



THE HIGH COURT

2019 No. 9746 P.

BETWEEN

CATHAL BOURKE

PLAINTIFF

AND

MARK BENNETT

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Garrett Simons delivered on 1 July 2022

1. This matter comes before the High Court by way of an assessment of damages only. That arises in circumstances where judgment has been entered against the defendant in default. More specifically, by order dated 7th March, 2022, the High Court (Coffey J.) entered judgment against the defendant for default in delivering his defence. Coffey J. ordered that the plaintiff is to recover against the defendant such amount as the court may assess in respect of the plaintiff's claim for damages and the costs of the suit. That assessment was to be carried out before a judge without a jury, and was to be set down accordingly.

2. The notice of trial in that regard was subsequently served, as I understand it, on 1st April, 2022. The defendant has not attended before court today and in those circumstances counsel on behalf of the plaintiff has taken me to the affidavit of service which indicates that the defendant was informed by way of letter sent by registered post that the matter would be heard today, 1st July, 2022. That letter was not returned as undelivered. The letter was sent to the address which the defendant had nominated in the notice of appearance which he filed in these proceedings as a litigant in person. So having regard to that affidavit of service, I am satisfied that the defendant was, indeed, aware of today's hearing before the High Court but has chosen not to participate.
3. Before turning to address the assessment of damages, it is necessary to say something in relation to the evidence which was ultimately called in the case. When the case was initially called on this morning, it was suggested that the plaintiff might be relying on certain medical reports and a booklet of those reports was handed in to the court.
4. Following an exchange between myself and counsel, I adjourned the matter briefly to allow counsel to consider with his client and instructing solicitor what course of action he and they wished to take in circumstances where it appears that none of the medical experts are to give oral evidence to the court. I explained to counsel that, if his client so wished, the matter could be adjourned to allow those experts to be called, or, alternatively, the matter could proceed today based on the plaintiff's own evidence.
5. There was some discussion as to whether or not the medical reports might be admissible, but I think the correct view is that they are not. Whereas there is provision made under the Rules of the Superior Courts for the exchange of expert

reports, those provisions do not allow—certainly not in the context of a personal injuries action—for the reports to be substituted for *oral evidence* unless there is express agreement between the parties to that effect. In other words, the mere handing in to court of an expert report does not make the content of the report evidence.

6. There is also a further complication in the present case in that it does not appear that the reports were served on the defendant. Now whereas it is of course correct to say that the defendant cannot challenge *liability* in circumstances where judgment has been entered against him in default of defence, the defendant would in principle be entitled to be heard in relation to the assessment of damages. He would have a right, for example, to challenge any evidence and if he so wished to adduce his own evidence. So, it seems to me that in the first instance the reports would not have been properly admissible as proof of their content, and, secondly, in any event, they could not, having regard to the requirement for fair procedures, be admitted as evidence in circumstances where the reports were not in fact served on the defendant.
7. As I say, counsel, his instructing solicitor and the plaintiff, Mr. Bourke, had an opportunity to consider their course of action and they have chosen to proceed on the basis of Mr. Bourke's evidence alone. As will become apparent, the case in one sense is quite straightforward because the principal physical injury is the loss of a number of teeth and that is something in respect of which Mr. Bourke is in a position to give direct evidence. It is not something which would, for example, in a more complicated case involving a neck or a back injury, require expert evidence to assist the court.

8. So then, turning to the evidence before the court, Mr. Bourke has given evidence this morning. He has explained the circumstances of the incident as follows. It seems that he had attended at the defendant's premises (he described those premises as the defendant's "yard") on 23rd June, 2017. It seems that prior to this there had been some history between the parties, that monies had been borrowed, and Mr. Bourke says that he had repaid the money by leaving it in the letterbox of the defendant and that he was attending at the defendant's premises to "*clear the air*" as he described it.
9. When he initially arrived at the premises, the defendant was not there, but then Mr. Bourke explains that the defendant arrived in some sort of van; that he got out of the van; and that there was another passenger in the van, a mutual friend of the plaintiff and the defendant. For reasons which are still unclear, the defendant engaged in an unprovoked attack upon the plaintiff.
10. Mr. Bourke has explained that the defendant hit him twice in quick succession. He has described both punches as being "*sucker punches*". He says that he certainly did not anticipate the first punch and not even the second punch because at that stage he was dazed and confused. As Mr. Bourke put it, the defendant "*hit him a box in the mouth*" twice.
11. Mr. Bourke also explains that when he looked down on the ground, he could see two of his teeth there, that obviously they had been knocked out as a result of the assault. Quite understandably, Mr. Bourke then left the premises as quickly as he could, he got into his own car, and he drove away. He described the attack as a "*very violent attack*" and explained that he wanted to get away as quickly as he could.

12. Mr. Bourke then attended at the A & E department at the local hospital. The hospital, in fact, was not able to do much for him. The bleeding had stopped at that stage, and the hospital as I understand it simply provided some pain killing medication. Mr. Bourke took that medication as I understand it for three to four days after the incident.
13. Mr. Bourke says that for the following two or three weeks after the incident until he had time to have a dental plate made and installed, he did not really leave the house much. He was unable to attend work. He says that he was socially embarrassed. He had some difficulty eating food, he had difficulty speaking because his speech was affected by the loss of his teeth. It was not until two or three weeks later that he returned to work.
14. In terms of the precise injury suffered, as noted already, Mr. Bourke's two front teeth were knocked out at the time of the incident, that is his two central upper incisors. It seems that a number of days later a third tooth, his left upper outer incisor, had to be removed. Mr. Bourke has described in evidence that that tooth was loose or damaged, and that on dental advice it had to be removed. So, the upshot of the assault was that Mr. Bourke lost three teeth.
15. He has since had a dental plate, or a dental palette prepared. Mr. Bourke showed that to me in evidence this morning. It clips onto his other remaining teeth and it provides three artificial teeth to the front of his mouth. Mr. Bourke has explained that this dental plate is the same one he has had throughout the last five years, that it is somewhat uncomfortable and that, ideally, he would prefer a longer term solution, one which would involve the insertion of some sort of implants in place of the missing teeth. That would be, as I say, a permanent

solution which would not require the dental plate to be taken in and out every evening when he goes to bed.

16. Mr. Bourke has explained that he has sought a costing in relation to that and he was told by a local dentist that it would cost somewhere between €9,000 and €10,000 to have that dental work done. Mr. Bourke has further explained that the dental work carried out to date, that is the removal of the third tooth and the making and fitting of the dental plate, was covered by his medical card and therefore he does not have any out of pocket expenses. It has been explained to him that the more sophisticated orthodontic dental work required in relation to the implants would not, in fact, be covered by the medical card and therefore he would have to pay for same if he wanted to pursue that.
17. I turn now to address the question of general damages. This case is subject to the Book of Quantum published by the Personal Injuries Assessment Board. In other words, it is subject to what might be described as the old regime. The new regime as introduced under the Personal Injuries Guidelines adopted by the Judicial Council in March 2021 does not apply because of the date of these proceedings. These proceedings were issued in 2019 and therefore they do not attract the new regime.
18. The Book of Quantum is something which a court must have regard to. The Court of Appeal has explained that the trial judge must always identify whether the Book of Quantum is applicable at all, and then indicate by reference to the Book of Quantum where in the scale of severity the particular injuries fall. The Book of Quantum deals with damaged teeth as follows. For a broken tooth, the range of figures is between €7,500 to €10,300, and then for the loss of (as

opposed to simply the breaking of) a tooth, the range indicated is €10,300 to €12,700.

19. The Book of Quantum then goes on to say the following in relation to the loss of more than one tooth:

“The impact of the loss of more than one tooth

There are several factors that need to be considered when calculating the assessment for loss of multiple teeth. Such factors would include, the number of teeth affected, location of the teeth, the level of previous dental hygiene, cosmetic effect, possible impacts on the requirement to change to a softer food diet.”

20. Counsel in the course of his submissions has suggested that, in circumstances where the headline figure is described by reference to the loss of one tooth, the appropriate methodology to apply where more than one tooth is concerned is simply to multiply that figure by the relevant number of teeth. So, in other words, on the facts of the present case, if the court fixed a figure of €10,300 for one tooth, the court would then move on to multiply that by three, producing an overall sum of €30,900.

21. With respect, I do not think that is the correct approach. It seems to me that the Book of Quantum requires something more nuanced and where there is more than one tooth lost the court must have regard to the criteria which have been identified and which I have just cited. So, it seems to me that it is not simply a case of multiplying by whatever number of teeth were lost, but rather looking at the situation in the round and the overall impact on the plaintiff.

22. So, on the facts of the present case, it seems to me that the appropriate figure to award for general damages for pain and suffering in relation to the loss of the three teeth is a figure of €17,500. It seems to me that whereas more than one tooth is lost, they were altogether, and the dental plate does provide a good

cosmetic finish and it seems to me that that is the appropriate figure in relation to general damages for pain and suffering.

23. The next matter then to consider is the psychological impact and I am going to consider that in the context of the claim for aggravated damages. These personal injuries proceedings are somewhat unusual in that the claim arises out of an assault. This is not, for example, a claim in respect of a road traffic accident where somebody has suffered injuries—possibly devastating injuries—as a result of the *negligence* of another party. Here, the injuries were caused by a *deliberate act* on the part of the defendant, Mr. Bennett, to engage in an unprovoked assault upon the plaintiff. It seems to me that the court is entitled to have regard to that and the additional pain and suffering and hurt feelings which would have been suffered by the plaintiff as a result. I think Mr. Bourke does not exaggerate matters when he says this was a violent and unprovoked assault. So, it seems to me that the appropriate award to make in this regard is to allow an additional sum of €7,500. That is intended to reflect, as I say, the hurt feelings and the normal matters that are covered by aggravated damages, and also the psychological insult suffered by Mr. Bourke. Mr. Bourke has explained that whereas before he was a calm and easy-going person, he is now socially anxious, he was prescribed anti-depressants by his GP and has taken those for a period of between six to nine months after the incident. He still resorts to them occasionally, but has explained in evidence he prefers not to rely on pharmaceutical products but rather to try and cope on his own. But it seems to me that taking into account the aggravated damages and the psychological impact that an appropriate figure to be allowed is €7,500.

24. I turn next then to consider the issue of special damages. It seems to me that the principal matter to be addressed by way of special damages is the dental implants which Mr. Bourke has indicated he wishes to obtain, and I propose to allow a sum of €10,000 in that regard. The evidence indicates that Mr. Bourke was quoted a figure a number of years ago now of €9,000, and it seems to me that €10,000, which is the figure indicated in the plenary summons, is probably a more accurate reflection of the current price of that dental work. Mr. Bourke has, as I have rehearsed, also explained that this dental work is not covered by his medical card.
25. Then the next significant head of damages is in relation to the loss of earnings. It was explained that Mr. Bourke was out of work for between two or three weeks following the incident and that his gross salary as I understand it was €550 per week. However, the particulars of special damages in the personal injuries summons have indicated a figure of €1,000. It seems to me having regard to the obligation introduced under the Civil Liability and Courts Act 2004 on both sides of a personal injuries action to plead and explain their case, that it would be unfair to impose a higher figure than that on the defendant. A defendant receiving a personal injuries summons is entitled to know the nature of the case against them. Of course, in some instances there would be ongoing damages, particularly in more serious cases, and indeed there may be cases where it cannot be said at the time the personal injuries summons is issued how long a particular plaintiff is going to be out of work. However, on the facts of the present case it seems that Mr. Bourke was back at work within three weeks and has been able to maintain work. As it happens, he has now changed career. He had been involved as I understand it in a form of childcare providing assistance to young

teenagers. He has now moved on as I understand it to an entirely different line of work in relation to the installation of coffee machines, but at all events this is not a case where somebody has been out of work for years and did not know, at the time the personal injuries summons issued, when they might get back to work. Happily, Mr. Bourke has through his own resilience been able to get back to work relatively quickly so I am going to fix that head of damages at the €1,000 sought rather than simply multiply €550 times three weeks.

26. The other damages claimed are in relation to travel expenses of €200 which I will allow. Mr. Bourke did not explain in evidence what was covered by miscellaneous expenses of €200 so I propose to leave that out of account. The chemist expenses are excluded in circumstances where these appear to have been covered by his medical card.
27. In summary, Mr. Bourke is to recover €17,500 by way of general damages; €7,500 by way of aggravated damages; and €11,200 by way of special damages. This gives a total sum of €36,200.
28. Mr. Bourke is also entitled to his costs of the proceedings as against the defendant. Mr. Bourke had to come to court to pursue his claim and even though the defendant has not in the first instance filed a defence and then did not turn up today to address the assessment of damages, Mr. Bourke was nevertheless put to the cost and expense of retaining a legal team in that regard and I propose to allow an order for costs in relation to that.
29. Having regard to the fact that the damages are well within the Circuit Court's jurisdiction, the costs will, in accordance with section 17 of the Courts Act 1981 (as amended), be allowed on the Circuit Court scale only but with High Court outlay.

Appearances

Dean Regan for the plaintiff instructed by F.H. O'Reilly & Co.

No appearance on behalf of the defendant

Approved
G. M. S. M. S.