

**THE HIGH COURT**

[2022] IEHC 124  
**[2019 118 P]**

**BETWEEN:**

**SINEAD MALONE WALKER**

**PLAINTIFF**

**AND**

**THOMAS RHYS AND SARA TWOMEY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Egan delivered ex tempore on the 25th day of February, 2022**

**Introduction**

1. The plaintiff was born on the 1st September, 1975 and at the time of the events giving rise to these proceedings worked as a receptionist in Killarney, County Kerry. The plaintiff is now married with three children aged 25, 17 and 5. On the 22nd February, 2016, the plaintiff was driving her son to an occupational therapy appointment in Tralee when she noticed that a motor vehicle, which was being driven in the opposite direction by the second named defendant, had crossed over the white line onto her side of the road. Fearing that there would be a head on collision, the plaintiff applied her brakes as a result of which a motor vehicle travelling behind her, and being driven by the first named defendant, collided with the rear of the plaintiff's vehicle.
2. Unsurprisingly, liability has been admitted and this case proceeded as an assessment only. The plaintiff's unchallenged evidence was that this was a substantial impact and that there was €6,000 worth of damage to her car.
3. The plaintiff had previously been involved in a road traffic accident in 1993 in which she sustained a neck injury. No legal proceedings were pursued. In addition, the plaintiff was involved in a subsequent accident in 2006 or 2007, giving rise to legal proceedings, in which she also sustained a neck injury. It is common case that the plaintiff had recovered from the effects of both of these prior injuries by the time of the present accident.
4. Evidence was given in this case by the plaintiff and by Mr. John Mangan and Professor Eric Masterson, consultant orthopaedic surgeons, who provided reports on behalf of the plaintiff and the defendant respectively. In addition, the court was furnished with four reports from the plaintiff's general practitioner, Dr. Darren Quirke of Deenagh Medical Practice, dated the 18th March, 2016, the 29th April, 2016, the 19th June, 2019 and the 3rd March, 2021 respectively. These reports were admitted without the necessity for formal proof. Counsel for the plaintiff informed the court that they would have liked Dr. Quirke to be present to give evidence but that unfortunately they were unable to secure this.

**The plaintiff's direct evidence**

5. In the immediate aftermath of the accident, the plaintiff was shocked and in tears but was not aware of any physical injuries to herself. Her immediate concern was for her son, who was fortunately uninjured. After exchanging details with the first named defendant, the plaintiff drove home. On the evening of the accident, the plaintiff developed pain in her

neck, down her right shoulder and into her right hand and pain at the top of her back; all of which, she stated, interfered with her sleep that night.

6. The plaintiff attended Dr. Quirke the next morning who prescribed anti-inflammatory medication and recommended physiotherapy.
7. The plaintiff found the initial period after the accident very difficult. She experienced pain all day and woke every night with pain and discomfort. The plaintiff's evidence was that, by six months post-accident, her pain level had not changed very much. This, she said, remained the situation for the ensuing years. Although the plaintiff attended her GP on occasion in relation to these symptoms, he did not feel that there was much that he could do for her and she therefore coped as best she could with her symptoms with the assistance of painkillers, over the counter medications, heat packs, tens machines and physiotherapy.
8. The plaintiff's direct evidence was that, up to the present time, six years post the accident, her pain has never gone away. She experiences pain in her neck on an almost constant basis, being at a level of five or six out of ten every day. On occasion, this pain will flare to a level of nine or ten out of ten. The plaintiff states that these flare ups occur approximately once or twice a month. The plaintiff emphasised that even when her pain is not at that debilitating level, she has some background pain in her back at all times. When her pain levels become particularly bad, the plaintiff seeks the assistance of her brother, who is a physiotherapist. The plaintiff also experiences occasional pins and needles in her right arm, down to her index finger and thumb. The plaintiff also indicated that her sleep problems are ongoing.
9. The plaintiff stated that this pain interferes with certain everyday activities. She drives her son to Dublin to visit Crumlin and the Mater Hospital on a reasonably regular basis and this long drive exacerbates her neck pain. In particular, the plaintiff finds reversing very difficult, as she cannot turn her head completely to the right. The plaintiff has continued to work as a receptionist but finds that her hand becomes painful if she types for long periods of time.
10. For the future, the plaintiff expressed concern about the severity of her symptoms. She also admitted that this continuous pain affects her mood which is often low, particularly when she is at work or looking after her children.
11. At the close of the plaintiff's direct examination she was asked whether she agreed with Professor Masterson's first report of July 2019 which recorded that as of that time, her neck hurt her only "*intermittently*". The plaintiff stated that she did not agree with this and that, as of July 2019, and indeed to date, she experiences pain every day at the level of five out of ten and is never free from pain.

**The plaintiff's evidence under cross examination**

12. The plaintiff was cross examined as to the accuracy, and to some extent veracity, of her evidence. Counsel noted that the plaintiff had given the court the impression that there

had been no improvement in her symptoms since the early days' post-accident and that, effectively, her pain had plateaued. This, it was suggested was inconsistent with several comments in Dr. Quirke's reports. For example, in his second report of April 2016, Dr. Quirke recorded that the plaintiff appeared to be "*making progress*" and that her symptoms were "*improved from when he first examined her*". Similarly, in his most recent report of March 2021, Dr. Quirke observed that the plaintiff was making a "*slow recovery*" (although her symptoms persisted).

13. The plaintiff conceded that she had experienced a little improvement in her pain. She stated that what she had intended to communicate was that there had been no significant improvement. Whilst I think it is correct to say that the plaintiff's direct evidence did not convey the impression of any improvement, I do not think that she was attempting to mislead the court as to her symptom trajectory. I accept that the plaintiff's perception is that she has made virtually no improvement since the date of this accident. As observed by both orthopaedic surgeons in their evidence to the court, pain is an entirely subjective sensation, the perception of which, I dare say, is not always predictable or calculable, particularly over time.
14. It was then suggested to the plaintiff that the level of pain which she stated that she suffered – at a level of five out of ten – was also inconsistent with Dr. Quirke's reports. Thus, on several occasions, Dr. Quirke's reports use the language, not of "*pain*", but of "*discomfort*", "*a sense of discomfort and stiffness*" and report the plaintiff as being "*quite stiff and uncomfortable*". I would not attach any significant weight to this. It is by no means uncommon for medical persons to use less evocative or dramatic language than might be used by their patients.
15. What may be more significant is the fact that the plaintiff's description of constant pain and of never being pain-free as per her direct evidence was somewhat qualified under cross examination. Under cross examination, the plaintiff's evidence was that she experiences daily pain but that, on any given day, it comes and goes and that, on occasion she might be pain free for a day, albeit that the pain would return the following day. Effectively, therefore, the plaintiff accepted that her pain came and went, that it was sometimes there and sometimes not. Overall, I do not think that a huge amount turns on this. The substance of the plaintiff's evidence, both under direct and cross examination is of neck pain which is largely unremitting on a virtually daily basis.
16. It was also put to the plaintiff that Dr. Quirke's reports did not record significant restriction of neck movement in the early aftermath of the accident. Dr. Quirke's first report of March 2016 does state that the plaintiff had a full range of movement of the cervical spine. He did, however state that she had pain on extremes of movement. In his second report of April 2016, Dr. Quirke described the plaintiff's range of movement of the neck as "*overall quite good*". This suggests at least some restriction in movement. Contrary to the defendant's suggestion, therefore, Dr. Quirke's observation of "*slight restriction on rotation*" of the cervical spine in March 2021 is an not entirely new finding. On the other hand, I do accept that, if the plaintiff's symptoms were as significant as her

subjective reporting might suggest, then one would expect to consistently see greater limitation of movement than has been reported.

### **Review of medical reports**

17. Dr. Quirke's four reports are interspersed in the time sequence with those of Mr. Mangan and Professor Masterson. I will review all reports in chronological order.
18. Dr. Quirke's first report of March 2016 records his examination of the plaintiff the day following the accident. Dr. Quirke's impression was of multiple myofascial injuries consistent with a flexion hyperextension type injury and he expected that the plaintiff would improve significantly in the following days or weeks.
19. Dr. Quirke's second report recorded his review of the plaintiff in April 2016, two months post-accident. The plaintiff was still experiencing ongoing discomfort affecting both trapezius muscles in the scapular region and an ache along the thoracic spine. She reported that it was difficult to sleep at night due to pain and discomfort. Examination showed diffusely tender trapezius muscles bilaterally with no focal spine tenderness. Some thoracic muscular tenderness was also evident. Range of movement of the neck and thoracic spine was overall quite good and there were no obvious neurological deficits. Dr. Quirke's impression was that the plaintiff was making slow progress but that her symptoms were improving. He hoped for further improvement in the coming weeks.
20. Dr. Quirke's third medical report, in June 2019, three years and four months post-accident, was on foot of a request for a medical report from the plaintiff's solicitor. The plaintiff reported that her thoracic and lumbar symptoms had improved but that her neck remained "quite problematic". She still experienced pain on the right side of her neck and in the right trapezius region, occasionally radiating to her right arm. This did not particularly affect her normal everyday activities although the plaintiff was wary of heavy lifting or awkward movements that might trigger pain. She also reported some difficulty sleeping. On examination Dr. Quirke noted trapezius tenderness on the right side but no focal cervical spine tenderness. The thoracic spine was non tender and lumbar examination was also normal. The plaintiff had been in receipt of physiotherapy. Dr. Quirke stated that, as per the plaintiff's solicitor's suggestion, he had referred the plaintiff to Mr. Mangan for further review.
21. Mr. Mangan's first report recorded an examination of the plaintiff very shortly after this, in July 2019. At that time, the plaintiff described her neck pain at the level of five out of ten on a visual analogue scale. Furthermore, the plaintiff's answers to a neck disability questionnaire were interpreted as reflecting a 42% disability. On clinical examination, motion of the cervical spine was reduced at extremes, right rotation and right lateral flexion and extension caused soreness. The lower cervical spine and trapezius muscles were tender. Mr. Mangan observed that MRI of February 2017 demonstrated established degeneration of C5/C6 and a combination of osteophyte and disc bulge indenting the thecal sac at this level. Mr. Mangan's opinion was that this road traffic accident had resulted in an injury at the cervical/thoracic level of the spine with radiation of the symptoms to the right upper limb. The plaintiff has cervical spondylosis, which

degeneration was present prior to the accident. Mr. Mangan's view was that the accident injured the degenerate cervical spine and probably aggravated the degeneration causing some acceleration of the degeneration. Mr. Mangan's view was that it was probable that the plaintiff would experience some degree of neck pain in the long term which would vary in severity and may radiate to one or other upper limb. He took the view that it was doubtful whether any shoulder injury had occurred.

22. Coincidentally, the plaintiff was also reviewed by Professor Masterson on behalf of the defendant at roughly the same time. Professor Masterson's first report of July 2019 states that at that time the plaintiff reported that her right neck hurt intermittently but was overall improved. Professor Masterson observed full range of movement in the cervical spine and in both shoulders, an essentially normal objective examination. Professor Masterson's view was that the plaintiff had some mild mechanical symptoms on the right side of her neck. However there was evidence of degenerative change with disc bulging to the C5/C6 level. This was almost certainly not caused by the accident but might have been rendered symptomatic in the short term. Professor Masterson's view was and remains that it is unlikely that, in the long term, the plaintiff's neck symptoms have been influenced by the accident.
23. Dr. Quirke's most recent report of March 2021 was purely for medico-legal purposes and he notes that the plaintiff had not attended him since his last report of June 2019; nor had she received any formal physiotherapy for two years. The plaintiff reported ongoing discomfort and stiffness to the right side of her neck radiating to her right shoulder and down her right arm. Any prolonged activity required the plaintiff to rest her arm as it would cause a sense of tingling or paraesthesia affecting her fingers. The plaintiff needed a pillow to support her neck if required to sit for a prolonged period. However, the plaintiff was still coping relatively well at work. Dr. Quirke also noted that the plaintiff had had some reasonably minor psychological effects following the accident in the form of anxiety and erratic sleep. This was improving and the plaintiff declined psychiatric referral. On examination, the plaintiff had slight restriction on rotation of the neck and discomfort at extremes of range of movement of the neck and shoulder. It was noted that the plaintiff had not been attending any form of physio for the last two years although she performed home exercises and took solpadine and difene to combat her symptoms. Dr. Quirke's view was that the plaintiff was making a slow recovery but still had symptoms which were consistent with cervical radiculopathy and were further consistent with the MRI scan showing a bulge at C5/C6. The plaintiff declined referral to a pain clinic.
24. The plaintiff was reviewed by Mr. Mangan in March 2021. This appears to have been at the plaintiff's solicitor's recommendation. On that date flexion, extension and rotation of the cervical spine were noted to be full. The plaintiff however complained of soreness at the right of the neck when flexing or rotating to the left. The lower cervical spine and adjacent trapezius area were also tender on palpation. The plaintiff also completed a second neck disability questionnaire and, on this occasion, Mr. Mangan noted that her neck disability was 28%. Mr. Mangan's overall opinion was the same as in his previous report: the accident had injured the degenerate cervical spine and caused some

acceleration of degeneration. He stated however that it was not possible to say what would or would not have happened to the plaintiff's cervical spine in the absence of the accident of February 2016.

25. The most recent medical report is on foot of an examination by Professor Masterson conducted in February 2022, a matter of weeks prior to this hearing. The plaintiff's complaints were of right sided neck discomfort "*on most days*", which could become worse when typing. The plaintiff also reported occasional pins and needles. On examination there was full range of movement in the cervical spine. Professor Masterson's view was that the plaintiff continues to have mechanical symptoms on the right side of her neck, probably secondary to the documented degenerative changes at the C5/C6 level of the MRI. He does not attribute her upper limb symptoms to this accident.

**Evidence of Mr. Mangan and Professor Masterson**

26. Mr. Mangan's oral evidence to the court was consistent with his report. He emphasised that the plaintiff's neck had been 100% fine prior to the 2016 episode. He stated that, whilst the plaintiff had degeneration prior to this episode, (1) she had been rendered symptomatic by the accident and (2) the accident had probably accelerated her pre-existing degeneration.
27. Mr. Mangan's view was that the effect of the accident was that the plaintiff had a chronically symptomatic cervical spine with radiation to the upper limbs and that the plaintiff continued to experience symptoms as a result of the accident. Mr. Mangan therefore disagreed with Professor Masterson's view to the contrary, albeit that he accepted that he could not say whether or not the plaintiff would, in any event, be experiencing some symptoms as a result of her pre-existing degenerative condition, had the accident not occurred. Although Mr. Mangan's view was that the plaintiff would continue to experience symptoms indefinitely, he again accepted that one could not say whether or not she might have experienced some symptoms in the future in any event as a result of her pre-existing degenerative condition. However, Mr. Mangan did not agree with Professor Masterson's evidence that it was unlikely that the plaintiff would have symptoms from the accident in the long term. There was, he stated, no scientific basis for this opinion. Indeed, Mr. Mangan stated that the longer these problems persist the worse the prognosis is, which did not bode well for the plaintiff.
28. Under cross examination, Mr. Mangan conceded that he could not say, as a matter of probability, that the plaintiff would now or in the future be symptom free were it not for this accident.
29. In oral evidence, Professor Masterson stated that objectively, the plaintiff's examination was normal on both occasions on which he reviewed her. He stated that in his view, whilst the plaintiff had a certain level of subjective complaints there was little objective evidence of an injury. Professor Masterson's view was that if one has a normal range of movement, this suggests that there is not significant discomfort to one's neck. In this respect, Professor Masterson's initial impression was that the other doctors examining the plaintiff had at all times also recorded normal neck movement. When he was corrected in relation

to this misapprehension, he fairly indicated that the plaintiff's complaints could be waxing and waning over time and this could account for the discordancy.

30. Overall, however, Professor Masterson emphasised that the accident only caused an exacerbation of the plaintiff's symptoms in the short term. His view was that the plaintiff's current symptoms are more likely to be related to underlying disc degeneration than to the accident. However, Professor Masterson accepted that it was difficult to be dogmatic about this and that causation or attribution of injury is an imprecise science.

## **Findings**

### **General Damages for pain and suffering to date**

31. The plaintiff was involved in a serious and frightening road traffic accident in which she sustained a flexion hyperextension type injury to her neck and shoulders. The plaintiff experienced symptoms of moderate severity as a result of this accident for a period of time. This is fully supported by Dr. Quirke's reports of March 2016 and April 2016.
32. After that, the plaintiff was not reviewed by Dr. Quirke until June of 2019. I accept that the reason for this is likely to be that Dr. Quirke was unable to offer her any particular treatment. In the circumstances, there was probably very little to be gained by repeatedly returning to see him. I therefore do not draw any conclusions from the plaintiff's failure to return to Dr. Quirke over this period, particularly as she attended ten sessions of physiotherapy. Further, the plaintiff's brother who is a physiotherapist, assisted her (and continues to assist her) in the event of particular flair ups in her symptomology.
33. Dr. Quirke expected that the plaintiff's symptoms would resolve within a reasonably short amount of time. When these symptoms did not resolve, an MRI and orthopaedic review were undertaken.
34. It appears to be the view of both orthopaedic surgeons that the plaintiff has an underlying spondylosis disc degeneration as evidenced by the MRI and that this was present prior to the accident of February 2016.
35. I accept the evidence of Mr. Mangan that the accident injured the plaintiff's degenerative spine and accelerated the degeneration. I further accept that the accident caused the plaintiff to suffer symptoms which she had not previously experienced and which she would not have experienced but for the accident. I also accept that, for a period of time, in the order of three-years, these symptoms were initially moderate and then mild to moderate in severity. I have no doubt that the plaintiff found these symptoms painful and intrusive.
36. It does however seem to me that there has been a reasonably significant improvement in the plaintiff's neck symptoms in more recent times. This is evident from the fact that the plaintiff has not had to undergo formal physiotherapy in recent times and from the fact that she has continued to work without, it seems, needing any time off for sick leave. On the whole, the plaintiff is able to continue with her activities of daily living, albeit that some activities do cause her some difficulty. I further note the improvement in the neck

disability index from 42% to 28%, which seems to me to be reasonably significant. I am also influenced by the fact that on recent examination, by both Mr. Mangan and Professor Masterton, neck movements were noted to be full, albeit associated with discomfort at the extremes of movement.

37. This all leads me to conclude that the plaintiff is somewhat unwilling to admit to herself of the improvement in her symptoms albeit I do not believe she is in any sense attempting to deliberately exaggerate her symptoms. Rather, after several years of pain, I think that the plaintiff has become exhausted and discouraged by her symptoms.
38. I therefore find that, although the plaintiff herself may on occasion still perceive pain at a higher level, as of the present time, the plaintiff's symptoms could reasonably be described as intermittent and as either mild or at the lower end of moderate.
39. Overall, I find that the plaintiff's past and current symptoms as described were caused, or were substantially caused by the accident the subject matter of these proceedings. The plaintiff did not have these symptoms before this accident and that it would be unrealistic to ignore the temporal relationship between the accident and the onset, and indeed persistence to date, of these symptoms. It would be reasonable to award the plaintiff €35,000 general damages for pain and suffering to date.

#### **General Damages for future pain and suffering**

40. I find that the general trajectory is in favour of continued improvement. If the plaintiff engages in further physiotherapy, and in fitness and conditioning exercising, there is every prospect that she will continue to improve such that her future symptoms are likely to be intermittent and reasonably mild, albeit undoubtedly unpleasant and, at times, upsetting.
41. Assessing the appropriate level of compensation for these future symptoms is extremely difficult as it involves a number of imponderable factors. Although I accept that this accident did accelerate the onset of symptoms, one simply cannot know how the plaintiff would have progressed but for this accident. Mr. Mangan repeatedly stated that it was not possible to assess what would have happened to the plaintiff's cervical spine in the absence of the accident of February 2016. Specifically, he could not say on the balance of probabilities, that were it not for this accident, the plaintiff would currently be asymptomatic, still less that she would be asymptomatic in the future. Nor did Mr. Mangan state that the plaintiff's future symptoms would necessarily be substantially less were it not for the accident. He very fairly said that there was no scientific basis to distinguish between symptomology attributable to underlying pre-existing degeneration and that attributable to exacerbation of that degeneration by the accident. He said that this would be mere guesswork. Professor Masterson's view, on the other hand, was that any symptoms experienced by the plaintiff beyond the short term were unrelated.
42. If the court were to be satisfied, on the balance of probabilities that the plaintiff's likely future symptoms, which it seems she will suffer indefinitely but which I find will be reasonably mild and intermittent, were wholly caused by the accident the subject matter



of these proceedings, then I would have been inclined to award a figure of perhaps €40,000 for future general damages. However, the plaintiff bears the burden of demonstrating that such future symptoms were caused by this accident and Mr. Mangan was just prepared to be drawn on this issue. Therefore, bearing in mind the uncertainties outlined above, and doing the best that I can, I will award half of that figure, being €20,000.

43. Overall, I will award the plaintiff general damages in the amount of €55,000 together with agreed special damages of €340.