

THE HIGH COURT

[2021] IEHC 448
[Record No. 2018/331 P.]

BETWEEN

JOSEPH MULCAHY

PLAINTIFF

AND

ALPHONSUS CLIFFORD

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered *ex tempore* on the 25th day of June, 2021

Introduction

1. This action arises out of a road traffic accident that occurred at approximately 11:00 hours on 11th November, 2016 on Ballysimon Road, Limerick. The plaintiff's case is that he was stopped at the Tipperary roundabout, awaiting an opportunity to proceed onto the roundabout, when he was rear-ended by the defendant's vehicle.
2. The defendant's account is that he had proceeded along the same road as the plaintiff and was stopped in the right hand lane at the mouth of the roundabout, waiting to proceed onto the roundabout, when the plaintiff's car suddenly veered over from the left lane and collided with the front passenger side of his car in the region of the front wheel arch and bumper.
3. The plaintiff alleges that as a result of the accident, he was caused to suffer significant injury to his neck and lower back. He also alleges that a pre-existing psychiatric condition of depression and anxiety, was exacerbated as a result of the accident.
4. Liability is contested between the parties. There is also considerable dispute as to the cause of the plaintiff's ongoing symptoms in his neck and lower back, having regard to his medical history prior to the accident.

Liability

5. The plaintiff's account of the accident was in the following terms: he stated that on the morning in question he was on his way to purchase some items in the Tesco supermarket. He had proceeded down Ballysimon Road going towards the roundabout. He had proceeded through the pedestrian crossing and had moved into the right-hand lane for entry onto the roundabout. He stated that he came to a halt at the mouth of the roundabout, waiting for a break in the traffic to allow him onto it. He then moved forward approximately 3 feet, but had to stop again as a car came very quickly onto the roundabout from his right. He stated that as he was stationary, waiting to proceed onto the roundabout, his car was struck from the rear by the defendant's vehicle.
6. The plaintiff accepted that the impact to his vehicle was not severe. It was located to the right side of his rear bumper, largely in the area below the right taillight. The cost of repairs to the plaintiff's vehicle was a little over €600. The court has had the benefit of photographs showing the damage to the respective vehicles.
7. The defendant's version of the accident was in stark contrast to that given by the plaintiff. The defendant, who is currently 92 years of age, stated that on the morning in question

he was making his daily journey to visit the grave of his wife, which he did every morning. He stated that he travelled down Ballysimon Road and moved into the right-hand lane in order to proceed onto the roundabout, as he intended to take an exit that was some distance further around the roundabout.

8. The defendant stated that he brought his vehicle to a halt at the mouth of the roundabout. There was no vehicle in front of him in the right-hand lane. He stated that suddenly there was a loud bang as the plaintiff's car collided into the front passenger wing of his car. The defendant stated that the plaintiff had simply veered suddenly from a position to his left, into his lane colliding with the front wing of his car.
9. In resolving this stark conflict of evidence, the court has been assisted by a detailed map of the locus drawn up by the plaintiff's engineer. This showed that at the pedestrian crossing, which was approximately 15.85m from the mouth of the roundabout, the width of the road was 4.45m. After the pedestrian crossing the road widened into two separate lanes allowing traffic to merge onto the roundabout. The width of the right hand lane at the mouth of the roundabout was 5.65m.
10. The court was also greatly assisted by a detailed sketch map drawn up by Garda Loughman, who attended the scene shortly after the accident. In his sketch, he has shown the position of the vehicles after the impact. The plaintiff's car was in the right-hand lane, but it had not proceeded onto the roundabout itself. Furthermore, the plaintiff's car was fully in the right-hand lane; it was not straddling the centreline, or encroaching onto the left hand lane. In the Garda sketch, the defendant's car was shown in the right-hand lane directly behind the plaintiff's car.
11. Garda Loughman stated in evidence that he had spoken briefly to the defendant at the scene of the accident. His impression was that the defendant was not exactly sure what had happened. He stated that for that reason, he obtained most of his information about the circumstances of what had happened from the paramedic who had come in the ambulance.
12. The paramedic, Mr McCauley, stated that when he arrived at the scene he spoke to each of the drivers and saw that there have been minimal damage to the vehicles. In relation to the plaintiff, he filled out a form for the assistance of the hospital personnel, wherein he had described the event as "*driver of car rear-ended by another vehicle while stopped in traffic*". He stated that he had obtained that information from the plaintiff.
13. He had also completed a similar form in respect of the defendant. In that form, he had recorded the event as "*driver involved in two car RTC which rear-ended another vehicle*". The witness stated that he had obtained that information from the defendant when he was in the ambulance.
14. The court also had the assistance of evidence from motor assessors retained by each of the parties. The court was also provided with a series of photographs showing the damage to the respective vehicles. In respect of the plaintiff's car, there was very minor

damage to the corner of the rear bumper, more or less directly beneath the rear right taillight. The remainder of the rear of the plaintiff's vehicle, which included a towbar, was not damaged; nor was the dust which appeared on the rear bumper dislodged. This indicates that the only point of impact with the plaintiff's car was the extreme right-hand portion of the rear bumper.

15. The damage to the defendant's car, while not great, was a little more severe. This damage was just in front of the passenger wheel arch and was at the front side of the front bumper on the passenger side. It appears that the side of the front bumper may have been broken away from its holding bracket. It appears that this was pushed back into place by the ambulance man at the scene. There was also sign of a very small indentation to the side of the front bumper just to the rear of the centre insert in the bumper itself. There was also some evidence of a tear to the front passenger wheel. The defendant's motor assessor conceded that in the absence of extensive damage to the wheel arch on the vehicle, such damage could only have occurred if the front wheels of the defendant's vehicle were turned at an angle at the point of impact.
16. The court has also had regard to the statement made by the defendant to the investigating Garda some days after the accident, on 23rd November, 2016. In that statement the defendant gave an account that was largely on all fours with the account that he gave in his evidence to the court.
17. In reaching its determination on liability in this case, the court has paid particular regard to the evidence of Mr McCauley, the paramedic, and the evidence of Garda Loughman, the investigating Garda. Their evidence can be relied upon, as they are independent witnesses, who do not have an interest in the outcome of the case. That is not in any way to cast any aspersion on the evidence given by the motor assessors, but in considering same, the court is of the view that the evidence of the damage to the respective vehicles is inconclusive as to whether the defendant's vehicle crashed into the rear of the plaintiff's car, as alleged by the plaintiff; or whether the plaintiff's vehicle veered over into the right lane and collided with the front passenger side of the defendant's vehicle, as alleged by the defendant. In other words, the damage to the respective vehicles is inconclusive as to the mechanism of how that damage occurred.
18. The court is of the view that the defendant's version cannot possibly be correct, having regard to the content of the Garda sketch of the scene of the accident. In his evidence when that sketch was put to him, the defendant stated that the sketch could not possibly be correct, because he had been stationary at the mouth of the roundabout and if the plaintiff's vehicle had been in front of him, he would of necessity have been on the roundabout itself.
19. That assertion is clearly incorrect, because the Garda sketch shows that the plaintiff's vehicle was not on the roundabout, but was stopped at the mouth of the roundabout. Furthermore, the sketch shows that the plaintiff's car was completely and fully within the right-hand lane. If the defendant's version was correct and that he was on the right hand lane at the mouth of the roundabout when he was struck by the plaintiff's vehicle, which

he alleged had veered over from his left into his lane, it is just not possible given the width of the right hand lane for both of the vehicles to have ended up in the lane itself.

20. The court is satisfied that Mr. McCauley has given cogent evidence in relation to what was stated to him at the scene of the accident and in the ambulance. Those accounts were recorded in the respective forms that he filled in for each of the drivers. The plaintiff's account as recorded therein, is consistent with his evidence to the court. The account that was given to the paramedic by the defendant, appears to suggest that the defendant conceded that there was a rear ending impact between the vehicles. That is inconsistent with his evidence to the court.
21. While the defendant appears to have become convinced of the account that he gave in his statement to Garda Loughman on 23rd November, 2016, the court accepts the evidence of the Garda that the defendant was unsure of the circumstances of the accident when he spoke to the defendant at the scene of the accident.
22. Taking all of these matters into consideration, the court is satisfied that the plaintiff's version of the accident is correct. The court accepts his evidence that he had come to a halt at the mouth of the roundabout, that he had proceeded forward a very small distance, when he had had to come to a halt again due to the emergence of a vehicle at speed onto the roundabout and that it was when he came to a halt for a second time, that the collision occurred. The evidence given by the defendant to the effect that he had brought his vehicle to a halt, had applied the handbrake and had taken the vehicle out of gear when the impact occurred, is not credible having regard to the position that he states he was in at the time of the impact and the position of the vehicles as recorded after the impact in the Garda sketch.
23. Accordingly the court finds as a fact that the collision occurred because the defendant's vehicle rear-ended the plaintiff's vehicle at the mouth of the roundabout. In these circumstances, liability for the accident must rest with the defendant. There is no question of any contributory negligence on the part of the plaintiff for either causation of the accident, or causation of his injuries.

Quantum

24. The assessment of damages in this case is not straightforward. The plaintiff, who is a married man of 57 years of age, had an extensive pre-accident medical history. It will be necessary to give a brief synopsis of that history, before coming to the injuries suffered as a result of this accident.
25. That are three areas of significance in his pre-accident medical history. The first relates to the plaintiff's mental health. As set out in the report furnished by the psychiatrist, Dr. Gulati, the plaintiff first came under the care of Kilmarnock Day Hospital in 2004 on a referral from his GP. He was suffering with low mood secondary to his work situation. He was referred for counselling.

26. The plaintiff was referred again to the mental health services by his GP in December 2014 where he was treated for depression. In January 2015 he was treated with antidepressant medication. When seen on 23rd February, 2015, he was diagnosed as suffering from a moderate depressive episode. A recurrence of anxiety was noted in August 2015, for which medication was prescribed. By April 2016, the plaintiff had improved, but still had residual issues with anxiety and motivation.
27. The plaintiff was seen by a doctor on the staff on 20th October, 2016. He reported that he had been to Poland with a religious group. He had enjoyed the trip, but accidentally he had left his medication in a hotel. Having run out of medication he had come off the medication over three weeks, but reported that he continued to experience good mood, good sleep, good appetite, good concentration and good levels of motivation. He was taking exercise by walking and had started to train an underage football team. He did not wish to restart the medication. That was the position that he was in in relation to his mental health approximately one month prior to the accident.
28. It should also be noted that the plaintiff had been out of work due to various stressors connected with work since in or about 2014. He had been awarded an invalidity pension.
29. The second relevant area in his pre-accident medical history, concerns visits that he had made to his GP complaining of neck pain in the years prior to the accident. These are significant due to the fact that the plaintiff alleges that he has suffered a significant neck injury as a result of the accident.
30. The medical records reveal that since in or about 1996, the plaintiff attended with his GP on approximately 17 occasions complaining of neck pain. Generally speaking, these visits occurred on an annual basis and the neck pain appeared to settle with medication within a short period. However, in some of the attendances it was noted that the plaintiff had had neck pain for a considerable period prior to his attendance with the GP.
31. The third area concerns an accident which the plaintiff had in 2014, when he fell in a shop. He injured his left shoulder. That injury recovered within approximately 18 months.

The Injuries Sustained in the Accident

32. As well as hearing evidence from the plaintiff's GP, Dr. O'Callaghan, the court was furnished with a total of 18 medical reports in relation to the plaintiff's injuries. It is not proposed to set out an exhaustive summary of the evidence contained in each of those reports. Instead, the court will give its conclusions in relation to the injuries said to arise out of the accident, having considered the medical reports.
33. The plaintiff attended with his GP on 14th November, 2016. At that time he was complaining of neck pain, with tingling in the fingers of his left hand and difficulty sleeping. He stated that those problems had started in the hours and days following the RTA on 11th November, 2016.
34. On examination on that occasion the plaintiff had restricted neck movements in all directions on rotation. He complained of tingling down the left arm and fingers. Neck

flexion and extension was painful. He had difficulty sleeping. Due to a deterioration in his symptoms, Dr. O'Callaghan referred the plaintiff for an MRI scan of his cervical spine.

35. The court had the benefit of reports from Dr. Stafford, consultant radiologist, in relation to the various MRI scans. The MRI scan of the neck on 15th November, 2016, revealed loss of lordosis in the cervical spine and upper third of the thoracic spine, which Dr. Stafford thought was indicative of a muscular, ligamentous or soft tissue strain almost certainly caused by the accident four days earlier.
36. There was also a relatively large left sided protrusion identified at C6/7, with left-sided compression of the spinal-cord and nerve root compromise of the anterior nerve root in the right side at that level. There was some migration of disc material above the level of the disk space behind the lower left side of C6. There was also disc bulging extending into the exit foramen on the left side at C6/7 with foraminal stenosis.
37. Lesser degenerative changes were identified at C3/4, C4/5 and C5/6, with degenerative osteophytes at C3/4 and C4/5. There was minor left-sided disc bulging with annular tearing at C7/T1.
38. In light of these findings, the plaintiff was referred by his GP to Mr. George Kaar. He first saw the plaintiff on 8th December, 2016. Having reviewed the MRI scan, he recommended conservative management of the condition.
39. The plaintiff was reviewed on 14th June, 2017. There was ongoing neck pain with radiation down the left arm and into the forefingers of the left hand. The doctor was of the view that the symptoms had slightly worsened since his previous review. Conservative management was continued. The plaintiff was reviewed again by Mr. Kaar on 18th October, 2017, at which stage he continued to complain of ongoing pain in the left side of his neck, which radiated into the left shoulder and arm. He had numbness with pins and needles in the left hand. He also complained of lower back pain radiating into the left leg.
40. Overall, Mr. Kaar felt that the symptoms were worsening. The plaintiff had difficulty sleeping. He was unable to sleep on the left side or on his back; he could only sleep on the right side. The doctor was of opinion that the accident had caused new mechanical symptoms in the left cervical area. That injury which had been superimposed against a background of degenerative changes in the neck and in particular, the accident appeared to have aggravated the C6/7 disc.
41. At this stage it has to be noted that the plaintiff was less than honest with the doctor, because he had told him that there were no previous neck, left hand or low back symptoms.
42. Fortunately, that was remedied by the plaintiff's solicitor, who by letter dated 14th May, 2018 furnished Mr Kaar with a comprehensive account of the plaintiff's pre-accident complaints in relation to his neck as revealed in the GP notes. In light of that information,

Mr Kaar issued an addendum to his report on 15th May, 2018, in which he stated that the preceding symptoms would confirm that there were background degenerative changes in the neck prior to the RTA. It was likely that those symptoms arose from the C6/7 level. Mr. Kaar felt that the accident had aggravated a degenerative C6/7 disc. He stated that the presence of background symptoms would make it more likely that chronic symptoms would result from any significant strain of the cervical spine. In view of the previous history, the plaintiff was more vulnerable to prolonged symptoms following any RTA involving the neck.

43. When the plaintiff's symptoms did not improve, he was referred by Mr Kaar to Prof. Harmon, a consultant pain specialist. He administered three injections to the plaintiff's neck. However, these only provided temporary relief from the pain.
44. Due to ongoing low back pain, an MRI scan of the lumbar spine was carried out on 10th February, 2017. Dr Stafford noted that this revealed some loss of lordosis at the thoracic/lumbar junction, consistent with muscle spasm. There was minor dehydration identified at the lower three thoracic disc spaces, without disc protrusion. The first four lumbar disc spaces were normal. There was minor degenerative dehydration identified at L5/S1. There was no lumbar disc protrusion or nerve root compression.
45. Due to pain in the pelvic area, an MRI of the pelvis was requested by the plaintiff's GP, which was carried out on 14th March, 2018. It did not reveal any fractures. There were some age-related degenerative narrowing of the superolateral compartment of the left hip joint, with lesser narrowing of the same compartment of the right hip joint space.
46. A second MRI scan of the pelvis was requested by the plaintiff's GP due to documented left hip pain since the RTA on 11th November, 2016. That scan was carried out on 8th July, 2019. It showed bilateral degenerative hip changes, in the left more than the right. A new finding since the previous MRI scan was made of minor tendinopathy at the left hamstring bony insertion.
47. Dr Stafford was of the view that the multilevel degenerative condition of the cervical spine predated the accident. It was likely that a lesser degree of disc protrusion/extrusion was present at C6/7 before the accident. However, he was of the view that it was likely that the trauma of the accident caused a significant further progression of a lesser degenerative protrusion on the left side at C6/7. The highest signal seen on the scan within the disc protrusion was indicative of a recent progression of a lesser protrusion at that level.
48. Dr Stafford felt that the MRI of the lumbar spine carried out on 10th February, 2017, demonstrated some loss of lordosis which was indicative of muscle spasm in the lumbar spine relating to a muscular, ligamentous or soft tissue strain in the region of the spine, which would be best assessed by clinical evaluation. There was some early degenerative change identified in the lower three thoracic disc spaces.

49. MRI examination of the pelvis showed that there was some degenerative change in the hip joints bilaterally which were age-related. He felt that the trauma of the accident may have aggravated a pre-existing clinically silent degenerative condition of the left hip. The minor tendinopathy observed at the left hamstring could not be attributed to the accident.
50. When the plaintiff's neck symptoms persisted, a further MRI scan was carried out on 19th August, 2020. This revealed persistent loss of lordosis in the cervical spine and the upper portion of the thoracic spine. There was also a minimal right sided torticollis seen on certain images. Dr Stafford felt that the findings were consistent with muscle spasm which was almost certainly incurred as a result of the muscular, ligamentous or soft tissue strain injury incurred in the accident in November 2016. He noted that there were degenerative changes in the cervical spine with a significant broad-based left sided disc protrusion at the C6/7 level, with left-sided compression of the spinal-cord and compromise of the nerve root. His overall opinion was stated in the following terms: -

"Based on the changes and improved appearance seen on MRI in August 2020 there is little doubt in my mind that Mr Mulcahy suffered a significant progression of a pre-existing degenerative condition at C6/7 which significantly progressed as a result of the trauma of the accident on 15 November 2016 [sic] but with conservative medication has improved to a moderate degree with a lesser degree of indentation of the cord and lesser degree of bulk of the herniated disc and migrated disc material behind the lower C6 vertebral body on the left side. There is persistence of muscle spasm in the cervical spine with additional loss of lordosis and scoliosis of the spine and torticollis concave to the right side indicative of persistent muscle spasm seen on MRI in August 2020, three years and nine months after the accident, indicating an ongoing disability due to a muscle spasm and underlying muscular, ligamentous or soft tissue strain in the cervical spine region, in addition to the problem particularly at C6/7 on the left side. At the C5/6 level there is a lesser protrusion in the midline which is more clearly seen on the MRI examination from 2020 with some unchanged disc bulging protrusion also present on MRI in 2016."

51. When the plaintiff's neck and lower back condition did not settle, he was referred on by Mr Kaar to Mr Mohammed Kamel, consultant neurosurgeon for consideration of surgical treatment. He was in agreement with Mr Kaar that given the persistent left upper limb symptoms and the fact that the plaintiff had exhausted conservative measures of treatment, it was appropriate to consider surgery. He was of the view that cervical discectomy or a cervical foraminotomy on the worst affected disc levels at C4/5, C7/T1 and C6/7 levels may help alleviate some of the plaintiff's symptoms; specifically his left upper limb pain which he thought could be due to a radicular component.
52. However, Mr Kamel cautioned that he suspected that the plaintiff would still experience ongoing symptoms despite the surgery, particularly the cervical pain and the headache, which do not respond well to surgery. He discussed these factors with the plaintiff and left it to the plaintiff to decide whether he wished to go ahead with the surgery.

53. In his evidence to the court, the plaintiff stated that given the level of ongoing pain and discomfort that he was experiencing in his neck, left shoulder and left arm on a constant basis, he had decided to go ahead with the surgery. The plaintiff's GP stated in evidence that having regard to the plaintiff's somewhat fragile psychiatric condition and given the lack of guarantee of success if the surgery were carried out, he was not at all sure that surgery would be the best route for the plaintiff to adopt.
54. Finally, turning to the psychiatric aspects of the injuries, the court has had the benefit of the report from Dr Gulati and a report from Prof David Meagher. In essence, it appears that the plaintiff's pre-existing mental health difficulties, primarily of depression and anxiety, were worsened as a result of the injuries sustained in the accident. In addition, he had some features of PTSD, although he did not reach the criteria for a diagnosis of that condition.
55. After the accident it was necessary to restart the plaintiff on psychotropic medication. Prof Meagher noted that in the aftermath of the accident, the plaintiff experienced a worsening of a long-standing mood and anxiety disorder, as well as having some symptoms of post-traumatic stress disorder. The plaintiff had undergone treatment in the form of medication and counselling for the aggravation of his mental health issues. In his report dated 5th May, 2020, Prof Meagher noted that the plaintiff's mental health had recovered to a baseline level. His prognosis from a psychological perspective was positive, in that the plaintiff had recovered well and had excellent social capital. He would continue to attend for review. The natural history of the condition, is that it can follow a relapsing course over time in the context of life stressors, but as of that time the plaintiff was stable.
56. Taking all of this evidence into consideration, and in so doing the court has considered the remainder of the medical reports which have not been summarised in extenso in this judgment, including the defendant's medical expert's report, as furnished by Mr Thomas Burke, consultant orthopaedic surgeon. The court finds as a fact that the plaintiff was a vulnerable person in terms of his neck. He had had long-standing difficulties, albeit of a somewhat minor nature, for a prolonged period prior to the accident. He had degenerative changes in his cervical spine and a disc protrusion at C6/7. The court accepts the evidence in the various medical reports that the plaintiff's pre-existing neck condition was significantly worsened as a result of the trauma sustained in the accident. He was vulnerable to such neck injury due to the existence of those pre-existing degenerative changes. The defendant must take the victim as he finds him.
57. The court accepts the evidence of the plaintiff that he suffered constant and at times severe pain in his neck radiating into his left shoulder and arm since the time of the accident. The court accepts his evidence that the pain and the resulting disability is of such a level, that he has decided to go ahead with the surgery suggested by Mr Kamel, notwithstanding that there is no guarantee that it will provide a very significant improvement in his symptoms. It seems clear that even if the surgery is regarded as successful, it will only give partial relief of his neck symptoms.

58. This means that the plaintiff has suffered a significant injury to his neck as a result of the RTA in November 2016. As a result, he has to undergo surgery to his neck in the relatively near future. That surgery is not without its risks, nor is it by any means guaranteed to produce beneficial results. Indeed, it would appear that the best outcome that can be hoped for, would be one wherein his symptoms are alleviated, but not completely removed.
59. Thus, it would appear that the plaintiff will be left after the surgery, with remaining symptoms for the rest of his life. He will also have some ongoing back pain into the future, although in fairness to the plaintiff he does not overstate the current level of the pain in his lower back.
60. The court also finds that the plaintiff's pre-existing mental health issues, were exacerbated in the years following the accident in the manner described by Prof Meagher in his report. However, the court finds that by in or about 2020, the plaintiff's mental health issues had resolved to their pre-existing baseline.
61. Taking all of these matters into account, the court awards the sum of €50,000 for pain and suffering to date. The court awards the sum of €25,000 for pain and suffering into the future.
62. In relation to the claim for special damages, the vast bulk of these were agreed in principle, subject to the finding of the court on liability. The items set out under subheadings (m) to (q), relating to the cost of the cervical neurosurgery, will only become payable in the event that the plaintiff elects to undergo the surgery recommended by Mr Kamel. As the plaintiff has indicated that he intends to undergo that surgery, it is appropriate that those sums are paid to him to be reimbursed to his medical insurance company in due course.
63. Adding the various heads of damages gives a total award in favour of the plaintiff of €88,406. The plaintiff is entitled to judgment for that amount against the defendant.