

THE HIGH COURT

[2022] IEHC 680
[Record No. 2022/551P]

BETWEEN:-

PATRICK MCDONNELL

PLAINTIFF

AND

UPTON FOODS LTD

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered *extempore* on 6th December, 2022.

- 1.** This action arises out of an RTA which occurred on 30th November, 2019. The plaintiff had brought his car to a halt with the intention of turning right into a garage premises on the far side of the road. While he was stationary awaiting an opportunity to turn into the garage, his car was struck forcibly from the rear by a van driven by an employee of the defendant. The plaintiff was wearing a seatbelt at the time of the accident. Liability for causation of the accident is not in issue between the parties.
- 2.** The assessment of general damages in this case falls to be decided under the provisions of the Personal Injury Guidelines and in particular, the principles that are to be applied when valuing multiple injuries.
- 3.** In this case, it is accepted that the dominant injury suffered by the plaintiff was a tear to the rotator cuff in his right shoulder. Secondary to that, it is accepted that the plaintiff suffered an adjustment disorder and depression as a result of his ongoing symptoms and functional disablement.
- 4.** In assessing damages in this case, a number of medical reports were admitted in evidence as follows: the reports from Mr. Hanan Mullett dated 27th April, 2020 and 14th November, 2022; a report from Dr. Gordon Daly dated 18th July, 2022; the reports from Mr. J K Nasser dated 2nd December, 2020 and 27th August, 2021 and a report from the psychiatrist, Dr. Elizabeth Cryan dated 15th October, 2022. In addition, the court had the benefit of hearing evidence from Mr. Mullett, who carried out a repair operation to the plaintiff's right shoulder on 23rd March, 2020.
- 5.** It is not necessary to set out the content of each of the medical reports in this judgment. The court has had regard to all of the medical reports that were submitted in evidence. In essence, the situation in relation to the injuries that were suffered by the plaintiff can be stated in the following way: the plaintiff is 65 years of age. He is a married man with three grown-up sons.

He is employed as an engineer in a small company which manufactures heating elements. The plaintiff stated that the impact between vehicles was severe. His car was shunted partially into the forecourt of the garage. The repairs to the vehicle had cost €6,500.

- 6.** After the accident the plaintiff experienced severe pain in his right shoulder. The gardaí had been called to the scene of the accident and an ambulance had been called. The plaintiff was removed to our Lady of Lourdes Hospital in Drogheda. X-rays taken at the hospital revealed that he had not fractured any bones in his shoulder. He was discharged from hospital later that day. Some days later, the plaintiff attended with his GP complaining of severe pain and limitation of movement in the right shoulder. Painkillers were prescribed and subsequently the plaintiff's shoulder was immobilised in a sling. The plaintiff was unfit for work for an initial period of one month post - accident.
- 7.** When the plaintiff's shoulder symptoms did not improve, his GP referred him to Mr. Hanan Mullett, consultant orthopaedic surgeon, at the Sports Injury Clinic, Santry, Dublin. On examination at that time, it was revealed that the plaintiff had a globally restricted range of motion, with very poor function. An MRI scan had revealed a tear to the supraspinatus and infraspinatus tendons in the shoulder.
- 8.** On 23rd March, 2020, Mr. Mullett performed a biceps tenotomy and arthroscopic subacromial decompression. At the time of surgery, the tear to the affected structures was revealed as being 5 cm x 4 cm. Mr. Mullett stated that the findings at the time of surgery were that the plaintiff's injury had the appearance of an acute rotator cuff tear, rather than a tear that had been caused by degeneration. The plaintiff made an uneventful post-operative recovery. He was discharged from hospital on the following day. He was unfit for work for a period of three months after the operation.
- 9.** The plaintiff was reviewed by Mr. JK Nasser on behalf of the personal injuries assessment board, on 2nd December, 2020; at which time, the plaintiff complained of intermittent pain in the right shoulder, which was related to activity. He was restricted in the amount of overhead activity that he could do, and he had decreased internal rotation of the right shoulder. He was unable to lift anything heavy. He stated that he could not lie on his right side and had disturbed sleep due to pain. Examination revealed fairly significant limitation of movement, particularly in flexion and abduction. The plaintiff very candidly told Mr. Nasser that his symptoms had improved by about 40% since the accident. The doctor was of opinion that recovery was slow and that it would take another 8 to 12 months before an assessment could be made in relation to the healing of the rotator cuff repair.
- 10.** When reviewed by Mr. Nasser on 17th August, 2021, the plaintiff stated that his right shoulder had improved further; however, lifting was still a problem and the shoulder caused him pain at work. He stated that overall his right shoulder symptoms had improved by more than 80% since

the accident. Examination revealed that there had been improvement in his range of movement to an almost full range of movement in the shoulder joint. Mr. Nasser noted that the plaintiff's right shoulder symptoms had subjectively improved by approximately 80% since the time of the accident. Clinical examination on that date revealed a good functional range of motion of the right shoulder, with some terminal subachromial impingement at 170° of internal rotation and flexion. Future treatment in relation to the right shoulder remained conservative. He advised that the plaintiff should continue with the home exercise program that had been recommended by his physiotherapist.

- 11.** The plaintiff was reviewed by Mr. Mullett on 27th October, 2022, at which time he noted that the plaintiff had significantly improved. He continued to complain of discomfort when lying on his side. He was able to manage the demands of his work. He complained of some discomfort and lack of strength when doing overhead activities. Examination revealed healed surgical scars, together with weakness of the infraspinatus and supraspinatus.
- 12.** Mr. Mullett was of opinion that the plaintiff had sustained a significant rotator cuff tear. Overall, he had improved from his surgery, but had residual symptoms, as was to be expected with the size of the tear. He had administered a steroid injection to the shoulder to alleviate his ongoing symptoms of pain. Mr. Mullett stated that he expected the current symptoms to be permanent. In his evidence to the court, Mr. Mullett stated that he was happy that a reasonably good outcome had been obtained from the surgical repair operation, but that permanent ongoing symptoms would be a feature given the plaintiff's age and his presentation some 2.5 years post operation.
- 13.** The secondary injury that was suffered by the plaintiff was in the form of psychiatric sequelae. The plaintiff stated that this accident affected him greatly. He had suffered with polio, which he had contracted as a very young child. As a result, he had always walked with a limp. He stated that he had coped with that disablement quite well. He had developed considerable upperbody strength by swimming up to 40 lengths in a pool, 4/5 times a week. The plaintiff stated that the injury sustained in the RTA, which affected his upper body strength, had affected him greatly. He described it as being a feeling of being "vulnerable", in a way that he had not felt prior to the accident.
- 14.** The plaintiff stated that prior to the accident, while he had not been able to participate in active sporting activity, he had been part of the coaching staff on a football team that had originally been set up by his father known as Walshestown FC. The club had fallen into disuse, but had been reactivated by the plaintiff and others following the 1990 World Cup. The plaintiff stated that he had enjoyed a long and successful coaching career with the club. Due to the injuries sustained in the accident, and after the restrictions that had been imposed by the Covid pandemic had been lifted, the plaintiff had not felt able to return to an active coaching role. This

was due to the fact that he could not lift or carry items of kit and equipment as he had done prior to the accident. In addition, he had lost interest in many aspects of his life. For this reason, he restricted his activities in the club to a role on the committee.

- 15.** The plaintiff stated that prior to the accident, he had enjoyed going out for a pint with his brothers after football matches. They had often gone to see Dundalk FC playing and would then go for a pint afterwards. He had given up that practice since the accident, because he was not able to lift a pint glass in his affected hand. However, the plaintiff stated that in recent times he had returned to limited socialising with his brothers.
- 16.** The plaintiff was treated by his GP due to his low mood with sleeping tablets and antidepressant medication. He had had to stop the sleeping tablets, due to unpleasant side-effects. He found that the antidepressant medication had not been that helpful. Due to the persistence of the plaintiff's psychiatric sequelae, he was referred by his GP to Dr. Elizabeth Cryan, consultant psychiatrist. She provided a detailed report to the court from an assessment carried out via zoom on 14th October, 2022, some three years post - accident. She considered that the plaintiff had experienced a severe adjustment disorder to the accident and his injury, which had been characterised by depressive and anxious features. She felt that the plaintiff's adjustment disorder had reached the threshold for a diagnosis of depressive disorder of moderate severity. She noted that when she saw the plaintiff, there had been some improvement in his psychiatric symptoms. She stated that the plaintiff struck her as a resilient person, who had overcome previous adversity in his life. Given the improvement that he had made prior to seeing her, she was hopeful that the plaintiff would continue to improve. She advised that the plaintiff would benefit from 8/12 sessions of CBT, to assist with his further recovery.
- 17.** Having heard and seen the plaintiff recount both the effects of the injury on him physically and from a psychiatric perspective, and having regard to the plaintiff's pre-morbid medical history and the evidence given by Mr. Mullett, together with the medical evidence as contained in the medical reports that were submitted to the court, the court is satisfied that the plaintiff has given a fair and accurate account of his injuries and of how they have come against him in the ordinary aspects of his life.
- 18.** The plaintiff was very frank with Mr. Nasser when he stated that by December 2020, he had made a 40% improvement in his level of functioning and that by the time of the second review with that doctor in August 2021, he estimated that he had improved by 80% from his situation in the immediate aftermath of the accident. The court was also struck by the fact that the plaintiff had only remained out of work for one month post-accident and for three months post-operation. It is also noteworthy that the referrals that were made for the plaintiff to be seen by the consultant orthopaedic surgeon and by the psychiatrist, both came from his GP. This is

indicative of the fact that the plaintiff presented to his GP with significant symptoms, which the GP felt warranted onward referral.

- 19.** In valuing general damages in a case where there are multiple injuries, the appropriate approach which the court should adopt, has been set out at p. 6 of the guidelines, where it is stated as follows:

"The assessment of general damages in cases involving multiple injuries gives rise to special difficulty given that in these guidelines each injury is valued separately. The principle difficulty stems from the fact that there will usually be a temporal overlap in the injuries sustained such that if each injury was to be valued separately the claimant would be overcompensated to the point that the award would be unjust to the defendant and disproportionate when compared with other awards commonly made for other greater or lesser injuries. Each injury will, of course, cause additional pain and suffering which must be reflected in the award, but the question is how to ensure that the award will be just in the light of the overlap of the injuries.

In a case of multiple injuries, the appropriate approach for the trial judge is, where possible, to identify the injury and the bracket of damages within the Guidelines that best resembles the most significant of the claimant's injuries. The trial judge should then value that injury and thereafter uplift the value to ensure that the claimant is fairly and justly compensated for all the additional pain, discomfort and limitations arising from their lesser injury/injuries. It is of the utmost importance that the overall award of damages made in a case involving multiple injuries should be proportionate and just when considered in the light of the severity of other injuries which attract an equivalent award under the Guidelines."

- 20.** Those principles were applied by Coffey J. in *Lipinski (A Minor) v. Whelan* [2022] IEHC 452, where he stated as follows at paragraph 14:

"The Guidelines further set out a procedure which the trial judge must have regard to when considering the effect of multiple injuries on the level of damages to be awarded to a plaintiff who has suffered more than one appreciable injury. In cases involving multiple injuries such as this, the trial judge is required by the Guidelines 'where possible' to identify the injury and bracket of damages that best corresponds to the most significant of the plaintiff's injuries which he or she should then value and thereafter 'uplift' by an amount that ensures that the plaintiff is 'fairly and justly compensated' for all of the effects of the lesser injuries in order to arrive at an overall award that is 'proportionate and just'. In arriving at that figure, the trial judge is required to have regard to the severity of other injuries which attract an equivalent award under the guidelines."

- 21.** The relevant principles to be adopted in cases of multiple injuries, were further considered by the Court of Appeal in *Meehan v. Shawcove Ltd* [2022] IECA 208 at paragraphs 56 - 63.
- 22.** In addressing the court on the issue of damages, Mr. McGowan SC submitted that the dominant injury in this case was the injury to the plaintiff's shoulder. He submitted that the injury to the plaintiff's right rotator cuff came within the band set out at section D(b)(III) of the guidelines, which related to serious shoulder injuries and in that subparagraph dealt with a rotator cuff injury with persisting symptoms notwithstanding surgery. For injuries within that description the guidelines suggested an award damages of between €40,000 - €75,000. Counsel suggested that having regard to the level of the plaintiff's injury, the treatment that had been afforded to him for it, and the recovery that he had made therefrom, together with the permanent sequelae that he will suffer, the appropriate amount of damages under this heading would be €60,000. He submitted that in respect of the uplift that should be applied for the psychiatric sequelae as described by Dr. Cryan, he submitted that this came within the section of the guidelines under section B(c), which dealt with moderate PTSD, which provided that in these cases the injured person would have largely recovered and any continuing effects will not be grossly disabling. In those circumstances, the guidelines suggested damages between €10,000 - €35,000. Counsel suggested that there should be an uplift of €20,000 under this heading in this case.
- 23.** Mr. Mohan SC on behalf of the defendant accepted that the shoulder injury was the dominant injury; however, he suggested that given its severity, it probably could be accommodated within the borderline of paragraph D(b)/(c). He suggested that the figure of between €35,000 - €40,000 would be the appropriate level of damages for this aspect. In relation to the figure for an uplift, it was submitted that the psychiatric sequelae had only become apparent some considerable time after the accident, as they were first mentioned in the report from the GP in 2022. He submitted that they would come within the definition of "minor psychiatric damage" which would warrant an uplift of €5,000.
- 24.** In valuing the injuries, both physical and psychiatric, suffered by the plaintiff as a result of this accident, the court has not lost sight of the fact that this plaintiff has had a number of unrelated, yet significant, health issues. In particular, he had ongoing lower back, hip and knee pain, which was resolved by surgery carried out in 2021. In addition, the court notes that when reviewed by Mr. Nasser on the second occasion, the plaintiff made complaint of pain in his neck, for which he had been referred to a consultant, and of pain in his left shoulder. These appear to be new complaints, which had only become apparent subsequent to the date of his first assessment by Mr. Nasser. The court accepts that these injuries are not related to the accident. In addition, the court notes that in terms of the plaintiff's psychiatric condition, one of the aggravating features was the fact that he could not act as a pallbearer at his brother's funeral. Undoubtedly the death of his brother, with whom he was very close, was of significant distress to the plaintiff, but was unrelated to the injuries sustained in the accident.

- 25.** In valuing the injuries, the court must have regard to the dominant injury and then apply a reasonable uplift for the psychiatric aspect, while at the same time ensuring that the overall award is not disproportionate. The court is satisfied that the plaintiff has given his evidence in a fair and frank manner. He has not tried to exaggerate his symptoms at any stage. The court is satisfied that he has suffered considerable pain in his shoulder, which has been largely, though not completely, alleviated by the surgical repair operation carried out by Mr. Mullett in March 2020. The court accepts the evidence of the plaintiff that he continues to experience pain and discomfort and some limitation of function in his right shoulder. It would appear from the report and the evidence of Mr. Mullett, that these sequelae will be permanent.
- 26.** Given the plaintiff's age and the effects that the accident has had on the ordinary aspects of his life and in particular on his ability to pursue his pre-accident sporting activity of swimming, which has been reduced from swimming approximately 40 lengths 4/5 times per week, to hardly being able to swim one length without pain, the court is satisfied that he does have a significant continuing level of disablement. In the circumstances, the court would value the dominant injury for both past and future pain and suffering at €55,000. The court is satisfied that the plaintiff has suffered a significant psychiatric injury as a result of this accident. The court awards an uplift of €20,000 for that aspect of his injuries. This gives an overall award of general damages of €75,000.
- 27.** The court is satisfied that when looked at globally, this figure represents fair compensation for the plaintiff. The figure of €75,000 for general damages, is broken down into €50,000 for pain and suffering to date and €25,000 for pain and suffering into the future.
- 28.** To that must be added the agreed sum for special damages of €14,250; giving an overall award of €89,250. The plaintiff is entitled to judgment in that sum against the defendant.