[2019] IEHC 741

THE HIGH COURT

IN THE MATTER OF AN GARDA SÍOCHÁNA (COMPENSATION) ACTS, 1941 AND 1945

[2008 No. 324 SP]

BETWEEN

A.B.

APPLICANT

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 4th day of November, 2019

SUMMARY

1. This judgment deals with two issues. First it deals with a claim by a member of An Garda Síochána who had his little finger broken during the course of his duties by a person being deported. The applicant ("Garda B") is claiming, as well as general damages for pain and suffering, a figure of €310,893 in loss of earnings arising from this incident. This loss of earnings figure is claimed on the basis that the incident in which his little finger was broken led to him becoming depressed, which depression was the cause of his early retirement from the force ten years early, at the age of 50.

2. Secondly, this judgment deals with a general issue affecting all cases taken under the Garda Síochána (Compensation) Act, 1941 and the Garda Síochána (Compensation) (Amendment) Act, 1945 (together "the Garda Compensation Acts"), namely the fact that there is a 0% settlement rate for these cases, whereas for other personal injury claims the settlement rate is said to be *circa* 90%. This lack of settlements means that the taxpayer, at significant cost, is funding fully contested hearings in the High Court for every single claim by a garda under the Garda Compensation Acts. As noted hereunder, the obvious reason for this is that there is no financial incentive for the injured garda to settle (unlike in other personal injury cases). Ironically there is in fact a financial incentive for the applicant's lawyers *not* to settle since they would, by settling, be forgoing the costs they get for the hearing. This judgment considers how to improve on the settlement rate of 0% and thereby lead to gardaí getting their compensation sooner and without the stress of court hearings, thereby also saving the taxpayers millions of euro in legal costs.

Garda B's claim for damages arising out of his broken little finger

3. As regards the applicant's claim for compensation in this case, as it involves very personal details about the applicant's family, this Court has chosen to avoid publicising those details unnecessarily and so has anonymised this written judgment.

4. Garda B's injuries arise out of an incident that occurred on the 3rd July, 2000. On the date in question, Garda B sustained an injury to his right hand during an attempt to restrain a violent and aggressive deportee, who during the incident also bit one of Garda B's colleagues (the "July incident"). Garda B attended the Emergency Department immediately after the incident where x-rays taken of his right hand revealed a fracture to his little finger.

5. Although the incident the subject of this application relates to a physical assault in which he broke his little finger, Garda B's injuries for which he is claiming compensation are primarily psychiatric in nature. In particular, he is claiming that he suffered from depression solely as a result of the July incident which led to his having to retire early from the force and accordingly he is claiming, in addition to general damages, loss of earnings of €310,893 from the Minister arising from his early retirement. Garda B retired ten years early on medical grounds at the age of 50, in December, 2005, due to depression.

6. The main focus of this case is the extent to which this depression was caused by the incident in which Garda B was assaulted in July 2000 during which his little finger was fractured and the extent to which this July incident can be said to have *caused* Garda B's early retirement and therefore the loss of earnings of €310,893 which he is claiming.

7. This case is different from a normal Garda Compensation case because of the conflicting psychiatric medical evidence adduced before this Court and because of the significant differing financial consequences of those conflicting medical opinions. Garda B's consultant psychiatrist, Dr. Denihan, gave oral evidence to the Court to the effect that it was his view that the July incident was the sole cause of Garda B's depression. In contrast, the consultant psychiatrist for the State, Dr. Devitt, gave oral evidence to the Court that the July incident was *just one* of the factors in the development of Garda B's depression.

8. For the reasons set out below, this Court found Dr. Devitt's evidence to be more convincing and this Court awards damages in respect of loss of earnings, not in the sum of €310,893 as claimed by Garda B, but rather in the sum of €42,699. This sum is awarded, along with other special damages (agreed between the parties) for out of pocket expenses and general damages awarded by this Court for pain and suffering for the injury to his little finger and for the depression. Therefore, the total award being made to Garda B by this Court is €75,981.30.

Why is there a 0% settlement rate in Garda Compensation cases?

9. The second issue considered in this judgment is the fact that, unlike other personal injury claims, where the settlement rate is anecdotally said to be close to 90%, it is the case that in personal injury claims taken by gardaí under the Garda Compensation Acts, there is a 0% settlement rate as evidenced by the fact that not one of the recorded 384 claims made in recent years were settled.

10. The only winners from the fact that 100% of Garda Compensation cases go to a full hearing in the High Court are the lawyers for the State and the lawyers for the applicant garda who get paid for those High Court hearings, while the clear loser is the taxpayer, who funds all of these legal costs, as well as the injured gardaí who have to wait to get their compensation and who, as noted hereunder, sometimes suffer medically from the delays and stress of court proceedings.

11. It is this Court's view that there is an onus on judges to look out for the interests of the taxpayer, who is not represented in legal proceedings but who is funding the entire court system. For this reason, this judgment considers how to improve on this 0% settlement rate not just in the interests of the injured garda but also in the interests of the taxpayer. This zero settlement rate is a startling statistic, although it is not surprising when one considers that, not only is there is *no* financial incentive for an injured garda to settle his/her claim without the need for a court hearing (unlike in other personal injury claims), but there is in fact a financial incentive for the applicant's lawyers *not* to settle. As noted hereunder, there is no criticism of gardaí or the lawyers involved in these claims, since it is the compensation system as it is currently operated which fails to encourage settlement.

12. In the absence of legislative reform to allow minor Garda Compensation cases to be heard by the District Court/Circuit Court or be dealt with by the PIAB, this judgment considers how to seek to increase the 0% settlement rate by changes to practice, as distinct from legislation, in the current system of garda compensation and thereby avoid gardaí having to undergo stressful and time-consuming litigation to get their compensation.

13. First however this judgment will consider in detail Garda B's claim for compensation. Then it will consider in detail the proposed changes to practice in dealing with Garda Compensation cases.

GARDA B'S CLAIM FOR COMPENSATION

14. While the majority of this judgment deals with the psychiatric injury suffered by Garda B, he is also seeking compensation in respect of his physical injuries and so that will be considered first.

Physical injury

15. The extent of the physical injury to Garda B's hand is not in dispute between the parties and, as a result, there is minimal focus in this judgment on that injury. The injury can be summarised in the following way. Garda B was diagnosed with a fracture to the base of his little finger of his right hand (the metacarpal bone). He received two injections and no other treatment for the injury and he has made a full recovery. His injury is not associated with any functional disability. While he was advised by his orthopaedic surgeon that there was a possibility of the development of arthritis in the future, he has had no difficulties of this nature in the 19 years since the July incident.

Calculating how much general damages to pay for an injury

16. As regards how a court calculates how much compensation should be paid for this fracture to Garda B's little finger, the case of *O'Connell v. Martin; Ali v. Martin* [2019] IEHC 571 is the most recent judgment in which this Court considered how a court goes about assessing general damages (i.e. for pain and suffering) and special damages (i.e. for out of pocket expenses).

17. As a preliminary point, in *O'Connell v. Martin*, this Court noted that the Book of Quantum is not binding on the courts in assessing what is a fair and reasonable amount for general damages for personal injuries. Instead, what is binding on this Court's assessment of

damages in personal injury cases are the principles of the Court of Appeal and the Supreme Court as set out below. Since the assessment of compensation in Garda Compensation cases is to be undertaken in the same manner as the assessment of damages in personal injury cases (*per* Irvine J. in *Carey & Ors. v. Minister for Finance* [2010] IEHC 247 at para. 4.24 et seq), these principles bind this Court in the assessment of damages for Garda B in this case. These principles are:

(i) The damages awarded must be fair to the plaintiff and defendant:
- *Nolan v. Wirenski* [2016] IECA 56,

(ii) Modest damages should be awarded for minor injuries, moderate damages for middling injuries and severe injuries should attract damages which are distinguishable from catastrophic injuries:
- *M.N. v. S.M*. [2005] 4 I.R. 461; *Nolan v. Wirenski; Fogarty v. Cox* [2017] IECA 309,

(iii) Damages awarded should be proportionate to the cap (generally €450,000) for general damages in order to avoid the concertina effect:
- *M.N. v. S.M.; Gore v. Walsh* [2017] IECA 278; *Payne v. Nugent* [2015] IECA 268

(iv) The award of damages is to be reasonable in light of general after-tax incomes (which are in the region of €35,000 at present, *per* CSO statistics):
- *Sinnott v. Quinnsworth Ltd* [1984] I.L.R.M. 523; *McDonagh v. Sunday Newspapers Ltd* [2018] 2 I.R. 1,

(v) Appropriate scepticism should be applied to litigants' claims:
- *Rosbeg Partners v. LK Shields Solicitors* [2018] I.L.R.M. 305,

(vi) Common sense should be applied to the parties' claims:
- *Byrne v. Ardenheath* [2017] IECA 293, and,

(vii) Caution should be taken by the Court when relying on expert reports:
- *O'Leary v. Mercy Hospital* [2019] IESC 48; *Byrne v. Ardenheath.*

Application of these principles to assess damages for Garda B

18. Having set out the principles which bind this Court in its assessment of damages, the next step is to consider the application of these principles to Garda B's injuries.

General damages for the fracture to the little finger

19. In Garda B's case, this Court, in applying these principles regarding general damages, concludes that the fracture to Garda B's little finger is a relatively minor injury for the very reason that the only treatment required was two injections and the injury has fully healed.

20. In assessing the amount of general damages for Garda B's physical injuries, it is important to note that this is compensation for the pain and suffering endured by Garda B in having his little finger broken. As such, it is separate from, and in addition to, any out of pocket medical expenses which he incurred (as dealt with below) and it is also separate from, and in addition to, any general damages for the psychiatric injuries resulting from the subject incident.

General level of incomes

21. In assessing the amount of compensation to be paid for the pain and suffering endured by litigants who have suffered minor injuries such as this one, the most important of the foregoing principles is, in this Court's view, the fact it takes a person on the average wage a full year to earn €35,000 in after-tax income.

22. Against this background, it is relevant to note the Book of Quantum suggests a figure of between €14,600 and €32,200 for a "*minor*" fracture to the metacarpal bone in the hand. This means of course that if say, an uninsured defendant negligently brushed against X causing him to break his little finger and X got awarded damages of the upper figure in the Book of Quantum, that defendant would have to pay €32,200 in damages for accidentally breaking X's little finger.

23. However, in assessing whether this is fair to the plaintiff and defendant as required by *Nolan v. Wirenski*, it is clear, from the principles set down by O'Higgins C.J. in *Sinnott v. Quinnsworth*, that regard must be had to the *'general level of incomes'.* While it might take a very successful lawyer, professional or business person perhaps a matter of weeks to earn €32,200, this is not relevant to the assessment of damages. Rather, it is clear from *Sinnott v. Quinnsworth*, that it is the general level of incomes in Ireland that is relevant and not those of high earners. In this regard, it is therefore relevant to note in considering an award of €32,200 as suggested by the Book of Quantum, that it would take an uninsured defendant on the average wage almost a year to earn that sum in order to pay those damages for accidentally causing the broken little finger. To put it another way, if this sum were to be awarded, a person who breaks his little finger is entitled to the same amount of money as a person on the average wage would earn in just under a year. In this Court's view, this cannot be a fair and reasonable amount of damages in this case for what the Book of Quantum itself describes as a '*minor'* injury.

24. However, the Book of Quantum is not binding on this Court. What is binding are the foregoing Court of Appeal and Supreme Court principles which emphasise, *inter alia*, the relevance of the general level of incomes when calculating damages.

Award to be proportionate to cap on damages

25. Also relevant in calculating damages for pain and suffering for a minor injury is the principle from *Nolan v. Wirenski*, that the award of damages should be proportionate to the maximum amount of damages (generally of €450,000) payable for the most catastrophic injuries, such as quadriplegia. Looking at it from this perspective, the sum of €32,200 suggested by the Book of Quantum for a minor fracture of the metacarpal bone is over 7% of that cap on damages. It cannot, in this Court's view, be proportionate for a person who sustains a broken little finger to get anywhere in the region of 7% of what someone who sustains an injury such as quadriplegia would receive. It seems to this Court that a minor injury like a broken finger merits an award of closer to 1% - 2% of the cap on damages, rather than 7% - 10% of that amount.

26. In these circumstances, it is this Court's view that the appropriate amount of general damages for the pain and suffering endured by Garda B arising from the physical effects (as distinct from the psychiatric effects – which are assessed below separately) of a

broken little finger is €10,000. This is a sum that it would take a person on the average wage just over 3 months to earn in after-tax income and is closer to 1% - 2% of the cap on damages.

Special damages – medical expenses

27. Special damages have been agreed between the parties in respect of the medical expenses arising from the physical and psychiatric effects of the injury to the finger in the sum of €8,180.30. This Court will therefore also award this sum.

Special damages - loss of earnings of €310,893 claimed by Garda B

28. The main head of damage in this case and thus the main issue in the case remains the extent to which Garda B's psychiatric injuries can be attributed to the July incident when his little finger was fractured.

29. Garda B claims that his depression and associated psychological symptoms were caused *solely* by the July incident in which his little finger was broken and, on this basis, claims that his early retirement from An Garda Síochána in 2005, at the age of 50, some 10 years earlier than the compulsory retirement age of 60, has led to a financial loss of €310,893.

30. In addition, he is seeking general damages for the pain and suffering he endured arising from this depression which he says was solely caused by the July incident.

31. As regards the loss of earnings claim, it is to be noted that of this figure of €310,893, a significant portion of it (the sum of €112,350) is made up of Courts Act interest, much of which is at the rate of 8% for the 19 years since 2000, as 8% was the applicable rate prior to the introduction of a lower interest rate of 2% in January 2017.

32. Counsel for the Minister submitted that it was unusual for an actuarial report to incorporate Courts Act interest in this manner. In light of principle (vii) above (from the Supreme Court case of *O'Leary v. Mercy Hospital*, regarding exercising caution when using expert reports), this Court would exclude this interest from the figure for loss of earnings, since it is preferable not to be dealing with claims for Courts Act interest in an actuarial report on loss of earnings.

33. This exclusion will reduce the loss of earnings claim from €310,893 to €198,543. In addition, however, this Court proposes to reduce this figure further by deducting the amount Garda B claims he lost by not being able to have worked part-time after his retirement from the age of 60 to 65 (if he had retired at his normal retirement age of 60). This is a sum of €32,157. This reduces the loss of earnings claim to €166,386.

34. The reason this Court has excluded this element of the loss of earnings claim, is because the possibility of Garda B working after 60 appears, to this Court, to be somewhat speculative. This is because as Garda B stated in cross examination:

> "[W]ho knows at sixty, I might have decided 'no, I don't want to work' but I'd like to think that given the opportunity that I would have worked."

Furthermore, on the basis of the evidence of Dr. Devitt regarding Garda B's pre-existing condition before the July incident and Dr. Devitt's evidence regarding the likelihood of other events, triggering Garda B's depression (considered in detail below), it seems to this Court that Garda B's ability to engage in work after his retirement at 60, even if the July incident had not occurred, is improbable.

35. However, the actuarial report of Mr. Brendan Lynch makes clear that from this sum of €166,386 must be deducted two sums to take account of the fact that by retiring when he did before the financial crisis in 2005, Garda B received a greater pension and gratuity than he would have got if he had retired in 2015. Based on this actuarial report, this leads to a deduction from this figure of €30,514 and €2,672, giving a net figure of €133,200 in loss of earnings claimed.

36. This figure of €133,200 is only due to Garda B if the July incident leading to the injury to his little finger could be said to be the sole cause of his depression and therefore his absence from work during the years 2000 - 2005 and his retirement 10 years early from the force in December 2005.

37. In this regard, the State accepts that the July incident was *one of the factors* in Garda B's depression, but it disputes that it was the *sole cause* of Garda B's depression. Garda B argues that the July incident was the sole cause of his depression, so that he is claiming to be entitled to 100% of any general damages in respect of the pain and suffering caused by this depression as well as 100% of the loss of earnings of €133,200 arising from this depression.

38. However, it should be noted at this stage that the State does accept that Garda B's absence on sick leave in the period from the July incident in 2000 until his return to work on the 27th February, 2001 was *solely* due to the July incident, since the relevant sick certs refer to the broken finger as one of the causes of his absence during this period. On this basis, the State accepts that a sum of €5,101.51 is due to Garda B in lost overtime during this period. The State does not accept that any sick leave taken after this return to work in February 2001 is *solely* due to the July incident, but rather it contends that it was due to Garda B's depression, which was caused by a number of factors, the July incident being just one of them. It follows that this Court will make an award of €5,101.51 in loss of earnings for the period from July 2000 to February 2001. Since the figure of €133,200 in loss of earnings sought by Garda B contains the figure of €5,101.51, the maximum amount which Garda B can claim in loss of earnings (if the July incident was the sole cause of his depression/early retirement) is €128,098.49.

39. The remainder of this part of the judgment will deal with the loss of earnings which should be awarded for the period after February 2001 to the date when Garda B should have retired in 2015 (at age 60) if he had not been forced by reason of his depression to take early retirement, and in particular it considers the medical evidence regarding the extent to which the July incident caused Garda B's depression. In this regard, and for the foregoing reasons, it is this figure of €128,098.49 which this Court will use to consider Garda B's loss of earnings claim, rather than the figure of €310,893 claimed by Garda B.

40. In reaching its decision, this Court must rely on the expert evidence before it. The expert evidence adduced on behalf of Garda B is that 100% of the economic loss (now at a figure of €128,098.49) is due to Garda B. The State's expert evidence is that some of this figure is due to Garda B, but not all of it.

General damages and special damages for psychiatric injuries

41. In relation to his psychiatric injuries following the July incident, Garda B was referred by his GP to a consultant psychiatrist ("Dr. Denihan") whom he appears to have first attended on 18th September, 2000. He attended appointments with Dr. Denihan on a further 21 occasions until 12th April, 2005, almost five years after the July incident.

42. Garda B was diagnosed by Dr. Denihan with "*a Depressive Episode of Moderate Severity with Somatic Syndrome*". Dr. Denihan noted that Garda B's depression was accompanied by anxiety, impaired concentration, sleep disturbance, panic attacks and difficulty coping with the demands of work. He was treated with various anti-depressant medications and augmentation with lithium carbonate, although the latter treatment was subsequently discontinued as a result of the negative effects it had on Garda B's eczemic skin condition. Despite heavy dosage of anti-depressant treatment over a number of years, Garda B's illness persisted, and he continued to suffer from "*residual depressive symptoms, anxiety, irritability and difficult in coping with stress".*

43. The report of Dr. Denihan dated the 13th June, 2011 regarding Garda B notes that his "*clinical condition has been stable in recent years*" and that his "*mood state is now one of protracted low-grade depression".* This report further notes that Garda B *"manages reasonably day-to-day"* but "that he *requires hypnotic medication to aid him sleep*."

44. This medical view regarding the stability of Garda B's condition is reflected in Dr. Devitt's report dated the 9th May, 2013 which notes that Garda B initially suffered from a depressive illness following the July incident but that his condition is now "*relatively stable on a day-to-day basis*" and is expected to remain stable provided he is not exposed to "*undue stress*". Thankfully therefore, Garda B's condition in recent years has been stable.

Key issue for determination

45. As noted at the outset of this judgment, the key issue for this Court is the extent to which Garda B's depression, which led to his early retirement, was caused by the July incident.

46. Dr. Denihan gave evidence to the Court that he was satisfied that the July incident in which Garda B broke his little finger caused the depression. In legal terms therefore, this supported a conclusion that the July incident when Garda B was assaulted and broke his little finger was the *sole* cause of the depression and thus the cause of his early retirement and so the cause of the financial loss arising from that early retirement of €128,098.49. Yet for the reasons set out below, this Court does not agree with Dr. Denihan's conclusion, but rather agrees with the views of Dr. Devitt that the July incident was but one of the causes of Garda B's depression.

Evidence of the actual cause of Garda B's depression

47. While Dr. Denihan was happy in 2019 in his evidence to this Court, to retrospectively reach the conclusion, as he looked back over the past 19 years, that the sole cause of Garda B's depression was the July incident in 2000, this Court did not find this conclusion compelling. This is particularly so when this conclusion is (i) contrasted with Dr. Devitt's conclusion (set out below) and also (ii) in light of the inconsistency of this conclusion in 2019 by Dr. Denihan with the contemporaneous medical reports and notes made at the time when Garda B was being seen by Dr. Denihan and other doctors during the five years post the July incident in 2000 up to Garda B's early retirement in December 2005.

48. This inconsistency is evident to this Court because nowhere in these reports and notes is there the conclusion, that Dr. Denihan is now reaching, that the *sole* cause of Garda B's depression was the July incident.

49. The inconsistency arises because in these medical reports and notes there is reference to a history of anxiety *prior* to the July incident and there is also a reference to a significant incident relating to Garda B's annual leave which occurred in April 2000 (the "April incident") and thus only a couple of months prior to the July incident. This relatively minor engagement between Garda B and his superior officer regarding annual leave, in April 2000, led to what Dr. Denihan himself, in his Report dated 24th February, 2005, describes as a "*catastrophic reaction*" on the part of Garda B.

50. This April incident occurred after Garda B had returned from a work trip to Hong Kong, although the dispute over annual leave had nothing to do with the trip to Hong Kong, save for the fact that it occurred when Garda B was very tired following his return home after that trip.

51. On his return to work, Garda B was wrongly accused by his superior officer of taking a day's annual leave without recording it. While he was subsequently proved not to have done so and the dispute was resolved, this engagement with his superior officer led to a catastrophic reaction on Garda B's part. According to Dr. Denihan's report of 28th July, 2005 "*he began to panic, shake and tremble when he was told about the problem relating to his annual leave*" and he had to go to his GP, who put him on sick leave for a week and prescribed tranquilising medication and hypnotic mediation for his symptoms.

52. This inconsistency between Dr. Denihan's conclusion that he has now reached and the medical reports and notes is also evident because those documents make more generalised references to the source of Garda B's anxiety being the workplace and the associated work-related stress, rather than the July incident, *albeit* that the July incident is referenced also as one of the sources of that anxiety.

53. The following examples outline how the cause of Garda B's depressive symptoms is not stated in the (relatively) contemporaneous reports to be *solely* the July incident, but rather there are multiple causes listed, including the April incident, anxiety developing over a number of years and stress relating to work (as well as the July incident).

54. For example, there is a consultation note taken by Garda B's GP, on the 25th August, 2000, which is *after* both the April incident and the July incident, and this note links Garda B's mental condition not to the July incident but rather to the April incident:

> "Fractured right hand, assaulted by prisoner. Still suffering from anxiety/stress re previous incident/Hong Kong. Refer Dr. Cian Denihan for opinion."

55. Furthermore, in a report dated 6th March, 2006, the same GP links Garda B's symptoms to stress in the workplace in the following terms in his summary of his consultation with him within a month of the July incident:

> "Examination: This took place in my surgery on 25/8/2000. Garda B described feeling acute anxiety and stress relating to work and felt unable to cope. […] Garda B has a history of anxiety/depression dating back to a work related incident when he went to Hong Kong in his line of duty and suffered some disciplinary proceedings. [….] Garda B has a history of *work related stress* and was referred to Dr C Denihan consultant psychiatrist for a specialist opinion." [emphasis added]

56. In Dr. Denihan's own Report dated 28th July, 2005, it is relevant to note that it is the April incident, rather than the July incident, which is described as the start of Garda B's principal difficulties in the following terms:

> "Mr B stated that *his principal difficulties started circa April 2000,* at which time he escorted several deportees to Hong Kong. He said that he was exceedingly tired after this journey and that stress ensued on his return home due to an error relating to his annual leave. [……] He felt exceedingly stressed about this issue and he was prescribed short term tranquilising and hypnotic medication." [emphasis added]

57. Later in this report, Dr. Denihan reports on Garda B's view that his symptoms evolved gradually over several years and he refers to work-related problems (in the plural) rather than just the July incident:

> "Mr B stated his confidence had deteriorated and this may have gradually evolved over the course of several years, but he was uncertain as to whether such a gradual timescale was accurate. In addition, he reported that he thought that his discomfort in crowded places may have also evolved slowly over several years and that he seemed to be less adept at making conversation and meeting new people. Mr B stated that these difficulties had become much worse and troublesome in his daily life since *his recent work-related problems."* [emphasis added]

58. In a later report dated 13th June, 2011, Dr. Denihan again refers in the plural to the cause of Garda B's problems when he states:

> "He still feels resentful on account of the traumatic *experiences* he suffered in the course of his work, which triggered his depression and ultimately led to his retirement." [emphasis added]

59. In his 28th July, 2005 Report, the April incident, rather than the July incident, is linked to Garda B's depression in the following manner by Dr. Denihan:

> "He reported that he was "shattered" on his return [from Hong Kong] and that he started to panic, shake and tremble when he was told about the problem relating to his annual leave. He said that he was exceedingly embarrassed, as work colleagues saw the degree of his distress and that he had always felt that being depressed was a sign of weakness."

60. Dr. Denihan refers in the 28th July, 2005 Report to Garda B's work-related issues (in the plural) as the source of Garda B's mental health problems in the following section of his Report:

> "I discussed the possibility of admitting him to hospital for inpatient treatment of his depression, but he was reluctant to consider this option. He remained quite preoccupied with work-related issues and fearful of how his colleagues would react if they knew that he was depressed."

61. Crucially, in his conclusion to the 28th July, 2005 Report, Dr. Denihan does not describe the July incident as the sole cause of the depression, rather he states that Garda B's illness developed over several years:

> "Mr B's illness seems to have developed slowly over time, with gradual emergence of anxiety and reduced self-confidence over several years. However, his symptoms greatly intensified and he became moderately severely depressed in association with work-related stress, including being the victim of an assault at work in July 2000."

62. On the foregoing basis, this Court did not find Dr. Denihan's evidence in 2019 compelling regarding the July incident being the *sole* cause of Garda B's depression, particularly when there was other expert medical evidence from Dr. Devitt (considered next) consistent with the relatively contemporaneous medical reports and notes. This is because Dr. Devitt relied on these medical reports and notes as well as his own consultation with Garda B to conclude that the July incident was but one of the factors in Garda B's depression.

Dr. Devitt's evidence

63. The evidence of Dr. Devitt, on behalf of the State, is, in this Court's view, consistent with the medical reports and notes in the five years immediately after the July incident (parts of which have been set out earlier in this judgment), which reports set out the April incident, the July incident and work-place stress as possible causes of Garda B's depression.

64. In light of these reports and his consultation with Garda B, Dr. Devitt states, inter alia, in his Report dated 9th May, 2013, that the April incident was a partial cause of Garda B's depression:

> "It is likely, therefore, that Ex-Garda B had an underlying medical condition which had not yet come to the fore and was partially triggered by the leave investigation in April 2000. […]

65. In reaching his conclusion, Dr. Devitt also placed a considerable emphasis on Dr. Denihan's own Report dated 28th July, 2005 which he quotes from and which states that:

> "Mr B's illness seems to have developed slowly over time, with gradual emergence of anxiety and reduced self-confidence over several years. However, his symptoms greatly intensified and he became moderately severely depressed in association with work-related stress, including being the victim of an assault at work in July 2000."

66. In his own Report of 9th May, 2013, Dr. Devitt concludes:

> "It is impossible to state definitively whether his condition would have remained stable and not clinically significant had the incident of 03/07/2000 not occurred or whether it would have manifested itself in any event.
>
> As no other causes have been identified, it would be reasonable to state that the 2 incidents, the investigation of leave [the April incident] and the assault [the July incident], in concert triggered the development of his illness, though it is likely the assault made the larger contribution."

While Dr. Devitt concludes in this section that between the April incident and the July incident, the July incident was the greater factor in Garda B's depression, it is also clear from his reports and his evidence to the Court that he was of the view that there were more than these two causes for Garda B's depression.

67. In this regard, it is relevant to note that Dr. Devitt in this Report of 9th May, 2013, identified the likelihood of some other event triggering Garda B's depression, since he states:

> "11. Ex-Garda B's apparent disproportionate emotional reaction to the assault and his overall poor response to treatment would suggest at least the possibility that some other event would have triggered his particular illness had the assault not occurred."

68. In this context, it is relevant to note that that Garda B had "*additional major stress*" in the period 2013 - 2015 (noted in Dr. Denihan's Report dated 3rd June, 2015) due to a delay of four months in the purchase of a new family home and due to two suicide attempts by his son in 2013. In Dr. Devitt's subsequent Report dated 13th December, 2016, Dr. Devitt states:

> "In relation to Point 11 of my [earlier] report, "*Ex-Garda B's apparent disproportionate emotional reaction* [….], this comment now appears particularly relevant given the mental health difficulties of his son in 2013."

69. It is also relevant to note that in his evidence to this Court Dr. Devitt was of the view that Garda B suffers from chronic Dysthymia which he compared to a personality disorder which he believes he had *prior* to the April and July incidents in 2000.

70. Finally, in support of his conclusion that the July incident was but one of the factors in Garda B's depression, Dr. Devitt states in his Report of 5th July, 2013:

> "Although the incident itself was a violent struggle, it does not appear to have been particularly traumatic and ex-Garda B regarded his reaction to it is difficult to understand."

Total compensation for Garda B

71. Having considered all the evidence, this Court concludes that the July incident was but one of the causes of Garda B's depression, the other causes being the April incident and work-related stress and the fact that Garda B had a personality disorder which preceded the July incident and which was liable to lead to depression even if the July incident had not occurred. This Court would therefore conclude that the July incident was but one of several factors leading to Garda B's early retirement on 16th December, 2005.

72. Since the State's psychiatrist, Dr. Devitt, accepts that the July incident, in which Garda B broke his little finger, was partly to blame for Garda B's depression, this Court must award damages to reflect this fact. In all these circumstances, this Court will award a total sum of €75,981.30 to Garda B consisting of the following:

- €10,000 for general damages for pain and suffering for the fractured little finger,
- €8,180.30 in agreed special damages/out-of-pocket medical expenses associated with the depression and fractured finger,
- €5,101.51 in agreed special damages/loss of earnings up to February 2001 due to absence on sick leave due to the broken finger,
- €42,699 being that proportion of loss of earnings which this Court determines was caused by the July incident in the period February 2001 to December 2015, and
- €10,000 in general damages for the pain and suffering caused by his depression to reflect that proportion of that depression which was caused by the July incident.

73. That completes the first part of this judgment which deals with the claim for compensation made by Garda B. This Court will now deal in the second part of the judgment with the issue of there being a zero-settlement rate in cases brought under the Garda Compensation Acts.

IMPROVING ON ZERO SETTLEMENT RATES IN GARDA CASES

74. It is important to note that in claims brought under the Garda Compensation Acts there is no dispute regarding liability. This is because when an application to bring a claim is authorised by the Minister for Public Expenditure and Reform, the State accepts that it is

liable to pay compensation to the injured garda for injuries sustained, which injuries are invariably incurred during the course of their work.

75. Accordingly, the litigation between the parties under the Garda Compensation Acts, which is subject to a fully contested hearing in the High Court, is simply about the amount of compensation due to the applicant garda.

Legislative reforms in compensating injured gardaí

76. In 2018, this Court referenced some legislative reforms that might be made to more speedily get compensation to members of An Garda Siochána who were injured during the course of their duties, to save those gardaí from the often-traumatic experience of having to attend court and to save the taxpayer having to fund the costs of court hearings in the assessment of that compensation.

Hearings in the District Court or the Circuit Court with reduced legal costs

77. In particular, in *Kampff v. Minister for Public Expenditure and Reform* [2018] IEHC 371, this Court referred to the fact that the majority of Garda Compensation claims did not need to be heard in the High Court, which hearings are at significant cost to the taxpayer, and where the majority of such claims merited damages on the District Court or Circuit Court level as they deal with compensation for minor sprains and soft tissue injuries with no claim for loss of earnings.

Assessment instead by PIAB with no legal costs

78. In the *Kampff* case, in order to save further on legal costs, it was suggested that Garda Compensation cases could be heard with no legal costs at all, if heard by the Personal Injuries Assessment Board (PIAB), a body which is specifically designed to deal with the assessment of damages due in personal injury cases (since Garda Compensation cases are assessment only cases). In this regard, in the *Kampff* judgment, this Court sought submissions from the Chief State Solicitor's Office on the actual amount per annum spent on legal costs in Garda Compensation cases. As it is awaiting those submissions, it is not in a position to give an accurate figure for the costs involved. However, based on an average of 100 hearings in Garda Compensation cases a year, with legal costs on average of say €10,000 - €20,000 per claim (for the solicitor(s) and barrister(s) for the State and for the solicitor(s) and barrister(s) for the applicant), one is dealing with a cost to the taxpayer in the millions of euro.

Having some financial incentive for Garda Compensation claims to be settled

79. If, however, Garda Compensation cases are to continue to be heard in the High Court (or any other court), this Court noted in the *Kampff* case, that there was no good reason why those cases should not settle just as in other personal injury cases. If Garda Compensation cases were to settle at a rate similar to other personal injury cases there would be a significant saving for taxpayers (since the State *invariably* pays the costs of legal representation at the hearing for *both* the applicant and the respondent) and also in a saving of court resources (which are also funded by the taxpayer).

80. This Court pointed out that there is currently no financial incentive for injured gardaí to avoid a hearing (unlike the position with other personal injury plaintiffs). This is because

the provisions regarding the lodgement into court of sums to settle a claim, which applies to all other personal injury litigants under Order 22 of the RSC, do not apply to Garda Compensation Cases.

81. These lodgement into court provisions under the RSC provide a very strong incentive for other personal injury plaintiffs, on the advice of their lawyers, to accept any reasonable sum which is lodged into court. This is for the very simple reason that if the court-award fails to beat the lodgement, the plaintiff is likely to have to pay for the legal costs of the hearing and thereby effectively end up with a reduced award.

82. It seems to this Court patently obvious that the absence of lodgement provisions applying to Garda Compensation cases has led to the current situation where the settlement rate of those cases is nil, in contrast to other personal injury cases where the settlement rate is very high. To put it starkly, if there is no financial incentive for an injured garda to settle, why would he/she settle?

83. While this Court does not have statistics in relation to the actual settlement rate for other personal injury cases, for present purposes only, it is assumed to be *circa* 90% based on anecdotal evidence to that effect. A settlement rate of 90% leads to a very significant saving in legal costs to the parties in those cases and to the taxpayer in savings in court resources, which saving is not made in Garda Compensation cases.

Financial incentive not to settle Garda Compensation cases

84. However, it is not just that there is no financial incentive for an injured garda to settle, it is also the case that there is a financial incentive for the garda's lawyer *not* to settle the case. This is because if a case settles, the lawyer would forgo the costs of the hearing that would inevitably be awarded at the conclusion of the case, since it is an assessment only case (where the liability of the State, to compensate for the injury and therefore to pay the costs of the hearing, is not disputed).

85. The effect of there being in effect a financial incentive for lawyers acting for garda applicants not to settle their cases is starkly illustrated by the following statistics regarding the resolution of Garda Compensation claims taken from the Courts Service website:

Year	**Incoming**	**Resolved**
	by court	out of court
2017	149	113	0
2016	173	83	0
2015	76	67	0
2014	125	121	0

86. Thus, in the four most recent years for which statistics are available, 2014 to 2017, not one of the 384 claims for personal injuries by gardaí was settled and so the State paid High Court legal costs for fully contested hearings in 100% of the claims made under the

Garda Compensation Acts. This contrasts with *circa* 10% of claims for other personal injuries which go to fully contested hearings.

87. Thus, in other personal injury claims (where a plaintiff and his/her lawyer are at risk of not getting their legal costs for the hearing), defendants and their insurance companies are usually only paying legal costs for hearings (and court resources are only required) in circa 10% of the total number of claims. In contrast, the State currently pays legal costs for hearings in 100% of Garda Compensation claims.

88. This zero settlement rate is a startling statistic, particularly since the costs of not settling and having fully contested hearings in every single case are borne by the taxpayer, who pays for the lawyers on *both sides* at those hearings and who funds the court staff to hear the cases. Of course, while a startling statistic, it is not a surprising statistic, for the reason stated, namely that there is a financial incentive for the applicant garda's lawyer *not* to settle.

89. However, this low settlement rate is not a criticism of the gardaí or their lawyers in not settling. This is because firstly to settle there has to be an offer from the State and in the past 18 months, when dealing with costs, this Court has not been advised of any instance in which an offer was made to a guard which was not accepted. Indeed, the zero settlement rate in the years 2014 - 2017 would seem to indicate that there is a practice on the part of the State of not making offers in these cases as a matter of course. The second reason there is no criticism of gardaí and their lawyers for this low settlement rate is because both would be acting contrary to their financial interests (and people do not generally act against their financial interests) if they were to settle the case. This is because collectively they are guaranteed to receive more money from the State by not settling, since they receive the costs of the hearing in *addition* to the compensation. The reason they receive these costs as a matter of course is because there is no practice in Garda Compensation cases of offers being made and therefore of costs not being awarded where rejected offers are not beaten by the court award.

90. Lawyers and their clients can only operate the system that is before them and it is the current system of garda compensation and how it is operated that needs to change so that it has similar financial incentives for gardaí to settle their compensation claims as currently apply to persons seeking compensation for personal injuries.

Benefits to gardaí of their getting compensation without court hearings

91. More important than the costs savings to the State of improving the zero-settlement rate, is the fact that settling compensation claims would be of considerable benefit to injured gardaí. This is because, first, a settlement should result in their getting the compensation sooner than if they had to wait for a court assessment. Secondly, and more significantly, settling a compensation case will mean that gardaí will get their compensation without the stress of a public court hearing in which they have to relive sometimes life-threatening situations.

92. In this regard, there is an inherent contradiction in an adversarial court-based compensation scheme (whether general personal injuries litigation or under the Garda Compensation scheme) which can have negative consequences for some injured plaintiffs seeking compensation. This contradiction exists because, on the one hand, it would be natural for a plaintiff's lawyer to feel that the measure of his/her success is the size of the award made by the Court. The logic of this position is that the greater the pain and suffering exhibited by the plaintiff at the time of the hearing (which could take place number of years after the subject event), the more successful the lawyer is likely to be in achieving a large award of damages. On the other hand, the irony of such an approach is that, as noted hereunder, this emphasis on the past and/or continuing negative physical and emotional aspects of an event may be counterproductive for the mental or physical health of the plaintiff.

93. For this reason, in some cases there may be a very clear conflict between a successful outcome *medically* on the one hand (which may involve a positive outlook and 'moving on' by a plaintiff) and a successful outcome *legally* on the other hand (with an emphasis on how bad the outlook is and the experience has been). It is for this reason, it seems, that in the Garda Compensation List, it is not uncommon for a doctor to comment in medical reports on the negative impact of litigation on the health of injured gardaí, particularly where he/she has to re-live a particularly harrowing experience in order to get compensation.

94. By coincidence, in a Garda Compensation case taken by another garda, Garda D, heard by this Court on the same day as this judgment was delivered, a doctor in his medical report stated:

> "It is likely that the Garda Compensation proceedings of themselves are stressful for [Garda D] and force her to recount and relive the traumatic events of the day. The sooner her action is settled, the better it will be for her." [Emphasis added]

95. It seems clear therefore to this Court that early settlement of Garda Compensation cases is not just in the financial interests of gardaí (by enabling them to get their compensation sooner) and in the financial interests of the State (by a saving in legal costs) but also, most significantly of all, in the interests of the physical and mental health of the injured gardaí, who on a daily basis put their bodies on the line for the security and safety of the State's citizens.

How to increase the settlement rate without legislation

96. The changes suggested by this Court in 2018 in the *Kampff* case to reduce the costs incurred in Garda Compensation cases (i.e. by the hearing of the majority of the cases in the District and Circuit Courts and/or the assessment of compensation by the PIAB and/or the application of the lodgement system to Garda Compensation claims) require legislation. In the very uncertain political and legislative climate which exists at present, it is perhaps understandable that this legislative reform has not received priority.

97. However, there are some changes in practice which this Court can implement to encourage (a) the State to make reasonable offers of compensation to gardaí at an early stage and (b) gardaí to accept any reasonable offers, which would lead not just to savings to the taxpayer, but which would also lead to injured gardaí getting their compensation sooner and without the need to undergo court proceedings.

98. In this regard, while Order 22 of the RSC (lodgements into court to settle claims) would require legislation to apply to Garda Compensation claims, it is the case that Order 99, Rule 1A of the RSC, which sets out the effect, on costs awards, of written offers, is not precluded from applying to Garda Compensation cases. This rule is broad enough to entitle a Court to refuse to grant a plaintiff/applicant their costs, or to award costs against him/her, for the costs incurred after a written offer is declined, where that offer is not then beaten by the court-award.

99. Accordingly, this Court has no hesitation in seeking to ensure that written offers are made to injured garda applicants wherever practicable in order to avoid the need for contested hearings and thereby save on legal costs, but also to ensure that injured gardaí get their compensation sooner rather than later.

100. In making this change in practice, this Court does so because of the public interest in encouraging litigants to resolve their differences themselves, and to only resort to court hearings where absolutely necessary. This is clearly not the case in Garda Compensation claims at present, where 100% of such claims go to a contested hearing. It seems clear that this is because gardaí seeking compensation under the Garda Compensation Acts, as it is currently operated, are entitled to litigate for that compensation without any financial consequences. In a different context (namely regarding whether a controller of a company should be personally liable for a costs order against that company), in the case of *W.L. Construction Limited v. Chawke* [2019] IESC 74 at para. 67, O' Malley J. quoted Clarke J. in relation to:

> "the need to prevent persons litigating on a consequence-free basis".

This principle is clearly applicable to all types of litigation. It follows that if a garda is offered reasonable compensation which he/she refuses and instead demands a full hearing in the High Court of the compensation claim, this hearing, which is at the cost of the taxpayer, should *not* be on a consequence-free basis. At para. 27, O'Malley J. described the policy justification to award costs against a litigant in the course of litigation designed for his benefit (which the Garda Compensation litigation is), in the following terms:

> "One policy justification for the jurisdiction is described in paragraph 4.12 [of *Moorview Developments Ltd & Ors. v. First Active plc & Ors*. [2018] 2 I.L.R.M. 403] as being to prevent parties having a "free ride" as to how they conduct litigation designed for their benefit, without there being a risk of a meaningful costs order against them. It was noted that procedural failures by parties in the course of litigation are normally dealt with by costs orders, rather than by

any order that might affect the substantive outcome of the case. This could be futile if parties were effectively absolved from the potential consequences."

101. In the context of Garda Compensation cases, it seems clear that the reason that there is a zero settlement rate is because injured applicants are in fact given a 'free ride' in relation to the need for High Court hearings to determine their compensation and the change to practice considered below is aimed at removing this 'free ride' in order to encourage settlement.

102. More generally, the fact that there is a public interest, in court resources only being used where the parties themselves fail to reach a settlement, is clear from the judgment of Gilligan J. in *Carpenter v. Stoneavon Holdings Ltd* [2016] 1 I.R. 367. Speaking in the context of the lodgement procedures under Order 22 of the RSC, he states at para. 17:

> "[..] the public interest is best served by allowing defendants to proffer to the plaintiff utilising the facility of the Courts a sum that the defendant considers adequately meets the plaintiff's claim. Again the underlying rationale for this view is for the bringing about of a reasonable resolution of the proceedings and a potential reduction in respect of legal costs that will necessarily be incurred if matters have to proceed to a full and potentially lengthy trial allied to the necessity of the Courts to efficiently use the resources available to them for the efficient disposal of litigation."

103. While Gilligan J. identified this public interest in the context of the lodgement procedures under Order 22, it seems clear to this Court that the public interest, in bringing about the resolution of proceedings without court hearings, is of general application to all court proceedings. Regardless of whether the proceedings involve gardaí seeking compensation under the Garda Compensation Acts or whether involving a dispute between commercial entities, as in the *Carpenter* case.

104. The public policy aspect of encouraging settlements was also identified by Laffoy J. in *Re Skytours Ltd; Doyle v. Bergin* [2011] 4 I.R. 676 at para. 14. In the context of written offers under Order 99, Rule 1A, she states:

> "As is the case with the lodgement, or tender offer in lieu of lodgement, procedure provided for in Order 22, the rationale underlying rule 1A of Order 99 is obviously to encourage compromise of legal claims with a view to shortening the duration of civil litigation. That is clearly a rational policy which the Court should implement where it is just and fair to do so."

105. It is this Court's view that, in light of the need to avoid consequence-free litigation identified by O'Malley J. in *W.L. Construction*, the public interest identified by Gilligan J. in *Carpenter* and the public policy identified by Laffoy J. in *Re Skytours*, it is the responsibility of the Courts to make whatever changes in practice are justified and legally permissible to ensure that court resources, which are funded by the taxpayer, are used as efficiently as possible.

106. This public policy means that disputes (whether about how much a garda is entitled to in compensation or otherwise) should only end up in court as a last resort, where the parties themselves have tried everything to resolve their dispute (whether through settlement negotiations, written offers, mediation or otherwise).

107. It is patently clear that if, as is clearly the case, 100% of Garda Compensation cases go to a contested hearing in the High Court, then a court hearing is not the last resort in Garda Compensation cases, but rather the *first and only* resort, at considerable expense to taxpayers.

Absence of written offers by the State?

108. It seems likely from the foregoing statistics that written offers are not being made by the State, at all, or on a regular basis. It may well be the case that it is not the practice of the State to make offers in Garda Compensation cases as it would prefer the compensation to be determined by a completely independent body, i.e. the Court, rather than having the Minister or the Garda Commissioner as the employer of the injured garda determine 'internally' how much to offer an injured garda. Indeed, for this reason it is possible that these parties may welcome a court direction to make offers to injured gardaí. In any case, the current apparent absence of offers and associated costs consequences comes at a considerable cost to the taxpayer and places an unnecessary strain on court resources.

109. It is also of course the case that if an offer is made, an applicant garda does not have to accept it and he/she can choose to have the High Court determine the compensation if he/she so wishes. It seems clear that the offer from the State will only be accepted if the applicant regards it as a good offer. Hence, this Court sees very good policy reasons for obliging the State to make written offers in every case, in order to seek to settle the claims. Furthermore, the State, as the respondent to almost 200 awards made by this Court in the past 18 months, should have little difficulty in most cases, in making what it regards as a reasonable offer of compensation so as to avoid the necessity and cost of a court hearing, particularly as many of them will relate to relatively minor injuries.

110. In these circumstances, this Court has no hesitation in (i) making a change in practice which will require the Minister (the State) in Garda Compensation cases to make a written offer in an attempt to settle compensation claims and (ii) confirming that this Court will rely on the terms of Order 99, Rule 1A of the RSC to decide whether an applicant is entitled to their legal costs for a hearing where the applicant refuses an offer which is equal or greater than the award made by the Court.

Changes to practice

111. On this basis, it is this Court's view that the following changes should be made to improve the current settlement rate in Garda Compensation cases and to reduce the number of hearings, thereby making savings for the tax payer in the amount of legal costs it pays for hearings, making a saving in court resources and speeding up the payment of compensation to injured gardaí and enabling them to avoid court proceedings. Most significant of all, and based on the expert medical evidence heard on a weekly basis by

this Court, this change in practice should lead to injured gardaí having better medical outcomes by avoiding stressful court proceedings:

(i) Within 7 days, or as soon as practicable thereafter, of the date when a case on the Garda Compensation List is set down for hearing for the assessment of the amount of compensation payable to the Applicant, the Respondent should, save for good reason, write to the Applicant with an offer in writing offering to satisfy the whole of the Applicant's claim.

(ii) Prior to the commencement of a hearing, the Respondent must confirm to the Court whether or not such a written offer has been made. If made, the Applicant should confirm to the Court that it has not been accepted by the Applicant before the hearing proceeds.

(iii) Where, at the conclusion of the hearing, an Applicant receives an award of compensation which is greater than the offer, the Court will, save for cause in accordance with s. 7(2)(h) of the Garda Síochána (Compensation) Act, 1941, exercise its discretion in relation to the awarding of costs by awarding the Applicant his or her entire legal costs.

(iv) If the compensation awarded by the Court is equal or less than the written offer, the Respondent should provide the Court with details of the written offer before an order for costs is made by the Court and then the Court will, in accordance with Order 99, Rule 1A of the Rules of the Superior Courts have regard to the terms of that written offer in determining whether there is cause to justify the Court in awarding costs to the Applicant only up to the date of the written offer.

112. Should counsel for the State or counsel for applicants wish to make any submissions in relation to this change in practice, this Court gives liberty for submissions to be made and accordingly this proposed change in practice will not yet take effect.