No Redaction Needed **[2024] IEHC 592**

AN ARD-CHÚIRT

THE HIGH COURT

[Record No. 2019/5573P]

[Record No. 2018/4660P]

[Record No. 2018/3516P]

BETWEEN

ZSOLT REZMUVES

PLAINTIFF

AND

AIDAN JOHN BIRNEY AND MARTINA BIRNEY

AND

GEORGE O'DONOGHUE

AND

PATRICK SIMONS

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered electronically on the 16th day of October 2024

Introduction

1. This judgment arises out of the combined trial of three separate sets of proceedings. The plaintiff who has for the last few years lived in Listowel and Castleisland Co. Kerry, was involved in a road traffic accident on 10 September 2014 ("**the first collision**"), 20 April, 2016 ("**the second collision**") and 10 March 2017 ("**the third collision**"). The defendants do not dispute their liability for each of the collisions. Following the resumption of the combined trials on 13 December 2023, counsel for the defendants advised the Court that it need not apportion damages to each of the defendants.

2. In summary, the Court is left to decide:-

(1) Whether the plaintiff, since the commencement of the trial on 29 November 2022, has adduced evidence or has sworn verifying affidavits which he knows to be false or misleading ("**the section 26 issue**");

(2) If the defendants do not satisfy the Court that the plaintiff knowingly adduced false or misleading evidence, what:

(a) special damages have been established by the plaintiff to be attributable to the collisions?

(b) general damages should be awarded to the plaintiff for the alleged injuries which he sustained in the collisions?

3. As counsel for the Birneys explained on 1 February 2024, the defendants will divide any compensation awarded in accordance with an agreement between the defendants, such that any application for costs on behalf of the plaintiff in each of the three sets of proceedings may be grounded as suggested by counsel. That approach commended itself to the Court, particularly in view of the multiple applications and adjournments of the trial since the plaintiff personally opened his claims on 29 November 2022. The Court case-managed the proceedings following the plaintiff's successful application to adjourn while he secured

solicitors and counsel for the remainder of the trial. The adjournment was sought by the plaintiff after he had completed his direct evidence; conditions were attached to the order granting the adjournment.

The collisions

First collision – 10 September 2014

4. The plaintiff explained in his opening and direct evidence on 29 November 2022 that his car was rear-ended in the first collision. After completing his school run that day, he went to a Ford dealer shop to have his car checked. There, he vomited, felt dizzy and experienced pain in his neck and shoulder which he had never experienced before. He attended Portlaoise Hospital which was only two minutes away. He was examined, discharged and went home. He told the Court that he later reattended the hospital where he was advised that he had "whiplash soft tissue injury". The plaintiff also said that his marriage "was affected". He attended Tullamore Hospital where L5 and S1 degenerative changes were noted. He told the Court that a cervical MRI showed a large C6/C7 protrusion and nerve pressure with a prolapsed disc in C5/C6 and that the "C6/C7 was pushing my spinal cord canal". He mentioned T3 and T4 changes also. At this time, the plaintiff was 34 years of age.

5. In his opening, which he confirmed on oath immediately afterwards, the plaintiff clarified that his brain tumour, which was diagnosed around the time of the fusion on his C6/C7 around February 2018, was not related to the collisions.

Second collision – 20 April 2016

6. Mr. O'Donoghue pulled his car out in front of the plaintiff on 20 April 2016. The plaintiff braked and there was a "low speed" impact, according to the plaintiff. The plaintiff relayed how his general practitioner treated him for his "seat belt injury" with a pain in the middle of his chest. The plaintiff indicated to the Court that he did not pay much attention to

the second collision initially. He told the Court how his "wife straight away suffered from posttraumatic disorder and she was really a difficult passenger after that…".

Third collision- 10 March 2017

7. The plaintiff told the Court that he touched the bumper and tow bar of a car in front which had suddenly braked on 10 March 2017. That caused the third named defendant to rear-end the plaintiff's car. After stepping out of the car, the plaintiff sat on the grass verge to relax as he was sore. Ultimately, the plaintiff was brought to St. James' Hospital. The plaintiff told the Court that x-rays confirmed that his C6 and C7 had collapsed more.

Family circumstances in 2017

8. According to the plaintiff's wife who gave a limited amount of evidence on 15 December 2023, the family moved from Laois to Kerry in 2017 because friends and family members around Laois pestered him ("pestered" is the Court's wording as that was the impression given) for help with and repairs to laptops, devices and Xboxes. She confirmed in cross examination that for six months before the first collision in 2014, the plaintiff used to bring the family's four children to and from school. He continues to undertake those journeys and tasks for the household.

Summary of effects

9. The plaintiff told the Court that he has become a different man, father and husband since the collisions. He lost his "ambitions… self-esteem… the chance of coming back in a good condition".

Economic loss

10. The plaintiff's story is that he came with his family to Ireland in November 2007 at the age of 27. He had undertaken a three-month trial period on his own in May 2007. He got a part time job before working as a painter. During the economic crisis, he was on "jobseekers" allowance. He said "[A]fter two or three years on jobseekers I try out if I can be

a good self-employer and generate proper income". He returned on the jobseekers' allowance around the time of the first collision. He emphasised that he was a trained painter and cannot work as such due to the conditions which he attributes to the collisions. There was no controversy at trial about the information given by the Revenue to the plaintiff by letter dated 4 May 2023 that the Revenue has no record of any employment having been registered for the plaintiff for the years 2009 to 2014. The Social Welfare Services Office by letters dated 12 May 2023 advised the plaintiff of the following total payments which he received in the years ending 31 December 2013 (€8,209.60), 2014 (€16,368.40), 2015 (€16,189.20) and for January 2016 (€1,619.50). Those payments included "Back to Work allowance", "Rent Supplement", "Basic Supplement Welfare", "Jobseekers' allowance" and "Back to school clothing and footwear".

Direct evidence of the plaintiff

11. Under oath, the plaintiff described that he has pain "all around [his] body". His neck has a sharp routine pain and the same occurs on the left side of his shoulder. He described pain around his rib cage during many routine functions. He has been unable to read his "Bible" without pain disturbance. He has sleep and intimacy issues which he attributes to the collisions. He outlined the emotional and physical distance with his son who has special needs which have increased since the collision. The plaintiff's wife is a full-time carer of that son.

12. Weight gain, "strong diarrhoea", loss of hair and other psychological issues were included in his list of complaints. The Court heard about the plaintiff's disappointment, including physical and emotional reactions, with his family since the collisions. The Court will not detail the issues which impinge upon the privacy of others but, nevertheless, takes account of the complete story recounted by the plaintiff.

Boat business and travelling

13. The plaintiff referred to his interest in boat fishing which his son with needs enjoys and which became the focus of the plaintiff's claim for prospective loss of income later in the proceedings. The plaintiff drives considerable distances in his automatic car. The plaintiff noted his attendances at multiple case management hearings in Dublin when his own legal team availed of the remote video facility. The plaintiff has a hearing difficulty which is not attributed to the collisions.

Original pleadings

First collision original claim – issued September 2016

14. Arising out of the first collision, a personal injury summons was issued in Laois Circuit Court on 27 September 2016. As with the pleadings for the other two claims, there was no plea in the defences that the accidents were so minimal that they could not have caused injury to the plaintiff. Thus, there was no controversy or evidence led about speed or the extent of impacts at the trial although the plaintiff mentioned "low speed" when describing the second collision.

15. The plaintiff was described as a painter and the special damages, including loss of earnings, were "to be ascertained". By reply dated 25 January 2017, the plaintiff stated that he "will not be making a claim for loss of earnings but would be making a claim for loss of opportunity". In his affidavit sworn on 10 April 2019, grounding a motion to transfer the proceedings to the High Court, there was no mention of changing his claim for loss of opportunity to a claim for loss of earnings. The statement of recoverable benefits, which was valid until 30 January 2019, in those proceedings, identified disability allowance of €229.80 per week which totalled €40,191.10.

Second collision claim – issued May 2018

16. The second collision prompted the issue of a personal injury summons in the High Court on 23 May 2018 by the same firm of solicitors for the plaintiff. Again, losses including

earnings were to be advised. The reply dated 2 January 2018 confirmed that the claim would only be for loss of opportunity.

Third collision claim – issued April 2018

17. The third collision is the subject of a personal injury summons which was issued in the High Court on 20 April 2018. Reply 14 in the notice dated 1 November 2018 stated:-

> "The plaintiff was in receipt of jobseekers' allowance for approximately six months prior to his accident on 10 September 2014. He has continued in receipt of social welfare payments since that date… He had set up his own business which he ran for two years prior to that. He did not generate significant profits in that business and has not made a return to the Revenue Commissioners in relation to either of the two years. No sums are due to the Revenue Commissioner. The plaintiff's claim is in respect of loss of opportunity."

18. All those pleadings were the subject of verifying affidavits sworn by the plaintiff.

<u>Resumption of trial on 13 December 2023</u>

19. The current solicitors on record for the plaintiff since 20 February 2023 copied to the solicitors for each of the defendants the following reports from expert witnesses who were ultimately called at the request of counsel for the plaintiff:-

(1) Mr. Muhammad Taufiq-A-Sattar (**"Mr Sattar")**, consultant neurosurgeon, dated 16 June 2022 which supplemented his report to the plaintiff's first solicitors, dated 20 June 2019;

(2) Mr. Declan O'Keeffe, consultant in pain management, dated 22 May 2023;

(3) Dr Anne Leader, consultant psychiatrist, dated 26 February 2023 which supplemented earlier reports dated 23 August 2018 and 20 May 2022;

(4) Mr. James Dennison, vocational rehabilitation evaluator, dated 31 May 2022;

(5) Mr. Nigel Tennant, consultant actuary, dated 24 January 2024 which supplemented his report of 7 September 2023.

Notice of additional particulars in 2023

20. A schedule of special damages served in April 2023 identified past and future loss of earnings while informing the reader that they were "to be ascertained". Prior to the resumption of the trial in December 2023, a schedule of special damages dated 11 September 2023 which was verified by the plaintiff in his affidavit sworn on 10 October 2023 listed the following:-

Past loss of earnings –	€184,832.00.
Future loss of earnings –	€471,504.00.
Future cost of spinal cord stimulator –	€94,804.00.

The total special damages, including other miscellaneous items, came to €757,190.20.

21. Following the Court's questions on 12 January 2024 concerning the factual basis for Mr. Tennant's evidence about future losses, the solicitors for the plaintiff obtained a further report from Mr. Tennant dated 24 January 2024 which capitalised net weekly losses for two, five and ten years. The plaintiff in his affidavit of verification sworn on 25 January 2024 referred to that report and averred: "I say to the best of my knowledge and believe (sic) the details and facts pleaded are correct and accurate". This last report sought to take some account of prospects for the plaintiff pursuing something different to the boat activity dreamed of by him and relied upon by Mr. Dennison who had given evidence on 12 January 2024. The future losses were capitalised for two years at €48,307, for five years at €117,719, and for ten years at €226,527. The claim for past loss of earnings had a corresponding increase in past loss of earnings.

Spinal cord stimulator

22. The claim for a future neck spinal cord stimulator requiring replacement every ten years was attributed a capital value of €94,329 by Mr. Tennant in his latest report dated 24 January 2024. This element of the plaintiff's claim had not been identified in his own evidence. In fact, the plaintiff had referred to a form of therapy in his State of origin which he would pursue with the compensation that might be awarded in these proceedings. Further the plaintiff's own consultant neurosurgeon, Mr. Sattar, did not support the claim for a stimulator. The stimulator was suggested by Mr. O'Keeffe who had only examined the plaintiff on 22 May 2023 at the request of the plaintiff's current solicitors after the trial had recommenced.

The section 26 issue

23. It is now convenient to address the s. 26 issue. The submissions made by counsel guide the Court's approach to this rather unique reconstructed claim and the allegation of misleading evidence which does not refer to the plaintiff's direct evidence given on 29 November 2022 but rather references his answers in cross examination over two days in December 2023 together with his verifying affidavits sworn on 10 October 2023 and 25 January 2024.

24. The defendants bear the burden of satisfying the Court that the plaintiff knowingly gave false or misleading evidence in a material respect. Considering that described above, the Court has examined the information given by the plaintiff to Mr. Dennison (vocational consultant) on 30 May 2022, the exchanges between the plaintiff and Mr. Dennison subsequently, the compilation of the schedule of special damages as verified in October 2023, the evidence given by the plaintiff under cross-examination beginning on 13 December 2023 and the said verifying affidavit of 25 January 2024 with an eye on earlier verifying affidavits. I refrain from referring to the information given to Mr Tennant because his evidence as an actuarial expert was adduced to assist the Court if the Court decided to award future losses. In

other words, the evidence of Mr Tennant could not establish losses but rather described the information collated by or on behalf of the plaintiff. Despite the opportunity afforded to the plaintiff to take advice in December 2023 on whether to revise his claim, the plaintiff persisted in his beliefs about his prospective earnings, the basis for which is now the subject of the Court's decision on this s.26 application.

Submissions for the defendant on section 26

25. On 1 February 2024 and 6 February 2024, counsel for the defendants made submissions, the principal points of which were:-

(1) The plaintiff, who has acquired an intimate knowledge of personal injury litigation, well knows his obligation to be truthful. In other words, he cannot be regarded as innocent when it comes to the effects of his exaggeration.

(2) Rather than taking the opportunity afforded by the Court in December 2023 to revise his claim for special damages, the plaintiff increased his claim for past losses by €10,000 and continued to include an unsupported claim for a spinal cord stimulator of €94,239.

(3) The plaintiff generated zero income from 2009 until September 2014 but continues to claim past loss of earnings from the date of the first collision on 10 September 2014. Further the plaintiff's income for 2008 is now exceeded by his receipts of welfare for his disability.

(4) The boat business upon which the plaintiff relies collapsed due to his injuries according to the plaintiff. The reality is that he was on "jobseekers' allowance" and had not exhibited the industry or will to establish himself in self-employment. The plaintiff's attempt at establishing any such boat business had failed according to the defendants.

(5) Mr. Dennison and Mr. Tennant were mislead about the plaintiff's business and prospects when they elicited details to prepare their reports and in anticipation of giving evidence so late in the trial.

(6) Despite Mr. Sattar's reports and evidence, the plaintiff still pursues a significant claim for a costly spinal cord stimulator.

(7) Counsel for the defendants referred to the video surveillance of the plaintiff put to the plaintiff and shown to the Court on 14 December 2023 and 15 December 2023. Counsel invited the Court to make inferences from same and from the considerable motoring undertaken by the plaintiff between Kerry and Dublin for the multiple case management hearings in these proceedings. In short, it was submitted that the plaintiff cannot be suffering such pain as to refrain from undertaking paid work in the State which now has near full employment levels.

Submissions for the plaintiff

26. The submissions of counsel for the plaintiff on 6 February 2024 which are relevant to the Court's consideration of the s. 26 issue may be summarised as follows:-

(1) According to the plaintiff's replies in cross examination on 13 December 2023, he undertook unpaid work experience at a Centra shop in Castleisland for three days in November 2023. This demonstrates that he will take up employment once his pain can be controlled according to counsel for the plaintiff.

(2) The plaintiff's qualifications as a forklift driver, training in stainless steel "tig welding" ("tig" = Tungsten Inert Gas) together with his experience as a painter and warehouse operative all indicate the plaintiff's ability to undertake various types of work if he overcomes his debilitating pain.

(3) The defendants failed to afford an adequate opportunity to the plaintiff during the trial to counter the assertion that the information which he gave was deliberately misleading. Moreover, it was never put to the plaintiff that he was a "fraud".

(4) A successful application under s. 26 must operate "within proper constitutional parameters" according to counsel. Just because the plaintiff takes an optimistic view as to his earnings, does not mean that he is deliberately misleading. The plaintiff is entitled to litigate his claim.

(5) The defendants should have given advance warning in writing about the intention to pursue the s. 26 issue although it was accepted that the plaintiff belatedly introduced the claim for loss of earnings and for the stimulator.

(6) If counsel had opened the case, reference would have been made to the failure of the plaintiff's business in March 2014 before the first collision. The plaintiff in the circumstances cannot be penalised for not having the experience and training of counsel.

(7) The kerfuffle which surrounds the verifying affidavits ought to be understood in the context of how the proceedings and trial progressed. The stimulator is an option according to Dr O'Keefe, whose evidence the Court can accept or reject. Reports from experts were the basis of the revised particulars which were verified.

(8) Mr. Dennison's reference to the necessity for the plaintiff's brother-in-law to assist the plaintiff "in … heavy and demanding duties" between 2012 and 2014 was misunderstood by the defendants. At worst for the plaintiff, the Court may have some regard to Mr. Dennison's reference in his report to the need for the plaintiff requiring physical help for any boating business prior to

the first collision. However, that is not sufficient to ground a successful application under s. 26 according to counsel for the plaintiff.

Loss of earnings or loss of opportunity

27. The Court in its memorandum to the parties issued in advance of the last day of hearings on 30 July 2024 in this protracted trial, invited the parties to make submissions about whether the plaintiff having advanced a significant claim for loss of earnings on the resumption of the trial on 13 December 2023 could now revert to a claim for loss of opportunity. Suffice to say, that counsel for the defendants emphasised the focus of the s. 26 application on earnings which were never established. Counsel for the plaintiff urged the Court to consider the figures for loss of earnings in the context of loss of opportunity if the Court disallowed the claim for loss of earnings.

The law relevant to this application

28. There is a surfeit of case law about the interpretation and application of s. 26. In the unique circumstances of this application, the Court chooses and applies the following relevant principles from the various formulations. Rather than quote large excerpts, the Court references particular paragraphs from each of the following judgments in support of the particular four principles which it will apply to the unusual trail leading to the trial:-

(1) O'Sullivan v Brozda delivered on 14 July 2022 [2022] IECA 163 **("Brozda").**

(2) Platt v OBH delivered on 28 July 2017 [2017] IECA 221 [2017] 2 IR 382 **("Platt").**

(3) Keating v Mulligan delivered on 9 November 2022 [2022] IECA 257 **("Keating").**

Principles

(1) The test of knowledge on the part of the plaintiff is subjective. [para. 7 of Collins J's judgment in Brozda].

(2) The onus of proof is to the civil standard but a trial judge should be "absolutely satisfied as a matter of high probability" that the plaintiff has been guilty of dishonesty. [para. 7 of Collins J's. judgment in Brozda].

(3) The plaintiff must be shown to know that his evidence is false or misleading [para. 30 of Noonan J's judgment in Keating].

(4) Section 26 is there to deter and disallow a fraudulent claim. It "should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation… "[para. 67 of Noonan J's judgment in Platt which quoted O'Neill J in Smith v. Health Service Executive [2013] IEHC 360 at p. 30].

Discussion

29. The primary fact to be determined in this application is whether the defendants have established that the plaintiff has not believed since 2022 that he would be running a boat repair business if the collisions had not occurred. Causation of the plaintiff's suffering is not an aspect in this application. The Court condenses the issue to be addressed into the following:-

> "Have the defendants established as a matter of high probability that the plaintiff knew in May 2022 that he was misleading Mr. Dennison, on 10 October 2023 he knowingly lied in his verifying affidavit the latest schedules and/or that he mislead this Court after the trial resumed in December 2023?"

30. The Court cannot and does not assume that the knowledge and experience of legal practitioners and of the Court itself was understood by the plaintiff on those dates. The Court recognises that dreams, wishful thinking and optimism may affect reason. Likewise,

connivance, dishonesty and fraud may affect subjective reasoning which the Court ought to consider. The Court is not satisfied to the requisite degree that the plaintiff acted fraudulently or dishonestly. No allegation was made against the agents of the plaintiff that they connived to exaggerate or put forward a fraudulent claim.

31. Having observed the plaintiff, heard his personal submissions and listened to his evidence over the past two years, the Court observed a sincerity coupled with some guile on his part. I use the word "guile" advisedly. It was apparent that the plaintiff has been alert from an early stage of the proceedings to the financial benefits of attributing all his woes (physical, mental, economic and social) to the three collisions. When pressed in cross examination the plaintiff blurred many responses in order not to accept the thrust of the defendant's arguments about the unreasonableness of his claim for losses and causation of his condition. Nevertheless, the defendants have not established to my satisfaction that the plaintiff in his personal reasoning is aware of his own irrationality (viewed objectively) and unreasonable views about his self-employment prospects since 2014.

32. It was indeed a high threshold for the defendants to overcome when making the s. 26 application. The plaintiff became over optimistic as the proceedings progressed and developed unreasonable (viewed objectively) expectations about what these proceedings could achieve for him financially. The Court stresses the unique feature of the trial where claims for soft tissue injuries with associated losses of opportunity were increased dramatically in 2023, nine years after the first collision.

33. It is good practice to notify a claimant of an intended s. 26 application. Here the plaintiff largely brought upon himself the possibility of the s. 26 application without notice before his cross examination. He delivered a verifying affidavit for the schedule of special damages (ultimately relied upon) a few weeks before he was due to be cross examined in December 2023. The plaintiff did not deliver amended summonses and so the opportunity to

deliver defences to amended summonses did not arise for the defendants. In addition, the comments of the Court in December 2023 when querying the basis and justification for adducing actuarial evidence contributed to the making of the s. 26 application.

Spinal cord stimulator

34. The plaintiff included in his latest schedule of special damages a claim for the future costs of a spinal cord stimulator estimated at €94,804.00. The plaintiff never said that he would avail of such a stimulator.

Dr. Declan O'Keeffe

35. Dr. O'Keeffe who had not treated the plaintiff, examined the plaintiff for the first time on 22 May 2023 and furnished a report to the plaintiff's current solicitors. While that report did not refer to the costs of a stimulator, Dr. O'Keeffe was asked in direct examination on 12 January 2024 about the sort of injections which might be required to alleviate the plaintiff's pain. It is worth noting that Dr. O'Keeffe's evidence was ultimately confined to the condition of the plaintiff as opposed to the issue of causation. The height of the evidence to support a claim for a stimulator was Dr. O'Keeffe's suggestion about giving the plaintiff "a trial of the spinal stimulator to see does it work". It was readily apparent to the Court that the claim for a spinal cord stimulator depended on speculation. The plaintiff himself discounted the use of a stimulator in his own evidence. The Court also observes that the plaintiff's legal team might not have had any alternative but to include the suggestion once it had been made by Dr. O'Keeffe. The Court deprecates the inclusion of items of special damage which cannot be supported in evidence. However, given how the trial progressed, one cannot attribute a fraudulent like intention on the part of the plaintiff or his agents. Yes, he should not have sworn the verifying affidavits which referred to particulars of a spinal cord stimulator if he had properly considered his own evidence. The plaintiff resulting from his decision to conduct these proceedings as a litigant in person, thought that he would recover the cost of

treatment in his country of origin without securing the attendance of any practitioner from that State for the trial. Therefore, the Court reluctantly gives the benefit of the doubt to the plaintiff for including a large claim for future treatment in the way that it emerged.

Conclusion on section 26 issue

36. For the reasons outlined, the Court does not dismiss the plaintiff's action pursuant to s. 26 of the Civil Liability and Courts Act, 2004.

Condition

Physical

37. Dr. O'Keeffe in his evidence on 12 January 2024 outlined the plaintiff's condition as he presented it on 22 May 2023. The elements of the plaintiffs complaints were divided as follows which the Court adopts to summarise past, current and future physical constraints on the plaintiff:-

(1) Restricted movement of the cervical spine;

(2) No focal tenderness in the thoracic spine which has a good range of movement;

(3) Pain on hyperextension of the lumber spine.

38. The Court noted that Dr. O'Keeffe got the plaintiff to bend and kneel during the examination. Dr. O'Keeffe did not observe the plaintiff attempting to lift or carry. Further Dr. O'Keeffe while having had access to reports from practitioners who did not give evidence, had not watched the videos of the plaintiff shown to the Court to demonstrate his ability to lift and pull, on certain dates after the collision.

Cervical spine

39. This is the dominant injury for the Court to consider as will become evident from the rest of this judgment and particularly under the section headed "causation".

40. The plaintiff had pain radiating to both shoulders after the first collision on 10 September 2014. He continued to undertake the school runs for his family. In September 2015 a CT brain scan revealed a small left sided cerebellar lesion which was a worry, but it had nothing to do with the first collision. I mention this to put the neck pain in a chronological context of the plaintiff's life saga.

41. The second collision on 20 April 2016 according to the plaintiff in his own evidence, was a low-speed impact. He informed Dr. O'Keeffe that lifting and carrying increased the dull ache and occasional sharp pain after that collision. He also stated that his interscapular aches and occasional sharp pain continued.

42. The plaintiff complained to Dr. O'Keeffe that his axial neck pain was associated with difficulty swallowing following the third collision on 10 March 2017. The plaintiff told Dr. O'Keefe, "Laughing, coughing and breathing deeply increased his interscapular pain".

43. In February 2018 the plaintiff had a successful C6/C7 fusion according to Mr. Sattar's evidence; he said that this gave relief of the neck pain, stiffness and right arm related pain. Neck ache still persisted.

44. As of 22 May 2023, Dr. O'Keeffe found that the plaintiff could forward flex to about 50% with his cervical spine. In cross examination on 12 January 2024, Dr. O'Keeffe accepted that the plaintiff had normal power in his upper limbs and that he did not have spasm. He further acknowledged surprise at the suggestion that the plaintiff could not resume some type of employment.

45. The Court viewed the surveillance videos and noted the plaintiff's reply in cross examination on 15 December 2023:-

> "I have good days, I have sometimes very good days and sometimes I force myself to have good days".

46. The plaintiff further accepted that seven months post-surgery, he had "no difficulty going out and about for four hours in [his] car, getting in and out of [his] car".

47. In summary the plaintiff's principal physical injury for the purposes of these claims has given rise to limitation of movement, recurring pain and discomfort with a contribution to the requirement for surgery in his cervical spine.

Lumbar spine

48. Dr. O'Keeffe's examination on 22 May 2023 led him to give evidence that the plaintiff in May 2023 could forward flex his lumbar spine to about 70 degrees from the ground as opposed to an optimum of 90 degrees. Dr. O'Keeffe agreed that the plaintiff "has the vast majority of what he needs in relation to straight leg raising and that he has no neurological deficit".

49. The essence of the plaintiff's complaint in this anatomical area is that he has lumbosacral pain "which he did not have on a daily basis" before the collision. Nevertheless, it is readily apparent that the plaintiff can walk and drive distances in addition to the activities shown on the surveillance videos.

50. Mr. Sattar at this outpatient clinic on 8 June 2022, met the plaintiff as arranged by the plaintiff's solicitors; Mr Sattar listed the plaintiff's complaints. Significantly "neurological examination showed good range of cervical spine and lumbar spine movement". No medical procedure other than pain management was recommended for the plaintiff's lumbar spine by his treating doctors. The plaintiff attended a Dr. Fitzgerald who is a pain management specialist in April 2019 but Dr. Fitzgerald did not give evidence. The plaintiff in reply during cross examination on 14 December 2023 told the Court that he had agreed with Dr. Fitzgerald "to continue with the home exercise and not taking (sic) any injection, or something like that".

51. As the Court explains under the heading "causation", the effect of any of the collisions on the plaintiff's lumbar spine is quite limited.

Psychiatric

52. Dr. Ann Leader, Consultant Psychiatrist gave evidence on 30 January 2024. She did not know before then that these proceedings had originally been listed for trial in October 2021. She was not aware of the circumstances giving rise to the requests to her from three different sets of solicitors for the plaintiff to examine and report on the plaintiff's condition. Dr. Leader discounted a diagnosis of post-traumatic stress disorder **("PTSD")** until her last of three consultations with the plaintiff on 26 February 2023. Prior to 2023, Dr. Leader had concluded that the plaintiff was "suffering from an adjustment reaction to chronic pain and disability associated with anxiety and depression symptoms".

53. The issue under this heading is whether the plaintiff has satisfied the Court on the balance of probabilities that he is suffering from PTSD. The evidence of Dr. Patrick Devitt (consultant psychiatrist) who had examined the plaintiff on 30 May 2023 followed the evidence given by Dr. Leader on 30 January 2024.

54. Dr. Leader fairly pointed out that she relied only on the plaintiff for his medical, psychological and psychiatric history. Dr. Leader was guided by the plaintiff in relation to facts which led her to change her diagnosis in 2023 to PTSD. Significantly, the plaintiff had omitted to inform Dr. Leader about his self-harm attempts prior to arriving in Ireland. Dr. Leader in cross examination stated that this was a "very relevant part of his history". Dr. Leader also acknowledged in cross examination that there had been no sign of symptoms for PTSD such as "hypervigilance, anxiety, intrusive thoughts or flashbacks" for years after the collision.

55. Dr. Leader stressed that the plaintiff is deeply traumatised and a man "without hope". In her final answer to the Court, Dr. Leader opined that the plaintiff "must have been traumatised by what happened" in his home state.

56. Dr. Patrick Devitt's observation of:-

> "…if you repeat something often to yourself, you begin to believe it and you'll probably persuade other people of it" was quite apt.

He discounted a "psychosomatic component" to the plaintiffs' complaints and suggested using the "medically unexplained symptom" term. Dr. Devitt identified a number of inconsistencies in the account of the plaintiff to him and also after viewing his walking and posture. The plaintiff curiously referred to a Law Society notice of practice about the role of the independent medical examiner during the consultation with Dr. Devitt.

57. It was unfortunate that the plaintiff took upon himself research into areas of medical and legal expertise because it became ever more apparent as the trial meandered to its conclusion, that the plaintiff was unable to assimilate a perspective other than his own regarding the proceedings and his physical, psychological and psychiatric condition. As already found under the s. 26 issue, the Court has not been satisfied that the plaintiff consciously sought to mislead the experts and this Court. Likewise, the plaintiff has failed to satisfy this Court that he is now suffering from PTSD as described by Dr. Leader for the first time in 2023.

<u>Causation</u>

58. Underlying progressive degenerative changes with their effects (past and future) on the plaintiff's condition permeated the evidence and opinions adduced at the trial.

Neck

59. Mr. Sattar and Mr. David O'Brien, Consultant Neurosurgeon, did not differ substantially on the existence and extent of degenerative changes. The C6/C7 fusion

procedure is a fact and there is a consensus now that the decision to perform same need not be questioned by the Court. A decision by a treating neurosurgeon to undertake a fusion may not have been made by another neurosurgeon. However, the Court in these proceedings concerns itself solely with the pain, treatment and prognosis which may be attributed to any or all of the collisions.

60. Mr. Sattar told the Court that the neck is the area which is most likely to have been impacted by the collisions. Mr. O'Brien who examined the plaintiff once only on 18 August 2017, about five months after the third collision and six months before the fusion, repeated on 31 January 2024 his report's conclusion:- "This gentleman's [the plaintiff's] symptoms are bizarre and disproportionate to the [first collision]. Whilst I take on board he has had two other accidents and the information hasn't been provided to me, the symptoms are inconsistent, unusual and atypical and I think it reads to a big psychosomatic component".

61. Mr. O'Brien agreed that the difference of opinion between him and Mr. Sattar which is relevant to this Court's decision, boils down to whether degenerative change is causing pain in the plaintiff's cervical spine. Mr. O'Brien from his examination in August 2017 and the radiological findings opines that the plaintiff is not suffering pain in his cervical spine arising from degenerative changes.

62. Counsel for the defendants correctly submit that the onus of proof rests with the plaintiff to attribute causation to the collisions on the balance of the probabilities.

63. Professor Peter McMahon, Clinical Professor in Radiology at University College Dublin and a specialist in emergency trauma and musculoskeletal imaging reported in January and June 2023 to the solicitors for Mr. Birney on available MRI scans. His view was that "there is no substantial progression in the degree of disc disease at other levels in the [plaintiffs] cervical spine when compared to 2015". He had earlier opined in his last report of 2 June 2023 that the plaintiff has longstanding bony change and described it as "degenerative

in aetiology". The Court found his evidence illuminating for the discussion about degenerative changes and whiplash type injuries. When questioned on 31 January 2024 about the absence of imaging for the cervical spine given the neck complaints, he agreed with counsel that it is "definitely true" that symptoms can build up over time. He elaborated that typically with accidents there are immediate symptoms but it is possible "that they build up over time but you wouldn't expect more than a few weeks to go by before symptoms start to present". The plaintiff's car suffered impacts and whiplash type injuries in those circumstances are commonplace. The evidence of the treating neurosurgeon, Mr. Sattar is not discounted by the Court. Mr. Sattar helpfully clarified that the symptoms arising in the plaintiff's cervical spine could on the balance of probabilities have occurred without the collisions. He also said that the current symptoms will last for the rest of the plaintiff's life. Thankfully the fusion procedure has benefited the plaintiff.

64. The fact that the relevant investigations and fusion procedure followed the collisions cannot be ignored. Whiplash type injuries commonly exacerbate underlying degenerative conditions. At the same time, there is some consensus that the plaintiff was going to suffer symptoms irrespective of the collision. The Court therefore attributes some past symptoms in the cervical spine area to the collisions. The Court has not been satisfied that future symptoms have been caused by the collisions.

Lumbar spine

65. Mr. Sattar's view that the plaintiff would on the balance of probabilities have had pain in his back causes little controversy. Mr. O'Brien summarised by stating that the collisions cumulatively did not cause significant structural or long-term damage to the lumbar spine. In short despite the plaintiff's subjective conviction, the medical evidence does not attribute his past and continuing lumbar spine symptoms to the collisions.

Loss of earnings/loss of opportunities

66. Enough has been written already in this judgment about the plaintiff's inability to understand the irrationality (objectively speaking) of his claim for loss of earnings other than to explain that the discussion about the cause of his complaints underscores the Court's view that his claim for loss of earnings should be dismissed. The care with which Mr. Dennison (vocational consultant) undertook his task is not underestimated. However, there was no basis other than the plaintiffs dream and hopes, to have embarked on investigating and reporting on a loss of earnings claim.

67. Despite the chances given to the plaintiff during the management of the trial, he did not adduce evidence from any person other than himself about the availability or loss of work opportunities since 2014.

Special damages

68. The remaining special damages claim were agreed at €3,050.

General damages

69. "The General Guidelines as to the amounts that may be awarded in personal injury claims" apply in these proceedings. The Court does not slavishly follow the guidelines but applies them when seeking to incorporate the principles of proportionality and reasonableness to all parties.

70. The Court views the principal injuries sustained in the collisions as described above as falling within the "moderately severe" whiplash soft tissue injury category. The plaintiff was a particularly vulnerable victim as each collision occurred. The defendants cannot be blamed for the ill-conceived notions of the plaintiff about what might be recovered through the three sets of proceedings. Nevertheless, the Court takes account of the trauma and upset caused by the collisions through no fault of the plaintiff. The series of collisions was not good for his wellbeing. On the other hand, the defendants acted reasonably after the collisions and the plaintiff has failed to satisfy the Court that they are liable for his current

condition and complaints. The plaintiff's persistent pursuit of the unachievable through litigation may be the root of many problems but the Court need not make any such finding because the plaintiff has not satisfied the Court as described. Having regard to all the circumstances including the immediate after-effects from each of the collisions such as short-lived pain in his thoracic spine and chest with discomfort and sleep disturbance, the Court awards €50,000 in general damages to be paid on behalf of all of the defendants in the manner to be particularised in the order of the Court after hearing further from counsel for the defendants.

Costs

71. There were several applications made in these three sets of proceedings by the defendants in respect of costs which were incurred as a result of adjournments and case management issues and those applications were deferred to after delivery of judgment. Further, parties may take a view about the necessity to have had particular days for the hearing of modules in the trial. The Court directs the defendants in each of the proceedings to furnish, within three weeks after the electronic delivery of this judgment, to the solicitors for the plaintiff, the terms of a proposed order with a schedule setting out dates and times as may ease future references to the order. The Court will not adjudicate on quantum of costs but it wishes to ensure that a complete and clear order for the adjudication of costs will be made by the Court. Within two weeks of receipt of that proposed order in soft and hard copy, the solicitors for the plaintiff are directed to return that order with any proposed changes duly tracked along with brief submissions as end notes to support those changes. Within a two-week period of receipt of that proposed order with tracked changes, the solicitors for each of the defendants are directed to file in Court and serve a copy on the plaintiff's solicitors, of the inter partes communications in chronological order up to that last-mentioned two-week period concerning the issue of costs in an indexed and paginated booklet. The Court will list

these proceedings for a hearing to finalise the terms of the orders to be perfected at 10:30a.m. on 10 December 2024 in all three sets of proceedings. If the parties agree on the terms of final orders in one or other of the proceedings before that date, the Court will sit to make the order or orders agreed subject to obtaining a date and time from the Registrar in advance.

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