

# THE HIGH COURT

[2023] IEHC 366

[Record No. 2021 6243 P]

**BETWEEN**

**AMY POWER**

**PLAINTIFF**

**AND**

**CIARAN MALONE**

**DEFENDANT**

## **JUDGMENT of Ms Justice Bolger delivered on the 16<sup>th</sup> day of June 2023**

**1.** This matter comes before the court by way of assessment of damages for the injuries sustained by the plaintiff from a road traffic accident, with a claim for contributory negligence arising from the plaintiff's failure to wear a seat belt.

### **Background**

**2.** The plaintiff was born on 2 April 2001. On 15 April 2019, some two weeks after she turned eighteen, she was a front seat passenger in a car driven by the defendant which crashed into the ditch on the left side of the road and then spun to the other side. The plaintiff sustained a loss of consciousness and has no memory of the collision until she came around in an ambulance on her way to hospital.

**3.** The defendant was wearing a seatbelt, but the plaintiff was not. Both airbags activated. The defendant sustained no injuries. He told the court that the plaintiff's head hit the top of the windscreen where it connects to the roof. The plaintiff submitted that the defendant was not an entirely independent witness and suggested that his evidence of how she had sustained her injuries may not be fully reliable. I do not agree. It was clear that the defendant was far from happy about having to attend court to give evidence, but I found him to be a credible witness in the account he gave of what took place.

**4.** The defendant's engineer opined, from a photo of the damaged vehicle, that a white area visible on the windscreen was evidence of damage and confirmed the place of impact of the plaintiff's head with the vehicle, which he said was consistent with the injuries she sustained to the right side of her head and her right hand. The plaintiff's counsel disputed that account and instead contended that the fact that the windscreen had not shattered but the passenger window did, along with the damage to the left side of the vehicle and the defendant's evidence that that side of the vehicle had been 'swiped', confirmed that the plaintiff had been thrown to the passenger window when the vehicle went into the left side of the road.

**5.** I am satisfied that the photographic evidence of some damage to the windscreen, confirmed by the defendant's engineer's inspection of that photograph, the nature of the plaintiff's injuries to the right side of her body and significantly the fact that the defendant, who was wearing a seatbelt, sustained no injuries, supports the defendant's evidence that the plaintiff's head hit the windscreen. I am, therefore, satisfied that the plaintiff's injuries

were significantly contributed to by her decision not to comply with her statutory obligation to wear a seatbelt.

### **Measuring Contributory Negligence**

**6.** The plaintiff's counsel referred me to *McMahon and Binchy* (3<sup>rd</sup> Ed.) which suggests most findings of contributory negligence for not wearing a seatbelt range from 10 to 20% and that some of the case law only requires a deduction from injuries caused or contributed to by the absence of the seatbelt. For the reasons set out above, the plaintiff has not satisfied me that her injuries would have occurred even if she had been wearing a seatbelt. Insofar as the burden of proof rests on the defendant, I am satisfied the defendant has established that the plaintiff's failure to wear a seatbelt contributed to her injuries.

**7.** There are a range of values that this court has put on this type of contributory negligence. Counsel for the plaintiff referred me to *O'Sullivan v. Ryan* [2005] IEHC 18 (decision of Peart J.), where Peart J. stated the following at p. 21:-

*"I have no hesitation in reducing the award of damages in this case by 25%. Given the extent to which these injuries have been caused by the failure to wear the seatbelt, I would favour an even larger reduction in damages, but I feel constrained in that regard by what the Supreme Court has stated on this topic in O'Sullivan v. Dwyer [1971] IR 275 where it is emphasised that damages are to be apportioned between the plaintiff and defendant on the basis of the "moral blameworthiness of their respective causative contributions" and not "on the basis of the relative causative potency of their respective causative contributions to the damage". On this basis I will reduce the plaintiff's damages by 25%. There can be no forgiveness surely for a responsible and experienced member of An Garda Síochána failing to wear a seatbelt while being driven while off duty as in this case. A smaller reduction might be in order in respect of a person of capable of being credited with a lesser understanding of the importance and necessity to wear one. This distinction seems to be compatible with the concept of assessing the degree of moral blameworthiness."*

**8.** That confirms that 25% is a high assessment of contributory negligence and in that case, was designed to reflect the particular blame to be placed on a member of An Garda Síochána for not wearing a seatbelt even when off duty. The plaintiff was only two weeks after her eighteenth birthday but was an adult and responsible for her own actions. However, I consider it appropriate to reduce the high level of contribution that Peart J. found against the off duty member of An Garda Síochána and instead I measure the plaintiff's contributory negligence at 20%, to be deducted from the totality of her damages. I note that rate was imposed by this court and upheld by the Supreme Court in *Ward v Walsh* (unreported decision, 31<sup>st</sup> July 1991).

### **The plaintiff's injuries**

**9.** The plaintiff lost consciousness and came around when she was in an ambulance on her way to University Hospital Waterford. She was transferred to Cork University Hospital that day, where she underwent surgery on her face and right hand. Debridement of the deep abrasions at the right temple and anterior hairline took place. The wound on the back of the right hand was debrided and the underlying EPB tendon was repaired. A protective splint was applied. The plaintiff was detained in hospital for three days and attended thereafter at the dressing clinic. She was required to wear a protective splint for approximately two months. Whilst the plaintiff is left hand dominant, she does use her right hand for various tasks including brushing her hair and applying her makeup. The plaintiff's physical appearance caused her considerable trauma in the immediate aftermath of the accident and for some time thereafter. Nevertheless, she returned to school only two weeks later, and

whilst she felt embarrassed about her appearance, she sat her Leaving Certificate and succeeded in passing all her subjects, which is a considerable testament to her. In September 2019, she started a beauty course at a local college, as she had always intended to do. The plaintiff is clearly a young woman interested in the beauty industry and in physical appearance. Unfortunately, she continued to experience the effects of her injuries and the accident on her mood and did not socialise with her friends for many months and did not socialise at all with her fellow students on her course. She found the massage classes difficult due to pain in her right hand after 30 minutes of massage. She was very upset when her tutor used her as a model to demonstrate using makeup to cover up scarring. By early March 2020, shortly before the onset of the COVID pandemic, the plaintiff decided to drop out of her course as she no longer wished to pursue a career in beauty therapy. The defendant argued that she could have done parts of beauty therapy had she sat the exams in the modules she had already completed but it was clear from the plaintiff's evidence that she had decided she no longer wanted to pursue the course or the career options flowing from it, due to the effects of her injuries.

**10.** Ms. Susan Tolon, occupational therapist and vocational evaluator, confirmed her view that, had the plaintiff not had psychological issues or scars or swelling of her hand as a result of her injuries, she might have completed her two-year beauty course and worked as a beauty therapist.

**11.** After dropping out of her course, the plaintiff did do some freelance makeup for friends for which she received some money. There was no evidence of this having been on any sort of largescale business or something that presented the plaintiff with career options that she considered viable in the light of her clear concerns about her appearance and her lack of confidence in working with people.

**12.** In September 2020, the plaintiff became pregnant. She eventually returned to work in March 2022 as a housekeeper in a local hotel. This is an entry level job for which no qualifications are required. The solitary nature of the work particularly suits the plaintiff, although she does experience some discomfort in her hand after a particularly heavy day.

**13.** The plaintiff is an impressive young woman who remains ambitious for her future. She has decided to return to college to study childcare and certainly presents as someone who will achieve the commendable goals she has set for herself. Ms Tolan confirmed that a childcare assistant or a special needs assistant do not earn as much a beauty therapist could earn, albeit both qualifications present the plaintiff with ample opportunity to secure work in the future.

**14.** Given the higher rate of pay that a beauty therapist can potentially achieve and the interest the plaintiff had in that type of work before her accident, alongside the clear personal interests she has in her own appearance, I am satisfied that, was it not for the plaintiff's injuries, she would have completed her course and worked successfully in the beauty industry.

**15.** The plaintiff was diagnosed with psychological injuries by Dr. Catherine Corby, consultant psychiatrist, to whom the plaintiff was referred by her solicitor in February 2023. The defendant did not raise any issue about the plaintiff having been referred by her solicitor rather than her GP but, in any event, the plaintiff's solicitor ensured that the medical issues the plaintiff had were fully explored by appropriate medical experts, just as a defendant will commonly do, in order to ensure that the court was fully informed of the issues and sequelae, if any, for the plaintiff. Dr. Corby found that the plaintiff demonstrated a level of avoidant behaviour as a result of her scars and had become low in mood following the accident. Dr. Corby opined that the plaintiff most likely had an adjustment disorder with depressive features at that time. She noted that the plaintiff had been prescribed antidepressant medication by her GP but the plaintiff confirmed she had stopped taking that medication after a short period of a few days. Dr. Corby did not identify any criticism of the plaintiff for

having ceased that medication. The plaintiff's psychological symptoms have, by now, largely cleared up.

**16.** When the plaintiff attended with Mr. O'Shaughnessy, a consultant plastic and hand surgeon, in December 2019, some eight months after the accident, she was still complaining of soreness in the scar on the back of her right hand after doing massage for approximately 30 minutes and frontal headaches, mostly at night and lasting for about 30 minutes, and for which she took painkilling medication. She also said in her evidence that she had experienced some pain in her back for a short time after the accident.

**17.** The plaintiff's current and permanent symptoms arise from the injuries to her face and right hand. She has permanent scarring on her right temple/upper cheek area which Mr. O'Shaughnessy describes as pale and not particularly noticeable. She has scarring on the back of her right wrist, red in colour with a small residual/recurrent swelling present just proximal to the scar on the ulnar side. Mr. O'Shaughnessy opined that there will always be a pale residual scar present and confirms that the plaintiff remains moderately self-conscious of the scar and intends to keep it covered with foundation makeup. The plaintiff was seen by Dr. Patricia Eadie, consultant plastic surgeon for the defendant, who described the scarring on her right temple as 9cm by 4cm and easily visible at a conversation distance and a 4cm immature scar on the dorsal aspect of her right hand. Dr. Eadie opined that these scars are a moderate cosmetic deformity.

**18.** The plaintiff showed me her scars both with and without makeup. They are visible at conversation distance even when covered with makeup, albeit the makeup does make the scars less visible and clearly provides comfort to the plaintiff, who is very self-conscious of the scars. The plaintiff wears heavy makeup (foundation and concealer) every day in order to conceal the scars. The nature of her current job as a hotel housekeeper is such that she is not permitted to wear makeup at work and must keep her long hair tied back. She is very conscious of how her scars appear without makeup and says that people regularly ask her about them. The plaintiff fairly accepts that not all the make up she uses is because of her scars. She spends €57 per month in total on foundation and concealer and seeks special damages for the future costs of that at a rate of €30 per month, coming to an actuarially adjusted figure of €17,529.

The plaintiff has always enjoyed using a sunbed and has increased her usage of it since the accident as she believes this renders her scars less visible. She freely admitted that her own GP has advised her against using a sunbed and, not surprisingly, no expert evidence was presented to support her view that the sun bed assists with the scars and the point was wisely not urged on the court by her counsel. The plaintiff's sun bed usage is not in her best medical interests and should not be supported or condoned by this Court.

### **Assessment of damages**

**19.** The Judicial Council Guidelines require the court to identify and value the dominant injury and, thereafter, to assess an appropriate uplift in damages to reflect any other injuries also sustained, subject at all times to the court's obligation to ensure that justice is done between the parties. The overall level of damages must be proportionate and justifiable.

**20.** Both counsel for the plaintiff and the defendant made detailed and helpful submissions on how the Guidelines should be applied here and identified the appropriate categories in the Guidelines into which they argued each of the plaintiff's injuries fall. I was referred to a number of decisions including *Lipinski (A Minor) v. Whelan* [2022] IEHC 452, *McHugh v. Ferol* [2023] IEHC 132 and *Flynn v. Saint-Gobain Building Distribution (ROI) Ltd t/a PDM* (decision of Reynolds J., 25 November 2022).

**21.** Counsel for the plaintiff urged me to view the plaintiff's facial and hand injuries as, in effect, co-dominant. I do not agree. Whilst both injuries have impacted significantly on the plaintiff and continue to do so, her greater concern rests with the permanent scarring on her face. That is the dominant injury. I found the analysis of Reynolds J. in *Flynn* helpful. A young male dance teacher was left with two small permanent scars on his face, which could benefit from further surgery, and which the plaintiff had to cover with makeup during his competitive dancing. However, unlike the plaintiff here, Mr. Flynn was merely discommoded in pursuing his chosen career rather than made to feel he had to leave it. Reynolds J. found his facial injuries fell to be considered within the upper range for serious scarring having regard to his young age, the nature and extent of the permanent scarring and the impact of the injuries on his quality of life in pursuit of his dancing career. She awarded €50,000.

**22.** I consider the plaintiff's facial scarring, which is permanently visible at conversational distance and has been and continues to be of great concern to the plaintiff, should be considered within the upper range for serious facial scarring. I do not consider the scars are serious enough to be considered as severe scarring. The impact that the scarring has had and will continue to have on the plaintiff's career choices and options, render it appropriate for me to measure damages at the highest level of that category, i.e. €60,000.

### **Uplift**

**23.** In respect of the plaintiff's remaining injuries, the most significant is the injury to her right hand. She has experienced considerable pain and loss of function, all of which has now cleared up. She is left with a very visible scar on her right hand which causes her distress and embarrassment. A moderate hand injury attracts a range of €10,000 to €25,000. However, non-facial scarring comprising of a single noticeable scar with some minor cosmetic defect has a range of €1,000 to €40,000

**24.** The plaintiff also experienced back pain for a short time and headaches that were still present when she was seen by Mr. O'Shaughnessy some eight months post-accident, but had cleared up when she attended with him in October 2022.

**25.** The plaintiff also sustained an adjustment disorder as diagnosed by Dr. Corby, consultant psychiatrist. That is a recognisable psychiatric injury. Whilst the plaintiff chose not to continue with the medication prescribed for her, she was very anxious and distressed for some time after the accident and that this impacted on her life in a very real way.

**26.** In *Lipinski Coffey J.* applied an uplift of €25,000 for the plaintiff's "other" injuries, which included a scar on her thigh that was a minor cosmetic defect along with various short-lived, soft tissue injuries.

**27.** I apply an uplift of €30,000 to the plaintiff's non-dominant injuries comprising of the injury to her right hand, including permanent scarring, the adjustment disorder, headaches and minor back pain.

**28.** In relation to the plaintiff's claim for special damages, I accept the plaintiff's claim that she is and will continue to require a lot more makeup than she had used prior to her injuries. Indeed, if the plaintiff takes her doctor's advice and reduces her sunbed use, that may cause her to rely even more on using makeup. I award her €15,000 in respect of the cost of that additional makeup to date and into the future. Additional special damages have been agreed between the parties as €2,596.

**29.** That gives a total of general and special damages to date and into the future of €107,596, from which I deduct 20% i.e. €21,517, giving a total award of €86,076.80.

**30.** Unless counsel can satisfy me otherwise, costs must follow the event.

Counsel for the plaintiff, Michael Counihan SC, David Geoghegan BL.

Counsel for the defendant, Liam Reidy SC, Sheila Reidy BL.