THE HIGH COURT

[2023] IEHC 398

[Record No. 2020/203P]

BETWEEN:-

PHILIP POWER

PLAINTIFF

AND

ELIZABETH WALSH

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered electronically on the 12th day of July, 2023.

Introduction.

1. This action arises out of a road traffic accident that occurred on 24 December 2018 at 16.30 hours at the junction of Shelbourne Road and Ennis Road, in Limerick. It is common case that the plaintiff's vehicle, a 2008 model Mitsubishi Pajero jeep, was stationary in a line of traffic stopped at traffic lights, when it was impacted from the rear by the defendant's vehicle, which was a 2017 model Toyota Rav 4.

2. The plaintiff alleges that as a result of the impact, he was caused to suffer a relatively minor soft tissue injury to his neck, for which he was treated by his GP on five occasions and received approximately ten sessions of physiotherapy treatment. He alleges that he suffered losses in the sum of €990, made up of physiotherapy fees of approximately €800, together with GP medical fees and prescription fees.

3. While the defendant admits that an impact occurred and that it was her fault, she maintains that the level of impact between the vehicles was so minor, that it was impossible for the plaintiff to have suffered the alleged or any, personal injuries, loss or damage.

The Evidence of the Parties.

4. The plaintiff stated that he had come to a halt in a line of traffic, which was stationary at traffic lights, which were red. He stated that he was the third vehicle back from the traffic lights. He stated that suddenly there was a loud bang when his vehicle was impacted from the rear by the defendant's vehicle.

5. The plaintiff stated that immediately prior to the impact, he had been talking to his father-in-law, who was a front seat passenger in the vehicle. The plaintiff stated that he

had been wearing his seatbelt. As a result of the impact, he stated that he was shunted forwards and backwards in his seat.

6. The plaintiff stated that he did not suffer any immediate onset of symptoms. He alighted from his vehicle, as did the defendant from her vehicle. The defendant took photographs of the damage to the respective vehicles on her mobile phone. The plaintiff stated that there was no obvious damage to his vehicle, due to the fact that he had a towbar protruding from the rear of the vehicle, which take most of the impact from the defendant's vehicle. He stated that the only visible damage to his vehicle was a crack to the reflector on the spare wheel cover, which was around the spare wheel, which in turn was affixed to the rear door of the jeep. He also alleged that there was minor damage to the right side of the rear bumper, which he thought was caused by the collision between the vehicles.

7. Having exchanged details, the parties continued on their way. The plaintiff stated that on the following day, he developed a burning sensation at the bottom of his neck just above his shoulder blades. He stated that his neck pain continued over the following days. He attended with his GP on 31 December 2018. He was given analgesic and anti-inflammatory medication. When the plaintiff's neck pain continued, he returned to see his GP on 11 January 2019, 8 February 2019, 2 April 2019 and 16 September 2019. He stated that at the time of the accident, he had been due to take one week's holidays. He was obliged to take a further week off due to his injuries. Thereafter, he returned to his employment as a supervisor with a company that did construction work on behalf of Limerick City Council and other entities. He stated that he was only able to do light duties on his return to work. He was not able to assist the workmen with their tasks, as he had done prior to the accident. He stated that within 8/9 months of the accident, he was back doing full duties.

8. The plaintiff stated that in total he had approximately ten sessions of physiotherapy treatment, at a cost of approximately €80 per session. He stated that his sleep had been disturbed. He would awake with neck pain a number of times during the night. He stated that by the summer of 2019, he had made a good deal of recovery, but still had neck pain. By Christmas 2019, he had significantly improved to the point where he had neck pain, but it would be relieved when he applied gel to the affected area. He stated

that in total he had experienced neck pain for a period of approximately eighteen months post-accident.

9. The defendant's account of the accident was broadly similar. She stated that she had driven to Limerick from Dublin, for the purpose of spending Christmas with her husband's family. Her sixteen-month-old child was travelling in a child seat in the back of the car. She stated that as she approached the traffic lights, they were showing red. She came to a halt approximately 1.5m behind the plaintiff's vehicle.

10. The defendant stated that when the traffic lights changed to green, the first two vehicles pulled off and as she expected the plaintiff to do likewise, she moved her car forwards. However, when the plaintiff's vehicle did not move forward, there was a very minor impact between the front of her vehicle and the rear of the plaintiff's vehicle. She stated that this was no more than a "tip".

11. The defendant stated that the front of her car impacted primarily with the towbar protruding from the rear of the plaintiff's vehicle. There was also an impact between the badge on the front of her vehicle and the reflector on the back of the spare wheel cover on the rear of the plaintiff's vehicle. She stated that the damage to her vehicle had consisted of the following: a crack to the badge on the front of her vehicle; a retaining screw on the number plate was popped out causing the number plate to hang down; and the front grills above and below the number plate were unclipped, but were not broken. She stated that having exchanged details at the scene, both parties proceeded on their way.

The Expert Engineering Evidence.

12. No engineering evidence was called on behalf of the plaintiff.

13. Mr. Tony Kelly, a consulting engineer, specialising in the field of forensic collision investigation, gave evidence on behalf of the defendant. He stated that he had not had the opportunity to examine either of the vehicles. He had been given photographs, which had been taken by the vehicle assessors of the respective vehicles at the time of their examination, a number of months after the accident. He had not had the opportunity to speak directly with the defendant, but had been furnished with a copy of her statement in relation to the circumstances of the accident.

14. Mr. Kelly stated that there were four areas of minor damage to the rear of the plaintiff's jeep. He was of the view that as the impact between the vehicles was likely to have been a direct rear ending between the vehicles head on, the only damage that was

consistent with the impact between the vehicles, was the cracking to the rear reflector on the spare wheel cover. He stated that the other areas of minor damage to the rear of the plaintiff's vehicle, as shown in the photographs in his report, were not likely to have been caused by any impact between the vehicles in the accident.

15. Mr. Kelly accepted that the towbar protruded beyond the rear bumper and the outer edge of the spare wheel cover to the rear of the plaintiff's vehicle. Therefore in order for the defendant's vehicle to have made contact with the reflector on the spare wheel cover, it would first have had to have come in contact with the towbar. The witness stated that from his examination of the photographs, he had not seen any evidence of damage to the structural components of the defendant's car. He stated that while it was apparent that the defendant's car impacted with the towbar on the rear of the plaintiff's vehicle, it appeared that this only caused a deflection of the front bumper. There was no evidence of penetration during the initial contact and there was no evidence of additional damage as the towbar disengaged from the front of the defendant's vehicle. The witness stated that it was noteworthy that the only damage that was apparent to the part of the defendant's vehicle that came in contact with the towbar, was the unclipping of the grills and the popping of the screw from the number plate. From the photographs it did not appear that there was any structural damage to the front of the vehicle.

16. In addition, he stated that the crack to the reflector on the spare wheel cover, was probably caused by an impact with the manufacturer's badge on the front of the defendant's vehicle. He stated that it was noteworthy that the leading edge of the bonnet, which was immediately above the manufacturer's badge on the defendant's vehicle, did not appear to be damaged. Thus, he was of the view that the impact between these two areas had been very minor.

17. Mr. Kelly stated that from the photographs that had been provided to him, it appeared that the contact between the front of the defendant's car and the rear of the plaintiff's vehicle was extremely light, with probably no retarding force exerted on the defendant's oncoming vehicle. If that was accepted, that would have meant that there would not have been an opposing force transmitted to the plaintiff's vehicle during contact. He stated that that was particularly so, having regard to the fact that the Pajero was a reasonably heavy vehicle.

18. Mr. Kelly stated that he calculated that, given the distance between the defendant's car and the jeep of approximately 1.5m, it was likely that her speed would have been in the region of 5/6 km/h at the point of impact. This meant that the probability of occupant injury to the target vehicle was very low. He stated that some research had suggested that a change in acceleration (ΔV) of 6km/h could cause personal injury. However, more recent research disagreed with that and was of the view that there must be a ΔV of 8km/h before there could be injury. Mr. Kelly did not specify to what research he was referring; nor did he produce it in evidence. He was of the view that given the forces that could have been exerted as a result of the impact between the vehicles, it was only possible that a very minor injury in the form of a headache for 24 - 48 hours could have been suffered by the occupants of the plaintiff's vehicle.

19. In cross-examination, Mr. Kelly accepted that there had to be a primary impact between the plaintiff's vehicle and the towbar, followed by a further impact between the badge area of the defendant's car and the reflector on the spare wheel cover. He accepted that on the evidence put before him, his opinion was that the probability of an injury to the occupants of the plaintiff's vehicle was very low, but not zero. He accepted that there could be an injury, but that that was a matter for the court.

20. The witness stated that there could be "restitution", being a slight rebound of the vehicles after collision. The mechanics of the collision can be evident in the resulting car damage, which in this case was minimal.

The Medical Evidence.

21. By agreement of the parties, the court was furnished with medical reports from Dr. Simon O'Connell, the plaintiff's GP and from Mr. Aidan Gleeson, consultant in emergency medicine, who had examined the plaintiff on behalf of the defendant. In addition, Mr. Gleeson also gave evidence to the court.

22. The first medical report from the plaintiff's GP, Dr. Simon O'Connell, was from an examination on 2 April 2019, some four months post-accident. In that report, he noted that the plaintiff had been first seen by his colleague, Dr. Kieran Daly, on 31 December 2018, at which time he was noted to have had a limited range of neck movement in all planes, particularly on lateral rotation to the right, with tenderness over his upper left sided trapezius. He had a normal range of movement in the shoulders. Dr. Daly was of opinion that the plaintiff had sustained soft tissue injuries to his neck. He advised the

plaintiff to take analgesic and anti-inflammatory medication and muscle relaxant medication. He gave a prescription for this medication. He also advised the application of topical medication to the affected areas.

23. The plaintiff was reviewed by his Dr. Daly on 11 January 2019, who noted that he had ongoing neck pain. He was sore and stiff in all planes of movement. He was referred to the local injury unit for further assessment, where he was also diagnosed with a soft tissue injury and was further prescribed with anti-inflammatory and muscle relaxant medication.

24. When reviewed again by Dr. Daly on 8 February 2019, the plaintiff had made some improvement, but continued to have persistent mild limitation of movement on lateral rotation to the left. He was prescribed further analgesic and anti-inflammatory medication and was referred for physiotherapy treatment. The plaintiff also stated that he had developed lower back pain approximately two weeks following the accident.

25. When seen by Dr. O'Connell on 2 April 2019, the plaintiff reported significant sleep disruption since the accident due to ongoing pain. He would awake during the night with pain and as a result, felt fatigued during the day. Clinical examination revealed that his upper and lower back remained uncomfortable and continued to limit his ability to carry out full duties at work. He continued to wake at night with pain. On examination there was significant tenderness and guarding over the lower latissimus dorsi musculature and paraspinal musculature of his lower back. He also had bilateral pain and tenderness in the rhomboid muscles. There was a full range of movement of the neck, which was noted as being pain free. He had a normal range of movement of the lower back, albeit it with discomfort. However straight leg raising was limited to 45° bilaterally, due to involuntary guarding and spasm of the musculature of the lower back. There was crepitus over the rhomboids bilaterally on retraction of his scapulae.

26. Dr. O'Connell was of the opinion that the plaintiff was likely to need ongoing physiotherapy treatment. The physiotherapist had indicated that the plaintiff would require eight-ten sessions in total. Dr. O'Connell was of the opinion that all of the plaintiff's symptoms and disability were caused by the accident.

27. The plaintiff returned to see Dr. Daly on 16 September 2019, when it was noted that he had ongoing sleep issues since the accident. He was waking seven to eight times per night due to neck pain.

28. The plaintiff was reviewed by Dr. O'Connell on 6 June 2023 at which time, he informed the doctor that he had made a full recovery from his injuries, apart from persistent intermittent discomfort in his upper back muscles, which appeared localised to the lower trapezius and rhomboid muscles. He was able for the demands of his work, but could experience discomfort after a heavy day's work. He used topical gel and over the counter anti-inflammatories as required for his upper back symptoms. He had had ten sessions of physiotherapy in total in 2019. Examination revealed a full range of movement of his neck and spine. The doctor was of opinion that, apart from his occasional muscular back pain, he was otherwise recovered from his injuries.

29. The plaintiff was seen on two occasions by Mr. Aidan Gleeson, consultant in emergency medicine, on behalf of the defendant. He first saw the plaintiff on 2 February 2021, some two years and two months post-accident. He noted that the plaintiff had seen his GP on approximately 4/5 times and had had ten sessions of physiotherapy. At the time of examination, the plaintiff stated that he still noticed pain in the upper thoracic region in the midline. This was generally at night when he was in bed. He stated that when he was up and moving about, it was not really a problem for him. Examination on that occasion was largely normal.

30. Mr. Gleeson stated that he failed to see how the jeep could have been pushed forward a number of feet, as he had been told by the plaintiff. Assuming that the impact had been a very light impact, he would not expect any injury to have been sustained. He further stated that if an injury had been sustained, it would have been no more than a very minor soft tissue injury of the spine, perhaps causing symptoms for a period of days, or one-two weeks at most. He therefore had difficulty accepting that the plaintiff would have needed to keep attending with his GP for painkillers, or that he had justified having ten sessions of physiotherapy treatment, or that he could have residual symptoms at that stage post-accident.

31. The plaintiff was reviewed by Mr. Gleeson on 6 June 2023, at which time the plaintiff stated that he still noticed a tight feeling in the upper thoracic spine area in the midline. He sometimes noticed it in the morning. He stated that he would just stretch out the area and that would deal with the problem. Mr. Gleeson's opinion remained unaltered. He stated that it was clearly a low-level impact and the likelihood of injury would have been low. Any injury that could have been sustained, would have been of a minor nature

only. He would have expected it to cause symptoms for a number of days, or perhaps one-two weeks. He could not therefore attribute the plaintiff's current complaints to the index accident.

32. In his evidence to the court, Mr. Gleeson stated that the plaintiff had told him at the first examination that his car had been shunted forward "a few feet". He had been surprised about that, due to the apparent low level of impact between the vehicles. He had asked the plaintiff whether the vehicles had been on an incline prior to the impact, but the plaintiff had stated that the road was flat at that point.

33. In cross-examination, Mr. Gleeson stated that his contemporaneous note taken at the first examination stated "Stationary at traffic light in car. Handbrake up. Jolted forwards and back. Wearing seatbelt. 'Towbar took most of it'. No repairs needed. Next day he was sore". He accepted that there was no mention in his contemporaneous note of the car moving forward a number of feet. However, he stated that that had definitely been said to him, as he had dictated his medical report immediately after the departure of the plaintiff from the consulting room.

34. Mr. Gleeson accepted that the plaintiff's complaints were consistent with a soft tissue injury to the neck. He accepted that the plaintiff's GP had found limitation of movement of the neck; had prescribed analgesic medication; and had prescribed physiotherapy treatment. However, he stated that given the level of impact between the vehicles, he could not understand the severity of the injury as complained of by the plaintiff; nor the extent of physiotherapy treatment which he had had.

Conclusions.

35. There are a number of facts which are not in dispute: there was an impact between the defendant's car and the rear of the plaintiff's jeep; that impact was the fault of the defendant. It is accepted that there were no repairs carried out to the plaintiff's jeep after the accident. It is accepted that neither the plaintiff, nor his passenger, made any complaint of injury in the immediate aftermath of the accident; nor did the defendant, or her child suffer any immediate injury.

36. Insofar as there is a conflict between the parties in relation to the severity of the impact between the vehicles, I prefer the evidence of the defendant in this regard. The evidence that is available to the court in the form of the photographs of the vehicles as

taken by the vehicle assessors, when they examined the respective vehicles sometime after the accident, is not indicative of there being a major impact between the vehicles.

37. While Mr. Kelly was very conscientious in relation to the expert evidence that he gave, it has to be recognised that there were limitations on the usefulness of that evidence, due to the fact that he had not had the opportunity to physically examine the vehicles. This was a significant limitation on the weight of the evidence that he could give. Normally a forensic collision investigator will base his or her investigation on their physical examination of the vehicles and an examination of the locus. Unfortunately, Mr. Kelly was not in a position to do either of these things. While photographs are often used by experts to demonstrate their findings on a physical examination of vehicles, or a locus; it is an altogether different thing to base expert opinion on photographs alone. This is due to the fact that photographs will rarely show the true extent of damage and will certainly not show any underlying damage that there may be behind the visible exterior parts of the vehicle.

38. Notwithstanding these limitations, I accept the evidence given by Mr. Kelly that the damage to the plaintiff's jeep was the crack caused to the reflector on the outer portion of the spare wheel cover, which was probably caused by impact with the defendant's car, in the area of the manufacturer's badge on the front of her vehicle. I accept his evidence that that badge was cracked as a result of the impact with the reflector on the spare wheel cover.

39. It was accepted by Mr. Kelly in cross-examination, and I find as a fact, that in order for the defendant's car to impact the spare wheel cover on the defendant's jeep, the bumper area of her car had to have first struck the towbar on the plaintiff's vehicle, which protruded beyond the outer rim of the spare wheel cover. I accept the evidence of Mr. Kelly that from the photographic evidence that was available to him, as supported by the evidence of the defendant, there does not appear to have been any structural damage to either vehicle.

40. Accordingly, I find as a fact that this was a minimal impact collision between the vehicles. While it is understandable that there was minimal damage to the rear of the plaintiff's vehicle, due to the fact that he had a towbar protruding from the rear of his vehicle; had there been a significant collision between the towbar and the front of the defendant's car, I am satisfied that there would have been far more damage to the

defendant's car, than was actually the case; which consisted of an unclipping of the grills to the front of the vehicle, a popping of the screw on the number plate and a crack to the manufacturer's badge. It is also noteworthy that there was no visible damage to the leading edge of the bonnet of the defendant's car, which was immediately adjacent to the manufacturer's badge.

41. Before turning to the central issue in the case, I wish to deal with two ancillary issues. First, insofar as there is conflict between Mr. Gleeson and the plaintiff as to whether he told Mr. Gleeson that the car had been pushed forward "a few feet" and had then rolled backwards, as a result of the collision; notwithstanding the absence of any reference to this in the contemporaneous note taken by Mr. Gleeson, I accept his evidence that on hearing that account, he made enquiry of the plaintiff as to whether there was an incline at the locus and on receiving a negative answer, recorded that in his report. Accordingly, I hold that this comment was made by the plaintiff to Mr. Gleeson at that examination.

42. Secondly, it was noteworthy that the plaintiff did not elect to call his father-in-law, who was with him at the time of the accident. It is settled law, that the court is entitled to draw inferences from the fact that witnesses are not called by a particular party, whom it is reasonably expected might have been called to give credible evidence on a relevant issue: see *Doran v. Cosgrove* [1999] IESC 74; *H v. St Vincent's Hospital* [2006] IEHC 443; *Dunne v. Coombe Hospital* [2013] IEHC 58 and *Whelan v. AIB* [2014] IESC 3. However, it may well be that there was some good reason why this gentleman was not called to give evidence; he may have died in the interim, or he may not be capable of giving evidence. In the absence of any evidence that he was available and in a position to give evidence to the court, the court declines to draw any adverse inference from the fact that he was not called to give evidence at the hearing of the action.

43. Turning to the central issue in the case, which is whether the plaintiff suffered the alleged or any personal injuries as a result of the impact between the vehicles on 24 December 2018, case law has established that even minimal impact collisions can give rise to significant injuries: see *Neville v. COD Plant & Civil Engineering Limited* [2015] IEHC 437.

44. In a case dealing with an alleged minimal impact collision, the Court of Appeal in *Dunphy v. O'Sullivan* [2021] IECA 171, stated as follows at para. 38:

> *"Defendants' insurers are naturally and properly vigilant about the potential for fraud in relatively trivial rear end impacts. Complaints of whiplash are easily made in the aftermath of such accidents. Because such soft tissue injuries are highly subjective, it can be difficult to establish that what a plaintiff says is not merely improbable, but downright fraudulent. It is to be expected that such claims will be subjected to particular scrutiny. However, on the other side of the coin, a plaintiff may suffer a genuine injury in what appears at face value to be a dubiously slight impact. Such a plaintiff will undoubtedly be met with considerable scepticism by insurers, and perhaps from time to time by judges too. As here, a plaintiff's credibility will often be a central feature of the case and courts will consider carefully any potential inconsistencies in the evidence."*

45. The key issue in this case is whether the plaintiff suffered any personal injuries as a result of the accident on 24 December 2018. Having observed the plaintiff in the witness box, I am satisfied that he is an honest witness. He did not allege that he had symptoms immediately after the accident. He stated that the pain had come on over the following days leading to his attendance with his GP on 31 December 2018. That is entirely consistent with the onset and development of a soft tissue injury to the neck.

46. The plaintiff saw his GP on five occasions in the months after the accident: on 31 December 2018; 11 January 2019; 8 February 2019, 4 April 2019 and 16 September 2019. During that time limitation of movement of the neck, and on some occasions the back, was noted on physical examination. He was prescribed analgesic, anti-inflammatory and muscle relaxant medication. He was referred for further assessment at the injury unit, where the diagnosis of soft tissue injury was confirmed. He was recommended to have physiotherapy treatment.

47. While the plaintiff's evidence that he had ten sessions of physiotherapy treatment, is unsupported by any documentary evidence; there is reference to the plaintiff receiving physiotherapy treatment at the time that he was seen by Dr. O'Connell in April 2019. On the balance of probabilities, I accept the plaintiff's evidence that he had ten sessions of physiotherapy treatment.

48. The plaintiff has not tried to state that he was badly injured. He accepted that he was able to return to work on light duties after a very short period. There is no claim for loss of earnings. The plaintiff accepted that he had made a full recovery within eighteen

months of the accident. That was consistent with the replies that he gave to the notice for particulars, furnished in August 2020.

49. While Mr. Kelly was of the view that there were minimal forces exerted on the plaintiff's vehicle as a result of the impact, one has to have regard to the fact that Mr. Kelly formed that opinion from viewing photographs. In addition, the plaintiff's vehicle had a towbar, therefore it was unlikely that there would be any damage to the rear of his vehicle. The lack of damage to the defendant's vehicle is not necessarily indicative of there being no forces generated as a result of the impact.

50. Mr. Kelly accepted that on some of the scientific literature, the defendant's car had reached a speed sufficient to cause injury to the occupants of the target vehicle; albeit he thought that any injury sustained was likely to be very minor.

51. The defendant's medical expert, Mr. Gleeson, accepted that the occupants of the plaintiff's vehicle could have been injured, but at a very minor level. It has to be remembered that he first saw the plaintiff on 2 February 2021, some two years and two months post-accident, by which time, on his own account, the plaintiff had long since fully recovered.

52. Insofar as there is a conflict on the medical reports submitted on behalf of the plaintiff and admitted in evidence, and the evidence given by Mr. Gleeson, I prefer the evidence of Dr. O'Connell. It was his medical practice that saw the plaintiff in the critical period after the accident. I accept the evidence that he was treated by the GP practice on four occasions in the four months post-accident and was seen again in September 2019. I accept that he was administered anti-inflammatory, analgesic and muscle relaxant medication as detailed in the reports. As already noted, I accept the evidence that he had commenced physiotherapy treatment when seen by Dr. O'Connell in April 2019 and that he had gone on to have approximately ten sessions in total.

53. In these circumstances, I find that the plaintiff suffered a relatively minor soft tissue injury to his neck, with a brief onset of back pain, and with sleep disturbance due to neck pain. I accept his evidence that while he was able for the full demands of his work within a short period of the accident, he had some symptoms for up to eighteen months post-accident.

54. The book of quantum provides that for minor soft tissue injuries, where a full recovery is made, the appropriate damages is anywhere up to a maximum of €15,700.

Having regard to the evidence tendered in this case, I award the plaintiff general damages in the sum of €14,500, together with special damages of €990, giving an overall award in favour of the plaintiff of €15,490.

55. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

56. The matter will be listed for a remote hearing at 10.30 hours on 27th July, 2023 for the purpose of making final orders.