

APPROVED

[2022] IEHC 650



THE HIGH COURT

[2016 11468 P]

BETWEEN

JASON MCCARTHY

PLAINTIFF

AND

WATERFORD CITY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered at Waterford Courthouse on Thursday 20 October 2022

1. Following the opening of the hearing of these proceedings last Monday 17 October 2022, counsel for the defendant helpfully identified that the questions for the Court in this claim for damages arising from a trip and fall, now alleged to have occurred on 1 February 2015 were:

- (i) did the fall occur as alleged or at all;
- (ii) did the fall happen outside the dwelling of the plaintiff's father-in-law;
- (iii) did the fall cause the injuries which are described in (a) the letter from Professor Mac Niocaill dated 25 February 2015 to Dr. Murphy in Thurles; (b) the report from Professor Mac Niocaill dated 28 September 2021 to the plaintiff's solicitors and (c) the evidence at the trial.

2. If the fall happened, the defendant accepts that the lip described "occurred as a direct result of poor compaction at the subbase", and "that any visual inspection of the area would have highlighted the presence of this lip and measures could have been taken to repair the area". Those quotes are taken from a report of Michael Fogarty, engineer, who reported to the plaintiff's solicitors on 31 May 2022.

3. The photograph taken with an instant camera marked "1", in the booklet of photographs agreed to be adduced in evidence, identified the locus of the fall. Suffice to say that the plaintiff's wife testified that she gave the instant camera to the plaintiff, and she saw the plaintiff taking the photograph. It was not established when exactly the plaintiff took the photograph, but nothing turns on the time that that photograph was taken. The plaintiff marked with an "X" the lip over which he tripped and fell. The plaintiff's father-in-law, Mr. James Delaney, marked the area of the fall, about 1.5 metres away from the "X" marked by

the plaintiff in photograph 3. Mr. Delaney appears to have only seen the plaintiff immediately after the fall as opposed to witnessing him tripping over the lip.

4. Ultimately the evidence of Mr. Delaney, the plaintiff's wife, and the plaintiff himself satisfied me that the plaintiff did actually trip and fall as he described. The cross – examination by counsel for the plaintiff focused on several issues in order to lay the basis for potential inferences which could be drawn by the Court to the effect that the plaintiff was inaccurate about the origin of his injuries and in particular the injury to his left wrist. The medical report of Professor Mac Niocaill on 28 September 2021 identifies that the plaintiff, now aged 36, suffered “a fracture of the scaphoid wrist on the left side”. That was not the subject of complaint from the plaintiff, according to the entry made in the records at the emergency department of the University Hospital when he attended there at 11:23 a.m. on 2 February 2015.

5. Counsel in cross – examination of the plaintiff referred the plaintiff to the following:

- (i) The 2 February (as opposed to 1 February) having been identified on the application to PIAB in the initiating letter and in the personal injuries summons, in conjunction with the refusal to identify the names of witnesses in a request from the defendant's solicitors. The inaccurate date and the alleged thwarting of any prospective attempt by the defendant to investigate the incident do not cause me to infer that the accounts given by the plaintiff, his wife and his father-in-law (Mr. Delaney) are sufficiently tainted as for me to disbelieve their evidence. Although the plaintiff often said “I don't know anything” in reply to questions, Mr. Delaney impressed me with his candour and account. He is a straight-talking man. The trip and fall over the lip occurred.

- (ii) The analogy of counsel in his questioning of witnesses about a 5:30 or 9:30 train, for the actual time of the incident, did not elicit such an inconsistency as to permit an inference adverse to the plaintiff's claim to be drawn. The answer to questions posed to the plaintiff's wife about the children having been put to bed at the time of the fall suggests that the fall occurred closer to the later time, but I do not need to make a definitive determination. The key issue concerns how the plaintiff suffered the injury to his left wrist.
- (iii) The account given by the plaintiff to Professor Mac Niocaill, which referred to an icy and cold weather day, was not remembered by the plaintiff. All I can find is that the plaintiff's account of the cause of his fall over the said lip in the pavement has not been undermined to such an extent that I must disbelieve him. None of the witnesses referred to ice as having been the cause of the fall and it was open to the defendant to adduce evidence from the caretaker of the houses or otherwise that it was more likely that the plaintiff slipped as opposed to having tripped as he testified.
- (iv) The plaintiff, as I commented during the trial, when prefacing a question to him, showed that his oath to give his evidence truthfully meant a lot. Mr. Delaney agreed that the plaintiff's way of answering questions regularly appears evasive, but it is part of his manner of communicating. I make those observations because I have no reason to doubt his account that he simply does not remember, seven years after the fall, whether he fell on his right or left side. Indeed, the plaintiff's memory of his pain, suffering, treatment and attendances with doctors is patchy. It is fair to say that the plaintiff does not appear to have been too much put out by the sequelae.

6. It is Professor Mac Niocaill who describes the relatively short periods for wearing casts, and the open reduction internal fixation with grafting from the plaintiff's left scaphoid on some date in 2016. Professor Mac Niocaill describes the plaintiff's complaint as having pain when lifting heavy weights: -

“... particularly in the mid – prone position. He has pain over the dorsum of his wrist on the radial border of his wrist and he experiences intermittent creaking and cracking. He has some increased pain in cold weather and has to occasionally take painkillers or wrap it in a bandage. He also notices that his wrist girth on the affected left side is decreased. On examination today (i.e., September 21) Mr. McCarthy has a well – healed approximately 7 cm L shaped scar on the volar surface of his scaphoid, consistent with his fixation, and an 8 cm scar over his right iliac crest consistent with bone graft harvesting. He has lost range of motion in his wrists, specifically approximately 10% of supination, his pronation is normal, his palmar flexion is decreased in the order of 20% and his dorsiflexion is in the order of 30%. His wrist is generally tender, and the scar is really quite tender”.

On physical examination in Court, I did not notice the difference between the wrists, but I noticed the well – healed scar around and above the wrist area.

7. The cross – examination which touched on the plaintiff's abuse of alcohol prior to 2015 and a question about using a fist in an assault did not yield any response which prompts me to disbelieve the link between the fall on 1 February 2015 and the plaintiff's left wrist injury.
8. It may seem odd that the plaintiff took a taxi to the emergency department on the morning of 2 February 2015 while his parents in law went off shopping in their car.

Nothing needs to be said or surmised by the Court about the dynamics at or around the breakfast table on the day after the fall. Again, I have no reason to doubt that the plaintiff attended the emergency department with his wife. Family members do not always act in the way we might anticipate, and again nothing turns on the questions which may have elicited vague replies. I am indeed conscious of the honest replies from both Mr. Delaney and his daughter (wife of the plaintiff) that they did not know that this claim was being pursued until they were asked to give evidence at the trial a year or two ago. The defendant may have been disadvantaged but I heard no evidence of those actual disadvantages.

9. Counsel also asked about the plaintiff's involvement with horses and the use of a sulky. Again, I need not recount too much about the replies to that line of questioning other than to conclude that the plaintiff's injuries, which are the subject of these proceedings, have not caused the plaintiff to forego those interests. The plaintiff's recovery of €17,555 arising from a Road Traffic Accident ("RTA") on 23 February 2003 and his recovery of a further €12,000 for yet another RTA on the 16 June 2009 were facts which the plaintiff acknowledged. The plaintiff was not that forthcoming until he was pushed about recovering another €15,000 arising from an assault when he was a child. The aforementioned are only slightly relevant to the assessment of damages which I will proceed to now.

10. So, I conclude on the balance of probabilities that the plaintiff did indeed suffer an injury to his left wrist as described in a trip and fall incident, for which the defendant now accepts liability in view of the facts established by this Court.

Damages

11. As opposed to the binding effect of the Judicial Council guidelines, the book of quantum 2016 is a guide. The book of quantum brought some consistency to awards with the

benefit of predictability. Counsel for the plaintiff submits that the plaintiff's wrist fracture falls within the "moderately severe" at the higher end which has a band of damages from €54,200 to €70,000. Counsel for the defendant submits that the plaintiff suffered a minimally displaced fracture which falls within the €35,000 to €75,000 range in the book of quantum. The plaintiff suffered a fracture which required fixation using a grafting procedure with the complaints and prognosis outlined by Professor Mac Niocaill. However, the damages already recovered by the plaintiff for injuries (albeit unconnected to the focus of his claim now) do have some minimal relevance when applying the proportionality exercise for the total €550,000 limit on damages in cases of catastrophic injuries. In other words, the accumulation of various awards for injuries which do not amount to catastrophic injuries influences this Court when undertaking the proportionality exercise. To date the plaintiff has recovered €44,550 in general damages. The plaintiff has little recollection of the effects of the injuries from the fall over seven years ago now. They do not impinge significantly on his current day-to-day interests. I take account of the opinion of his current symptoms and that he has an unspecified increased risk of arthrosis around the scaphoid, although the fracture appears to have united at this stage.

12. Taking all the above into account, I assess general damages for the period from the 2 of February 2015 to 17 October 2022, including the operation in 2016 at €21,000 and damages for future pain, suffering and restriction in the non – dominant hand with scarring at €14,000; all of which is a total of €35,000.

Application for Costs

Following delivery of this judgment and having heard that Counsel had agreed a final order in regard to all issues, the Court ordered by consent the defendant to pay the sum of €30,000 to the plaintiff together with his costs on the Circuit Court scale including all reserved and any discovery costs all to be adjudicated in default of agreement.

Solicitors for the plaintiff: JJ Fitzgerald & Company Solicitors

Solicitors for the defendant: Mr. Donal O'Connell

Counsel for the plaintiff: Mr. Dermot Cahill SC, Ms. Elaine Morgan SC

Counsel for the defendant: Mr. Stephen Lanigan O'Keeffe SC, Mr. Mark Flynn BL