

THE HIGH COURT

[2004 No. 18751 P.]

BETWEEN

GINA VAN AMERSFOORTH

PLAINTIFF

AND

JOHN CORRISTINE AND MIDLAND HEALTH BOARD

DEFENDANTS

JUDGMENT of Mr. Justice Cross delivered on the 1st day of June, 2017

1. The plaintiff in this case was born on 11th October, 1966, in New Jersey in the United States of America. She had Irish parentage. The family returned to Ireland in June 1975, to Claremorris in Co. Mayo where the plaintiff attended the convent of Mercy Primary and Secondary School and she sat her Intermediate Certificate. In 1983, the plaintiff returned to the United States with her mother as her parents had separated. She is an American citizen. The plaintiff received her High School diploma in June 1985 and she had an excellent work history. She met her husband, Paul, in Atlantic City, New Jersey and they worked in the hospitality industry in casinos and restaurants working as waiters and waitresses. The plaintiff moved to Las Vegas where she worked until July 1999.

2. The plaintiff's lifestyle was, I accept a very good one. She was happy and outgoing. Her earnings and her husband's earning were very good in the hospitality industry, they had a nice house and engaged in hobbies including flying and hiking etc. The plaintiff had no significant health issues though she did have a termination of pregnancy when she was nineteen and when she was somewhat younger, her sibling was apparently responsible for one incident of abuse.

3. In 1999, the plaintiff and her husband decided to return to Ireland to set up a business. They were encouraged to do this by the plaintiff's father who assisted them in opening a furniture shop in Portlaoise. Around that time, the plaintiff's husband had lost his job and would have had to find alternative work in Las Vegas.

4. The plaintiff and her husband went about the furniture selling business which they built up to being a success. They set up a second store in Mullingar. The plaintiff operated a "front of house" role in the Portlaoise shop. But also assisted fully in the business moving furniture and being responsible for orders and attending to some of the paperwork.

5. One of the reasons the plaintiff wanted to return to Ireland was that she and her husband believed it was a better environment in which to raise a family and the plaintiff hoped for two or possibly three children.

6. Unfortunately the plaintiff did not succeed in becoming pregnant and she was referred to the first named defendant, a consultant gynaecologist at Portlaoise Hospital who first prescribed medication to assist fertility which was not successful and she developed a right ovarian cyst which ruptured and was painful and she was prescribed some medication to deal with this problem. However, she continued to attend the first named defendant for further treatment.

7. The first named defendant advised that the plaintiff should have a diagnostic laparoscopy to establish why she was unable to get pregnant. This was described to the plaintiff as a routine procedure involving the insertion of dye to ensure that her tubes were patent. The procedure was anticipated to be a day case and the plaintiff was admitted on the Day Ward on 4th June, 2002. Unfortunately, while the plaintiff was under anaesthetic, a 7.8mm Trocar was inserted into the plaintiff's abdomen to allow telescopic examination and as soon as the telescope was inserted, it was obvious that there was significant serious bleeding from a major blood vessel caused by the Trocar.

8. The laparoscopy was converted to a laparotomy and a large collection of blood formed in the cavity. The first named defendant was unable to identify the bleeding point though by this stage she had lost much blood and the blood vessels were obscured. Aortic compression was established whereby pressure was placed upon her abdomen.

9. Subsequent to the incident, the plaintiff was advised by someone who was there in graphic detail what had occurred including the fact that her intestines had to be taken out of their normal location and put to one side on the operating table and that some staff member had to "sit" on top of her in order to control the bleeding. That, at least, is what the plaintiff perceived to have occurred.

10. The first named defendant required the assistance of a vascular surgeon who travelled from Tullamore which took approximately one hour he retrieved the situation. The plaintiff was advised that she was in a serious life threatening situation and was "lucky" to be alive.

11. What occurred was that the first named defendant had torn the plaintiff's right distal iliac artery and punctured her right common iliac vein. She lost in total approximately eight pints of blood.

12. The entire procedure took approximately four hours and the plaintiff was given initial resuscitation and blood transfusion and then was admitted to the intensive care unit, was ventilated and was on life support. She required adrenaline infusion to maintain her blood pressure and remained on the ventilator until 6th June, 2002. She was upset and confused and did not rely where she was and was drifting in and out of consciousness. She was treated with a cocktail of antibiotics and required morphine for pain. Catheters were inserted.

13. The plaintiff was discharged to the gynaecological surgical ward on 10th June, 2002, and a urinary catheter was removed. She required assistance for all her requirements and for mobilisation. She did not commence oral fluids until the morning of 10th June. She was tearful and the psychiatrist was sent to see her but the plaintiff did not avail of counselling as the psychiatrist sought to question the plaintiff on the previous termination and her sibling's abuse.

14. While the abuse could only be described as "minor", I fully accept that even minor abuse can cause significant psychological and indeed psychiatric damage to the victims just as serious abuse can leave little significant psychological scars. Similarly, I accept that a termination of pregnancy can result in psychological damage. I am satisfied, however, that neither of these two events had any real effect upon the plaintiff and she lived a full and happy life up to the indexed event and I accept that she was understandably upset

about being questioned on what she considered to be irrelevant matters and, reasonably, declined the counselling at the time.

15. The initial explanation given by the first named defendant to the plaintiff was that the Trocar had malfunctioned and apparently sought to suggest that it was a manufacturing problem. The plaintiff never has been given a proper explanation from the defendants as to what happened or why it occurred.

16. After a discharge from hospital, the plaintiff returned to the first named defendant on 20th June, and advised him that she was in severe pain in her abdomen and was also suffering from constipation. The first named defendant indicated it would take some time for her bowels to settle in place as they had been moved and that it could take up to two years to be a hundred percent improved.

17. Thus, the plaintiff complained of suffering from gastrointestinal problems from the beginning as well as abdominal pain and cramps. She was also admitted to the A&E Department in August 2002, complaining of profuse abdominal pain, colicky in nature which was relieved by vomiting. She also had constipation.

18. She was prescribed laxatives and painkilling medication.

19. In essence, the plaintiff's claim is that as a result of the indexed event, she has suffered not alone the trauma of the incident itself, the resulting scars but ongoing abdominal pain and discomfort principally in the right iliac fossa and constipation. The pain has especially in more recent years been dealt with by extensive analgesia including a morphine based medication. She has had significant anti-anxiety medication and has been diagnosed as having had Post Traumatic Stress Disorder which resolved and to be succeeded by a depressive disorder. The plaintiff complains that her abdominal pain has also caused back pain.

20. She had pain and difficulty with intercourse and but still attempted to conceive. She realised that conception could not be naturally achieved and in 2006, the plaintiff underwent a number of courses for IVF and in May 2006, she became pregnant as a result of three IVF cycles and delivered a healthy baby girl on 24th January, 2007 by way of a lower segment caesarean section. Although she attempted further IVF, she did not become pregnant and believes that had the indexed not occurred in the manner it did that she would have had, at least, one other child.

21. Though the plaintiff continued to draw salary from the business, I accept that her involvement with the shop was only marginal after 2002 and she was unable to do any of the physical work and also her concentration was adversely affected to the extent that she made elementary mistakes.

22. In any event, the second store which the plaintiff and her husband had opened in Mullingar closed in 2002, as the plaintiff's husband had to concentrate on the original store in Portlaoise. Between 2007 and 2009, the plaintiff and her husband also opened a nursery supply shop, this venture did not last long and due essentially to the recession, all the plaintiff's business closed down in 2009. The plaintiff and her husband have some significant debts as a result of the collapse and both are surviving on social welfare and their home is at risk.

23. The plaintiff now contends that had the incident not occurred that after the economic downturn and the collapse of their business, she and her husband would have returned to the United States to resume their waitressing activities in Las Vegas, or in the alternative she would have, by now, easily obtained work in retail stores in a managerial capacity. She claims damages in respect of the original operation and the scar, the fact that post-operation she has had continuing right iliac fossa pain and bowel discomfort, anxiety, some Post Traumatic Stress Disorder and depressive episodes and is unable to carry out basic household activities.

24. In addition, the plaintiff's marriage has run into difficulty and the plaintiff and her husband, who was supportive of the plaintiff and sat beside her throughout most of the case, are going to obtain a divorce. The plaintiff contends that the reason for this divorce is principally due to the indexed event due to her constant abdominal pain, her constipation difficulties, her pain in relation to intercourse and her altered mood. She is supported in this contention by her husband who while accepting that marital disharmony is never due to one person only gave evidence that the plaintiff has changed since the indexed event and is not the outgoing pleasant capable person that she was before. I note that the marital disharmony has, at least on one occasion, resulted in significant rows and the gardai were called.

25. Initially, full defences were filed by both defendants. In addition, it was pleaded that the personal injuries loss and damage were not reasonably foreseeable or were too remote and the plaintiff is not entitled at law to damages in respect thereof. The defences were delivered in 2005, and there the matter remained until by letter of 31st March, 2017, when the now joint solicitor for both defendants wrote a letter stating, inter alia:-

"Please note that the defendant admits breach of duty in causing the Trocar to puncture the plaintiff's right common iliac artery as alleged in paragraph 7(k) of the statement of claim. This is an admission of breach of duty only. It is not admission of liability. We refer you in particular to the causation plea contained in paragraph 6 that confirm that causation is still very much an issue..."

26. In essence, accordingly, the case proceeded with the defendants admitting responsibility for the operation, the scar and the initial pain and suffering but disputing the alleged consequences of the operation namely the constipation, depression/anxiety, right iliac fossa and back pain and the loss of earnings etc. are related to the incident.

27. Rather the defendants contend that the cause of the constipation is Irritable Bowel Syndrome principally caused by psychological factors not related to the incident. While initially, reliance seems to be placed upon the two pre-incident events from the plaintiff's younger life, the defendant now contends that as a matter of probability, she sustained Irritable Bowel Syndrome caused by stress due to the financial collapse of their business, difficulty in conception, certain illnesses of her parents, and marital disharmony and that the Irritable Bowel Syndrome is responsible for the ongoing abdominal pain.

The Source of the Plaintiff's Current Complaints

28. I had the benefit of hearing evidence from a number of expert witnesses from both sides and also read a number of medical reports from practitioners who did not give evidence but whose reports were admitted by agreement from both parties. Mr. Eadhbhard Mulligan who was the defendant's colorectal surgeon, was of the opinion that the plaintiff's symptoms are that of Irritable Bowel Syndrome with the predominant feature being constipation. Stress is commonly seen as a principal cause of Irritable Bowel Syndrome. Mr. Mulligan did not accept that adhesions from the surgery caused the constipation and was initially of opinion that the previously mentioned two incidences which arose prior to the indexed event together with other life time stresses (which he included the fact that she "moved to Ireland from America and back") were responsible for the Irritable Bowel Syndrome. He added in evidence that the separation of Ms. Amersfoorth's parents may have all accumulated to produce these symptoms. It was further opined by Mr. Mulligan

that as the plaintiff had been on regular doses of opiate medications this would have exacerbated the constipation problems. In evidence, Mr. Mulligan related her abdominal pain to the Irritable Bowel Syndrome caused by stress. 29. Dr. Paul Murphy, Pain Specialist, on behalf of the defendant related the plaintiff's constipation to the opiate medication that she was taking and disputed the plaintiff's experts contention that her abdominal pain was neuropathic rather than caused by the Irritable Bowel Syndrome.

30. The defendant's experts based their conclusions essentially on the fact that the plaintiff's records from her GP and otherwise, including the records of the plaintiff's prescriptions, did not recount regular complaints of abdominal discomfort or indeed constipation up in approximately 2009 or 2010, when as a result of complaints of abdominal pain, she was put on significant regular opiate medication and indicated greater constipation problems.

31. The defendant's surgical and pain experts did agree to defer to psychological or psychiatric opinion in relation to the psychological factors but were of opinion that the plaintiff's complaints were not related to the indexed event.

32. Prof. Thakore, the defendant's Consultant Psychiatrist, was of opinion that she had what is known as an Adjustment Disorder with anxiety and mood symptoms. He agreed that the stressor would have been the 2002 event which resulted in emotional behavioural symptoms in response to the events in question. He was of the opinion that the disorder was stress related and not a serious mental illness such as "major depression, bipolar disorder or schizophrenia". He went on to state:-

"It begins within three months of the outset of a stressor and usually lasts no longer than six months after the stressor or its consequences have eased. It is characterised by the development of marked distress and significant disability. It does not meet the criteria for another mental disorder or normal bereavement and is not merely an exacerbation of pre-existing mental disorder."

33. In his evidence, Prof. Thakore added that, as well as the 2002 event, the post event occurrences such as the financial stress and difficulty in conception and marital disharmony as been contributed to the plaintiff's present psychiatric problems.

34. Even if we take the defendant's experts on their own without any analysis of the plaintiff's experts, the defendant's theory (that all her problems are related to post incident stresses which allegedly caused constipation and Irritable Bowel Syndrome which then caused her the pain in the abdomen) is not supported by the totality of the defendant's evidence. It is clear, Prof. Thakore is of the view that the psychiatric disorder which he found was initially caused by the indexed event. Accordingly, the plaintiff's ongoing pain cannot be divorced from the indexed event.

35. In addition, when one examines the plaintiff's evidence, it is clear that the defendant's case cannot be supported. The plaintiff complained of abdominal pain and constipation almost immediately after the admittedly negligent operation. She was advised by the first defendant that these problems could last, at least, two years. The plaintiff was hospitalised for the condition shortly after the incident. The plaintiff's GP has given evidence which I accept that the plaintiff was on a consistent basis complaining of her abdominal pain and constipation from his initial examination right up to date. His notes do not record every complaint of abdominal pain or constipation but he stated that his notes would only deal with new matters not previously dealt with and that the overriding fact on the plaintiff's file was her pains as a result of the indexed operation.

36. The plaintiff's expert, Dr. Buchan, gave evidence that there were adhesions in three places and the distortion of the adhesions caused her pain. The constipation was caused as postoperatively the bowels take time to recover from the fact that they were removed from their place within the plaintiff and put to one side on the operating table and then had to be re-inserted. Generally, speaking, this should settle down but that in the plaintiff's case, it did not.

37. The adhesions were dealt with operationally some years later but Dr. Buchan was of the opinion that adhesions could and did reoccur. It is common case between the experts that no physical examination would show a mal-alignment after the operation but Dr. Buchan was of the view that the mal-alignment was the cause of the problem.

38. Dr. Simpson, the plaintiff's Accident and Emergency Consultant, was more nuanced in her evidence than Dr. Buchan and she indicated the plaintiff had chronic abdominal post-surgical pain that the pain is complex and she identified five different categories including abdominal wall pain due to scarring, secondary pain in her back, intra-abdominal pain involving her organs, adhesions and bowel nervous system (neuropathic pain due to an abnormality in the nerve) and finally the opiates which she has been prescribed are likely to have led to extra sensitivity. Dr. Simpson was of the view that the plaintiff's pain is not psychologically based though she stated that clearly non-enduring chronic pain is of itself a cause of psychological distress. In the main, Dr. Simpson of the view that the ongoing pain endured by the plaintiff in her abdomen was neuropathic pain caused by the abdomen and that this was also the view of the plaintiff's treating team. This was also the view of Prof. Roger Grace, Professor of Colorectal Surgery, who also was of the opinion that the damage is likely to be permanent because the nerves were damaged in the initial procedure. Such nerve damage is not something that would show up on any study but it can be deduced from what happened to the plaintiff.

39. The fact that neither her abdominal pain or constipation were present prior to the indexed event which led Prof. Grace to the conclusion that both are due to the 2002 operation. Prof. Grace was not of the view that the adhesions caused the constipation but rather the operation did.

40. This was further agreed by Prof. PWN Keeling, Consultant Gastroenterologist, who treated the plaintiff and was of the opinion that the plaintiff's ongoing pain was caused by bowel symptoms due to the indexed event. He was of the opinion the plaintiff suffered not from Irritable Bowel Syndrome but from neuropathic pain which was the same opinion as Dr. Simpson and Prof. Grace.

41. It is agreed by experts on both sides that the vascular nerve pain and Irritable Bowel Syndrome are similar and Irritable Bowel Syndrome has been described as what you used to call any such symptoms about which you could not ascribe a particular cause. In relation to this case, the only issue that really needs to be resolved is whether the plaintiff's ongoing pain and constipation were caused by post incident psychological stresses or by the incident itself either physically or psychologically caused.

42. I have no doubt but that the indexed operation was the cause of the plaintiff's problems. Her problems have persisted continuously since the operation, her physical problems as a matter of probability caused the ongoing psychiatric or psychological problems rather than the reverse. It does not really matter for my purposes whether you describe the condition as Irritable Bowel Syndrome caused by psychological stressors on neuropathic pain caused by the physical damage to the plaintiff's internal organs in the procedure if the psychological problems were initially caused by the incident as Prof. Thakore indicated. However, between the competing theories, I prefer the view of Prof. Keeling, Prof. Grace and Prof. Simpson that the cause of the plaintiff's right iliac pain was nerve damage to the plaintiff's organs which resulted in the particular pain sustained by the plaintiff. In this regard, the fact that there was no nerve damage to the site of the insertion is not of relevance and was never contended for by the plaintiff's experts.

Accordingly, I must reject the central contention on behalf of the defendant.

43. The plaintiff was not taking significant medication over a prolonged period in the few years after the indexed event though she was complaining of both constipation and abdominal pains. I accept the evidence on her behalf that the reason she did not take any significant amount of medication is that she was always attempting to become pregnant. (First of all by natural means and then by IVF.) These attempts persisted up to and beyond her safe delivery of her daughter in 2007. After that event, she continued to attempt to become pregnant via IVF and was concerned all the time not to take heavy or significant medication which might damage an unborn child, or in any way affect her pregnancy. In or about 2009, when she ceased to attempt pregnancy due to the aging process and the failure of IVF, she was prescribed and continues to be prescribed a significant cocktail of medication including opiates which have, as a regrettable side effect, an increased problem in constipation.

44. I have come to the conclusion that the defendant's experts relied overmuch on the plaintiff's medical notes without any regard to the actual evidence of her treating doctors.

45. Accordingly I find that the plaintiff's ongoing abdominal pain which is serious and significant is as a result of the indexed event. I also accept that the indexed event caused the ongoing constipation problems and that these have been worsened since 2009 by the medication that the plaintiff has been prescribed to deal with her pain. All of this is directly related and flows from the admitted negligence of the defendant.

46. In relation to the plaintiff's back pain about which the plaintiff made less complaints, I think that in the main the back pain is due to the arthritic changes that had been observed in the plaintiff's back though some of her back pain may be referred from her abdominal pain as is contended for. Given the totality of the matter, however, and given the fact that the back pain is a minor aspect of the plaintiff's case other than to say whatever back pain exists was at most only partially due to the indexed event, nothing further needs be stated.

47. In relation to the plaintiff's psychological or psychiatric issues, Prof. Thakore discounted that the plaintiff was suffering from Post Traumatic Stress Disorder. Dr. Dennis Murphy, the psychiatrist on behalf of the plaintiff and Anne Loughlin, Consultant Psychologist, were of the view that the plaintiff suffered initially Post Traumatic Stress Disorder for a period after the surgery and continued to have some residual features of this. I accept that the plaintiff did indeed suffer from Post Traumatic Stress Disorder in the period after the incident. She fulfilled the criteria set out by Prof. Thakore: near death or serious injury experience, intrusive recollections, avoidance phenomenon, negative cognition and mood and these symptoms lasted longer than a month. The plaintiff's avoidance was clear due to her fear of hospitals and in particular of Portlaoise Hospital and the fact she had to take medication or be counselled to attend these.

48. Dr. Murphy was of the opinion that the plaintiff:-

"Has suffered from depression of fluctuating severity since the adverse surgical events described in 2002. In addition she suffered from Post Traumatic Stress Disorder for a period after the surgery and continues to have some residual features of this including anxiety in relation to medical procedures and fear of doctors. She experienced a great deal of anxiety in relation to medical procedures relating to her infertility, her pregnancy and the delivery of her daughter. There were adverse effects on her relationship with her husband culminating in their current separation. In relation to the question of whether any of the current symptoms could be explained by a psychological cause, I am of the view that there is sufficient evidence of physical causation identified in multiple medical report to render it impossible to say that emotional conflict or psychosocial problems are the main causative influences. The prognosis is difficult to be certain about particularly in view of her ongoing pain. It is likely that she will benefit from further antidepressant treatment with further psychotherapy but after thirteen years there is considerable risk that her symptoms would prove longstanding."

I accept that evidence.

49. The plaintiff first sought counselling by Ms. Asta Ghee in September 2002, in relation to the incident. Ms. Asta Ghee's report referred to the fact that the plaintiff's sleep patterns had become increasingly erratic that she was restless and cried out in her sleep. The plaintiff was deeply aware of how close she had come to losing her life and was initially too afraid to ever become pregnant. The plaintiff attended Ms. Ghee for some six months and after this she was able to resume her attempts to become pregnant.

50. The Post Traumatic Stress Disorder clearly is improved and the plaintiff has not currently suffering from Post Traumatic Stress Disorder. Prof. Thakore refers to the plaintiff's present condition as an "adjustment disorder" and Dr. Murphy refers to it as a reactive depression. It is, of course, correct to say that the plaintiff's medication did increase with the collapse of her business and the financial stresses and this must be a factor in her present symptomology in this regard. However, I accept that the plaintiff is still suffering from the depression as described by Dr. Murphy and which is principally related to her ongoing physical pain. Prof. Thakore was it seems unaware of the evidence post operation that suggested, as I have found that the plaintiff suffered from Post Traumatic Stress Disorder at the time and accordingly I will prefer the diagnosis of Dr. Murphy.

Damages

51. When assessing damages, the plaintiff is entitled to general damages for pain and suffering to date and into the future in relation to the operation itself, the resulting scars, the ongoing continuous abdominal pain, the Post Traumatic Stress Disorder, the ongoing depressive symptoms, the constipation caused both by her visceral pain and exacerbated by the opiate medication that she has been prescribed in order to deal with this pain. I believe that the indexed event was the principal though probably not the only cause of her marital disharmony. As a matter of probability had she not been ill, it is likely that she would have conceived earlier and probably would have gone on to have a second child. Had the indexed event not occurred in the manner that it did, it is likely that she would not have had the altered personality, the pain, the difficulty in intercourse and relationship with her husband and that her marriage would have continued to thrive.

52. It is likely, of course, that without indexed events but with the plaintiff continuing to manage the shop in Portlaoise that nonetheless the business would have folded in 2009 with the financial crash. Mr. Amersfoorth was able to say that the business commenced a decline some time in 2007.

53. I accept that this financial stress has added to the psychological distress of the plaintiff but by no means is it the cause of it.

54. I believe that had the operation not taken place in the manner that it did, given the fact that the plaintiff would, as a matter of probability, have had a second child that the plaintiff and her husband would not have returned to the United States though they now

believe they would have done so.

55. I believe that what is more likely is that the plaintiff would indeed have by now returned to the workplace and would have found employment in a managerial capacity in a department store in the midlands. This return to work would, of course, in turn have lessened or removed her financial stress.

56. I accept the evidence from the experts that the plaintiff's pain and suffering is likely to persist for the rest of her life at its present level if not worsen. Accordingly, the plaintiff is going to have to live the rest of her life with constant pain, constant medication and constant constipation problems with the probability of resultant psychological illness.

57. It is on that basis I must assess the damages in the case.

Special Damages

58. Due to the good sense of the parties, there has been some agreement in relation to the quantification of items of special damages.

Past medical expenses €3,665 (agreed)

Past hospital expenses €4,817.80 (agreed)

Past travelling expenses €6,822.60 (agreed)

Asta Ghee (Counselling) €1,400 (agreed)

Anne Loughlin (Counselling) €3,200 (agreed)

Total €19,905.40

59. In relation to Anne Loughlin, her counselling was marriage counselling and the agreement was subject to my being satisfied that this was incurred principally due to the indexed events and the liability of the defendants and I do so find.

Future Medical Care

Additional GP visits €6,755 (agreed)

Future additional medication €44,583 (agreed)

Future travel €2,000 (agreed)

60. Future counselling was agreed at €15,000 for three years of weekly sessions and €25,000 for five years of weekly sessions. I believe that a sum of three years would be reasonable in the circumstances so will allow €15,000.

61. A sum of €10,500 was agreed in respect of future abdominaloplasty surgery. I am not satisfied that the plaintiff will undergo such surgery and I will not allow same.

62. Future housekeeping, a figure of €67,550 has been agreed for five hours per week subject to the court finding that the need for housekeeping has been as a result of the injuries sustained in June 2002 and I do find and will allow the figure.

63. The total of the aforementioned matters come to the sum of €155,793.40.

64. The next issue to consider is the issue of loss of earnings to date. I accept that had the indexed event not occurred, the plaintiff would as a matter of probability have returned to work. I believe that she would, as I have stated as a matter of probability had two children and that contrary to what she now believes, I do not think that she and her husband would have returned to the United States of America.

65. A interesting legal point accordingly does not fall to be decided in that figures were given in respect of the gross earnings as a food service server in Las Vegas which included tips and I was advised that by agreement between the union and the Internal Revenue in the United States that an agreed rate for gross earnings, including a nominal amount for tips, on which the food service would be taxed was arrived and that any other earnings went into the pockets of the food servers with the connivance of the United States Revenue.

66. An issue would arise as to whether or not Irish public policy would prevent such extra monies being recoverable but I believe that the likelihood is that the plaintiff would have returned to the work in Ireland. Accordingly, the issue of the tips in Las Vegas does not arise.

67. The work that she would have returned to was the work she was used to namely in retail. I do not believe she would have been confined to work as a sales person but would have returned to a managerial capacity. I accept the evidence that the appropriate gross figure for a person in that capacity is €32,000 per annum. Higher figures relate presumably to full store managers in larger stores and I think that the plaintiff's earnings would probably have been at a lower rate than that and which is why I have accepted the figure of €32,000 gross per annum.

68. A figure of €193,000 has been arrived as the potential net earnings from 1st January, 2010 to 11th May, 2017. I am not convinced that the plaintiff would in fact have been able to earn the sum of €32,000 from 2010 as the economic recovery has been mainly in the last number of years and I think that being fair to both parties I will allow the sum of €100,000 in that regard.

Future Loss of Earnings

69. I have been given figures by the actuaries and note that the actuaries on both sides are in agreement as to the multipliers. The calculation in respect of plaintiff's earnings up to €32,000 per annum to aged 68 is €399,378 and to aged 65 is €340,783. The actuaries' figures are, of course, guides and do not take into account any deductions for *Reddy v. Bates*. In the circumstances, I think it fair to both sides to allow a figure of €300,000 for future loss of earnings.

General Damages

70. The purpose of damages for personal injury has been consistently since the 19th century stated as being to put the injured party into the same position as they would have been had they not sustained the wrong for which compensation is payable. Once that general principle is stated, it is, of course, notoriously difficult to put it into practice. Damages must be fair and reasonable both to the injured party as well as to the tortfeasor.

71. I do not believe that damages can be approached in a mathematical or in a manner that could be described in any sense as scientific. A broken finger to violin player would bear no relation to a broken finger to a barrister. Accordingly, damages must be dependent upon the individual who has been injured and how the injuries have affected him or her. It is not, of course, possible for a court to mend a broken finger or fix a compromised back but the general damages will enable the innocently injured plaintiff to do

certain things they would otherwise not be able to do such as purchase better holidays, buy a more expensive car, extend or upgrade a house, or if they please to fritter the money away on any manner of frivolities.

72. The exercise of assessing general damages is not in the main a matter of law. It is a matter of common sense. Legal principles must, of course, be followed but the ultimate amount of the damages is a mercurial thing. This is not a matter of regret or something to be apologised, it is the essential flexible characteristic of our system of damages. A judge now, since the abolition of juries is required to step into the shoes of the "common man" and determine what is fair and reasonable.

73. Whereas there should be consistency between damages in different cases, there can never be uniformity. It is indeed clear that as has been correctly re-emphasised by the Court of Appeal in a number of recent decisions, serious cases should require serious and significant damages; moderate cases, moderate damages; and minor cases, minor damages. However, the starting point in relation to compensation is always to attempt insofar as money can do so to place the plaintiff in the same position as she would have been had the tort not resulted in her injury. A judge must start with the injury and not at any comparisons. As Geoghegan J. said in *Gough v. Neary* [2003] 3 I.R. 92 at 134, the cap figure (or it would follow other comparisons) can be taken into account "in a general way" in assessing appropriate general damages in a non-cap case. Accordingly, a judge must always start with the injury and its effect on the plaintiff before any possible comparisons are made or indeed before he brackets a case into "serious", "moderate", or "minor". To commence the approach by way of any comparisons is to fly in the face of established jurisprudence for nearly two centuries.

74. Assessing the issue of general damages in this case being fair to both sides, it is clear that the plaintiff's injuries as a result of the indexed event incident were very serious and significant indeed. Her life has been significantly impaired as a result of what occurred. I have viewed the scars, they are as described and they are not insignificant. I have observed the plaintiff. I have heard her recount, the extent of her suffering and nothing can surpass that first hand experience. It is, however, not so much the incident itself and the scar and her initial pain and suffering that are the most serious aspect of the case. Rather, it is the ongoing abdominal pains and cramps, constipation and psychological distress which I find are likely to persist indefinitely if not worsen that must be the most significant aspect of her claim.

75. While, there are many other plaintiffs who have been more damaged than Ms. Amersfoorth, it would entirely inappropriate in any way to minimise what she has suffered. Whereas I have no doubt that the plaintiff would view her injuries as being catastrophic in their effects upon her life, a court cannot assess damages based upon the plaintiff's subjective views and her injuries cannot be described as "catastrophic" in any legal sense and I must assess them as being very serious and significant but not catastrophic.

76. I am obliged to take into account the Book of Quantum but I do not find it of assistance to me given the multiplication of the plaintiff's physical and psychological injuries.

77. Being fair to both parties, I will assess general damages as follows:-

Pain and suffering to date €200,000

Pain and suffering in the future €100,000

Summary

Special damages to date €155,793.40

Loss of earnings to date €100,000

Loss of earnings into the future €300,000

Pain and suffering to date €200,000

Pain and suffering in the future €100,000

Total €855,793.40

78. I am then obliged to consider whether that said sum is fair and reasonable in all the circumstances and I do so consider that the plaintiff is entitled to judgment in that sum.