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Judgment: approved by the Court for handing down | *Delivered:* **16/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2003 No 6118

BETWEEN:

MICHELLE FEENEY

Plaintiff

And

TYCO HEALTH CARE (UK) MANUFACTURING LIMITED

Defendant

GIRVAN LJ

[1] The plaintiff who was born on 24 February 1971 sustained injuries to her left wrist in February 2001 when she was employed by the defendant, a company involved in the production of medical and health care equipment. In the course of her employment she was required to remove a bag of syringes from a trolley stacked high with such bags. While doing this job a bag containing 5,000 syringes fell off the trolley. When trying to prevent the bag falling on her she suffered injuries to her left wrist which gave rise to the present claim. The defendant admits liability and no issue of contributory negligence arises.

[2] When the bag struck the plaintiff's left palm her left wrist was forced into hyper-extension. The next day her wrist was very painful. According to the history she gave to Mr Brian Dane FRCS was still experiencing pain two weeks after the accident. When she attended her GP she complained of pain in the left wrist, pain extending to the fingers of her left hand and pain

extending up her left arm towards the elbow. She attended at the Accident and Emergency of the Causeway Hospital where she was informed that she had no bony injury. When she attended the fracture clinic in March 2001 she was advised to wear a removable type of wrist splint. She did so for a month but found it unhelpful. She was referred to Mr Laverick in April 2002 and then was seen by Mr Maginn in March 2004.

[3] Mr Dane in his report of 5 June 2002 noted that she complained of episodes of pain at the site of the injury with pain occurring once or twice a day. These bouts of severe pain only lasted for a few seconds when rotating her forearm. She complained of occasional numbness involving the little finger of the left hand. She was taking Ibrufen pain killers usually about three times a week to relieve residual pain in her left wrist. Mr Dane found normal movements in both wrists. He noted an abnormal prominence of the head of the left ulna bone, suggesting a partial dislocation. In a supplement to his report after reviewing the clinical and radiological findings Mr Dane noted that she attended at the Accident and Emergency on 13 March 2001 with a referral letter from her GP which noted a full range of movements and a very prominent distal head. At the Accident and Emergency Department no bony tenderness was found and a full range of movements was noted in the wrist. At a subsequent referral to the fracture clinic she was noted to be doing well but was still getting pain on and off. She had good function in the wrist.

[4] In due course the plaintiff was referred to Mr Maginn FRCS who saw the plaintiff on 18 May 2004. By that stage the plaintiff, who had returned to work after the accident, had been off on maternity leave since 18 April 2003 and had not returned to work. The plaintiff at this stage was complaining of deterioration in her wrist symptoms. She reported continuous pain on the ulnar side of the wrist and she claimed to be limited in what she could do with her baby, saying that she was unable to lift the child as it gained weight and she had difficulty doing housework. Mr Maginn found full wrist movements and full rotation. The plaintiff was complaining of numbness and tingling of the little left finger. An MRI scan showed a dorsal subluxation (dislocation) of the distal ulna and a full thickness perforation of the triangular fibro-cartilage, this latter feature probably being the result of degenerative changes rather than attributable to the accident. Mr Maginn suggested surgical reduction and stabilisation of the distal radio ulnar joint involving a tendon graft from the left forearm. This procedure was due to be carried out on 1 April 2005. It involved freeing a tendon from the forearm and using it to reconnect the ligaments of the distal radio ulnar joint looping through bones via drill holes.

[5] When seen by Mr Maginn post-operatively on 31 January 2006 he found that the ulnar head sat in a reduced position and that there was no tenderness. He found a 5 degree lack of flexion in the left wrist, full supination and a loss of 10 degrees in pronation. Movements were pain free

and she had a good grip and normal sensation. She complained of being still sore with pain if the wrist was moved suddenly. Mr Maginn in his report of 31 January 2006 pointed out that one would usually have expected her pain to have improved following stabilisation surgery and one would not expect to see such a constant level of pain. In his subsequent report on 7 August 2007 he recorded continued complaints of a high level of pain in the wrist but he noted no limitation of wrist movement. It was her complaint of pain which she claimed to be increased by lifting weight that prevented her from returning to normal activities. When seen again on 9 October 2007 the plaintiff claimed to be getting no relief from the pain. She also complained of numbness this time in the middle finger as well as the small finger and claimed to be taking high dosages of painkillers. Mr Maginn noted full extension, slight reduction in flexion, a good grip and no muscle wastage or motor weakness in the left hand. An MRI scan did indicate excess fluid in the distal radio ulnar joint. Mr Maginn thought that "for whatever reason she will be left with continuing pain around the wrist" but he did not expect deterioration of the symptoms. A year later on 2 October 2008 at a time very close to trial Mr Maginn noted that she claimed to be very sore and was not getting any relief from pain. She told him that she occasionally splinted the wrist when it was very sore but did not want to rely on the splint. He noted at most a point 5 centimetre wasting on the left arm which he did not consider significant and no muscle wasting or weakness in the hand. Her grip was good.

[6] Mr Calderwood FRCS who advised the defendant in relation to the plaintiff commented when he saw her in December 2004 that he had difficulty in accepting a complaint that the wrist would become very painful turning over clothes when ironing. He did accept that there was some evidence of muscle wasting in the left arm pointing to a reduced use of the left forearm. The plaintiff did not mention numbness of the fifth finger. Mr Calderwood found that flexion of the left wrist was 30 degrees giving pain compared with 90 degrees pain free on the right hand. Extension of the left wrist was 40 degrees giving pain compared to 90 degrees pain free on the right hand side. These results were significantly different from Mr Maginn's finding around the same time. Mr Calderwood said that he saw her again on 30 October 2007. She was complaining of continuing pain and had limited use of the left wrist, was unable to lift readily and wore a splint "most of the time". This is to be compared with what she told Mr Maginn whom she informed she wore the splint "occasionally" but did not want to depend upon it. She complained of numbness in the ring and little finger of the left hand but examination did not show any wasting of small muscles indicating ulnar nerve lesion. Mr Calderwood found it difficult to explain these complaints though there may have been post operative irritation of the ulnar nerve. Mr Calderwood stated it was difficult to give a reasonable explanation for the discrepancies in the examination findings on the left wrist and what was found in the records

from Musgrave Park Hospital, Mr Maginn's examination of the plaintiff and his own examination.

[7] Dr Phang, a Consultant Neurological expert, examined the plaintiff on 28 May 2008. He found the left ulnar sensory and motor conductors to be well within normal range and there was no asymmetry when compared to the right side. The results showed no evidence of any significant ulnar nerve lesion at the left wrist and elbow and no evidence of any significant median nerve entrapment at the wrist. He pointed out that sensory touching with light touch and pin prick produced subjective results, a point to be born in mind when considering the plaintiff's claim to altered sensation in the little left and ring fingers.

[8] Dr Philip McCrea, an occupational health consultant, carried out an assessment at the request of the company on 25 April 2006 and 10 months after surgery. The plaintiff complained to him of the constant pain she suffered exacerbated by lifting anything including a carton of milk. She said she required extensive use of painkillers. He found a significant decrease in the range of movements of the left wrist by a factor of 35% at that stage. Dr McCrea did not consider her capable of normal duties with respect to her employment and did not foresee an early return to work. When seen by in October 2006 the plaintiff claimed she was getting worse. Being pregnant again she had to reduce her use of painkillers. She bathed her left wrist in hot water to soothe the pain. Dr McCrea noted an improvement on the range of movements in the left wrist. The grip had not improved compared to previous assessments and was at a level of 50% of the grip measured on the right hand. He noted that the plaintiff claimed to be wearing a splint for prolonged periods but Dr McCrea considered that immobilisation in the splint could be a potential factor in relation to the persistence of pain. The plaintiff said that she would return to work if the pain levels were significantly reduced. When seen by Dr McCrea on 19 November 2007 she said she was wearing the splint for three hours with a one hour break in between. She continued to complain of significant pain on the left wrist, was unable to cook, do housework, shop or drive. Dr McCrea's grip test revealed a reduction in the grip on the left hand of about 40% at that stage. He accepted that grip measurements can be subjective and even using a grip dynamometer a person may provide a false reading. Dr McCrea concluded that the plaintiff remained unfit for normal duties for the foreseeable future.

[9] The plaintiff was also seen in May 2008 by Breda Jamison, an Occupational Therapy Consultant, who prepared a disability case report. She found movements reasonably good with the plaintiff having full extension and only slight reduction in flexion. She had full supination but lacked 30 degrees in pronation. She noted no muscle wasting and she had reduced sensation to the ulnar aspect of the palm of the hand and the fourth and fifth finger. The plaintiff claimed to be unable to drive long distances "because the

arm goes into spasm which is very painful." She claimed only to drive for short distances. The plaintiff claimed to be unable to hold comfortably an onion, carrot or potato to peel or cut.

[10] An analysis of the medical evidence demonstrates a number of significant differences in the plaintiff's description of her conditions as given to different medical experts. In demonstrating the reductions in risk movements to Mr Calderwood in 2004 who was advising the defendant she demonstrated tenderness over the dorsal medial and palmar aspect of the distal ulna, a moderately reduced grip, a fair degree of pain and significant limitation of pain and extending the left wrist. When seen by Mr Maginn in May 2004 she had full wrist movements. The pain she was describing to Mr Dane in June 2002 was episodic occurring about twice a day. If her evidence is correct there appears to have been a marked deterioration in the amount of pain she referred to when seen by Mr Maginn in May 2004, particularly when lifting things. But she had a full range of movements when seen by both Mr Dane and Mr Maginn preoperatively. In the period 2006 to 2007 she appeared to Mr Maginn to have a good grip and movement. To Mr Maginn she said her use of the splint was occasional but she claimed to Mr Calderwood that she wore the splint most of the time. To Dr McCrea in 2006 she demonstrated a significant decrease in the range of movements in the left hand wrist and claimed a deteriorating level of pain. To Mr Calderwood and Dr McCrea she revealed a reduced grip, moderately reduced in the case of Mr Calderwood with a significant reduction in the case of Dr McCrea at times when Mr Maginn was finding a good grip.

[11] In her own evidence Mrs Feeney accepted that she continued to work after the accident until she stopped in May 2003 when she took maternity leave. She did not return to work since then though she has had three pregnancies in a five year period. She claimed that she relied on assistance from the staff members in the defendant company when lifting heavy bags. Mr Birkenshaw, the production manager in the defendant company who had ultimate responsibility for supervising production on the work line, said he saw no evidence of this and would have been aware of that occurring. Other members of staff would not tolerate doing somebody else's job. While it is possible that on occasions the plaintiff did ask for some assistance if she was suffering from one of the occasional episodes of pain which she described to Mr Dane I do not accept that this was something which routinely happened. Fellow workers may be willing to occasionally help a workmate out but I accept Mr Birkenshaw's proposition that they would not routinely do the work of a colleague who was being paid for the work. It is clear that the plaintiff did continue to carry out her job until she went off on maternity leave and that she must have been able to do so without undue difficulty. In view of the way in which she described her symptoms to Mr Dane this would not be surprising.

[12] In giving her evidence relating to the problems with the wrist the plaintiff said that the pain got worse after the operation. She painted a picture of a searing pain which she described as like a knife in her wrist. She described wearing a splint for hours at a time, taking if off frequently to bathe it in hot water but putting the splint back on again. Her description of the use of the splint was quite at odds with the way she explained the use of it to Mr Maginn. The numbness she described as suffering from extended to three fingers the little ring and middle fingers on the left hand, again a version of events that did not tally with what she told the other medical witnesses. According to the plaintiff her injury resulted in her being unable to do ordinary household tasks like ironing, vacuuming cleaning, lifting things or lifting her children and she painted a picture of being dependent on her mother in law for many routine things around the house and in relation to looking after the children.

[13] In view of the clear conflicts and discrepancies of the various medical assessments and in view of the ready acceptance of the medical witnesses and the occupational therapist that much depends on the accuracy and veracity of the plaintiff's description of her problem and symptoms it is necessary to consider the plaintiff's evidence with care and caution. Observing her giving evidence I formed the clear impression that she was exaggerating her complaints. It must be recognised that whether a person is suffering pain internally or not may not be readily ascertained from the exterior appearance of the individual. However, I noted in the plaintiff, in her body language and in her facial expressions revealed nothing indicative of continuous knife-like pain in her wrist. She appeared in court wearing her splint which she could remove without difficulty or apparent genuine discomfort. Her wrist movements appeared to be free and this was borne out by the medical evidence. The extent of the grip which she demonstrated displaying lifting a relatively small water carafe in the witness box appeared to be deliberately weakened by the manner in which she carried out the exercise. While one must be cautious to decide a case in reliance on a witness's actions in the witness box what can be said is that the plaintiff's actions and her performance in the witness box confirmed the view which could be formed from a consideration of the medical evidence that she was not a frank or fully honest witness or historian as to the true nature and extent of her injury. She has not persuaded me that on a balance of probabilities she suffers either the degree of pain and discomfort or the physical difficulties she claims to suffer. I am satisfied that she has exaggerated the extent of the wrist problem and the extent of the problem in relation to her ability to carry out daily chores or to carry out ordinary work.

[14] Once the credibility of a plaintiff has been seriously damaged as a result of apparent exaggeration and distortion, however, it is difficult to determine where exactly the truth lies. One must try as best one can to form an objective picture of where that truth probably lies. Clearly in the aftermath

of her accident she was able to continue work. The nature and extent of the subluxation of the wrist pointed to a wrist injury that was not insignificant. The wrist was misshapen and it could be expected that there would be some pain. She described the pain as episodic and of limited duration. The injury did not prevent her from doing her job although, as I have accepted, on limited occasions she may well have asked for help. It is significant that she continued to work up to the commencement of paid pregnancy leave and the fact that she continued to receive pay for a period of time while off work due the alleged risk problem after giving birth may be significant. To continue to draw remuneration while being able to stay at home with a new baby could have its attractions for somebody who might well prefer to stay at home with her baby. After payment stopped the plaintiff thereafter received incapacity benefit based on her wrist complaints giving her a tax free income of £102 compared to a wage of £190 with her employer. These financial arrangements in her family circumstances provided her with a financial cushion which might lead her to exaggerate her condition. The operation which Mr Maginn carried out was intended to improve the appearance of the wrist which it did and reduce any residual discomfort. His experience apart from this case and that of another litigant led him to conclude that the situation would be improved and residual problems reduced. The outcome achieved on the plaintiff's case led to deterioration in her problems, led to increased pain which she claims now to be constant and has reduced her grip and lifting ability significantly. If she is correct, she could not now do the job that she could do after the accident and before her maternity leave. While the medical experts framed their reports and evidence in such a way as not to accuse the plaintiff of deliberately falsifying her complaints it is obvious that Mr Maginn and Mr Calderwood were extremely surprised that the outcome of the surgery was so bad. To this must be added the objective evidence that there is no neurological evidence explaining the pain. Standing back and reviewing the evidence as a whole I conclude that the plaintiff does not suffer from pain and discomfort of anything like the degree she alleges. Her continued use of the splint for long periods, if true, may itself exacerbate any underlying residual discomfort. The plaintiff may have exaggerated to herself the extent of her discomfort and created in her own mind a greater problem than objectively exists. The continuation of the litigation process may have contributed to this state of mind. She underwent surgery to correct the bony dislocation and that involved six weeks of Plaster of Paris and all the discomfort associated with that and the operation. She must have genuinely had a degree of discomfort in the wrist that led to her deciding to undergo such surgery. It must be accepted that she had a level of on going discomfort sufficient to lead her to agree to undergo the operation. I conclude on a balance of probabilities that the operation did result in some improvement to the wrist. It resolved any bony dislocation problems and it was unlikely to lead to a marked increase in pain in the wrist though I am prepared to accept that she has from time to time had discomfort. A refusal to properly use the wrist and over reliance on the splint may be contributing to the continuation

of the problem and to a weakening of the wrist but that is not something that can be visited on the defendant.

[15] I conclude that the injury falls within parameter (c) of paragraph (H) of the Guidelines for the Assessment of Damages in Personal Injury cases dealing with wrist injuries. This is a category which relates to less severe but still permanent disability as e.g. persisting pain and stiffness. This section follows (b) which refers to an injury resulting in significant permanent residual disabilities. The range for (c) falls between £15,000 and £36,000 according to the Guidelines, which of course must be read in a broad way. I consider that the proper level of general damages is £30,000 taking account of (a) the degree of residual pain and discomfort, (b) having regard to the need to undergo the surgery of intervention which she did and (c) the possibility of some further treatment.

[16] The plaintiff in addition claims financial losses including loss of earnings past and into the future and care costs which have been assessed by Mrs Jamison who formulated various potential claims for care provided to the plaintiff herself and her mother in law and husband and child care costs representing the costs carried out by the plaintiff's mother in law in helping to do chores in relation to the babies such as changing nappies, lifting them in and out of high chairs, bathing them and so forth. There is also a minor claim for some items such as special bottle openers, cooking utensils and cordless kettle tipper. Having regard to the conclusions which I have reached in relation to the true extent of the plaintiff's injury and disability I conclude that if she had wanted to she could have returned to work after her maternity leave. Her job at Tyco will disappear because of redundancy in early 2009 but the true nature of the injury as I have found it to be will not go against her in the labour market to any real extent. Accordingly, I am not satisfied that she has made out a valid claim for loss of past and future earnings. In relation to the care claims the figures claimed are unrealistic and assume a serious level of incapacity which I have concluded she does not suffer. As Mr Ringland QC argued, such care costs are essentially subrogated claims with the plaintiff being under a duty to account for the award to the providers of the care. The plaintiff must show a real intent to repay the monies to the providers of the care. Even if this level of care was provided by her mother in law the plaintiff adduced no evidence of an intent to pay any recovered sum to her and her mother in law was not called to give evidence either in relation to the extent of the work that she carried out or in relation to her expectation of being paid. I can accept that the mother in law who lives in the same household may assist the plaintiff with child care and doing chores around the house but the evidence falls short of persuading me that this would truly additional work over and above what could be expected in the domestic arrangements prevailing in the household. Accordingly the plaintiff is not entitled to damages in respect of that nor have I been persuaded that she has a valid claim in respect of loss of earnings in the past or for the future. In view of the

conclusions which I have reached in relation to the extent of her disability I consider that she was in a position to return to work after completion of her maternity leave. In the result the plaintiff would be entitled to judgment in the sum of £30,000 and I will hear counsel on the question of interest and costs.