testimony that he considered the Plaintiff to be an entirely genuine and honest individual.

The Injuries; Consequences.

11. Not surprisingly, in the immediate aftermath of the accident the Plaintiff was very shocked. He was also very angry and admitted to having been very aggressive towards the second Defendant at the time, whose response he described as one of profuse apology for what had happened. It is a measure of the Plaintiff having been attended to by the emergency services at the scene and having calmed down that when he found himself needing to take a taxi in order to get home, he brought and dropped the second Defendant back to his house in Gardiner Street.

12. When he got back to his home the Plaintiff was in a lot of discomfort. He went to bed but was unable to sleep properly. The following morning he went to St. Vincent's Hospital where he complained of pain in his neck, lower back and in both arms. He also made a complaint of what he described in evidence as a dreadful pain in his head. Fortunately this transpired to be transient and cleared up. I pause here to observe that in Mr McQuillan's first medical report he made a note which has some significance to the matter in issue, namely, when the Plaintiff attended St Vincent's Hospital, his complaints specifically included bi lateral arm pain.

13. The Plaintiff underwent clinical and radiological examinations which included plain x-rays and an MRI following which he was discharged. Radiological examination was reported as essentially normal. Over the weekend the Plaintiff's sleep had been very disturbed, he had experienced recurring nightmares and flashbacks of the accident. On the Monday he went to his GP, Dr. Corboy, whom he also re attended on a number of occasions thereafter during the first few months following the accident. Dr. Corboy's evidence was confined to this period. He described the Plaintiff as having been in a very emotional state when first recounting the events of the accident and that he had had to counsel him, indeed, on their first meeting the consultation had lasted approximately three quarters of an hour.

14. Apart from emotional distress Dr Corboy noted pain and restriction of movements in the Plaintiff's neck, lower back and, again significantly in my view with regard to the matter in issue, restriction of movement and pain in both arms. He summarised his findings opinion and prognosis in a report dated the 15th June, 2014, the content of which he also gave and expanded upon in evidence. Apart from the physical injuries principally affecting the neck, lower back and elbows, Dr Corboy formed the impression that the Plaintiff was suffering from symptoms of post-traumatic stress disorder. He advised physiotherapy, mobility exercises and prescribed pain killing and analgesic medication. He also referred the Plaintiff for counselling.

15. During the first few months in particular, the Plaintiff suffered a lot of pain and emotional trauma, nevertheless, and another measure of the man, at approximately ten weeks or thereabouts post accident he decided to get back to work. To do so he had to acquire another Taxi. The Plaintiff's injuries prevented him from returning to working nights. He was nervous and fearful that he might be involved in another accident, furthermore, his confidence was gone. Accordingly, he modified his expectations and confined himself to day time driving three days a week. One of his children and two of his grandchildren have since come back to live with him; looking after his grandchildren, which he enjoys, has now become a feature in his daily routine, something which may explain the absence of any claim by way of enhanced general damages for diminution in his capacity to work.

16. The Plaintiff's mood was low and he remained quite depressed in the first year following the accident during which time he also experienced disturbed sleep, nightmares and frequent flashbacks. He attended counselling and undertook a number of sessions of physiotherapy for his physical sequelae. He carried out exercises, advised by the physiotherapists he had attended, together with stretching exercises which he had always carried out as part of his fitness programme. Notwithstanding, he found himself unable to return to jogging principally because this aggravated his back pain.

17. His inability to return to vigorous exercise post-accident had other negative consequences apart from loss of amenity, the Plaintiff's weight increased from 14 to 16 stone. He was cross examined closely about his body 'deconditioning' and his commitment to rehabilitation. The Plaintiff's evidence was that he had complied with the advice he had been given concerning exercise to the extent that that was possible given his ongoing problems and the limitations these placed on his functional physical capacity.

18. So far as other sports and hobbies were concerned, had been unable to return to playing golf, a consequence of particular disappointment given the enjoyment he had derived from participation in the game, a recreational activity at which he had become quite proficient. Although his family had signed him up for five day membership in a local golf club and he had attempted to return to playing, he found he could no longer do so partly because of an inability to rotate his back due to pain and partly because of an inability to swing the club due to pain and restriction of elbow movement. Nor was the Plaintiff able to return to his DIY hobby. He found himself unable to carry out so many of the tasks entailed in this pastime because his arms are weak, movement is restricted and his elbows are painful. Following temporary relief obtained from pain killing injections into his elbows, the Plaintiff had attempted to paint a wall but found this caused a recurrence of severe elbow pain.

19. The Plaintiff was unable to lie on his side in bed, to do so hurt his elbows; he found it necessary to lie on his back in order to get comfortable at night. When giving evidence he demonstrated the restrictions in the movements of his forearms, restrictions which were corroborated by the evidence of Mr Morris, Mr. Kelly, and, indeed, by Mr. McQuillan. The depressed mood and flashbacks gradually improved over the course of the first year following the accident, the Plaintiff became less depressed, irritable and anxious. The flashbacks to the accident have almost fully abated but still occur from time to time, estimated at approximately once a month or so.

20. The Plaintiff had been advised to take medication in order to help him deal with his psychological sequelae, however, he explained in evidence that he did not want to take medication; his psychological symptoms were improving and he had received great support from his family. The diagnosis of prostate in cancer in 2017 had come as a shock and understandable regression in the progress which he had made psychologically. The Plaintiff does not seek to attribute any regression to the accident.

21. The restriction of arm movement, pain and discomfort in his elbows and a feeling of weakness in his arms developed to the point where the Plaintiff was referred to Mr. Morris, Consultant Orthopaedic Surgeon, whose opinion and findings are set out in his reports. Suffice it to say that when he first examined the Plaintiff on the 19th May 2016 he noted areas of injury to the neck, the lower back and the left elbow. The Plaintiff was taking Neurofen and Solpadine and using Volterol gel to try and control his pain. He had had significant radiation of pain down the right leg for four to six months post-accident but this symptom then resolved.

22. Mr Morris noted complaints of lower back pain on activity and restriction of back movements on examination. A complaint of left sided neck pain exacerbated by movement was also noted though this symptom was reported not to be present at rest. The restricted neck movements were accompanied by an audible clicking sensation; the Plaintiff described a feeling that his neck was too heavy. Initial clinical examination of the elbows was confined to the left elbow. Movement was limited by a loss of 10 degrees of terminal flexion. Mr Morris opined that the Plaintiff had sustained soft tissue injuries to these areas as a result of the accident. He considered that there was significant scope for improvement if the Plaintiff could get back into condition. No mention was made of a complaint in the right elbow, an omission on which both the Plaintiff and his medical witnesses were closely cross examined.

23. When next reviewed by Mr Morris in September 2017, the Plaintiff had been assessed by Mr Kelly who advised and had recently carried out bilateral pain killing injections into the elbows consisting of a local aesthetic and steroids, a treatment which curtailed Mr Morris's clinical examination. His opinion at the time was that the Plaintiff had ongoing bilateral elbow problems for which he was being treated by Mr. Kelly. The neck pain had resolved but the back symptoms were continuing and were attributed to a combination of soft tissue injuries and facet joint injuries caused by the accident. There was still some scope for improvement in the event the Plaintiff was able to engage in a rehabilitation programme. As mentioned earlier, the Plaintiff's evidence was that he was doing whatever he could in terms of exercise but was limited in what he could do by his ongoing symptoms.

24. Mr Kelly gave evidence in line with his reports. He had no doubt that the mechanism of the accident had been responsible for the Plaintiff's injuries. His grip on the steering wheel meant that when the forces involved in the impact were transmitted through the steering column they continued through the steering wheel and up the forearms until they reached the previously asymptomatic arthritic elbow joints which caused development of arthopathies or inflammation in both elbows, the left worse than the right.

25. The Plaintiff accepted Mr Kelly's advice to undergo injection therapy in both elbows. This was carried out and had initially resulted in a good relief of symptoms. Unfortunately, this benefit was short lived, after about ten weeks symptoms returned to pre-treatment levels. Further injection therapy, which had been considered, is now contraindicated by the medications required to treat the Plaintiff's prostatic cancer. The condition in the elbows is unlikely to improve and whilst symptoms continue at a relatively low level at rest, pain is experienced on activity. Mr Kelly explained that the pain results from movement of the arthritic elbow joints which are inflamed. The pain is a natural neurological reaction the object of which is to prevent the occurrence of further damage or irritation of the joint tissues by inducing a reaction, namely, a limitation in use. Both Mr Kelly and Mr McQuillan noted that a further reduction in the range of movement of the left elbow had occurred during the time interval between their first and final medical examinations.

26. The significance of the absence of a recorded complaint specific to pain in either elbow until the first medical examination by Mr. Morris in 2016 was canvassed under the cross examination of Mr. Kelly. He did not see it as his function to comment on the findings or absence of findings of complaints made to other physicians, rather he proceeded on the basis of the information given to him by or on behalf of the patient and upon the result of his own professional examination. In all probability there would have been some non-functionally significant reduction in elbow movement which was not appreciated by the Plaintiff up to or at the time of the accident. To the extent that there was any pre-existing restriction in elbow movement this was attributable to bilateral asymptomatic arthritis present in those joints which were impacted by the high energy forces generated in the collision and transmitted up through the arms from the steering wheel which the Plaintiff was gripping at the time.

27. It was not unusual for the consequence of the resulting damage to present as forearm pain rather than as pain in the elbow joint itself. Unfortunately for the Plaintiff he is unlikely to experience any improvement in his condition, evidence which I took to mean that as a matter of probability the position in which the Plaintiff now finds himself is permanent.

28. Mr. McQuillan robustly defended the views expressed in his medical reports dated the 30th November, 2017 and 21st May, 2018. He confirmed the reduction in the range of movement of both elbows found by Mr. Kelly at the time of his examination in March 2018. At that stage the left elbow showed a range of motion from 20 degrees less full extension to 100 degrees of flexion. The right elbow showed a range of motion from 30 degrees less full extension to 110 degrees of flexion.

29. Mr. McQuillan also fairly accepted that there may have been some symptomatic aggravation of the pre-existing degenerative arthritis in the elbows at the time of the accident, indeed, this could also have likely occurred in the case of the Plaintiff's neck and lower back, however, as far as he was concerned the soft tissue injuries and any aggravation of the underlying degenerative changes would have subsided by now. While he accepted that the Plaintiff is suffering from the consequences of generalised osteoarthritis, particularly in his lower back and elbows, he did not accept that the ongoing symptomology was causally related to the accident, rather, such symptomology and the reduction in shoulder movements is attributable to the progression of the disease; the accident is no longer contributory.

Decision

30. With regard to the issue of causation, I am satisfied that the Plaintiff has discharged the onus of proof to establish his case on the balance of probability, accordingly, the physical injuries to the Plaintiff's neck, lower back and elbows and were caused by the accident. As mentioned earlier it is significant, particularly in the light of the evidence of Mr. Kelly, that from the earliest time following the accident the plaintiff had complained of pain in his arms.

31. Mr. McQuillan attributed the symptoms suffered by the Plaintiff to the progressive nature of the pre-existing osteoarthritis which, in his view is severe. Indeed, the Plaintiff has advanced osteoarthritis in both hips more so in the right than the left. In my view this finding has significance in the resolution of the matter in issue between the parties and in particular in determining the likely cause of the ongoing symptomology. The arthritis in the Plaintiff's hips, said to be advanced, has no doubt progressed in tandem with the arthritis present in his spine and other joints yet his involvement in a serious road traffic accident and the natural progression of the disease did not result in the hip osteoarthritis becoming symptomatic.

32. The Plaintiff makes no complaint about his hips. The Court is concerned with the injuries which he claims were sustained as a result of the accident physical as well as psychological. Prior to the accident the Plaintiff had established generalised but asymptomatic osteoarthritis, colourfully described by Mr. Kelly as 'rust'. I accept the explanation given by Mr. Kelly concerning the transmission of the forces generated by the impact up through the steering wheel, hands and forearms terminating in the elbow joints and that this caused the asymptomatic arthritis in the joints to become inflamed and painful. I also accept his evidence and find that the resulting problems which the Plaintiff experiences in the use of his elbows are going to remain with him for the foreseeable future. Unfortunately for him while the injection therapy administered by Mr. Kelly provided temporary relief and he would have been a candidate for further injective therapy this is now contra-indicated by the medication required to treat the prostatic cancer. Either way the condition in the elbows is likely to be permanent.

33. So far as the injuries to the Plaintiff's neck and back are concerned, I accept the evidence of Mr Morris contained in his report of the 25th September 2017, admitted as it was in evidence, that the consequences of the neck injury have essentially abated and that

he has recovered from this injury though he will of course be left with the underlying degenerative changes which are naturally progressive. So far as his lower back is concerned, I also accept the evidence of Mr Morris contained in the same report that the Plaintiff is likely to continue to experience on going back pain and discomfort in his lower back consistent with a combination of soft tissue and facet joint injuries which will curtail him. I accept the Plaintiff's evidence with regard to the way in which his injuries have affected him in the various aspects of his life, personal, vocational and recreational.

34. It is to the Plaintiff's credit that he has dealt with the psychological consequences of the accident without the benefit of medication which the cynic might consider was indicative of there not been too much wrong psychologically, however, and in fairness to the Defendants, that case is not made and the evidence of Dr Murphy contained in his reports is uncontested. I am satisfied that the progress towards recovery from his post traumatic stress disorder and depression which was being made by the Plaintiff was well advanced until it was set back by the news that he had prostate cancer. In the absence of that diagnosis it seems reasonable to infer from the evidence of Dr Murphy and the Plaintiff that the psychological sequelae would have continued to abate and to have ultimately he would have recovered.

35. It is not suggested on behalf of the Plaintiff that the Defendants should be responsible for any interruption or delay in such an outcome by virtue of the cancer diagnosis, clearly there is no causal connection with the accident. Even with the cancer diagnosis Dr. Murphy's prognosis is that the Plaintiff will continue to gradually improve. As stated previously, I am satisfied that the emotion which was shown during the course of the Plaintiff's evidence is indicative that the accident has had and continues to have an effect on him psychologically. Whether or not he would have recovered completely had it not been for the cancer diagnosis is a matter of speculation in which it would be inappropriate for the Court to engage, suffice it to say that I am satisfied that the significant psychological sequelae of the post-traumatic stress disorder have by now largely resolved.

Assessment

36. Having reached these conclusions, the final matter with which the Court is tasked by the parties is to assess the general damages to which the Plaintiff is entitled. In that regard the law is clear and well settled. The purpose and function or object of general damages in a case such as the present is to measure compensation for the Plaintiff in an amount which is fair and reasonable for the consequences suffered or as may likely be suffered as a result of the Defendants wrongs.

37. Compensation is assessed on the basis of providing a sum of money which will put the Plaintiff back into the same position, insofar as that can be achieved by a money award, as the Plaintiff would have been in had the injuries and loss not been sustained, succinctly summed up in the Latin *restitutio in integrum*. An award of compensatory damages is made in respect of past and prospective losses together with any interference caused to the enjoyment of the amenities of life attendant on the living of it by the injured Plaintiff. Justice requires that the amount of the award must be fair, reasonable, proportionate and commensurate with the injuries and loss sustained. See *Murphy v. The Minister for Public Expenditure and Reform* [2015] IEHC 295, and *Mullen v. The Minister for Public Expenditure and Reform* [2016] IEHC 868.

38. As the Court is required to have regard the Book of Quantum, recently updated, by virtue of s. 22 (1) of the Civil Liability and Courts Act, 2004, I see no good reason in law or otherwise why, subject to the findings to be made by the court, the parties should not be invited to make submissions with regard to the applicable range of damages where specified in the book relevant to the circumstances of the case. The parties are under no statutory obligation to make such submissions and in this case chose not to do so. The Court has had regard to the Book of Quantum as required and without in any way intending to minimise the injuries to the Plaintiff's neck, lower back and psychiatric injuries I am satisfied that the most serious injury sustained by the Plaintiff relates to his elbows and that this injury alone falls into the range of damages under the category 'severe and permanent conditions'.

39. Having due regard to the findings made and conclusions reached and applying the well settled principles of tort law referred to above, I consider that a fair and reasonable sum to compensate the Plaintiff for pain and suffering to date commensurate with and proportionate to the injuries sustained is €50,000 and that for pain and suffering into the future a sum of €30,000, making a total sum of €80,000 to which the special damages agreed in the sum of €2,067 will be added making in aggregate a total award of €82,067. The Court will so order.