APPROVED **[2022] IEHC 732**

THE HIGH COURT

[2020 47 P]

BETWEEN

PATRICK RYAN

PLAINTIFF

AND

QUEALLY PIG SLAUGHTERING LIMITED

DEFENDANT

Judgment delivered on 21 December 2022 by Mr. Justice Tony O'Connor

Introduction

1. The principal focus of this judgment is directed to the effects of an injury sustained by the plaintiff at his place of work for the defendant in April 2017. The Court heard evidence about "facet joint dysfunction" against the background of a contention on behalf of the defendant that the plaintiff had a bad back, which was going to cause him many of his current complaints. At trial, the defendant initially kept liability an issue, but later confined its

defence to the cause and extent of the plaintiff's injuries and losses. An issue about minimising losses also arises for consideration.

Background

2. The 60 – year – old plaintiff lived at and worked near his current home in Carrick on Suir for his entire life. He always had a good work ethic. He only experienced short periods of unemployment since leaving after his first year in secondary school. He worked on farms, in a tannery and at another bacon factory before joining the defendant in 2003. I accept that all the plaintiff "…ever wanted to do was to work and earn a living". It was his raison d'etre.

3. In April 2017, the plaintiff started work at 6:30a.m. and moved to the "VAC PAC" area at around 7.30a.m. There he interchanged on a regular basis with a fellow employee for the repetitive task of twisting and lifting bags of pork which could weigh up to 25 kilograms and more. Overtime work, which was expected by both parties, meant that he worked until 5 p.m. Monday to Friday. The work was hard with time limited breaks. The defence, up to the end of the direct evidence of the plaintiff, maintained that the system was safe.

4. Counsel for the defendant admitted liability before Leonard O'Sullivan, a professor in industrial ergonomics at the University of Limerick, started his evidence on day two. Suffice to say that no changes were made, despite concerns expressed regarding the system of work and the ergonomic exposure in the manual handling required of the plaintiff up to April 2017.

The incident

5. On 13 April 2017, the plaintiff, after the 15 – minute break at 10a.m. returned to the VAC PAC section and experienced an awful pain in his central mid lower back area when swinging over one of the bags. The plaintiff did not want to make a fuss, as appears to be typical of his career and character. He thought that he would be "grand". On the following

day, which was a Good Friday, and after having been up all night with back pain, he attended a doctor who referred him to accident and emergency in Clonmel Hospital.

6. The evidence of the plaintiff and his general practitioner (Dr. John Flanagan) for some 20 years, satisfied me that the plaintiff wanted to return to work despite his significant pain. Physiotherapy did not afford the plaintiff any relief and there was a suboptimal response to medication and injections administered. The plaintiff was strongly motivated to maintain employment which was connected to his role in his family unit and in his community. He was a good manual worker, and he did what he knew was best for himself, his family and his employer. To this day despite the agony which waxes and wanes he walks his two dogs for a few kilometres most days but avoids hills. He gardens raised beds for which his wife carries the compost. He has had to forego his lifelong interest in sea fishing and looks longingly at anglers on the river. The plaintiff ceased his engagement with local clubs. He gave up on attending matches because he must move around due to his back pain and he got tired of people asking him about his wellbeing. He is a private man. Demanding domestic duties are no longer undertaken. He drives short distances; the drive to Waterford and then to Dublin for the trial caused him great difficulties, as was evident from his physical presentation and posture in the courtroom. In short, the plaintiff's previously fulfilled life has deteriorated drastically since the incident in April 2017.

Mr. O'Riordan

7. When cross – examined, retired consultant orthopaedic surgeon, Mr. Michael O'Riordan - who had reported to the defendant's solicitors that there was ". . . some inconsistency" in the plaintiff's "physical signs" conceded that there was no basis for anyone to interpret this comment as meaning that the plaintiff was exaggerating the effects of his pain. The extent to which Mr. O'Riordan was prepared to go without having mentioned it in

any report prior to the trial, was that the plaintiff could handle two – kilogram weights as long as he did not have to bend to pick them up or move them from place to place.

Dr. Patterson

8. Dr. Patterson, consultant in anaesthesia and a director of pain medicine in the Whitfield Clinic Cork, gave evidence by video link. He described how facet joints twist and move, by reference to a model of the back. Facet joints allow the lumbar spine to move as the back twists. He succinctly explained that: -

"Actual back pain can come from facet joint issues, or it can come from disc issues"

He deduced from having achieved temporary relief of about 60% for the plaintiff by injecting the facet joints, that the plaintiff had "facet dysfunction". Unfortunately, the plaintiff will not achieve any long – term benefit from such injections or surgical procedures in the future.

9. Dr. Patterson told the Court that too much strain "… builds up tension in the muscles of the back and results in muscle spasm and acute facet syndrome. This is what happens with the facets, it's a kind of waxing and waning thing. Patients will often be okay for a time, then they overdo it, it comes back to plague them, they get back spasm and pain and they are unable to do their day-to-day activities"

10. Dr. Patterson further testified how he advised the plaintiff against considering a spinal cord stimulator. The plaintiff obtained a second opinion from Dr. Paul Murphy, pain specialist at St. Vincent's Hospital in Dublin. After review by Dr. Murphy and his team, the plaintiff's anti-inflammatory medication was changed to minimise the risk of kidney damage. On the day which the plaintiff gave evidence, he was on an opiod, anti-spasm medication, tablets for blood pressure in addition to his daily dose of eight paracetamol. The plaintiff has a broken and limited sleep because he needs to move for a comfortable position every twenty minutes or so.

Review in July 2022

11. Following the lifting of restrictions to combat Covid and the catching up on the delays for treatment under the public health system, the plaintiff underwent a different injection procedure at St Vincents hospital. Unfortunately, this too was unsuccessful in alleviating the condition. My conclusion is that the plaintiff will not obtain long term relief from any care which may be offered by Dr. Patterson, Dr. Murphy, his team or from any surgical procedure.

12. Notwithstanding the considered cross – examination of Dr. Patterson based on the reports of Mr. O'Riordan and Dr. John O'Dwyer (retired consultant neuroradiologist) and having heard all of the evidence from the experts, I am satisfied that the plaintiff could not have done anything more than he has done to alleviate his pain. The suggestion that the plaintiff ought to have persisted with a chiropractor, physiotherapist or recommended exercises does not stand up to scrutiny. The plaintiff underwent physiotherapy and tried exercises which caused him more pain and discomfort. Lumbar support belts made his condition worse when tried. The plaintiff demonstrated an admirable motivation to return to work and did so from July 2017 to April 2018, but he suffered for his efforts more than if he stayed off work with "sick certificates". The duties may have been lighter than those with which he was engaged in April 2017, but they still caused him difficulties as noted by Dr. Flanagan.

Bad back

13. A theme pursued in the defence of this claim was that the plaintiff had what is colloquially termed as a "bad back". The defendant contended that due to the degeneration of his lumbar discs and adjoining facet joints, the plaintiff was going to have the pain which he now endures.

14. Dr. Flanagan was pressed about the results of an MRI scan taken in May 2017. He disagreed with Mr. O'Riordan's reported proposition that the MRI scan showed "moderate disc degenerative disease affecting all of the lumbar discs with some facet joint arthrosis".

Dr. Flanagan relied on the report from the radiologist as opposed to the opinion of Mr. O'Riordan who had reported to the defendant's solicitors.

15. The issue arising from the straight leg raising results, reported upon by Mr. O'Riordan, were respectfully discounted by Dr. Patterson. I am satisfied from the opinions offered and the concessions made by Mr. O'Riordan in cross – examination that the plaintiff's inability to work is indeed attributable to the facet joint dysfunction. The effect of the defendant's position at its height is that the plaintiff was prone to developing some back pain in later life.

Prior complaint

16. Interestingly, the plaintiff had only taken three days off work in 2010 after he had pulled a muscle in his upper shoulder. The incident on 13 April 2017 was at a "very high risk" of occurring according to Professor Leonard O'Sullivan. There is no merit in the defendant's position that the injuries and inability to work which the plaintiff now has to endure are solely or substantially attributable to his "bad back".

Professor McMahon

17. The evidence of Professor Peter McMahon (consultant radiologist at the Mater Hospital, Dublin) copper fastens my understanding of the information which may be gleaned from comparing MRI scans of the plaintiff's lumbar spine taken on 2 May 2017 and those taken on 4 April 2019. He said that the plaintiff's wear and tear arthritis had progressed slightly in those two years, but it was not at a high grade. Unlike Dr. John O'Dwyer (retired consultant neuroradiologist) who had only reported to the defendant's solicitors on 3 December 2022, Professor McMahon relied upon normal ranges when reviewing the relevant scans. Professor McMahon's ongoing experience of reading scans allowed him to opine that the work required of the plaintiff contributed to the arthritis in the plaintiff's spine. I accept that evidence, which means that the facet joint dysfunction and the contribution of some 20%

to the plaintiff's arthritis from the work required, combined to have an overwhelming effect on the plaintiff's lumbar spine.

Vocational assessment

18. Ms. Susan Tolan, occupational therapist and vocational evaluator, assessed the plaintiff by way of telephone conversation in January 2021 due to the restrictions to combat Covid. She was also impressed by the hard-working history and ethic of the plaintiff. She referred in evidence to the serious effect of the plaintiff's chronic pain on his sleep and concentration. There is no doubt that the plaintiff was committed and confined to manual work. I accept that the plaintiff is not now fit for any job which requires bending, stooping, carrying or lifting weights of any significance. It is unrealistic to expect an employer, even with the current high rate of employment rate in the State, to risk employing the plaintiff for any type of physical work. The plaintiff just cannot persist at tasks. He may be able to walk, observe or do the odd bit of gardening with raised beds, but unfortunately, he cannot be relied upon to stay at something for any period of time. The cocktail of medication prescribed allows him to function but in a limited way. He will be plagued for the rest of his life with back spasm after trying to work beyond what he has achieved to date. The recent trips from his home to Waterford city and then to Dublin show that he could not undertake regular travel for work. Ms. Tolan succinctly stated that the plaintiff "…is unlikely to work again."

19. The plaintiff responded promptly and honestly to the suggestion from counsel that he does not have circles under his eyes from lack of sleep. He had not observed his eyes with that in mind. The toll of the plaintiff's pain is indeed visible on his face and in his posture. I respectfully comment that he is not a young looking 60 year old.

Return to work

20. The plaintiff was 55 at the time of the accident on 13 April 2017. He returned to light duties in July 2017, which involved moving weights of about 1 to 2 kilograms. The return to

work arose after the plaintiff had expressed a wish to his general practitioner to return. He stayed working and did not miss a day. Dr. Flanagan had been certifying the plaintiff as unfit from April 2017 to July 2017 and then from April 2018. The defendant did not carry out its own occupational medical assessment of the plaintiff at any stage since 2017 other than the to obtain the medico legal reports relied upon at trial. Despite the facility offered for light duties, the plaintiff's pain and discomfort got worse, as reported by his general practitioner during those months. Nothing now turns on whether the plaintiff ceased working on the advice of Dr Patterson; the plaintiff simply causes himself back pain if he works. There was no evidence of any assessment by the defendant of tasks which the plaintiff could undertake safely. The defendant relied on the certificates of inability to work issued by the plaintiff's doctor without question.

21. The plaintiff attended Dr. Patterson for a second time on 14 March 2018, following which the plaintiff ceased working on 14 April 2018. Counsel for the defendant pressed the issue about whether the plaintiff gave up work on the advice or as a consequence of his attendance with his advisors. I am satisfied that the plaintiff was just not fit for work and his effort to work between July 2017 and April 2018 are to his credit. Certainly the defendant did not establish that the plaintiff had or currently has an ability to work as an employee. Dr. Patterson has not only opined that the plaintiff could not return to his previous work but also "felt" that he would not return to work. Dr, Flanagan's notes, certificates and evidence support the view that the plaintiff was really unable to do the "light work" which he had for the said eight months.

22. When the trial of these proceedings resumed early in December 2022, some ten weeks after the initial two days of hearing in Waterford, the plaintiff was recalled for further questioning by counsel for the defendant about the extent of the light duties undertaken in those eight months and his alleged omission to ask for alternative tasks. It is relevant that no

effort was made before or at trial in Waterford to put it to the plaintiff that he would have been given long term work with which he could cope, and which would comply with the safety, health and welfare obligations of the defendant.

Mitigation

23. Mr. Patrick Vaughan, the defendant's plant manager since before 2017, despite having sworn a verifying affidavit on 12 October 2022 for the defence delivered on 24 February 2020, which had alleged "reckless disregard" as one of the pleas of contributory negligence, suggested to the Court that the plaintiff could have returned to some different manual work after April 2018. He explained that the plant typically has 280 employees and that arrangements can be made with staff to take lighter work if that work is available. He was not specific about the work which the plaintiff could have undertaken, and which could have complied with the regulations and advice for the safety, health and welfare at work of employees. He suggested that it was for the plaintiff to look for a task which he could do. Mr. Vaughan effectively sought to place the onus on the plaintiff to identify and seek tasks. The thesis for the defendant goes as follows: - had the plaintiff followed up with the defendant and had the defendant considered the follow up with other employees, and had a job been identified for the plaintiff, the plaintiff would have been offered a job to take right up to his retirement age. Apart from the fact that this sequence was not put to the plaintiff to comment upon, the conditional sequencing is rather hypothetical. The defendant employer expects a lot from its previously hardworking manual worker and of this Court to find that the defendant would have offered safe employment to the plaintiff for the rest of his working life. One cannot ignore the plaintiff's poor concentration and inability to maintain doing one task for any length of time. There was no evidence that the defendant considered these impediments. The defendant merely complains by way of submission that the plaintiff ought to have pursued the defendant.

24. The onus of proof indeed lies with the defendant as wrongdoer to establish that the plaintiff has not taken reasonable steps to mitigate his loss. The defendant has not established that the plaintiff failed to take reasonable steps to reduce his loss. Moreover, it is unlikely that any step which he might have taken would have actually reduced his loss. The factual and expert evidence adduced lead me to conclude that the plaintiff is incapable of employment. As some controversy arose at trial about the memory of the plaintiff relating to his review by Dr. Patterson in March 2018, it is worth remarking that "he was [then] on quite a high dose of medication" and that he told Dr Patterson "… that the return to work [in July 2017] had not worked out for him, that his back pain was worse than ever."

Loss of earnings

25. The agreed net loss of earnings from April 2017 to December 2022 is €130,000. The defendant as compensator will be obliged to pay the considerable sum of "recoverable benefits" to the Department of Social Protection from that sum.

26. As for future loss of earnings, the Court had the benefit of the actuarial evidence offered by Mr. Tennant. He relied on an accepted 1 ½% rate and the latest mortality statistics for a man of the plaintiff's age to identify a multiplier, assuming tax of 28.5% of 222 up to age 25 and 272 up to age 66. Mr. Tennant calculated without objection that if the plaintiff had continued in his employment with the defendant, he would now be earning €760.65 gross per week and €653 net per week.

Reddy v. Bates

27. The recent judgment of Noonan J in Twomey v. Jeral Ltd. & Ors [2022] IECA 177 (Unreported, Court of Appeal, 16 June 2022) clarified that the conventional Reddy v. Bates discount is between 15% and 25%.

28. Considering the plaintiff's work ethic and the views of Dr. Flanagan, Mr. Patterson and Professor McMahon about the principal cause of the plaintiff's back problems, it is

reasonable to conclude that the plaintiff would have worked up to 65 or even 66 when his State Contributory Pension will commence. I have considered the point maintained about the plaintiff having a "bad back". The evidence adduced and my earlier findings lead me to conclude that a more automated system of work for that undertaken by the plaintiff before April 2017 would have allowed the plaintiff to continue with his "bad back" which was evolving. Moreover, the evidence of Mr. Vaughan, the plant manager, is that employees are facilitated where possible with lighter work when they so require and desire. The plant needs committed workers like the plaintiff.

29. In those circumstances the agreed net weekly loss of €653 when multiplied by 272 is €177,616 and when multiplied by 222 is €144,966. Applying the 20% Reddy v. Bates discount as considered by the Court of Appeal in Walsh v. Tesco Ireland [2017] IECA 64 and having regard to the vicissitudes of life, the uncertainty of the economy , the trade with which the parties are involved and the limited options for the plaintiff as a manual worker, the Court arrives at €150,000 (a figure for cessation of work between ages 65 and 66) less 20% which is a sum of €120,000 for future loss of earnings.

General damages

30. The written and oral submissions made on behalf of the parties were concise and much appreciated by the Court. A "facet joint dysfunction" in the lumbar spine is not indeed mentioned in the book of quantum published in 2016 which may act as an aid to the Court. The description at Part 3A – "Back injuries and spinal fractures" and under the sub – heading "severe and permanent" on p. 31 is the category most close to the plaintiff's injuries - it reads: -

> "The most severe category. These injuries will have also affected the structure of the back and the discs, resulting in serious limitation of movement and the requirement for surgery. Little or no movement regained on a permanent basis

resulting in ongoing pain and stiffness with the necessity to wear a back brace/ support for long periods in the day. €52,300 to €92,000".

31. The plaintiff has undoubted serious limitation of movement and pain which surgery will not alleviate. The said book of quantum band suggests surgery which may help, and that possibility is not open to the plaintiff. There will be no change in the plaintiff's position on a permanent basis and he will have ongoing pain and stiffness. He has tried back supports unsuccessfully. All he can do is take evasive action and medication. The said band of damages makes no allowance for the destruction of the plaintiff's previous raison d'etre and fulfilled life. His sense of enjoyment of life went from a high grade to a very low grade.

32. Having due regard to the principles for the assessment of general damages enunciated recently by Faherty J. in O'Sullivan v. Brozda [2022] IECA 163 (Unreported, Court of Appeal, 14 July 2022) at para. 108 and the caution for judges not "to shoehorn the pain and suffering…of a particular plaintiff into a category", I conclude that the general damages for pain and suffering from 13 April 2017 to today, being eight months over 5 years, is €55,000.

33. The plaintiff will inevitably suffer similar pain, agony and diminution of life fulfilment, albeit with some experience of acquired coping skills and avoidance mechanisms. I take account of the submission for the defendant that the preponderance of awards is for general damages in respect of the past rather than the future. Therefore, an identical sum of €55,000 for future suffering is fair and reasonable as one hopes that the plaintiff will have multiples of 5 years during the remainder of his life. Both sums when aggregated are proportionate to the accepted cap on general damages except for rare cases. The sums are related to the specific back problems caused by the breach of duty on the part of the defendant during a period up to and including 13 April 2017.

Summary

34. The order of the Court will be to grant judgment in favour of the plaintiff together with his costs (to be detailed in the perfected order) against the defendant for the following sums while noting the obligation of the defendant as "compensator" to pay out of the total, the sum of €75,086.45 to the Minister according to the "Statement of Recoverable Benefits" dated 25 November 2022: -

Past loss of earnings	€130,000
Future loss of earnings	€120,000
General damages	€110,000
Agreed special damages	€5,536
Total	€365,536.

Halley and Sons Solicitors for the plaintiff.

Benjamin J. Higgins Solicitors for the defendant.

Michael Counihan SC, Elaine Morgan SC and David Bulbulia BL for the plaintiff.

Jeremy Maher SC and Kevin Byrne BL for the defendant.