THE HIGH COURT

PERSONAL INJURY

[2023] IEHC 622

Record No. 2021 4249 P

BETWEEN

GERALDINE CORLESS

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Ms. Justice Bolger delivered on the 10th day of November 2023

1. This case is an assessment only relating to the injuries sustained by the plaintiff as a result of an accident at work on 10 January 2016 shortly after she had commenced employment as a care attendant at the defendant's hospital. She attempted to return to work in the immediate aftermath of her accident but was unable to do so due to her injuries. She has not returned to work since. The plaintiff's date of birth is 9 November 1960.

The plaintiff's injuries

2. In the initial aftermath of the accident, the plaintiff experienced severe pain in her back as well as pain in her chest, shoulder and right ankle. She attended her GP regularly, was prescribed medication and attended physiotherapy. In 2017, she began to complain of hip pain which eventually resolved when she had a successful hip replacement in 2021. Unfortunately since then she has continued to suffer severe and dehabilitating back pain which she says affects her ability to do physical work, walk more than fifteen to twenty minutes at a time, carry heavy items and generally engage in her daily tasks. She had been certified unfit by the defendant's occupational health doctor consistently since the accident and in 2021 she was certified as permanently unfit and recommended for early retirement on grounds of ill-health. Her period of employment was too short

to lead to any current pension entitlements including on grounds of ill health. Her employment remains in place to date but she has not received any payments since the cessation of her sick pay. The plaintiff's only current source of income is her social welfare widow's pension of which she had already been in receipt prior to her accident.

3. The plaintiff's GP, Dr Magnier, has seen her regularly since her accident and continues to prescribe various medication including Difene which she takes regularly. He opined that she remains symptomatic, unfit for work and is unlikely to ever be free of pain. He had recommended physiotherapy which the plaintiff availed of regularly until 2021 when she felt it was no longer helpful to her. Since then, Dr Magnier recommended pilates which she does weekly. She also does chair yoga and finds that to be helpful. Investigations, including an MRI, have confirmed the existence of pre-existing degenerative changes but Dr Magnier confirmed that she had no difficulties with her back or any other physical complaints of note from when she first attended with him in 2006 until the accident in 2016.

4. In 2017 Dr Magnier referred the plaintiff to Professor Harmon, consultant in pain medicine. Professor Harmon has been treating the plaintiff for pain management regularly since then, apart from during lockdown when his service was closed and for a time around her hip replacement in 2021. He said he found the plaintiff to be genuine and pointed out that he would not have carried out the extensive procedures of the past few years had he not believed her to be in severe pain. Initially, his treatment focused on her hip pain which he had found to be one of the sources of her pain. Professor Harmon referred her to an orthopaedic surgeon who eventually carried out a successful hip replacement in 2021. Having addressed the hip pain Professor Harmon then progressed to treating the plaintiff's back pain by way of a right lumbar rhizotomy in August 2021 and again in July 2022 and bilateral lumbosacral facet joint injections and caudal epidural in May 2023. The plaintiff said that she secured relief from these procedures for periods of four to five weeks. Professor Harmon is of the view that the plaintiff remains unable to engage in any manual work due to her significant back pain although he said he would encourage some activity in spite of the pain. He said the plaintiff will need further procedures twice a year for the next three to five years.

5. The plaintiff's consultant orthopaedic surgeon, Mr Rice, confirmed recurring mechanical pain in the lumbar region which he said was triggered by the accident. He said the plaintiff has an

established pain pattern that will limit her ability to engage in working activities in the long term. He did not consider her back pain had been caused by her pre-existing hip problems, which had been largely resolved by the hip replacement in 2021 and which he described as separate to her back pain. Mr Rice diagnosed chronic pain syndrome given the daily pain and impaired function therefrom. He said the plaintiff was unfit for work but fit for what he described as "sheltered" activity which might take her mind off her pain but that she would not be able for long periods of standing or sitting.

6. The defendant's sports and orthopaedic physician, Dr Spillane, saw the plaintiff first in May 2018. He recommended orthotics for the plaintiff's right ankle which she found to be helpful in clearing up her ongoing symptoms from that injury. Dr Spillane saw her again in December 2020 and opined that she needed orthopaedic assessment and eventual replacement of her left hip which was causing her significant difficulty at that stage. He opined that her back pain was due to a combination of the pre-existing degenerative changes, arthritis in her hip and a small proportion to the accident. However Dr Spillane did not see her since then and in particular has not seen her since her successful hip replacement in October 2021 which led to a dramatic improvement in her left hip pain but did not seem to alter the ongoing pain she experienced and has continued to experience in her back. Dr Spillane also confirmed in his evidence that he had never seen the reports from the defendant's occupational health doctors who have consistently certified the plaintiff as unfit for work and since 2021 as permanently unfit for work.

7. I accept the evidence of the plaintiff's doctors that her significant back pain from which she continues to suffer was triggered by the accident. There was pre-existing degenerative change which had not caused any issues before the accident. The plaintiff's previous and current back pain, as well as the pain she experienced closer in time to the accident in her chest, shoulder and ankle are as a direct result of the injuries sustained by her in the accident. The pain in her hip seems to have been due to pre-existing degeneration which was resolved by her hip replacement. I accept Professor Harmon's evidence that the hip was only one of the sources of her pain albeit the first one that he treated as the one he felt had the best chance of securing a good outcome at that stage.

8. As a result of the accident, the plaintiff continues to suffer from significant, ongoing and dehabilitating pain in her back. Her pain eases for some time after Professor Harmon's injections and is also helped by the strong medication prescribed by her GP that she takes regularly. She

describes having good days and bad days, which her medical advisers say is consistent with her condition. The plaintiff's own medical advisers, including Professor Harmon to whom she was referred by her GP and who is one of her current treating doctors, all confirm that her current disability and inability to work is due to her back pain which her doctors are actively treating. Her complaint is genuine and she has been proactive in seeking recovery. She has taken her doctor's advice to go for walks. She attended many physiotherapy sessions until she stopped in 2021 having found them unhelpful and after she says her physiotherapist told her he could not do anything more for her. Her GP then recommended her to try pilates which she did and she continues to attend a weekly class to date as well as chair yoga which she finds helpful and which Mr Rice, her orthopaedic surgeon, confirmed to be useful for her progress. Her pain has rendered her unfit to continue working in a job that she enjoyed for which she had previously trained in the UK, and also interferes with her day to day activities. The situation has clearly taken a toll on her physical and psychological well being. The defendant submitted photographs of the plaintiff driving, opening the boot of her car, carrying items of shopping and joining people for drinks, walks and holidays. I did not find that evidence to suggest anything that was inconsistent with what I heard from the plaintiff and her doctors.

Alternative employment

9. In November 2021 the defendant's occupational health doctor certified the plaintiff as permanently unfit for work. It was not specified as unfit for her position as care attendant but rather that she was "unfit for work". I see no basis for that to be read as anything other than she was found to be unfit for work. Nevertheless the defendant contends that the plaintiff could and should have sought alternative part-time light, sedentary work. The defendant's vocational assessor, Mr. O'Loinsigh, criticised the plaintiff for not seeking out such alternative employment and in his report, described her as having ceased employment by choice in circumstances where he found her to have no level of motivation to return to the workforce. The defendant also criticised the plaintiff's failure to avail of the plaintiff's own vocational assessor's advice in 2019 to look for a place on a community employment scheme with a view to securing part-time employment doing light, sedentary duties, such as retail or counter duties. Ms. Breen, the plantiff's vocational assessor, said in her evidence that that type of scheme could have led to a period of approximately three years of employment somewhere like a local charity shop, during which time the plaintiff would have been paid a small amount on top of her existing social welfare. However Ms. Breen had reassessed the plaintiff more

recently and found her level of ongoing back pain to be such that Ms. Breen no longer considered the plaintiff to be a candidate for any such employment and is now of the view that the plaintiff will not be able to secure any paid employment between now and her normal retirement age of 66.

10. Had the plaintiff taken up Ms. Breen's advice in November 2019 to seek a place on a community employment scheme, which Ms. Breen said would usually last about three years, the plaintiff would have had to resign from her employment with the defendant. Ms. Breen described this as complicating the situation vis-à-vis the plaintiff engaging with a community employment scheme. The defendant has never moved to terminate the plaintiff's employment on grounds of incapacity or otherwise. In any event, any application the plaintiff might have made for a place in a community employment scheme in November 2019, would likely have taken 4 to 6 months (according to Ms. Breen) and given the timing, it would have coincided with the onset of the pandemic in March 2020. Even if the plaintiff had managed to secure such a community employment scheme position during lockdown, and had been able to do the work in spite of the difficulties her doctors say she has with long periods of sitting and standing, her income therefrom would have amounted to approximately €20 per week on top of her existing social welfare. Therefore, the impact on her actual loss of earnings to date and into the future would have been modest if they would ever have occurred at all.

11. The defendant's vocational assessor, Mr O'Loinsigh, set out in his evidence the extensive rehabilitation and retaining programmes that the defendant apparently has in place to enable their employees to return to light duties and condemned the plaintiff for not having availed of those options. He accepted on cross examination that he was unaware of the fact that the plaintiff had sought to return to light duties in at a meeting with the Assistant Director of Nursing in November 2019 and was informed at that meeting and later by letter, that her request to do so could not be accommodated and that she could only return to work upon being certified as fit to carry out all the duties of her position as a care attendant. Surprisingly, Mr O'Loinsigh was also unaware of the plaintiff having been certified by the defendant's occupational health doctors as unfit for work. He accepted on cross examination that, in the light of those matters, his judgement of the plaintiff lacking motivation was "*perhaps incorrect*". He also accepted that the plaintiff could not seek a place on a community employment scheme while she was still employed by the defendant.

12. The plaintiff's counsel submitted that the defendant could not allege a failure to mitigate by not seeking alternative employment where it had not been pleaded, relying on the decision of *Molloy v. Tipperary Glass Ltd* [2022] IEHC 263 where, at paragraphs 46 and 47 of the judgment, Simons J. said:

> "*46. The onus of proof lies with a defendant, as wrongdoer, to establish that the injured party has not taken reasonable steps to mitigate their loss. See T. Dorgan and P. McKenna, Damages (Round Hall, 2nd ed., 2021 at §4-119). Whereas the injured party bears the onus of proof in establishing loss, the burden of demonstrating that there were reasonable steps which the injured party could have taken to reduce their loss shifts to the defendant.*
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> *47. A defendant who seeks to resist a claim for damages on the grounds that the injured party has failed to mitigate their loss should include an express plea to that effect in their defence and provide particulars. At the very least, the intention to rely on an alleged failure to mitigate should be raised in correspondence prior to the trial of the action."*

13. The defendant's counsel asserted that the plaintiff has a general duty to mitigate which qualifies any damages to which they may be entitled. He suggested an analogy with caselaw on breach of contract where the courts have required a party to a breached contract to bring the contract to an end and then seek to mitigate their losses. He also suggested it would be contrary to policy to prevent an employer, who has kept the employee's job open, from making mitigation arguments and to possibly force such an employer to terminate the contract rather than keeping the possibility of future employment alive.

14. The plaintiff, in effect, seeks to cut the defendant off from making a mitigation argument on a pleading point, whereas the defendant seeks to place all responsibility for the contract and the continuation thereof on the plaintiff on the basis that all of the duty to mitigate rests on them. I do not find either argument particularly compelling but in any event I am satisfied that the facts of this case including the evidence of the defendant's own vocational assessor, confirm this plaintiff as having discharged any burden of proof that may rest on her to prove that she has properly sought to mitigate her loss. The plaintiff has not failed to mitigate the loss she has suffered from her continued unfitness for work by not seeking a place on a community employment scheme. In fact it seems that the most viable option for alternative light duties for the plaintiff was, as confirmed by the defendant's vocational assessor, via her own employer, the defendant. The plaintiff's

unchallenged evidence was that she sought alternative light duties from the defendant at a meeting in November 2017 that she requested and at which she and identified work she thought she could do in the hospital, but was told she could only return to work if she was certified fully fit for her previous duties as an attendant. At no time since her accident has she been certified fit and in 2021 she was found by the defendant's occupational health doctor to be permanently unfit for work. Whether that medical prognosis was the reason for the defendant not having engaged with their normal rehabilitation and retraining programmes or not, it is very clear that the plaintiff's efforts to seek a return to alternative light duties was rejected out of hand by the defendant without any discussion or explanation other than to confirm she could only return to work if she was fully fit for the duties of her position as attendant. In any event, in circumstances where the defendant's own occupational health doctors had certified the plaintiff as unfit for work (as versus unfit for specified physical duties) it is difficult to see how any retaining could have been possible or practical. Either way I am satisfied that the plaintiff behaved responsibly and proactively in trying to get back to work and is not to be blamed for her failure to take up any paid employment since the accident. She is not guilty of any failure to mitigate her loss of earnings.

The plaintiff's involvement with a dance school

15. The plaintiff is and has been involved with an Irish dancing school established by her two daughters in August 2017. The plaintiff did not mention this in any of her pleadings or expert reports and the issue was not raised until her cross examination when the defendant's counsel put documentary evidence to her from the school's Instagram and other online presence which cited her involvement in the school and showed photographs of the plaintiff with students of the school. Prior to the production of this evidence during her direct evidence, the plaintiff had been asked by her counsel to give an account of her daily routine since her accident. She spoke of spending her time at home and of making efforts to get out of the house by going for short walks, calling to her son's house and meeting her friends for coffee and having her daughter coming to her house to help her with her housework. Her evidence of a rather limited social existence mirrored the account she gave to the many doctors and vocational assessors whom she had attended since her accident for the purpose of this litigation. On cross examination the plaintiff confirmed being involved in her daughters' dance school (which is also clearly demonstrated by the online documentary evidence) which she described as going to the school a few times during the week to watch the students, travelling with them to competitions and supporting and advising her daughters whom, she said, did

not want to leave her out of their dance careers in which she had encouraged them all their lives. An account of her involvement in her daughters' dance school should undoubtedly have been included by her in any complete account of her current daily life and of the restrictions she says her injuries have caused to her. One of the online entries expressly refers to her alongside her two daughters as one of the three people by whom the students are taught in which both of her daughters are identified as having an Irish dancing teacher qualification (TCRG) whereas the plaintiff has no such qualification identified and in her evidence said she had never qualified as a dance teacher although she did say she had taught beginners many years ago in her early 20s. There is a photograph of the plaintiff with her two daughters wearing a t-shirt with the words 'Coach Ger'. The plaintiff says that some of the children see her as one of their teachers because she is present during their classes. There are a number of photos showing the plaintiff with students who have won prizes. However none of the photographs suggest that the plaintiff had been either physically dancing or teaching dance. There was no evidence of the plaintiff having received any financial recompense for her involvement other than what she said was the payment of her expenses whenever she accompanied her daughters on overnight trips to competitions in which the school's students were participating. The plaintiff's daughters arranged for her to be garda vetted, which is to be expected given her presence at classes and events for children.

16. Having heard the plaintiff's response to the online evidence of her involvement in the dance school and the evidence of her daughter who spoke of her and her sister's strong desire to involve their mother in their dance school because of the role she had historically played in encouraging their dancing careers, I am satisfied that the plaintiff's involvement in the dance school is as a mentor and adviser to her daughters and a type of mother figure to the students. I do not believe she is actively teaching in the school or in receipt of an income from the school, albeit she is clearly part of its activities particularly around the students' participation in competitions. It is regrettable that the plaintiff did not disclose her involvement in the school to anyone, including I believe to her own legal team. It seems the plaintiff would have continued to exclude this part of her life that engages her for a number of days each week from her account of how her injuries now come against her, had it not been for the information garnered by the defendant.

17. I do not find the plaintiff's involvement in the dance school to be inconsistent with her and her doctors' account of her current and serious symptoms of pain and her resulting unfitness for work, particularly in the light of the opinion of the defendant's own occupational health doctor of her

permanent unfitness for work, a view shared by all of the plaintiff's medical advisers and a view from which they did not pull back in their evidence having been made aware of the plaintiff's involvement in her daughters' dance school. However I do consider the plaintiff's exclusion of this part of her life in her account of how her injuries have and continue to come against her, is relevant to assessing the extent to which her injuries have impacted on her enjoyment of her daily life to date and into the future, to which I return further below.

Loss of earnings

18. The plaintiff is entitled to compensation to reflect her loss of earnings to date, future loss of earnings and future loss of pension. The plaintiff was on an intern pay scale, designed by the defendant to avoid the moratorium on recruitment that was in place at the time of the plaintiff's appointment. The defendant's payroll manager confirmed that the plaintiff was never moved off this scale as she was on long term unpaid sick leave but that had she continued in receipt of pay, she would have moved to the attendant scale along with all other interns in July 2016 and by now she would be on the 9th and highest point of that scale which ranges from €31,291 to €37,369. The plaintiff suggested she should have been on the higher scale as a healthcare assistant but I have no evidence of that other than the plaintiff's laudable ambition to have progressed in an area of work in which she had previously trained. I am satisfied that loss of earnings should be based on the scales for the position of attendant on which the plaintiff would have been had she been in receipt of salary when the other interns were moved to that scale in July 2016.

19. The plaintiff's actuary, Mr. Tenant, prepared a calculation of her loss of earnings to date based on a 17% premia for weekend and Sunday work which he calculated from the average premia payments that were paid to the plaintiff during her short period of employment and in the light of his experience that HSE employees doing this type of work invariably receive premia sometimes of a level far higher than 17%. The defendant submitted that her premia was higher than it would have been at a different time of the year, but led no evidence to support that. I accept Mr. Tennant's figure for net loss of earnings inclusive of 17% premia of €191,238 from which I deduct the figure of €2,902.69 in respect of the net sick pay the plaintiff received, leaving a total net loss of earnings of €188,335.31. The plaintiff has been at the loss of any income since the cessation of her sick pay, other than her widow's social welfare contributory pension which she had been in receipt of prior to and during her employment. She is entitled to courts interest on her loss of earnings to date and

the defendant has not established any basis for that not to be paid. I therefore add €15,213 in respect of interest.

20. The plaintiff will continue to experience the current level of loss of earnings until retirement, which Mr Tenant has calculated to 65 even though she could have asserted a right to work to 70. That seems to me to be a reasonable basis for a claim for future loss of earnings. I accept that there should be some small *Reddy v Bates* adjustment which I assert at 10% given the short period of time between now and the plaintiff's retirement age and the more secure nature of the plaintiff's employment with the HSE as compared with the private sector where the viability of an employer's business may not be guaranteed regardless of the quality of the employee's work. I therefore deduct 10% from the future loss of earnings to 65 of €58,916 leaving a total of €53,024.40 to which I add the future loss of pension of €33,932 and the pension lump sum loss of €11,135. The total loss of earnings to date and into the future comes to €301,639.71.

General Damages

21. I had the benefit of counsel's submissions on where the plaintiff's general damages should lie in terms of the Book of Quantum, to which I have given careful consideration both in terms of the figures and their submissions on how I should approach the fact that the plaintiff has sustained a primary injury to her back which is what gives rise to the ongoing pain to date and into the future, as well as injuries to her chest, shoulder and ankle which have now largely cleared up.

22. The plaintiff had chest and shoulder pain that cleared up within a relatively short time. The plaintiff's ankle injury did cause her pain and discomfort for some time but has now been addressed by her wearing orthotics on the advice of Dr Spillane which she acknowledged to have been very helpful. She confirmed that she no longer has any issues with her ankle, other than her inability to wear high heels as she did previously. I note the many photographs taken by the defendant's private investigator of the plaintiff out and about as well as the photos of her from social media from awards ceremonies for her daughters' Irish dancing school where she is consistently wearing flat shoes, including at events where she and those around her are fashionably dressed. In all the circumstances this injury fits around the upper end for minor ankle injury as per the Book of Quantum minor. I return to that below.

23. The plaintiff suffered low mood as a result of her injuries for which her GP prescribed anti-depressant medication in September 2016 and referred her for counselling which she attended and found to be helpful. She does not seem to have been on that medication for very long but it is clear that there were psychological consequences of her injuries which I take into account in assessing her general damages.

24. The plaintiff's primary complaint is the back pain from which she has and continues to suffer and which has caused her to be certified as permanently unfit for work both by the defendant's occupational health doctor and her own doctors. The plaintiff's counsel places the back injury at the lower end of the Book of Quantum severe and permanent back injury whereas the defendant's counsel suggests it fits at the lower end of moderate to severe.

25. The plaintiff was described by her own and the defendants' medical and vocational witnesses as truthful and genuine in her account of her injuries and the impact that they have had on her and her ability to engage in her day to day life as she had prior to the accident. The plaintiff can no longer work as a care attendant which is a great loss for her both financially and socially. Before her accident she was committed to working as a health care worker in a maternity hospital and had gone to significant lengths to secure training and qualifications for such work in the UK. She is not someone who wants to be at home all day and the restrictions that her injuries have placed on her occupational and her social life clearly rest heavily with her, even though she has tried hard to be positive and to get on with her life and to enjoy the company of her friends and family in spite of her pain. Nevertheless I have to take account of the plaintiff's omission of her involvement with her daughters' dance school from the many accounts she gave of her present, restricted life to the lawyers, doctors and vocational assessors whom she attended for the purpose of this litigation, and indeed to this court up to her cross examination. I have considered carefully the implications of the plaintiff's willingness to omit this part of her life from what she would have had the court consider in assessing the damages to which she is entitled. I do not think it changes the established fact of her permanent unfitness for work, a matter on which the medical views of the defendant's occupational health doctors and the plaintiff's own doctors are very clear. Indeed when her involvement in the dance school was put to her own doctors and vocational assessor, they all agreed that it was something that got her out of the house and out of herself was good for her, which makes her omission of this evidence even more difficult to understand or accept. The plaintiff's involvement in her daughters' dance school is a significant part of her life and engages her on a number of days

each week. I am satisfied that she does not earn any income from it and her involvement is not inconsistent with her unfitness for work but it does suggest a life more fulfilling than what she had suggested in setting out for the court how her current back pain comes against her and interferes with her enjoyment of life.

26. I find the plaintiff's primary back injury to fit in at the Book of Quantum lower end of severe and permanent back injury and, taking account of the secondary injuries fitting at the upper end of minor ankle injury and taking account of her other injuries, I assess general damages for pain and suffering to date at €70,000 and pain and suffering into the future at a further €20,000. From that total of €90.000 I am deducting 20% to reflect (1) the plaintiff's omission of her involvement in her daughters' dance school from her accounts of how her injuries have come against her and; (2) her ongoing ability to coach and mentor her daughters in the running of their school, and to enjoy and be fulfilled in doing that. I find some support for this approach in the decision of Simons J. in *Molloy* where, at paragraph 39 of the judgment, the award for general damages, was stated to have taken into account the plaintiff's retention of "*a limited ability to engage in amenity activities for short periods of time.*"

27. The total for general damages is €72,000. Special damages are agreed at €4000. Adding the total loss of earnings to date and into the future inclusive of court interest to the general and special damages comes to €377,639.71. I will hear counsel on costs and final orders.

Counsel for the plaintiff: Padraig McCartan SC, Gerry Tynan SC and Sheila Finn BL

Counsel for the defendant: Michael Tuite SC and Ciara Daly BL