

THE HIGH COURT

[2017 No. 5579 P]

BETWEEN

JOANN TWOMEY

PLAINTIFF

AND

JERAL LIMITED, JEREMY BUCKLEY AND ALICE BUCKLEY

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 29th day of October, 2020

Background

1. This claim arises out of an accident that took place on 27 April 2015. The plaintiff was an employee of the defendants. Whilst on their premises, in the course of her employment, a steel girder fell on the back of her right leg causing a severe laceration to her right calf. This laceration was approximately 25 centimetres in length with a transverse orientation across the proximal one-third of her right calf.
2. Liability is not in issue, so the hearing proceeded as an assessment only.

The Plaintiff

3. The plaintiff was born on 24 June 1968 and is now 52 years old. The plaintiff received her secondary school education at Mayfield Community College, Cork, where she remained until she completed her Senior Certificate course in 1986. Subsequently, the plaintiff attended and completed the following courses: -
 - 1990/91: Receptionist/Typist course;
 - 1991: Improvers Typing course;
 - 1991/92: Psychology course;
 - 2007: Beginners Computer course, FETAC Level 3 and 4;
 - 2007: Office Procedures course, FETAC Level 3;
 - 2007: ECDL; and
 - 2007 to date: Nutrition and Healthy Eating; Stress Management; Flower Arrangement; Alexander Technique; and Basic Massage Techniques.
4. The plaintiff has always been in employment. Between September, 1990 and March, 2007, she was employed by Quinnsworth (now Tesco Ireland). In June, 2007, she was employed by the defendants, for whom she worked until October, 2015. Following a brief period of employment, with Marks & Spencer, LIDL Ireland and Amber Petroleum, she commenced working with Boots Ireland. The plaintiff is currently employed as a Customer Assistant with Boots Ireland and her duties include: checkout operations, customer service duties, stocking shelves and dealing with customer queries.

5. I have set out the plaintiff's employment history as it is of particular relevance in her claim for future loss of earnings.

The Plaintiff's Injuries

6. As mentioned, the plaintiff sustained laceration to her right calf measuring approximately 25 centimetres in length. She was taken by ambulance to the Accident and Emergency Department at Cork University Hospital and, a number of days later, had an operation to suture her leg. She remained in Cork University Hospital for a number of days thereafter.
7. On 25 May 2015, it was found that the wound was infected so the plaintiff had to be re-admitted that day. The following day, the plaintiff underwent an operation for debridement and vacuum cleaning of the wound. Some days later, the plaintiff underwent a further operation for a skin graft. Skin was taken from her right thigh. Subsequently, the plaintiff was discharged and physiotherapy was advised.
8. The plaintiff has an ongoing complaint of pain which she describes as being sharp around the scar tissue, shooting or radiating down to her ankle. Further, she has difficulty in bending her knee. The aforesaid pain persists and is nearly constant. The plaintiff gave evidence that this pain, as well as impacting on her social and recreational life, has meant that she has had to reduce her hours of employment per week from some 37 and a half hours to 22 hours.
9. The plaintiff has been left with a scar on her calf, together with two further scars on the donor sites. The plaintiff gave evidence that the scar on her calf causes particular upset and embarrassment when she goes swimming, an activity which she enjoys. The plaintiff described this scar as looking like a "shark bite". Because of the scar, the plaintiff no longer wears skirts and, as a result of the pain, does not wear high heels. Every day she uses E45 cream on the scar site.
10. Arising from the accident, the plaintiff suffered psychiatric injuries and was reviewed by Dr. Tessa Neville, Consultant Psychiatrist. Dr. Neville informed the Court that, arising out of the injuries, the plaintiff developed posttraumatic stress disorder and had a mild depressive illness. The intensity of the PTSD symptoms has improved over the passage of time and Dr. Neville was of the view that the plaintiff fulfils the criteria for a major adjustment disorder with mixed emotions of depression, anxiety and frustration. The plaintiff's prognosis is guarded.

Medical Evidence

11. As mentioned, the Court heard evidence from Dr. Tessa Neville, Consultant Psychiatrist. Mr. S.T. O'Sullivan, Consultant Plastic and Reconstructive Surgeon, gave evidence on behalf of the plaintiff, as did Dr. Sarah Sheehan, General Practitioner.
12. On behalf of the defendants, evidence was heard from Mr. M. O'Shaughnessy, Consultant Plastic and Hand Surgeon, and Dr. David M. Mulcahy, Consultant Orthopaedic Surgeon.

Employment Evidence

13. The plaintiff herself gave detailed evidence of both her employment history and the various courses which she has taken since leaving school. I have set out details of this previously. Ms. Healy, Store Manager of Boots, Patrick Street, Cork, gave evidence concerning the plaintiff's earnings. Of importance was Ms. Healy's evidence to the effect that the plaintiff was an excellent employee, both willing and committed to do the work that was available to her.
14. The Court heard evidence from Ms. Patricia M. Coghlan, Vocational Rehabilitation Consultant. In a detailed report, Ms. Coghlan set out the plaintiff's educational and employment history. Her evidence referred to the impact which the injuries have had on the plaintiff's working life. According to Ms. Coghlan, though the plaintiff has managed to get back to work in the retail industry, she is clearly struggling with the demands which work makes of her and has well-grounded fears for her vocational future. She advises that the plaintiff seek sedentary employment that would accommodate her limitations rather than aggravate them. This will have an adverse impact on the plaintiff's earnings into the future. The capital value of this loss was given by Mr. Nigel Tennant, Actuary.

Consideration of Evidence

15. The plaintiff gave evidence of the injury and its effects on her working, social and recreational life. In my view, the plaintiff was an honest and truthful witness who did not seek to exaggerate the effects of her injury. Further, she emphasised, and I accept, that she has made every effort to try and return to her life as it was before the accident.
16. The plaintiff has been left with three scars and I had an opportunity to view these in the presence of the legal representatives involved. The principal scar is that on her calf. It is clearly visible from a distance and, on viewing at an angle, there is a clear indent, though I do not think it is of the order of a "*shark bite*" as described by the plaintiff. However, I do understand why she is of such a view. The scars arising from the donor sites for the skin grafts are well healed and ought not to be a problem for the plaintiff. I accept the plaintiff's evidence that, because of the scar on her calf, she only feels able to wear trousers now and requires to apply E45 cream on a daily basis. It is also the case that there will be no further improvement in this scar.
17. The plaintiff's main ongoing complaint is that of pain. As mentioned earlier, she describes this pain as being sharp around the scar and that it "*shoots*" or radiates down the leg to her ankle. This pain is present constantly. The questions which I have to consider are: -
 - (i) Is the plaintiff's complaint of pain genuine; and
 - (ii) Is the pain attributable to the accident.
18. As for (i), I do not believe that the pain is an invention on the part of the plaintiff. The plaintiff's employment history and her involvement in numerous courses post-school presents a picture of the plaintiff as being a person who is anxious to remain in employment and acquire new skills. In the course of her evidence, the plaintiff repeatedly and convincingly emphasised her desire to get on with things and not to allow the pain

which she described to control her life. I, therefore, accept that the plaintiff's complaint of pain is genuine.

19. As for (ii), there was a dispute between the medical experts called on behalf of the plaintiff and the defendants. Having heard this evidence, it seems to me, as a matter of probability, that the pain as described by the plaintiff indicates nerve involvement. The pain was not there prior to the accident and Mr. O'Sullivan was of the view that the pain as described was consistent with an injury to one of the underlying cutaneous nerves. The findings of the plaintiff's General Practitioner, Dr. Sarah Sheehan, as set out in her report, is also consistent with nerve involvement.
20. Mr. M. O'Shaughnessy, Consultant Plastic and Hand Surgeon on behalf of the defendants, took a different view, telling the Court that it is difficult to see a basis for the pain, there being no touch hypersensitivity or a neuroma present. Mr. O'Shaughnessy was of the view that the plaintiff's ongoing complaints were more at a psychological than a physical level. Having considered the matter, my conclusion is that it is more probable that there is in fact nerve involvement as a result of the accident.
21. In my view, the plaintiff's ongoing problems, both physical and mental, stem from the pain she has described. As already stated, the Court had the opinion of Dr. Tessa Neville, Consultant Psychiatrist, to the effect that post-accident the plaintiff developed PTSD but that this has improved with the passage of time. The treatment for this condition was counselling and cognitive behavioural therapy. The plaintiff did not require ongoing treatment from a psychiatrist and does not appear to have required anti-depressant type medication. This would lead me to the conclusion that her psychological injuries are at the lower end of the scale.
22. The ongoing pain, as described by the plaintiff, has impacted on her working life. She gave evidence to the effect that the hours which she can now work are reduced from some 37 and a half hours per week to 22 hours. The plaintiff's job is not sedentary and requires moving about. I accept the plaintiff's evidence on this and I am fortified in this conclusion by the plaintiff's own work record. It is clear that the plaintiff has taken every opportunity she can over the years to acquire more skills. Given her evidence, I do not believe that the plaintiff would be happy with a number of the alternative employment options referred to by Ms. Coghlan. Therefore, I am satisfied that the plaintiff has established a basis for this Court to award a sum to compensate her for future loss of earnings.

Principles to be applied in the award of Damages

23. There have been a number of recent decisions both of this Court and, more particularly, of the Court of Appeal, which set out the principles which should be applied by a court in assessing damages. I refer to a recent decision of the Court of Appeal: *Emma McKeown v. Alan Crosby & Mary Vocella* [2020] IECA 242. In the course of this decision, Noonan J. made specific reference to the statutory requirement that a court in awarding damages have regard to the Book of Quantum: -

"31. It seems to me therefore that in cases where the Book of Quantum is clearly relevant, it would assist the court's considerations to hear submissions from the parties about how it should be applied, or perhaps whether it should be applied at all. Recent judgments of this court, such as *Nolan v Wirenski*, have drawn attention to the fact that it is important for trial judges to explain how particular figures for damages are arrived at, since otherwise the appellate court is left in the dark about the trial judge's approach and whether it ought to be regarded as correct or not. The review process on appeal would be greatly assisted by reference to the categorisation and severity of the injury provided for in the Book of Quantum, assuming that to be feasible. If on the other hand the trial judge considers that the Book has no role to play in the particular circumstances of the case, it would be very helpful for the appellate court to know why that is so."

Further, Noonan J. referred to the following passage from the judgment of the Supreme Court in *Morrissey & Anor v. HSE & Ors* [2020] IESC 6 where the Court revised upwards to €500,000 the "cap" on damages. The following passage from the judgment of Clarke J. (as he then was) was referred to: -

"14.28 I should say that I have come to that view by considering that the proper approach to the limit for damages for pain and suffering is the one which sees that limit as the appropriate sum to award for the most serious damages. This is therefore the sum by reference to which all less serious damage should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. The point which I have sought to make, however, is that the type of injuries which do properly qualify for the maximum amount may nonetheless come into different categories. While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award."

When he cited this passage, Noonan J. observed: -

"33. Although the Supreme Court has recalibrated the upper limit by an approximately 11% uplift, it does not of course mean that the value of all other injuries should increase by a similar percentage. ..."

24. Having invited counsel to make submissions on the Book of Quantum in the instant case, both counsel submitted that, given the nature of the injuries involved, i.e. a serious laceration which resulted in a significant scar, the various ranges as set out in the Book of Quantum were not of assistance. I accept these submissions but would say that what is involved here is an injury to the lower limb with sequelae of a scar and pain which, to my mind, puts the injury in the range of "moderately severe" to "severe".

25. The plaintiff is claiming damages for loss of future earnings. Mr. Tennant, Actuary, has capitalised this amount in the value of €115,062. This amount will be subject to a “*Reddy v. Bates*” deduction. Such a deduction was considered by the Court of Appeal in *Walsh v. Tesco Ireland Limited* [2017] IECA 64, where Irvine J. (as she then was) stated: -
- “67. As to the submission made that the trial judge erred in law in his failure to make any deduction from his award in respect of future loss of earnings for the exigencies of life as referred to in *Reddy v. Bates*, that I fully accept.
68. While the trial judge was entitled to take a very optimistic view of the work market that would likely have been available to Ms. Walsh had she not been injured and thus to conclude that work would always have been available to her, what he failed to take into account is that for reasons completely unrelated to the work market, she may not have been in a position to avail of that work.
69. The reasons why a well motivated person may find themselves not working continuously or full time into the future are too numerous to mention. However, by way of example, they might be injured in a road traffic accident with the result that they cannot work or they might fall prey to some illness with similar unfortunate consequences. Their husband, partner, one of their children or an elderly relative might, for some period of time, need their care and support such that they would not be able to work or work fulltime as they had hoped. As people advance in life the risk of these occurrences cannot be ignored or ruled out. Nobody is immune from such risks. Nobody can say with certainty that they will be able to work continuously for the following eighteen year period, that being the duration of Ms. Walsh’s claim for future loss of earnings in these proceedings.
70. In these circumstances, having regard to the prevailing jurisprudence, I must conclude that the trial judge erred in law when he failed to discount the figure which he considered proved in respect of future loss of earnings to take into account the factors outlined in *Reddy v Bates*. In circumstances where the trial judge clearly took an optimistic view as to the market which would otherwise have been available to the plaintiff, I consider that the reduction to be made should be at the lower end of the parameters often applied by the court and I would propose a reduction of 15% having regard to the overall findings of fact made by the trial judge.”
26. In the passage which I have just cited, Irvine J. (as she then was) helpfully set out a number of factors that may be considered in reaching the appropriate percentage figure for the deduction. In this case, I consider a figure of 40% to be appropriate. In doing so, I have had regard to the ongoing consequences of the measures taken to halt or prevent the spread of COVID-19, which may persist for a number of years. It is undoubtedly the case that the retail sector is one that has been, and will continue to be, adversely affected. In any event, the number of retail stores has reduced in recent years with the increase in “*online*” shopping. Were the plaintiff to be made redundant from her current position, I have no doubt, given her history, that she would actively seek alternative

employment. However, considering the report of Ms. Coghlan, the remuneration for such employment would be at a lower level than she currently receives.

27. In his report, Mr. Tennant refers to proposals that all employers in the State are to be obliged to make occupational pension schemes available to their employees in future years and to make contributions to those schemes on the employee's behalf. Were this to occur, it would be an offset to the "*Reddy v. Bates*" deduction. However, as these are only proposals, I cannot arrive at any figure for such an offset.

General Damages

28. In assessing general damages to date, I have had regard to the following: -

- (i) The nature and circumstances of the accident;
- (ii) The trauma of experiencing a significant laceration, as described;
- (iii) The various operative procedures that had to be carried out on the plaintiff;
- (iv) The resultant significant scar on the plaintiff's calf and, to a considerably lesser extent, the scars at the donor sites;
- (v) The psychological effect on the plaintiff of the scars;
- (vi) The psychological sequelae to the accident;
- (vii) The ongoing pain as described by the plaintiff;
- (viii) The interference with the plaintiff's normal daily life in having to apply E45 cream on a daily basis and the limitation on the clothes and footwear that the plaintiff can wear; and
- (ix) The general interference and upset to the plaintiff's social, recreational and working life.

In regard to the foregoing, I assess the general damages to date in the sum of €50,000.

29. I am satisfied that the matters referred to at (iv), (vii), (viii) and (ix) will persist into the future and, for this, I award general damages in the sum of €30,000.

Future Loss of Earnings

30. For the reasons stated, I will reduce the sum of €115,062 by 40%, which amounts to €69,037.20.

Special Damages

31. I accept the evidence that was called on behalf of the plaintiff to establish loss of earnings to date. The figures are as follows: -

- May 2015 – October 2015 – €7,373.71
- October 2015 – July 2018 – €7,373.71

- To loss of earnings arising from reduction of hours from 37 and a half hours per week to 22 hours per week, to date – €12,000
- Total – €26,747.42
- Subtracting Social Welfare – €4,919
- Total – €21,828.42
- Medical expenses (agreed) – €18,543.88
- Total special damages – €40,372.30

Conclusion

32. By reason of the foregoing, the plaintiff is entitled to the following: -

- General damages to date and into the future – €80,000
- Loss of future earnings – €69,037.20
- Special damages – €40,372.30
- Total – €189,409.50

33. As this judgment is being delivered electronically, the parties have fourteen days to make submissions on any consequential orders, including costs.