

**THE HIGH COURT****2010 2960 P****BETWEEN:****LOUISE FOGARTY****PLAINTIFF****AND****STEPHEN HANNON****DEFENDANT****Judgment of Mr Justice Michael Peart delivered on the 17th day of January 2011:**

This plaintiff was one month short of her twenty eighth birthday when on the 6th February 2008 she was driving along Cappagh Road in Galway when without any warning whatsoever a car being driven by the defendant collided with the driver's side of the plaintiff's car, having emerged from a housing estate. The plaintiff described the impact as severe. She has stated that she was greatly shocked and traumatised by it. According to her evidence she was trembling and was having difficulty breathing. She was fortunately wearing a seatbelt, and at that time was not conscious of any injury as such. She did not suffer any blow to her head and there was no loss of consciousness.

She was able to get out of the car through the driver's door and she was able to exchange insurance details with the defendant. She tried to phone her boyfriend but was unable to contact him at that time, and she proceeded to drive her car home.

It was not until some days later that she began to feel unwell, believing at the time that she had developed flu-like symptoms having on the night of the accident attended a student ball in less than ideal clothing for a wet and cold evening. She was a student teacher at the time.

The following day she attended her GP which was about one week post-accident. She referred to having some neck soreness, but curiously never mentioned that she had been involved in this accident a number of days previously. She was prescribed some medication for her neck soreness.

It appears that about a week later than that, she began to develop pains in her neck and back, causing her difficulty when seated and climbing stairs. She again went to her GP who prescribed appropriate pain relief medications, and on that occasion she appears to have mentioned the accident also. It was necessary for her to take time off from some part-time work she had at weekends, and which was sedentary in nature, and she had to miss some of her lectures also over the coming months.

She was at that time also referred to a sports injury physiotherapist who prescribed a brace, but her GP later advised that she discontinue the use of the brace as it appears to have produced some pain in her left leg, according to the medical report of her GP, Dr Niamh Haverty.

That report opines that the plaintiff suffered a mild soft tissue injury to her neck and back. It reports also that on examination there was tenderness in the spine and "specifically T12-S1". All reflexes were normal, as was a Straight Leg Test. Dr Haverty stated in her report that no long term sequelae were anticipated.

Nevertheless the plaintiff has continued to complain of ongoing symptoms, which, as reported by her, have deteriorated significantly in both physical and psychological terms. Having heard her evidence, it is no exaggeration to say that the plaintiff believes that this relatively minor accident has destroyed her life, and left her in a state of not only great physical pain and discomfort in her back, and which is not improving with time, but has caused her to have serious psychological sequelae consistent with Post Traumatic Stress and impacting on all areas of her life, both work and personal.

She qualified as a teacher, but had great difficulty with her teaching job due to back and neck pain. She has had to take time off work. She currently works as a teacher in France where she is able to cope somewhat better but with assistance from other staff, who are understanding.

She has frequent panic attacks especially when a passenger in a car. This has caused great difficulty for her in personal relationships, including with her boyfriend to whom she has been engaged for some three years now. Being an extremely nervous passenger, she can be irrationally and extremely critical of the manner in which a car is being driven and this causes upsets with the people concerned.

She is unable to be as active as before the accident due to ongoing back pain. By way of example, in spite of the difficulties which she was having with her back, she along with some friends undertook a walking holiday on the Camino de Santiago. This was a walk over a period of about four days. However, it appears that by the end of the first day, such was the difficulty being experienced by the plaintiff with her back that she had to abandon the remainder of the walk.

Over the next year or so her symptoms persisted and if anything worsened. I have been provided with an agreed medical report of Dr Siobhan McDonagh, General Practitioner who the plaintiff attended for examination on the 23rd February 2010 for the purpose of a medico-legal report requested by her solicitors. It will be recalled that her previous GP, Dr Haverty had opined that a full recovery was expected from this mild soft tissue injury. At any rate, Dr McDonagh having set forth the history as given by the plaintiff describes her examination and findings as follows:

"On examination today, there is tenderness over the mid/lower cervical spine. Full range of movement. Pain on extension of lower neck. Tenderness +++ over the lower lumbar spine – L3-L5. Full range of movement. No radicular symptoms. Straight leg raising 90 degrees bilaterally. Reflexes and sensory exam normal."

Dr McDonagh's report concludes as follows:

"Ms. Fogarty was involved in road traffic accident in February 2008. She complains of ongoing neck and back pain. She states that menstruation is more painful than before. She finds stepping down from steps painful. She finds it difficult to carry a backpack. She states that she also suffers from persistent symptoms of anxiety. I feel that given the duration of her symptoms, that she requires further Psychiatric assessment to determine her current mental state. I will endeavour to arrange same."

Following the receipt of that report by the plaintiff's solicitors, they must have written to Dr McDonagh about whether or not the plaintiff should be referred for orthopaedic assessment. In answer to that question by letter dated 10th June 2010, Dr McDonagh states in what she intends to be an addendum to her previous report:

" ..... On examination of 23/04/10, Ms. Fogarty complained of bilateral knee pain. On examination there was no effusion, tenderness or reduced mobility. On initial examination, it was felt that this was not related to the previous road traffic accident of February 2008. However, given the level of discomfort that was being experienced by Ms. Fogarty, I felt it appropriate that a referral for physiotherapy be sent to Merlin Park Regional Hospital, under the General Medical Services (Medical Card) Scheme. I have not received any correspondence regarding outcome of same. At the time of examination, I felt that her symptoms would resolve and that the opinion of an Orthopaedic Consultant was not necessary."

Nevertheless, it would appear that the plaintiff's solicitors obtained a report from Michael F.X. Gilmore, Consultant Orthopaedic Surgeon who examined the plaintiff for that purpose on the 6th July 2010 and provided them with a report thereafter. In his report Mr Gilmore sets out the history as given to him by the plaintiff. He lists her present complaints as being a very bad passenger, being nervous and anxious and has seen a psychiatrist but has been given no medication, pain in neck and lower back, does not feel right with these pains, knees can be sore, occasionally not comfortable in bed but sleeps okay most of the time, difficulties with swimming which leads to neck pain. He notes also that "she has negative impulse pain, no pins and needles, numbness or weakness and no bladder or bowel symptoms. She has no referred pain to either her arms or hands".

Under "Examination" Mr Gilmore states the following:

"Cervical spine – flexion and extension lead to pain but she has nonetheless a full range of movement. She is tender in the right trapezius but there is no neurological deficit in either upper limb.

Lumbar spine – she stands tall and straight.

Forward flexion is to her mid shin with a tightness in her legs.

She is sore on coming up from a flexed position.

Lateral flexion and extension are normal.

Straight leg raising is tight but negatively bilaterally.

There is no neurological deficit in either lower limb.

Knees – she has slightly positive patella femoral testing right equal to left."

Under "Opinion", Mr Gilmore states:

"This lady sustained soft tissue injuries to her cervical spine in this accident now almost two and a half years ago and continues to have ongoing difficulties with her neck and back. She also has ongoing psychological difficulties as a result of this accident with panic attacks, nervousness, etc. while driving or as a passenger.

Frequently the combination of psychological upset and physical problems cause a vicious circle and one potentiates and aggravates the other.

The hope would be that with the passage of time of perhaps a further nine months to a year her psychological trauma will settle and hopefully with this also there will be an improvement in her physical condition.

It has to be stated however that it is already two and a half years since the accident and the likelihood is that she will be left with some ongoing difficulty. I think, provided she is careful with her neck and back and tries to avoid any aggravating factors, she should be able to get by satisfactorily."

Before leaving the orthopaedic complaints, I should refer to the report provided to the defendant's solicitors by Desmond Mackey, Specialist in Trauma and Orthopaedic Surgery. His report is dated 30th June 2010.

He saw the plaintiff for the first and only time on the 30th June 2010. He took her history as given by her, and describes her present complaints as given to him, namely that she continues to complain of some pain in her neck, and pain also in her lower back which makes her feel uncomfortable. He states also that her friends have commented on her getting out of a car and "that she is like an old woman as she hobbles off".

Mr Mackey examined all areas of her spine.

In relation to the cervical spine he noted a normal range of neck movement, and that her shoulders and upper limbs were normal. He notes "even gentle massage of her neck she indicates is with some soreness, and would be a 'slow process' if she were having a proper massage.

In relation to her thoracic spine he states that the plaintiff "indicates residual tenderness in the midline upper mid-back, thoracic 1-6.

In relation to the lumbar spine he notes a normal range of lower back movement, with no sciatic nerve restriction, and some residual superficial tenderness at L3/4 with deeper palpation normal.

He then states: "Very realistically no x-rays or scans have been requested in this case".

His conclusions include an opinion that the plaintiff presents "with an authentic history, without embellishment, without dramatics". But he then notes the unusual history which this case has, and that the plaintiff herself is unsure how her symptoms started, i.e. whether it was the onset of flu after the accident or whether it was the accident itself. He expresses the view that if the symptoms are the result of a trauma in this accident, he would have expected the symptoms to have cleared up in a relatively short time, as indeed Dr Haverty stated in her report. He states that orthopaedic surgeons work on the basis that where there is a normal range of movement, without any neurological deficit, the prognosis is normally good, and since that is the situation in the plaintiff's case any residual minor tenderness is "more subjective", and that he is unable to explain in orthopaedic terms why there has not been a more satisfactory recovery. He concludes as follows:

"I believe it is realistic that there has not been any specialist referral or investigation. There is no standout sign which requires such investigation. There is no reason for referral to an orthopaedic surgeon or neuro-surgeon, for plainly there is no place for surgery. The symptoms are rather vague. Perhaps there are stress factors which would partly explain.

The issue will be that some vague and undefined symptoms appear to persist now beyond two years. Ms. Fogarty dates these back to an accident. My contribution is to affirm that there is no significant orthopaedic finding which can explain a long-term situation. Specific physiotherapy has been notably absent from her rehabilitation. In normal course, regular exercise, getting active, good posture, that is, sound physiotherapy principles, should have relieved these symptoms before now, and would be my recommended way of managing her residual complaint."

In April 2010, Dr McDonagh referred the plaintiff to a psychiatrist, Dr Bridget McLoughlin, who provided a report to the plaintiff's solicitors. That report recites a history as given by the plaintiff, and describes the physical symptoms as being intermittent pain and stiffness in the neck but with no radiation, and similar symptoms in her back and with pain radiating towards the hips. As for psychological symptoms, the report notes disturbed sleep, accident-related nightmares once or twice a week over a period of several months post-accident. She has not had flashbacks as such, but is anxious, irritable and depressed. Panic attacks are noted as commencing some weeks after the accident which occurred while driving and in crowded situations. She describes also a loss of energy and interest and an impairment in concentration and short-term memory, which had an effect on her studies for her final examinations. The plaintiff also admitted to anhedonia, social withdrawal and loss of libido, as well as hypervigilance and exaggerated startle response. Dr McLoughlin has noted also that the plaintiff has stated that by March 2009 "she had reached a point where she could no longer function" and "was unable to sleep or drive" and "felt exhausted and indecisive". Her mood was low and was experiencing more frequent panic attacks. It is noted also that while antidepressants had been prescribed by her doctor she had declined to take these and had taken five weeks off work and college at that time.

This report notes also something which the plaintiff also stated in her evidence, namely that in January 2005 (i.e. some three years before this accident) a friend of the plaintiff's had died by suicide and that she had had a severe grief reaction to this sad occurrence and that she had attended a student counsellor in relation to this event up to the time she left college.

Dr McLoughlin states that the plaintiff was cooperative and related openly at interview, maintained good eye contact but her mood appeared anxious, but there was no evidence of sustained depression, and she had no psychotic symptoms and cognition was grossly intact.

Dr McLoughlin's conclusions are stated as follows:

"Ms. Fogarty was involved in a road traffic accident on 06.02.2008, as a result of which she sustained soft tissue injuries to her neck and lower back. Physical symptoms have impacted negatively on her quality of life. Symptoms have improved but have not fully resolved.

She has developed psychological symptoms consistent with a diagnosis of Post Traumatic Stress Disorder, with superimposed depressive symptoms. Psychological symptoms were exacerbated by ongoing physical symptoms. She has improved significantly over time, but continues to display mild residual symptoms (anxiety, increased arousal and car-phobic symptoms, foreshortened future). She is of stable premorbid personality and has no past history of psychiatric illness apart from a severe grief reaction following the death of a friend. I feel that the long-term prognosis for psychological recovery is good though will be influenced by the extent of recovery from physical injuries."

The medical reports which I have referred to were agreed by the parties. No medical evidence was called by either side.

### **Conclusions:**

I am satisfied first of all that the impact which occurred to the plaintiff's car when the defendant collided with her was relatively speaking a minor one, even though I accept of course that for the plaintiff who was in her car when it occurred it was an impact which occurred almost without any prior warning and it was one that appeared to her to be severe at the time and which caused her significant shock and distress at the time. Nevertheless she was not at that time conscious of any physical injury and she was able to drive away after it in spite of the fact that there was damage to her car.

It is not unusual for the onset of some physical symptoms to be delayed for some short period after such an accident. While the plaintiff attended her doctor about a week after the accident with what she at that time thought were flu-type symptoms, and did not even refer to the accident at that particular time, she returned to her doctor about a week later again with pain in her neck and her back. These were soft tissue injuries only, and at no stage was it considered necessary for her to be referred to any orthopaedic specialist for further investigation. No x-rays or MRI scan has ever been considered necessary. There is no clinical explanation for her ongoing symptomatology in relation to her neck or her back, though the plaintiff herself accepts that her neck is largely unproblematic by now. It is her back problems which are said to persist and which have been the cause of her ongoing pain and discomfort and have impacted negatively on her ability to function normally. There is no medical evidence from which I can conclude that the impact caused by this accident is the cause of her ongoing subjective symptoms. The medical reports, even those from her own doctors, do not attribute her ongoing difficulties to any clinically evidenced factors. In assessing damages, therefore, the Court must consider the injuries resulting from this accident to be soft tissue in nature only, and of a kind which normally would have been expected to have cleared up quite quickly. Nevertheless, it is appropriate to recognise that even as such they had an adverse impact on her ability to study for her final examinations, and to interfere with her ability to socialise to some extent and to perform to some extent her part-time work which was sedentary in nature. But she is not entitled to recover damages in my view for the more long-term nature of the symptoms which she still suffers or into the future. The evidence from the reports which have been agreed and put into evidence satisfy me that on the balance of probabilities, these more long-term symptoms are subjective only and without clinical justification.

As for the psychological sequelae as described by the plaintiff both in her own evidence to the Court, and as noted in the medical reports provided, it is not reasonable to attribute these to an impact of the kind that occurred in this case. Such sequelae cannot be regarded as being reasonably foreseeable due to such an impact. This was a minor collision from which it is reasonable to foresee that some physical injury might result being that soft tissue in nature or otherwise. But the only physical injury reported and found is soft tissue only. In fact there is no categorical statement by Dr McLoughlin that the accident is the cause of the plaintiff's psychological symptoms apart from the shock experienced at the time of the accident, which can be regarded as normal and perhaps inevitable. But the more extreme complaints which have been described are not a foreseeable or reasonable consequence of this accident, and it would not be appropriate for this Court to conclude that they are something which should sound in damages against the defendant.

Having said that, I want to make it clear that I am not for one moment concluding that the plaintiff is making this up or that she is in any way deliberately exaggerating her injuries. No medical person has suggested that the plaintiff is other than an honest historian. I am certain that to the plaintiff the difficulties which she has had are real, but while I accept that she herself feels that this accident has been the cause of all her problems, there is no medical evidence which supports this. This Court must go by the evidence, and part of that evidence is that much of what she presently complains of, and has complained of in the past, is subjective in nature, and unsupported by any clinical findings.

For these reasons I assess damages as follows:

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| Past pain and suffering in relation to neck and back | €25,000 |
| Psychological sequelae following the impact          | € 5000  |
| Disturbance to work and social life                  | € 5000  |

The total for general damages is therefore €35000 to which I will add a sum special damages as agreed, if any. Judgment will be entered against the defendant accordingly.