

## THE HIGH COURT

[2016 No. 9916 P.]

BETWEEN

BARBARA PHILLIPS

PLAINTIFF

AND

MICHELLE MULCAHY

DEFENDANT

**JUDGMENT of Mr. Justice Barr delivered on the 27th day of November, 2017****Introduction**

1. This case arises out of a road traffic accident which occurred on 22nd May, 2015, when the plaintiff was a passenger in a motor vehicle driven by her husband. Their car was stationary on Brackenstown Road, Swords, Co. Dublin, awaiting to make a right-hand turn into the driveway of their property, when they were collided into by a motor vehicle owned and driven by the defendant. As a result of the impact, the plaintiff alleges that she has suffered serious personal injuries, both physical and psychiatric, together with a modest sum by way of special damages. Liability is not in issue in these proceedings.

2. The plaintiff is 70 years of age, having been born on 14th April, 1947. The essential point of dispute between the parties, is the extent to which the plaintiff's pre-existing physical condition was exacerbated by the injuries sustained in this accident. The plaintiff had been diagnosed as suffering from rheumatoid arthritis since she was aged in her forties. Some ten years prior to the accident, she was diagnosed as suffering from fibromyalgia. She also had osteoarthritis in her hands.

3. The plaintiff makes the case that these pre-existing conditions were significantly exacerbated by the injuries sustained in the accident. In particular, the plaintiff claims that her neck and shoulder symptoms were made worse from the time of the accident until approximately January 2017 and that her lower back condition, remains significantly exacerbated and according to her doctor, Dr. Paul O'Connell, is likely to remain so until possibly January 2019. In addition, the plaintiff has suffered psychiatric injuries, which have been diagnosed by Dr. Elizabeth Cryan as being a depressive disorder of moderate severity and post-traumatic stress disorder of mild severity. There was also an episode of amnesia, which was apparently considered by the consultant neurologist in Beaumont Hospital, who had assessed her following investigation to have been a conversion disorder. Dr. Cryan is hopeful that if the plaintiff continues on the current dose of Cymbalta and undergoes a course of cognitive behavioural therapy, improvement will hopefully be made in her psychiatric condition. However, the doctor is of the opinion that the prognosis for recovery from the psychological symptoms must remain guarded.

4. The defendant's case is that the plaintiff had suffered from significant neck and back problems prior to the accident, as was evidenced by the fact that she had been referred by Dr. O'Connell to Dr. Keaveney, consultant pain specialist, who had administered injections to the plaintiff on a fairly regular six monthly basis prior to the accident and indeed, had given her an injection to her back in April 2015, a month before the accident. In these circumstances, it is argued that the plaintiff had a significant pre-accident condition. Furthermore, the evidence from the defendant's medical experts is that the exacerbation thereof, was of fairly limited duration and had finished prior to the hearing of the action in October 2017. The defendant did not proffer any psychiatric medical evidence.

5. The quantum of special damages was agreed at €4,100.52. However, the defendant did not accept liability for these sums, on the basis that insofar as they referred to medical treatment, in particular injections administered by Dr. Keaveney, the plaintiff would have needed these in any event.

6. Neither of the parties called any medical evidence. Instead, it was agreed between the parties that a number of medical reports would be submitted to the court from either side.

**The Plaintiff's Evidence**

7. It is not necessary to set out the entirety of the plaintiff's evidence in great detail. What follows is a summary of the main points in her evidence. She stated that on 22nd May, 2015, she had been sitting in the front passenger seat in the vehicle driven by her husband. They were stationary on the road, awaiting a gap in oncoming traffic so that they could turn right into their driveway. While waiting for this to happen, they were collided into by the defendant's car. It was a very severe impact. The plaintiff stated that she was very frightened and was thrown forward forcibly and was restrained by her seatbelt. She was very frightened and was worried about the health of her husband. She was also concerned for the condition of the lady who was driving the other car. On hearing the noise of the impact, her son, who is a detective sergeant in An Garda Síochána, came out of her house, as did some neighbours. The plaintiff was brought into the house and made comfortable. Some short time later, she went to her G.P., who diagnosed that she had suffered a soft tissue injury to her neck. He prescribed non-steroidal anti-inflammatory drugs and Diazepam and advised the application of a local gel to her right neck area.

8. Due to the severity of her symptoms at that time, the G.P. advised the plaintiff to attend at the Accident and Emergency department of Beaumont Hospital. The plaintiff did this, but having waited for nine hours without being seen, she returned home. Due to ongoing severe symptoms, the plaintiff got an emergency appointment with Dr. Keaveney, the consultant pain specialist, whom she had been attending prior to the accident. She saw him on 10th June, 2015. At that time she complained of pain in her neck and lower back. She rated her symptoms at 10/10 on a verbal pain scale. Dr. Keaveney prescribed pain relieving medication in the form of OxyContin, Baclofen and Amitriptyline. Unfortunately, the OxyContin had severe side effects for the plaintiff and she was obliged to desist using same. Due to ongoing neck and back pain, she re-attended with Dr. Keaveney who administered surficial and lumbar facet joint injections on 22nd August, 2015. She had a further injection in the form of a lumbar rhizotomy carried out on 8th December, 2015. Although not mentioned in Dr. Keaveney's report, it would appear from the details of claims paid by the VHI, as contained in the documents vouching the claim for special damages, that further injection treatment was administered by Dr. Keaveney on 5th April, 2016.

9. Dr. Keaveney reviewed the plaintiff on 10th May, 2016, at which time she continued to complain of lower back pain, particularly on the left side. This continued to radiate towards both legs and across the central part of her back. She also complained of chronic neck pain, particularly on the left side of her lower neck, radiating towards the left arm. Her sleep was disrupted. Generally she rated

her symptoms at 8/10 on a verbal pain scale. Dr. Keaveney advised her to commence using Butrans patches.

10. An M.R.I. scan of the plaintiff's neck in February 2016 demonstrated evidence of decreased cervical lordosis, with significant degeneration and reduction in disc height and posterior disc bulging at C4/5, C5/6 and C6/7. At C4/5 and to a lesser extent at C6/7 there was a central disc bulge, which was indenting the Thecal Sac, but not causing any spinal cord or nerve root compression. An M.R.I. scan of the lumbar spine showed evidence of long-standing significant degeneration extending between the 2nd to the 5th lumbar vertebrae, with evidence of retrolisthesis at L2/3. At L3/4 there was a central and left sided disc bulge, which was causing some compromise of the L4 nerve root.

11. In his report, dated 21st December, 2016, Dr. Keaveney noted that following the R.T.A. on the 22nd May, 2015, she developed increasing levels of neck and back pain. She had had a previous history of neck and back pain. He had been treating her with injections, which had been quite helpful for the plaintiff. Following the accident, the pain had got somewhat worse. She had not had the same level of response to injections, as she had had prior to her accident, she was currently taking a Butrans 10 patch. In terms of a prognosis, he was of the opinion that in the long term one would hope that the plaintiff's symptoms would slowly settle and revert to her pre-accident state. That process should be achieved within one to two years following the accident.

12. In relation to her pre-accident condition, the plaintiff stated that she had been diagnosed with rheumatoid arthritis in her forties. She had been diagnosed with fibromyalgia approximately ten years prior to the accident. She also had osteoarthritis in her hands. She had been treated for these complaints by a Mr. Paul G. O'Connell, consultant in rheumatology and rehabilitation at Beaumont Hospital. She had been referred by him to Dr. Keaveney. She stated that she had come under Dr. Keaveney's care in 2011 and had received injections on a fairly regular six monthly basis since that time. She stated that the injections gave her considerable relief, but that this would wear off over time. She stated that with the injections, she was able to cope with her pain and lead an active lifestyle.

13. In support of this contention, she pointed out that while she had been diagnosed with rheumatoid arthritis in her forties, she had in fact done a FAS course when she was aged 50 and had returned to the workforce. She had worked as a care assistance in a facility run by the HSE for teenagers with behavioural and learning issues. Her medical condition did not prevent her from carrying out the duties of her work, which she did for a period of ten years. She then gave up working with the HSE, so as to have more time to assist with the rearing of her grandchildren.

14. However, the plaintiff did accept that prior to the time of the accident she had had pain in her neck and back, which had required treatment in the form of injections. She was also on medication. She also accepted that she had been on the anti-depressant Lexapro at various intervals in her adult life. However, she denied that she had had any of the psychiatric symptoms as outlined in Dr. Cryan's report prior to the time of the accident. The plaintiff summarised her position prior to the accident by saying that, while she did have neck and back pain, which had required treatment by Dr. Keaveney, she was able to manage her pain and could lead an active life. She stated that she had been an outgoing and sociable person, who had taken great pride in the maintenance of her home. She enjoyed weekends away with her husband and also enjoyed spending time with her neighbours. She particularly enjoyed being with her children and grandchildren.

15. The plaintiff stated that after the accident, all of that changed. The pain in her neck and back became more severe and in particular, was present on a constant basis. She stated that she had daily pain. This had required the additional injection and rhizotomy treatment outlined by Dr. Keaveney. She was also put on a cocktail of pain killing medication, which was considerably stronger than that which she had taken prior to the accident.

16. The plaintiff stated that her pain now interfered with her life in a profound way. She was not able to do housework such as cleaning and hoovering and on that account, had been obliged to hire in a home help for a number of hours per week. Despite the fact that her husband had put a raised flower bed in the garden, she was not able to resume her hobby of gardening. She was unable to sit or stand for long periods. She stated that she had felt "worn out" and had turned into an old person.

17. The plaintiff also stated that she had suffered from considerable psychiatric symptoms. In particular she had periods of intense anxiety and low mood. She was unable to drive in the car and when she did so, she had to travel as a passenger with her eyes closed. She stated that her mood was constantly low and she had lost all enjoyment of life. Instead of enjoying family occasions, she now dreaded them and avoided them as much as possible. She recounted how her daughter had got married in August, 2016, but it had been an awful experience for her. She had felt very unwell and required a lot of help during that day. She would make excuses to avoid attending social functions. In February, 2016, she had had an episode of complete amnesia, where she had been unable to remember anything at all. She had been investigated in hospital, where it was concluded that she had suffered a conversion disorder, probably due to the stress of her ongoing injuries. The plaintiff stated that her personality had changed since the accident. She could not longer see the light side, or the funny side of anything. She had lost her sense of humour.

18. In cross examination it was put to the plaintiff that she had been on Lexapro prior to the time of the accident. She stated that she had been put on that medication at the time that her husband had been diagnosed as having prostate cancer. She accepted that she had been diagnosed in 1999 with fibromyalgia. She stated that she had been sore all over her body at that time. The doctor had told her that it was fibromyalgia. She had never heard anymore about it. She stated that she did not have low mood or anxiety or disrupted sleep at that time. She accepted that she had had a cataract removed and had also suffered from vertigo, irritable bowel syndrome and asthma in addition to the rheumatoid arthritis, fibromyalgia and osteoarthritis.

19. It was put to the plaintiff that in a letter written by Dr. O'Connell in August 2012, he had stated that the plaintiff had "a huge issue with insomnia", yet the plaintiff had said that she had no problems with sleep prior to the accident. The plaintiff accepted that she may have had sleep difficulties at that time, but stated that in general her sleep was good prior to the accident. Counsel further pointed out that in a letter from Dr. O'Connell dated the 14th January, 2015, he had stated that the plaintiff had had a number of injections by that time, yet she had had a lot of symptoms and was not sleeping; the plaintiff was asked as to why she had not stated that she had had these symptoms prior to the accident. The plaintiff stated that she had forgotten about those symptoms. The letter went on to state that she was taking a lot of medication including Lexapro. Counsel put it to her that this was prior to the time that her husband was diagnosed with prostate cancer. The plaintiff stated that she did not remember when that diagnosis was made. She was never on OxyContin until after the accident. She was not on her present level of medication prior to the accident.

20. It was put to the plaintiff that her symptoms as set out in January, 2015, were similar to her complaints post accident. The plaintiff accepted that she did have symptoms pre accident, but those that she had post accident were much worse. She stated that her sleep difficulties then, were much less than they were at the present time. She stated that prior to the accident she was only on two medications, whereas now she was on a number of very strong opiates. She accepted that before the accident she had had flare ups of pain, but she was able to manage her condition well. Since the accident the injections had not worked as well. She stated that now she had pain every single day and it was a different type of pain.

### **The Evidence of Ms. Suzanne Donnellan.**

21. Evidence was given on behalf of the plaintiff by Ms. Suzanne Donnellan, who is employed as a nurse manager in a hospital and is a daughter of the plaintiff. She confirmed that prior to the time of the accident, while her mother had suffered with rheumatoid arthritis, fibromyalgia and osteoarthritis, she had been able to manage her pain and was able to lead a full and active life. She stated that her mother had been very proud of her home and had always kept a very tidy house. She had looked after her husband and her children very well. When she reached the age of 50 years, she did training with FAS and worked as a care assistant. She excelled at this work and was an important member of the staff at the care facility. She had only given up that work, so that she could devote more time to assisting the witness in the care and upbringing of her own children.

22. Ms. Donnellan stated that the plaintiff's pain prior to the accident was of an intermittent character, where there were flare ups caused by damp and cold weather. Whenever she had a flare up of pain, she would attend with Dr. O'Connell and latterly with Dr. Keaveney, when she would be given injections. Prior to the accident she had been a sociable and outgoing person, who enjoyed her family and enjoyed contact with her neighbours.

23. Since the accident her pain was not managed despite receiving extensive treatment and medication. The pain interfered with all aspects of her everyday life. She stated that the family had to care for her mother on a daily basis. She stated that when she would telephone her mother, she was say that she was "fine", but that if she called around to her house later that day, she could see the pain etched on her mother's face. Her mother would not admit it to the children as she did not want to burden them. She stated that this decline in her mother's health, was heartbreaking for them as a family.

24. Ms. Donnellan stated that after the accident the plaintiff had experienced a significant psychiatric decline. She suffered from low mood and anxiety. She finds social and family events very stressful. She would sit in a corner and would be nervous and fidgety throughout the event. The pain relieving medication also had side effects causing forgetfulness and fatigue. She has pain on a daily basis. She could only sit or walk for limited periods. She was not able to do long shopping trips with her daughters. She stated that they were concerned about the prognosis for her psychiatric recovery.

25. The witness stated that the plaintiff had cognitive difficulties, in particular with memory and concentration. It was put to her that the plaintiff had had a stroke earlier in 2017. The witness stated that she had had a stroke like event, but stated that the plaintiff's memory difficulties had predated that event. The witness accepted that when Dr. Cryan did a test of the plaintiff's level of cognition, she was found to be above the normal level.

### **The Medical Evidence**

26. There was no medical evidence called in this case. Instead, it was agreed between the parties that both the plaintiff's medical reports and the defendant's medical reports would be handed into court. In these circumstances, it is not necessary to set out *in extenso* the entire content of each report; a brief summary thereof will suffice.

27. The content of Dr. Keaveney's report has been sufficiently outlined earlier in this judgment. A report was furnished by Dr. Roisin O'Kelly, the plaintiff's G.P., dated 14th July, 2015. She gave a history of the accident and the early treatment received by the plaintiff. She also outlined the plaintiff's pre-accident medical history. She noted that the plaintiff had had pain injections in her back in April 2015. This had given her great relief and the plaintiff had had little or no pain with daily activities. She noted that one week after the accident, on 29th May, 2015 the plaintiff was still experiencing quite a lot of neck pain and low back pain. She had been taking certain medication which had caused side effects and that was stopped. However, Tramadol medication was continued. X-rays of her neck and lumbar spine were performed and these showed degenerative changes as previously noted. She went on to outline how the plaintiff had an urgent appointment with Dr. Keaveney on 11th June, 2015, following which he prescribed an amount of strong opiate-based medication. She noted that the plaintiff was at that time awaiting a further appointment with Dr. Keaveney in August 2015. She also noted that the plaintiff suffered from low mood and anxiety intermittently. That had been exacerbated since her accident. She stated that her quality of life at that time was poor, as carrying out daily activities exacerbated her pain.

28. In terms of a diagnosis and prognosis, Dr. O'Kelly was of the view that the plaintiff had suffered a soft tissue injury to her neck and lower back area causing severe pain. Her symptoms were slow to resolve, as the plaintiff had had pre-existing musculoskeletal problems. The G.P. was hopeful that her symptoms would resolve to her pre-accident level, although she did not put any time span for this to happen.

29. A report was furnished by Mr. Paul O'Connell FRCPI, consultant in rheumatology and rehabilitation. He had treated the plaintiff for a number of years in relation to rheumatoid arthritis, fibromyalgia and osteoarthritis. He noted that she had attended him intermittently for quite a few years with ongoing musculoskeletal pain. He noted that after the accident, she experienced progressive right-sided neck pain, with pain across both shoulders, and over the hours and days following the accident, developed significant left-sided low back pain, with referred pain down the left leg. She had attended with Dr. Keaveney, who had prescribed relatively strong opiate medications. She had attended with him over the next year for a variety of injection therapies. He referred to the M.R.I. scans, the results of which have been set out earlier in this judgment.

30. Dr. O'Connell had treated the plaintiff since 1999. He was of the opinion that the plaintiff had developed jarring injuries, probably involving forward flexion and extension of the cervical and lumbar spine, with resulting exacerbation of the long-standing degenerative problems in both of these areas, with worsening of underlying osteoarthritis and fibromyalgia. However, it did not appear that she had suffered any specific new bony injuries. She had also experienced some difficulty with low mood and anxiety as a result of the worsening of chronic pain associated with the accident. He noted that the plaintiff had attended him intermittently since 1999 for management of musculoskeletal pain that had been a mixture of osteoarthritis and a sero-negative (rheumatoid) arthritis with ongoing myofascial pain and features of fibromyalgia. He outlined the treatment which had been given to her. He noted that she had been last seen by him prior to the accident on 14th January, 2015. At that time, she had had a significant flare up in symptoms. She was having a degree of neck and shoulder pain and referred pain down the left leg, which was limiting her activities and waking her at night. However, there was not a lot of severe back pain at that time. M.R.I. scans were performed at that time, which showed degenerative changes quite similar to the ones performed after the accident. She received an injection into a trochanteric bursa at that time. His memory was that the plaintiff's level of symptoms was not as severe as that presented at the time of the current review in January 2017. He stated that he would see the current symptoms of the accident as a significant exacerbation of her pre-existing symptoms, made worse by the jarring injuries received on top of the previously symptomatic degenerative changes in her neck and lower back.

31. Dr. O'Connell outlined her complaints at the time of his review in January 2017. At that time, she had pain across the neck and shoulders, which was achy and stiff. She awoke at night with this pain. It was associated with discomfort and movement. However, the plaintiff's biggest problem was left-sided low back pain, which radiated across the low back and down the left leg. The back pain component, which was not prominent in January 2015, was now her single biggest issue. The referred pain down the leg was also

upsetting. The plaintiff felt that overall, the level of pain in both her neck and back was much worse since the accident. She had chronic poor sleep as a result of the pain and was feeling discouraged and had struggled with her mood intermittently over the previous year. She had gained significant weight, due to her inability to exercise or walk any distance.

32. Following his examination carried out on that date, Dr. O'Connell gave the following summary of the plaintiff's condition and prognosis:-

"I would agree that the injuries are consistent with the accident and that appropriate investigations have been undertaken. It is clear that she is not back down to the level of pain experienced before the accident. The primary area that appears to be worse is the left-lower back pain, which remains her biggest problem. There has been some improvement in the neck and shoulder pain, which is probably close to the original level. The referred pain down the left leg appears unchanged. At this point, close to two years following her accident, the low back pain remains severe and I suspect that it is going to take quite some time to settle down. There does not appear to be any bony or neurological damage. The exacerbation of underlying symptoms are likely to continue for another one to two years. As time goes on, it will, however, become more difficult to tell the effects of the accident from the natural history of the underlying degenerative change."

33. A report was also furnished by Dr. Anne Leader, consultant psychiatrist, who had been retained on behalf of the Injuries Board. Her assessment of the plaintiff was carried out on 21st July, 2016, some 14 months post-accident. She outlined the circumstances of the accident and the treatment which the plaintiff had received since then. She noted that the plaintiff still experienced severe ongoing pain. She noted that before the accident, the plaintiff had received injections about twice a year for two to three years. The plaintiff told her that before the accident, she obtained great relief from the injections for about six months. She had been coping well with her symptoms at the time of the accident. She went on to state that the accident had aggravated her pain. When seen by Dr. Leader, the plaintiff was prescribed the painkiller, Palexia, six tablets per day. She also used pain patches. The doctor noted that Palexia was indicated for the management of severe chronic pain.

34. The plaintiff told her that she felt old and redundant since the accident. She felt that there had been a major change in her lifestyle. She was more irritable and tired. Her lifestyle was restricted and her quality of life was reduced. The pain was aggravated by bending, lifting, shopping, etc. The plaintiff was unable to do any gardening. Her back pain was the most severe accident related pain. It radiated down both legs and sometimes into her left foot. The plaintiff was very nervous as a passenger in a car. She dreaded travelling in a car. She would close her eyes in a car and anticipated accidents happening. Dr. Leader stated that in summary, the plaintiff had had a history of pain prior to the accident and was seeing a rheumatologist and a pain specialist. The pain was aggravated, especially the back pain, by involvement in the accident. It was now more difficult to control. She noted that the plaintiff was finding chronic pain difficult to endure and experienced the well-recognised psychological burden of same. These symptoms were described in the report. She stated that the plaintiff's prognosis was uncertain.

35. A detailed report was also furnished by Dr. Elizabeth Cryan, consultant psychiatrist. She had assessed the plaintiff on 20th May, 2017, some two years post-accident. The plaintiff outlined to her in detail the physical and psychiatric symptoms which she experienced. These have been outlined extensively earlier in this judgment. It is not necessary to repeat same. Dr. Cryan was of the view that as a result of the accident, the plaintiff had experienced an episode of depressive disorder, which was at least moderate in severity. In particular, the plaintiff had reported a markedly reduced capacity to enjoy her life, associated with anxiety and dread of any social occasions. She reported intermittent crying, which her daughters had noticed, associated with reduced interest and motivation and a disturbed sleep pattern. She reported a change in her appetite and had put on weight due to comfort eating. She had become socially-avoidant and reported that it took a great effort for her to get ready to meet anyone, or to attend a social occasion, such as a child's communion.

36. In addition to the depressive disorder, Dr. Cryan considered that the plaintiff had suffered from Post Traumatic Stress Disorder, which was in the mild range of severity. This was characterised by marked anxiety and avoidance of being driven, associated with hyper-vigilance; worries and anxiety about her children; irritability; efforts to avoid any discussion of the accident; reduced interest and concentration and becoming easily startled. She was inclined to view herself in a negative and self-critical light and considered that she had become an old person, who her same-age neighbours considered to be older. She reported often thinking about the accident, while waiting for sleep, and became especially anxious when her husband was waiting to turn into their driveway.

37. In addition to the P.T.S.D. and depressive disorder outlined, the plaintiff had suffered an episode of amnesia which Dr. Cryan understood had been considered to be a conversion disorder by the consultant neurologist at Beaumont Hospital, who had assessed her following investigation for that episode. Dr. Cryan stated that she encouraged the plaintiff to remain on the current dose of Cymbalta. She also suggested that the plaintiff might benefit from Cognitive Behavioural Therapy, as her avoidance behaviours were likely increasing her anxiety related to the accident. She considered that the plaintiff's prognosis for recovery from her psychological symptoms must remain guarded in the context of their chronicity and her persistent experience of pain and the associated limitations in her life.

### **The Defendant's Medical Reports**

38. The plaintiff was examined by Mr. Martin G. Walsh FRCSI on 24th March, 2016 on behalf of the Injuries Board. He outlined that the M.R.I. scans taken on 21st February, 2016 indicated that the plaintiff had significant disc degeneration in her neck, together with disc bulging at C4/5, 5/6 and 6/7. The lumbar M.R.I. revealed evidence of longstanding and significant disc degeneration extending between the second and fifth lumbar vertebrae, with evidence of a retrolisthesis at L2/3, with disc bulge which was indenting the thecal sac. At L3/4, there was a central and left-sided disc bulge which was causing some compromise of the exiting left L4 nerve root foramen. He was of opinion that all of these changes were long-standing and predated the accident. He gave a history of her progress since the time of the accident. In relation to her complaints at the time of the examination, he noted that the plaintiff had informed him that prior to her accident, her neck shoulder and lower back complaints were intermittent in nature, but that as a result of the accident, her symptoms were then of a constant and distressing nature. She reported persistent disruption of her sleep. In the mornings, her neck, shoulders and lower back were stiff and sore. They would ease to some extent with gentle mobilisation. However, she would never revert to her pre-accident level of mobility. She informed him of the occasion in December 2015, when her back had locked causing her to be unable to move and she required a home visit from her G.P. Examination on that date revealed a limitation of movement of the neck and back.

39. Mr. Walsh was of opinion that the plaintiff would benefit from involvement in a programme of gentle mobilisation and strengthening exercises for her neck and lower back. Hopefully, on these measures, in tandem with ongoing medication, she would gradually revert to her pre-accident level of complaint over the following 12/24 months. This would mean that the period of exacerbation would cease in March 2017 or March 2018. He recommended that in view of her complaints of an increase in her level of stress and anxiety since the accident, that it might be worthwhile to seek an opinion from an expert in that field.

40. The plaintiff was examined by Mr. Robert McQuillan, consultant in emergency medicine, on 27th June, 2017. He outlined her history since the time of the accident. In terms of her complaints at the time of that examination, he noted that the plaintiff stated that her back pain was worse than it was pre-accident. She stated that her stress had increased and her sleeping pattern had changed. She stated that her life had changed greatly. On examination, he found limitation of movement of the neck, shoulders and back.

41. Mr. McQuillan noted that the plaintiff had had significant symptoms at the time of her accident and was attending a rheumatologist regularly and was attending the pain clinic and had an injection into her back for back pain one month prior to the accident. She was on extensive medication at the time of the accident and this medication was increased when she re-attended with Dr. Keaveney. There was no evidence that she developed complaints that were not previously present, but she stated that pre-existing symptoms increased. He stated that it was quite reasonable to accept that the pre-existing symptoms increased, but they would be expected to settle towards a baseline level. He had no doubt that they had reached this level by the time of his examination, some two years from her rear end impact. He went on to state that the plaintiff was obviously going to complain on a long-term basis, much as she did prior to the accident. It was unlikely that her symptoms were much different than they were prior to the accident. Thus, he was of opinion that the period of exacerbation had concluded by the time of his examination.

42. Finally, the plaintiff was examined by Mr. Frank McManus, orthopaedic surgeon, on 4th September, 2017. In preparing his report, he had the benefit of the medical reports furnished by Dr. Roisin O'Kelly, Mr. Martin Walsh, Dr. Keaveney, Dr. Cryan and Mr. McQuillan. In relation to her complaints at the time of his examination, the plaintiff stated that in essence, she could manage the symptoms in her cervical spine. She found the medication that she was taking to be quite effective and in all, she was on seven different drugs at that time.

43. In relation to her lumbar spine, the plaintiff told him that she did not like standing for long periods. She was able to walk, but on a steady rate. When she goes shopping, she required a trolley so that she could lean on the trolley because of the discomfort in her lumbar spine. She did not like to stand in a queue for any reasonable period. In essence, if she was standing, she wanted to sit down. She therefore had difficulty associated with tasks such as ironing, cooking and her household duties. She also stated that if she walked to the local church, which was 1km from her home, she would have pain in her back. She stated that she was not able to do any gardening because of the pain in her back. On enquiry, she stated that she was not carrying out any rehabilitation exercises because she felt that she should leave well enough alone. She stated that in fact, exercises had never been suggested to her. She stated that the pain in her back, which could go down both legs, could occur both sitting and standing. He noted that she had had no physiotherapy since the accident occurred, but she did have additional X-rays and scans carried out. He also reviewed the plaintiff's cervical spine and function in the context of the normal activities of daily living. She was not specifically symptomatic under axial load. On examination, the plaintiff had a 50% limitation in the range of movement of her cervical spine. His examination also revealed a limitation of movement in the lumbar spine.

44. Mr. McManus stated that having reviewed the medical reports furnished by his colleagues and having reviewed the M.R.I. scans taken in February 2016, and in light of the examination carried out on that date, he was of opinion that the plaintiff had had pre-existing degenerative disc disease comprising rheumatoid and osteoarthritis and had symptoms in both her cervical and lumbar spine that had required interventions by Dr. Keaveney. As a consequence of the accident, it was likely that the plaintiff would have had an exacerbation of her symptoms for a period of time, perhaps 12 to 18 months at most. However, he thought that the persistence of her symptoms at the time of his examination was undoubtedly due to the pre-existing pathology that predated the accident of May 2015. Any additional treatment that the plaintiff would require in the future could only be attributed to the pre-existing pathology that predated the accident. Thus, Mr. McManus was of opinion that the exacerbation would have lasted up to December 2016 at most.

45. In an addendum letter dated 19th October, 2017, following a review of the plaintiff's medical records, he stated that his view was essentially unchanged. The plaintiff undoubtedly had problems prior to the accident, as was confirmed by her medical records. She sustained an exacerbation of her symptoms as a consequence of the road traffic accident, but the persistence of her symptoms at that time, more than two years after the accident, was in all probability due to the underlying pathology that had necessitated her ongoing attendance with Dr. Paul O'Connell and Dr. Keaveney.

## **Conclusions**

46. It is accepted by all parties that the plaintiff was involved in an R.T.A. on 22nd May, 2015, when she was 67 years of age. It is accepted that prior to the accident, she had had pain in her neck and back due to a combination of degeneration in her cervical and lumbar spine and also due to the presence of rheumatoid arthritis, fibromyalgia and osteoarthritis. This had required referral to Dr. O'Connell and an onward referral by him to Dr. Keaveney, the pain specialist. He had administered a number of injections to the plaintiff over the years, the most recent pre-accident injection having been administered in April 2015.

47. The central issue in this case is the degree of exacerbation of her pre-existing symptoms and the duration of such exacerbation. On the plaintiff's side, Dr. Keaveney is of opinion that the exacerbation would have lasted up to May 2016 or May 2017. Dr. O'Connell pushes this period out somewhat further to January 2018, or January 2019. On the other hand, the defendant's experts are of the view that such exacerbation was much more limited in duration. Mr. Walsh put it as continuing until March 2017, or March 2018. Mr. McQuillan was of the view that the exacerbation had ceased by the time that he saw the plaintiff on 27th June, 2017. Mr. McManus thought that the exacerbation probably lasted up to about December 2016 and had ceased by the time of his examination of the plaintiff on 4th September, 2017.

48. It is very difficult for the court to reach a decision on disputed facts when it is faced with contradictory opinions from expert witnesses as set out on paper in their medical reports. However, as the parties have agreed that the medical reports would be the only medical evidence put before the court, the court must do the best that it can on the material before it.

49. Having carefully considered the medical reports, the court prefers the opinions given by Dr. Keaveney and Dr. O'Connell for the following reasons. Firstly, they are the treating doctors. Dr. O'Connell has treated the plaintiff since 1999. Thus, he has an intimate knowledge of the plaintiff over many years, both before and after the accident. Secondly, when one is dealing with a case of exacerbation of a pre-existing condition, Dr. O'Connell and Dr. Keaveney are in the best position to comment on the extent of the exacerbation and on its likely duration, because they saw and treated the plaintiff on numerous occasions in the years prior to the accident and subsequent thereto. This gives them a huge advantage over the defendant's experts, who only had the benefit of one consultation with the plaintiff, a considerable time after the accident. It may have been preferable for the defendant to have stuck with one expert, who could have seen the plaintiff on a number of occasions. However, the defendant was free to engage whatever experts they wished, even though this would mean that each expert only had one opportunity of actually talking to the plaintiff and of examining her.

50. The third reason why the court prefers the opinions expressed by the plaintiff's doctors is that while the defendant's experts are of opinion that when they saw the plaintiff she had reverted to her pre-accident state, Dr. O'Connell's prognosis that the plaintiff will not achieve this state until January 2018, or January 2019, is supported by the evidence of the plaintiff and her daughter. This evidence was to the effect that the plaintiff continues to experience pain, particularly in her back, which is worse than pre-accident and is constant in nature. The court accepts the evidence given by the plaintiff and her daughter as to the plaintiff's present condition. The court is satisfied that they have given truthful accounts of the plaintiff's condition and progress since the accident. The court is satisfied that they have not tried to exaggerate the level of the plaintiff's current physical or psychiatric symptoms.

51. That being the case, the court is satisfied that the prognosis, as set out in Dr. O'Connell's report, is in fact accurate, as it is supported by the continuance of the plaintiff's symptoms at the present time, which had been foretold by him at the time of his report in January 2017 i.e. the plaintiff's account of her current condition, which is accepted by the court, supports the accuracy of his prognosis.

52. Thus, the court is satisfied that the plaintiff continues to experience an exacerbation of her back condition since the time of the accident. Her neck condition seemed to have largely reverted to its pre-accident state by January 2017. The court accepts that she continues to experience daily back pain at a severe level. The court accepts the evidence of Ms. Donnellan that on occasions, the plaintiff would say to her that she was "fine" when speaking on the phone, but when she called around to her mother's house, she saw pain "etched" on her face. The court accepts that the plaintiff is disabled in the ordinary aspects of her life, in particular, in relation to her housework and has had to hire in a home help for a number of hours per week. She is also disabled when walking or standing and is unable to do any gardening. The plaintiff also has disturbed sleep.

53. The difficulty for the court is to determine exactly the degree of the exacerbation of her pre-accident symptoms. It is clear from the medical reports and from the medical records, that the plaintiff had significant neck and back pain prior to the accident in 2015. This is evidenced by the fact that Dr. O'Connell had referred her to a pain specialist in 2011, who had administered injections to her on a regular basis, approximately every six months. However, the court accepts the plaintiff's evidence that these injections gave her great relief from pain, at least for a number of months, during which time she could lead a reasonably active life. The relief would wear off over time, and hence, it was necessary to repeat the injections every six months. Having regard to this history, the court has to conclude that prior to the accident, the plaintiff had a significantly symptomatic neck and back, which required injection treatment from a pain specialist, the most recent of those, prior to the accident, having been administered in April 2015.

54. The court is satisfied from the content of the medical reports and from the plaintiff's own evidence, that the plaintiff had a significant exacerbation of her back condition that was already significantly symptomatic pre-accident. The court accepts the plaintiff's evidence that after the accident, notwithstanding the administration of a significant quantity of pain relieving medications, she required further injections in August 2015 and a rhizotomy in December 2015, and it would appear from the documents vouching special damages, that she had a further injection in April 2016. Her back had also locked on one occasion in December 2015, requiring a home visit from her G.P. As noted earlier, the exacerbation of the plaintiff's neck complaints seemed to have reverted to its pre-accident level by the time that she saw Dr. O'Connell in January 2017. As already noted, the court accepts his opinion that the exacerbation of the plaintiff's back complaints is likely to continue until January 2018, or January 2019. The finding that the exacerbation of the plaintiff's neck and back symptoms was significant, is supported by the fact that the plaintiff required more frequent and more invasive treatment and was prescribed a significant quantity of strong opiate medication after the accident.

55. In addition to the physical injuries, the plaintiff also suffered psychiatric injury. These have been set out in detail in Dr. Cryan's report. The account given by the plaintiff to Dr. Cryan and in her evidence was supported by the evidence of Ms. Donnellan. It is not necessary to repeat same. The court accepts the evidence of the plaintiff and of Ms. Donnellan in this regard.

56. The opinion of Dr. Cryan is unchallenged. Accordingly, the court accepts her diagnosis that the plaintiff has suffered from a depressive disorder, Post Traumatic Stress Disorder and a conversion disorder in relation to the episode of amnesia. The court accepts Dr. Cryan's opinion that the prognosis for her future recovery from the psychiatric symptoms must be guarded. This is somewhat open-ended. Doing the best that it can, the court is of opinion that if the plaintiff continues to take Cymbalta, as advised by Dr. Cryan, and if she has a course of C.B.T., and as her physical symptoms subside, in accordance with the prognosis given by Dr. O'Connell, it is reasonable to assume that by January 2019, or within six to twelve months thereafter, she will in all probability have reverted to her pre-accident mental state.

57. In assessing general damages in this case, the court was referred to a number of decisions of the Court of Appeal, notably, the decisions in *Payne v. Nugent* [2015] IECA 268; *Nolan v. Wirenski* [2016] IECA 56, and *Shannon v. O'Sullivan* [2016] IECA 93. In these decisions, the Court of Appeal clearly enunciated the principles which this Court should adopt when assessing the level of general damages. These principles were summarised in the judgment of Irvine J. in the Nolan case at paras. 39 to 41 as follows:-

"39. When it comes to assessing damages I believe it is useful to seek to establish where the plaintiff's cluster of injuries and sequelae stand on the scale of minor to catastrophic injury and to test the reasonableness of the proposed award, or in the case of an appeal an actual award, by reference to the amount currently awarded in respect of the most severe category of injury *sic*. Such an approach should not be considered mandatory and neither does it call for some mathematical calculation; what is called for is judgment, exercised reasonably in light of the case as a whole. Not every case will be suitable for such an analysis and that is where the trial court will want to explain the reasons why that approach may not be suitable in the particular circumstances. However, the fact that this yardstick is not absolute and may not be of universal application in all cases does not diminish its value generally.

40. As to where on the spectrum of awards the injuries of an accident victim such as Ms Nolan should be located will be determined by the nature and extent of the physical or psychological trauma induced by the defendant's wrongdoing and the extent to which they may be expected to recover therefrom. There is no template or formula to be applied. Judges, I suggest, tend to look to the presence or absence of particular factors and features to guide them as to the seriousness of any particular injury. They might have regard to the likely answers to the following questions;- Was the incident which caused the injury one which was traumatic and caused distress? Did the particular plaintiff require hospitalisation and if so for how long? What did they suffer in terms of pain and discomfort or lack of dignity during that period? What type and number of surgical interventions or other procedures did they require during that period? Did they need to attend a rehabilitation facility at any stage and if so, for how long? While recovering in their own home, were they capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependant in all or some respects? If the plaintiff was dependant, why was this so? Were they, for example, wheelchair bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependant? What if any limitations had been imposed on their activities such as leisure or sporting pursuits? For how long were they out of work? To what extent was their relationship with family and friends interfered with? Finally, what was

the nature and extent of any treatment, therapy or medication required? These are all matters that might be relevant to considering the seriousness of the injury and the amount that ought to be awarded in respect of pain and suffering to date.

41. The appropriate award to make in respect of pain and suffering into the future requires the trial judge to reach a conclusion as to the likely amount of pain, treatment, medication, intervention and lifestyle limitation the plaintiff will have to endure in the future. The elements cannot be exhaustively catalogued for every case. Assessment is a rational process taking into account, in summary, the severity of the injury, how long it has taken the plaintiff to recover, whether it has short-term or long-term consequences or sequelae and if so their nature, the impact on the plaintiff's life in all its different aspects including his family, his work, his sports or hobbies or pastimes, in addition to any other features that are relevant in the plaintiff's particular circumstances."

58. The court was also referred to three other decisions, two of which were somewhat fact-specific and the third merely set out the general principles to be applied by an appeal court; hence the court did not find them particularly helpful in reaching its determination in this case.

59. Adopting the general principles set out by the Court of Appeal in the cases mentioned above and having considered all the evidence in this case, I award the plaintiff the sum of €37,500 for pain and suffering and loss of amenity to date. I award the sum of €15,000 for pain and suffering into the future.

60. To this must be added the sum of €4,100.52 for special damages in respect of medical treatment up to April 2016. While one could argue that even without the accident, the plaintiff was likely to have required another injection in about October 2015, being six months after April 2015, I think it appropriate to allow the sum claimed in full, particularly as it does not seek to include any medical expenses after April 2016, which was some 20 months prior to the end of the exacerbation period as per the opinion of Mr. O'Connell. Accordingly, the plaintiff is entitled to judgment in the sum of €56,600.52