Neutral Citation No: [2005] IEHC 17

THE HIGH COURT
Record Number: 2001 No. 15591P

Between:

Cynthia Hussey
Plaintiff

And

Mary Twomey, Eugene Courtney and The Motor Insurers Bureau of Ireland

Defendants

Judgment of Mr Justice Michael Peart delivered the 18th day of January 2005:

On the 20th July 1999 the plaintiff was a front seat passenger in a car belonging to the first named defendant, and being driven at the time by the second named defendant. The car went out of control at a bend and hit a lamp-post, as a result of which the plaintiff was injured.

Liability is admitted, save that the defendants allege that the plaintiff is guilty of contributory negligence because she allowed herself to be driven in the car on this occasion by the second named defendant when she knew or ought to have known that he had consumed more than the permitted amount of alcohol. It is appropriate to consider this issue ahead of dealing with the plaintiff's injuries and the other evidence related thereto.

At the time of the accident in 1999 the plaintiff was a student aged 21 years. It appears that she knew the first defendant, who was at that time the girlfriend of the second named defendant. She did not know the second named defendant other than that he was the boyfriend of the first named defendant.

Contributory negligence:

According to her evidence, she and the first named defendant went to a bar in Parnell Street, Cork on the night of this accident at about 7pm, and the second named defendant arrived there sometime later, which she put at about 7.30pm. Her evidence has been that she spent most of the evening in an area, where there was a pool table, and which was away from the first and second named defendant and some other friends who were in the bar area.. She says that she did not see the second named defendant come into the pub and was in his company only for about half an hour at the end of the evening around 11 – 11.30pm. On cross-examination she accepted that he could have arrived at about 7.30pm. She had not seen him drinking during the course of the evening, and she herself consumed six or seven drinks during the course of the evening.

It appears that at some point during the evening the first and second named defendant had some sort of row or altercation which resulted in the first named defendant leaving the pub ahead of the others, and in particular ahead of her boyfriend. The plaintiff says that she had arranged to spend that night in the first named defendant's house, and that at closing time the second named defendant offered to drive her to that house. That is how she came to be in the first named defendant's car with the second named defendant on this occasion.

According to her evidence this accident occurred a few minutes after her journey in the car started. He was driving too fast at the time. She stated in cross-examination that before the accident happened she had asked him to slow down and even to stop but that he had not done so.

It was put to her that the Gardai had noted when they spoke to him after the accident, whereas she says in her evidence that as far as she was concerned he did not appear to be drunk. She says that she was surprised to learn that the Gardai were of the opinion that he was heavily intoxicated. She stated that even though it was a small enough pub, she had not seen him during the course of the evening and therefore did not know that he had been drinking. She accepted when it was put to her in cross-examination, that she had not attempted to establish his state of intoxication before getting into the car. She says that during the course of the evening in the pub she herself had consumed about 6 or 7 drinks, but that she was unaware that he had taken any drink, and that it was only during the final hour in the pub that she had seen him at all. She stated that she had not expected him to be drunk because he was a designated driver that evening.

This set of facts raises interesting questions concerning the possible culpability of a plaintiff, from the point of view of contributory negligence, who gets into a car about to be driven by a person either known to have consumed more alcohol than the legal limit, or by someone whom the plaintiff ought to have known had or might have consumed such a level. We know in the present case from the evidence that the plaintiff made no enquiry as to the state of sobriety or otherwise of the second named defendant. On the other hand there is no real dispute that he was present in the licensed premises from about 7.30pm that evening until closing time, and that the Gardai are satisfied, from speaking to him about one hour after the accident, that at the time of the accident he was "heavily intoxicated". She has stated that as far as she was concerned he did not appear to be drunk.

One question which arises certainly is whether the state of knowledge on the part of the plaintiff should be assessed subjectively or by reference to an objective test as to what is involved in the taking of reasonable care for one's own safety. Of course it goes without saying almost that a finding of contributory negligence is no longer, except in the most exceptional of cases, a complete defence to the plaintiff's claim. There can be the most rare of cases where there is so great an element of contributory negligence as to cancel out an award against the defendant. It follows that even if the plaintiff ought to have at the least made enquiry as to the sobriety or otherwise of the second named defendant before getting into his car, it cannot avail him of an absolute defence to the plaintiff's claim. In former times the defence of 'volenti non fit injuria' could provide an absolute defence to a plaintiff's claim. But nowadays the doctrine of contributory negligence has been introduced on a statutory basis by s. 34 of the Civil Liability Act, 1961 which provides a scheme for the reduction of damages in proportion to the degree of "negligence or want of care" on the part of the plaintiff. This phrase is interesting and bears some examination in the context of the facts of the present proceedings.

I should say first of all that I am not satisfied on any balance of probability to accept that this plaintiff was as unaware as she says she was as to whether the second named defendant had or had not been drinking. This was a small pub, and even though she says that she was in the area where the pool table was and therefore away from the bar area where her friends were, including the second named defendant, it is unreal to think that she would have had no contact during the evening with her friends and acquaintances in the pub throughout the four to five hours they were there.

I am certainly not satisfied as a matter of probability, that she had no knowledge of whether the second named defendant was drinking, or reasonable means of acquiring it had she had so endeavoured. The fact that she herself had, on her own evidence, consumed six or seven drinks may well have impaired her own judgment at the end of the night, as to the sobriety of the second named defendant, and the evidence of the Gardai is quite definite, and I accept it, regarding the state of intoxication of the second named defendant – albeit one hour following the accident. The evidence of Garda Ruttle is that the second named defendant confirmed to him that he had not consumed any alcohol between the time of the accident and his conversation with Garda Ruttle one hour later. Garda Ruttle's evidence was that this man was dishevelled, his eyes were blurred, his speech was slurred, he had to support himself with one hand on the jamb of the front door, and that when he brought him to the hospital from the house in Dominick Street, he had to link his arm to support him to the car. As far as Garda Ruttle is concerned, the second named defendant was "very drunk" one hour after this accident, and in his view any normal adult would have known that.

In cross–examination, reference was made to the fact that the second named defendant had a cut to his head, and it was suggested that whatever blow to the head he had received in the accident, and the accident itself, could have resulted in the demeanour and appearance of the second named defendant. Garda Ruttle could not accept that proposition, and neither do I. Garda Ruttle also referred to a strong smell of drink from the second named defendant.

Given this evidence, I am of the view the plaintiff ought reasonably to have at the least suspected that he may have had drink taken during the evening, and have been upon enquiry as to that situation before entering the car he was going to drive, particularly on the basis of an objective test of reasonableness.

But given the evidence of Garda Ruttle and the other evidence as to the time he was in the pub, I do not accept that the plaintiff is being truthful when she says that she had no idea he had been drinking. On the balance of probability, it must have been obvious to any adult such as the plaintiff, if she had been concerned about the possibility, and certainly sufficiently obvious for her to make enquiry of him, which she says she did not, if she was in any doubt about it. In my view her evidence has lacked candour in this regard.

What consequence does this finding have at law, as far as contributory negligence is concerned?

The starting point has to be the terms of s. 34(1) of the Civil Liability Act, 1961 which provides as follows:

> *"Where, in any action brought by one person by another in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the* ***negligence or want of care of the plaintiff****, or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by* ***the wrong of the defendant****, the damages recoverable in respect of the said wrong shall be reduced by such*

*amount as the court thinks just and equitable having regard to the **degrees of fault** of the plaintiff and defendant…"*(my emphasis)

This provision is subject to certain provisos which are not relevant to the present case.

It is notable that the provision speaks of 'wrong' on the part of the defendant, but of 'negligence or want of care' on the part of the plaintiff. This nomenclature is of some importance. Clearly a defendant's *'wrong'* equates to a plaintiff's *'negligence'*. But the word *'negligence'* is here used as an alternative to *'want of care'* on the plaintiff's part, and the two words must therefore give rise to different meanings, otherwise 'want of care' is superfluous, and that could not have been the intention of the Oireachtas.

The legislature clearly contemplates that a plaintiff as opposed to a defendant can be guilty of contributory negligence even if the conduct on her part falls short of the 'wrong' of negligence, but yet amounts to a 'want of care'. In that sense 'negligence' is a term of art perhaps, capable only of a strictly legal definition. The alternative concept of 'a want of care' is not so technical and seems to me to be indicative of a more flexible and less technical, and therefore wider, definition. In their seminal work **'Law of Torts', McMahon & Binchy** refer to this section, and state at para 20.14 of the Third Edition;

"*Contributory negligence essentially involves a lack of reasonable care for one's own safety or the safety of one's property in contrast to negligence which involves a breach of duty towards others. An act may of course constitute both contributory negligence and negligence at the same time – a foolhardy lack of caution for one's own safety, such as climbing a mountain without proper equipment, may induce a rescue attempt, resulting in injury to the rescuer."* (my emphasis)

The 'want of care' concept seems to be ideally suited to the facts of the present case, where any reasonable adult person would know that it was unwise to the point of carelessness, and even recklessness as to one's own safety, to get into a car about to be driven by a man who either had, or might reasonably be suspected to have taken more alcoholic drink that was legally permitted or was safe, while at the same time was not negligence in the sense of being a breach of care to another person causing them an injury. To that extent the objective test of a reasonable want of care is met in the present case, since it is reasonable that the plaintiff ought to have at least considered the possibility, if it was not in fact completely obvious to her, that the second named defendant might be 'over the limit', and did not even attempt to enquire or establish that fact one way or the other. This is particularly relevant in the light of the Garda opinion, that he was in fact very drunk.

Another matter arising from the terms of s. 34(1) of the Act is that in cases of contributory negligence, damages are to be reduced based on 'the degrees of fault' which the Court finds on the part of the plaintiff and the defendant. The defendant will have to show, if he is to succeed in the plea, that the plaintiff's failure to exercise reasonable care for her own safety contributed the injury complained of. It will avail a defendant nothing to establish that a plaintiff lacked care for her own safety unless he can also show a connection between that lack of care and the injury suffered. In the present case, there is a clear connection between the plaintiff's lack of care in not making herself aware of the state of sobriety or intoxication of the second named defendant, and the injury which she sustained when the car he drove hit the lamp post when it went out of control. There was no other car or factor involved.

In this regard **McMahon & Binchy** [op. cit.] state at para 20.17;

"...the courts will not adopt an unduly specific investigation in determining the risk to which the plaintiff's conduct exposed him: 'it is sufficient if it is a danger of a particular class whose occurrence he should anticipate and take reasonable precautions to guard against' "

It does not follow from what I have stated that I consider that in all cases in which a person accepts an offer of a lift in another's car, he/she must initially establish reasonably as to the state of sobriety of the driver before accepting a perhaps genuine and kind offer. But on the other hand, I am of the view that part of the duty to take reasonable care for one's own safety and avoid the 'want of care' referred to in s. 34(1) of the Act involves so doing, where there are reasonable grounds for suspecting that the driver may have consumed alcohol – that situation being assessed by an objective test of reasonableness.

For example, where the plaintiff ought reasonably to have, or did in fact get a smell of alcohol from the driver's breath, it would be hard to argue that it would not amount to a 'want of care' to accept a lift from that driver without further enquiry. Similarly, a lack of sobriety on the part of the plaintiff may not excuse a failure to make reasonable enquiry, and similarly again, as in the present case, where the plaintiff's own evidence is that the second named defendant was present in the bar area of the pub from about 7.30pm until closing time, and that she was not in his presence during most of that time (which might have been sufficient to reasonably assure her or allow her to assume that he had not been drinking alcohol during the evening) it must be a 'want of care' not to even attempt to establish the position – and it is fair and reasonable for the Court to have regard to the actual evidence as to the fact that he was found to be very drunk one after the accident (not having

consumed alcohol thereafter) in assessing whether the plaintiff ought to have reasonably suspected and/or enquired as to the possibility that he had consumed alcohol.

I am satisfied that in the present case there is sufficient evidence on a balance of probability that the plaintiff was lacking in care within the concept of 'a want of care' for the purpose of contributory negligence. I am also of the view that in the present case it is a significant want of care given the reasonableness in present times of attaching to a normal and indeed intelligent person, such as the plaintiff, full knowledge of the dangers to herself, as well as others, of a drunken driver, and that to make merely a nominal finding of contributory negligence would be to in part condone, or at least forgive/understand that lack of care in a way which would fail to underline the seriousness and obviousness of the dangers of drink driving. If the Courts see fit to substantially reduce damages for not wearing a seat-belt, it should do so all the more in respect of a person who voluntarily, or carelessly, or even recklessly places herself in danger at the hands of someone such as the second named defendant in this case.

In the circumstances, there will be a reduction of damages in the amount of 40% in respect of contributory negligence.

The injuries:

The plaintiff described that as a result of the heavy impact in this accident a rere seat passenger in the car was thrown against the rere of the front seat in which she was seated, and that the driver was also thrown over to her side of the car. Her seat and the door of the car were jammed and she managed eventually to get out of the driver's side of the car. It is not disputed that she was fortunately wearing a seatbelt at the time.

In her evidence she stated that after the impact she could not move her head and had difficulty breathing. She stated also that she was sore everywhere down to her torso, and she also had bruised her leg. She says that she walked to the Mercy Hospital but as a result of a delay in being seen there her parents brought her to the University Hospital at about 2am – which is about one hour and forty minutes after the impact.

Mr Stephen Cusack, A&E Consultant:

Mr Stephen Cusack, A&E Consultant has stated in his report that the plaintiff complained of "neck pain, back pain and chest wall pain". On examination she was found to be alert and awake, but tearful, and he noted that there was "tenderness over the upper back between the shoulder blades, and in the neck posteriorally", as well as bruising over the right shin. X-rays were taken of the cervical spine, thoracic spine and right shin, and no acute bony injury was revealed. His diagnosis was of soft tissue injury for which analgesic and anti-inflammatory medication was prescribed. He states also that in the days following the accident she experienced quite significant pain and upset. He saw her again on the 22nd July, 24th July and 26th July 1999.

He expressed the view in his report dated November 1999 that her recovery would take "a number of weeks", but that it was quite possible that she would have persistent symptoms for a significant period of time. He suggested in his report a further review in eight months.

He stated in cross-examination that when he saw the plaintiff after the first accident he found nothing which indicated any injury to her low back area, and that he had not ordered any low back x-rays. He was also questioned about the significance of the possible fact that she did not start to receive treatment for low back pain until after the second accident had happened in June 2000. He stated that it was his understanding that in fact she had received some treatment for her back problem before her second accident. But when pressed further to say if it would be significant if in fact his understanding was not correct, he accepted that this would be significant, but not that the significance would be that it would indicate that the back problem must have been produced by the second accident. He said at one point that it was possible that the first accident aggravated her pre-existing degenerative changes in her lower back, such that the second accident produced the symptoms. He was not prepared to accept that simply because she did not have any symptoms prior to the second accident that it must necessarily follow that it was the second accident which caused them. He was of the view that the first accident could have done some injury which only became apparent after the second accident. He was prepared to accept that the second accident had something to do with her back pain, even if he was not prepared to accept that it necessarily caused that problem to the exclusion of the first accident.

Dr Fergus O'Connell:

She went to her G.P. Dr Fergus O'Connell on the 27th July 1999. At that stage he noted that her complaints were of (1) a lump in her anterior chest wall on the right side which was very tender, (2) stiffness in her neck and shoulder, and (3) pressure in her abdomen. On examination he has noted that she had large bruises below both knees and her neck movements were normal; that there was swelling over the 2nd rib at the sternal border, and pain on raising the right arm. He

also noted at that stage that her straight leg raising was normal on both sides and tendon reflexes were normal. However he states that "on examination of her lower back I noted that forward spinal flexion impaired". There is no note that she complained of low back pain on that date, but he appears to have examined it nevertheless.

His clinical notes for 22nd November 1999 indicate that he saw her again on that date and that she complained then of pain in her sterno-costal joint (2nd on right side), as well as pain in her right shoulder and low back. On examination in relation to the low back pain, however, he notes that "forward spinal flexion - N" (N = normal)

He saw her again on the 27th January 2000 and he noted that she still had pain in her neck and shoulder, but that on examination her neck and shoulder movement was normal, as were her forward spinal flexion and tendon reflexes.

I want to just say at this point that on the 29th July 2004 Dr O'Connell wrote to the plaintiff's solicitor and in that letter he set out details of his consultation with the plaintiff on the 27th July 1999, and a further consultation on 22nd November 1999. It will become relevant later in relation to whether the plaintiff had back pain prior to June 2000, but I want to note at this point that this letter does not contain all the information which is contained in Dr O'Connell's clinical notes. In particular his notes indicate that while the plaintiff is noted as complaining of low back pain on the 22nd November 1999 his examination of her showed everything tested as being normal, including "forward spinal flexion". This is not mentioned in the letter dated 29th July 2004. However I will return to that matter in due course.

Dr Michael Molloy, Consultant Physician/Rheumatologist:

The plaintiff was seen by Dr Molloy on the 2nd June 2000, having been referred to him by her GP Dr O'Connell. In his account of the history he says that when she was taken to Cork University Hospital after this accident she had X-rays of the neck, shoulder and low back. This would appear to be an error, since there is no doubt that Dr Cusack did not direct that her low back be x-rayed, since she had made no complaint to him in that area specifically. This report in the history also seems to be in error in reciting that after the accident she had reported pain in her low back. Again the clear evidence is that the back pain reported after the accident was interscapular – i.e. between the shoulder blades and not the low back. I presume that Dr Molloy either erred himself, or simply reported what the plaintiff told him.

The history also states that while the plaintiff was back in Jersey after the accident she continued to have pain in her neck, shoulder, right chest wall "with low back and right leg pain also occurring." Again I assume that this is information which must have come from the plaintiff herself, and not from any clinical findings referred to, if any.

He noted, inter alia, that she had received significant injuries in this accident and still had residual pain in her neck, right chromioclavicular joint and chest wall with low back pain and right leg pain. He found on examination that she had a good range of lumbar spine movement; straight leg raise test was 85%, but there was tenderness to the lower lumbar area along the paraspinal muscles at L2 to S1. In cross examination he agreed that up to June 2000 he had found nothing wrong with her low back and that there had been no need to refer her on to Mr Michael O'Sullivan, which in fact was done later. He agreed that the plaintiff had concentrated more on the upper body pains than the low back. However, there is reference in this report to some tenderness to the lower lumbar region nevertheless.

He opines at that stage that further investigation will be necessary "to evaluate the shoulder, neck and low back". Dr Molloy stated in his evidence that at this stage the plaintiff's main concerns were related to her neck and shoulder pain, and not to any low back pain.

The Second Accident – 24th June 2000:

A complicating factor in the history of the plaintiff's injuries is that on the 24th June 2000 she was involved in a further traffic accident in which she was driving. No other car was involved. She had three passengers all of whom were injured and have instituted proceedings. There was apparently €6000 of damage done to her car when it went off the road into a filed hitting a concrete post of some kind on the way. The plaintiff in her evidence stated that she took a bend too fast and went into the field. She was able to drive the car away. She stated that she did not believe that the injuries caused in the first accident were worsened by this second accident. However it is also a fact that by November 2000 the low back pain to which I have referred already became the main focus of medical attention, as this low back pain worsened, even though the plaintiff says that she does not believe that this deterioration is connected to the second accident. However, it is notable and indeed strange that the plaintiff never told her medical advisers about this second accident when she was seeking assistance for her low back pain, and it is certainly being contended by the defendants that the reason for this is that the plaintiff wished to relate the worsening of her low back symptomology only to the first accident since she could have no claim against any person in relation to the second accident. I will deal with this aspect again in due course.

Dr Molloy (cont'd):

Dr Molloy saw her again in December 2000. She did not say anything about the second accident which had occurred 6 months previously. But his report dated 4th April 2001 states that at this December 2000 examination, she had a good range of movement in her cervical spine, with discomfort at the extremes of movement as well as tenderness in the supraspinatus and trapezius muscles on both sides. There was also some prominence of the right sterno-clavicular joint again noticed with some tenderness. It is also noted at December 2000 that "Lumbar spine movements were full and pain-free. He also states "her SLR was normal and detailed neurological evaluation of her lower limbs entirely normal". Dr Molloy arranged for CT Scan of the lumbar spine which happened on the 25th January 2001, and an MRI Scan of the cervical spine which was done on the 19th February 2001.

The MRI of the **cervical spine** showed degenerative changes at a number of positions "with changes suggestive of degenerative change and osteophyte formation rather than acute disc protrusion". These abnormalities are at C4/C5, C5/C6, and C6/C7, and Mr Ryder felt that it would be important for him to review the films taken on the 20th July 1999 and he stated that he would seek these. In due course this took place and in his report dated 4th March 2002 he states that these disc spaces show osteophytosis and minor degenerative changes with small posterior osteophytes. He stated also that they pre-dated the accident *"and this indicates that this young woman had significant degenerative disease of the cervical spine, prior to the accident and that this has been rendered symptomatic by the accident, rather than being caused in its entirety by it. It is impossible to say how much of the appearances on the MRI Scan can be attributed to the accident."*

The CT Scan of the **lumbar spine** "showed some bulging at L4/5 with no significant nerve root or cord compression. Large right postero-lateral disc protrusion at L5/S1." He concluded that the Ct Scan and X-rays showed degenerative changes and significant disc damage of the cervical and lumbar spine and he states that this is significant in somebody of her age group. He thought that she may recover in 6 to 12 months but that if she disimproved she may require surgery. In his evidence he stated that at this stage her neck and chest had settled and that her back and leg pain were now the major concern.

Dr Dermot Ryder, Consultant Radiologist had carried out the CT Scan. In his report dated 17th March 2001 he states that three disc levels were scanned – LV.3/4 was normal; the middle of these discs was shown to have a "slight generalised bulge with slight compromise of the neural foramina, although they are not fully obliterated." However the lowest disc scanned "shows a large right postero-lateral disc protrusion extending well over 1cm into the canal."

Dr Ryder was not available to give evidence, but Dr. Denis Kelly, Consultant Radiologist gave evidence that he had looked at the CT Scans. He said that the 1cm disc protrusion shown was significant and certainly required surgery. In his report, Dr Ryder had stated in his conclusion as follows:

"This patient has very significant disc problems in both the neck and the lumbar spine. I personally do not see how, if these had been present prior to the accident, that they would have been asymptomatic and the choice is that there was either pre-existing asymptomatic degenerative disease in a very young patient which was aggravated by the accident, or the appearances were caused in total by the accident……."

Dr Ryder of course, as well as Dr Molloy, were not aware at that stage the plaintiff had been involved in the second accident to which I have referred, and have been prevented in their reports from taking that incident into account in the opinions which they have expressed.

Dr Molloy stated in evidence that he would have liked to have been told by her of that accident and was disappointed and found it strange that she had not done so, but stated that perhaps she had attached no importance to it herself. He stated that he was unable to say what part the second accident might have had in relation to the progress of her injuries. However, he regarded the apparent severity of the second accident, as described to him, as something which would have been relevant. He also remarked that at the December 2000 examination the plaintiff's neck and chest injuries were settled and that the major problem was by then the low back and leg pain.

Mr Michael O'Sullivan, Consultant Neurosurgeon:

The plaintiff had been referred to Mr Michael O'Sullivan, Consultant Neurosurgeon because of her ongoing and persistent symptoms in her low back. He saw her in September 2001 when she had three sets of symptoms, namely pain in the neck radiating to both shoulders, pain in her right chest wall, and lastly, low back pain which he noted had started "approximately 6 months after the accident" (which is around the time of the second accident on the 24th June 2000). At this point she was given a "Back School Care programme", but when she was examined again in November 2001 by Mr O'Sullivan she was still symptomatic. An epidural injection had not had any positive effect. In July 2001 the MRI scan had shown marked signal change in the L4/5 and L5/S1 discs with moderate right disc prolapse. In February 2002 she underwent a discectomy and when Mr O'Sullivan saw her again in March 2002 he noted that her neck and thoracic pain had largely subsided and that her back pain had gone from 7/10 down to 2/10 and was much more comfortable. However he noted also that she nevertheless could no longer engage in her hobby of Pool and Snooker, could not bend down, was unable to sit for long

periods or lift, and had to take constant analgesia.

In his report dated 1st March 2002, Mr O'Sullivan refers to the fact that the plaintiff had a second accident in June 2000, noting that *"she said this accident did not exacerbate her previous symptoms."* In the opinion section of this report he states, inter alia:

"3. Her MRI of the lumbar spine shows marked degenerative change in the lower two lumbar discs with a sizeable disc prolapse at L5/S1. A six month period elapsed from the date of her injury and the onset of her symptoms and, in all likelihood therefore, this had no bearing on her discogenic lumbar pain."

She continued to progress well as far as her symptoms were concerned so that by January 2003 Mr O'Sullivan was able to report that her neck was largely asymptomatic, her thoracic spine remained asymptomatic, and her low back pain continued to improve, and that she had no leg pain or sphincter disturbance. He noted that her social activities were restricted since she could not bend and this affected her Pool and Snooker hobby, and she still found it difficult to sit, stand or bend for prolonged periods, but her use of analgesics had decreased dramatically.

In September 2003 it would appear that the plaintiff's solicitor wrote to Mr O'Sullivan regarding the passage of his Report dated 1st March 2002 which I have quoted above where he stated that the 6 month delay from the date of the accident in the onset of low back symptomology meant that the first accident had no bearing on her discogenic lumbar pain. I do not have a copy of that letter but in reply, Mr O'Sullivan stated as follows:

"...I have reviewed my own case notes and these specifically record that her back pain symptoms started 6 months following her injury.

I have reviewed Dr Cusack's report and under the 1st paragraph (History) it is stated that she complained of neck, back pain and chest wall pain. However, under treatment progress report, the rest of the symptoms referred to neck and chest pain only. There is a clear discrepancy between what I have been told by Cynthia Hussey and what Stephen Cusack records. Perhaps this should be clarified with Cynthia herself."

In his further letter dated 26th September 2003 to the plaintiff's solicitor, he states that he had by then had an interview with the plaintiff. He goes on:

"She informed me that she had back pain upon attending the Accident & Emergency Department of Cork University Hospital and it never eased over the following six months. By December/January however it became a noticeable feature of her syndrome and has persisted since.

She was however at that time more concerned with her neck and hence the low back pain was given a lower pain rating. This seems to confer (sic) with Dr Cusack's report. On that basis I would wish to revise the original opinion.

Opinion – Revised, Point 3.

MRI of lumbar spine shows marked degenerative changes in the lower two lumbar discs with a sizeable disc prolapse at L5/S1. This became symptomatic following her injury, and, under the laws of probability therefore, this caused her disc prolapse to become symptomatic."

There is then a further letter dated 10th September 2004 from Mr O'Sullivan to the plaintiff's solicitor in which he states that plaintiff had attended his clinic on that date wishing to discuss her medical report. He referred the plaintiff to his letter dated 26th September 2003 to her solicitor in which he had revised his opinion 3. But she presented him with a copy of a letter (presumably this is the letter dated 29th July 2004 from Dr O'Connell to her solicitor) from her GP, Dr Fergus O'Connell which had recorded, inter alia:

"…On examination [on 27th July 1999] of her lower back I noted that forward spinal flexion was impaired. Straight leg raising however was normal. I prescribed distalgesic tablets for the pain. She returned on the 22nd November 1999 complaining of pain in the lower back as well as pain in the right shoulder……"

In relation to what is contained in the letter dated 29th July 2004 from Dr O'Connell, Mr O'Sullivan states:

"This again reinforces the view that she did have symptoms within a short time of the injury and, therefore, as detailed in my letter of September 26th 2003, it is likely that the accident caused her back symptoms."

I have already referred to the fact that Dr O'Connell's letter dated 29th July 2004 does not contain everything which is contained in his clinical notes for the consultation with the plaintiff on the 22nd November 1999, and in particular that while

it is noted that the plaintiff complained of low back pain, his clinical examination showed all tests to be normal including forward spinal flexion."

I also asked Mr O'Sullivan, after his cross-examination was completed, whether his "Revised opinion 3", as a result of learning that she had complained of back pain to Dr Stephen Cusack after the first accident, was predicated on the assumption that the back pain complained of on that occasion to Dr Cusack was low back pain, and he agreed that it was. That of course has been shown to be wrong since it is clear that the reference to back pain on that occasion was inter scapular pain – in other words in the upper back between the shoulder blades.

Dr Diarmuid O'Connell:

It is worth noting his report dated 25th September 2003. The plaintiff was referred to him by her GP Dr Fergus O'Connell for acupuncture treatment for pain relief around July 2000 which is less than one month after the second accident. She never told her GP about that second accident apparently, and she does not appear to have mentioned it to Dr Diarmuid O'Connell either. In his history he makes no mention of it.

He noted what he had been told by the plaintiff and there is nothing to suggest either that when the plaintiff saw him on 21st July 2000 she told him that following the first accident she had any low back complaint, other than that he states:

"Generally she had aches and pains all over which lasted about two weeks. Over the following number of weeks these pains localised on her right shoulder area and right neck area."

He examined her on the 21st July 2000 (which is almost one month after the second accident prior to giving her acupuncture, and he found that she had upper body restrictions of movement and treated her accordingly. He notes that she returned in November 2000 (5 months after the second accident) and he notes that "she also had some pain and tenderness over the low back." He states that on frequent occasions during 2001 she returned with severe low back pain, muscle spasm, and tenderness over the lower lumbar and sacral spine.

His report goes on to deal with her later treatment and symptomology following her discectomy.

Pregnancy:
The plaintiff became pregnant during July 2003 and gave birth to a daughter in March 2004. When it was suggested in cross-examination that she seemed to have managed a pregnancy in spite of her alleged low back injury, the plaintiff stated in her evidence that in fact during her pregnancy she was improved as far as her symptoms of pain were concerned. One of the doctors explained this on the basis that perhaps during that time she might have been taking more care of herself and doing less. However, Dr Diarmuid O'Connell in his report dated 27th May 2004 states:

"During the pregnancy she developed several flare-ups of low back pain. I saw her on 14.10.03 with muscle spasm in her lower lumbar spine, tenderness over her sacro-iliac joints and pain in her right hip……..She continued to have pain in her lower back and neck during the following months. She required further treatment to her left shoulder and left neck and lumbar spine in November 2003. She developed pain more specifically in her sacro-iliac joints in December and required treatment to this area. She required a further treatment in January 2004……..

Back pain can sometimes be a feature of normal pregnancies but it appears Ms. Hussey's was aggravated by her previous neck and back problem."

To say the least, this statement sits uncomfortably with the plaintiff's own evidence that she felt very good during her pregnancy and felt much better.

There is other medical evidence and statements in reports dealing with the plaintiff's more recent progress following her discectomy, but before dealing with the prospects for the future generally, I want to set out what Dr Frank Matthews, Consultant, called on behalf of the defendants.

Dr Frank Matthews:
The plaintiff was first seen by Mr Matthews for the defendants on the 19th May 2000 which was about one month before the second car accident at the end of June 2000. In his evidence he stated that when he saw the plaintiff she complained of pain in her right shoulder and a stiff neck, and that she also told him that she had hurt her low back but had no symptoms. He stated that in his notes he had recorded that she had no other complaints by writing "Nil else". He saw her again in March 2001 but says that she never told him of the second accident in June 2000. He also sated that the plaintiff who he saw before the second accident was a different person to the one he saw after her second accident.

In cross-examination he was referred to the fact that in his report in May 2000 he had referred to "back stiffness" as one of the complained made by the plaintiff on that occasion before the second accident. In response he stated that his notes for

that examination noted "says LBP to LS junction" [low back pain to lumbar spine junction]. But he was not prepared to accept in any manner that the symptoms complained of to the low back after the second accident can be attributed to the first accident.

He was referred also to a portion of his report dated May 2000 where he has stated that "she located low back pain to the lumbo-sacral joint". He said that his use of words was unfortunate in that regard because what he had intended to convey was that this was the area in which she indicated that in the past this was the location of some pain. He had not intended to convey that she was at the time of this examination in May 2000 experiencing pain in that area of her back. I notice that this sentence is in fact followed by the words "She had full low back movements". But it was put to her that this region was in fact at L5/S1 and that this was also the location of the discectomy later performed. Nevertheless Mr Matthews was not prepared to accept that after the first accident and before the second accident the plaintiff suffered the low back pain complained of and treated after the second accident, even though she may have had some back tenderness and discomfort following the first accident. He was intensively cross-examined in this regard and he was unmoved in his opinion that the symptoms in her low back which led to her discectomy could not be attributed to the first accident given the lack of symptoms complained of in this area until after the second accident – albeit that there was some reference to back pain after the first accident.

Mr Kieran Barry, Consultant Orthopaedic Surgeon:

Mr Barry also gave evidence on behalf of the defendants. He saw the plaintiff on the 15th October 2001. He notes "she denied any prior history of note. Specifically, she denied any previous neck or back symptoms." There is no reference of any kind to the second accident. She did not mention it to him.

When giving his evidence he was asked whether it was significant that in November 1999 she complained of low back pain to her GP. He stated that while she may have complained of symptoms in that area, it was not necessarily significant. He said that the low back pain complained of at the time may have been back stiffness. He was referred to the fact that Dr Molloy was of the view that since the pain had been located at L5/S1 in November 1999, and the discogenic lesion had been located at the same level, leading to the discectomy, it must be associated with the first accident. He stated that he could not understand how Dr Molloy could be so sure about that. He was certainly not of that view. He says that it is significant that the true situation did not become evident until after the second accident. In his direct evidence Mr Barry said that even without a trauma in an accident this plaintiff was at moderate to high risk of low back trouble, and that if one adds actual trauma to that situation, she is bound to have risk. In cross-examination, he stated that it would have been helpful to see the clinical notes of Dr Fergus O'Connell who saw the plaintiff seven days after the first accident. These are the notes which state that the plaintiff's forward spinal flexion was impaired at that stage. Mr Barry stated in this regard that any person, a short period after an accident, would complain of general aches and pains, but it would not necessarily mean any more than that, and that the same could be said even after some weeks and up to three months. But in this case the first complaint by her of pain in the lower back was at the consultation in November 1999. His notes, as I have already pointed out, note that she complained of low back pain on that date but that he found nothing on examination to confirm this. All tests were reported as normal on that date. Dr Barry also noted that this plaintiff had stated that she had in fact improved after six months.

Conclusions re: injuries and first/second accident:

At the outset it is necessary to state that the onus is on the plaintiff to prove on the balance of probability that the injuries sustained and in respect of which she seeks to be compensated, result from the first accident. That onus is greater than mere statability. It must be proven as a matter of probability, which is of course short of proof beyond reasonable doubt. But she must show that it is more likely that the injuries were sustained in the first accident. She may also prove to the same level of proof that some ailment sustained in the first accident was exacerbated or made worse by the second accident. However in the present case she has given evidence that she did not consider that the second accident worsened her injuries sustained in the first accident, and in fact did not seek any medical assistance so far as we are aware.

But she cannot expect that injuries more probably sustained in the second accident, rather than the first, can be compensated by the defendants in the present case. That is a major feature of the medical evidence in this case, as there is some conflict of opinion as to whether the first accident caused the plaintiff's low back pain. The Court will have to resolve that conflict on the basis of the balance of probabilities.

Low back pain:

I am satisfied that the "back pain" noted by Dr Cusack a couple of hours after this accident and recorded in his medical report dated 26th November 1999 was pain between the shoulders, and related to the "tenderness in the upper back" seen on examination. Symptoms related to her low back are absent at this point in time. Dr Cusack agreed that this was the case, and that there was nothing to indicate to him that an x-ray should be taken of her lower back. However that does not

dispose of the possibility that some symptomology in her low back might reasonably ensue from this first accident.

Dr Fergus O'Connell has stated in a letter dated 29th July 2004 to the plaintiff's solicitors, who I have no doubt were naturally anxious to establish that the later low back difficulties could be linked to the first accident, that when he saw the plaintiff on the 22nd November 1999 she was complaining of pain in her low back. However, I am concerned in this regard that his clinical notes give a fuller account of that consultation on the 22nd November 1999. Three complaints are noted. The first related to her chest, the second to pain in her right shoulder, and the third was "low back pain". He examined her in the light of these complaints and found all relevant movements to be normal. Again no steps were considered to explore further this pain in her low back. Her forward spinal flexion was normal as was her straight leg raise test. These results were repeated on the 27th January 2000.

In addition to these matters, it is now evident from a CT Scan of the plaintiff's lumbar spine at the end of January 2001 (seven months after the second accident) that she, unusually for her age, had pre-existing degenerative changes in her lumbar spine. Dr Ryder stated in his report dated 17th March 2001, as I have already set forth above: *"This patient has very significant disc problems in both the neck and the lumbar spine. I personally do not see how, if these had been present prior to the accident, that they would have been asymptomatic and the choice is that there was either pre-existing asymptomatic degenerative disease in a very young patient which was aggravated by the accident, or the appearances were caused in total by the accident. Review of the plain films would help in this matter, but may not finalise the question."*

He stated that when he saw those films, it was impossible to state whether the disc level seen on the CT Scan (which was confirmed as the cause of the plaintiff's pain by the discography) was caused by the accident or merely aggravated by the accident. It is necessary to state that Dr Ryder was not aware of the second accident, so we do not know whether his view would have been different had he done so, as he was not available to give evidence to the Court. But I am of the view, again on the balance of probability, that the pre-existing degenerative changes found on the CT Scan account for the low back pain of which she complained to Dr O'Connell on the 22nd November 1999. I am of this view because of his own clinical notes which describe all the tests undertaken as being "normal". Again there was nothing found which prompted Dr O'Connell to have any further investigations carried out.

The second accident happened at the end of June 2000. Fortunately we have an examination of the plaintiff by Mr Molloy on the 6th June 2000. He found that the lumbar spine had a good range of movement albeit with some tenderness to the lower lumbar area along the paraspinal muscles at L2 to S1. Her SLR was normal. He examined her again in December 2001 when he notes that she continues to have low back pain, but he does not say this is new or different in any way from previously. She never mentioned the second accident to him. He arranged the MRI of her cervical spine and CT Scan of her lumbar spine, and as a result of these was able to state in April 2001 that she had the degenerative changes and significant disc damage in both the cervical and lumbar spine. He said in evidence that at this time in early 2001 her back and leg problems had become her main problems, whereas previously it had been her chest and neck, which had greatly improved. His report of April 2001 must be read in the light of the fact that he was not made aware by the plaintiff that she had in the meantime had a second accident, albeit one which she believes did not exacerbate her first accident injuries. But the fact remains that Dr Molloy was not allowed the opportunity to factor in the potential of that second accident into his consideration.

In my view the plaintiff's situation is not improved in this regard by the "retraction" or alteration of opinion by Mr Michael O'Sullivan that the delay of six months in the onset of symptoms in the lower back meant "in all likelihood that this {her first accident] had no bearing on her discogenic lumbar pain." The reason I say this is that he stated in answer to a question from me, as I have already stated, that his alteration of view which he was pressed to make, was predicated upon the back pain presented to Dr Cusack on admission was low back pain, and not as it was inter-scapular pain. It follows in my view that the Court should take his view as that expressed in his report dated 1st March 2002 in its unaltered form.

I should also refer top some of the particulars supplied to the defendants' solicitors, such as those delivered on the 22nd June 2000 where it is stated that after the first accident x-rays were taken of the plaintiff's low back. That is incorrect as the evidence has shown. The Civil Bill refers to the plaintiff complaining on admission to hospital after the first accident of low back pain. That was not correct , as the evidence has shown. In addition there is another unfortunate matter. It is in a document at Tab 3 of the Book of Pleadings produced to the Court. It bears the date "22nd March 2000", which predates the second accident by some months, but a reading of that document reveals that this date must be incorrect since it refers to matters which occurred in 2002, such as the laminectomy on the 4th February 2002, and examinations later than that. I notice nowhere in that document any reference to the second accident, in spite of a reply therein to paragraph 5(a) of the Notice for Particulars which enquired if the plaintiff had ever either prior to or subsequent to this accident suffered any injury in any other accident. The reply which must have been furnished after taking instructions from the plaintiff states that "the plaintiff was involved in an accident in 1996……"
If she did not tell her own solicitors about the second accident when instructing them for that reply to particulars in 2002, it means that she has not displayed the candour which the Court must be entitled to expect of any plaintiff.

I will not refer to all the medical evidence again in these conclusions. While it is possible to suggest or state that the low back injury may have emanated from the first accident only, or that an injury suffered in the first accident was made symptomatic by the second accident, the argument cannot in my view be sustained to the point beyond 50% of probability. I am firmly of the view, on a reasonable interpretation of the available evidence, that the first accident has not been shown to be the cause of the low back pain which later led to the discectomy.

That being the case, the plaintiff is entitled to be compensated to the injuries related to the first accident and these comprise the upper back, shoulder and neck pain reported after the first accident, and the consequences these injuries had on the plaintiff's life.

Effects on the plaintiff's life and studies:

The most immediate effect of the injuries was that she had been due to sit some examinations two or three days after this first accident and, quite understandably, she was unable to do so. She was on a course in Financial Services at the College of Commerce. It was a two year course which she had started in August 1998. Before the accident she had failed some of her examinations and had come back from Jersey in order to sit repeats which were to take place just after this accident. It seems strange to me that having failed some exams and having applied to repeat same she would go to Jersey to work rather to spend that time to devote to her studies for the repeats, but the fact is that that was what she chose to do. In any event, the accident meant that she did not do the repeats, and the consequence of that was that she would have to repeat the whole year in academic year 1999/2000. She was not prepared to do that. She spent the following year instead working in Jersey as a barmaid for a time, as well as in a Snooker Club in Cork, as well as a waitress in a hotel in Cork. She had difficulty performing any of these jobs due to the symptoms she was suffering from this first accident.

She began an Arts Degree Course in UCC in October 2001. It is noted by Ms Feely, Vocational Rehabilitation Consultant, that she missed one of her exams in Computer science due to severe back pain. She also missed a couple of other exams due to a tummy upset/vomiting unrelated to the accident. She is now in the third year of this course and is hoping to gain an honours degree. There is no need to go through Ms. Feely' evidence and report in full detail. She is of the view that the effect on the plaintiff of not sitting the repeat exams in the summer of 1999 is that if she had sat and passed those exams she would in all likelihood have qualified in the summer of 2001 with her qualification in Financial services. At that point she could have gone into employment, or have gone back to college for a further qualification at 3rd level. Ms. Feely states that the plaintiff is unsure what option she might have taken. A job at that point according to Ms Feely may have paid between €15000 – €19,000. That would be gross.

Ms. Feely was of the view that the plaintiff has lost two years and possibly more in relation to her career. She is of the view that the accident resulted in her achieving nothing for two year at least. She believes that the accident demoralised the plaintiff and knocked her off track, so to speak. She believes also that had this accident not happened she might have ended up in 2001 with some sort of job in banking services, or might have gone on to a 3rd level degree qualification in that area of study. She believes that the fact that the plaintiff now has an adverse medical history may militate against her job prospects in the future. That brings me to another matter which I do not propose to deal with in any detail, since my judgment may well be made public in some way. But the fact is that there is also another factor in the plaintiff's life which she has dealt with but which is a fact in her life which has the capacity to come against her in the future in any search for employment. The plaintiff is to be commended in the manner in which she has dealt with that difficulty, but nevertheless she cannot overlook it in assessing any difficulties she may have in the employment market in the future, and it is certainly something to be weighed in the balance in considering whether this accident has reduced her chances of gainful employment in the future.

There is yet another matter which cannot be overlooked in considering the degree to which this accident may have delayed the plaintiff's entry into employment and her study career generally. She became pregnant in about July 2003 and gave birth to a daughter in early March 2004. She has plenty of family support in relation to the minding of her daughter, but it still a factor to bear in mind.

Mr Desmond White, a Vocational Consultant engaged by the defendants was of the view that she had certainly lost one year as a result of the injuries. He felt that there were other factors in the plaintiff's life which might have caused her delay in any event. He felt that there was evidence that she was an intelligent and, now, a well motivated person who has the capacity to do as well as anybody else, and that while the accident would have caused some disruption to her study career, she should have no difficulty getting a job. Some of what he was referring to however would have related to that aspect of the injuries which I have found is attributable more to the second accident than to the first accident.

The Court has to consider the view of each expert and the evidence generally and arrive at a conclusion on the balance of probability. In my view the plaintiff has lost two years for one reason or another, some of which cannot in all fairness be laid at the door of the defendants. There is no doubt that her student life seems to have been marked by instability and

stress in her personal life, and that there are aspects of her personal life in these years which had the capacity to come against her prompt entry into the job market. It cannot be said with certainty that by the end of summer 2001 she would have emerged with a qualification from which she would have progressed into immediate employment. I feel that it is more probable that having passed her repeat examinations in the summer of 1999 she would have gone on to enrol in the next level of study which may have led to a third level degree. There are some uncertainties in that regard given what was going on in her life in other respects.

However, in fairness, I believe that a period of eighteen months is reasonable to allow the plaintiff in respect of her loss of career time. That may be on the generous side, but I balance it against some other findings I have made which the plaintiff may feel are somewhat harsh from her perspective, I am trying to strike a fair balance in the interests of justice to both sides.

Overall conclusions:

I have decided already that the low back pain is not something for which she can recover compensation in these proceedings. She is entitled to compensation for the injury to her neck, shoulder and upper back and for the degree to which these injuries interfered with her life generally.

I have no doubt that her symptoms from these injuries alone were significant over a considerable period of time. In fact Dr Molloy is of the view, and I accept what he states, that even after the birth of her daughter in March 2004, her upper body symptoms came against her in relation to the management of her baby's care, such as washing, breast-feeding, lifting and so on. Because she wished to breast-feed her baby she was unable to take medication for pain. I have little doubt but that the plaintiff's pregnancy was more difficult as a result of the upper body injury as opposed to the low back problems, even though the plaintiff herself in her evidence made little of the difficulties during her pregnancy. It appears from the medical reports that she had need of treatment from Dr Diarmuid O'Connell during that time. She had muscle spasm in her neck at that time and needed treatment. She needed treatment in her neck and shoulder region during her pregnancy according to Dr Diarmuid O'Connell's report dated 27th May 2004. The same applies to the period after the birth. He feels that she will continue to recover over the years to come. Dr Molloy would be of the same view.

General damages:

For past pain and suffering in respect of her neck, shoulder and upper back, I assess the sum of **€35,000.**

She is likely to suffer into the future to some extent in relation to these particular injuries, but there has been substantial improvement. Nevertheless I award the sum of **€15000 for future pain.**

In relation to loss of employment opportunity, I believe it is fair to accept that she has lost 18 months employment. I believe she may have suffered monetary loss as a result based on a salary of €19000 gross. I have no evidence of what her nett loss would be based on that figure, but I am taking a figure of a nett loss of €15000 per year for a period of 18 months. That produces a figure of **€22500 nett loss.**

As far as special damages are concerned I have been handed a list of special damages the amount of which is agreed, but subject to the Court being satisfied that these expenses are properly incurred in the context of the proceedings. The Court has no way of deciding which of these items of special damages are attributable only to the injuries which I have found to be attributable to the first accident. **Given that there is a finding of 40% contributory negligence in any event, I propose accepting these figures as they are on the list provided. The amount of same is €10,809.**

The total of these items is €83,309.00. A deduction of 40% must be made in accordance with my findings in contributory negligence.

I therefore deduct the sum of €33.323.60, and give judgment to the plaintiff in the sum of **€49,985.40.**