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Judgment: approved by the Court for handing down | *Delivered:* **8-8-16**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

AMY-LEE LONEY (A MINOR) BY BRENDA McALINDEN, HER MOTHER AND NEXT FRIEND

Plaintiff:

-and-

RORY McDONALD and MOTOR INSURERS BUREAU

Defendants:

STEPHENS J

Introduction

[1] The plaintiff, Amy-Lee Loney, now 7 years and 11 months, then 4 years and 9 months, sustained injuries in a road traffic collision which occurred at 12.17 pm on Saturday 4 May 2013. The plaintiff was on a public footpath playing with friends in the street at her grandparents' house, when she was hit by the first defendant's scrambler motorcycle. The second defendant the MIB has admitted that the first defendant was negligent. The only issue is the assessment of damages.

[2] Mr McCrea, appeared on behalf of the plaintiff and Mr Michael Maxwell appeared on behalf of the defendant. I am grateful to counsel for their assistance.

The initial injuries and the treatment which the plaintiff received

[3] The plaintiff sustained a significant laceration of her right cheek which I find was caused by the handle bar of the scrambler motor bicycle. This was a through and through "C" shaped laceration involving a hole from the outside to the inside of her cheek. The laceration passed through and completely divided the Stenson's duct that carries salvia from the large salivary gland on the cheek into the mouth. The plaintiff also sustained scratches and bruises to her right leg, damage to one of her

deciduous teeth, an injury to her left index finger together with an adjustment reaction with fear on exposure to the noise of motorbikes and separation difficulties.

[4] The plaintiff's parents were away on the day of the road traffic collision and so she was accompanied in the ambulance to Craigavon Hospital by her grandmother. The plaintiff arrived at hospital at 1.18 pm. She vomited in the waiting room. The plaintiff was examined. It was decided that, as she had sustained injury to her salivary duct, arrangements should be made for her to be admitted to the Ulster Hospital, Dundonald, on Sunday 5 May 2013. She was discharged from the Craigavon Hospital at 3.37 pm to home by ambulance on 4 May 2013 and it was at this stage that her parents found her lying on the sofa covered in blood. Her cheek was extremely swollen. The plaintiff vomited twice after discharge. Unfortunately, the plaintiff developed a salivary fistula which resulted in a great deal of saliva leaking out of the wound into her mouth and for this reason she was brought back to Craigavon Hospital at 11.30 pm that night. The wound was packed and she was again discharged home.

[5] On Sunday 5 May 2013 the plaintiff was admitted to the Ulster Hospital but, because the hospital was busy, her surgery was delayed which involved her repeatedly fasting only to have the operation postponed. In the event the operation was performed on Tuesday 7 May 2013 under general anaesthetic. The wound was washed out thoroughly and sutured both facially and intra orally. The decision was taken to leave the Stenson's duct unrepaired in the hope of spontaneous recanalisation of the duct. The plaintiff required intravenous antibiotics for 48 hours. The plaintiff had a reaction to anaesthetic with repeated vomiting. She was discharged home on oral antibiotics on 10 May 2013. Following the operation her face was very swollen and this took numerous weeks to settle. Post discharge her parents noted large amounts of discharge from the wound especially when eating or just prior to meals.

[6] The plaintiff was reviewed on 28 May 2013. Her face remained very swollen. Her mother was advised to commence scar moisturisation and massage therapy. It was envisaged that topical scar therapy in the form of topical silicone would be commenced in June 2013.

[7] The plaintiff was further reviewed on a number of occasions and topical silicone treatment was commenced. This continues twice daily.

Legal principles as to the assessment of future risks, as to awards of provisional damages together with exercise of discretion in relation to provisional damages

[8] The assessment of damages in this case involves consideration of potential future events including whether there is a chance of deterioration in the plaintiff's right Stenson's duct or a chance of improvement in the cosmetic appearance of the plaintiff's scar by plastic surgery or by the application of cosmetics. In *Mallett v McMonagle* [1970] AC 166 it was stated at page 176 that:

> "… the court must make an estimate as to what are the chances that a particular thing will … happen … and reflect those chances, whether they are more or less than even, in the amount of damages it awards."

So once it has been established that the chance of deterioration or improvement is not too small to be ignored, damages are to be assessed in proportion to that chance.

[9] In relation to a claim that the injury caused by negligence may cause further injury the court may make an award of provisional damages see Section 68 and Schedule 6 of the Administration of Justice Act 1982 together with Order 37, Rules 7-10 of the Rules of the Court of Judicature (Northern Ireland) 1980. If "there is proved … to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, … suffer some serious deterioration in his physical … condition" then the court may "award the injured person (a) damages assessed on the assumption that the injured person will not … suffer deterioration in his condition; and (b) further damages at a further date if he suffers the deterioration." There are three questions which required to be addressed before a court makes an award of provisional damages see *Wilson v MOD* [1991] ICR 595, *Davies v Bradshaw* [2008] EWHC 740 and *Bittles v Harland & Wolff plc and another* [2000] NIJB 209 namely:-

(a) Whether it is proved that there is a chance.

(b) Second whether it is proved that the chance is of some serious deterioration in the plaintiff's physical condition.

(c) If the plaintiff succeeds in satisfying both of these whether the court should exercise its discretion in the plaintiff's favour in the circumstances of the case by making an award of provisional damages.

[10] The plaintiff has not claimed an award of provisional damages. Ordinarily this would prevent the court from making such an award, see *Cowan v Kitson Insulations Limited* [1992] PIQR Q19. However the plaintiff is a child and I consider that the court could in such circumstances make an award by amending the pleadings and giving the parties an opportunity to make submissions. However, it is not necessary to do so in this case, as I consider that in the exercise of discretion the future uncertainties can all properly be taken into account in making a once and for all assessment of damages.

Scarring to the right cheek

[11] The plaintiff has what is more accurately described as a "U" shaped scar on her right cheek. Sensation in the area is normal. The scar is very soft.

[12] There are different measurements given for the scar as follows:

(a) Mr Ramsay-Baggs FRCS, Consultant Oral and Maxillofacial surgeon, measured each limb of the scar at 2.2 cms.

(b) Mr Brennan FRCS, Consultant Plastic Surgeon, measured each limb of the scar at 1.5 and 2 cms. He measured the width of the scar at 1 mm wide but there is a wider area at its medial end which is 2 mms wide.

(c) Mr Lewis FRCS, Consultant Plastic Surgeon, measured the total length of scar at 5.5 cms with a width of 0.3 cms for the majority of its length.

(d) Mr G Smith FRCS, Consultant Oral and Maxillofacial Surgeon, measured the scar at 2 cm in height, 1.5 cm in breadth and 3mm wide fairly uniformly throughout its length.

It is not necessary to resolve the differences between these various measurements. It is a very obvious scar in a prominent position on the cheek of a young girl.

[13] The scar is adherent to the underlying muscle. This means that the scar is flat when the plaintiff's face is relaxed but when her facial muscles contract the scar becomes notably and markedly indented especially at its medial end. The effect is that when the plaintiff smiles, expressing happiness and enjoyment, the impact of the smile is spoilt by the scar becoming markedly indented. It may be possible to revise the scar in order to minimise the adherence to the underlying muscle. Mr Brennan FRCS considers that such an operation would require a general anaesthetic. Mr Lewis FRCS considers that it may be capable of being performed under local anaesthetic. In any event the operation should be delayed until the plaintiff is much older. The operation will not change the size of the scar but "may" reduce the indentation which occurs when the plaintiff's facial muscles contract. Mr Lewis considers that the result of scar revision "may be modest at best". Such an operation "may or may not be successful" and it would come at the cost of either a further general anaesthetic or a local anaesthetic and some 18 months exacerbation of the appearance of the scar. I approach the case on the basis that there is little chance of the plaintiff having this further operation and that if she did that the chances of improvement are so small that they should be ignored. Accordingly on a life time basis she will have marked indentation, especially at the medial end of the scar when her facial muscles contract.

[14] On behalf of the defendant it was submitted that in the future visual impact of the scar could be improved by the use of cosmetics. I consider that the size and nature of the scar would not be amenable to such improvement or that if it was it would be at the expense of the obvious application of far too much cosmetics. I reject that submission.

[15] Mr Ramsay-Baggs, who examined the plaintiff one year and four months after the road traffic collision, was of the opinion that the scar would "improve significantly over the next year or two … and it may result in a very minimal cosmetic defect". He also considered that "the puckering of the cheek will almost certainly improve with time". Unfortunately neither prognosis has proved to be correct. The puckering remains and will remain. There has been an improvement in the colour of the scar but the improvement has not been such as to render it of very minimal cosmetic impact. At the date of Mr Ramsay-Baggs examination the scar was "livid red". There is a different description of the colour in Mr Brennan's report which was prepared at almost the same time as that of Mr Ramsay-Baggs. Mr Brennan described the scar as pink in colour. At almost three years after the road traffic collision Mr Lewis described it as red in colour. The plaintiff's mother gave evidence, which I accept, that the colour of the scar reacts to temperature so that it is purple in the cold and a more striking red when it is warm. She stated that the normal colour is what she described as "slightly red."

[16] The overall impact of the scar was described by Mr Ramsay-Baggs as "a very obvious scar" by Mr Brennan as constituting "a very significant degree of scarring especially in a young girl" and by Mr Lewis as "noticeable". The assessment of damages for scarring includes an assessment as to how others will view the disfigurement. I have not only taken into account the assessments of the medical experts but also I have seen the scar and assessed its visual impact. I consider that it is and remains and will remain a very obvious scar which has to be seen in the context of a very pleasant but relatively shy young girl who takes care of her personal appearance.

[17] The plaintiff's mother stated, and I accept, that the scar swells for a period of about 1 hour after the plaintiff has eaten any food that requires to be chewed and that this tendency to swell has not improved over time. I consider that this will be a permanent feature though I do not consider that the swelling is significant.

[18] The assessment of damages for scarring also includes an assessment as to how the person affected by the scarring will react at this stage in their life and also in the future. As far as the present is concerned Dr Leddy MRCPsych, who is a highly respected Consultant Child and Adolescent Psychiatrist, having examined the plaintiff stated that "No self-consciousness with regard to the scar is evident." However given the cosmetic effect of the scar I consider that it is inevitable that the plaintiff has had to deal and presently has to deal with the issue of her scar with her peer group. However I do not consider that the scar was the reason for her moving schools which I find was due to a desire for her to achieve a better academic performance in her new school. As far as the future is concerned Dr Leddy states that:-

> "In the future, and in particular when she reaches adolescence, Amy Lee may become very self-conscious with regard to the scar on her face and this could lead to

feelings of poor self-worth, low self-esteem and increase the risk of developing depressive illness."

The plaintiff has been assisted by the clear and consistent reassurance provided by her parents but my estimation is that in the future, during her adolescence, that reassurance will have less impact. In my view, having seen the plaintiff, seen the level of the scarring and read all the medical reports the plaintiff "will" as opposed to "may" become very self-conscious of the scar on her face. I consider that there is a significant and real risk that this could lead to feelings of poor self-worth, low self-esteem and increase the risk of developing depressive illness.

The injury to the right Stenson's duct

[19] The right Stenson's duct was completely divided. It was not repaired at operation. Fortunately it re-canalised. When the action first came on for hearing the medical evidence in relation to the impact of this injury was not clear. Mr Ramsay-Baggs concluded that "She *may* develop a stricture of the *parotid* duct (which is another name for Stenson's duct) which *may* require treatment which *could* be difficult, however at the moment she has no problems and all looks well for the future" (my emphasis). No definition had been brought to these risks or as to the consequences if they materialised. Furthermore, in an e mail dated 19 May 2016 Mr Ramsay-Baggs referred to the risk of the duct becoming narrowed in later life though again no definition had been brought to the nature of the risk or as to its consequences. I adjourned the hearing directing that further medical evidence should be obtained in relation to a number of issues including:

a) Whether the Stenson's duct is the only duct delivering saliva to the upper right side of the mouth; whether there is an equivalent duct on the left side of the mouth; whether there is another duct delivering saliva to the lower right side of the mouth?

b) Whether the recanalisation of the Stenson's duct has been by the formation of new duct tissue or whether it was by a passage opening up through soft tissue?

c) What is the degree of risk of infection in Stenson's duct, the accessory part of Stenson's duct and in the parotid gland?

d) If infection develops then with what frequency is it likely to occur, what are the symptoms, what is the treatment and how effective is the treatment?

e) In relation to the potential development of a stricture of the parotid duct what is the risk of a stricture developing, what are the consequences if it does develop, what is the treatment and why could it be difficult?

f) In relation to the risk of the duct becoming narrowed in later life what is the degree of risk of narrowing and whether there is any method of assessing that risk?

g) What is the risk of stone formation, what are the consequences if stones do form and what is the process that leads to the development of stones?

[20] The plaintiff obtained a report from Mr G Smith, FRCS, Consultant Oral & Maxillofacial Surgeon, following his examination of the plaintiff. He advised that both parotid glands were normal to palpation, there was no swelling and clear salvia was issuable from the parotid duct on the right as well as the left. Recanalisation of the right parotid duct had probably occurred by it forming a passage through the repaired soft tissue. There was no evidence of widening of the duct structure or blockage. However it was difficult to ascertain the current status of the right parotid duct as to do so would necessitate a parotid sialogram which is an interventive test where the duct itself is cannulated and dye run into the gland followed by x-ray assessment of the filling of the gland. This would not be appropriate in a seven year old who has no obvious symptoms at this point in time.

[21] In relation to strictures of the parotid duct Mr Smith could not identify any problems at this time and stated that "hopefully this is something that will not develop." He went on to state that he could not quantify the risk of strictures developing because this would depend on how the duct has repaired itself or the amounts of damage to the end of the duct when it was transsected. He stated that unfortunately these injuries are very variable in the amount of damage to the tissue. If a stricture did develop then there would be periodic swelling of the parotid gland which can be quite significant. If very severe this can be treated by balloon dilation utilising a very fine balloon catheter preferably after identifying the stricture with direct vision via the endoscope. However surgical removal of the parotid gland in severe cases can be necessary to resolve these swelling episodes.

[22] Mr Smith considered the current risk of infection to be quite low as infections are normally only secondary to bacteria entering in from the oral cavity and that aspect of the duct has not been damaged.

[23] Mr Smith considered that the risk of stone formation within the gland is quite low. The symptoms would be similar to those for a stricture and the treatments are much the same with the possibility of surgical removal of the stone if it is amenable to this depending on its position.

[24] The medical evidence is now more detailed but it is still only possible to conclude that the parotid duct was transsected, that it has re-canalised, that the exact extent of the risks for the future cannot be determined though they exist but are low but if they do materialise the plaintiff could suffer periodic and quite significant symptoms.

Psychological reaction

[25] After the incident the plaintiff was very quiet and shocked at first. She had a few nightmares and became irritable. In the two months after the incident she was very panicky for instance when there were scramblers in the field beside her home so that the noise of these motorbikes caused her to become fearful and clingy. In the first few weeks after the injury she was noted to scream in the car if for example motor bikes passed them by. However, with clear and consistent reassurance her anxiety settled. Dr Leddy considers that she suffered an adjustment reaction with fear on exposure to the noise of motorbikes and separation difficulties. I find that the adjustment reaction had effectively resolved over an 8 month period.

Consideration of the Guidelines for the Assessment of General Damages in Personal Injury cases

[26] I was referred by counsel to the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (4th Edition) published on 4 March 2013 ("the Guidelines") which at page 39 lists three relevant categories under the heading "Facial Disfigurement (a) Females" namely:

(i) Very severe facial scaring. Factors to be taken into account: age, cosmetic deficit and psychological reaction - £75,000 - £225,000.

(ii) Less severe scarring where the disfigurement is still substantial and where there is a significant psychological reaction - £30,000 - £75,000.

(iii) Some scarring where the worst effects have been or will be reduced by plastic surgery leaving some cosmetic disability and where the psychological reaction is not great or having been considerable at the outset has diminished to relatively minor proportions - £28,000 - £75,000.

In relation to the last category (a) I have concluded that the effects will not be reduced by plastic surgery (b) I note that age is not mentioned (c) the top figure for this category is the top figure for the next category and the bottom figure for the final category and (d) the differences in the financial range of awards between the last two categories is £2,000.

[27] Mr McCrea submitted that the scarring in this case was in category (i) and taking all the aspects of the plaintiff's injuries an appropriate award would be £100,000 whilst Mr Maxwell submitted that it fell within either category (ii) or (iii) and an appropriate award would be in the range of £67,500 - £70,000.

[28] In the introduction to the Guidelines Girvan LJ made reference to adjusting the figures for inflation stating that:

> "the figures which we have given are at current values. As each year goes by, courts in assessing damages should take into account the effect of RPI inflation over time when assessing the appropriate damages in individual future cases. The figures for damages are given in broad terms and with relatively broad ranges to take account of the infinite variety of factual situations. The assessing court can thus determine the appropriate damages at the correct figure taking account of relevant inflation in the period subsequent to the date of publication of these updated Guidelines."

Over three years have elapsed since the Guidelines were published. Inflation over that period has been low and I only take this factor into account to a very modest extent in the most general way.

[29] I agree that this case does not fit easily into category (i) or (ii) in that for instance the plaintiff does not have a significant psychological reaction though there is a significant and real risk for the future. The plaintiff's age and the cosmetic deficit are significant factors indicating an award within category (i) which when taken together with the injury to the plaintiff's Stenson's duct, the albeit low risks for the future in relation to the saliva duct and a saliva gland, the psychological reaction following the road traffic collision place the overall award within the financial range of category (i).

Conclusion

[30] I assess overall damages at the figure of £90,000 and enter judgment for that amount.