

## THE HIGH COURT

[2013 No. 5316 P.]

BETWEEN

KATARZYNA PLONKA

PLAINTIFF

AND

AINARS NORVISS

DEFENDANT

**JUDGMENT of Mr. Justice Cross delivered on the 18th day of March, 2016****1. Introduction**

1.1 The plaintiff was born on 10th March, 1978, and hails from Poland where she left school in 1996, married and has three children. She came to Ireland with her family in 2008 and has little or no command of the English language so her evidence was given through the aide of interpreters and indeed the plaintiff's interaction at all stages with the medical and other witnesses was with the aide of formal or informal interpreters.

1.2 The plaintiff took up employment in Ireland working as a part time cleaner in the Omniplex Cinema in Wexford. On 8th August, 2009, the plaintiff suffered a trip and fall on stairs at home and went to Wexford General Hospital complaining of injury to her right eye. Subsequently, in February 2010, the plaintiff self referred to Wexford Hospital complaining of a three week or so history of low back pain radiating down her legs which she ascribed to the 2009 fall. In her evidence, and previously in her various medical examinations, the plaintiff referred to this as being an injury to her coccyx.

1.3 On 29th September, 2012, the plaintiff sustained an injury to her back at work while lifting a bucket. She worked on but took some days off work.

1.4 On 12th October, 2012, the plaintiff travelled as a passenger in a vehicle to her place of work with a certificate from her GP to inform them that she intended to return to work on Monday, 15th October. On some occasion, the plaintiff reported that she was asymptomatic by 12th October and on other occasions that she had some symptoms.

1.5 On 12th October, 2012, at a roundabout just outside Wexford Town the vehicle in which the plaintiff was travelling which was a Peugeot 407 which had a tow bar fitted, was hit from behind by the defendant's Mercedes 240 motor vehicle.

1.6 It is common case that it was a minor impact and the defendant produced evidence that showed some small damage to the number plate and possibly to the front of the Mercedes and little noticeable damage to the tow bar. The engineering evidence from Mr. O'Keeffe on behalf of the defendant, which I accept, was that the speed of the impact was 5mph or less. The defence in this matter originally denied liability but it was amended. Now the defendant denies that the plaintiff suffered any appreciable injury in the accident and further in the proceedings, the defendant alleges that the plaintiff has grossly exaggerated her claim and the defendant has, in their submissions, invoked the provision of s. 26 of the Civil Liability and Courts Act 2004.

**2 The Plaintiff's Case**

2.1 The plaintiff concedes that the force of the impact was not severe and that the collision was of low speed. The plaintiff claims that she suffered some injuries to her neck which cleared up but also to her lumbar area. She described an "electric shock" type pain in her lower back. The plaintiff sought treatment from her general practitioner, Dr. Bowe, who was not available to give evidence in Dublin and his reports were not agreed.

2.2 Dr. Bowe apparently prescribed the usual cocktail of anti-inflammatory medication and painkillers and physiotherapy, but as the plaintiff's pain continued the general practitioner referred the plaintiff to Mr. George Kaar, Neurosurgeon in Cork.

2.3 Mr. Kaar did give evidence and he examined the plaintiff on 1st May, 2013, and had the benefit of an MRI scan which had been ordered by the plaintiff's general practitioner.

2.4 The MRI scan revealed existing osteophytic changes but Mr. Kaar did not find any neurological problem with the plaintiff. He stated that the persistence of her symptoms was related to:-

"[the] severity of the injury, the proceeding symptoms, the presence of disc degeneration with existing protrusion, the referred left leg symptoms and the circumstances of the accident which occurred unexpectedly and gave rise to acute ongoing symptoms."

2.5 Mr. Kaar referred the plaintiff for pain management of Dr. Lyons. Dr. Lyons was not available to give evidence but Dr. Hugh Gallagher, another pain specialist and anaesthetist, did give evidence and he examined the plaintiff in February 2014, when she made numerous complaints of pain and numbness which continued and are intensified by physical chores such as lifting or using a vacuum cleaner and that she is unable to sit for any appreciable length of time. She preferred to stand and had obtained crutches from a friend for the use of them to help her stand.

2.6 The plaintiff had not returned to work since the accident. She is on an anti-inflammatory drug she obtained from her native Poland. Her movements were restricted and she her injuries had an effect on her social life. Dr. Gallagher found that the plaintiff's pain pattern does "not follow any dermatomal pattern".

2.7 Dr. Gallagher was of the opinion that:-

"The degeneration noted on Mrs. Plonka's MRI scan is consistent with the type of physical work done throughout her life. I do not think there is objective evidence of nerve root impingement on her study to explain her left leg pain...I agree with Dr. Kaar's assertion that Mrs. Plonka's left leg apparent weakness is due more to pain than any possible nerve injury. The sensory changes notes do not follow the root of any specific nerves or dermatomes and are also unlikely to suggest nerve root problems.

Mrs. Plonka shows a degree of catastrophisation in her presentation. Psychologists use this term and it implies the prediction of a negative outcome as well as the conclusion that, if the negative outcome does happen, the result is a catastrophe for the individual. It assumes a worse conclusion than the individual has adequate evidence to support and it involves an emotional reaction which is proportional to that dire conclusion..."

2.8 That essentially is the plaintiff's case: A minor impact produced a small physical finding in her lumbar area which was already weakened due to the previous incidents, and she has essentially had a psychological reaction to that minor physical ailment out of all proportion to the physical findings.

2.9 As a result of the plaintiff's injuries, she has had to give up work, has not been able to return to work, her husband who is working casually has given up most, if not all, of his work and now is essentially a carer. Whereas the total family income through social welfare payments to her husband is not significantly different from the pre-accident situation, the plaintiff herself is at a loss of her earnings.

### **3 The Defendant's Case**

3.1 The defendant contends that the plaintiff suffered, essentially, no injury, and if she did suffer any injury that she has deliberately exaggerated her symptoms in order to profit from the defendant.

3.2 The accident undoubtedly was a very minor one and expert evidence was given by Mr. Byrne of Edge Anderson Motor Assessors who had examined both vehicles showing the minor damage as outlined above and from Mr. William O'Keeffe, B.E., who gave evidence, first of all, as to the estimated collision speed which I have accepted and then gave evidence of various studies of whiplash type injuries in accidents concluding there was little or no risk of whiplash injury for impacts of less than 7.5mph. Mr. O'Keeffe also very fairly gave evidence of a "placebo" study in which subjects were fooled into believing that they were involved in a rear end collision (by seating them in a car with simulated breaking glass noises and a slight rolling forward off the ramp after "impact") and that 20% of test subjects developed acute whiplash symptoms from just believing they had been in a collision.

3.3 In this regard it is interesting to note that these "placebo" individuals had no financial incentive to manufacture complaints yet they subjectively reported whiplash type pains notwithstanding the absence of any actual impact. This does pose questions to the common cynical reaction to whiplash cases as being merely compensation driven which cynicism has all the authority derived from musings on barstools in golf clubs and elsewhere rather than from any scientific, evidence based or rational basis.

3.4 It was also accepted by Mr. O'Keeffe in cross examination that his studies were of neck injuries rather than injuries to the lumbar spine.

3.5 Mr. Michael O'Riordan, Consultant Orthopaedic Surgeon, on behalf of the defendant and Prof. Jack Phillips, Consultant Neurosurgeon, gave evidence on behalf of the defendants of examining the plaintiff who had travelled to Dublin in the case of Mr. Phillips and to Kilkenny in the case of Mr. O'Riordan and the plaintiff presented crutches to support her and appear to be remarkably disabled.

3.6 Prof. Phillips found that her complained of weakness in her right and left leg were unexplainable and that she had mild to moderate weakness of her left arm which was, again, unexplainable and concluded that her presentation is "functional" with no ready scientific explanation for her disability. Clinical examination was variable and so abnormal as to suggest her subject complaints are unreliable.

3.7 Mr. O'Riordan was met with a similar presentation and concluded that her "very abnormal pain pattern of behaviour is not organic". Originally, he was of the view that this could be explained either on the basis of a psychological problem or that she was, in effect, acting deceitfully.

3.8 The defendant had the plaintiff put under private investigation and the court was shown video footage of the plaintiff seen at some distance in her garden where her feet were obscured by the garden wall but she appeared to be walking in and out of her house without much difficulty. She was hanging out clothes on the washing line and was carrying what appears to be a laptop on one occasion. The plaintiff was also photographed walking outside her house using crutches both at the time of the medical examination and on one occasion with a friend in the vicinity of her house.

3.9 Having seen the work of the private investigator, Mr. O'Riordan and Prof. Phillips were of the view, in essence, that the plaintiff was deliberately falsifying her symptoms.

3.10 As stated above, the defendants rely upon the provisions of s.26 of the Civil Liability and Courts Act, 2004 to the effect that the plaintiff who they contend has been involved in what is a fraudulent exercise should be entitled to no damages even if she suffered some injury.

### **4 Did the Plaintiff Suffer any Injury in the Accident?**

4.1 The first issue to be determined is whether the plaintiff suffered any injury in the accident, the subject matter of the proceedings.

4.2 I did not have the benefit of any engineering evidence on behalf of the plaintiff, furthermore, neither the driver of her car or any members of her family give evidence. Her General Practitioner, Dr. Bowe was unavailable to give evidence and indeed neither did we hear from the first pain expert, Mr. Lyons. The defendants contend that the court should draw a sinister inference from the absence of these witnesses.

4.3 I was invited by counsel on behalf of the defendant to take a similar view to that of O'Sullivan J. in the High Court in *Quinn v. Midwestern Health Board & Anor* and as approved in the Supreme Court judgment of Kearns J. (as he was) 8th April 2005, where critical inferences were taken of the absence of certain witnesses on behalf of the plaintiff.

4.4 I do not find the circumstances of this case similar to that of the *Quinn* case (above) in that in those proceedings the absence of a medical witness on behalf of the plaintiff could properly be inferred to be caused by an unfavourable report received from the individual. This is not the case in the instant proceedings.

4.5 It is the obligation of the plaintiff, at all times, to prove her case on the balance of probabilities. It is, of course, the obligation of the defendant to successfully invoke the provisions of s. 26 of the 2004 Act. I do not see anything sinister in the absence of the plaintiff's driver. The plaintiff did inform one doctor or the doctor understood from her that the driver was taken to hospital which is not the case. However, given the fact that it is common case that it was a very small collision, which the plaintiff's driver would undoubtedly have agreed with, the absence of the driver to say what was common case or, indeed, an engineer to say that there was indeed a small impact is not sinister.

4.6 I do note that there was no engineering evidence available to this plaintiff (as was available to the plaintiff in *Lackey v. Kavanagh* [2013] IEHC 341, to give evidence of the physical impact of a collision to a passenger in the rear of a bus) to explain the physical forces which would have impacted upon the plaintiff. Accordingly, I accept, as previously stated, the evidence of Mr. O'Keeffe on behalf of the defendant in relation to this matter, I also accept insofar as it is of relevance his evidence in relation to whiplash injuries, but of course the plaintiff is not complaining of a whiplash injury to her neck but rather an injury to her lumbar spine.

4.7 I am informed by counsel that the plaintiff's solicitor, despite all efforts, could not secure the attendance in Dublin of their missing medical witnesses. I must assess the case on the basis of the evidence before me and only the evidence before me, but I do not make any sinister conclusions against the plaintiff due to the absence of these witnesses.

4.8 On the issue whether the plaintiff suffered any injury, I note the evidence of Prof. Phillips who was of the opinion that in an accident such as this, a minor injury was possible.

4.9 I believe and do so find that the plaintiff did suffer a minor physical injury in the accident. Her original complaint was of an electric shock type pain in her lower back and I believe the plaintiff has been consistent in relation to this.

4.10 As Mr. Byrne on behalf of the plaintiff submitted if the plaintiff suffered no injury then the only conclusion must be that the plaintiff was, from the start, intent on a course of action to deceive in order to obtain compensation.

4.11 I have observed the plaintiff giving evidence. I have observed the plaintiff's distress. I note all the inconsistencies but I accept that she did suffer an injury in the accident, the subject matter of these proceedings of the type outlined by Dr. Kaar and Dr. Gallagher of a fairly minor physical trauma to an already vulnerable back.

4.12 To conclude this is not of course to determine whether the plaintiff is entitled to damages as the next issue is whether the plaintiff has deliberately exaggerated her injuries or has suffered from the "catastrophisation" as contended by Dr. Gallagher.

## **5 Section 26 of the Civil Liability and Courts Act 2004**

5.1 "Section 26 provides:-

(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done."

5.2 The plaintiff's presentation since the accident has been someone who is extremely disabled. She has consistently described the "electric shock" pain in her low back, some neck pain which rapidly resolved, that she was prescribed the usual cocktail of anti-inflammatories, painkillers and physiotherapy by her GP, but as her condition did not improve he referred her to Mr. Kaar, the neurosurgeon, who subsequently transferred her to the care of Dr. Lyons, the pain specialist, who gave epidural injections and then she was examined by Dr. Gallagher. She had limited improvement from these injections and the courses of physiotherapy. She has been unable to work and has been confined to light household duties. She wears crutches which she obtained from a friend whenever she is outside of her house. She utilised these crutches on visits to various medical attendants where she needed them to keep herself steady and she utilised them in court. She attempted to return to work on Monday but she was unable to do it and has not worked since. Her life has, in effect, by her own account been ruined by the incident.

5.3 There are, it seems three possible explanations for the plaintiff's presentation:-

(a) that she has suffered a significant physical injury of a neurological or orthopaedic nature;

(b) that there was in addition to any physical injury for a psychological impact on her resulting in her genuine belief as to her physical incapacity which is not supported by the physical evidence; or

(c) that she is deliberately exaggerating her complaints in order to profit from these proceedings.

5.4 All the evidence from both the plaintiff's and defendant's doctors together indeed with the engineering evidence proffered by the defendant is that the plaintiff did not suffer a significant physical injury. Her pain pattern follows no neurological pattern neither is there an orthopaedic explanation for her complaints. This is, in effect, common case from Mr. Kaar, Dr. Gallagher, as well as from the defendant's experts, Prof. Phillips and Mr. O'Riordan.

5.5 Dr. Gallagher is of the opinion, as previously stated that the plaintiff shows "a degree of catastrophisation in her presentation". Mr. O'Riordan was aware of this possibility but it is fair to say that Mr. O'Riordan and Prof. Phillips, while initially allowing for the possibility of psychological element such as catastrophisation as a cause of the plaintiff's complaints came to the conclusion of exaggeration having seen the photographs and video recordings of the defendant's private investigator, as well as some other photographs taken from the plaintiff's Facebook page showing her wearing high heels at a social function. It is, accordingly, important to examine the strength, or otherwise, the evidence of the private investigator. Mr. Clarke, the private investigator, impressed me as a most professional witness who gave evidence under cross examination of observing the plaintiff for some 29 days. These would not have been a full day of surveillance but Mr. Clarke surveyed from a locus in which he had a view of the plaintiff's garden for a number of hours, during these days and also surveyed her when attending a medical examination. As Mr. Clarke said, the plaintiff rarely left the house and on those 29 days she left the house on only four occasions one of which was when she was known to be attending a

medical examination.

5.6 Mr. Clarke agreed that in the 29 days, he did not once see the plaintiff leaving the precinct of her house or garden without a crutch and never saw her using a crutch when she was inside the property.

5.7 We then turn to the video and the photographs themselves. I have seen and, indeed, re-seen these images. As I previously said, the video and photographs were taken from some distance showing the plaintiff's back garden in the summer months, and on occasion, the plaintiff is seen coming down her steps into her garden. On one occasion she appears to be carrying a laptop and on another occasion, a sheet which she puts on the washing line. She does not use crutches. She does not appear to be hanging onto the wall in order to steady herself but again, the movement of her feet and legs cannot be examined as they are entirely obscured by the garden wall.

5.8 The allegation of exaggeration or the invoking of s. 26 of the Civil Liability and Courts Act 2004, are, in effect, allegations of fraud against the plaintiff. It is incumbent upon the defendant to establish these allegations on the balance of probabilities.

5.9 Having looked at the evidence, I am not of the view that the defendant's evidence establishes the conclusions urged upon me by Mr. Reidy. I think that Prof. Phillips and Mr. O'Riordan, when they came to their adverse conclusions, were overly influenced by merely seeing the videos and not having explained to them, the context in which they were taken and the very limited number of occasions where the plaintiff was seen emerging from her house at all. These witnesses did not have the benefit of hearing the cross examination of Mr. Clarke before they gave their opinions.

5.10 Rather than establishing a fraud or exaggeration on behalf of the plaintiff, I believe that if taken as a whole, the evidence of the private investigator supports the plaintiff's contention that she uses crutches as a support or balance when outside the confines of her home and indeed supports her evidence of being essentially housebound which is very significant for a young lady of her years.

5.11 For a conclusion to be made, the plaintiff was deliberately exaggerating her symptoms, I would have to conclude that the plaintiff, from the day of the accident embarked upon a deliberate and sustained policy of deception in order to procure an unfair advantage in relation to compensation. I would have to conclude that the plaintiff has maintained this attitude to her own great personal and financial discomfort by declining to return to work, by confining herself to a very large extent within her home, by limiting her social outlets and by causing clear distress and disadvantage not just to herself but to her family. I would further have to conclude that all of this scheme was hatched by the plaintiff, a person who has no command of the English language, and who presumably is not well versed in the laws of this land from day one and that she has deliberately chosen to forego a regular salary in order to obtain what must always be fairly nebulous compensation. I do not accept that to be the case.

5.12 I accept that there are, and have been, inconsistencies in the plaintiff's presentation. There is no doubt that her pain complaints do not correspond with any known neurological, or indeed orthopaedic, pattern, but I am driven to accept the description of catastrophisation as set out by Dr. Gallagher as being the most probable explanation for the plaintiff's symptoms.

## **6 The Plaintiff's Injuries**

6.1 The plaintiff suffered a relatively minor physical injury which impacted somewhat more than usual on her because she had an already vulnerable back. I believe that the plaintiff's symptoms when she self referred in February 2010, to Wexford Hospital were indicative of a neurologically compromised back and that this is supported by the subsequent MRI scans. The plaintiff at all times referred to that pain as pain in her coccyx. She also had an injury to her back at work shortly before this accident which had substantially, though not fully, recovered by the time of this accident.

6.2 In her accident, the plaintiff suffered a genuine if not severe physical injury to her lumbar spine which was already compromised and soft tissue injury to her neck, which speedily resolved. As a result, however, of what has been described as catastrophisation, the plaintiff has predicted a negative outcome and conclusions and has interpreted everything that has occurred as being catastrophe. Accordingly, since the accident, in October 2012, the plaintiff's life has been, in fact, dominated by this accident and her perception of her injuries.

6.3 I am under a considerable difficulty in assessing the value of the plaintiff's claim. I have no difficulty in my assessment that the plaintiff was a vulnerable person who suffered from the minor impact to a significantly worse degree than would otherwise have been the case and I have also no difficulty in utilising the term catastrophisation as meaning that the impact of this minor trauma to the plaintiff has had a significantly worse affect than would otherwise be the case.

6.4 What I do not have is any psychological or psychiatric evidence to tell me what "catastrophisation" is, whether it is a medically recognised disease in itself or, as I believe, suggests a vulnerability such as the classic "egg-shell skull". I do not know how long this catastrophisation will last, or whether it is curable or changeable.

6.5 If I were to conclude that the plaintiff has established that she was suffering from, in effect, a mainly psychologically or psychiatric illness caused by the accident which had lasted to date and was likely to persist into the future then clearly her damages in this case would be enormous.

6.6 I can, however, view the plaintiff as someone with an "egg shell skull" who was affected far more by this injury than anybody else but I believe I am limited in any prognosis for what she has suffered. As there was no medical expert evidence from any psychologist or psychiatrist on behalf of the plaintiff to assist in that regard and accordingly I cannot speculate to the disadvantage of the defendant.

6.7 Accordingly, I will view the plaintiff as someone with a physically vulnerable back who suffered a minor physical trauma which affected her significantly, more seriously, than it would have someone else, who has not been able to work since the accident, but given my findings, there is, I believe an evidential gap as to what her future will hold.

6.8 The plaintiff, due to her economic circumstances is not to be faulted for not receiving any psychiatric help or psychological counselling or treatment for her condition to date and I note that her existing medical advisers do not seem to have adverted to this necessity.

## **7 Damages**

7.1 The plaintiff has not worked since the accident. I had evidence of the plaintiff's earnings. The defendant makes the point that the plaintiff's husband has been given an allowance which, in effect, means that the total intake to the house has remained unchanged but, of course, it is the plaintiff who has the claim and she has suffered a loss.

7.2 The plaintiff was earning an average of €160 gross per week and Mr. Leonard, the occupational therapist, is of the view that based on her presentation, he was unable to be optimistic in relation to her future employability.

7.3 I was furnished with actuarial evidence but I do not believe that actuarial evidence to be appropriate in this case.

7.4 I believe that the plaintiff is entitled to a sum for loss of earnings to date and a sum spoken by way of general damages for some loss of earnings into the future but that this sum cannot be in any way of the significance urged on me on behalf of the plaintiff because I just do not know the nature or longevity of the plaintiff's present symptoms.

7.5 I earnestly hope that the plaintiff will through counselling or similar assistance regain her place in the workplace in the knowledge that her physical injuries are not, it seems, her main problem.

7.6 I will allow the sum of €20,000 for loss of earnings to date. I believe, whatever the nature of the "catastrophisation" may be that it is reasonable that the plaintiff has not been able to work since the accident as she has not the resources to avail of any psychological services to deal with the problem to-date.

7.7 In relation to general damages, the plaintiff has clearly had a bad time since the accident and I accept that the plaintiff subjectively believes she is in a far worse position than she actually is. She is entitled to be compensated for this subjective position, and I believe the general damages for pain and suffering to date should be assessed in the sum of €50,000.

7.8 In relation to future, I very little to guide me. It is clear that the plaintiff is going to suffer some injury into the future. One would hope and expect that her present situation is not chronic and, if properly addressed, by the psychiatric and psychological services that a resolution will take place, and while there is no evidence that such a resolution will, in fact, take place, it is for the plaintiff to prove that a resolution will not take place. In the circumstances I must assess damages assuming a good outcome and will award the sum of €15,000 for pain and suffering into the future.

7.9 In addition to that sum, I think a modest sum for loss of job opportunity should be awarded. The actuarial figures are very substantial but for the reasons previously given, I do not believe that the plaintiff's proofs have been up to that standard and accordingly, I will award a sum of general damages for loss of job opportunity of €15,000.

7.10 The total of those sums is as follows:-

Loss of earnings	€20,000
Pain and suffering to date	€50,000
Pain and suffering into the future	€15,000
Loss of job opportunity	€15,000
<b>Total</b>	<b>€100,000</b>

7.11 I believe that a sum of €100,000 is fair and reasonable in the circumstances. I have not been given any assistance from the PIAB Book of Quantum.