THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 242
Record Number: 2019/525
High Court Record Number: 2018/8764P

Whelan J.
Noonan J.
Power J.

BETWEEN/

EMMA MCKEOWN

PLAINTIFF/RESPONDENT

-AND-

ALAN CROSBY AND MARY VOCELLA

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 11th day of August, 2020

Introduction

1. This is a relatively simple and straightforward personal injuries claim. It has no real complicating factors. Liability is not in issue. The special damages and all the medical reports are agreed. The only witness to give oral evidence was the respondent, and for ease of reference, I shall refer to her as the "plaintiff". The plaintiff was found by the trial judge to be an honest and credible witness who did not exaggerate her injuries. The injuries suffered by the plaintiff were typical soft tissue injuries of a kind frequently seen in the aftermath of a road traffic accident.

2. The case was heard by the High Court (O'Hanlon J.) at Dundalk on the 11th December, 2019. It was conducted with remarkable efficiency by the legal teams on both sides and judging from the short transcript, the trial lasted for about a half hour. An *ex tempore* judgment was given on the next day, the trial judge having had the opportunity to consider the medical reports overnight. The trial judge awarded the plaintiff a sum of €70,000 for general damages, comprising €65,000 to date and €5,000 into the future, together with agreed special damages in the amount of €6,000 making a total award of €76,000. The appellants, to whom I shall refer as the "defendants", appeal against the quantum of the award on the essential ground that it was excessive. The plaintiff has cross appealed against the award of €5,000 for the future on the ground that it is too low.

Relevant facts and evidence

3. The plaintiff was born on the 15th August, 1986 and is a home carer by occupation. She was involved in a road traffic accident on the 21st March, 2017 when she was 30 years of age. On that date she was driving on the Newry Road in Dundalk and was turning to her

right into the entrance of a house when she was struck by the defendants' overtaking jeep. Although this was described as quite a significant impact resulting in about €3,000 worth of damage to the plaintiff's vehicle, the airbags in her vehicle were not activated. At the time of the accident, the plaintiff was working as a care assistant with a company called Home Care. She was asked in her direct evidence what parts of her body were affected in the accident and she said her shoulder, arm and back. Although no evidence was given about this, it would appear from the defendants' medical reports of Mr. Frank McManus, Orthopaedic Surgeon, that the plaintiff attended her GP, Dr. Whately on the evening of the accident. The plaintiff told Mr. McManus that Dr. Whately prescribed appropriate medication and advised her to carry out exercises. The medical reports indicate that the plaintiff saw Dr. Whately on a number of subsequent occasions but on how many occasions or for how long is not known. Perhaps somewhat surprisingly, Dr. Whately did not provide any medical reports nor were any records of the plaintiff's attendances with him produced. Instead, the plaintiff relied upon five medical reports from Mr. Alan Walsh, Consultant Orthopaedic Surgeon at Our Lady's Hospital in Navan. The plaintiff resides in Dundalk.

4. It seems clear that the plaintiff consulted her solicitors very shortly after the accident as they arranged an appointment for her with Mr. Walsh on the 14th April, 2017, barely three weeks after the accident. None of Mr. Walsh's reports give details of any treatment he afforded the plaintiff and it must, therefore, be assumed that the plaintiff saw Mr. Walsh for medico-legal purposes only. The plaintiff was asked in cross examination if Mr. Walsh had given her any treatment and she replied that he had given her directions to keep up with the physiotherapy.

5. Mr. Walsh first saw the plaintiff on the 14th April, 2017 and noted that her initial complaints after the accident were that she had painful symptoms affecting her low back mainly, but also her thoracic and cervical spine areas. She also complained to him of a recurrence of shingles and an exacerbation of psoriasis but the trial judge accepted, and her finding is not appealed, that these were unrelated to the accident. Mr. Walsh noted that the plaintiff had been prescribed analgesia including an anti-inflammatory and a muscle relaxant, presumably by her GP. Mr. Walsh noted that the plaintiff had been off work since the accident and in fact she remained off work for a total of six weeks. Her complaints were of central lower back pain worsening since the accident but not radiating significantly. This was associated with pain also felt in the inter scapular area and in the posterior low cervical spine. She also complained of symptoms of numbness affecting her left hand and fingers. There was some reduction in the range of movement of her lumbar spine but movement of the cervical spine was normal. Mr. Walsh at that stage was of the view that her symptoms were most likely related to a musculotendinous sprain from whiplash as a result of the accident. He recommended an MRI scan if she had not improved by six weeks post-accident.

6. An MRI scan was duly arranged on the 23rd June, 2017 which showed low grade degenerative changes with a central annular bulging affecting the L5/S1 lumbar intervertebral disc. In commenting on the MRI findings, Mr. Walsh said that these changes most likely pre-dated the accident in asymptomatic form but there may have

been an element of exacerbation contributing to her lower lumbar symptoms associated with myofascial pain. He felt the symptoms were likely to improve significantly over a one to two year period from the accident with a focused rehabilitation programme and analgesia when required.

7. The plaintiff's evidence was that she returned to work after six weeks and she was asked by her employer to move to work in Cavan. She said that due to the soreness of her back when driving, she was unable to accommodate this change and accordingly was made redundant. She then took up employment with a company called Home Instead. The plaintiff also gave evidence that she followed Mr. Walsh's advice and started physiotherapy although when this commenced or how many sessions she had was not stated. She also had something called dry needling and took up Pilates. This situation appears to have continued until approximately August 2018 when the plaintiff changed to a better job with a company called Inspire. However, she found this too demanding physically and returned to Home Instead. Apart from her lower back, the plaintiff was asked in cross examination about her symptoms in the neck and upper back and she agreed that these symptoms resolved completely a couple of months after the date of the MRI scan, in other words approximately four months after the accident. Her lower back symptoms continued.

8. The plaintiff then saw Mr. Walsh on the 2nd August, 2018 just over a year and four months post-accident. On that date, she told Mr. Walsh that she took regular analgesia including an anti-inflammatory and a muscle relaxant for approximately ten months after the accident. Thereafter, she reduced her medication to Panadol which she said she took two or three times per week. Mr. Walsh noted that she recently began to attend physiotherapy and sports massage and had taken up Pilates in the last month, suggesting that apart from medication, she had no treatment for over a year after the accident. Mr. Walsh noted that the plaintiff continued to complain of central lower back pain which was now at a constant level with intermittent severe exacerbations. Her lumbar range of movement had improved over the previous examinations. Mr. Walsh felt her symptoms should continue to improve over time but there was a possibility of low level symptoms persisting in the longer term.

9. The plaintiff was seen by Mr. McManus on the 17th December, 2018, one year and nine months post-accident. She told Mr. McManus that she had ongoing symptoms in her lumbar spine, particularly driving her car for more than half an hour. On examination, Mr. McManus found the plaintiff to have a degree of limitation of movement in her lumbar spine which he felt was largely associated with immobility and that she would benefit from a structured programme of treatment with a chartered physiotherapist. He felt this had the potential to restore normal function and leave her with very minimal residual symptoms, if any. This was the only occasion she saw Mr. McManus.

10. She again saw Mr. Walsh on the 5th April, 2019, now two years post-accident. She told him that she had reduced her medication to very occasional Panadol and was using heat patches. She was getting physiotherapy every one to two weeks together with sports massage and dry needling. He noted that all her painful symptoms had improved significantly over the previous eight months. Of importance, the symptoms in her lower

back were now intermittent and mostly related to prolonged sitting. Also of note, he found that the range of motion in her lumbar spine was now within normal limits with some pain at the extremes. His opinion was that she now had low grade recently improving symptoms and that these should continue to improve over time, albeit with a possibility of some persistence at low level. Mr. Walsh's final report was based on an examination on the 4th October, 2019 now two and a half years post-accident. This report largely repeats both in terms of complaints, findings and prognosis what was contained in the previous report.

11. As of the date of trial, the plaintiff was two years and nine months post-accident. Her direct evidence in relation to her back was that she was a lot better but still quite sore from sitting for long periods of time and when standing. She denied that her back movements had come back to normal, despite apparently what Mr. Walsh had found. She did concede they were significantly better. She said she had some problems from standing too long and her back would be sore after a full day's work. By the date of trial, she had reduced her physiotherapy to once per month and said she did not take painkillers unless the pain was very bad. She used heat patches. She agreed that her symptoms had improved since she saw Mr. Walsh in April.

12. To summarise the position therefore, the plaintiff suffered soft tissue injuries primarily to her lumbar spine. She also suffered injuries to her thoracic and cervical spine affecting her left shoulder, arm and hand but all her symptoms resolved completely within about four months save for those relating to her lower back. She appears to have taken prescription medication, prescribed by her GP, for about ten months post-accident and thereafter, occasional over the counter medication. It is unclear when she commenced physiotherapy and other treatments but Mr. Walsh's report appears to suggest that it was not until over a year post-accident. By two years post-accident, the plaintiff was left with intermittent low back symptoms but enjoyed a full range of movement. Insofar as she had any residual symptoms, Mr. Walsh felt these should continue to improve over time albeit subject to a possibility, rather than a probability, of some low level continuation. At the date of the trial, beyond the fairly minor subjective complaints of the plaintiff herself, there was no evidence to suggest that the plaintiff was likely to suffer any ongoing significant pain, discomfort or interference with any activity relating to work, household activities or leisure pursuits or that she was inhibited in any way from leading a full and normal life.

Judgment of the High Court

13. The trial judge at the outset indicated that she found the plaintiff to be very impressive, credible and to have done everything she could to mitigate her losses. The judge said that she had regard to the Book of Quantum. She expressed herself impressed by the fact that the plaintiff did whatever she could to continue working. She felt that it was quite clear that the plaintiff wanted to continue working and was not a person to lie down under the injuries and she had done her best to stay in employment despite what happened. She stated that she was impressed by the fact that the defence medical report recognised the need for further rehabilitative treatment. She then went on to assess the plaintiff's damages as follows: -

> "So, I believe that she suffered a significant enough loss for the amenities of life as shown in the job changes that she had to make to keep in the workforce and I admire her hugely for that. So, for pain and suffering to date €65,000, pain and suffering into the future €5,000…"

14. The trial judge then proceeded to read some passages from the medical reports on both sides. She noted from these that even though there was a significant improvement one year on, the plaintiff showed that she was doing everything she could to alleviate her symptoms by doing physiotherapy, sports massage, dry needling and Pilates. The trial judge felt that the numbness affecting the plaintiff's left hand and fingers was significant. The court noted that there was no claim for loss of earnings.

Grounds of Appeal

15. The defendants' initial notice of appeal simply stated that the trial judge erred in awarding €65,000 general damages to date and €5,000 general damages into the future without further elaboration. There was also a complaint about a refusal to grant a stay of execution. The plaintiff in her respondent's notice takes issue with the notice of appeal and indicates an intention to cross appeal on the basis that the award of damages of €5,000 into the future amounts to an error of law and fact by the trial judge. Given the brevity of the initial notice of appeal, the defendants filed an amended notice of appeal with more detailed grounds which largely relate to factual matters in respect of which the defendants claim insufficient weight was accorded by the trial judge.

Damages for personal injuries

16. Damages are, in theory at least, restitutional, meaning that they are intended to put the plaintiff back into the position he or she was in before the event complained of. Where financial loss has been suffered, this is generally a straightforward calculation. Where the loss is non-financial, as in the case of personal injuries, it is not a calculation at all. Pain has no monetary value. It is often said that no money could ever compensate the catastrophically injured plaintiff, less still a sum subject to an artificial cap. However, an award of monetary compensation is the only mechanism available to the court by which it can attempt to redress the wrong suffered by the injured plaintiff. It cannot be restitutional in the true sense.

17. How then are damages to be reckoned? It can only be by the award of a conventional sum, that is to say a sum which by convention and experience society considers to be fair and just compensation for injury. The assessment of damages is not amenable to scientific analysis. It takes account of societal factors of the kind referred to in the seminal judgment of O'Higgins C.J. in *Sinnott v. Quinnsworth* [1984] ILRM 523, a judgment credited with introducing the notional "cap" on general damages. Having discussed the special damages to date and into the future to which the plaintiff was entitled, the Chief Justice said (at p. 532): -

> "What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation. In assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me that some regard should be had to the ordinary living standards in the country, to the general level of

incomes and to the things upon which the plaintiff might reasonably be expected to spend money."

18. The Supreme Court in that case concluded that the maximum amount that should be awarded in any case for general damages should be a sum in the region of £150,000. This passage was cited with approval by Denham J. (as she then was) in giving a judgment with which the other members of the Supreme Court agreed in *M.N. v S.M* [2005] 4 IR 461.

19. She noted that the fact that there was a limit on general damages in catastrophic injury cases was relevant to consider in other cases. She was also of the view that information on awards of general damages given in previous cases benefits a court assessing general damages. There should be a "rational relationship" between awards of damages in personal injuries cases. In approaching the assessment of general damages, Denham J. said (at p. 474): -

> "In assessing the level of general damages, there are a number of relevant factors to consider. Thus an award of damages must be proportionate. An award of damages must be fair to the plaintiff and must also be fair to the defendant. An award should be proportionate to social conditions, bearing in mind the common good. It should also be proportionate within the legal scheme of awards made for other personal injuries. Thus the three elements, fairness to the plaintiff, fairness to the defendant and proportionality to the general scheme of damages awarded by a court, fall to be balanced, weighed and determined."

20. These dicta were applied by this Court in *Nolan v Wirenski* [2016] 1 IR 461, where Irvine J., delivering a judgment with which the other members of the Court agreed, observed (at p. 474): -

> "Thus it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages, and more severe injuries damages of a level which are clearly distinguishable in terms of *quantum* from those that fall into the other, lesser categories."

21. The concept of proportionality in awards of damages for personal injuries falls to be considered therefore in two particular respects, first against the yardstick of the cap for the most serious injuries and where in the hierarchy of damages the injury under consideration fits. Secondly, the award must be considered in the light of awards given by courts for comparable injuries. More generally however, proportionality falls to be considered in the *Sinnott* context under which regard is had to prevailing societal factors. In the modern context, such factors undoubtedly include the cost of liability insurance be it motor, public or employer's liability. The cost of such insurance is for most ordinary people and businesses, a significant outgoing. The extent to which awards by courts influence that cost is, in recent times, a matter of widespread public discourse, debate and dispute. Whatever the reality may be, it is clear that awards made by the courts have an impact on society as a whole and the courts are mindful of that fact. Ultimately each member of society must bear the cost of a compensation system whether through

the payment of insurance premia in the case of private defendants or taxes in the case of public defendants. Society thus has a direct interest in the level of awards.

22. Fundamental to these concepts and to fairness in the operation of any system of monetary compensation for personal injuries is consistency and predictability. Other jurisdictions strive to achieve those aims by utilising tools akin to our Book of Quantum, which have as their goal uniformity of awards insofar as that can ever be possible, recognising that no two plaintiffs and no two injuries are exactly alike. The Book of Quantum has been with us since 2004 but it has had a surprisingly limited impact on the level of awards, particularly when one considers the fact that courts are mandated to have regard to it by s. 22 of the Civil Liability and Courts Act, 2004. Judicial considerations of the Book are relatively sparse. The 2004 edition, published during the height of the Celtic Tiger years, was perceived as going out of date very quickly. Judicial comments have noted that it was not suited to complex cases – see for example *Murphy v Galway Motor Club* [2011] IEHC 135 and *Walsh v Tesco* [2017] IECA 64.

23. Some courts have observed its limitations in that it cannot take account of how a particular injury affects a particular plaintiff – see *McFadden v Weir* [2005] IEHC 47. That is true up to a point but such an approach runs the risk that similar plaintiffs with similar injuries may end up with substantially dissimilar compensation. Should the person who bears the consequence of an injury with fortitude receive less compensation than one who does not? Such an approach could hardly be viewed as just or fair. The subjective element of an injury is inherently difficult to assess. A court has no objective way of knowing what pain a plaintiff feels. Regrettably, exaggeration is not uncommon. Different plaintiffs may have different pain tolerances, if such a thing truly exists, but because of the subjectivity of such matters, the court has to look to the objective medical evidence in particular to arrive at fair compensation in any given case.

24. The Book of Quantum acts as an aid to that exercise. It is perhaps to be viewed as a guide and in many cases, its value may be limited for a wide variety of reasons. However, it does at least recognise that there are different categories of severity of injury, each of which has an approximate band of values. This does little more than reflect the reality of personal injuries litigation which lawyers in that sphere understand very well, namely that there is a "going rate" for particular injuries, especially those that are common. This is demonstrated by the fact that the overwhelming majority of personal injury cases, probably more than in any other area of litigation, are settled by the emergence of a consensus as to the value of the case. Indeed, even where cases proceed to trial, that is not necessarily because lawyers on opposite sides cannot reach a consensus as to its value, but more often than not because the particular plaintiff does not share in the consensus.

25. The successful operation of any personal injuries litigation system is highly dependent on predictability. The Book of Quantum seeks to introduce a measure of predictability, at least where it can be said that the injury in question is capable of categorisation and is one that has affected the plaintiff in a way that it might be expected to affect most people. There will of course always be points of departure from the norm and a relatively minor finger injury for example, may affect a concert violinist very differently from, say, a

clerical worker. This is something that the range of damages for a particular injury is designed to accommodate.

26. The relatively recent and long overdue updating of the Book of Quantum in 2016 has made it considerably more relevant, as damages have in recent years become more static. Indeed, some commentators suggest that they have fallen. It does of course remain the case that the Book of Quantum is most suited to relatively straightforward cases where the injury falls more clearly into one or more of the defined categories. In complex cases with multiple injuries, it may be of little or no assistance and there are many injuries it does not capture at all, for example scarring and psychiatric/psychological injury.

27. The importance of consistency in awards is a major factor underlying the passage of the recent Judicial Council Act 2019, and in particular, the forthcoming introduction of Personal Injuries Guidelines under that act. The Guidelines will replace the Book of Quantum but have the same objective, identified in s. 90(3)(d) of the 2019 Act as the need to promote consistency in the level of damages awarded for personal injuries. The court will have the same obligation to have regard to the Guidelines as it did in respect of the Book of Quantum but with the additional requirement that if it departs from the Guidelines, it shall state the reasons for doing so.

28. In the field of personal injuries litigation, it was always a fact of life for practitioners that some judges were viewed as more generous or parsimonious in their awards than others. Frequently, the identity of the trial judge would not be known until moments before the case actually commenced, resulting in varying outcomes depending on the "draw". It is clear that this has the potential for injustice. It cannot be fair to either plaintiff or defendant that the value of their case depends on the identity of the trial judge. Personal injury litigation should not be a lottery and plaintiffs and defendants alike are entitled to reasonable consistency and predictability. This is particularly important in the context of injuries which fall at the lower end of the spectrum as these constitute the vast bulk of cases, most commonly involving soft tissue, or "whiplash" injuries.

29. It is perhaps a somewhat remarkable feature of personal injury litigation in this jurisdiction that it was, until relatively recently at any rate, pretty well unheard of to address the court on the proposed level of the award. It is difficult to see in principle why this was so. It is, for example, one of the factors often criticised in the context of jury awards where in the absence of some clear guidance on figures, juries may arrive at wildly inappropriate awards inevitably leading to appeals and increased costs. That happily seems to be changing – see for example the recent judgment of this Court in *Higgins v. Irish Aviation Authority* [2020] IECA 157. It has to be said however, that in that case, despite guidance, the jury still arrived at a figure approximately five times the amount considered by this court to be appropriate.

30. It used to be common in the context of Garda compensation cases to refer the court to past awards for similar injuries recorded by the State in a sort of precursor to the Book of Quantum. Despite the fact that the Book of Quantum has been around for 16 years, it is seldom referred to in express terms by either advocates or judges. This case is a typical

example where, despite the injuries being of a kind that would appear to lend themselves readily to consideration in the context of the Book, in the High Court neither party referred to it or indeed made any submissions on damages beyond counsel for the defendants suggesting that this was in reality a Circuit Court case. Similarly, the trial judge made no more than a fleeting reference to having had regard to it. That is not a criticism of anyone but simply to note that this appears to be the norm.

31. It seems to me therefore that in cases where the Book of Quantum is clearly relevant, it would assist the court's considerations to hear submissions from the parties about how it should be applied, or perhaps whether it should be applied at all. Recent judgments of this court, such as *Nolan v Wirenski*, have drawn attention to the fact that it is important for trial judges to explain how particular figures for damages are arrived at, since otherwise the appellate court is left in the dark about the trial judge's approach and whether it ought to be regarded as correct or not. The review process on appeal would be greatly assisted by reference to the categorisation and severity of the injury provided for in the Book of Quantum, assuming that to be feasible. If on the other hand the trial judge considers that the Book has no role to play in the particular circumstances of the case, it would be very helpful for the appellate court to know why that is so.

32. Until recently, the so-called cap on general damages stood at approximately €450,000 by virtue of the judgment of High Court (Quirke J.) in 2009 in *Yun v. MIBI & Tao* [2009] IEHC 318. That cap was recently revisited by the Supreme Court in *Morrissey & Anor v HSE & Ors* [2020] IESC 6 where the Court revised it upwards to €500,000 to reflect the passage of time since it was last judicially fixed. Clarke C.J., in delivering a judgment with which all the members of the court agreed, also considered the issue of proportionality in the context of the cap and observed (at p. 117): -

> "14.28 I should say that I have come to that view by considering that the proper approach to the limit for damages for pain and suffering is the one which sees that limit as the appropriate sum to award for the most serious damages. This is therefore the sum by reference to which all less serious damage should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. The point which I have sought to make, however, is that the type of injuries which do properly qualify for the maximum amount may nonetheless come into different categories. While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award."

33. Although the Supreme Court has recalibrated the upper limit by an approximately 11% uplift, it does not of course mean that the value of all other injuries should increase by a similar percentage. Rather it is a recognition that for the most serious categories of injury, the passage of more than a decade since the earlier cap was fixed meant that it

was no longer a fair and just figure for such injuries. The Chief Justice noted that the limit of €450,000 was fixed having regard to the economic circumstances which prevailed in 2009 and it was not unreasonable in 2020 to increase it (at p. 115).

Some comparable cases

34. Some recent judgments of this Court have considered the appropriate level of award for particular types of injury. Of course it cannot be the function or objective of an appellate court to ensure precise streamlining of awards by tinkering at the margins. This has been expressed in different ways over the years. In *Nolan v Wirenski*, Irvine J. summarised all the relevant authorities on the jurisdiction of the appellate court in relation to awards of damages and it would be idle to repeat that. Suffice it to say that the Court must be satisfied that no reasonable proportion exists between the sum awarded by the trial judge and what the appellate court itself considers appropriate, bearing in mind the factors to which I have already referred. The appellate court is obliged to pay particular respect and deference to the views of the trial judge in his or her assessment of the plaintiff and how the particular injuries have affected him or her. That is of course not to suggest that the appellate court should ignore glaring inconsistencies between the plaintiff's own evidence and that of the medical experts or indeed of other objective factual evidence. While the appellate court of course pays particular regard to the trial judge's view of the plaintiff, the authorities make clear that where the expert evidence is, as here, given by way of agreed reports, this court is in as good a position as the trial court to assess that evidence.

35. A useful starting point is the decision of this court in *Payne v Nugent* [2015] IECA 268. The judgment of the court was given *ex tempore* by Irvine J. and although a detailed description of the injuries does not appear from the judgment, certain features of the case appear to bear considerable similarity to those in the present case. The plaintiff was a passenger in a car which was rear ended by the defendant's vehicle. She appears to have suffered soft tissue injuries to her shoulder, neck and back. Approximately two years had elapsed between the date of the accident and the date of trial. The plaintiff's medical condition was entirely managed by her General Practitioner who actively treated her for a period of some fifteen months post-accident. The plaintiff's shoulder and neck injuries cleared up within a period of seven months but she continued to complain of significant back pain thereafter. She also complained of psychological injury. The plaintiff's evidence was that she had ongoing chronic back pain up to the date of trial that had interfered with her quality of life and this evidence was accepted by the High Court.

36. As in the present case, reports were obtained by the plaintiff's solicitors from medical experts who did not treat the plaintiff. The trial judge observed that the plaintiff was a truthful witness who did not exaggerate. The plaintiff received painkillers and anti-inflammatories from her GP for fifteen months as I have noted and she also used heat pads on her back. She was due to have an epidural injection a year or so after the accident but this did not proceed. The expert evidence was that the plaintiff had an adjustment disorder and suffered from low mood. The trial judge awarded €45,000 damages for pain and suffering to date and €20,000 into the future making €65,000 in

total. Irvine J. was of the view that this award was not reasonable or proportionate. She described the injuries as "modest". She noted (at para. 18): -

> "If modest injuries of this type are to attract damages of €65,000 the effect of such an approach must be to drive up the awards of those in receipt of the more significant middle ranking personal injuries claims such that there is a concertina type effect at the top of the scale of personal injuries. So for example the award of general damages to the person who loses a limb can be little different to the award made to the quadriplegic and that simply cannot be just or fair."

37. The judge reduced the award of general damages for pain and suffering to date to €30,000 and damages into the future to €5,000 for a total of €35,000.

38. In *Nolan v Wirenski*, the plaintiff was fifty years of age at the date of hearing which was some four years post-accident. She suffered soft tissue injuries to her right shoulder, hand and thumb. The plaintiff had undergone quite extensive treatment by the date of trial. Apart from some sixty sessions of physiotherapy, she had her shoulder manipulated under general anaesthetic and the affected area was injected. She had a second subsequent subacromial injection. Ultimately, she underwent surgery in the form of an arthroscopic subacromial decompression and rotator cuff repair. However, she continued to remain symptomatic as of the date of hearing and she had ongoing discomfort in her right shoulder and wrist. Of note, however, in that case, was the significant conflict, commented upon by this court, between what the plaintiff alleged in terms of her limitations and what was shown by objective video evidence seen by the court.

39. The court was also influenced to an extent by the fact that a very substantial claim for the cost of future care amounting to some €350,000 was withdrawn without explanation on the morning of the trial. The trial judge awarded general damages of €90,000 to date and €30,000 for the future totalling €120,000. Despite these issues, it was not in dispute that the plaintiff would continue to have permanently reduced movement of her shoulder but that it should affect her to a fairly limited extent. The Court of Appeal concluded that the injury was a relatively modest one when considered in the context of the entire spectrum of personal injury claims and reduced the damages to €50,000 in respect of pain and suffering to date and €15,000 in respect of pain and suffering into the future. The total thus awarded of €65,000 was notably less than the award in the present case despite the plaintiff having undergone significant surgery and being left with a degree, albeit modest, of permanent disability.

40. Finally, the decision in *Shannon v O'Sullivan* [2016] IECA 93 is of relevance to this case. There were two plaintiffs, Mr. and Mrs. Shannon who suffered similar soft tissue injuries in a road traffic accident. The trial took place approximately two years and four months after the accident when Mrs. O'Sullivan was aged fifty five and her husband fifty seven. This was also a case in which there were significant credibility issues. The trial judge accepted the evidence of a consultant rheumatologist that Mrs. Shannon suffered an injury to a nerve in her neck and that previously asymptomatic degenerative changes in her neck had become symptomatic and troublesome. The trial judge accepted the evidence that the injury had become chronic and would continue to affect the plaintiff into

the future and she might require surgery. The trial judge also accepted that Mrs. Shannon had suffered psychological/psychiatric injury although not as severe as she had maintained. Although she rejected the contention that Mrs. Shannon suffered post-traumatic stress disorder, she accepted that she had ongoing depression which required anti-depressant medication and that she had a guarded prognosis from a psychological perspective.

41. Mr. Shannon had suffered similar injuries to his neck although of less severity. He received two injections but no other treatment. At the date of trial Mr. Shannon was taking over the counter painkillers irregularly. However, the trial judge felt that his symptoms had become chronic and would continue into the foreseeable future. She accepted that Mr. Shannon also had suffered psychological injuries and that he had in fact suffered post-traumatic stress disorder but of a mild nature. The trial judge awarded Mrs. Shannon €50,000 for pain and suffering to date and €80,000 into the future making in total €130,000. In Mr. Shannon's case she awarded €35,000 for pain and suffering to date and €55,000 into the future totalling €90,000.

42. Delivering the sole judgment of this court, Irvine J. referred to the principles canvassed in earlier cases as I have identified them and to the necessity for proportionality in the context of assessing where the plaintiff's injury fits in the spectrum of mild to catastrophic injuries, the latter then valued at €450,000. The court also posited a series of questions to be considered by the trial court in order to assist in the assessment exercise. Irvine J. considered that the injuries had to be viewed as modest indeed in the context of the overall spectrum, falling somewhere towards the bottom end. In Mrs. Shannon's case, the Court reduced the award to €40,000 for pain and suffering to date and €25,000 for the future making a total of €65,000. In Mr. Shannon's case, the award was reduced to €25,000 to date and €15,000 for the future making a total of €40,000.

Relevance of the Book of Quantum in this case

43. Because the injuries in the present case are reasonably defined in terms of categorisation, severity and duration, in my view this is a case in which the Book of Quantum has a clear role to play. Section 3 of the Book deals with back injuries and spinal fractures. It differentiates between five categories of injury: minor - substantially recovered, minor - a full recovery expected, moderate, moderately severe and finally, severe and permanent. A range of damages up to a maximum is identified in each case. Both minor categories are described in narrative terms as follows: -

> "These injuries are minor soft tissue injuries. Whilst the duration of symptoms will be of importance, there are also other factors that need to be considered when calculating the assessment. Such factors will include the nature of the back injury, the intensity of the pain and extent of the symptoms, the presence of additional symptoms in the buttocks or hip areas, the impact of the injuries on the person's ability to work and/or the extent of the treatment."

44. The "moderate" category is described in the following terms: -

> "These injuries would be moderate soft tissue injuries where the period of recovery has been protracted and where there remains an increased vulnerability to further

trauma. Also within this bracket would be injuries which may have accelerated or exacerbated a pre-existing condition over a period of time, usually no more than five years."

45. In the course of this appeal, both parties addressed the court on the Book of Quantum with counsel for the plaintiff contending that his client's injury fell into the moderately severe category which is described thus: -

> "These injuries involve the soft tissue wrenching type injury of the more severe type resulting in serious limitation of movement, recurring pain, stiffness and discomfort and the possible need for surgery or increased vulnerability to further trauma. This should also include injuries which may have accelerated and/exacerbated a pre-existing condition over a prolonged period of time, usually more than five years resulting in ongoing pain and stiffness."

46. Although there is an argument for suggesting that the plaintiff's back injury falls into the minor category or at best, between minor and moderate, in deference to the findings of the trial judge that she suffered a significant loss of amenity as a result of having to change jobs, I would classify the injury as within the moderate category. The moderate category is from €21,400 to €34,000. As regards her neck and shoulder injury, these fall into the lowest category of minor-substantially recovered where the suggested maximum is €14,800. As the Book of Quantum itself recognises, where the injuries fall into more than one category, it is not appropriate to simply add up the totals but rather carry out an adjustment to the overall award to fairly reflect the effect of all the injuries on the plaintiff.

Assessment

47. Unfortunately, the judgment of the trial judge gives little insight into how the amount awarded was arrived at. Taking into account all the relevant factors to which I have referred in the context of the proportionality of the award in this case, I am satisfied that by any reasonable measure it cannot be viewed as proportionate. It is not proportionate when viewed against the measure of the maximum for the most serious injuries. Neither is it proportionate in relation to other comparable awards and in that respect, the most directly comparable award is that in *Payne v Nugent*. Finally, it bears no relation to the range identified in the Book of Quantum which I consider appropriate in this case.

48. With regard to the plaintiff's low back injury, I am satisfied that the correct figure for pain and suffering to date is €25,000. I would make a further allowance of €5,000 to take account of her neck and shoulder injuries so that general damages to date amount to €30,000. With regard to pain and suffering into the future, I am satisfied that the evidence taken as a whole suggests that any level of future pain and suffering will be of a very minor order indeed and the trial judge reached the correct conclusion in awarding a sum of €5,000 in that regard. Thus the total amount for general damages is €35,000 to which must be added the agreed special damages of €6,000, making in total €41,000. I would accordingly substitute judgment in this sum for the award of the High Court. It follows that I would allow the defendants' appeal and dismiss the plaintiff's cross-appeal.

49. As this judgment is being delivered electronically, both Whelan J. and Power J. have indicated their agreement with it.

50. With regard to costs, the defendants will have liberty to file written submissions not exceeding 2,000 words on the appropriate form of order within 28 days and the plaintiff will have a similar period within which to respond.