THE HIGH COURT

CIRCUIT APPEALS

[2024] IEHC 582

RECORD NUMBER 2019/00144

BETWEEN

JURATE JAUTUSENKIENE

PLAINTIFF/APPELLANT

AND

FYNES PHONE WATCH LIMITED AND MARRION FLEET MANAGEMENT LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT OF Mr. Justice Twomey delivered on the 10th of October, 2024

INTRODUCTION

1. This case highlights, not for the first time, how hospital consultants are being used in an '*inappropriate'* manner and so contrary to the direction of Barr J in *Dardis v. Poplovka* (No. 1) [2017] IEHC 149 at para. 156. It illustrates how hospital consultants are being used by persons claiming damages for personal injuries, so as to substantiate their claims with inappropriate medical evidence.

2. The medical evidence, in the form of the resulting consultant's report, is inappropriate as there is no medical basis for it, since it does not arise out of a medical need. This is because it does not arise from a GP referral. Instead, it is generated solely for legal reasons as it arises from a referral by a solicitor to a consultant.

3. At the same time as consultants are seeing patients, where there is no medical basis for them to be seen, one reads about patients, who have been referred by GPs *because of medical need*, being on long waiting lists. Yet, if this case had settled, as *circa* 99% of personal injury claims do,[1] this issue would not have come to light. However, since this case did not settle, this Court heard how a plaintiff with a claim over a sore back, which was so minor that it did not even lead to *one* sick day, ended up being referred to a Consultant Psychiatrist *and* a Consultant Orthopaedic Surgeon, to support her claim for damages. This was despite the fact that the plaintiff's own GP had advised that the injuries *did not require* specialist advice. As a result, this minor case about a sore back, which should have been heard in the District Court, ended up taking almost a full day of scarce resources in the High Court, a court in which costs have been described as being at *'millionaire'*[2] levels.

4. The case is an appeal of a Circuit Court decision by Judge O'Malley Costello in which she dismissed the plaintiff's claim for personal injuries against the defendants, with an order for costs in favour of the defendants. It relates to a minor car accident on 30 March 2018 on the Donore Road in Drogheda when two vehicles came into contact when one car was overtaking the other. For the reasons set out below, this Court has no hesitation in affirming the decision of Judge O'Malley Costello.

Very minor soft tissue injuries led to a claim for Circuit Court damages

5. One of the most striking aspects of this case is that by any standards, the plaintiff's injuries were *minor* soft tissue injuries. Her primary complaint seems to be that she suffered some lower back pain as a result of the coming together of the two vehicles. It is to be noted

[1] Report of the Personal Injuries Guidelines Committee (published by the Judicial Council in December, 2020) states that only about 0.54% of all personal injury claims were actually heard in court (in the period 2017-2019). See also the statement of President of the High Court of 10 July, 2020 which states approximately 97% of personal injury cases settle.

[2] See the comments of Kelly P. in The Bar Review, February 2018, Vol 23(1), at p. 11: "*Under the current system, as they say, the only people who can litigate in the High Court are paupers and millionaires*"; see also the comments of Kelly P (as Chairman of The Review of the Administration of Civil Justice (2020), Chapter 9 at para 1.2 that *"[..]Ireland ranks among the highest-cost jurisdictions internationally for civil litigation".*

that she was not referred by a GP to hospital, but she referred herself to hospital on the day of the accident. Once seen in the hospital, she did not require to be admitted and she was discharged. In particular, it is to be noted that her injuries did not cause her to miss any days of work, even though she works in a physically demanding job. In addition, her GP, in her report dated 18 May 2018, noted that she had only needed two visits to the GP in total for her injuries and that she estimated that plaintiff would have fully recovered from these soft tissue injuries within a few months, and she prescribed some pain killers and some sleeping tablets. In particular, the GP also advised that *no specialist reports were recommended for the plaintiff's injuries*. The plaintiff herself conceded under cross examination that she had fully recovered within 6 months of the accident i.e., by September 2018.

6. Despite the foregoing minor soft tissue injuries, the plaintiff did not institute proceedings in the District Court (where she would have been entitled to damages of up to €15,000), but she brought her claim in the Circuit Court and so was seeking damages of between €15,000 and €60,000, of which she was claiming €2,950 in out of pocket expenses (known as 'special damages').

7. It is relevant to note therefore that she was, in effect, claiming damages for pain and suffering (known as 'general damages') of at least €12,050 and up to €57,050 for her back pain, for which she was given some painkillers/sleeping tables, and which did not lead to even one sick day.

8. Putting a price on 'pain and suffering' is not an intuitive and mathematical exercise (like damages for the repair of a car) and so the Supreme Court has held that its calculation is to be based on the '*general level of incomes',* according to McCarthy J. in the case of *Sinnott v Quinnsworth* [1984] ILRM 523 at p 532, where he stated:

> "What is to be provided for in in addition in the way of general damages is a sum over and above [special damages], which is to be compensation and only compensation. In

assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me, that **some regard should be had** to the ordinary living standards in the country, **to the general level of incomes** and to the things upon which the plaintiff might reasonably be expected to spend money." (Emphasis added)

9. It seems clear to this Court that the logical way for a court to comply with the Supreme Court's direction in *Sinnott*, to have *'regard'* to *'general level of incomes'*, when calculating damages, is by considering how long a person, on the average wage in the State, would have to work, to earn enough to pay the damages being claimed or proposed.

10. The median annual earnings in Ireland for the most recent year analysed by the CSO is €41,824.[3] Accordingly, in the terms in which the Supreme Court has said damages are to be calculated, the plaintiff is claiming that she is entitled to, *at a minimum*, the same sum in damages for her back pain (€12,050) as it would take a person, on the average wage *circa four months to earn* (without taking account of tax).

11. This begs the question of how a claim for a minor back injury, which did not lead to the loss even of one day of work, resulted in a claim for damages equivalent to four months of the average income in the State (at a minimum).

How did minor injuries lead to claim for four months of average income in damages?

12. This is where *medical* evidence, that came into existence *without any medical basis*, but purely to support this claim for damages, comes in. As noted below, this is not 'proper' medical evidence in the sense of being medically justified. However, it is *prima facie* helpful to the plaintiff's claim for damages since it has the veneer of being proper medical evidence simply because it has been provided by a consultant and so gives apparent weight to the

[3] For the most recent year analysed by the CSO, 2022, the median annual income for a male is €45,537 and for a female it is €37,782 and so the median income for males and females in Ireland is €41,824. See Central Statistics Office, Statistical Publication, 12th December, 2023.

plaintiff's claim (even though, when one looks carefully, one sees that it was procured without any medical basis).

Reliance on solicitor-referrals have a negative effect on credibility of the plaintif

13. However, this evidence, which is not 'proper' medical evidence, rather than increasing the sum which the plaintiff might be awarded, simply called her credibility into question, and thus also negatively affected her credibility regarding her account of the accident and the extent of her alleged injuries.

14. This is for the simple reason that the plaintiff was involved in attending two consultants, without any medical basis (since there was no good medical reason for her referral) but solely for legal reasons, i.e., to gather evidence to add apparent substance and gravitas to her claim by having a consultant's report to support it and thereby, it seems, increase the sum that she might receive in damages.

Two consultant reports appear, despite GP advising no need for specialist reports

15. The inappropriateness of the plaintiff attending even one consultant in order to support her claim for damages is particularly stark in this case since her own GP had expressly stated that there was no need for such consultation. Yet in this case, there were in fact not one, but two consultant reports procured by the plaintiff to support her claim for damages.

Two consultant reports sought by plaintiff two years after a full recovery

16. Furthermore, the timing of the visits to these two consultants makes the inappropriateness of the plaintiff 's attending them even more stark. This is because the plaintiff, on her own evidence, had fully recovered by September 2018. Yet she decided to attend the first consultant (a psychiatrist) some two years after this fully recovery, on 24 September 2020. Then, she decided to attend another consultant (an orthopaedic surgeon) two and a half years after this full recovery, on the 5 February 2021.

17. All of this meant that some four years after the accident, when the case was heard in the Circuit Court on 15 November 2022, what looked like a minor case regarding a sore back had taken on the 'appearance' of a much more involved case. This is because, to support her claim for damages, the plaintiff now had two consultant reports, with the attendant gravitas which such expert reports *normally* command.

A psychiatrist and an orthopaedic surgeon are brought into the case

18. The first report is from Consultant Psychiatrist, Dr. Geraldine Lyster, arising from her consultation with the plaintiff on 24 September 2000 regarding the *'anxiety'* that the plaintiff had allegedly suffered as a result of accident.

19. However, this Report is of little value to the Court because it consists mainly of the *plaintiff's description* of the accident and the *plaintiff's description* of her symptoms, repeated by Dr. Lyster in her Report. In this sense the plaintiff's evidence is given the apparent gravitas of a consultant's report simply by being stated by a consultant in her report. However, it is still the plaintiff's allegations of what happened to her and a description of the psychiatric injuries she allegedly suffered. The plaintiff's claims regarding her injuries do not become of greater evidential value simply because it is a consultant who is repeating those allegations.

20. The second report is from Consultant Orthopaedic Surgeon, Mr. JK Nasser, after his consultation with the plaintiff on 5 February 2021. Again, this report consists mainly of the *plaintiff's description* of the accident and the *plaintiff's description* of her alleged symptoms, which are repeated by Mr. Nasser in his Report. In this way, once again, the plaintiff's evidence is given the apparent gravitas of a consultant's report. As is the case with Dr. Lyster's report, the plaintiff's claims regarding her injuries do not become of greater evidential value simply because it is a consultant who is repeating those allegations.

Not 'proper' medical evidence since no medical basis for that evidence

21. However, in addition to the limited value of these reports for this reason, this Court does not regard either of these two Reports in September 2000 and February 2021 as 'proper' medical evidence. This is because there was no medical basis for the consultations that led to these reports. Instead, it seems that they were *generated solely for legal reasons*. This is because:

- In May 2018, the plaintiff's GP indicated that the plaintiff's minor soft tissue injury did not require any specialist reports. This is not surprising, since it is clear that the plaintiff's injuries were very minor in nature. This is clear from the fact that on the day of the accident, the plaintiff was not referred to hospital by a GP or any other healthcare professional. Rather she decided to go there herself. After being seen, she was not detained and the extent of her medical treatment for her injuries was that some painkillers and some sleeping tablets were prescribed by her GP who she saw on a total of two occasions.
- The other reason no specialist reports were required is because in May 2018, the GP indicated that the plaintiff would have *fully recovered* within *'3-6 months'* and so well before the end of 2018.
- In addition, under cross examination the plaintiff conceded that *she had in fact fully recovered* by September 2018.

Despite all of this, in 2020 and in 2021, *some 2-3 years after being fully recovered*, it seems that the plaintiff's solicitor, who has no medical expertise, decided to refer the plaintiff, not to one, but to two, consultants. This seems clear from the fact that both reports provide that they were requested by the plaintiff's solicitor, and they make no reference to the referral having been made by the GP (who, as previously noted, specifically advised against any specialist referrals some years previously).

On this basis, one can conclude there was absolutely no medical basis for these two consultations, but solely a legal reason for them (i.e., to support a claim for damages). In this sense only therefore, this is not 'proper' medical evidence (i.e., evidence which came about for medical reasons). Instead, it is medical evidence that was generated purely for legal reasons, i.e., to support a claim for damages.

It is '*inappropriate*' for solicitors to refer their clients to consultants

22. These solicitor-referrals that appear to have been made by the plaintiff's solicitor were made in direct contravention of the High Court's direction that such solicitor-referrals are '*inappropriate*' (*Dardis v. Poplovka* (No. 1) [2017] IEHC 149 at para. 156 per Barr J).

23. The reason these referrals are *'inappropriate'* is because there is no medical basis for these consultations for the simple reason that solicitors have no medical expertise. When a referral is made, not by a GP, but by a solicitor, to a consultant, then by definition, *this cannot have been for medical reasons* but must be for legal reasons i.e., in order to support a claim for damages.

24. The solicitor-referrals in this case are particularly stark, since:

- They were procured not from one, but two, consultants,
- In contravention of the direction in *Dardis*,
- In contravention of the medical advice of the plaintiff's GP, who stated that no specialist reports were required, and
- They were procured some two years after the plaintiff had fully recovered from her alleged injuries.

Therefore, it seems clear to this Court that these *referrals to consultants were made to increase the plaintiff's chances of a larger award or a larger settlement, rather than for genuine medical reasons.*

Solicitor-referrals raise credibility issues for the client's claim of injury

25. Unfortunately, this is not the first time the High Court has come across solicitor-referrals, despite the High Court's clear direction in *Dardis* that they are inappropriate.[4] However, as this case vividly illustrates, while solicitors may believe that they are increasing the chance of a higher award for their client by procuring these reports, the opposite is the case. This is because, all such reports do is weaken the plaintiff's case. This is because the credibility of a person, who is claiming damages for personal injuries, is called into question if that person is willing, in contravention of the High Court's direction, to procure 'medical' evidence, which is not 'proper' medical evidence, but which is procured solely for legal reasons (i.e., to support a claim for damages).

26. In this case, the plaintiff was willing to visit two separate specialists, some 2-3 years after being fully recovered, in direct contravention of her GP's advice and so without any medical basis for doing so, in order to increase the damages to which she might be entitled.

No reliance placed by Court on this 'medical' evidence

27. For this reason, this Court believes no weight should be attached to these Reports and their existence, rather than supporting the plaintiff's claim, calls into question her creditability regarding the nature of the accident, and her credibility regarding the extent of her alleged injuries, and so is a factor in this Court believing the defendants' version of events rather than hers.

28. This is the background to how a very minor soft tissue injury ended up being pursued, not in the District Court, but in the Circuit Court, and then on appeal in the High Court.

[4] In *Harty v. Nestor* [2022] IEHC 108 at para. 24, Barr J. stated that "The practice of solicitors referring their clients directly to consultants for the purpose of drawing up medicolegal reports has been disapproved of in a number of decisions: see *Fogarty v. Cox* [2017] IECA 309 (para. 43); *Dardis v Poplovka* (No 1) [2017] IEHC 149 (paras. 156 & 157) and *O'Connell v Martin* [2019] IEHC 571 (paras. 41 et *seq*)." See also Flannery v HSE [2018] IEHC 127 at para 32, where the High Court (Barr J.) makes a similar point.

ANALYSIS

29. The car accident behind this claim involves two conflicting accounts of what occurred from the plaintiff, on the one hand, who was the driver of a car, and Mr. John Fynes, on the other hand, who was the driver of the van which was involved in the accident. As was very fairly observed by the plaintiff's engineer, Mr. Robert Burke, the two conflicting accounts of the road traffic accident were both plausible, based on the engineering evidence.

30. For this reason, this case comes down to the credibility of both parties.

31. As already noted, one of the factors which weighs against the credibility of the plaintiff is that she has procured 'medical' evidence to support her claim for damages, even though there was no medical basis for same. Although not a determinative factor, this is nonetheless a factor which is not in the plaintiff's favour when it comes to assessing her credibility in relation to this claim. For this and the other reasons set out below, this Court agrees with Judge O'Malley Costello that the plaintiff's claim should be dismissed.

Conflicting accounts of the accident

32. On the plaintiff's version of events, she was travelling on the left-hand side of the Donore Road in Drogheda, and the defendant's van was parked on the left-hand side of that road when he verred into her car, without indication, as she was in the process of overtaking the van.

33. She says the first defendant's van was parked on the left-hand side of the road but that when she was parallel to the van, but towards the back of that van, Mr. Fynes veered into her car.

34. Mr. Fynes' version of events is completely different. He says he was not parked, but that he was in fact travelling along the Donore Road in the same direction as the plaintiff, but ahead of her, when he slowed down and indicated that he was turning into an industrial estate

on the right-hand side of the road. When he commenced making the turn, he was hit by the plaintiff as he says she was overtaking him on his right-side, even though he was turning right.

35. He also stated in his evidence to this Court that, because the entrance to the industrial estate was narrow, he moved slightly to the left before making the turn. Counsel for the plaintiff pointed out that he had not given this evidence in the Circuit Court regarding moving slightly to the left, before turning right, and that this new evidence supported the plaintiff's version of events.

36. However, the defendant disagreed and said this evidence did not in fact support the plaintiff's position since her evidence was that he was parked, and he stated that he was not parked.

37. While the defendant may not have given this evidence (that he moved slightly to the left before turning right) in the Circuit Court, this did not provide compelling evidence to support the plaintiff's claim that Mr. Fynes was parked on the left-hand side of the road as she approached his van and that he veered out into her car.

38. In contrast, the plaintiff's evidence in the Circuit Court was significantly different from that in the High Court and the consequences of that changed evidence are very significant.

39. This is because, firstly, uncontroverted submissions were made to this Court that, in the Circuit Court the plaintiff stated that she *was 'almost passed'* the van when the collision occurred.

40. Furthermore, the plaintiff's own engineer recorded in his report that she stated that she *'was almost passed when the vehicle turned out right coming into collision with her vehicle'*.

41. Again, very fairly, Mr. Robert Burke, who came across as an expert witness who was conscious of his duty to the court, accepted that the damage which occurred to the vehicles could not have occurred if the evidence, which the plaintiff gave to the Circuit Court (and

which she also gave to him), was correct, i.e., that she was almost passed the van when impact occurred.

42. So, in light of this evidence from the plaintiff in the Circuit Court regarding how the accident happened (which her engineer accepted *could not be correct* in light of the damage to the vehicles), what happens on appeal in the High Court?

Plaintiff changes her evidence in High Court to evidence consistent with accident

43. What happens is that the plaintiff gives quite different evidence in the High Court from that which she gave in the Circuit Court and which she gave to her engineer. This is because she now states that she was towards the back of the van when the impact occurred. Mr. Burke stated that this second version of the events from the plaintiff was consistent with the engineering evidence.

44. In the face of this change in evidence by the plaintiff, this Court must therefore treat the plaintiff's recollection of what occurred with considerable caution.

45. However, this is not the only instance when inconsistent evidence was produced on behalf of the plaintiff to support her claim for damages.

Failure to disclose previous accident

46. For example, the plaintiff told the Consultant Psychiatrist, Dr. Lyster (who the plaintiff would have known was preparing a report to support her claim for damages) that she had no previous accidents.

47. She also told the Consultant Orthopaedic Surgeon, Mr. Nasser (who she also would have known was preparing a report to further support her claim for damages) that she had no previous accidents.

48. However, this is not correct, as she had in fact a previous road traffic accident only four months prior to this accident as is clear from the Replies to Particulars.

49. She obviously realised that it was important to tell her solicitor of this accident to enable him prepare those Replies. However, she did not tell this fact to the two consultants, even though she would/should have known that this fact could influence the reports which were concerned with the amount of damages which she might be awarded for this accident. This further calls into question the credibility of her evidence to this Court.

Referral to two separate consultants for legal, rather than, medical reasons?

50. Although not determinative, it has already been noted that this Court must treat with caution the credibility of any plaintiff who would procure two Consultant Reports, even though there was no medical basis for them, but purely for legal reasons, i.e., to increase her claim for damages, and in direct contravention of the High Court direction in *Dardis*.

51. In *Cahill v. Forristal* [2022] IEHC 705, this Court agreed with Barr J in *Dardis* and noted that it was not the role of solicitors to make referrals to consultants. If there is a medical need for specialist intervention, a GP makes the referral, and a solicitor can then seek a report from that consultant. *If there is no medical basis* for referrals (and only a healthcare professional, usually a GP, can determine if there is one), then *none should be made, even if a solicitor believes that it is likely to lead to a greater settlement/award of damages if he makes such a referral.*

CONCLUSION

52. At para [44] of *Cahill*, this Court pointed out that there were reasons, in the *interests of their clients*, why solicitors should not make solicitor-referrals to consultants, i.e., because it impacts on the credibility of a clients' claim for damages for personal injury. This is because the very existence of a solicitor-referral is *prima facie* evidence that there is in fact no medical

basis for that referral. The client therefore is engaging in the creation of medical evidence without there being any medical basis for its creation.

53. This immediately raises question marks about the existence, and severity, of the alleged injuries, since that plaintiff is seeking consultant reports when there is no medical basis for them.

54. In addition, that solicitor referral is also *prima facie* evidence that the consultant was chosen, not for medical reasons, but solely for legal reasons, i.e., to support the claim for damages. This is because the choosing of the consultant is being done by a solicitor with no medical basis for making that choice.

55. The fact that the plaintiff in this case was willing to be referred to two separate consultants without any medical reason, in order to support her claim for damages, raises question marks about her credibility. While a solicitor may believe that referring their clients to consultants may increase the chances of a higher award/settlement, this case starkly illustrates that it can have the opposite effect by calling the credibility of the plaintiff into question, when the court has to consider her version of the accident and her injuries.

56. Thus, in this case, this Court believes that the plaintiff's credibility has been compromised by her willingness to obtain medical reports to support a claim for damages in the Circuit Court for a relatively minor injury when there was no medical basis for such reports.

57. For this and the other reasons set out above, this Court finds that Mr. Fynes' version of events is the more credible one. Therefore, this Court has little hesitation in affirming the decision of Judge O'Malley Costello in which she dismissed the plaintiff's case and awarded the defendants the costs of the Circuit Court proceedings.

58. As regards the costs of the High Court, counsel for the plaintiff sought not to have those costs awarded against the plaintiff, it seems, on the basis of her not being in a very well-paid employment. However, plaintiffs must appreciate that if they decide to pursue a case for

damages, it is not a cost-free exercise. Indeed, it is even more costly when they decide to appeal, in the High Court, the dismissal of their case in the Circuit Court. Their financial position is of no comfort to an individual or small business which must pay the costs to have the case dismissed, not just once in the Circuit Court (at some considerable cost), but then a second time in the High Court (at enormous cost). Such individuals or small businesses are not charities. They cannot be expected to absorb the costs of defeating personal injury claims, simply because the plaintiff is not a person of means.

59. Indeed, the only real disincentive to speculative claims, such as this one, is ensuring that an award of costs is made against plaintiffs who bring them. In this way, plaintiffs know that if they take speculative claims and lose, any *present or future funds* to which they become entitled will be subject to that costs award. Accordingly, this Court has no hesitation in awarding costs against the plaintiff in the High Court, as was done by Judge O'Malley Costello in the Circuit Court.