

Neutral Citation No. [2008] NIQB 77

Ref: **COG7215**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **30/06/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ROBERT WESLEY WILSON

Plaintiff;

and

JAMES ANTHONY GILROY and MOTOR INSURERS BUREAU

Defendants.

COGLIN J

[1] In this case the plaintiff, Robert Wesley Wilson, was born on 1 October 1967 and was employed as the manager of the Plumbing Department in Cathcart Ltd, which is a large and well-known hardware store in Enniskillen. On 18 December 1999 the plaintiff was working at a tractor link-box in the driveway of a house that he was building at Drumree, Enniskillen. At approximately 8.00pm the plaintiff's wife drove her motor vehicle to the premises with the four children of the family as passengers. The plaintiff's son Joshua, then approximately 2 years of age, was in the front seat while his three daughters occupied the rear seat. Each of the children had removed their seatbelts and were about to alight when a car driven by the first-named defendant violently collided with the rear of the vehicle driven by the plaintiff's wife. At the material time, the first-named defendant was intoxicated and uninsured. The plaintiff witnessed the impact and ran to the assistance of his family. His wife was wedged against the steering wheel and all of his daughters were injured with one having particularly serious injuries. Joshua, his only son, sustained severe head injuries as a result of which, some two days later, he died in hospital. The plaintiff was represented by Mr O'Donoghue QC and Mr Dunlop while Mr Ringland QC and Mr Spence appeared on behalf of the defendant.

[2] As a consequence of witnessing the collision and his direct involvement in the devastating consequences of the accident it is alleged that the plaintiff sustained Post Traumatic Stress Disorder (PTSD) and severe depression. Over time he has been seen by three Consultant Psychiatrists,

namely, Dr Curran and Dr Diana Day-Cody for his own solicitors and Dr Fleming on behalf of the defendant. Reports prepared by each of the medical experts were read into the record and all three gave oral evidence.

Diagnosis

[3] After seeing the plaintiff in April 2000 and June 2001 Dr Curran diagnosed PTSD noting that the plaintiff had been severely traumatised. When he saw the plaintiff again on 8 February 2003 Dr Curran detected his mood was more depressed than during the course of his previous interviews.

[4] Dr Fleming saw the plaintiff on behalf of the defendant on 4 March 2004 and 29 March 2007. As a result of his first interview Dr Fleming was prepared to accept Dr Curran's original diagnosis of PTSD although he noted that some of the post-traumatic symptoms had improved with time and thought that these were likely to further improve. At that time he felt that the PTSD had largely given way to a degree of pathological grief which had become chronic and was interfering with the plaintiff's ability to function. When he saw him again in March 2007 Dr Fleming recorded that the plaintiff was quite composed throughout the examination with reactivity to his mood which contrasted with the earlier examination when he had been clearly distressed and emotional when talking about his son.

[5] In her first report to the plaintiff's solicitors in September 2004 Dr Day-Cody expressed the view that, as a result of the accident, the plaintiff had developed a significant depressive illness and that, in addition, he was suffering from PTSD. When she saw him again on 14 January 2006 she expressed the view that he was still experiencing PTSD as well as chronic depression. She expressed a similar view after her final examination in October 2007. In evidence she said that her focus had always been on depression and that his current PTSD symptoms were mild to moderate fluctuating in intensity.

Treatment and Medical Records

[6] The plaintiff seems to have initially attended his General Practitioner in January 2000 when anxiety/depression was diagnosed and he was prescribed sleeping tablets and Prozac. Subsequently he was referred to the Fermanagh Community Mental Health Team in April 2000 and was assessed on 20 April by one of the Community Psychiatric Nurses. Thereafter he was referred to a therapist for Cognitive Behaviour Therapy ("CBT"). CBT counselling seems to have continued for just over a year when it was terminated in August 2001. At that time it was noted that the counsellor had attempted to focus on trauma but that the plaintiff found it distressing, stopped attending and was discharged. Throughout this period he was also seen by Mr Farrell, a Community Psychiatric Nurse ("CPN").

[7] On 17 March 2003 during the course of recording a medical history on an insurance form the plaintiff's GP, Dr Hutchinson referred to the occurrence of the accident and its consequences and noted that, as a result, the plaintiff had become quite anxious and depressed but that he seemed "to be coming to terms with the situation." It appears that the plaintiff attended the CBT therapist, Susan McGandy, on 4 April 2003 for assistance in completing a DLA form. She made a note of his current complaints and arranged for him to be seen by Dr Day-Cody with a view to further therapy. On 21 August 2003 Dr Day-Cody recorded the plaintiff as suffering from "a depressive episode of moderate to severe intensity." In evidence she explained that, at this time, she gave some thought to the possibility of hospital admission but the plaintiff preferred to remain at home. She arranged for a treatment plan including input from the CPN and an increase of anti-depressant medication. The plaintiff did not keep a further appointment with Dr Day-Cody in a week's time. He was then seen by Dr Day-Cody's junior, who diagnosed a severe depressive illness with psychotic symptoms. It seems likely that it was inexperience that led the junior doctor to the conclusion that the plaintiff had a psychotic illness. On 18 December 2003 he noted a better rapport with the plaintiff and that he was more forthcoming but still severely depressed.

[8] On 9 October 2003 Dr Day-Cody saw the plaintiff again and in a letter to his GP stated that she was pleased to report an improvement in his mental state, that he was sleeping better, no longer experiencing suicidal thoughts and displaying greater interest and enthusiasm. He was still experiencing flashbacks and it was noted that he was due to attend the CBT therapist. On 23 October 2003 Dr Day-Cody saw the plaintiff again and concluded that he was "significantly better than he had been 4-6 weeks earlier with no evidence of suicidal ideation." She recorded that he was able to function more around the house and felt more optimistic about his future. Dr Day-Cody reviewed the plaintiff on 15 January 2004 and sent a letter to the GP stating that there had been an improvement on the anti-depressant medication but the plaintiff was still suffering from excessive tiredness, reduced energy, sleep disturbance, lower mood and occasional thoughts that life wasn't worth living. The dose of anti-depressant was increased and she arranged to see him again in 6 weeks time. Thereafter, there does not appear to have been any contact between the plaintiff and Dr Day-Cody's department.

[9] Subsequently in 2004 Mr Farrell spoke to the plaintiff's wife who confirmed that the plaintiff's coping skills were fine at present. On 21 October 2004 he recorded that the plaintiff's mental health was more stable, that the plaintiff felt he was coping better at present and that involving himself in home improvements was providing a positive structure to his day. On 23 March 2005 Mr Farrell again referred to the plaintiff's mental state as more settled although he noted that he was still prone to poor sleep patterns. The plaintiff informed Mr Farrell that he was looking forward to brighter

evenings hoping that it would give him an interest in work activity. He appeared to be anxious about the forthcoming court case which he found stressful. When he saw him finally on 5 September 2005 Mr Farrell made the following notes:

“While his presentation would indicate a degree of depressive thinking he is showing more interest around the family home by way of home improvements and supporting his wife with the children. He recently participated in a family holiday to England. He continues to comply with medication. He denied any suicidal plans or intent. He is soon to attend an appointment with my CBT colleague and I have actively encouraged Robert to actively engage in this form of therapy. The benefits were outlined. We both agreed that I would at this point discharge him from follow-up from myself.”

The plaintiff was left with a telephone number at which Mr Farrell could be contacted.

[10] During the course of his interview with the plaintiff in November 2007 Dr Fleming discussed the apparent absence of any contact between the plaintiff and the Community Mental Health Team since September 2005. He recorded the plaintiff as displaying some resentment and stating that no one had bothered with him since he had been seen at that time. His appointment with the CBT therapist had not been confirmed and he had later learned that she had moved away without being replaced. During the course of his evidence the plaintiff expressed the view that after September 2005 Belmore House, the location of Fermanagh Area Mental Health psychiatric services, “just seemed to forget about me.” He emphasised that since that time he had wanted help and that he still wanted help.

Expert Medical Evidence

[11] Dr Curran was the first Consultant Psychiatrist to examine the plaintiff and he did so in April 2000, June 2001 and February 2003. Upon each of these occasions Dr Curran noted the plaintiff to be distressed and openly agitated. He diagnosed PTSD with a depressive element which was more pronounced at the time of his second examination.

[12] The plaintiff was seen by Dr Day-Cody for medical-legal examination upon three occasions on 15 January 2004, 14 January 2006 and 10 October 2007. Initially she diagnosed a significant depressive illness and PTSD which had only partially responded to anti-depressant medication and CBT as well

as ongoing support from the CPN. In 2007 she confirmed her diagnosis and expressed the view that the plaintiff remained significantly disabled by psychological sequelae. She did not think that he was fit to return to his original employment but she did not consider that it would be unreasonable at present to attempt some therapeutic form of work.

[13] I am afraid that I found Dr Day-Cody's evidence to be rather unimpressive in a number of respects. While she accepted that it was very important for a Consultant Psychiatrist carrying out an examination to have access to any relevant notes and records she agreed that she had not carried out such an exercise prior to her examination in January 2006. She initially said that she would not have had access to such records but then accepted that, as Medical Director at the relevant time, she could have access to the records if necessary. She accepted that the records of the Area Mental Health Unit between September 2004 and September 2005 did appear to show improvement which was not reflected in her reports. In her report dated 10 October 2007 she recorded that Mr Wilson had been "...unable to engage in a psychological approach." In her direct evidence she said that the future was uncertain because the plaintiff was unable to deal with CBT. She said that he did not attend for further appointment in 2005 and that, as a consequence of not turning up, he would have been discharged. Initially in cross examination she referred to the plaintiff's symptom of avoidance and asserted that avoidance was the reason for his inability to engage in CBT. When questioned further on the basis that the records did not appear to confirm the making of any appointment for CBT or any other attempt to contact the plaintiff after September 2005 and that he had expressed resentment to Dr Fleming about the fact that no one had bothered with him she accepted that Mrs McGandy had moved away but said that she had not "given up on this man". Dr Day-Cody said that he would be offered further CBT but pointed out that there was a very long waiting list for CBT in Fermanagh.

[14] The plaintiff was examined by Dr Fleming on 4 March 2004 and 29 November 2007. As a result of his initial examination Dr Fleming agreed with Dr Curran's diagnosis of PTSD although he felt that some of the PTSD symptoms had improved with time and were likely to continue to improve. At that time he considered that the most prominent feature of the plaintiff's presentation was a degree of chronic pathological grief which was interfering with his functioning. When the plaintiff attended for the second examination in November 2007 Dr Fleming noted that, whereas at the time of the previous examination he had been clearly distressed and emotional when talking about his son, this was no longer the case and the plaintiff had been quite composed throughout the examination with reactivity to his mood. In the course of giving evidence Dr Fleming noted the apparent improvement in the plaintiff's condition contained in the records between October 2004 and September 2005 and expressed the view that the latter date might have been an appropriate time to suggest a phased approach to return to work. He accepted that the

symptoms recounted by the plaintiff differed between those given to Dr Day-Cody in October and to him in November 2007 and that, to some extent, the differences were difficult to reconcile. He thought that it was quite possible that the plaintiff might have suffered a relapse post September 2005 in the absence of treatment. Dr Fleming considered that the plaintiff appeared genuine and, so far as he was concerned, the picture was one of continuing improvement.

Financial Loss

[15] In addition to the loss to date the plaintiff's claim for financial loss involved a number of elements including:

- (i) Continuing loss of his employment as a sales manager at Cathcart Ltd in Enniskillen.
- (ii) Alternatively, loss of employment as a self-employed plumber.
- (iii) Alternatively, loss of employment with Cathcart Ltd together with an element of self-employed income from plumbing "homers".
- (iv) Loss of services to the household.
- (v) Costs of care.

[16] While he had served an apprenticeship as a plumber with T W Scott in Enniskillen, the plaintiff had never actually worked as a plumber and he joined Cathcart as a manager. Prior to the accident he had been employed for some 6 to 7 years as a sales manager in the Plumbing Department and he was described by Mr Meldrum, who was also employed as a Sales Manager, as very competent. Apart from a brief period of some 8 weeks with Cathcart Ltd between March and May 2000, the plaintiff has not returned to work since the accident.

[17] Both the plaintiff and his wife gave evidence about his performance of plumbing "homers" for many years prior to the accident. They said that he had built up a lot of customers. For some 10 years prior to 1999 the plaintiff had been a part-time soldier in the Royal Irish Regiment and, as such, he had performed "homer" work for Western Builders a firm that had connections with the security forces. The plaintiff and his wife said that the "homer" work had been increasing and that it had been his intention to become self-employed. The plaintiff had a CORGI registration.

[18] I considered much of the evidence relating to financial loss to be unsatisfactory. It seems that Mrs Wilson was the main source of information upon the basis of which Miss Beattie of Harbinson Mulholland, Forensic

Accountants, compiled her report. The letter from the Inland Revenue to the plaintiff's solicitors of 22 December 2003 indicated that the earliest period of self-assessment commenced on 6 April 1999. Mrs Wilson's diaries, which were furnished to Harbinson Mulholland, appeared to show some indication of self-employment going back as far as 1996. Mrs Wilson admitted that her diaries were not "a complete record" but a note that she kept "for myself" of hours worked. She said that she had been very busy and that her husband tended to keep a lot of things in his head. She said that they might not have included such jobs as fixing a tap or installing a washing machine but she was unable to say why. The diaries did not contain the details of any costs or expenses related to this work and there were only two invoices for self-employed work neither of which was dated earlier than June 1999. Miss Beattie accepted in cross-examination that the diary had all the hallmarks of a record of work in respect of which there was no intention to pay tax. Mrs Wilson said that, some 6 months prior to the accident, she and her husband had gone to see an accountant named Mr Bates in Enniskillen for the purpose of arranging a submission to the Inland Revenue in relation to self-employment. She said that all the documentation was given to Mr Bates. However, it appears that, when he was contacted by the plaintiff's solicitors, Mr Bates denied that he held any relevant records. In cross-examination Mrs Wilson said she did not know why Mr Bates denied that he had any records. She accepted that he was still in practice in Enniskillen but agreed that she had not made any attempt to contact his office. She said that was a matter for her solicitors. She also said that the bank manager at the Northern Bank in Irvinestown, Mr Johnson, had received a complete set of records from the accountant but agreed that she had not taken any steps to get any such documents from the bank. The plaintiff said that during the course of his self-employment with Western Builders he had received a letter at the end of each year recording the amount of tax that the firm had held back. He said that he did not know where these letters were but assumed that he had given them to his wife. His wife said that a lot of paperwork had been lost in the move to the new house and that is when those documents must have gone astray.

[19] The Harbinson Mulholland report included a section detailing a claim for loss of services on behalf of Mrs Wilson in respect of the plaintiff's DIY work including plumbing, electrics, joinery, construction, and gardening. It seems that Mrs Wilson informed Miss Beattie that, since the accident, the plaintiff had been quite unable to carry out any such activities. Miss Beattie agreed that the records kept by Mr Farrell indicated that the plaintiff had begun to take more interest in the family home by way of home improvements which were providing a more positive structure to his day. She was not supplied with any documentation to confirm payment to any outside contractors or workmen for carrying out the type of DIY work that the plaintiff would have done. The plaintiff himself stated that he done some pieces of work around the house including some painting, planting apple trees and working in the greenhouse. He said that he had also done work

around his mother's house in company with his brother when his mother moved in. On the other hand, Mrs Wilson denied in evidence that the plaintiff carried out any DIY activities after the accident. When she was referred to Mr Farrell's records she said that he never finished anything and had carried out no improvements apart from "tarting up some paintwork".

[20] Mrs Wilson was also responsible for providing the information upon which the Cost of Care section in the Harbinson Mulholland report was based. According to that document, which is dated 17 October 2007, Mrs Wilson said that the plaintiff was unable to control his own medication, that he received regular counselling from a Community Psychiatric Nurse, that she believed that he was at constant risk of self-harm and she could not leave him alone and that he remained in bed until lunchtime every day. She also said there were occasions when he stayed in bed all day. When asked in cross-examination why her husband had not alleged that he had been unable to control his medication since the accident and why such an allegation had not been put to any of the medical witnesses she said that "he would have told the psychiatrist that he was taking it." Mrs Wilson said that she did not agree with Dr Day-Cody that the plaintiff had made any progress or that his symptoms were as mild as those described by Dr Fleming. She accepted that her husband had not received regular community counselling since September 2005 and therefore her statement to Miss Beattie about this topic had not been accurate and that the records did not support her allegation that because of the risk of self-harm her husband could not be left alone. She also accepted that neither Dr Day-Cody nor Dr Fleming had indicated that there was an ongoing risk of this type. When asked why she had not told the psychiatrists about her husband staying in bed until midday and sometimes all day her response was that "he is embarrassed about mental problems."

[21] Mr Wilson stated that he had not attempted to return to any form of employment since the accident. He said that he could not go back to Cathcarts because he could not face meeting people. When asked about Dr Fleming's view that he was fit for a phased return to work he agreed that a resumption of some form of employment would assist in his desire to return to normality but conceded that he had made no attempt at all to investigate part-time or voluntary work nor had he made any relevant inquiries with the local job centre. Mrs Wilson accepted that she had made no attempt to encourage her husband to return to some form of work.

Conclusions

[22] On the balance of probabilities I am satisfied by the medical evidence that the plaintiff developed PTSD together with depression as a consequence of the accident. The co-morbidity of these conditions is a phenomenon that is well-known and regularly recorded both in the relevant literature and by clinicians. I accept the view of Dr Fleming that his symptoms have improved

over time and that his present depressive condition is probably one of pathological grief. Dr Day-Cody reported an improvement in his mental state to his GP in October 2003 and that appears to have continued gradually until he was discharged by Mr Farrell in September 2005 in anticipation of his appointment with Mrs McGandy the CBT therapist. Despite the improvement that has taken place over time, I was satisfied from the medical evidence and from my own observations of the plaintiff during the course of giving evidence that he still remains significantly incapacitated as a consequence of his mental condition. In such circumstances, I consider it to be particularly unfortunate that he has not been in receipt of any active CBT, counselling or other therapy since September 2005. While I accept that the plaintiff had a duty to mitigate his loss and that neither he nor his wife appear to have made any real attempt whatever to secure a resumption of his treatment or even to contact Mr Farrell I also bear in mind that both individuals developed psychological conditions as a consequence of the accident a significant element of which has proved to be depression. In such circumstances, on the basis of the evidence before me it would seem that the major failure to ensure that the plaintiff has continued to receive more effective treatment has been that of the relevant NHS Trust. The difficulty in securing the services of qualified psychotherapists is well-known but even if there was a problem about replacing Mrs McGandy it seems to me that the Trust had a clear duty to remain in communication with the plaintiff and to take all reasonable steps to ensure that the progress recorded by Mr Farrell was not allowed to dissipate. It appears that Mrs McGandy has now returned and I would be optimistic that, given the appropriate type and level of intensity of treatment, including, quite possibly, a phased return to some form of employment, the plaintiff's symptoms are likely to continue to improve. In the circumstances, I award general damages of £65000.

[23] Taking into account the relevant benefit rules the parties are agreed that no financial loss has been sustained prior to 18 September 2004. On the basis of the figures set out by Harbinson Mulholland his loss of earnings from the Cathcart employment from 18 September 2004 to 6 April 2008 appear to be in the region of £37,750 net. In view of the unsatisfactory nature of the evidence I would not be prepared to allow more than £3000 net per annum in respect of "homer" work producing approximately £ 24000 from the date of the accident. I am not prepared to make any allowance in respect of cost of care. I also allow £2000 per annum for loss of services for a period of 5 years and £1500 per annum for a further 3 years. A total of £76250.

[24] In the context of the failure of the Trust to provide adequate treatment and the duty of the plaintiff to mitigate his loss, it is extremely difficult to make any accurate prediction with regard to future financial loss. Given the improvement in the plaintiff's condition first noted by Dr Day-Cody and subsequently confirmed by the medical records I am of the opinion that, with the appropriate treatment, it is possible that the plaintiff might have been able

to resume some form of employment, whether direct or self-employed, by 2006/7 and that he still might be able to do so in the relatively near future. I accept that any such resumption is likely to be gradual and phased. Doing the best that I can I propose to measure future financial loss as follows:

(i) 2 years loss of net Cathcart salary @ £11000 p.a.	£22000
(ii) 3 further years reduction in salary @ £ 5000 p.a.	£15000
(iii) 5 years loss of DIY @ £1000 p.a.	£5000
(iv) 5 years loss of "homer" work @ £3000 p.a.	£15000
	Total
	£57000
	Past Financial Loss
	£76250
	£133250
	General Damages
	£ 65000
	Award
	£198250