THE HIGH COURT

CIRCUIT APPEAL

[2016 No. 956 C.A.]

BETWEEN

ROSALEEN O'CONNELL

PLAINTIFF

AND

RUTH MARTIN

DEFENDANT

[2016 No. 574 C.A.]

BETWEEN

ASHRAF ALI

PLAINTIFF

AND

RUTH MARTIN

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 10th day of May, 2019

SUMMARY–one fraudulent & one exaggerated personal injury claim dismissed
1. This is a case in which one fraudulent personal injuries claim by the first plaintiff, Ms. O'Connell and one exaggerated/misleading personal injuries claim by the second plaintiff, Mr. Ali were dismissed by this Court. Both claims arose out of minimal impact between two cars which resulted in a minor dent to the bumper of the Mr Ali's car (with an estimate, obtained by Mr. Ali, of €400 to repair) and no damage to the defendant's ("Dr. Martin") car.

€3,000 or €17,500 for whiplash/soft tissue injuries in the Circuit Court?
2. This judgment considers the relevance of the fact that the plaintiffs were referred to a consultant, by a solicitor, who has no medical expertise, for their alleged injuries and also considers the principles applicable to the assessment of damages for personal injuries. The application of these principles to Mr. Ali's whiplash injury in this case led this Court to conclude that €3,000, rather than the €17,500 awarded by the Circuit Court, should have been awarded to the plaintiff, if an award for damages were to be made.

3. A key factor undermining the claims made by both plaintiffs is that, contrary to what this Court would regard as the usual practice, of a GP referring a patient to a consultant, it was a solicitor, with no medical expertise, who referred both Ms. O'Connell and Mr. Ali to a consultant, for their alleged injuries in order to progress these claims. The fact that a solicitor, rather than someone with medical expertise, made these referrals led this Court to the unavoidable conclusion that there was no medical need for the referral of the plaintiffs to the consultant, but a legal need to support a claim for damages. This conclusion that there was no medical need for the referral to a consultant supported Dr. Martin's claim that one plaintiff (Ms. O'Connell), was not even in the car at the time of the accident, and supported Dr. Martin's claim that the neck and back injuries suffered by the other plaintiff (Mr. Ali) were not as extensive as he claimed.

4. The very fact that there was a referral by a solicitor (who has no medical expertise) of two clients to a consultant specialising in back injuries is curious per se. However, it is made even more curious and concerning by the fact that when the plaintiffs were assessed by their respective GPs after the alleged 'car accident', both plaintiffs did not have any medical issues justifying a referral to a consultant specialising in back injuries. In Ms. O'Connell's case, she visited her GP after the car accident for a sinus issue only, yet within days, somebody without medical expertise, i.e. her solicitor, referred her to a neck/back consultant. Similarly, Mr. Ali attended his GP shortly after the accident and made no mention of any neck or back problem, yet the very next day, the same solicitor (who was acting for both plaintiffs) referred him to that same neck/back consultant.

5. Since one can conclude that the Medical Reports from that consultant (Dr. Henry) did not arise from any medical need on behalf of the plaintiffs, but rather from a legal need to support a claim for damages, those Medical Reports have to be treated with considerable scepticism, to say the least. This scepticism is increased where the contents of those Medical Reports are based on the subjective evidence of the plaintiffs (e.g. the statement in the Medical Report that Ms. O' Connell had experienced a *'big jolt'* in the car and *'is now sore on most days'*).

6. As noted hereunder, it makes economic sense for defendants to settle unmeritorious claims such as these brought by impecunious plaintiffs, since the defendants are unlikely to recover the very significant costs of fighting these cases in the Circuit Court and on appeal, in the High Court. However, in this case and presumably at significant cost, the defendant did not settle this case in the Circuit Court, or on appeal by Ms. O'Connell to the High Court. Accordingly, this case highlights the manner in which Ms. O'Connell, who this Court has found was not even in the car which was involved in the alleged 'road accident', managed to use the services of:

- a solicitor (who referred her to a consultant for no good medical reason);

- a barrister, who sought punitive damages from Dr. Martin for having the temerity to suggest in the High Court that Ms. O'Connell might be lying when she said she was in the car (even though Ms. O'Connell's case had already been thrown out by the Circuit Court),

- a consultant physician (who saw Ms. O'Connell on a referral from the solicitor, and thus for no good medical reason), and who then saw her on three occasions and prepared five separate Medical Reports that stated, *inter alia*, that she had received a *'big jolt'* from the *'car accident'*, and

- a consultant psychiatrist, (again, on a referral from a solicitor) who was asked to opine as to whether Ms. O'Connell showed evidence of a psychiatric disorder arising from the 'car accident' (which *'car accident'*, even if she had been in the car, was the equivalent of a tip to a stationary car from another car while parking).

In this way, Ms. O'Connell used the professional expertise of four different professionals, two lawyers and two doctors, in order to create what had all the appearance of a legitimate claim for damages for personal injuries, which could have led to a settlement sum being paid to her, in order to avoid the costs of a full High Court hearing on the part of Dr. Martin (and her insurance company), which are unlikely to be recovered from Ms. O'Connell. This case highlights therefore the need for, not just lawyers, but also doctors and other professionals to be alive to the possibility of their services being used to facilitate the bringing of fraudulent claims.

7. This judgment also considers the award of €17,500 for pain and suffering/general damages made by the Circuit Court to Mr. Ali. This Court concludes that if Mr. Ali had not provided exaggerated/misleading evidence to this Court, damages of no more than €3,000 should have been awarded by the Circuit Court to him for the whiplash/soft tissue injury. This reduced amount should have been awarded on the grounds, *inter alia*, that the Circuit Court and this Court *is not obliged* to make awards consistent with the historic awards referenced in the Book of Quantum (which references awards of up to €18,400 having been made for 'minor' soft tissue injuries and may have influenced the Circuit Court in the calculation of its award).

8. Rather this Court and the Circuit Court is *obliged* by the Court of Appeal to award '*modest damages*' for '*minor injuries'*. In this case the objective evidence, as distinct from the subjective evidence of Mr. Ali, is that the whiplash/soft tissue injuries received from the minimal contact between the cars were the epitome of a 'minor injury', thereby justifying modest damages, in this case, of €3,000 (if Mr. Ali's claim were not otherwise being dismissed due to his misleading/exaggerated claim).

MS. O'CONNELL'S CASE

9. The first action is a case in which the plaintiff, Ms. O'Connell, of Dock Road, Limerick claims to have suffered injury to her back on the 10th February, 2015 when she was a back-seat passenger in a car driven by Mr. Ali. It is accepted that Dr. Martin, was driving her car and came into contact with the back of Mr. Ali's car, when Mr. Ali's car was stationary at the junction of the South Circular Road and the Ballinacurra Road in Limerick city.

10. Dr. Martin, who was a convincing and credible witness, gave evidence that at the time of the incident she was '*crawling along'* the road at approximately 20 km per hour, as it was school closing time and traffic was very heavy on that stretch of road. She gave evidence that Mr. Ali braked suddenly when approaching the junction and that she then came into contact with Mr. Ali's car causing a minor dent to his rear bumper. She gave evidence that it was the most negligible of contact similar to the contact that might result if one was parking a car and tipped a stationary car in a car park. This evidence was supported by the fact that Dr. Martin gave evidence that there was absolutely no damage done to her own car.

11. Dr. Martin's evidence was very clear that after the accident she went around to the front of Mr. Ali's car to take his insurance details and observed that the only other occupants of the car were Mr. Ali's wife and his two young children. She was very clear that Ms. O'Connell was not in the car at the time of the accident.

12. Ms. O'Connell, for her part, claims that she was in the back-seat of the car and that she suffered back injuries for which she now seeks damages. While her claim was dismissed by the Circuit Court, this Court must consider all the evidence de novo to determine whether her version of events, namely that she was in the car and that she suffered back injuries, or Dr. Martin's version of events, is to be believed. In this regard, this Court found Dr. Martin to be a convincing witness regarding the very minor nature of the contact between the two cars. Her evidence was supported in this regard by the fact (as noted below) that Mr. Ali offered to accept only €400 for the damage to his car (which offer was, in any case, not even accepted by Dr. Martin).

Ms. O'Connell visits her GP for sinus not back pain

13. In determining the credibility of Ms. O'Connell and her version of events, it is relevant to note that she claims that she suffered back injuries as a result of this very minor contact between the two vehicles on the 10th February, 2015. In this regard, Ms. O'Connell gave evidence that she had sustained a back injury some years prior to the car accident. This pre-existing back injury occurred when she fell down a set of stairs and has resulted in her being on a disability allowance. She also gave evidence that she was in back pain up to and including the time of the car accident on 10th February, 2015. At the hearing of this action before this Court, she appeared in court on crutches. However, she claimed that she was on crutches for back pain caused, not by her previous fall, but by the back injury suffered in the minimal impact between Dr. Martin's car and Mr. Ali's car.

14. Against the background of these claims now being made by Ms. O'Connell regarding the cause and extent of her back injury, it is relevant to note that when she attended her GP, some nine days after the minor contact between the two vehicles, on the 19th February, 2015, her only complaint to her GP was in respect of her sinuses. Furthermore, it is noteworthy that in her second GP visit after the date of the accident, on the 28th March, 2015, Ms. O'Connell did refer to back pain but there is no reference in the GP notes to the cause of the back pain.

Ms. O'Connell gives the 'fall down the stairs' as reason for back pain

15. More significantly, on the 11th July, 2015, Ms. O'Connell attended her GP again for back pain, however, even though a cause for the back pain is provided on this visit, the cause is recorded as the fall-down the stairs some years previously, and not the car accident, in which she alleged she was involved.

16. Similarly, on another GP visit for back pain on the 21st July, 2015, the cause of Ms. O'Connell's back pain is again recorded in the medical notes as the fall-down the stairs.

17. However, in these proceedings and in her evidence to this Court, Ms. O'Connell is quite adamant that the cause of her back pain and the reason for her being on crutches on the date of the hearing of this action, was the car accident on the 10th February, 2015. When it was put to Ms. O'Connell that the cause of her back pain, which led to these GP visits, was not the car accident, she replied that during each of these GP visits she told the doctor that her back pain was because of the car accident, but none of the doctors had recorded this fact but had instead incorrectly recorded that the cause was the fall down the stairs. This Court did not find Ms. O'Connell's evidence in this regard, or indeed her evidence more generally, to be credible.

18. Then, on the 6th of August, 2015, many months after what this Court accepts was very minor contact between the two vehicles, Ms. O'Connell's story changes. She goes to her GP with back pain and on this date the GP note from this visit states that Ms. O'Connell *'thinks'* the road traffic accident in February of that year *'may have something to do with back pain'.*

19. In summary therefore, the four GP visits from nine days after the accident on the 19th February, 2015 to the 21st July, 2015,

initially for sinus issues and then for back pain, either make no reference to the car accident or they reference the fall down the stairs as the cause of the back pain.

No referral by GPs to a consultant for back pain
20. It is particularly relevant to note that in none of these GP visits (and different GPs saw Ms. O'Connell over this period), did any of the GPs refer her to a consultant regarding her back pain. This Court can conclude therefore that during this period, from immediately after the car accident in February 2015 to July 2015, Ms. O'Connell did not have a medical need to see a back specialist.

21. Despite this fact, on or prior to the 9th March, 2015 (the date of the Consultant's Report), which date was shortly after Ms. O'Connell's visit to her GP for her sinus issues, Ms. O' Connell was referred to Dr. Aideen Henry, a Consultant Physician in Orthopaedic and Sports Medicine in Limerick, who this Court was advised specialises in medico-legal matters. Ms. O'Connell was referred to Dr. Henry for her back pain.

Ms. O'Connell is referred to a consultant physician by a solicitor
22. However, this referral to Dr. Henry was made, not by a GP, but by Ms. O'Connell's solicitor. The only logical conclusion that can be drawn from this fact is that Ms. O'Connell was not referred to Dr. Henry on the basis of medical need, but rather for legal reasons, namely to support a claim for damages against Dr. Martin.

23. If a person needs to see a medical consultant because of his/her medical condition, this would normally be because of a referral made by a person with medical expertise, usually a GP. On the other hand, if a referral is made by a solicitor to a consultant of a client for back pain, or indeed for any other condition, this is not indicative of medical need, for the very reason that a solicitor is not qualified to make any call on the medical needs of a client. Indeed, the fact that this referral was made, not by a GP, but by a solicitor, supports the contrary proposition, namely that there was no medical need for this referral, and the only logical conclusion therefore is that it was made solely for a legal reason.

24. In the circumstances of this case, this conclusion that Ms. O'Connell was referred by her solicitor to a consultant in the absence of medical reasons, but solely for legal reasons, is reinforced by the fact that, at the very time when Ms. O'Connell was being referred by her solicitor to a consultant for her alleged back injury arising from this very minor contact between two cars, she had seen her GP for her medical conditions, which at that stage amounted to sinus problems. Furthermore, when Ms. O'Connell did raise her back problem with her various GPs, none of them thought that it merited a referral to a consultant.

25. This Court is not aware of how common it is for consultants to take referrals of patients from solicitors rather than general practitioners. However, in order to avoid a situation where a court might be misled (by making the natural assumption that a person attended a specialist for medical reasons), it would be good practice if the Court was advised, where medical reports are being relied upon by plaintiffs, if they came into existence for legal, rather than medical, reasons, since as noted below this could in certain circumstances be a factor in this Court's determination of whether the claims were fraudulent and/or exaggerated.

Consultant's Report on the 'cause' and 'extent' of back injury
26. Against this background, it is relevant to note that, in her report, Dr. Henry states that Ms. O'Connell *'experienced a big jolt and was thrown forwards by the impact and immediately noticed low back pain'*. This statement, coming from a medical consultant, on the cause and extent of the injury would *prima facie* provide significant support for a claim for damages. A defendant might take this Medical Report at face value and if she did, it could lead to a settlement offer to Ms. O'Connell or it might lead to an award of damages by a court (as it did in the case of Mr. Ali). This is because such a statement has all the appearance of a statement of fact in the Medical Report. However, it is simply Dr. Henry's summary of what Ms. O'Connell said to her during her consultation, and it must be remembered that Ms. O'Connell was referred to Dr. Henry for no good medical reason, but rather to support a claim for damages.

Ms. O'Connell is referred to a consultant psychiatrist by her solicitor
27. On or prior to the 13th September, 2017 (as that was the date of the consultation), Ms. O'Connell was referred to a consultant psychiatrist, Dr. Peter Kirwan, for a psychiatric assessment. It appears that this referral was also made by her solicitor, since Dr. Kirwan in his report makes no reference to a GP and writes directly to Ms. O'Connell's solicitor.

28. In his Report, Dr. Kirwan states that Ms. O'Connell *'was able to give details of the accident without any distress'* and had *'no history of anxiety attacks or panic attacks and no phobic anxiety in relation to the driving or been driven'*. On this basis, Dr. Kirwan was able to conclude that *'there is no evidence of any psychiatric disorder arising from the accident'.*

29. This Court finds it surprising, to put it at mildest, that a solicitor, with no medical expertise, would refer a client to a psychiatrist for a report on the 'psychiatric effect' of this most minor of contact between cars. Since the solicitor has no medical expertise, the only logical conclusion that can be drawn from this referral is that there was no medical basis for it and that it was done solely for legal reasons, namely to seek to increase Ms. O'Connell's claim for damages. It is for this reason that this Court believes that it is not good practice for solicitors to refer clients to medical specialists.

30. While Dr. Kirwan confirmed that Ms. O'Connell had not suffered post-traumatic stress disorder from the equivalent of a tip in a car park, this referral does raise a bigger issue. The referral of a person for a psychiatric assessment arising from minimal impact between two cars by a person with no medical expertise (and thus made for no medical reason but solely for the purpose of supporting a damages claim) and duly accepted by the consultant psychiatrist, risks devaluing personal injury litigation for those people who are genuinely injured and deserving of compensation.

Caution regarding reliance on Medical Reports
31. While Dr. Kirwan's Medical Report did not support a claim for damages for psychiatric injury, Dr. Henry's Medical Report did support Ms. O'Connell's claim for damages for her back injury. This Medical Report on the cause and extent of Ms. Connell's back injury has the potential to mislead a defendant (or more accurately the defendant's insurance company) and a court. This is particularly so because of the privileged position which experts (whether engineers, doctors or actuaries) enjoy in the Irish courts in personal injury and other litigation. As noted by MacMenamin J. in *O'Leary v. Mercy Hospital* [2019] IESC 48 at para. 17:

> "*As experts, such witnesses enjoy a degree of latitude with regard to the* general rules on admissibility of evidence for the purposes of assisting the court and finding and *drawing inferences of fact in relation to matters which are not, and cannot be expected to be, within the experience of the fact finder, whether that be a judge or jury.* The judgments in *Ruddy* identify the areas of expertise as being ones where there may be special study or experience required in order that a just opinion be formed, as in, for instance, "matters of art, science, medicine, engineering and so forth" (per Davitt P.). […] As Charleton J. commented [in *Flynn v. Bus Atha Cliath* [2012] IEHC 398], *experts are privileged by being able to express a view relevant to the issue before the court because of the unusual nature of their status and enables them to*

express a view; sometimes, but not in every case, on and matters relevant to those upon which the case may turn (para. 9). In short the role of such witnesses can be of great importance in assisting a court determine the outcome of any case; the more important the role the higher the duty of independence. Ultimately the judge, and the judge alone, must make the decision." (emphasis added)

32. However, despite the privileged position held by experts in the Irish courts, it is clear that this position has sometimes been abused by expert witnesses who instead of complying with their *'higher duty of independence to the court' have expressed views or opinions which 'all too often appeared to correspond too favourably with the interests of the parties who retained them'* (*per* Irvine J.). For this reason, and as noted by Irvine J. in *Byrne v. Ardenheath* [2017] IECA 293, caution needs to be exercised by courts when faced with expert reports, including medico-legal reports, which are obtained on behalf of one party to litigation.

33. The case of *Moore v. Carroll* [2017] IEHC 731, another case involving 'minimal impact' between cars, starkly illustrates the necessity for that caution. In that case, this Court remarked on the fact that a consultant rheumatologist in his Medical Report stated that it was *'quite likely'* that the plaintiff's hip injury was caused by a car accident (which involved the most minimal of impact between two cars). In that case, this statement in the Medical Report was made by the consultant despite the fact that only weeks previously, the consultant had received a letter from the plaintiff's GP stating that the plaintiff had experienced chronic left hip pain going back many years prior to the alleged car accident. Since the test for establishing liability and therefore the basis for awarding damages in personal injury cases is the *'balance of probability'*, this statement by the consultant of the *'likely'* cause of the plaintiff's injury was akin to an expert stating that the plaintiff was *legally entitled* to damages. Since, as noted by MacMenamin J. and Charleton J., experts are in a very privileged position because they can express a view upon which the case may turn, this was exactly the type of situation in which a Court would rely on expert opinion to decide the case. Were it not for the discovery of the earlier letter from the GP to the consultant (which clearly contradicted the consultant's conclusion), this Medical Report might have led to an award of damages in the *Moore* case.

34. As is evident from Ms. O'Connell's case before this Court and the *Moore* case, just like other expert reports, the reports of medical consultants need to be treated with caution in personal injury actions, since as noted by Irvine J. at para. 31 of *Byrne v. Ardenheath*:

> "It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for trial judge."

35. In this case, Ms. O'Connell and her legal team relied on Dr. Henry's Medical Report and in particular the statements in the Report on the extent of Ms. O'Connell's pain (*'it is now sore on most days for a number of hours'*), to support her claim for damages. As a result, Dr. Martin (or more accurately her insurance company) was faced with the prospect of settling this unmeritorious claim at a significant sum, or incurring perhaps even more in legal costs in fighting and winning the case. This illustrates the dilemma for a defendant such as Dr. Martin (or her insurance company), who knew Ms. O'Connell was not in the car, yet was nonetheless confronted with an unmeritorious claim from a plaintiff.

Lose/lose for defendant in unmeritorious claim by an impecunious plaintiff

36. In this regard, it must be noted that Ms. O'Connell currently receives disability allowance, as she has done for a number of years, and is therefore a person of limited financial means. Accordingly, a defendant insurance company faced with Dr. Henry's three Medical Reports for Ms. O'Connell along with Dr. Kirwan's Medical Report, for what, Dr. Martin believed was a spurious claim, might be coerced to conclude that it would make more economic sense to settle this unmeritorious claim by paying Ms. O'Connell a lump sum (out of which will be paid Ms. O'Connell's solicitor, barrister, consultant physician and consultant psychiatrist). This is because a settlement amount, to pick a random figure, of say €7,000, for Ms. O'Connell and her advisers and experts, would be less than the amount it would cost the defendant to pay its own legal team to win the case (which in the Circuit Court might be €5,000 - €10,000, but in the High Court, on appeal, might be €10,000 - €30,000). Accordingly, a defendant such as Dr. Martin (or her insurance company) is in a lose/lose situation regarding unmeritorious claims by plaintiffs such as Ms. O'Connell with limited means, since:

- if the defendant fights the unmeritorious claim and wins, she 'loses' because her legal costs are unlikely to be paid by the impecunious plaintiff, or

- if the defendant settles to avoid incurring those legal costs, she 'loses' by paying money to an undeserving plaintiff and their solicitor, barrister, medical experts, engineering experts etc. (albeit usually slightly less than she would have incurred in legal costs in 'winning' the case).

Medical Reports such as Dr. Henry's therefore, which are generated solely for legal reasons, provide the necessary ingredient for nuisance claims, which are more economical for defendants to settle, rather than fight, even where the plaintiff's case is completely without merit and the defendant believes that it is without merit. In pure economic terms, it is cheaper for a defendant to pay damages of €X to the plaintiff, his solicitor, barrister and medical consultants, than to pay €X + €Y to his own lawyers to fight and win the litigation, since he is unlikely to recover this amount from the plaintiff.

Real power is not merits of case, but legal costs inflicted by impecunious plaintiff

37. This case also illustrates why unmeritorious claims by impecunious plaintiffs are usually settled. It is not because there has been negligence on the part of the defendant, but rather because *settling a claim costs less than winning* such 'nuisance claims', as the legal costs incurred in winning will not be recoverable from the plaintiff. Logic also dictates that the greater the legal costs being threatened, the greater the economic imperative to settle for a defendant. So, in this case, with legal costs so high (say €40,000), compared to the level of the award (€17,500 was awarded to Mr. Ali in the Circuit Court), a likely settlement (of say €7,000) makes economic sense.

38. In many of these unmeritorious cases, where the legal costs dwarf any likely award of damages, a defendant considering settling, is in reality dealing, not with the merits of the case, but rather with the issue of who is going to pay the very significant legal costs. Thus, the real issue for a defendant is:

- whether, in the case of an impecunious plaintiff with an unmeritorious claim, settling makes economic sense in order to avoid the defendant having to pay his own very large legal costs even after winning, or

- whether in the case of a wealthy plaintiff with an unmeritorious claim, settling makes economic sense in order for

the defendant to buy off the very small risk of having a very large legal bill (which may dwarf the value of the claim itself).

39. The biggest factor at play will often therefore be who will pay the huge legal costs which a defendant will/may have to pay, by not settling the case. As noted by Charleton J. (when writing extra-judicially in the *Irish Judicial Studies Journal* [2019] Vol. 3 at pp. 5 and 6) the enormous costs of litigation is a massive issue for the administration of justice in Ireland:

> "The Irish system, over the last two decades, has increasingly suffered from the defect that it has become extremely expensive through the continual and unchecked escalation of legal fees, which undermine the constitutional duty to make access to the courts available to the people. […] The control of lawyers' fees is a matter that has been subject to much statutory regulation without any success, making a rethink at the level of principle necessary."

Plaintiff with fraudulent claim can inflict two sets of irrecoverable costs

40. This case also illustrates that where an impecunious plaintiff such as Ms. O'Connell takes an action which is dismissed by the Circuit Court, it seems, as a fraudulent claim, and thereby inflicts irrecoverable legal costs on a defendant, there appears to be no restriction (e.g. the requirement to provide security for costs) on such a plaintiff from inflicting a second set of irrecoverable legal costs on the defendant in an appellate court. Thus, in this case, the defendant, Dr. Martin (or her insurance company), will likely have to pay her own legal fees for fighting and defeating a fraudulent claim on two occasions. On the other hand, the plaintiff, Ms. O'Connell had a 'free go', (in the sense that Ms. O'Connell is unlikely to pay the defendant's legal costs) not once, but twice, in taking a fraudulent claim, in the hope of receiving damages or a settlement.

Not good practice for solicitors to refer clients to medical consultants

41. Against this backdrop and in order to ensure that Medical Reports are not generated without any medical need, it is this Court's view that it is not good practice for solicitors to refer clients to medical specialists. The more usual way in which Medical Reports come to be relied upon in court cases, is that a client, if and only if he/she has a medical need, is referred by a person with medical expertise, usually the client's own GP, who has knowledge of the client's medical history, to a Consultant. Only after this threshold of 'medical need' is passed, would it be usual for there to be a Medical Report which then can be provided to the client's solicitor for the purposes of litigation.

42. In this case, even if Ms. O'Connell had complained about her back to her solicitor (and no evidence was provided to this Court as to how the solicitor came to refer Ms. O'Connell to Dr. Henry), it is not the role of a solicitor to determine whether the medical condition complained of is such as to merit any medical intervention or referral, which type of specialist to send the client to, and indeed which of the people practising in that speciality is the most appropriate for her condition in light of her medical history.

43. That is the role of a person with medical expertise, usually the client's GP. Furthermore, the Moore case, as cited above, illustrates another reason why it is good practice for referrals to a consultant to be made by a GP, rather than a solicitor. A GP, as the Moore case illustrates, can provide the consultant with a full medical history of the client, which a solicitor cannot do. A full medical history provided to a consultant by a GP will increase the likelihood of an accurate assessment being made of the *cause* and extent of personal injuries which are the subject of a claim for damages.

44. Furthermore, in a genuine personal injuries case, a referral by a solicitor (rather than a GP) of a client to a consultant indicates that the client, although genuinely in an accident, did not have medical needs which justified the referral to a consultant. This may be of significance for the court in assessing the extent of the personal injuries which are claimed by the plaintiff to have been suffered (as in Mr. Ali's case below).

Dismissal of Ms. O'Connell's claim as she was not in the car

45. In summary, this is a case where there is evidence that Ms. O'Connell went to see a back specialist after the alleged car accident, even though the medical evidence at that time showed that her only medical complaint related to her sinuses. This, combined with the fact that the referral to the consultant was made for Ms. O'Connell by her solicitor, who has no medical expertise, is evidence that there was no medical basis for that referral. In contrast, this Court found Dr. Martin to be a credible witness and she gave evidence that Ms. O'Connell was not in the car at the time of the minor contact between the two cars. For these and the other reasons set out in this judgment, this Court concludes that Mr. O'Connell was not in the car but rather was seeking to make a fraudulent claim. Accordingly, this Court does not accept that the statement in Dr. Henry's Report, regarding the cause of Ms. O'Connell's back pain (*i.e.* a jolt from Dr. Martin's car while sitting in Mr. Ali's car), is accurate. While this Court concludes that Ms. O'Connell has made a fraudulent claim, it should be noted that this finding is made on the balance of probabilities (and not beyond reasonable doubt) and is not therefore a finding that Ms. O'Connell has committed a criminal offence.

46. In conclusion, this Court has little hesitation in affirming the decision of the Circuit Court in dismissing Ms. O'Connell's claim and in awarding costs against her, although as previously noted, it may well be difficult for Dr. Martin (or her insurance company) to recover these costs from Ms. O'Connell.

Counsel seeks to punish Dr. Martin for suggesting that claim was fraudulent?

47. In the Circuit Court, when this action was heard, Ms. O'Connell's claim was, it seems, dismissed as a fraudulent claim since it was dismissed as being without any merit and with costs awarded against Ms. O'Connell. Yet in opening this case in the High Court, senior counsel for Ms. O'Connell suggested that the very fact that Dr. Martin was alleging that Ms. O'Connell was lying about being in Mr. Ali's car, merited not only general damages against Dr. Martin, for Ms. O'Connell's *'pain and suffering'* for her alleged back injury, but also punitive damages against Dr. Martin for, it seems, her temerity to question Ms. O'Connell's honesty.

48. This claim by counsel for Ms. O'Connell, that Dr. Martin should be punished in damages for suggesting that Ms. O'Connell was lying, seem curious, to say the least, in a context where the Circuit Court had already, it seems, dismissed Ms. O'Connell's claim as fraudulent. Dr. Martin's claim that Ms. O'Connell was not in the car at the time of the car accident was clearly believed in the Circuit Court and has also been accepted in the High Court. Accordingly, this Court will not be awarding any damages to Ms. O'Connell, let alone punitive damages.

49. It is this Court's view that if such a claim for aggravated/punitive damages is being made, this Court should be advised that the plaintiff's claim was dismissed by the Circuit Court, since it seems to this Court that a claim for aggravated/punitive damages is unstateable in those circumstances, because how can a defendant's claim be so egregious as to merit an award of punitive damages, when the Circuit Court has agreed with the defendant in dismissing the case?

MR. ALI'S CASE

50. Mr. Ali of Huntsfield, Dooradoyle, Limerick claims that he suffered neck and back injuries in the contact between his car and Dr. Martin's car on 10th February, 2015.

51. As regards Mr. Ali's claim, there is no dispute between the parties that he was in the car at the time of the accident. However, as previously noted, this Court accepts the evidence of Dr. Martin regarding this accident, namely that the contact between the two cars was so minor that it did not lead to any damage to her car and led to only a minor dent to the rear bumper of Mr. Ali's car.

52. As regards Mr. Ali's evidence, this Court did not find him to be a credible witness as he was evasive and suggested he did not understand questioning when it did not support his claim.

53. In particular, while it is not clear what evidence Mr. Ali gave in the Circuit Court, in this Court he gave evidence that Ms. O'Connell was in the car at the time of the accident, while this Court, and it appears the Circuit Court (since it too dismissed Ms. O'Connell's claim), has preferred the evidence of Dr. Martin in this regard, namely that Ms. O'Connell was not in the car.

Minimal contact between the two cars
54. In addition, this Court has accepted Dr. Martin's evidence that the contact between the two cars was so minimal that, while it did lead to a minor dent to Mr. Ali's bumper, it led to no damage at all to Dr. Martin's car. The very minor nature of the impact is also supported by the telephone contact between Mr. Ali and Dr. Martin on the day after the incident. This is because Mr. Ali accepted that he had suggested on the telephone to Dr. Martin that the repair of the bumper would cost a nominal amount. His recollection is that he said to Dr. Martin that the garage quoted him a figure of €500, but Dr. Martin's recollection is that the figure was €400 and this is accepted by this Court as she is the more credible witness. While even this nominal amount was not agreed by Dr. Martin (and the matter did not therefore settle), the figure proposed by Mr. Ali indicates the very limited damage caused by the contact between the two cars.

Visit to GP after accident makes no reference to neck or back pain
55. After this minimal contact between the two cars, Mr. Ali visited his GP, some nine days after the accident, on the 19th February, 2015 and he made absolutely no reference to his neck or back.

Following day, solicitor refers Mr. Ali to specialist in back pain
56. However, the very next day, the 20th February, 2015, Mr. Ali visited his solicitor for the first time and was referred to Dr. Henry by his solicitor, who was the same solicitor who referred Ms. O'Connell to Dr. Henry. This referral was made despite his solicitor having no expertise in medical matters and even though the previous day Mr. Ali had been with his GP and had made no reference to neck or back pain.

57. In summary therefore, Mr. Ali attended his GP for his medical condition and makes no reference to his back pain, then the following day, he is referred to a specialist in neck and back pain, not by a medical practitioner, but by a solicitor. As was noted above in Ms. O'Connell's case, this referral to a consultant by a solicitor is curious, to say the least. The logical inference from this referral by a solicitor is that there was no medical reason for this referral to a consultant. This inference that there was no medical need for the referral is a relevant factor in considering the extent of the injury to Mr. Ali's neck and back, which he claims to have suffered in the very minor contact between his car and Dr. Martin's car.

58. It is also relevant to note that as with Ms. O'Connell, this referral to Dr. Henry, which was made without any medical reason, led to several consultations between Mr. Ali and Dr. Henry, in his case five consultations between March 2015 and November 2018. It also led to the preparation of five Medical Reports by Dr. Henry to support Mr. Ali's claim.

Medical Report in similar terms to Ms. O'Connell's Report
59. When Mr. Ali duly attended Dr. Henry on the 9th March, 2015 she stated in almost identical language to her report for Ms. O'Connell, that Mr. Ali suffered a 'big jolt' and noticed pain in his neck and back. Since this Medical Report came into existence for no good medical reason and solely to support Mr. Ali's claim in damages against Dr. Martin, it must be treated with considerable scepticism, insofar as it suggests a causal link between the car accident and Mr. Ali's complaints about his neck and back and insofar as it provides subjective evidence from Mr. Ali regarding the extent of his neck and back pain.

Dismissal of Mr. Ali's claim for misleading evidence
60. In all the foregoing circumstances, and also because of Mr. Ali's evidence regarding Ms. O'Connell being in the car (when this Court has preferred the evidence of Dr. Martin), this Court concludes that Mr. Ali has given misleading evidence regarding the circumstances of the accident, the nature of the impact and in particular the effect of that accident on his neck and back. Thus, this Court concludes that the neck and back pain of which Mr. Ali complains was not caused by the very minor contact between his car and Dr. Martin's car.

61. It may well be the case that Mr. Ali did not give misleading evidence in the Circuit Court, which made an award of €17,500 in general damages/pain and suffering in his favour. However, this Court can only decide this case based on the evidence Mr. Ali gave in this Court and based on that evidence, this Court would apply the provisions of s. 26 of the Civil Liability and Courts Act 2004, to dismiss his claim. This Court does not believe that this dismissal would lead to any injustice being done. In this regard, this Court would note that Mr. Ali's wife, who was in the front passenger seat at the time of the accident, has already received a settlement from PIAB of her claim arising from the contact between Mr. Ali's car and Dr. Martin's car.

€17,500 DAMAGES FOR SOFT TISSUE INJURIES/WHIPLASH?
62. Finally, this Court will now consider the level of award it would have given Mr. Ali for his whiplash, if his claim had not been dismissed. This consideration is important because in the Circuit Court he was awarded €17,500 in respect of general damages/pain and suffering. In this regard, the Book of Quantum provides that, historically, awards for the lowest grade of soft-tissue injuries to the back were as follows:

> "Minor – substantially recovered up to €14,800
>
> Minor – a full recovery expected up to €18,400"

63. This damages award of €17,500 was based, it seems, on the medical reports of Dr. Henry in which the subjective assessment of the injury (*i.e.* based on the information supplied by Mr. Ali) was that he had been in '*constant pain day and night'*. The objective assessment of Dr. Henry was that he had a full range of movement in his neck and his back, *albeit* that he complained of some tenderness during examination. The other objective evidence contained in these medical reports to indicate the extent of the injury is that Mr. Ali had attended physiotherapy on only two occasions.

64. In calculating damages for personal injuries such as this, the historic figures for previous whiplash awards in the Book of Quantum of '*up to'* €18,400 are not binding on the trial court, as is clear from s. 22 of the Civil Liability and Courts Act 2004. What is binding however, are the following principles derived from decisions of the Court of Appeal and the Supreme Court, which bind the High Court, the Circuit Court and the District Court:

Fair to the plaintiff and defendant

i. The award should be fair to both the plaintiff and the defendant (*per* Irvine J. in *Nolan v. Wirenski* [2016] IECA 56).

Minor injuries/modest damages, middling injuries/moderate damages etc

ii. Awards need to be just, equitable and proportionate and this involves ensuring that minor injuries attract appropriately modest damages, middling injuries attract moderate damages and more severe injuries attract damages of a level that are distinguishable from damages for catastrophic injuries, where the cap for such damages is generally in or around €450,000 (*per* Denham J., as she then was, in *M.N. v. S.M.* [2005] IESC 17 and Irvine J. in *Nolan v. Wirenski* and *Fogarty v. Cox* [2017] IECA 309).

At para. 34 in *Nolan v. Wirenski*, Irvine J. noted that it has been suggested that the cap of €450,000 in catastrophic injury cases is less than would otherwise be the case for general damages because a plaintiff is, in catastrophic injury cases, also awarded significant special damages. However, Irvine J. rejected this suggestion as irrational and unjust and this Court is bound by her comments and so the cap for general damages, which applies in this Court's assessment of damages, is in general €450,000.

Award proportionate to other awards and cap on damages

iii. When it comes to calculating the proposed award of damages, the Court of Appeal recommends that the trial judge establish where the plaintiff's injuries stand on the scale of minor to catastrophic injuries to test the reasonableness of the proposed award (*per* Irvine J. in *Nolan v. Wirenski*), where the cap on general damages is in general €450,000. This is because the award must be proportionate to the damages awarded for other injuries (*per* Denham J. in the Supreme Court case of *M.N. v. S.M.* [2005] 4 I.R. 461) and thus proportionate to the cap on damages so as to avoid the 'concertina effect' (*per* Irvine J. in *Payne v. Nugent* [2015] IECA 268).

It is clear from *Payne v. Nugent* that the 'concertina effect' is the unfairness which would result if awards of damages for minor injuries crept upwards towards awards of damages for middling injuries, which then forced those middling damages awards upwards towards the damages awards for serious injuries, which then forced those serious damages awards upwards towards the cap of €450,000 for damages for catastrophic injuries. This would, according to Irvine J., lead to the injustice of an award for general damages for a serious injury, of say the loss of a limb, only being modestly different from the award for quadriplegia. Hence, it is important that awards for modest injuries, middling injuries and serious injuries remain within what might be regarded as the ball park for those injuries, and thus proportionate to other awards and thereby avoiding the 'concertina effect'. Otherwise, as noted by Irvine J. in *Gore v. Walsh* [2017] IECA 278 at para. 38, if damages, in that case, for scarring to a child's hand were to receive damages of €50,000:

> "it is difficult to see how the Court would be in a position to make a *proportionate and fair award* in respect of, for example, substantial third degree burns to a large area of the body including the face which would not require an award of damages far beyond the level of damages [i.e. €450,000] commonly reserved for those who sustain the most extreme type of catastrophic injury such as severe brain damage or quadriplegia." (emphasis added)

Award to be reasonable in light of general level of after-tax incomes

iv. The award of damages should be reasonable in light of '*the ordinary living standards in the country*' and 'the general level of income' in this country (*per* O'Higgins C.J. in *Sinnott v. Quinnsworth* [1984] I.L.R.M. 523). A similar point was made more recently by Irvine J. in *Kinsella v. Kenmare Resources* [2019] IECA 54 at para. 152, where she applied the principles, applicable to the calculation of personal injury awards, to the calculation of defamation awards. In doing so, she summarised O'Donnell J.'s comments in the Supreme Court case of *McDonagh v. Sunday Newspapers Ltd* [2017] IESC 59 where she notes that he observed that:

> 'the plaintiff could have lived off [the award] comfortably for the rest of his life. He noted that the award would not be subject to tax and that in such circumstances it was worth considering how long and hard an individual would have to work to amass such a sum.'

As regards the general level of incomes in Ireland, the most recent figure released by the CSO for the average annual earnings of a person working full-time in the State is €47,596 (CSO Statistical Release, 11th June, 2019). Thus, in considering the reasonableness of any award, the fact that it takes the average person a full year to earn €47,596 is relevant. However, as noted by Irvine J. and O'Donnell J., it is unrealistic to consider the gross income figure, since this amount is not received by the average person in the State, because average annual earnings are subject to tax. In the case of a single person on average annual earnings of €47,596 gross, the net pay after tax for an employee is in the region of €35,500.

Thus, when calculating damages for personal injuries, it is useful to consider, as suggested by O'Donnell J., '*how long and hard an individual would have to work'* to earn the proposed damages. Therefore, one way to apply the *Sinnott v. Quinnsworth* principle requiring damages to be reasonable in light of the general level of income is to ask:

> Considering that it would take a person earning the average wage, a month to earn €2,960 approx., and a year to earn €35,500 approx. of after tax income, what amount of damages for pain and suffering, in addition to any special damages/out of pocket expenses, would be reasonable?

While it may not be appropriate in every case, one could equally ask:

> Assuming that a defendant earns the average wage and assuming that he was responsible, through negligence or otherwise, for the injury to the plaintiff, 'for what period of time would it be reasonable to 'notionally' require that defendant to work full time and then hand over his entire salary to the injured plaintiff, in order to compensate the plaintiff for the injury?'

Thus, in this case, Mr. Ali suffered whiplash and the objective evidence for the extent of the injury was that it necessitated two trips to the physio. To determine what amount of money would be reasonable to award Mr. Ali to compensate him for this injury, in light of the Supreme Court principle that it should be *'fair and reasonable'* in light of the *'general level of incomes'* in Ireland, one could ask the following question. If the injury done to Mr. Ali had been caused by an uninsured person on the average wage walking down the street, and considering that it would take that person six months of full time work to earn €17,500, is an award which would require that person to work this long in order to earn this amount of money to pay to the plaintiff fair and reasonable compensation for the plaintiff (who required two trips to the physio) and fair to the defendant who has to pay it?

When applying the *Sinnott v. Quinnsworth* principle in this manner to calculate damages, it is of course irrelevant whether the injury was caused by an uninsured wealthy person, an uninsured person on the average wage of circa €35,500 after tax, an uninsured unemployed person receiving annual social welfare payments of *circa* €11,000, or indeed an insured person.

The entitlement of the plaintiff to reasonable damages remains the same in each case. It is important to note that the use of the average wage is solely a 'reference point' to assist the Court in determining whether €X damages is *reasonable* when one considers that it would take the average person Y months/years to earn €X. The use of the average wage is simply a means to assess the true value of the money which is being awarded to the plaintiff to compensate him/her for his/her injury to determine whether it is reasonable.

Finally, since it is notoriously difficult to put a value on pain and suffering, but it is nonetheless something which the Courts are required to do, one advantage of using this *'general level of incomes'* approach as a touchstone for assessing damages, as required by the judgment of O'Higgins C.J. in *Sinnott v. Quinnsworth*, is that it enables members of the public to relate more easily to how damages are assessed, e.g. where a person suffers whiplash that requires two visits to a physiotherapist, should the damages for 'pain and suffering' be what an average person earns in a week/month/year?

Appropriate scepticism applied to litigants' claims

v. As noted by O'Donnell J. in the Supreme Court case of R*osbeg Partners v. LK Shields* [2018] IESC 23 at para. 22, appropriate scepticism and common sense has to be applied to claims for damages, not because of any dishonesty on the part of litigants, but simply because human nature is such that memories and accounts, as to the extent of the damage claimed, tend to become *'unwittingly adjusted'* because of the potential financial consequences for plaintiffs of their evidence.

In a similar vein, Irvine J. in *Shannon v. O'Sullivan* [2016] IECA 93 commented on the need to carefully evaluate a plaintiff's subjective evidence regarding the extent of their pain and to consider whether there might be other objective factors which would assist the Court in reaching its assessment of this subjective evidence, as has been done above.

Common sense applied to the parties' claims

vi. The case of *Byrne v. Ardenheath* is authority for the fact that where one is dealing with activities which are not unduly complex, there is a need for the trial judge to apply common sense when considering the evidence tendered on behalf of the parties. In that case, the Court of Appeal was dealing with expert evidence in the context of what amounted to reasonable care by the owner of a car park to visitors.

A more recent example of expert evidence in relation to an activity which was not unduly complex was seen in the case of *Donnelly v. Dunnes Stores* [2019] IEHC 347, where a plaintiff was injured doing the most mundane of tasks, namely putting her hands into a cardboard box to retrieve t-shirts, when through her own inadvertence she bent too close to the corner of the flap of the box and injured her eye in the process. To assist in her negligence action against her employer, the plaintiff obtained an engineer's report to support a finding of negligence/breach of duty by her employer. This Court rejected the expert's evidence and, *inter alia*, applied common sense in concluding that if this accident had happened in her home, it is likely that the plaintiff would have regarded it as an unfortunate accident caused by her own inattention and no legal responsibility attached to the employer.

In this Court's view, this common-sense principle advocated by the Court of Appeal in *Byrne v. Ardenheath* is not restricted to cases involving expert evidence on what amounts to reasonable care to visitors to a car park or negligence/breach of duty by employers. It is equally applicable to the extent of injuries which are likely to have resulted from an everyday occurrence in modern life, i.e. a minor tip between cars.

Caution when relying on medical and other expert reports

vii. More generally, *Byrne v. Ardenheath* is also authority for the principle that caution should be exercised when relying on all expert reports, whether in complex or non-specialised fields, which are sourced and paid for by the party for whom they are prepared, since they are *'frequently compromised by the fact that they all too often appeared to correspond too favourably with the interests of the parties who retained them'.*

More recently, the Supreme Court has also referred to issues which arise in relation to the reliability of expert reports, and which lends support for this cautious approach. In *O'Leary v. Mercy Hospital* [2019] IESC 48 at para. 48, MacMenamin J. concluded that:

> "In the past, there have been occasions where the quality of expert testimony fell very substantially below that which might be expected by a court"

APPLICATION OF THESE PRINCIPLES TO ASSESS DAMAGES

65. In Mr. Ali's case therefore, this Court must apply the following principles regarding damages:

(i) Fair to the plaintiff and defendant,

(ii) Modest damages for minor injuries etc.,

(iii) Award proportionate to cap on damages to avoid concertina effect,

(iv) Award to be reasonable in light of general after-tax incomes,

(v) Appropriate scepticism applied to litigant's claims,

(vi) Common sense applied to parties' claims,

(vii) Caution when relying on expert reports.

Applying these principles to Mr. Ali's case, what is particularly relevant is:

- the objective evidence regarding the very minimal contact between the cars,
- the subjective nature of the evidence regarding Mr. Ali's pain,
- the objective evidence that the only treatment he had for his whiplash/soft tissue injury was two sessions of physiotherapy,
- the fact that there was no medical reason for his referral to a consultant specialising in neck and back pain, but solely legal reasons.

On this basis, it seems to this Court the personal injury suffered by Mr Ali was on the minor scale.

Non-binding Book of Quantum v binding Supreme Court principles

66. As previously noted, the Circuit Court made an award in this case of general damages of €17,500. The Circuit Court in making this award may have referred to the Book of Quantum, which provides that minor soft tissue injuries received in the past awards of up to €14,800 for substantially recovered injuries and up to €18,400 where a full recovery of the injuries was expected.

67. However, the Book of Quantum, which contains historic awards made by judges, is not binding on trial judges as is clear from s. 22 of the Civil Liability and Courts Act 2004. In contrast, the decisions of the Court of Appeal and the Supreme Court are binding on trial judges and in particular the decisions of the Court of Appeal handed down since the publication of the awards made in previous years contained in the Book of Quantum. These Court of Appeal decisions led to damages in those cases being approximately halved e.g. *Nolan v. Wirenski, Fogarty v. Cox, Shannon v. O'Sullivan, Gore v. Walsh*. What is also binding on a trial judge is the Supreme Court principle (adopted by the Court of Appeal) that modest damages should be awarded for minor injuries.

68. In this regard, Mr. Ali suffered what can only be described as the epitome of a minor injury (i.e. whiplash that led to two physiotherapy appointments, *albeit* that Mr. Ali claims that he was in pain most days). In this instance therefore, the Court of Appeal principle that minor injuries deserve modest damages should have dictated the level of damages awarded to Mr. Ali, rather than historic awards made for whiplash/soft tissue injuries contained in the Book of Quantum.

69. It seems to this Court that modest damages means damages which are anywhere between €1 and €15,000, since this is the range of damages which can be awarded in the District Court, which is the court of local and limited jurisdiction. While the range of €1 to €15,000 might therefore be regarded as the range for minor injuries, in this case Mr. Ali suffered what, in this Court's view, was a very minor injury.

70. In this regard, an award of €17,500 would indicate, in this Court's view, that the injury was not a minor injury, but rather a middling injury, as that term is used by the Court of Appeal in the minor/middling/serious/catastrophic range of injuries.

71. This Court regards a sum of €17,500, which it would take a person on the average wage six months to earn, to be an unreasonable amount of compensation for the minor injury suffered in Mr. Ali's case. Thus, if this case were not dismissed because of misleading evidence, this Court would have categorised Mr. Ali's personal injury, as being minor and justifying an award of €3,000 in damages for his pain and suffering (in addition of course to any out of pocket expenses, such as the cost of his two physiotherapy appointments), a sum which a person on the average wage would earn in approximately one month and thus fair and reasonable compensation for the injury suffered.

Case should have been heard in the District Court

72. In light of the level of damages appropriate to the injury suffered by Mr. Ali, it is also clear that this case should have been heard in the District Court (as it has jurisdiction to award damages of up to €15,000) rather than the Circuit Court (suitable for awards of damages between €15,000 and €60,000). The fact that this Court has determined that the maximum award Mr. Ali should have received was €3,000 means that if there had been such an award, Mr. Ali's award would have been effectively reduced, if not eliminated, by virtue of the defendant being entitled to be reimbursed by Mr. Ali for the additional costs incurred in having to defend the proceedings in the Circuit Court, rather than the District Court (a so-called 'differential costs order'), pursuant to the provisions in s. 17(5) of the Courts Act, 1981 (as amended).

73. This case also highlights therefore that where there is a claim for minor soft tissue/whiplash injuries, as in this case, a plaintiff has

a *strong incentive* to take the proceedings in the District Court, rather than the Circuit Court, since as noted by Hardiman J. in the Supreme Court decision in *O'Connor v. Bus Átha Cliath* [2003] IESC 66 at para. 41, the legislative purpose of differential costs orders is:

> "to provide a strong incentive to the institution of proceedings, generally, in the lowest court having jurisdiction to make the award appropriate to them."

In the same judgment, in relation to the discretion of a judge to make a differential costs order, Hardiman J. stated at para. 47 that:

> "In my view the sole fact which triggers the discretion is that the plaintiff was awarded a sum, in the High Court, which a lower court would have power to award."

The same principle clearly applies in relation to an award in the Circuit Court, that could have been made in the District Court. The fact that a differential costs order is likely to arise in cases such as this (if Mr. Ali had been awarded €3,000 for his whiplash), is evident from the recent judgment of the Court of Appeal in the associated cases of *Moin v. Sicika* and *O'Malley v. McEvoy* [2018] IECA 240, where such a differential costs order was made.

It follows that plaintiffs with soft tissue/whiplash injuries should very carefully consider whether the extent of their injuries is such that the more prudent approach would be to take proceedings in the District Court, rather than the Circuit Court, to avoid the risk of their award being reduced, if not eliminated, by a differential costs order.

CONCLUSION

74. In conclusion therefore, the case of Ms. O'Connell is being dismissed as a fraudulent claim, since this Court found Dr. Martin to be a more credible witness than Ms. O'Connell and therefore preferred her evidence that Ms. O'Connell was not in the car on the date of the minor impact between Mr. Ali's car and Dr. Martin's car. This Court's conclusion, regarding Ms. O'Connell's credibility and that she was not in the car, is supported by, *inter alia*, the fact that there was no medical reason for Ms. O'Connell to see a back specialist and a psychiatrist, since at the relevant time she was referred by a solicitor who had no *medical* expertise and so the only reason for this referral was a *legal* reason, namely to substantiate her claim for damages.

75. Mr. Ali's claim is being dismissed because of his misleading evidence that Ms. O'Connell was in the car (in light of Dr. Martin's more credible evidence) as well as this Court's conclusion that he made an exaggerated claim for damages, which conclusion was supported, in part, by the fact that, like Ms. O'Connell, there was no medical reason for him to be referred by a person with no medical expertise to see a back specialist, but simply a legal reason, namely to substantiate his claim for damages.

76. This Court also concludes that if Mr. Ali was to be awarded damages for the soft tissue injuries suffered in this case, that this Court (as well as the District Court and the Circuit Court) is bound by the principles set down by the Supreme Court and in particular the principle that *'modest damages'* should be awarded for *'minor injuries'*. Applying this principle, the appropriate award, if one were to be made, should have been €3,000 (a sum which it would take a person on the average wage approximately a month to earn), and not a sum of anywhere close to €18,400, the maximum suggested by the Book of Quantum (which is not binding on the District, Circuit or High Court) or a sum of €17,500 which was actually awarded by the Circuit Court to Mr Ali. This Court would regard such damages as *'unduly generous'* (to quote Irvine J. in *Payne v. Nugent* [2015] IECA 268 at para. 19) and thus, unfair to a defendant.

77. This is because when one considers, in the words of by O'Donnell J., *'how long and hard an individual would have to work'* to earn the proposed damages, it cannot be reasonable, in this Court's view, to award damages which would require a defendant (assuming he/she is on the average wage) to work for a half year to earn that amount, all for a soft tissue injury arising from 'minimal impact' between two cars, an injury that led to no restriction on the range of movement of the plaintiff and required just two sessions of physiotherapy.