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Judgment: approved by the Court for handing down

Delivered: **26/05/2006**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERT McMULLAN

Plaintiff/Respondent

and

COLERAINE FOOTBALL AND SPORTS CLUB LIMITED AND SANDEL BUILDING COMPANY

Defendants/Appellants

Before: Nicholson LJ, Campbell LJ and Sheil LJ

NICHOLSON LJ

[1] This is an appeal from the judgment of Higgins J whereby he awarded to the plaintiff, who is the respondent in the appeal, the sum of £75,000 for general damages together with the sum of £1,000 for special damage agreed by the parties.

[2] The plaintiff who was born on 9 March 1951 was involved in an accident at Coleraine Football Club on 30 June 1999. He was with another man, Patrick McGowan. They had been lifted up in a cradle attached to a crane in order to erect advertising hoardings or billboards on top of one of the main stands of the football club when the cradle became detached from the crane and crashed onto the concrete steps. He managed to crawl out of the cradle and shortly afterwards became unconscious. He fell from a considerable height but the actual distance was never proved. Liability for the accident was admitted by the defendants.

[3] He sustained two major physical injuries and a psychiatric reaction. The pleading of the personal injuries is not worded happily. We consider that the phrases "will sustain loss and damage" and "The plaintiff is subject to review", together with the details contained in the particulars of personal

injuries, put the defendants on notice of a claim for future pain and suffering confined to his chest and liver and risk of herniation and adhesions.

[4] We propose to deal with the physical injuries in turn, starting with the injury to the liver. It was described by the judge in his careful judgement as follows:-

> "He also suffered serious lacerations or a fracture of the right lobe of the liver … Emergency surgery was necessary in order to save his life. That involved an exploratory laparatomy, his gallbladder was removed and his liver was subsequently encased in a special absorbable synthetic mesh to allow healing process … he … developed a `subphrenic abscess'. The further treatment involved the insertion of a drain and catheter with a bag … the drain was subsequently removed on 30 September … He remains at risk of adhesion formation, probably about ten per cent with a requirement for surgery if such adhesions were to arise. He is also at risk of a hernia, probably eight to ten per cent with a possibility of surgery if such hernias were to arise. He claims he is still in pain, particularly on his right side … He has very significant scarring on … his abdomen and his side …
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> The plaintiff suffered a severe injury to his liver which was life threatening … this was a most unusual injury for a personal injury claim. It is more usually associated with a fatal accident claim. Not surprisingly the guidelines for the assessment of general damages in personal injury cases makes no mention of injuries to the liver. Mr Ringland submitted that this type of injury should be comparable to an injury to or removal of the spleen."

The judge rejected this comparison and we endorse his rejection. If an attempt was to be made to compare one with the other Mr Ringland should have cross-examined Mr Diamond FRCS, the expert called by the plaintiff on this aspect of the case. He did not do so. We find no assistance in valuing this injury by reference to awards for loss of the spleen.

The judge continued:-

> "The liver … is the largest gland in the body with a multitude of functions including the formation of bile, the metabolism of carbohydrate fat and protein, the formation of erythrocytes, the symbiosis of plasma protein and the processes of detoxification. I have taken the liberty to look up the medical definitions in respect of those organs [the liver and the spleen] in view of the comparisons which were put to me by Mr Ringland. Life is not possible without the liver. I regard it as an important organ of the body and more important than the spleen … The liver is perhaps more akin to the kidney but at least there are two of those in the body. As well as the damage to his liver the plaintiff also had his gall bladder removed. He has made a good recovery from the injury to his liver but there is a risk of adhesion formation and hernia to which I have referred, albeit at the lower end of the range. The risk of adhesion formation in my view is much more significant than the risk of hernia. Overall I consider the injury to his liver to be a very serious and life threatening injury as was agreed by the doctors …"

[5] Mr Ringland sought to criticise the judge for looking up "the medical definitions" in respect of the liver and the spleen. We reject this criticism. What he did was not in any way contentious and did not involve research which might have required to be tested in court. Although the function of the liver and the kidneys are more comparable than liver and spleen, we have not found much assistance from a consideration of cases involving the loss of a kidney. Liver injuries seem to stand apart and we have not been directed to compensation for injuries to the liver (which were not fatal) in any jurisdiction.

Whilst the trial judge has many advantages over the Court of Appeal, he is dependent on his note of the evidence, whereas the parties can point to specific answers in the transcript which he may not have had the opportunity or time to record in full.

[6] Mr Diamond FRCS has a specialist interest in hepatobiliary, including liver, surgery. He was the main medical witness called on behalf of the plaintiff. We do not have a transcript of the evidence of the general practitioner who was also called as a witness. Mr Diamond stated in his evidence-in-chief that it was very difficult to be dogmatic but the risk of

adhesions was perhaps in the order of 5-10%. Mr Ringland QC then cross-examined and asked the following question:-

> "My understanding of it is that the research papers in this field strongly suggest that the majority of those people who are going to fall foul of that risk do so within the early stages after surgery in the first couple of years', is that fair?"

Under our adversarial system, had counsel for the plaintiff objected, the judge would probably have disallowed the question. The comment was misleading.

[7] Mr Diamond answered:- "I would agree with that, yes" and, having been told that Mr McMullan had had no adhesions in the 5 to 6 years since he had last treated Mr McMullan, agreed that the highest risk period had gone, agreed that the risk factor had reduced significantly and that he had a small and definite risk, clearly significantly less than 5-10 per cent. He was not re-examined.

[8] Had he been re-examined by reference to the reports of Mr R J Maxwell FRCS in which the principal research paper was summarised it is difficult to believe that he would have adhered to the answers given in cross-examination. He would have seen that the research showed that one-fifth of patients are re-admitted to hospital within the first year after surgery and the remaining four-fifths of patients are re-admitted at any time in the next 9 years. The risk for them does not diminish with time. Mr Maxwell referred to a 10 per cent risk of incisional hernia over Mr McMullan's lifetime which is not in dispute. His assessment of the risk of adhesions more than one year after treatment in hospital was 8-10 per cent and of operation at 5-7 per cent that is to say, operation for adhesions as distinct from conservative treatment in hospital. On examination in December 2004, over 5 years after injury Mr McMullan gave a history of an acute onset of severe crampy abdominal pain, the abdomen felt bloated and he vomited. Mr Maxwell reiterated in his second report his estimate of the lifetime risk of incisional herniation to be upwards of 10 per cent. He considered that the risk of adhesive obstruction remained in the order of 8-10 per cent and of requiring an operation to be 5-7 per cent and that this was possibly an underestimate. He referred to the relevant literature and research to which we have had access.

[9] But, of course, he was not subject to cross-examination as he was not called as a witness and Mr Diamond was not asked to comment on the history of abdominal problems which Mr Maxwell obtained.

[10] Mr O'Donoghue QC for the plaintiff accepted that the evidence was that there was a small significant risk of abdominal adhesions significantly less than 5-10 percent.

[11] The judge had assessed the risk of adhesions at 10 per cent and the necessity for surgery at 10 per cent. This finding was probably made because he did not have access to the transcript. We consider that we must act on the views expressed by Mr Diamond.

[12] The plaintiff had unpleasant scarring which was not shown to us. It is described in a plastic surgeon's report of 23 January 2001. The judge inspected the scarring. Mr McMullan had multiple fractures of the right fifth to seventh ribs together with an associated pneumothorax, treated with a chest drain. Twenty months after the accident Mr McMullan was complaining of continuing pain in the right side of the chest. Air entry at the right lung base was diminished in comparison to the left.

[13] Mr McMullan complained in December 2004 that he had pain in his back, chest, right elbow and right leg and had treatment from Dr Ron Cooper, a specialist in chronic pain control, but there was no report from Dr Cooper.

[14] Then there was the psychological damage recorded by Dr Michael Curran. It was unfortunate that a decision was taken not to disclose his second report in November 2003. But the fact remains that in May 2000 he told Dr Curran that he could not summon up the interest to watch television programmes, especially boxing matches and had tried to withdraw away from everybody, not having the same degree of closeness to his children or wife as he had and lacked energy or motivation to do the simplest things. His sleep was poor and he usually only got two to three hours per night, wakening up three or four times a night. He had morbid dreams and suffered from alopecia. He was reluctant to go swimming because of his scarring. Dr Curran diagnosed an adjustment reaction with lowered mood secondary to slow resolution and recovery from physical injuries and a persistent impairment of sleep. He appeared depressed. On further examination in November 2003, Mr McMullan complained of quite severe pain on the right side of his body and discomfort in his right arm. He was due to go to the pain clinic at Coleraine Hospital for an epidural and his sleep remained broken with occasional flashbacks and nightmares. He slept apart from his wife and had no interest in intimacy. We comment that there is very little of this in the pleadings of personal injuries. He led a very aimless existence spending most of his time in the house. The patches of alopecia were less obvious. In the mornings he generally felt unrefreshed and fatigued.

[15] Dr Curran gave evidence to the court about the loss of interest in boxing and in going to Coleraine Football Club where he sustained his injuries. We did not gain assistance from the cross-examination of Dr Curran. We have read Dr Fleming's report. The judge described the adjustment reaction as "in the scale of such reactions a modest one".

[16] The plaintiff gave evidence, in the course of which he stated that he could not take any severe painkillers because he would hallucinate, become feverish and very sick. He complained to his doctor about the pain on his right, on his rib cage and on his chest. The pain was described as like a sharp toothache, whereas the rheumatoid arthritis was a very stiff dull pain. The pain in his side was like a sharp gnawing pain for which he took co-codamol but could not take anything else as he vomited up anything else together with what he had eaten. He told the court that he had been to faith-healers, acupuncturists and Chinese practitioners in relation to pain. He had been to a hypnotist and tried everything to relieve pain about his rib cage and his side. He was sent by his GP to the pain specialist, Dr Cooper, but the course of tablets prescribed made him violently sick. He said he had pain from morning to night and most nights he got out of bed 2 or 3 times. He used to have a great interest in boxing but now had lost interest because he was not fit to do anything with the young boxers. He had not swum since the accident and had not gone to a football match since the accident. He had no interest in anything since the accident.

[17] Mr McMullan said that he got sore and crabbed and agitated and his oldest son had moved out of the house because of his bad temper. He told the court that he had been in considerable pain during the course of the trial. He was waiting to go back to see the pain specialist, Dr Cooper, in Coleraine. He took about 100 tablets a week since the accident. We did not gain assistance from the cross-examination of the plaintiff except to admire the forbearance of the judge with counsel.

[18] The judge was in the best position to assess the plaintiff and he summarised the plaintiff's evidence at paragraphs 1 to 3 of his judgment. He stated that there may have been some exaggeration and a degree of confusion. He regarded him as reasonably genuine but confused at times.

[19] Mrs McMullan said that in hospital he was in continuous pain. As time went on he still complained of pain everywhere but he would complain of this pain in the chest all the time. She did not pay a lot of attention to remarks of pain because she would "try and say he was very lucky". She was just so grateful that he lived that the pain side of it did not really come into play.

[20] Mr Ringland suggested to her that the first time he complained of pain in his chest was in 2003 but that was plainly wrong. She said that between 1999 and 2003 she found it difficult to know whether pain was coming from the lung or the chest or whatever. He continually complained of pain down his right side and if he lay on that side at night it wakened him. Because of her husband's accident he became very aggressive to people who were coming in. He did not want visitors. She agreed that one of the biggest stresses in her family's life was a death threat from paramilitaries and

harassment. Again the judge was in the best position to assess her. He found that she supported much of her husband's evidence and was a very straightforward person.

[21] The judge also held that the plaintiff was told to expect pain and be stoical about it. His general practitioner supported that view and confirmed his attendance on occasions complaining of pain in his chest, although there were no written records relating to it. The judge thought the general practitioner was an impressive witness and he had no reason to doubt her accuracy despite the absence of records.

[22] In Flint v Lovell [1935] 1KB 354 the Court of Appeal stated that it would be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the court thought that if they had tried the case in the first instance they would given a lesser sum: "…it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled." This statement was approved and adopted in the House of Lords in Davies v Powell Duffryn Collieries [1942] AC 601 and by the Privy Council in Nance v British Columbia Electric Railway [1951] AC 601.

[23] If the judge has given undue or insufficient weight to the evidence, this falls within the first category: Owens v Sykes [1936] 1 KB 192. If it can be shown that the judge must have wrongly taken or failed to take certain elements into consideration, this falls within the second category. But the court is less disinclined, in respect of the second category at least, to interfere with a judge's award than with a jury's award.

[24] To use the phrase "entirely erroneous estimate" is now regarded by many judges as likely to mislead. In Wells v Wells [1999] 1 AC 345 Lord Lloyd preferred "outside the appropriate bracket." See also Simpson v Harland & Wolff Ltd [1988] NI 432.

[25] The judge did not break down his award into damages (a) for the chest injury (b) for the liver injury (c) for the scarring and (d) for the psychological damage and in our view no criticism can be made of his approach on this issue. There is an element of overlap. As a result of our opportunity to study the transcript, as distinct from relying on a note of the evidence, as he had to do, we can see that his finding that there was a 10 percent risk of adhesions and of operative intervention is incorrect on the evidence, unsatisfactory though that evidence is. He should have proceeded on the basis that there was a small, definite risk - about five per cent - of adhesions and that there was a risk of operative treatment of about three per cent.

[26] On this evidence the injury to the liver seems to us to be the main injury and the risk of adhesions and of operative intervention seems to us to be the most important factor and must have been the main factor in the judge's award. We propose to reduce the award for general damages from £75,000 to £62,500 together with interest at 2 per cent from the issue of the writ of summons on 27 June 2001 plus interest at judgment rate from date of judgment. To be added is £1,000 for special damage at judgment rate from the date of judgment.