Neutral Citation No. [2009] NICA 48 | *Ref:* **MOR7641**

Judgment: approved by the Court for handing down | *Delivered:* **13/10/09**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERT WESLEY WILSON

Plaintiff/Appellant;

-and-

JAMES ANTHONY GILROY and MOTOR INSURERS' BUREAU

Defendants/Respondents.

Before: Morgan LCJ, Higgins LJ, and Girvan LJ

MORGAN LCJ

[1] This is the judgment of the court.

[2] The plaintiff appeals against an award of £272,107.43 made by Coghlin J on 30 June 2008 for personal injuries, loss and damage sustained by him as a result of a road traffic accident for which the first named defendant was responsible. The award included a figure of £65,000 for general damages and £57,000 for future loss. The plaintiff maintains that each of these figures was too low. In addition he complains that interest was not awarded in relation to the general damages and the amounts assessed for past loss of earnings.

[3] The plaintiff was born in 1 October 1967 and was employed as the manager of the plumbing department in a well-known hardware store in Enniskillen. On the evening of 18 December 1999 he was working in the driveway of a house he was building outside Enniskillen. His wife drove up with their four children. They were preparing to alight from the car when the first named defendant drove his motor vehicle so that he violently collided with the rear of the stationary car. The plaintiff's two-year-old son was seriously injured and died two days later. His wife and one of the other children were seriously injured. The plaintiff witnessed the accident and ran

to the assistance of his family. As a result of the accident the plaintiff developed psychiatric illness.

[4] The plaintiff's General Practitioner saw him in January 2000 and diagnosed anxiety/depression. He was referred to the local community mental health team in April 2000 and thereafter referred to a therapist for Cognitive Behaviour Therapy (CBT). CBT counselling continued until August 2001 when the plaintiff stopped attending because he found the focus on trauma distressing. During this period he was seen by Dr Curran who diagnosed him as suffering from post traumatic stress disorder. Dr Curran saw the plaintiff again in February 2003 and found him grossly agitated and very significantly depressed. As a result of this consultation the plaintiff again attended his GP in March 2003 and was eventually referred to a consultant psychiatrist in August 2003 who recorded that he was suffering from a depressive episode of moderate to severe intensity. In October 2003 his psychiatrist noted an improvement in his mental state and recorded that he was sleeping better, no longer experiencing suicidal thoughts and displaying greater interest and enthusiasm. In January 2004 she stated that there had been an improvement on the antidepressant medication but the plaintiff was still suffering from excessive tiredness, reduced energy, sleep disturbance, low mood and occasional thoughts that life was not worth living. His dose of antidepressant medication was increased. Thereafter he was seen by Mr Farrell, the community psychiatric nurse, and his mental state improved until he was discharged in September 2005 in anticipation of an appointment with the CBT therapist.

The judgment

[5] In paragraph 22 of his judgment Coghlin J concluded that the plaintiff developed PTSD together with depression. His symptoms had improved over time and his depressive condition was the prominent feature of his presentation. The trial judge accepted a diagnosis of pathological grief. Despite the improvement the plaintiff still remained significantly incapacitated as a consequence of his medical condition at the trial date. The learned trial judge considered it to be particularly unfortunate that the plaintiff had not been in receipt of any active CBT since September 2005 and concluded that the major failure to provide this therapy was that of the relevant NHS Trust rather than any avoidance by the appellant related to his condition. Coghlin J concluded that with the renewed availability of CBT and given the appropriate type and level of intensity of treatment the plaintiff's symptoms were likely to continue to improve.

[6] The plaintiff had attempted to return to work shortly after the accident but was unable to continue after a short number of months. By the time of the trial he had been unfit for work since 2000. In assessing the plaintiff's future financial loss the learned trial Judge indicated that it was extremely difficult

to make any accurate prediction. Given the improvement in the plaintiff's condition noted by the psychiatrist and subsequently confirmed by the medical records he was of the view that it was possible that the plaintiff might have been able to resume some form of employment, whether direct or self-employed, by 2006/7 and considered that he still might be able to do so in the relatively near future. He accepted that any resumption of employment was likely to be gradual and phased and measured future financial loss as follows:

(i) 2 years loss of net Cathcart salary @ £11,000 p.a.	£22,000
(ii) 3 further years reduction in salary @ £5,000 p.a.	£15,000
(iii) 5 years loss of DIY @ £1,000 p.a.	£5,000
(iv) 5 years loss of "homer" work @ £3,000 p.a.	£15,000
Total future loss	£57,000

The submissions of the parties

[7] For the appellant Mr O'Donoghue QC submitted that the award of £65,000 for general damages constituted a wholly erroneous estimate. He pointed out that prior to the accident the appellant was a hard-working man with an excellent family life who had just bought land close to the new house which he was building. He noted that none of this had been mentioned in the judgment. He contended that the prognosis for the appellant was poor unless he was provided with CBT and he was clearly vulnerable in the future. In light of the fact that his condition had endured for the best part of 10 years and the prognosis was at best guarded he submitted that this was a case of severe psychiatric damage with a level of damages between £60,000 and £150,000. If the case was one of moderate to severe psychiatric damage it would attract damages of between £36,000 and £80,000. He also maintained that this was a case of severe post-traumatic stress disorder providing for damages of between £42,000 and £90,000. In the round the appropriate range suggested for this case was between £80,000 and £100,000.

[8] In relation to financial loss the appellant submitted that the assessment of future loss contemplated that the appellant would have no employment until June 2010 and would then have reduced income only until June 2013. The appellant argued that it was against the run of the evidence to conclude that by that date he would have the same earning capacity as if he had not been injured. In support of that submission Mr O'Donoghue relied upon portions of the transcript of Dr Day-Cody, a psychiatrist called on behalf of the plaintiff. She expressed the view that the appellant would not be able to return to a responsible job. It was accepted that the learned trial judge was entitled to conclude from the evidence of Dr Fleming that the appellant had a

residual earning capacity but it was also Dr Fleming's view that the appellant was significantly incapacitated at the date of trial. It was submitted, however, that allowing the appellant something under 25% of the total that he would have recovered if he had never worked again was inadequate. In addition there was no reason why interest should not be added in the usual way.

[9] For the respondent Mr Ringland QC submitted that it was clear that the learned trial judge preferred the evidence of Dr Fleming to that of Dr Day-Cody. The medical records showed a picture of improvement and Dr Fleming recorded a very dramatic difference between his level of pathological grief in 2007 as compared to that in 2004. Dr Fleming considered that he had a chronic mild but persisting grief reaction at the time of trial but also agreed that his life was still massively different from what it was the day before the accident. He pointed to passages of the evidence where Dr Fleming considered that the appellant was capable of work and stated if his opinion that the prognosis was for sustained improvement. Mr Ringland resisted the suggestion that future loss could be calculated by taking a percentage of the total he might obtain if he never returned to work and pointed out that this approach had not been relied upon at the trial. In relation to interest he submitted that there had been undue delay in this case although it appears that some of this had been caused by ongoing criminal proceedings and the prolonged treatment of the plaintiff.

Discussion

[10] As it happens the respondents in this appeal were appellants before this court in May 2008 in respect of an award made to the appellant's wife. Kerr LCJ set out the proper approach to appeals against awards of damages. He approved the observations of Maurice Kay LJ in Santos v Eaton Square Garage Ltd [2007] EWCA Civ 225:

> "It has long been established that we do not interfere with an award unless satisfied that the judge acted on some wrong principle of law, misapprehended the facts or that the amount awarded was wholly erroneous. It is not sufficient that the members of this court would have awarded a different sum if they had been sitting as the court of first instance – see *Flint v Lovell* [1935] 1 KB 354, 104 LJKB 199, [1934] All ER Rep 200; *Owen v Sykes* [1936] 1 KB 192, 105 LJKB 32, [1935] All ER Rep 90. If anything, the current approach is less rather than more interventionist. Thus, in *Ashdown v Michael* (unreported) [98/0516/2] Buxton LJ stated that:

> 'It should only be in exceptional cases ... where this court should be asked to consider interfering.'
>
> For my part, I would add that in this context it is pertinent to have regard both to the sums of money involved and the cost of Appellant litigation and to ensure that the one is not disproportionate to the other."

He then went on to deal with criticisms of the "entirely erroneous estimate" test:

> "We have been unable to find anything in the judgment of Lord Lowry CJ in *Simpson v Harland & Wolff Ltd* which supports the notion that the use of the phrase 'entirely erroneous estimate' is misleading or inapt. On the contrary, Lord Lowry said that each of the members of the Court of Appeal had reached the conclusion that the amount awarded by the trial judge for general damages in that case was 'very high indeed compared with what we would have expected under this heading.' This seems to us to be as consistent with a conclusion that the award was a wholly erroneous estimate as it is with any other basis of review. Moreover, we cannot, with respect to the authors of *McGregor*, agree that use of the phrase, 'entirely erroneous estimate' is likely to mislead or that there is any widespread judicial view that it does. The phrase describes a familiar concept that is regularly used by appellate courts in a wide variety of different contexts. It indicates a proper reticence to interfere with a decision of the lower court. The reasons for this reticence are well known. A judge at first instance enjoys a considerable advantage in having listened to and formed an impression of the various witnesses whose evidence must crucially inform his assessment of the proper level of compensation. It appears to us, therefore, that the law in this jurisdiction remains as expressed by Lord Lloyd in *Wells* and that, unless an assessment of damages can be impeached as being based on a wrong principle in law or a misapprehension of the facts, it must be shown to have been a wholly erroneous estimate."

[11] In this case it is clear that there was a difference of medical opinion between Dr Fleming and Dr Day-Cody. That difference of opinion was resolved by the trial judge in favour of Dr Fleming at paragraph 13 of his judgment. He expressed his concern about the fact that the medical notes and records were not available to Dr Day-Cody when she formed her opinion as expressed in her reports in January 2006 and October 2007. He also rejected her suggestion that the failure to take up CBT was because of avoidance behaviour by the appellant consequent on his condition. He concluded that the plaintiff's symptoms were likely to continue to improve. The evidence of Dr Fleming supported this conclusion and suggested that the only event that might set him back would be something like a road traffic accident which might rekindle some of the symptoms temporarily. Mr O'Donoghue's submission contended that the appellant was clearly vulnerable in the future and he relied upon Dr Day-Cody's evidence to support that proposition. The trial judge did not accept that assessment. The respect to be paid to the trial judge's assessment of the conflicting evidence of the medical witnesses is similar to that which should be paid to findings of fact. The caution to be exercised by an appellate court is encapsulated in the remarks of Lord Hoffmann in Biogen v Medeva plc [1996] 38 BMLR 149,165:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence."

[12] In determining whether the award was wholly erroneous it is necessary to consider each head of damage separately (see George v Pinnock [1973] 1 WLR 118 at 126 approved in Wells v Wells [1999] 1 AC 345). In assessing damages for psychiatric injury the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (3rd edition) (the Guidelines) suggest that particular attention is to be paid to the following factors:

(i) Ability to cope with life and particularly work;
(ii) Effect on relationships with family etc;
(iii) Extent to which treatment would be successful;
(iv) Future vulnerability; and
(v) Prognosis

In this case the applicant has not been able to work since the accident in December 1999 other than for the few months that he tried to get back to work at the start. It is common case that he will not return to work immediately and that any return to work will be phased. The trial judge accepted that the

appellant remained significantly incapacitated as a result of his medical condition. In relation to his family life the appellant complains that there was no consideration of this but at paragraph 9 within the judgment the learned trial judge records a note made by Mr Farrell on 5 September 2005 which describes the appellant as showing more interest around the family home by way of home improvements and supporting his wife with the children. It recorded that he recently participated in a family holiday to England. Paragraph 20 of the judgment makes it plain that Mrs Wilson was not considered a reliable informant in relation to the appellant's condition and it is unsurprising, therefore, that there is no further reference in the judgment to her complaints about the impact on family life. The trial judge noted the improvement which had occurred to date and anticipated that CBT would contribute to further improvement. In light of his acceptance of Dr Fleming's evidence the risk of future vulnerability was speculative and the prognosis was for improvement and a return to work. I do not accept that the reference in paragraph 24 of the judgment to the fact that the appellant might be able to return to some form of employment in the relatively near future in any way detracts from the assessment to be drawn from the approach to financial loss that with improvement in his condition the appellant was likely to return to employment.

[13] The Guidelines indicate that severe psychiatric damage is characterised by a person having marked problems with respect to factors (i) – (iv) and a very poor prognosis. The conclusions of the learned trial judge readily recognise significant problems associated with these factors but a more optimistic prognosis. That fits comfortably within the category of moderately severe psychiatric damage with a bracket of £36,000 to £80,000. The trial judge accepted that the appellant suffered post traumatic stress disorder but indicated that the depressive condition was the only real factor still relevant at trial. In those circumstances the award for post traumatic stress disorder is in the moderate bracket which lies between £9,000 and £36,000. There is obviously considerable overlap between these conditions and, as Mr O'Donoghue recognised, one has to stand back and take a view in the round. I do not consider that the figure of £65,000 for general damages which lies towards the top of the range for moderately severe psychiatric damage could be said to be outside the bracket or wholly erroneous.

[14] The assessment of future loss is different in kind to the determination of past events. This much is clear from the speech of Lord Reid in Davies v Taylor [1974] AC 207 at 213.

> "You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes

> virtually nil. But often it is somewhere in between and if it is somewhere in between I do not see much difference between a probability of 51 per cent. and a probability of 49 per cent."

The task of the court is to evaluate the possibility of loss occurring after the trial. In this case the calculation of past loss was made on the basis that the appellant would still have been employed at Cathcarts or in similar employment at the date of the trial if he had not suffered injury. The medical evidence accepted by the learned trial judge was that the appellant at the time of trial remained significantly incapacitated but the trial judge was optimistic that with the appropriate type and level of intensive treatment the appellant's symptoms were likely to continue to improve. Although at paragraphs 22 and 23 of his judgment the trial judge couches his consideration of a return to work in terms of a possibility it seems clear that this is related to whether it might occur in the relatively near future rather than an assessment that a return to work probably would not occur.

[15] It is clear that the trial judge recognised that there were contingencies surrounding the ability of the appellant to return to work. He needed treatment. It was uncertain how quickly his condition might improve with the benefit of treatment and how long it might take to begin a phased return to work. The period of the phased return was also uncertain. The precise nature of employment that he might achieve on a phased or full-time return to work was also unknown. Inevitably it was impossible to predict the remuneration that the plaintiff was likely to achieve on the assumption that he was able to get employment. He had a secure job prior to the accident and may or may not have been able to secure such a job in the market. Although the learned judge anticipated improvement in his condition which would enable him to work full time it was not suggested that his mild but persisting chronic grief reaction would resolve and accordingly there was uncertainty about the types of employment for which the plaintiff would be suited in the long term. This point was specifically referred to by Dr Fleming in his examination-in-chief. Faced with uncertainty at this level the choice for the court is either to attempt a calculation based on the traditional multiplier/multiplicand method with appropriate discounting for contingencies if appropriate or, if the variables are too great, to adopt a broad brush lump sum assessment as occurred in Blamire v South Cumbria HA [1993] PIQR Q1. Even where a broad brush lump sum approach is taken the assessment must be one which properly balances the various possibilities, probabilities and chances in light of the evidence.

[16] Although he recognised in paragraph 24 of his judgment that it was extremely difficult to make any assessment of future pecuniary loss the learned trial judge decided to carry out a calculation based on the multiplier/multiplicand method. He allowed a period of two years into the

future before the appellant began his phased return to work and a further three-year period during which the appellant would be working on an intermittent or part-time basis. All this in my view was well within the range of possibilities open to the trial judge on the basis of Dr Fleming's evidence which he accepted. The real substance of the issue pursued by the appellant is that he stopped his assessment at that point. It seems clear that any attempt to continue the multiplier/multiplicand approach would inevitably have been pure speculation after the 5 year stage. It was impossible to anticipate the nature of the employment, the rate of pay or the extent to which the employment might be secure. Dr Fleming's evidence could only go so far as to say that the plaintiff would have been fit for some type of full time employment and that his condition was likely to have improved but not resolved. These features strongly suggest that this was a case for a "round sum" calculation and the decision of the Court of Appeal in Chase International Express Ltd v McRae [2004] PIQR 21 supports that view. Any figure to be allowed for the period must, of course, recognise that any additional losses would not be sustained until 5 years after the date of trial and would have to be discounted accordingly. The plaintiff's earnings with his employers at the time of the accident were relatively modest and this also argues for a modest figure to represent the additional losses. The assessment must also take into account that the learned trial judge accepted the evidence of Dr Fleming that the plaintiff was likely to be fit for full time work during this period. We consider that the evaluation of future loss in this case was wrong in principle in that the learned judge relied on the multiplier/multiplicand method to calculate those losses whereas the extent of uncertainty was such as to make that method inappropriate. We consider that the plaintiff is entitled to be compensated for additional losses beyond the 5 year period and we assess total future financial loss at £90,000.

[17] The final issue concerns interest. In the statement of claim the appellant had claimed interest at 8% on the damages. Interest was not mentioned by the trial judge in his judgment nor was it brought to his attention when the case was remitted for recalculation of certain past losses. At a late stage in the appeal the appellant was permitted to amend his notice of appeal to pursue his interest claim. Interest on general damages has conventionally been awarded at the rate of 2% from the date of issue of the writ. We do not consider that the respondent's submissions on delay ought to deprive the plaintiff of that interest in the circumstances of this case. The plaintiff also seeks interest in relation to loss of earnings from 18 December 2004 until 6 April 2008. For some time there has been a conventional rate of 6% for interest on outstanding amounts which takes into account that interest rates have varied significantly over the last number of years. At some stage it may be appropriate to reconsider the appropriate rate but the material is not available in this case to do so. We consider that the plaintiff should be allowed interest at the rate of 3% per annum on this amount to reflect the fact

that some of this loss was incurred in December 2004 whereas some of it was only incurred in April 2008. To that extent also we allow this appeal.