

**THE HIGH COURT**

[Record No. 2022/4816P]

**BETWEEN**

**DEREK COUGHLAN**

**PLAINTIFF**

**AND**

**CGR CONSTRUCTION LIMITED**

**AND**

**NIALL O'SULLIVAN**

**DEFENDANTS**

**JUDGMENT of Ms Justice Carmel Stewart delivered on the 17th day of November**

**2023**

1. This is a personal injury case which came before the court for assessment of damages only. At issue is the amount this court should award by way of general damages for the plaintiff's pain and suffering to date and into the future, together with a decision on a claim for special damages.

2. The plaintiff was born on 12 May 1963. He had worked as a floor installer since the age of 17 years up until in or around 2016. On 13 August 2020 he was driving from Howth County Dublin to his home in South Dublin. Whilst stopped at a main traffic junction and

heading in the direction of the M50, his car was rear-ended by the defendant's vehicle which was a large truck which had bull bars on the front. The impact of the rear-ending was such that the rear window of his car was shattered and the car was ultimately written off. The plaintiff's case is that he sustained significant injuries as a result of this accident. In and around 2016 he had suffered a myocardial infarction and had a stent fitted. Initially after the impact he described feeling sick and dizzy and that his head and shoulder were sore and his chest was sore, however, he was more concerned about his stent and whether it had been affected by the impact of the rear-ending. His evidence was that his wrist was injured from holding the steering wheel, however, within a few weeks it had cleared up. He also described that his chest area was sore for a few weeks but also cleared up. His evidence was that when he heard about the potential for a fractured rib he was concerned about his stent because he knew that he had to be careful about certain things that could dislodge it or cause a problem with it. In any event the stent was unaffected by the accident. He described pain in his upper body and shoulder where the seatbelt would have caught it and he said that he still feels it when he moves. He describes still having this pain and the severity of it depends upon what he is doing at a particular time, and he described dressing and washing as being particularly difficult. He received steroid injections which gave him relief temporarily, but he was disappointed that they didn't provide any lasting relief. He had come under the care of Mr Hannan Mullett, Orthopaedic Surgeon and the ultimate plan is for orthopaedic surgery for a repair of a rotator cuff injury.

**3.** He also described suffering headaches after the accident. He stated that he had never had headaches before except an occasional mild one but never anything quite like this. He stated that he gets different types of headaches, and described the categories of headaches to the court. He said the first category is the most worrying; it is like sticking a pin into a point in his head. The pain moves and shoots out in a line and then stings at a different point several

times in the space of a few minutes, if he was driving he would sometimes have to pull over. The second category of pain is in the back of his head; a heavy pulsating headache, and he said it is worse when it happens in the front. He doesn't take medication for this, however, the headaches affect his concentration and he is worried about this on top of everything else. He said the headaches could be every hour or nothing for several days and they can be quite severe. He was referred approximately two years ago by his GP to the St Vincent's Hospital Neurology Department and he has now received an outpatient's appointment for 15 November 2023.

4. The medical reports in this case were agreed.
5. It is common case that the Personal Injuries Guidelines which were adopted by the Judicial Council on 06 March 2021 apply to this case (hereinafter referred to as 'the Guidelines').
6. The operation of the Guidelines was discussed by my colleague Coffey J in *Lipinski v Martina Whelan* [2022] IEHC 452.
7. Coffey J refers to section 99 of the Judicial Council Act 2019, which provides as follows:  

“(1) The court shall, in assessing damages in a personal injuries action -

  - (a) have regard to the Personal Injuries Guidelines (within the meaning of section 2 of the Judicial Council Act 2019), and
  - (b) where it departs from those guidelines, state the reasons for such departure in giving its decision.”,
8. In summary, Coffey J states that the Guidelines were drawn up to reflect the principles and policies set out in s.90 of the Judicial Council Act 2019 for the assessment and award of damages for personal injuries. He states that it is clear that the Guidelines are a reiteration of the well-established principles which apply to the assessment and award of damages in personal injury cases. The aim of the Guidelines is to achieve greater consistency in awards

through the categorisation of injuries and through setting out procedures which the trial judge must follow. Coffey J places emphasis on the express requirement on the trial judge to adhere to the relevant well-established legal principles applicable to the assessment and award of damages which were determined and developed over time by the Superior Courts.

**9.** *Lipinski* was also referred to with approval by Noonan J in the Court of Appeal in *Zaganczyk v Pettit* [2023] IECA 223.

**10.** In submissions to the court counsel for the plaintiff suggested that there are two dominant injuries, namely a shoulder injury which is ongoing and headaches which are persistent. The plaintiff's counsel also urged the court to uplift the award of the other injuries in light of the two dominant injuries. The other injuries were injuries to the left wrist which occurred when he braced on the steering wheel, a chest/rib injury which was raised as an issue in the hospital, although there appears to be a dispute as to whether in fact there was a rib fracture. The radiologist's report is categorical in this regard that there was no rib fracture. Although it is clear from the hospital notes that certainly in the emergency department the question of a fracture to the 5<sup>th</sup> and 6<sup>th</sup> rib was being discussed and considered, and the plaintiff was aware of this. The plaintiff was clearly concerned in this regard due to the stent which he had inserted in 2016 and the possible impact which it might have had on his cardiac condition. In addition, the plaintiff had a neck injury, and counsel for the plaintiff submits that this is apparent on the evidence of the plaintiff himself but also on the report from the defendant's own Orthopaedic Surgeon.

**11.** With regard to the shoulder injury, counsel for the plaintiff submits that this falls into the serious shoulder injury category under the Personal Injuries Guidelines and in particular sub. (b)(iii) thereof, *i.e.*, a rotator cuff injury with persistent symptoms. He suggests that it is in the upper end of this band and should attract an award of €75,000.

**12.** With regard to the head injury, he says this is established by the uncontroverted evidence of the ongoing headaches which the plaintiff has suffered since the date of the accident and of which he had no prior history. Counsel for the plaintiff submits that the headaches are ongoing and that they fall to be assessed pursuant to the Guidelines under s.3 which is headed head injuries. While the heading is that of head injuries the subcategories delineated therein are under the heading of various types of brain damage, (a) being most severe brain damage; (b) severe brain damage; (c) serious and moderate brain damage; (d) minor brain damage or head injury; and (e) established epilepsy. Counsel for the plaintiff submitted that the court should categorise the plaintiff's headaches as falling under section (c)(iv) *i.e.*, brain damage similar to (iii) above but where the claimant is able to return to a level of work materially similar to same that he was able to carry out prior to the injury and which attracts a range of damages in the band of €25,000 to €60,000.

**13.** It is only in sub. (d) under the heading of minor brain damage or head injury that there is a reference to a head injury at all. Without any definition of same, this section states as follows:

“In these cases, the brain damage, if any, will have been minimal. Considerations affecting the level of the award will be:

- severity of initial injury;
- period taken to recover from any symptoms;
- the extent of any continuing symptoms such as headaches or dizziness”

and

(i) where a substantial recovery takes place in two to five years €12,000 to €25,000;

(ii) where a substantial recovery takes place in one to two years €6,000 to €12,000;

(iii) where a substantial recovery takes place in six months to one year €3,000 to €6,000;

(iv) substantial recovery within six months €500 to €3,000.”

**14.** Counsel for the defendants is of the view that the shoulder injury is the substantial dominant injury in this case. She suggests that the shoulder injury should be assessed under category C which is moderate and be in around €30,000 at the upper end of that category. She submits that proportionately this is in accordance with the approach taken by Barr J in the decision of *McDonnell* [2022] IEHC 680.

**15.** In my view, *McDonnell v Upton Foods Ltd* [2022] IEHC 680 can be distinguished from this case on the basis that the plaintiff in that case had access to immediate medical attention and surgery within months, and an improvement of 40% was seen on first review. On a subsequent review, he had made an 80% improvement. In the case before me, the private surgery recommended by Mr Mullett to the plaintiff was not readily available to him due to financial constraints, and he continues to suffer from an almost complete tear of the rotator cuff. His symptoms are ongoing.

**16.** With regard to the question of head injury Ms Morgan submits that there is no evidence of brain injury or head injury and that, if anything at all, the injury complained of is an injury to the neck. She refers to the report of Mr Young, the Neurologist retained by the plaintiff who refers to headaches which he submits are secondary to a non-dominant neck injury. With regard to the damages proportionate to such an injury she refers to p. 29 of the Guidelines at para. (d)(iii) and suggests that the award should be in the category of €500 to €3,000. With regard to the wrist injury at s. (h), again she submits that it falls into category (d)(iii) €500 to €3,000, and in relation to the rib and chest alleged injury she said that this is not established on the evidence but that even if it was it would fall into the lowest category *i.e.*, category (g)

which attracts an award of between €1,000 to €15,000 depending on the number of fractured ribs and the degree and nature of the pain and discomfort.

17. I am satisfied based on the evidence both of the plaintiff, who I found to be a reliable and credible witness, and of the medical reports before me that the plaintiff suffered an injury to his right shoulder which has involved a tear to his rotator cuff which was established on radiological examination. I regard this to be the dominant injury for the purpose of this assessment. This has caused and continues to cause ongoing pain and distress to the plaintiff, and I am satisfied that he will in due course require to undergo the orthoscopic surgery suggested by Mr Hannan Mullett and also indicated by the defendant's orthopaedic consultant Mr Hynes. The plaintiff was 57 years of age at the time of the accident. The pain arising from the injury to his shoulder is ongoing. It will ultimately require surgery. The plaintiff is right hand dominant, and the injury is to his dominant upper limb. The court has no evidence of the presence or risk of degenerate changes, and I am satisfied that he will require further medical intervention and treatment and in particular the orthoscopic surgery. The plaintiff has not worked since the accident. His evidence to the court was that he had worked as a floor installer in a family business since the age of 17. He described since the age of 7 having been a flyfishing enthusiast. However, since the injury he has been unable to participate in his lifelong hobby. I am satisfied that without the surgical intervention the plaintiff will continue to suffer from the ongoing shoulder pain caused by the accident. I would categorise the injury as being a serious shoulder injury which is captured by sub. (b)(iii) of the Guidelines, *i.e.*, rotator cuff injury with persisting symptoms notwithstanding surgery. I would categorise it at the upper end of the scale and I propose to award a sum of €75,000 by way of general damages being €50,000 for pain and suffering to date and €25,000 for pain and suffering into the future.

**18.** With regard to the headaches that he has given evidence of and has been enduring since the accident, I am satisfied that they amount to a type of head injury. However, I think the position of the plaintiff is not fully captured within the subcategories outlined in the Personal Injuries Guidelines. I am not satisfied to categorise it as falling into section (c)(iv). However, neither am I satisfied to categorise it into sub. (d) which does reference a head injury and in particular sub. (i) thereof where a substantial recovery takes place in two to five years €12,000 to €25,000 range. Counsel for the plaintiff was quite clear that he was not suggesting that the plaintiff had suffered a brain injury. However, he submitted that the plaintiff is clearly suffering from headaches since the accident and they are ongoing. The Neurologist retained on behalf of the plaintiff reported “I think it is unlikely at this stage that there will be any significant improvement...”

**19.** Having had regard to the Guidelines in terms of the categories and descriptions set out therein, there does not seem to me to be a clear category into which the headaches complained of can be slotted in. This being so I must exercise my discretion in order to determine an appropriate level of damages. It is now in excess of three years since the accident and the headaches persist, with no improvement likely. In my view a sum of 30,000 compensation for these headaches would be appropriate if it was a stand-alone award.

**20.** With regard to the balance of the injuries complained of by the plaintiff, I am satisfied that he suffered an injury to his left wrist which healed in a relatively quick period of time and that a figure of €1,000 is appropriate in respect of same. In respect of the neck injury, I agree with the defendants that this is also in the minor category, and I would award a sum of €1,000 for same. With regard to the rib/chest injury, this seems to have been soft tissue trauma to his chest which cleared up in a relatively quick time, and I would also attribute a sum of €1,000 by way of damages. With regard to the question of a rib fracture, I cannot be satisfied that this complaint has been made out on the balance of probabilities. Indeed, the



report from the radiologist is unequivocal that there was no fracture noticed upon the x-ray examination of the plaintiff. Whilst it is undoubtedly the case that there was discussion in respect of same within the emergency department, which I entirely accept would have caused upset and anxiety to the plaintiff due to the stent which he had inserted as a result of his heart attack, there was in fact no injury made out in this regard.

**21.** However, I am mindful that I cannot simply total the amount of individual categories and award same. The total awarded, in accordance with the established practice to date and now articulated in the Guidelines requires the overall award to be proportionate and fair to both parties and bearing in mind the overall context and the maximum amount payable in the most severe of cases, and also in similar cases.

**22.** In summary, whilst I have determined to award the plaintiff a sum of €75,000 by way of general damages in respect of the shoulder injury, I would propose to uplift/increase the overall award by €15,000 making it a total of €90,000 by way of general damages which in my view is a just and proportionate compensation to the plaintiff for the additional injuries which accompanied the dominant injury which he has suffered as a result of the accident on 13 August 2020.

**23.** With regard to the question of special damages, I am satisfied that the figure of €6,758 should be awarded by way of special damages for the purposes of the plaintiff obtaining the requisite orthopaedic surgery to repair his shoulder injury. The cost of such a procedure has been agreed between the plaintiff and the defendant, however, the need for such surgical intervention is not agreed. The court had the benefit of the plaintiff's own evidence in this regard. He has given sworn evidence to the court that it is his intention to avail of this surgery although given his cardiac history he is reluctant to embark upon same just yet. I find this approach understandable. The surgery is indicated by the plaintiff's own orthopaedic surgeon and furthermore is also supported by the report of Mr Hynes, the orthopaedic consultant

retained on behalf of the defendant. In addition, there was an independent MRI which confirms the almost complete tear in this area.

**24.** So, in total I would award the plaintiff the sum of €96,758 by way of damages in this matter.

**25.** As regard to the question of costs and as the plaintiff has been successful in his action I award him the costs of this action with costs to be adjudicated in default of agreement. If there is any objection to the making of this order or any adjustments required thereto, the parties have liberty to reply on notice within 48 hours to the other.