THE HIGH COURT

[2023] IEHC 771

[Record No. 2021/4714P]

BETWEEN

ALAN MASSEY

PLAINTIFF

AND

CHRISTINA CROFT

DEFENDANT

JUDGMENT of Mr Justice Micheál O'Higgins delivered on the 8th of December 2023

1. This is an assessment of damages in a personal injuries case. The case concerns the correct approach to follow when assessing multiple injuries in a pre-Guidelines case. On 16 August 2019, the plaintiff was cycling his bicycle on Beaumont Road in Dublin when the defendant's car turned right across his path and crashed into him. Liability is conceded and so the case proceeded as an assessment. The parties agreed the medical reports could be admitted into evidence as proof of their contents without formal proof. The plaintiff was the only witness to give evidence.

2. The plaintiff was born in 1974 and is now aged 48. He is married with children. He works as a pharmaceutical process operator. As part of his job, he is required to load heavy drums of tablets (5-25kg) into large machines. Therefore, on a day to day basis his work involves a fair amount of physical lifting.

3. The accident occurred when the plaintiff was cycling home from his mother's house along the cycle lane on Beaumont Road. As he got closer to the defendant's car up ahead, the car suddenly accelerated and crashed into him. He was sent flying off his bike and landed on the ground. He was left on the ground for a while and was in a lot of pain. He was brought by ambulance to Beaumont Hospital and was detained overnight. His two most serious injuries were a fracture of his left distal radius which extended into his wrist joint and a fracture of the base of his right acromion process. The acromion process is a large bony projection on the end of the scapula. It functions to stabilise the shoulder joint. The plaintiff also suffered soft tissue injuries to his right knee, right ankle and chest wall.

Plaintiff's evidence

4. I found the plaintiff to be a pleasant and credible witness. He gave his evidence in a straightforward fashion and engaged with all questions asked of him. He did not exaggerate his symptoms and on occasions made appropriate concessions in cross examination. He gave very clear evidence that the accident had impacted his work and recreational life significantly. In his evidence, he distinguished between the effects on his life of the two fractures, versus the more limited effects of his soft tissue injuries which cleared up after a number of months.

5. The plaintiff's evidence was not perfect in all respects. For instance, he initially said the cast on his wrist was on for 5 months, but when he was reminded what was recorded in a medical report, he acknowledged this was incorrect and confirmed the cast was on for 6 weeks. However, in the main, I found the plaintiff's evidence to be clear and credible and amply supported by the medical reports provided to the court. My overall impression of the plaintiff was that he is a stoic individual who is frustrated with the fact that he has been left with a permanent injury which impacts him on a daily basis. He struck me as a person who

just gets on with things and generally does his best to work around his symptoms by doing exercises at home and taking over-the-counter medication for pain relief, when required.

6. For the two main injuries to the wrist and shoulder, the plaintiff was placed in a cast and his arm placed in a sling in the hospital and he was given medication for pain relief. He was in a lot of pain with the fractures and had severe pain in his body. He feels he hit his chest, knee and ankle off the car in the crash as these areas were causing a lot of pain. In the weeks and months following the accident he remained in pain. I think it is important that the plaintiff's injuries were such that he had to take a full five months off work. He says, and I accept, that he was seriously incapacitated during this period. His wife had to help him shower. He told his GP that he couldn't dress himself and he was unable to cook or do domestic chores. He had to hold the dog's lead in his wrong hand in order to protect his wrist and shoulder. He had a number of sessions of physio in the hospital and was given exercises to do at home, which he complied with. His wrist got better over time as he continued with physio and exercises with rubber bands and squeezing a ball.

7. In evidence in chief, the plaintiff emphasised that his principal injuries were to his wrist and shoulder. His knee was hurting him for ages but is okay now. His ankle clicks every now and then and, he feels, is larger than his left ankle. He doesn't get pain in the ankle anymore. His wrist remains an issue for him, though it has got a lot better. His main ongoing problem is the injury to his shoulder which he is "raging about". The shoulder injury affects day to day tasks such as hanging out washing and putting things into the press; both activities cause pain. He also finds sitting on the couch or lying in bed problematic, depending on which part of the body he is lying on. He said that if he ends up sleeping on his bad shoulder, it is very sore the next morning.

8. The plaintiff's ongoing injuries also impact his work. He returned to work after 5 months and has done his best to just get on with it. His colleagues look after him and do the

heavy lifting tasks that he now has to avoid. With the help of his work mates, he can focus on the paperwork side of things. As to his hobbies, the main impact has been to his cycling which was something he really enjoyed prior to the accident and did a lot of (in that regard I note that the agreed specials include the cost of replacing a bicycle worth approx.. €1500). The plaintiff described how prior to the accident he frequently went cycling around Dublin and particularly around the seafront in Clontarf. He has returned to cycling since the accident but nowhere near the same frequency or duration. When he does get out, he has to take painkillers afterwards because of the pain in his shoulder. All told, he is really disappointed about the impact the accident and his ongoing injuries have had on his life and he is quite down about the fact that he now has to live with a *"gammy shoulder"*, as he puts it, for the rest of his days.

9. In cross examination, the plaintiff confirmed that the 5 sessions of physio he got in Beaumont was the extent of the physio that he received. The physiotherapist also gave him exercises to do at home, which he always followed. When asked if he might be mistaken when he said that he had the cast on his wrist for 5 months, in circumstances where he had told a doctor that the cast was on for 6 weeks, he accepted that was incorrect. He was unable to say precisely how long he wore the sling for his shoulder, but he believed it was longer than the cast. It was put to him that his claim for special damages indicated that his need for medication was limited to the weeks and months after the accident, and he disagreed. He said, and I accept as a fact, that he still has to take painkillers from time to time. (This is supported by what he told his consultant, which I will come to later). He said he did not keep receipts for all painkillers and acknowledged they were not in the agreed special damages. He confirmed that he had not been attending his GP with any frequency following the GP's assessment at 5 months. He said he had been doing physio exercises himself at home, and from time to time took Solpadeine or Paracetamol. It was put to him that he hadn't required

active medical treatment from a doctor or therapist in respect of his injuries since late 2019. The plaintiff denied that he had returned to cycling in February 2020, and said the return to cycling was around the end of 2020. He acknowledged that he was now back cycling on occasion, but he doesn't do this regularly because it causes him pain in his shoulder and his wrist.

10. As to the soft tissue injuries to his right knee and ankle, he confirmed that the only specific treatment was that his GP ordered an MRI which *"showed ligament injury and a ganglion cyst"*. When it was put to him that the right ankle being twice the size of his left was not something noticed by the orthopaedic surgeon, Mr Quinn at 14 months post accident, or by Mr Mullett in his later report, the plaintiff said the ankle was not causing him pain but maintained that it was larger than the left ankle. It was put to him that any issue with his knee and ankle was very minor and short lived; he agreed.

11. Asked about his wrist complaint, the plaintiff said that some days it is fine but other days it causes him pain. He stated, and I find as a fact, that as of today four years later, his wrist still hurts him every now and then; it depends on what he is doing. He told Mr Mullett (at 3 years and 4 months post accident) that he had occasional pain in the wrist which affected him after prolonged activity or cold weather. He also confirmed that he told Mr Mullett he had discomfort in the shoulder, and was particularly affected by overhead activity or cold weather.

12. The plaintiff was asked why, in view of the progress of his injuries, he remained unable to get back to the same level and duration of cycling. He said that cycling in the cold tends to cause him difficulties and that leaning over his bike hurts his shoulder. It was put to him that he hasn't really tested himself on the bike, but he did not accept this. He confirmed that he has gone back to doing some work in the gym and that he has tried to build up some muscle in his shoulder with some light exercise. Finally, it was put to him that, overall, he has

had a very good outcome from his injuries and that the accident had not intruded too much on his life circumstances. The plaintiff disagreed, saying *"Well, I think it has"*.

Medical reports

13. As I have mentioned, the plaintiff was the only witness. Medical evidence was provided by way of agreed reports which I will summarise presently. The plaintiff provided reports from three doctors: Dr Kate MacSweeney, General Practitioner (GP), dated 12 February 2020, Mr Mark Quinn, Consultant Orthopaedic Surgeon (PIAB report), dated 22 October 2020 and Mr Hannan Mullett, Consultant Orthopaedic Surgeon, dated 24 February 2023. The defendant provided one report from Mr James Colville, Consultant Orthopaedic Surgeon, dated 29 November 2022. Mr Colville references the possibility of him providing an addendum report but only one report was provided.

Report of Dr Kate MacSweeney, GP, dated 12 February 2020

14. Dr MacSweeney states that the plaintiff was diagnosed with a comminuted fracture of his left distal radius which extended into his wrist joint. He was placed in a splint. He was also diagnosed with a fracture of the base of his right acromion process. He was placed in a sling for this. He also had pain in his right knee and pain in his anterior chest wall, but x-rays were normal. The plaintiff was admitted to the hospital overnight. Soon after discharge the plaintiff noticed his right ankle was bigger than his left. He has no pain of his ankle. He attended Dr Sarah Phillips in her practice on 26 August 2020. Dr Philipps ordered an MRI scan of the right ankle which showed ligament injury and a ganglion cyst.

15. Dr MacSweeney noted that the plaintiff had approximately five sessions of physiotherapy in Beaumont Hospital and approximately four visits with Mr Hannan Mullett, Consultant Orthopaedic Surgeon. The plaintiff was absent from work from 16 August 2019 to

14 January 2020 and she confirms that the absence was ongoing and due to the accident and further that the absence from work was reasonable in her view. She notes that the plaintiff took Solpadeine on an "as needed" basis for five to six weeks.

16. At the time of her examination (at five months post-accident) the plaintiff had been unable to cycle at all for four months and was currently cycling for short distances only. He was unable to walk his dogs for several months but felt able for this in the previous few weeks. In the first few weeks post-accident his wife had to shower and wash him, he couldn't dress himself, and was unable to cook or do any domestic chores.

17. As to his complaints at five months post-accident, the plaintiff had right shoulder pain approximately one to two times per day. He described it as a sharp pain. He did not take analgesia for this. He found that his right shoulder clicks. He was awaiting results of a CT scan of his shoulder and an expert opinion. He could not wash his back in the shower. He had left wrist pain approximately once every day and still had occasional right knee pain, especially when kneeling down. His chest discomfort had fully resolved.

18. Dr MacSweeney states that on examination the plaintiff had a full range of motion of his right shoulder, with pain on full abduction and adduction. A "click" noise was audible on abduction. He had a normal range of motion of his left wrist with no pain. His right knee examination was normal. There was no tenderness of the joint on palpation and the range of motion was normal.

Report of Mark Quinn, Consultant Orthopaedic Surgeon, dated 22 October 2020

19. Mr Quinn saw the plaintiff on 22 October 2020, at one year and two months post-accident. He says that the plaintiff suffered a comminuted left distal radius fracture. He also suffered a fracture of the right acromion of his right scapula and he suffered a right ankle soft tissue injury. Mr Quinn notes the plaintiff has had multiple x-rays of his left distal radius. He

was treated in a cast for six weeks and then underwent physiotherapy. He had x-rays and CT scans of his right shoulder to assess and manage the acromion fracture of his right scapula. He was treated in a sling for this and has undergone physiotherapy. The plaintiff continued to complain of right ankle discomfort and he was sent for an MRI in Santry Sports Clinic. At the time of the consultation, the plaintiff did not have the MRI report with him but he relayed that it was reported as a ligament injury that could be treated with analgesia and physiotherapy. Mr Quinn notes the plaintiff had at least ten sessions of physiotherapy.

20. In the box dealing with x-rays and MRI results on p.3 of the report, Mr Quinn details:

> "*Multiple x-rays of his left distal radius showing a comminuted left distal radius fracture.*
>
> *Both x-rays and CT scan of his right shoulder to assess and manage his acromium fracture of his right scapula.*
>
> *MRI right ankle reported as a 'ligament injury'".*

I mention this detail because it is relevant to a submission made by counsel for the defendant which I will address later on in this judgment.

21. Mr Quinn notes that the plaintiff felt (at fourteen months) that his left wrist and right ankle had very much improved. His right shoulder still caused intermittent pain. He had a good range of movement of his shoulder but it could still wake him from sleep. He avoids heavy lifting/extremely physical tasks in work. He used to go to the gym very regularly but has not returned to that since. Due to the discomfort in his shoulder he is back cycling but only at shorter distances now.

22. Mr Quinn reports the following clinical findings on examination of the plaintiff:

> *"On examination his wrist has a good range of movement with dorsi flexion to 60° and palmer flexion to 80°. His wrist is non-tender. There was no crepitus on movement of the joint and his grip strength is equal to the other side (not measured*

formally). With regards to his shoulder, his right shoulder abducts to 110° versus 135° on the left side. His external rotation in both shoulders to 30°. Internal rotation is limited to L3 on the right side versus T8 on the left side. His rotator cuff is intact. He has negative impingement signs and negative cross-body apprehension tests. His ankle is non-tender and he has an excellent range of movement and he is fully weightbearing".

23. In his prognosis section Mr Quinn states that:

"[The plaintiff's] right ankle and left wrist have greatly improved. His shoulder still gives him some intermittent pain and he is limited with regards to heavy lifting and work and has not returned to the gym which he used to do very frequently. His most recent scan show that his acromium has not united with the rest of the scapula and is likely this won't unite at this stage or he will generate a fibrous union".

24. Mr Quinn felt that, as with any intra-articular fracture to the wrist, there is always a risk of osteoarthritic degeneration later on. He may also continue to suffer from discomfort with his right shoulder as his acromion will either stay un-united or go through a fibrous union but that level of displacement is unlikely to heal. He does not expect a full recovery, but feels Mr Massey will continue to improve. He may have some intermittent right shoulder pain and there may be residual symptoms long term.

<u>Report of Mr Hannan Mullett, Consultant Orthopaedic Surgeon, dated 24 February 2023</u>

25. Mr Mullett saw the plaintiff on 02 February 2023, at three years and four months post-accident. By that stage, the plaintiff had made a good recovery from his knee and ankle injuries and had no symptoms relating to these. In relation to his left wrist, he had occasional pain and discomfort with prolonged activity and cold weather intolerance. His main issue

relates to his right shoulder. He had ongoing discomfort in relation to his acromial fracture. He has discomfort with overhead activities. The plaintiff reported that he regularly takes analgesia.

26. On examination, Mr Mullett noted that there was an obvious step deformity at the level of the distal acromion. The full range of motion of the shoulder was within normal range, the rotator cuff strength was good. In relation to his wrist, there was minimal restriction of the range of motion with good pronation. Mr Mullett reviewed the plaintiff's x-rays from Beaumont Hospital from the time of the injuries and the x-ray of the left distal radius. He states that this is an intra-articular fracture that is undisplaced. Subsequent imaging shows the fracture in the wrist has gone on to unite. However, in relation to the right shoulder, there is a fracture of the acromion. Subsequent x-rays and CT scans performed on 8th January 2020 show that there was a non-union of the acromion.

27. In the prognosis section, Mr Mullett states that the plaintiff sustained a number of injuries in this road traffic accident. The salient orthopaedic injury was of an undisplaced intra-articular fracture of the left wrist. Overall, he has made a good recovery from this. He has mild limitation of range of motion. There is a small risk of developing degenerative changes. In addition, the plaintiff suffered a fracture of the acromion. This is an unusual injury but has a high rate of non-union as in this case. The plaintiff has ongoing symptoms in relation to this injury. The patient may benefit from surgical intervention, *i.e.,* open reduction internal fixation and bone grafting. This however is a significant undertaking and, in the surgeon's experience, is quite unreliable in securing fixation in relation to the acromion. Mr Mullett has not recommended surgery at this stage but it would be an option into the future. He feels that if the plaintiff underwent this surgery, he would be in a sling for a four-week period and out of work for several months. Given the main shoulder joint, *i.e.,* glenohumeral, is not involved, there is no significant risk of the patient developing shoulder arthritis. In the

absence of further treatment, the non-union will be a permanent feature with the expected symptoms that the plaintiff currently describes.

Report of Mr James Colville, Consultant Orthopaedic Surgeon, dated 29 November 2022

28. Mr Colville saw the plaintiff for the defendant at three years and three months post-accident. He refers to the plaintiff's injuries to his right shoulder, left wrist, right knee and right ankle. He says that x-rays of the left wrist are reported as showing a comminuted fracture of the distal radius involving the wrist joint. X-rays of the right shoulder showed a fracture at the base of the right acromion. As to complaints on 29 November 2022, the plaintiff stated that his biggest problem was the right shoulder. He has pain there almost every day. Holding the steering wheel when he is driving for any length of time bothers his right shoulder. The range of movement was quite restricted but the plaintiff confirmed that it was better than it was. The plaintiff stated that he no longer rides a bicycle. He tends to use his right hand more than his left and overuse of it bothers his right shoulder. He has not had any treatment for his shoulder. The plaintiff stated that his ankle was swollen for a while, but it was now largely settled. Walking long distances causes it to be sore but it is never sore enough to need medication.

29. Mr Colville noted that examination of the right shoulder compared to the left revealed a loss of active forward flexion (hand above the head) of 20°. Internal rotation (hand behind the back) was reduced by the distance of three lumbar vertebrae. Overall strength to the right shoulder was reduced by one grade (⅘). There were no clinical signs of arthritis and no signs of instability. Examination of the left wrist revealed a range of movement which was restricted at the extreme of the range both in dorsi flexion and palmar flexion. There were no

clinical signs of arthritis. Examination of the remainder of the left wrist and hand was normal. Examination of the right ankle revealed no residual swelling and a full range of movement.

30. In his prognosis section, Mr Colville states that as far as the plaintiff's wrist is concerned, although the fracture is reported as involving the wrist joint, there are no clinical signs of arthritis and there is nothing to suggest in the short to medium term that he will have any problems there. As far as the shoulder is concerned, the plaintiff has post traumatic stiffness but more information with regard to the state of the healing of the reported fracture is required. He indicated that he could seek a consultation with Mr Mullett and provide an addendum report. However, no additional report from Mr Colville has been furnished by the defendant. Mr Colville states that as far as the plaintiff's ankle is concerned, he has more or less made a full recovery with no real residual disability. The ganglion reported following scanning was an incidental finding and unrelated to the accident. In the consultant's view overall, the length of time the plaintiff was out of work was reasonable as are most of his current symptoms.

Book of Quantum

31. This is a pre-Guidelines case. The parties are agreed that the Book of Quantum valuations apply. Counsel for both sides provided the court with helpful oral submissions on valuation.

Analysis

32. Page 10 of the Book of Quantum provides the following guidance as to how to assess multiple injuries:

"Identify the part of the body that suffered the most significant injury. Generally, severity is categorised into the following broad ranges to reflect the degree of disruption to lifestyle, pain and permanency of the condition:

- *Minor*
- *Moderate*
- *Moderately severe*
- *Severe and permanent*

The majority of cases fall within the range but it is neither a minimum or a maximum for individual cases. If, in addition to the most significant injury, there are other injuries, it is not appropriate to add up values to determine the amount of compensation. Where additional injuries arise, there is likely to be an adjustment within the value range".

33. Section 22 of the Civil Liability and Courts Act 2004 requires the judge hearing the case to have regard to the Book of Quantum. In *Zaganczyk v. John Pettit Wexford Unlimited Company and C & M Delaney Limited* [2023] IECA 223, Noonan J. in the Court of Appeal considered the correct approach to the assessment of damages in multiple injury cases. As part of his review, he considered, with approval, the judgments of Coffey J. *in Lipinski (a Minor) v. Whelan* [2022] IEHC 452, and Murphy J. in *McHugh . Ferol* [2023] IEHC 132. He also referenced his own earlier judgment in *Meehan v. Shawcove Limited* [2022] IECA 208 which, unlike *Zaganczyk,* was a pre-Guidelines case.

34. In *Meehan*, Noonan J. emphasised that whatever individual categories of injury a plaintiff may have suffered, a trial judge should strive to take a *"holistic view of the plaintiff and endeavour to place the plaintiff's particular constellation of injuries and their cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum [cap] and awards made to other plaintiffs".*

35. In the earlier case of *Shannon v. O'Sullivan* [2016] IECA 93, Irvine J. in the Court of Appeal emphasised that a court should concern itself not so much with the diagnoses or labels attached to a plaintiff's injuries, but rather with the extent of the pain and suffering those conditions will generate and the likely effects which the injuries will have on the plaintiff's future enjoyment of life. She stated that it has long been accepted that damages must be fair to the plaintiff and the defendant; proportionate to social conditions, bearing in mind the common good; and proportionate within the scheme of awards made for other personal injuries.

36. As to the assessment of damages for multiple injuries in a post-Guidelines context, Noonan J. in *Zaganczyk,* considered the methodology of Murphy J. in *McHugh* where she assigned "full value" for the plaintiff's dominant injury according to the Guidelines bracket that it fell into, and then added a discounted "uplift" to reflect all of the other injuries. Murphy J. held that a fair way of assessing what the uplift should be in any given case is to categorise each of the additional injuries according to the bracket that it would fall into, were that the main injury, and then discount the award to allow for the temporal overlap of the injuries. Noonan J. noted at para. 25 of the judgment that in England and Wales *all* of the injuries in a multiple injuries case are discounted so as to prevent double counting and overlap, whereas in Ireland the plaintiff will obtain "full value" for the dominant injury with the discount to be applied, if it is to be applied, to the lesser injuries *only.*

37. In the same case, Noonan J. emphasised that whatever mathematical approach is to be adopted, it is important not to lose sight of the global impact of all the injuries on the particular plaintiff concerned:

> "*The plaintiff is entitled to be compensated for all the suffering they have endured, be it from one or ten discrete injuries suffered at the same time".*

38. Barton J. made much the same point in *Healy v. O'Brien* [2018] IEHC 602 where he observed that in a case where the plaintiff suffers injuries to different parts of the body, the unfortunate victim is generally aware that different parts of the body have been injured and experiences separate and distinct symptoms, the intensity and duration of which may be quite different. When assessing damages in such a case:

> *"account has to be taken of all the injuries sustained and the contribution each has had on the victim as a whole person; to do otherwise runs the risk of under compensating the plaintiff".*

39. Bearing these principles in mind, I will now consider valuations for shoulder injuries in the Book of Quantum. Counsel referenced the valuations provided for a fracture of the humerus on p. 39 of the Book. Counsel for the plaintiff contended that the plaintiff's shoulder injury fell into the *"severe and permanent conditions"* category attracting a damages range of €50,100 to €83,900. Counsel for the defendant disagreed and submitted that the injury fell in the "*minor"* category albeit at the top end of that band. The defendant suggested an assigned value of €30,000-€35,000 in respect of the shoulder injury.

40. In my view, selection of the appropriate band for this injury is a slightly tricky exercise, made more difficult by the fact that no bands or ranges are provided for a fracture to the acromion process and the court has not had the benefit of hearing oral evidence from any doctor. The Court is basically left with whatever is stated in the medical reports, and the plaintiff's own evidence. However, adopting the parties' suggestion that the "next best" equivalent provided by the Book of Quantum is the valuation for a fracture to the humerus, it seems to me that the plaintiff's injury falls at the upper end of the "*moderate"* category for that injury. The moderate category attracts a range of damages between €34,700 and €64,500.

41. I reject the submission that the correct classification for the plaintiff's shoulder injury is the "*minor"* category (attracting damages of up to €36,800) because the notes in the Book

of Quantum say this relates to a "*simple non-displaced fracture to the humerus with no joint involvement which has substantially recovered"*. Based on the agreed medical evidence, I find as a fact that the plaintiff's shoulder injury has not substantially recovered.

42. Both orthopaedic surgeons for the plaintiff confirm that the plaintiff will not have a full recovery with regards to his right shoulder, that he is likely to have intermittent pain on an ongoing basis, that the fracture is likely to remain un-united and that there will be residual symptoms long term. Mr Mullett saw the plaintiff at three years and four months post-accident and he continued at that stage to have ongoing symptoms in the shoulder. I accept the plaintiff's oral evidence that he has ongoing symptoms in the shoulder, that his sleep is impacted, and that the injury restricts him in his working and recreational life. Moreover, if he rolls on to his shoulder during sleep, he wakes up in pain. I regard this as a significant factor. If a person's sleep is regularly impacted, this has a knock-on effect in terms of mood and overall welfare. I accept the plaintiff's evidence that he still does his exercises as given to him by the physio, but his shoulder comes against him when carrying out the normal tasks of daily living such as household chores, driving, working, and when engaging in his chosen pastime of cycling.

43. I accept the plaintiff's evidence that his shoulder hurts in cold weather and he continues to take pain killers when required. I note that he told Mr Mullett in his examination in February 2023 (three years and four months post-accident) that he continues to take analgesia. The fracture in the shoulder has failed to unite and will continue to cause pain and problems indefinitely. Both consultants feel the level of displacement is unlikely to heal. Mr Mullett says surgery is warranted but he is not recommending it.

44. The notes in the Book of Quantum for the "*moderate"* category for a fractured humerus state that *"fractures to the humerus that may have required surgery with either a full recovery expected or minimal low level ongoing pain but not lack of movement to the*

arm". The notes for the "*severe and permanent conditions*" category say the following: *"complex and multiple fractures to the humerus which required extensive surgery and extended healing but may result in an incomplete union and the possibility of having or has achieved arthritic changes and degeneration that may result in permanent loss of function to the arm".*

45. This latter category carries a band valuation of €50,100 to €83,900. Counsel for the plaintiff contended this category is the applicable band for the plaintiff's shoulder injury.

46. In my view, while the element of permanency has been established, I am not persuaded that all elements of the injury profile place the case in the most serious category. We are not dealing here with multiple fractures, nor with established arthritis or with permanent loss of function to the arm. However, as against that, the plaintiff's shoulder has not recovered and may never recover. It continues to cause him pain and discomfort. As the plaintiff himself said in evidence, he is *"raging"* that he has been left with a *"gammy shoulder"* on a permanent basis.

47. The damages bracket for the two more serious categories overlap to a considerable degree. The top end of the *"moderate"* bracket is nearly €15,000 *more* than the bottom end of the "*severe and permanent conditions"* category. In my view, the plaintiff's shoulder injury straddles these 2 bands. All told, I think the most appropriate category is the "*moderate"* category but at very much the upper end of that band.

48. In contending for the "*minor"* category, counsel for the defendant points to the fact that there has been no surgery to date. However, that overlooks the reality that surgery is necessary and the only question is whether it is advisable. Mr Mullett, the plaintiff's treating Orthopaedic Surgeon confirms that in the absence of an operation, the non-union of the plaintiff's acromion process will be a permanent feature with the expected symptoms that the plaintiff describes. He also confirms that the plaintiff continues to have ongoing symptoms.

As matters stand, Mr Mullett is not recommending surgery, not because surgery is not warranted, but rather because he feels such surgery is a significant undertaking and, in his experience, is quite unreliable in securing fixation in relation to the acromion. Were the plaintiff to opt for surgery, this would involve open reduction, internal fixation and bone grafting and he would be in a sling for a four-week period and out of work for several months. Understandably, the plaintiff is not enthusiastic about taking on the risk of such an operation, and the life disruption that would entail, without any guarantee that the procedure would work.

49. When the defendant's doctor, Mr Colville saw the plaintiff at 3 years and 3 months post-accident, he noted considerable restriction in the range of movement of the shoulder: a loss of active forward flexion (hand above the head) of 20 degrees; and internal rotation (hand behind the back) was reduced by the distance of 3 lumbar vertebrae. Overall strength of the shoulder was reduced by one grade (4/5).

50. Having regard to all of the above and based on my view that the plaintiff's shoulder injury lies at the top end of the moderate range, I assign a value of €60,000 in respect of this element of the plaintiff's injuries.

Wrist injury

51. Fractures to the wrist are covered at p.44 of the Book of Quantum and they are broken into four categories as follows:

> "*Minor (€19,300 to €36,800)*
>
> *Simple nondisplaced fracture to any of the bones of the wrist which has substantially recovered.*
>
> *Moderate (€35,000 to €45,000)*
>
> *Simple or minimally displaced fractures with a full recovery expected with treatment.*

Moderately severe (€54,200 to €70,100)

Multiple fractures that have resolved but with ongoing pain and stiffness which impacts on movement of the wrist.

Severe and permanent conditions (€68,400 to €78,000)

Complex and multiple fractures to the bones within the wrist which required extensive surgery and extended healing but may result in an incomplete union and the possibility of having or has achieved arthritic changes and degeneration of the wrist and may affect the ability to use the hand".

52. Counsel for the plaintiff says the plaintiff's injury falls between the "*moderate*" and the "*moderately severe"* bands, whereas counsel for the defendant says the injury falls within the "*minor*" category. Accordingly, counsel for the plaintiff suggests a valuation of between €45,000 and €54,200 whereas counsel for the defendant urges a valuation within the mid to upper range of the lowest bracket. The defence submission was based on the contention that the "minor" category does not require full recovery and secondly, the contention that the plaintiff has not proved the fracture to the wrist was in fact comminuted. Counsel points to the fact that the report of Mr Mullett makes no mention of the wrist fracture being comminuted, but simply states *"this is an intra-articular fracture that is undisplaced".* Counsel submits that it is not clear that either Dr MacSweeney, the GP or Mr Quinn, the Orthopaedic Surgeon actually reviewed x-rays or scans and positively found there to be a comminuted fracture. Therefore, according to defence counsel, there is not enough in the medical reports to enable the court safely proceed on the basis that the injury to the wrist involved a comminuted fracture.

53. Having reviewed the medical reports very carefully, I do not feel defence counsel's point is sustainable. In the first instance, the parties have agreed that the medical reports can be admitted into evidence without formal proof and constitute evidence as to the proof of

their contents. In the report of the plaintiff's GP, and also in the report of the Orthopaedic Surgeon, Mr Quinn there is express reference to the plaintiff having suffered a comminuted left distal radius fracture. Moreover, in the defendant's own report provided by Mr Colville, it is stated that x-rays of the plaintiff's left wrist *"are reported as showing a comminuted fracture of the distal radius involving the wrist joint".* There is no indication in Mr Colville's report that the diagnosis of a comminuted fracture should be second guessed, reassessed or questioned in any way.

54. Secondly, at p.3 of the report of Mr Quinn, with regard to x-rays and MRI scans, Mr Quinn states the following: *"Multiple x-rays of his left distal radius showing a comminuted left distal radius fracture".* In my view, a fair reading of Mr Quinn's report and in particular the x-ray/MRI results section of the report, warrants the court concluding that x-rays of the plaintiff's wrist confirmed that the fracture was comminuted.

55. Insofar as Mr Mullett's report does not mention the adjective "comminuted" but does mention that the fracture was "undisplaced", it seems to me that those two adjectives are not internally inconsistent. The defendant has not called any evidence to say that an undisplaced wrist fracture cannot be comminuted, nor has the defendant chosen to cross-examine any of the plaintiff's doctors.

56. The Supreme Court in *RAS Medical Ltd v. Royal College of Surgeons* [2019] 1 IR 63 held that the onus was on a party who contended that sworn affidavit evidence should not be accepted, in respect of any point of fact material to the court's determination, to ask the court for leave to cross examine, so that evidence concerning the credibility or reliability of the evidence concerned could be put to the witness and the court could reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned. In circumstances where the defendant has agreed without *caveat* to admit the medical reports, and has not sought to cross examine the authors, I take the view that the principle identified by the Supreme Court

applies by analogy here. For all these reasons, I am satisfied to conclude that the plaintiff has proved that the fracture to the plaintiff's wrist was indeed comminuted.

57. As to valuation of the wrist injury, in my view the plaintiff's injury falls at the top end of the "minor" category. Mr Mullett examined the plaintiff at three years and four months post-accident and at that stage the plaintiff had occasional pain and discomfort with prolonged activity and cold weather intolerance. Mr Mullett notes this is an intra-articular fracture that is undisplaced. Subsequent imaging confirms the fracture has gone on to unite. Being an undisplaced intra-articular fracture, there is a small risk of developing degenerative changes. All of these findings are supported by the earlier report from Mr Quinn.

58. In relation to the valuation for the wrist injury, counsel for the defendant provided the court with a helpful comparator in the form of the decision of McGovern J. in the Court of Appeal in *Rowley v. Budget Travel Limited (in liquidation)* [2019] IECA 165. In that case, the plaintiff was a 24-year-old woman who had sustained an undisplaced fracture of the distal right radius at the very tip of the ulna styloid. Her wrist was put in a cast for six weeks. She then had some physiotherapy. She was not admitted to hospital as an inpatient on her return nor did she require any surgery for her injury. In the consultant's second report it was felt the plaintiff's wrist fracture had healed satisfactorily but she had some ongoing symptoms and loss of function particularly with grip strength. Kearns P. in the High Court awarded the plaintiff a total of €25,000 in respect of the wrist injury (€20,000 for pain and suffering to date and €5,000 for pain and suffering into the future). The Court of Appeal set this aside and substituted a higher award of €35,000 for general damages. The court noted that that figure approximated to the higher end of the scale in the Book of Quantum for "minor" wrist injury involving a non-displaced fracture and the lower end of the scale for a "moderate" injury to the wrist.

59. While every case should be assessed on its own individual facts, I note that the Court of Appeal regarded the President's award of €20,000 damages for pain and suffering to date as being "low" albeit not sufficiently disproportionately low to warrant being set aside on appeal. That suggests to me that, had the appeal court been sitting at first instance, the award for general damages would have been higher than €35,000. As against that, it might also be said that the present plaintiff's symptoms with respect to the injury to the wrist are of a lower intensity or duration than the plaintiff in *Rowley v. Budget Travel*.

60. In any event, having regard to the plaintiff's evidence and the totality of the medical reports, it seems to me that with respect to the plaintiff's wrist injury I should assign, on a stand-alone basis, a value of €35,000. This was an intra-articular fracture involving the radial styloid which, according to Mr Mullett at 3 years and 4 months post accident, was still causing the plaintiff some pain and discomfort. The wrist fracture, as I have stated earlier, was more serious by virtue of being comminuted. Dr MacSweeney described it, correctly in my view, as a *"significant"* injury. The consultants agree that it carries a risk of arthritis, albeit a low risk. I accept the plaintiff's evidence that, now over four years on, the wrist continues to cause him symptoms, and interferes with his cycling. When Mr Colville saw the plaintiff at 3 years and 3 months post-accident, examination of the left wrist revealed a range of movement which was restricted at the extreme end of the range both in dorsi flexion (bending the hand upwards) and palmar flexion (bending it downwards).

Soft tissue injuries

61. Moving then to the soft tissue injuries to the plaintiff's right ankle, right knee and chest wall, it seems to me these injuries are of less significance in the overall injury profile. The plaintiff's answers under cross examination indicate that these injuries were largely resolved within a number of months and did not interfere with the plaintiff's enjoyment of

life unduly. The report from the GP indicates that an MRI scan of the right ankle "*showed ligament injury and a ganglion cyst"*. The finding of a cyst appears to be incidental according to Mr Colville and I am not satisfied I should take it into account. However, the injury to the ankle is established in the evidence in my view. Mr Quinn, who saw the plaintiff at 14 months post-accident, noted that the ankle at that point had "greatly improved". It was non-tender and there was an excellent range of movement. The plaintiff in his evidence said it did not cause him pain but did say that it remained bigger than his left ankle. In my view, the ankle injury falls into the low end of the "*minor"* category as set out on p. 62 of the Book of Quantum. That bracket has a damages range of up to €23,100. Taking everything into account, I assign the plaintiff's ankle injury a value of €5,000 on a stand-alone basis.

62. In my view, the knee and chest wall injuries can be taken together. Dr MacSweeney's report notes that the plaintiff had pain in his right knee and pain in his anterior chest wall, but x-rays were normal. On examination at 5 months, the plaintiff reported getting occasional right knee pain, especially when kneeling down. His chest discomfort had fully resolved by that point. I think a fair value for both of these injuries, on a stand-alone basis, is €5,000.

63. I also take into account, in an overall way without assigning a specific value, that the accident itself was undoubtedly quite shocking and traumatic for the plaintiff and would most certainly have impacted his cycling and "road" confidence and caused him a considerable amount of distress at the time and in the period that followed. In my view, this factor can sometimes be overlooked.

64. Valued individually, the plaintiff's additional injuries would amount to €45,000. This is made up of €35,000 for the wrist injury, €5,000 for the ankle injury and €5,000 for the injuries to the plaintiff's knee and chest wall. Taking into account the overlap of injuries and the "roll-up" factor, I propose to discount this figure by 25%. Noonan J. for the Court of Appeal has made clear that only the additional injuries should be discounted, not all the

injuries. Full value is assigned for the dominant injury. Accordingly, there will be a discount of €11,250 from the additional injuries aggregate of €45,000 (being 25% of 45,000). That means the net "uplift" for the additional injuries will be €33,750. Adding that figure to the €60,000 for the shoulder (dominant) injury, that yields a total general damages figure of €93,750 euro.

65. I note that in *McHugh,* Murphy J. applied a discount of 50% to the assigned value for the additional injuries. However, it seems to me that she was not being prescriptive in that regard and was not intending to lay down a rule of thumb, still less a hard and fast rule, that in all cases a 50% reduction would be appropriate. The judgments of the Court of Appeal emphasise that each case falls to be decided in accordance with its own individual facts. In the present case, I think it is relevant that the plaintiff's wrist injury was of a higher order of significance than the other lesser injuries, and involved a higher and longer level of disruption to daily life than the lesser soft tissue injuries which cleared up reasonably quickly. Moreover, I think the level of overlap between the plaintiff's various injuries was quite limited and this too tends against applying a substantial discount. All things considered, if all the non-dominant injuries are to be grouped together for the purposes of arriving at the figure to be discounted, I feel a reduction of 25% on the evidence here is fair and just.

66. It should be noted, as acknowledged by counsel for the defendant in her submissions, that firstly, Murphy J.'s decision in *McHugh* was a Guidelines case, as was Noonan J.'s decision in *Zaganczyk*. Secondly, counsel quite properly acknowledged that the Court of Appeal was not necessarily to be taken as mandating a 50% discount approach, or indeed any strict mathematical approach, to the assessment of damages for the lesser injuries. In my view, that acknowledgement was correctly and appropriately made. Noonan J. was at pains to emphasise the point that a plaintiff is entitled to be compensated for all his injuries, be it from

one or ten discrete injuries. One looks at the global injury profile and one shouldn't airbrush out or ignore the other discrete injuries.

67. Moreover, I note that Noonan J. expressly approved of the decision of Coffey J. in another multiple injuries case, *Lipinski (a Minor) v. Whelan* [2022] IEHC 452. In *Lipinski,* Coffey J. applied an uplift for the additional injuries but did so without specifying a specific discount or percentage. This approach was found to be perfectly acceptable.

68. Applying the legal principles that I have outlined above, and based on the plaintiff's evidence which I accept, and also on the basis of the agreed medical evidence, I feel a 25% discount for the additional injuries is warranted in this case and that an overall "uplift" in the terms indicated is appropriate.

69. That's not the end of the exercise, however, because as the Court of Appeal made clear in *Meehan*, it may be necessary to stand back from the compilation of individual figures in order to assess whether the global aggregate figure for pain and suffering and loss of amenity would be proportionate both to the maximum cap of €500,000 and to awards made to plaintiffs in other cases. Adopting that approach here, I take the view that an overall award of €93,750 for general damages to this plaintiff – for pain and suffering and loss of amenity in the past and pain and suffering and loss of amenity into the future - represents an outcome that is fair to both sides and proportionate in the sense indicated. I say this for a number of reasons.

70. The plaintiff suffered multiple injuries in this accident. His injuries were such that he was off work for 5 months. The injury to the plaintiff's wrist was quite significant in its own right. He continues to have occasional pain and discomfort particularly with prolonged activity and cold weather. The wrist fracture was an intra-articular comminuted fracture. The dominant injury was the fracture to the plaintiff's shoulder. The fracture has not healed or united. More than four years since the accident, it continues to cause him problems and

ongoing pain. It affects his ability to carry out working tasks. With the assistance of colleagues, he is able to avoid heavy lifting duties, and focus on the paperwork side of things. However, were his employment circumstances to change, this state of affairs could change. The shoulder injury also affects the plaintiff's sleep and it sometimes means he starts the day in pain, if he has slept on his injured right side.

71. I accept the plaintiff's evidence that prior to the accident he used to go to the gym regularly, but this is no longer the case. Moreover, he used to be a very keen cyclist and regularly cycled long distances as a hobby. He has returned to cycling but on a much reduced basis and no longer manages long distances. This to my mind represents a significant loss of amenity and impacts his wellbeing and enjoyment of life.

72. The option of an operation to fix the shoulder has been discussed, but such is the nature of the fracture that his consultant is not currently recommending this option. His treating consultant feels that the residual symptoms that the plaintiff describes will endure in the long term. This is not contradicted by either the PIAB specialist or the defendant's orthopaedic surgeon.

Conclusion

73. In all the circumstances, having carried out the necessary "stand-back" assessment as mandated by the Court of Appeal, I consider a general damages award of €93,750 to be reasonable and proportionate.

74. I will hear the parties on the question of costs and the final order. I note that special damages are agreed and can be added to the final award.

Signed:

Micheál O'Higgins

Appearances:

David McGrath SC and Micheál O'Scanaill SC with Conor Kearney BL for the plaintiff.

Elaine Morgan SC and Paul Henry O'Neill BL for the defendant.