THE HIGH COURT

[2012 No. 3367 P.]

BETWEEN

MARGARET BROWNE

PLAINTIFF

AND

PETER VAN GEENE AND MOUNT CARMEL MEDICAL GROUP (KILKENNY) LIMITED TRADING AS AUT EVEN HOSPITAL

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 20th day of October, 2017

Introduction

1. This is a medical negligence action, in which liability is not in issue. Very briefly, the plaintiff's case is that in the years prior to 2010, she had been quite unwell with complaints of chronic fatigue, urinary tract infections and most particularly, she felt unwell at the time of menstruation. After various unsuccessful tests and treatments, she was eventually sent to see a Dr. Stratton in Waterford University Hospital. He carried out a laparoscopy, which revealed that the plaintiff had extensive endometriosis and cysts on her ovaries. A decision was made that she would have operative treatment in the form of a total abdominal hysterectomy and an oophorectomy. Due to there being a long waiting list and the operation of the National Treatment Purchase Fund, the plaintiff came under the care of the first named defendant, at the hospital owned and ran by the second named defendant.

2. On 6th April, 2010, the first named defendant carried out the hysterectomy operation. In the course of that operation, he placed sutures in the ureter leading to the left kidney. This caused a total obstruction of the ureter. Unfortunately, despite the fact that the plaintiff had continuing distressing symptoms of pain, the blockage was not identified until the following month. At that time, the plaintiff had a further operation when a new ureter was effectively formed by means of a Boari flap. It is not necessary to set out the full extent of the plaintiff's complaints in the years that followed, as these are set out fully in the summary of her evidence given later in the judgment, suffice it to say that in the years which followed, the plaintiff continued to experience severe pain and discomfort. She underwent multiple investigations and procedures. Eventually, a decision was made that her left kidney was functioning at such a low level, that it needed to be removed. Accordingly, on 15th April, 2013, the plaintiff underwent a total left nephrectomy.

3. It is the plaintiff's case that notwithstanding this further treatment, carried out in 2013, she continues to experience significant sequelea as a result of the negligent operation carried out in April 2010 and the subsequent investigations and procedures carried out in the years thereafter, culminating in the left nephrectomy in April 2013. In particular, her main complaint is that she has been left with an unstable bladder, such that she is obliged to go to the toilet on a very frequent basis; approximately 10 – 14 times during the day and approximately 4 – 10 times at night. She further claims that she has experienced psychiatric illness as a result of the injuries and the protracted treatment given to her in the years 2010 – 2014, in the form of Post Traumatic Stress Disorder and depression. The plaintiff states that while improvement has been made in relation to these complaints, she has been advised that further psychiatric treatment, in the form of cognitive behavioural therapy, is needed. Finally, she complains that since the index event, she has experienced pain in her back and in her side, and since 2013 she has also experienced phantom pain in the area of the left kidney. Additionally she complains of some loss of sensation and pain on touch to the outer aspect to the left leg.

4. The plaintiff alleges that as a result of the complaints outlined above, she has been disabled in the work aspects of her life and remains so disabled. She claims that she will only ever be fit for part time employment, if she can obtain a job where she will be able to go to the toilet on a frequent basis. This gives rise to a significant claim for loss of earnings and other ancillary losses into the future.

5. The defendants' case can be briefly summarised in the following terms: firstly, the defendants accept that the plaintiff suffered a significant injury as a result of the negligence of the first named defendant when carrying out the hysterectomy operation in April 2010. They accept that the plaintiff was subjected to a number of invasive treatments and tests in the years between 2010 and 2013, culminating in the left nephrectomy in April 2013. They accept that she suffered significant pain and distress during this period.

6. The main point of dispute between the parties, is whether the plaintiff has any significant ongoing complaints after the nephrectomy operation in 2013. The defendants submit that allowing for the post operative recovery period after the nephrectomy operation, the plaintiff had gone on to make a good physical recovery by the end of 2013. In support of that proposition, the defendants point to the fact that the plaintiff set up her own online clothing business, which commenced trading in January 2014 and continued until November 2016. In addition, she had a small shop premises on the quay in Waterford, which opened in January 2014, and continued until 9th July, 2015, when the plaintiff announced on her Facebook page that she was closing the shop for health reasons and due to the economic climate. However, she continued the online business for a further eighteen months until November 2016.

7. In further support of their submission, the defendants point to various notes made by unconnected doctors who treated the plaintiff in the years 2014 and 2015, wherein it was noted that the plaintiff was generally well and much improved when they saw her in various outpatient clinics. The defendants also refer to the plaintiff's G.P. records which show that while there was a significant number of visits by her to the G.P. in 2014, there were only two visits in relation to complaints connected to these proceedings in 2015 and three visits in 2016, but these may have been to do with psychological issues.

8. In further support of this contention, the defendants point to the fact that the plaintiff was able to enter a dancing competition in 2015, and was engaged in organising a fashion show to be run in conjunction with the dancing competition. The only reason that she did not complete these projects, was due to the fact that she had an ongoing knee injury, which required surgery in the middle of 2015. That knee injury was totally unconnected with the injuries the subject matter of these proceedings. The defendants also refer to the fact that at some time in early 2016, the plaintiff participated in a promotional video, which was placed on YouTube wherein she was shown participating in a vigorous boxing exercise lasting a number of minutes. This video was made to promote a personal trainer and his gym, which the plaintiff had attended for some months in 2015.

9. In these circumstances, the defendants submit that while the plaintiff certainly had a torrid time in the years 2010 to 2014, by January of 2014 she had gone on to make a reasonably good recovery from her physical injuries. They submit that the plaintiff is no longer restricted in the work that she can do. It was submitted that this was demonstrated by the fact that she ran her own clothing

business for three years until November 2016. While the plaintiff had argued that she had closed the online business because she could no longer cope with the demands of that work, the defendant submitted that having regard to the postings on her Facebook page, she was well able for the demands of the work. They submitted that the real reason the shop had closed, was probably due to commercial reasons, such that her business was simply not economically viable in the current market. On the basis that the plaintiff had engaged in this business for three years, the defendants submitted that there should not be any award of damages for loss of earnings into the future.

10. In relation to the plaintiff's psychiatric difficulties, the defendants accept that she has some continuing P.T.S.D., but it was submitted that her psychiatric difficulties are not affecting her ability to work, as in fact had been conceded by the plaintiff in cross examination. They submitted that the plaintiff will go on to make a full recovery from her ongoing psychiatric difficulties in the near future.

11. Finally, the defendants have submitted that in relation to the loss of earnings claim put forward by the plaintiff, both in relation to her past loss of earnings and in relation to her alleged future loss of earnings, the plaintiff had attempted to mislead the court in a material respect and that accordingly, her entire action should be dismissed pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004. The plaintiff's loss of earning claim had been based on the fact that she had pre-accident earnings of €26,000 per year. The plaintiff had claimed that in 2009, she had had a contract with a company called Swimworld (Waterford) Leisure Ltd. t/a The Kingfisher Club [hereinafter; "The Kingfisher Club"], under which she was to receive a salary of €26,000 per year. Her claim for future loss of earnings was based on this level of earnings. The defendants submitted that, while at the trial, the plaintiff had abandoned her claim to past loss of earnings calculated on this basis and had invited the court instead to make an award of general damages in respect of loss of opportunity on the job market; the plaintiff continued to maintain that her claim to future loss of earnings should be calculated on the basis of alleged pre-accident earnings of €26,000 per annum.

12. The defendants submitted that this was a fraudulent exercise, because the reality of the situation was that the plaintiff had only worked for The Kingfisher Club for a very short period in 2009, possible as short as a month, which was evidenced by a single payment into her bank account of €961 in June 2009. In view of the fact that the plaintiff had not produced any written contract from The Kingfisher Club, nor had she called any witness from the company to prove her level of earnings, it was submitted that her loss of earnings claim, as originally pleaded in respect of past loss of earnings and as maintained at the trial in respect of future loss of earnings, was entirely fraudulent. In these circumstances, it was submitted that the plaintiff's entire claim should be dismissed pursuant to s. 26 of the 2004 Act.

13. The plaintiff strongly rejected this submission. She steadfastly insisted that she had had a written contract with The Kingfisher Club, under which she was to be paid €26,000 per annum. She said that she had thoroughly searched her house, but could not locate a copy of the contract. She accepted that she had only worked with the company for a number of months in 2009, she thought that she had probably worked three – four months with them. She stated that she had left the company due to personality difficulties with her manager and due to the fact that she did not think that the company would be sympathetic if she had to take time off due to her health condition of endometriosis, which had not yet been diagnosed at that time, but which caused her significant symptoms at the time of menstruation. Accordingly, it was argued strongly on behalf of the plaintiff, that the defendants' submission in this regard should be rejected.

14. Thus, while this was an action for assessment of damages, there were a number of issues which were highly contested between the parties. The essential issues which the court has to determine are the following: the level of the plaintiff's injuries and losses for the period 2010 – 2013; whether the plaintiff had substantially recovered by the beginning of 2014; as alleged by the defendant or, if not, assess what complaints she had subsequent to that time; assess whether the plaintiff has any continuing complaints at the present time and, if so, what is the prognosis for her future recovery and depending on the findings made in respect of the foregoing, assess what are the plaintiff's financial losses into the future. Finally, the court has to adjudicate on the defendants' application made pursuant to s. 26 of the 2004 Act.

The Plaintiff's Evidence

15. The plaintiff is 47 years of age, having been born on the 28th September, 1975. She is married with one adult daughter, now aged 22, and she lives in Co. Waterford. Her husband had been a lorry driver, however, he took redundancy in 2008 due to neck and arm pain. It transpired that he had nerve damage in his neck which required major surgery on two occasions. He has been left with ongoing neck and arm problems and is unable to work as a result.

16. The plaintiff has had a troubled background: first she was abandoned at a very young age when her parents separated and her mother moved to England. As a result, the plaintiff was brought up by her grandmother and an aunt. Her mother subsequently became badly injured as a result of a parachuting accident and has since returned to Ireland. Secondly, as set out in the evidence given, and as set out in a medical report furnished by Dr. Cryan, the plaintiff was the subject of sexual abuse by a relative, when she was quite young.

17. The plaintiff attended school and did her Leaving Certificate examination in 1993. She was very independent from a young age, this was evidenced by the fact that during school she worked in Penneys shop and in a sweet shop and paid for her own school books.

18. When her daughter was three years old, she did a course in N.C.B.A. in integrated business technology and computer applications. She wanted to better herself and felt that the course would be helpful. It was a full time course, which ran Monday to Friday for two years. During this time, she worked on Friday evenings and on Saturdays in the customer services department in Penneys shop. After that, she took some time off, as she found it very stressful working and looking after her daughter. She was also anxious to spend time with her daughter and give her the love of a mother, which she never had.

19. In relation to the plaintiff's health before the hysterectomy operation, counsel put it to the plaintiff that in a letter dated 1st May, 2001, a Dr. Ward had given the opinion that she was suffering from Chronic Fatigue Syndrome and Irritable Bowel Syndrome. On 28th May, 2001, Dr. Ward had suggested the use of antidepressant medication, but the plaintiff was not sure if she had taken any at that time. On 1st August, 2008, a Dr. McNeill wrote to Dr. Walsh stating that the plaintiff had chronic tiredness. The plaintiff stated that it was her belief that many of her symptoms related to the fact that she had undiagnosed endometriosis for many years. This had been confirmed by post-operative histology investigations which had revealed endometriosis and adenomyosis. A lot of the symptoms which were due to endometriosis were alleviated by the operation in 2010.

20. It was put to the plaintiff that in a letter dated 24th March, 2009 from Dr. McCarty to Dr. Crowley, there was reference to burning pain in the left leg, spasms in her eyelids, shooting pain in her chest and difficulty swallowing. She also had tongue difficulties and a vitamin B12 deficiency. She had also attended with Dr. Darragh Foley Nolan, a rheumatologist. He had seen her on 28th

October, 2009.

21. Prior to the operation in 2010, she became unwell and suffered from back pain, a burning pain in her leg; vomiting and she also became quite thin. She attended with her G.P. at the time, but felt that he was not listening to her, so she changed doctor.

22. Eventually, she came under the care of Dr. Stratton in Waterford University Hospital [hereinafter; W.U.H.], after being referred to him for a scan by a locum G.P. following the result of a blood test known as CA125 which showed an elevated amount of the protein.

23. In 2009, Dr. Stratton performed a laparoscopy. During that year, the plaintiff had been working for The Kingfisher Club. However, she did not get on with the manager and also felt very unwell, so she handed in her notice after a short period. The laparoscopy carried out in W.U.H. showed extensive endometriosis and cysts on one of her ovaries. The plaintiff stated that to an extent she was relieved, that they had eventually found something definite. She discussed treatment options with Dr. Stratton and he recommended a total abdominal hysterectomy. Having thought about it carefully, the plaintiff decided to have the procedure, even though she was still quite young, being only 34 years of age at the time.

24. A doctor rang her on 31st December, 2009, and asked her was she sure that she wanted to go ahead with the operation, as the removal of the ovaries would induce the menopause. The plaintiff stated that she was satisfied to go ahead with the operation. She was put on a long waiting list at W.U.H. She subsequently got a letter telling her that the procedure could be carried out under the National Treatment Purchase Fund [hereinafter; N.T.P.F.]. At that time, she had a lot of burning pain in her legs and she would bleed one day per month. She was referred to Aut Even Hospital.

25. She had a consultation with the first named defendant at the hospital and he scheduled her for surgery. She was admitted to hospital on the day before the operation. The first defendant's secretary had posted out the consent form. The plaintiff signed it and brought it with her to the hospital. In evidence the plaintiff stated that she was anxious to keep one of her ovaries at this time, due to the impact of being forced into the menopause if it was removed. When she raised this with the hospital staff, the nurse told her that she could talk to the first named defendant on the following morning.

26. After the operation, the plaintiff stated she was in severe pain all around her stomach. She was in hospital for one week, being discharged on 11th April, 2010. The operation was done on a Tuesday and on the following Sunday the first named defendant came into the hospital in casual clothes and asked the plaintiff if she felt well enough to go home. Her cousin brought her home later that day.

27. Upon discharge she stayed in her aunt's house, as she felt very unwell. At first she thought she was unwell due to the surgery and that this was to be expected. After enquiring with her G.P. she was advised to take a laxative. She went on to develop cramps and pain in her stomach. This pain became worse and went into her back. Her G.P. advised her to take painkillers and assured her she would be alright. She stated that she felt somewhat of a nuisance to the doctors at that stage. Due to severe stomach pain she went to the Care Doc after hour G.P. service. In the following days, she stated that she felt very cold, even when using an electric blanket and a heater and two duvets and that she was in bed most of the time.

28. On 29th April, 2010, she rang the first named defendant's secretary early in the morning. The plaintiff stated that at this time, she said that she thought she was dying. She was in agony. She was moving about on her hands and knees. She was suffering from diarrhoea and was very cold. Her father drove her to Aut Even Hospital. She saw the first named defendant in the out patient department. The plaintiff stated that at this time the first named defendant said "I hope it is nothing I have done". She was referred to St. Luke's for a C.T. scan. The first scan was brought back to Aut Even Hospital. On 30th April, 2010, she had a second C.T. scan and was unwell. She was brought back to Aut Even Hospital and was told that there was an obstruction of the ureter and that she had hydronephrosis and reflux back into the kidney. She did not see the first named defendant again.

29. She was seen by Dr. Ahmed in Aut Even Hospital where she was detained for a number of days over the weekend. She had a cysotoscopy under general anaesthetic. The plan was to insert a stent into the ureter to see if they could remove the obstruction. On 4th May, 2010, she had a cystoscopy and an ureteroscopy, but they were not able to get the stent up very far, due to the obstruction in the ureter. Dr. Ahmed told her that she had an obstruction but he did not know what it was. At this stage, Mr. Jones was brought in to assist. The plaintiff said that she was terrified when she woke up from this operation. She was still in severe pain.

30. Mr. Jones stated that he would have to do a Boari flap operation. He drew a diagram to explain what he would do during the operation. In effect, he was going to create a new entry point between the ureter and the bladder. He said that he did not know the cause of the obstruction in the ureter. The plaintiff stated that she was very anxious when the operation had been explained to her. On 6th May, 2010, the Boari flap operation was carried out under general anaesthetic, this operation took four and a half hours. Mr. Jones informed the plaintiff that during the operation he had found a number of sutures which had trapped the ureter. As a result her kidney had been blocked off for approximately one month.

31. The plaintiff stated that post operatively she was in the worst pain that she had ever experienced in her life. She told her father that the pain was so bad, she wanted to die. Her husband and her father waited with her in hospital during this time. She stated that she had pain in her stomach and in her back. She told the court she felt that she was "on fire" on the inside and that the pain was intolerable. She fainted due to pain on a number of occasions. The plaintiff told the court she was so ill, the staff made a special high dependency unit for her in the hospital, as the hospital did not have such a unit.

32. Following the operation Mr. Jones came back to see her late at night. She had been given a patient controlled analgesia stick with which to self administer analgesic medication. It later transpired that the pump which the stick operated was broken, and an anaesthetist had to prescribe a new unit. This resulted in the plaintiff in effect not having morphine medication in the first 24 hours postoperatively. She stated that the pain was particularly bad on 6th – 8th May, 2010. The new surgical incision was in the same area as the hysterectomy incision, only wider. She stated that after 8th May, 2010, up to the time she was discharged, the pain was somewhat less, as she had adequate pain medication.

33. She stated she went home, feeling very unwell, with a catheter in situ. A JJ stent had been inserted into the new ureter to keep it open, however, an ultrasound carried out in the hospital, showed that the JJ stent had fallen into her bladder and was floating there. She knew at this time that she had an infection in her bladder and in her kidney, because there was a very bad smell from the colostomy bag, there was residue in the bottom of the bag and she felt a severe stinging sensation.

34. On 26th May, 2010, she returned to Aut Even Hospital, where she had surgery to remove the JJ stent. Following this, she detailed having a large number of renal isotope scans and other similar scans. She had a renogram on 16th May, 2010, following which she was told it revealed she had only 30% function in her left kidney. Prior to that time she had been attending with her G.P., who had

prescribed Ixprim and Paracetamol to alleviate her pain.

35. Things did not improve after the removal of the stent. She re-attended with Mr. Jones and told him that she could feel "snake like" movements in her stomach. He told her that this could have been caused by reflux. At this stage, she was going to the toilet very regularly, as her bladder was overactive. She also had sutures, which caused a problem when urinating.

36. In September 2010, she re-attended with Mr. Jones, who carried out an ultrasound examination. He said that there was going to be reflux as a result of her new ureter not functioning like a natural ureter. She was still getting bladder spasms and snake like movements within her bladder. To treat this she had eight cystostat injections. These injections gave her some relief, but they tended to wear off after some time. This treatment was covered under the N.T.P.F. Mr. Jones advised her that she may need a nephrectomy, or they could try reimplantation. She stated that this second option freaked her out. She stated to him that if they could not do that on the first occasion, why would they be able to do it on a second occasion? He advised that they should leave things as they were and see how she got on. The plaintiff stated she got a number of urinary tract infections at this time and her bladder became inflamed and was susceptible to infection.

37. The plaintiff stated that in 2010, when she had the stent and the Boari flap operation, there had been a drain stitched into her abdomen, which she found very distressing. This was in addition to the catheter. This was taken out in parts over a number of days after the Boari flap operation. She stated that she had been very anxious about that procedure. She was very frightened by medical procedures at that time.

38. In 2011, the plaintiff had left renal angle pain. She was referred back to Mr. Jones. It was found she was not evacuating her bladder fully. An I.V.P. scan taken in February 2011 showed that she had a swollen bladder. A renogram was carried out in March 2011. The plaintiff stated that during that year she had a lot of infections. She had polynephritis, which led to the presence of blood and puss in her urine. It caused her severe pain in her kidney. She was admitted to W.U.H., where she was put on I.V. antibiotics. A renal ultrasound taken in June 2011, showed that she had hydronephrosis. In August of that year she was seen in the Accident and Emergency Department suffering with a U.T.I. At that time, her G.P. recommended that she should get a second opinion. It was also necessary for her to go to another doctor as the N.T.P.F. was closing. She was referred by her G.P. to Mr. O'Malley in the Mater Private Hospital in Dublin. However, he had too many cancer patients on his list, so she was passed back to Mr. Jones at W.U.H. Mr. O'Malley had not given her any treatment. At one stage, she felt so unwell that she drove straight to Aut Even Hospital and insisted on being seen. She stated that she felt somewhat abandoned by the medical profession at that stage. She thought that she had had a breakdown. The hospital administrator told her that the N.T.P.F. had ceased.

39. The plaintiff saw Mr. Jones in September and October 2011. He wrote to Prof. Hegarty, the urologist at W.U.H. Mr. Jones had apparently said to her that the flap could burst at any time; the plaintiff stated she was very worried about this. She stated that her pain was variable, but on occasions she was in a lot of pain. Mr. Jones had done a number of tests and she was waiting to see Prof. Hegarty.

40. The plaintiff stated that by Christmas 2011, she was a broken woman. Her relationship with her husband had suffered. She stated that at this time, she was not able to look at herself in the mirror, as she had gained a lot of weight. She felt totally miserable. She recalled that at Christmas time, although not sure of the year, there had been a party for her brother's engagement, she had been very unwell as she had pyelonephritis. She was so bad that she drove to St. James' Hospital in Dublin and they put her on a drip.

41. Mr. Mills B.L., examining the Tramore Medical Clinic notes, put it to the plaintiff in cross-examination that she had gone on a number of foreign holidays in 2010, including a holiday in Morocco. The plaintiff stated that she had three foreign holidays in 2010 - in June, September and December. The plaintiff stated that in hindsight, it was wrong to have gone on holidays in June 2010, as she had got sick. She was asked if it had been wrong to go in June, why had she gone on holidays again in September of that year. The plaintiff stated that she was mentally and emotionally "off her head". She did not know why she had gone on the holidays. People had seen how bad she was generally and had given her money to go away. She went to Morocco in September and had had to go to hospital when she came home, in relation to cellulitis. She accepted that there was reference in the medical notes to a third holiday in November and to her having a "funny turn" while on holidays, but she did not know to what it referred. It was put to her that if she had been very sick in 2010, it was unlikely that she would have gone on three holidays that year. The plaintiff stated that she just went on those holidays to relax.

42. The plaintiff was asked about holidays in 2011. She stated that her grandmother used to help her out financially whenever she could in relation to holidays. Her grandmother had been on the Winning Streak game show and had won €30,000 many years previously. She was not sure who paid for the 2011 holidays. It was pointed out to her in cross-examination, that in a note dated 6th May, 2011, there was reference to her heading to the Canaries in the morning. In a later note dated 23rd August, 2011, there was reference to her having been "fine on holidays". The plaintiff said that she could not recall that holiday. Additionally the plaintiff stated that on 20th September, 2011, she went on holidays with her aunt and uncle in the Canaries. They had paid for the holiday as they liked having company when they were abroad. She stated that she had gone on this holiday in an attempt to relax.

43. In April 2012, she saw Prof. Hegarty. He explained to the plaintiff that if urine became dirty or infected and remained in the bladder, it could go back up into the kidney causing necrophylitis. He stated that this was having a yoyo effect, where there were repeated infections leading to hospitalisation and the administration of I.V. antibiotics and that this was not good for a person over a protracted period.

44. The plaintiff stated that she could not have sexual relations with her husband at this time, as she was terrified of infection and having to be re-hospitalised as a result of infection. She told the court that she told her husband to go and find someone else. She stated that she would make him shower before having intercourse and she would do likewise after intercourse.

45. The plaintiff stated that her general condition did not improve. Prof. Hegarty advised that she should have her left kidney removed. He told her that she would not be treated in W.U.H., but that he could refer her to Prof. Lynch, an appropriate specialist. The other option available was to have cystostat injections. However, she had had eight of those before. An alternative option was re-implantation. The plaintiff stated that she could not face that operation at all.

46. The plaintiff stated that throughout the rest of 2012 she was very anxious and depressed. She got episodes of acute polynephritis, which was treated by I.V. antibiotics at St. James Hospital, where she was kept in overnight. She stated that on New Years Eve 2011 she felt very fed up of being sick for so long and decided to go out with friends. She stated that in hindsight that was a bad idea, as she fought with her friends and also with her husband and drank a lot of alcohol. She told the court that on that night she ran out of the pub in which she had been socialising and went down to the weir in Kilkenny City, where she stood on the bank and thought about jumping in. She told the court that she thought of her grandmother and she pulled back from jumping in. She

stated that she was very afraid. A friend came down from the pub and brought her back.

47. She had two sessions of counselling, but stated she was not able to connect with the counsellor. She had been referred for counselling by her G.P. She stated that she had no money at that time. She was on disability benefit and was unable to afford the counselling. Her G.P. had suggested psychiatric medication, but she was not keen on that, as her uncle had been detained in a psychiatric hospital and she had memories of visiting him there. She stated that she tried to get over her psychological difficulties on her own.

48. Before she had the operation in 2013, Prof. Lynch ran his own tests which were invasive and unpleasant. When the tests had been completed they agreed that he would perform a nephrectomy.

49. The plaintiff stated that she had been looking forward to the nephrectomy operation, as she had had three years of hell. She stated that at that time, she began to see her kidney as a little person inside her, who would scream when it was taken out. She was telephoned by St. James's Hospital at 22.00 hours on 14th April, 2013. She was told to come up to the hospital straight away. She arrived there at 01.00 hours. She stated that she did not sleep at all that night and was very anxious.

50. On 15th April, 2013, the nephrectomy operation was carried out by Prof. Lynch. The operation itself went well. Post-operatively, her blood pressure was a little low and she stated she was anxious about that. She was given Oxycontin and opiates postoperatively. She stated that that week in St. James's Hospital was somewhat of a blur to her. She had a central line in her neck, which had to be taken out. She was discharged from hospital on 20th April, 2013. Due to the Oxycontin, she had had severe hallucinations while in hospital and also on her way home in the car. She thought that she saw a very large chicken's head in the middle of the road, which had a large hand in its mouth which was coming towards her. When she was at home for a number of days, she decided to reduce the Oxycontin. She described sweating a lot at this time and having to change her bed sheets at least three times per night. She slept in her own room at this time. She had very severe pain and could not lie on her back, but had to use five pillows to prop her up. This was a different type of pain to that which she had experienced before. When the pain got so bad, she rang the Care Doc out of hours service, they recommended that she go to hospital. When seen there, they discovered that her C reactive protein level was very high. A C.T. scan was also carried out in the hospital, however, they were not able to access her notes. She told them that she would not have any further operation, so she was given I.V. antibiotics and pain medication. They informed her that her pain could be due to a bowel perforation, or air trapped inside her.

51. At the time of the nephrectomy operation, they had found the old ureter and had taken it out. However, they left the stump of the ureter in situ, as they were not able to take that out. This was a problem, as the stump could become infected. She was told that during the operation, they found that her left kidney had been very badly damaged, so it was the correct decision to take it out.

52. The plaintiff stated that over the following months, she tried to rehabilitate herself. The number of infections went down and she did not have pylonephritis again. She did have some "phantom pain" in the area of the left kidney. During this time, she tried to lose weight and went to see Dr. Eva, who had appeared on the RTE series "Operation Transformation". She also went to a personal trainer, who devised a rehab programme for her. He tried to strengthen the muscles and ligaments around her knees, as she had had an operation on her left knee in 2015. The personal trainer also recommended boxing training to relieve stress. The plaintiff stated that she tried this, but had to stop it as she was in agony. The plaintiff stated that her mood was quite variable at that time.

53. In relation to sporting activities, the plaintiff stated that she had loved swimming and she had swam in school competitions. She used to swim approximately 70 lengths per day. At present, she was not able to do it, as she feels very conscious of her weight. She does go swimming, when there are not many people in the pool. She also goes into the sauna. She does not go into the Jacuzzi, as she is frightened of picking up an infection to her remaining kidney. At present, she experiences pain predominantly in her right side, she worries that this may be another ureter problem. She stated that she was very frightened, as she only has one kidney. She did accept that her pain and infections decreased after the nephrectomy operation. She stated that most nights she would go to the toilet approximately four to six times per night.

54. The plaintiff estimated that before she became sick, she weighted about 80kg. She stated that her weight went up gradually, but increased a lot after the nephrectomy operation. She now weighs approximately 105kg/ 107kg. After she had had her knee operation in 2015, she had gone on a weight loss programme. She had done a course with a personal trainer in a gym. She had borrowed money to pay for it. She stated that she had always had a big interest in boxing. She had previously become a boxing coach through St. Paul's Boxing Club in 2008/ 2009.

55. The plaintiff had gone to a personal trainer in May/ June 2015. He had put her on a special diet. She found that when she got stressed, she would go back eating a lot.

56. In relation to the plaintiff's previous work history she stated that in 2008, she had worked in insurance sales. This involved field sales work. She had been paid on commission. This was when her husband had been sick and she stated she felt pressure to become the main bread winner. She earned approximately €10,000/ €11,000 per year and the work was somewhat sporadic. They would do competition weeks, when the insurance reps would meet in a hotel and would then work on the ground for one week in different locations.

57. The plaintiff stated that she was a Platinum Sales Manager with The Kingfisher Club in 2009. She signed a contract under which she was going to be paid €26,000 per annum. Her job entailed making calls to existing customers, usually companies, attempting to get them to upgrade their gym membership to include membership of the Platinum Club, which would enable them to have various treatments at the day spa. This was a fulltime job, working Monday to Friday. She accepted that she had only received one payment of €962, in June 2009, which was probably two weeks' net salary of approximately €450 per week. She stated that she was paid weekly into her bank account. She thought that she had worked for The Kingfisher Club for a couple of months, approximately three to four months in 2008 or 2009. She stated that she left of her own accord due to difficulties with her supervisor. She acknowledged that the bank records only showed one payment having been made on 11th June, 2009. She presumed that the company was making all the appropriate returns to the Revenue Commissioners. She had subsequently telephoned the Revenue Commissioners herself, who had told her that they had no records of anything from The Kingfisher Club in respect of her. She was adamant that she had signed a contract for €26,000. She did not know where the contract was. She stated that she has searched all over her house, but had only managed to find the Employee Handbook which she had been given when she started working with the company.

58. In relation to her work history in administrative roles, she worked in an office in South East Tourism, as part of a social welfare scheme, where she dealt with tourists. She had also worked in administration in the De La Salle School, which was part of a Community Employment Work Scheme, as these schemes are for allotted periods of time, they came to a natural end. She stated that at the end of the work period her employers were sorry to see her go.

59. The plaintiff stated that she had not been looking for part-time work since 2013, as it would be unfair to any employer to say that she would be sufficiently well to attend work. She stated that she could be good one day, but bad the next day and would not be in a position to give 100% to the job. She felt that it would be unfair to an employer for her to take on work in those circumstances. She stated that she would be prepared to do retraining, but she did not know in what area she might do the training. She currently receives Disability Allowance and has been in receipt of that since she left The Kingfisher Club.

60. Post-operatively in the year after the nephrectomy, the plaintiff's sleep did not improve; she still had to go to the toilet regularly during the night. In an effort at rehab, she started a small retail business called "Sparkle Closet". She stated she was always very interested in fashion. She had gone to the Social Welfare office and they had told her that she could continue to draw her disability allowance and also work for a number of hours per week, possibly up to 20. It was put to her in cross-examination, that if she earned more than €120 per week, the Social Welfare payment can be reduced. She was adamant that the Social Welfare department knew of the shop business, as she had had a number of meetings with a Mr. Lee Murphy in that office. She stated that she opened a very small shop on The Quay in Waterford, which was open three days per week from 11.00am to 5.00pm. She opened on a Wednesday in the beginning and thereafter on a Thursday, Friday and Saturday. She also had a website and utilised social media to promote the business. She stated that whenever she needed to go to the toilet, she had to ask her customers to leave the shop. Also, due to lack of sleep, she would often not open on time. She stated that the shop was mainly a hobby and a distraction for her. It operated from about January 2014 to June 2015. Thereafter, she continued trading online for a further eighteen months, until November 2016.

61. The plaintiff stated that she did not really make any money from this venture. She enjoyed the work, but could not cope with the pressures of being there and paying bills. In June 2015, she felt that it had got too much for her and that she had to get herself better. She could not manage the shop and she decided overnight that she would not continue, so she informed the landlord and gave it up. She stated that she did not have any accounts for the business, as she could not afford to pay an accountant to prepare the accounts. She stated that if she had not been unwell, she could have succeeded at the business, as she had 18,000 followers on Facebook. She stated that she had also done some charity work in the form of a number of charity fashion shows. She tried her best to get out there into the market, but she could not do it on her own.

62. In relation to the running expenses of the shop the plaintiff stated that her weekly rent was €75/ €80, her ESB bill was circa €180 per month in winter and €90 per month in summer and her car parking fees were €16/ €20 per week. In terms of her stock, she stated that she would purchase a dress for approximately £5 stg and sell it for €15. She would also get some dresses for approximately $35/ $40 which she would sell for €70/ €80. She thought that her profit was circa €100/ €150 per week, from about six months after she had started the shop. She accepted that she did not tell the Social Welfare about these earnings.

63. In terms of the size of the shop, the plaintiff stated that it was approximately 5m long x 4m wide. It had a small display area, a fitting room and a toilet. She stated that she always asked customers to leave the shop if she needed to go to the toilet, as she could not leave them in the shop for fear that they would steal the merchandise while she was in the toilet.

64. Her daughter had given some help in the shop, but she was not very interested in it. She stated that her landlord was very easygoing; she could pay him weekly or monthly. On occasions, her landlord had given out to her if the shop was closed, which might have been due to the fact that she was sick at home. Often, she had to put a notice on the door, stating that she would not be in until 12 noon, or sometime thereafter. Sometimes, she would come in at 11am and take a lunch break from 1pm to 3pm. She stated it was not a traditional shop and could more accurately be considered a collection point for online sales.

65. It was put to her in cross-examination that in 2014 her shop had been nominated as "Best Shop" in the "Irish Times". The plaintiff agreed that such a nomination had been made, but she did not know who had nominated her. It was put to her that in the 508 pages, printed from her Facebook account from September 2014, it was demonstrated that she had put a lot of effort into establishing and running the shop. She stated that she had tried her best. Counsel suggested that the shop had failed, but it was not due to any lack of effort on her part. It was put to her that she had stated in her postings on Facebook that she had been ill in the past tense. The plaintiff agreed, but stated that she said that she had had to close the shop due to health reasons. She had kept on the online business, as she did not want to let go of the business completely. She stated that running the shop had been therapy for her.

66. It was put to the plaintiff, in cross-examination, that on 9th July, 2015, she had posted an announcement on her Facebook page that she was closing the shop and that thereafter it would only operate online. The reasons for the closure were given as her health and the general economic climate. It was put to her in cross-examination that in her evidence in chief, she had not mentioned the second reason for closing the shop, being the economic climate. The plaintiff stated that she was not sure what she had said in her evidence in chief. It was put to her that she had told various doctors that the shop had closed due to health reasons; she had not mentioned the economic climate. The plaintiff accepted that that was correct. She stated that she was ashamed that her shop had had to close down. She was not trying to blame anyone for the closure of the shop, she just could not give it the time and effort that it needed and the footfall was poor. She denied that it was successful as an online business.

67. The plaintiff stated that she felt that she never got over all the operations. She was very tired, but she pushed herself very hard. She was not able to manage the work. She would also get very down when she felt sick and this had had an effect on her mental health.

68. In terms of her future career, she did not know what work she would be capable of doing. She would love to work 2-3 days per week, perhaps doing something in sales. If the job involved driving, she stated that she would need to stop frequently to go to the toilet. In relation to her current capacity for part-time work, she accepted that the vocational assessor had given an opinion that she was capable of such work. She stated that she would love to get back to work, but she was not sure if she was ready for it mentally, as she was anxious that she could not cope because she would need to go to the toilet frequently. She felt that employers would not understand her difficulties in that regard. She also felt that her current level of knowledge was lacking. She felt behind the curve and not up to date. She stated that she could not see herself working as a nurse or a paramedic. Overall she was not confident about the future.

69. In 2012 in her personal injury summons, she had said that she was claiming loss of earnings. She stated that her job was to sell insurance. She could not recall if she had mentioned The Kingfisher Club in those pleadings. She could not explain why she had not mentioned The Kingfisher Club until October 2016. It was put to her that she was claiming €120,000 for past loss of earnings based on her earnings from The Kingfisher Club. The plaintiff stated that she did not know about that claim. It was put to her that she knew that she had not earned €26,000 from Kingfisher. The plaintiff accepted that that was correct, but stated that she did have a contract for €26,000 per annum with them. The plaintiff was asked, why it was not made clear that she was not pursuing a claim for €26,000 per year. The plaintiff stated that she did not know why that had not been made clear; she was relying on the advice of her legal advisers.

70. The plaintiff stated that her mood improved after the nephrectomy operation, but the tiredness remained, as she had to get up frequently at night to go to the toilet. She was very tired in the mornings. She stated that her relationship with her husband improved a long time after the operation, but she remained very conscious of her increased weight and the scarring to her abdomen. She felt somewhat embarrassed about her body. She stated that sometimes when she goes to the toilet, she tends to spray urine and can soil her clothes.

71. She had done some counselling when her grandmother died in April 2015. She was feeling very low at that time. She felt guilty that she had not been able to help her grandmother in her final years, as she too sick herself at that time. She stated that she cried for her grandmother and for the time that she missed being with her and for the loss of her kidney. She had sat with her grandmother whenever she could. She felt very guilty that she had not been able to do more for her, after all that she had done for her. At the time of her grandmother's death she stated, she spiralled out of control, she went to her grave and cried. At that time, she went to St. John's College, where she had counselling for 18 months. However, the counselling stopped because the counsellor had to have an operation to her knee. The plaintiff had resumed counselling recently, but as the counsellor was getting married and going on a holiday, she would not be able to see her until June 2017. She was being given the counselling at a reduced charge of €35 per hour for Cognitive Behavioural Therapy [hereinafter; C.B.T]. She stated that she had not found it that beneficial, but she would keep attending.

72. She had taken Amitriptyline for sleep and also for her bladder, but one of its side effects is that it makes you thirsty so she would drink more, which would cause her to go to the toilet more frequently. She only took this medication for a week or two.

73. In 2015, Mr. Jones had reviewed her condition and found that her remaining kidney was in good condition, but found residue of 90/100ml in her bladder. This was causing her to feel the need to urinate all the time. She recalled that when in St. James's Hospital, a cystogram had been carried out. She had been awake for this procedure and found it very distressing. She had had a row with her husband, accordingly, she had gone to the hospital on her own. She stated that she felt very alone at that time. Unfortunately, the cystoscope had been broken and it was necessary to put in another one. The doctor told her that she had an inflamed bladder which was causing the problems. He put her on medication, but she did not find this helpful. Dr. Miller had given her the option of having Botox injections, but there was a 30% risk of side effects with such treatment and she was not prepared to take that risk. She stated that she was currently awaiting a gynaecological operation due to pain on her right side.

74. The plaintiff had seen a urologist in St. James's Hospital in October/ November 2015, so she still had urinary problems at that time. She stated that she had always tried to push herself forward. She was very tired from being up at night going to the toilet. She stated that behind her smiling outward façade, she was dying on the inside.

75. In January 2017, she had gone to see Dr. Miller, who had done tests in London. She went to the clinic where they did blood tests, an ultrasound of her kidneys, ureter and bladder and had taken X-rays. She was not able to recall much about the tests. She could remember meeting Dr. Cleaverly. She stated that during this meeting, she was asked to drink water, she had removed her clothing and was wearing a gown and they then did an ultrasound. She was then asked to use a toilet, which had a special system to catch the urine. She stated that the kidney, ureter and bowel ultrasound was like a normal X-ray. Dr. Miller recommended stretching of the urethra to deal with the spraying of urine. She confirmed that she had only had one U.T.I. in the last year.

76. The plaintiff was asked about the pre-operative period. She went to the Tramore Medical Practice who had referred her to Dr. Tuthill, at her request, whom she saw in February 2010. It was noted that in a letter sent by Dr. Tuthill to her G.P. on 26th February, 2010, in the medical history section, she had stated that the plaintiff suffered from "recurrent U.T.Is.". The plaintiff accepted that that was what she had told Dr. Tuthill.

77. There were two pre-operative entries in the notes from The Tramore Medical Clinic dated the 9th February, 2010 and 15th March, 2010, both of which referred to U.T.Is.. It was put to the plaintiff that she had had a long history of recurrent U.T.Is.. The plaintiff stated that her G.P. thought that the number of U.T.Is. was normal, but she had told Dr. Tuthill that she had had them. She was worried about a number of complaints at that time. She was asked, whether she had told any doctor about investigations in 2009 about trembling or twitching. The plaintiff stated that she had not disclosed these, because she had been diagnosed with endometriosis and those tests had been negative. Dr. Tuthill noted that she had been doing minimal exercise in 2010. She said that she had gained weight over the previous 18 months.

78. The plaintiff was asked as to whether she had told the doctors that she was attending Dr. Foley Nolan, a rheumatologist, in relation to a possible connective tissue disease. She stated that she did not think that she had told the doctors about that. She said that she possibly had not told the doctors about recurrent U.T.Is.. She may not have told them about the trembling problem, as it had settled. She stated that all of that had happened a long time ago. It was put to her that she remembered things that suited her. The plaintiff stated that certain things stood out in her memory and other things did not.

79. It was put to the plaintiff that it was evident from the medical notes supplied by the Rowe/ Creavin Medical Practice, that she had a significant preoperative history of U.T.Is. prior to 2010. It was put to her that the records also indicated that she had told Dr. Ward in 2000 or 2001 that she had given up jobs to alleviate stressors in her life. The plaintiff accepted that she probably had said that. It was put to her that there was a history of her having trouble staying in jobs for protracted periods, such as the jobs in Canada Life, Combined Insurances and The Kingfisher Club, in each of which she had only remained a number of months. The plaintiff agreed that that was so, but stated that she had her daughter to raise at that time.

80. Since the hysterectomy operation, the plaintiff stated that she has experienced a loss of sensation in the top of her left leg. She stated that the leg feels dead, but if it is touched by anything, this causes a painful sensation. The affected area is from the thigh to the knee. She had been told that the sensation in her leg would probably come back. This came on circa 2010 two to three months after the Boari flap operation and had remained the same since. Dr. McNamara, neurophysiologist, had done tests on her legs and had came to the conclusion that these were not due to nerve problems. There were question marks about M.E. because she was very tired. She was not treated for M.E. after the operation in 2010.

81. In relation to psychiatric referral, it was noted that on 20th January, 2012, Dr. Byrne had made a reference to Dr. O'Sullivan, a psychiatrist, but with the very long waiting list, she was not able to be seen by him.

82. It was pointed out that in a note dated 19th June, 2012, it stated "suggests psychiatric – wishes to source self". The plaintiff stated that she had attended a counsellor in St. John's. She was trying to get a counsellor through the H.S.E.; however, the waiting list was very long. She had not gone to the psychologist, as they were very expensive circa €80/ €100 per session. She accepted that her family had given her money for holidays. She did not use that money for counselling. She stated that she had been ashamed to talk to her family about mental health issues. She felt ashamed about all the medical complaints and the treatment which she had

had.

83. In relation to the plaintiff's physical health in 2012, counsel for the defendants put to the plaintiff a reference to her using a cross-trainer, as mentioned in the notes of 15th August, 2012. The plaintiff stated that she could not explain that note, as she had never been on one. She had done a little skipping in the garden. She could not explain any reference to a treadmill.

84. In 2012, she had applied to do a nursing studies course. However, before the nephrectomy operation, she had been very unwell. She felt that she could not manage the course and she also felt guilty that she was taking up a place on the course. It was a fulltime course in Parnell Street in Waterford. She felt that she could not manage it, when she was up at night so often, going to the toilet. When it was indicated that she needed the nephrectomy operation, she knew that she would not be able to manage it, so she did not go on the course. She felt that every time she tried something, she would be knocked down again.

85. Counsel noted that in a note dated 23rd December, 2013, it stated "recently opened shop – generally well". He suggested that that accurately represented the picture by 2013; she was going on holidays, she was refusing antidepressant medication and was setting up a shop, so while she was not fully better, she had made significant improvement, she was generally well. By 2015, had entered a dancing competition and in 2016 she was doing a promotional video doing a boxing exercise. The plaintiff stated that she always tried to push herself.

86. It was put to the plaintiff that in June 2014, there was a note from St. James Hospital which read "considerably better except for very minor issues". The plaintiff accepted that she had improved since removal of her kidney in 2013. It was put to her that a urodynamics report dated 29th September, 2014 stated "frequency 3 - 4 hourly", which would indicate that she went to the toilet 6 - 8 times per day. Based on that note, it would appear that she had improved considerably by September 2014. The plaintiff accepted that that was what was written in the notes. She accepted that she had told that doctor that her symptoms had improved. Subsequent to that, she had had a cystoscopy and she was not sure if that procedure had irritated her bladder. The tests were very invasive and uncomfortable. She did not think that her condition had changed radically. It was put to the plaintiff that either the note in the records was wrong, or it represented the medical picture at that time, which showed that her condition had been bad, but that it had improved by the time of that note. The plaintiff stated that she was not sure that the note was correct.

87. It was put to her that she had been attending St. James's Hospital in January/ February 2015, and that in a note dated 26th February, 2015, it had stated "very happy at present. Very happy LUT symptoms". Counsel stated that that was an accurate portrayal of her position at that time. The plaintiff stated that the note must be correct if it had been written in the hospital records.

88. Counsel pointed out that in a note on 27th November, 2015, an ultrasound had been carried out and advice was given regarding bladder training and fluid consumption. In a note dated 22nd August, 2016, there was reference to frequency greater than 10 times per day and accompanied by urgency. The doctor had discussed a reduction in caffeine intake. The plaintiff stated that she had decreased her consumption of tea and tried to drink water instead. However, she stated that she was on H.R.T. and that she had been advised to drink two litres per day to prevent her having a stroke. So, she was getting contradictory advice in relation to fluid intake. She stated that the first defendant had told her to keep herself hydrated. She stated that she tries to watch what she drinks. If she has an infection, she had been advised that she should flush it out.

89. In terms of her present condition, she stated that her main difficulties were urinary problems and anxiety about having frequency and urgency and also tiredness from being up at night. In relation to medication at present, she is on H.R.T. medication, Ixprim, Ponstan and sleeping tablets, as required. She stated that she was nervous taking medication as she only has one kidney. In October 2016, she was put on a trial of Amitriptyline, but this was not successful. It tended to make her mouth dry and she was thirsty, but if she drank liquid, she would go to the toilet. The plaintiff accepted that she had been offered antidepressant medication. She had taken some medication in the form of Lexapro in 2016. She thought that she had also taken some other antidepressant medication. She takes them as she needs them, in particular Diazepam for anxiety. Sometimes she would take sleeping tablets.

90. The plaintiff was asked whether her urinary frequency symptoms varied from time to time. She stated that they did, from day to day, but stated that she gets very anxious when she wants to go to the toilet. She goes when her bladder feels full. The urgency symptoms do not vary or improve. In terms of her urinary frequency, she goes to the toilet 10 - 14 times per day. This has not significantly improved since 2010.

91. The plaintiff accepted that she had not taken any anti-collorinergeric medication. She was currently having C.B.T. which had started in St. John's in 2015. She had been recommended to have C.B.T.. She had found a woman in the Horizon Clinic who would give such treatment for €35 per hour; she is on holidays at the present time. Dr. Nolan had written to a psychiatrist to see her, but the waiting list was very long. She could not attend a psychiatrist before she attended one for the purpose of these proceedings, but she had seen counsellors.

92. The plaintiff in evidence discussed additional health difficulties unrelated to this claim. The plaintiff has had surgery to her left knee for a medial meniscus tear, but accepted that this was not connected to her claim. Additionally, the plaintiff developed Carpal Tunnel Syndrome circa 18 months ago, for which she has had an operation on her left wrist.

The Medical Evidence

The Evidence of Mr. Rodger Clements.

93. Mr. Clements, consultant obstetrician and gynaecologist, met with the plaintiff and carried out an examination in July 2016. He took a full history from her, including details about her time on a public hospital waiting list waiting for the hysterectomy procedure. He stated that he did not believe the plaintiff should have been on the public waiting list at all and should have been treated promptly by Dr. Strattan in Waterford in a triage service, because of the severity of her endometriosis. He stated that a big district hospital is the preferable place to treat an endometriosis patient, as this condition makes pelvic surgery complicated.

94. Mr. Clements described endometriosis as a condition in which the endometrium, the lining of the womb, splits from the womb and grows in other areas of the pelvis where it should not. He stated that the mechanism by which this happens is somewhat debatable. He described endometriosis as a condition where parts of the endometrial tissue, instead of being expelled from the body during menstruation travel backwards along the fallopian tubes. This leads to a spillage of endromentrial tissue into the pelvis. He described how these "showers" of endometrial tissue may affect the ovaries, the area behind the uterus, the cecum or the sigmoid colon. Some of this tissue will implant, as it is very aggressive. These small groups of endrometrial tissue menstruate and will shed again because the oestrogen and progesterone, which are the growth hormones for this tissue, are cut off at the end of the menstrual cycle, causing these deposits of endrometruial tissue to grow. He stated that these growths stick to everything, as the blood congeals. Endometriosis is a progressive condition, that usually gets worse as menstruation continues, although in some patients it does not

progress. He stated that at menopause the condition improves as there is no longer oestrogen and progesterone to support the growth and there is no longer menstruation so the tissue growth stops. Endometriosis may cause very serious interference in the lives of patients, causing pain and their bowel and bladder may be affected by it. He stated that the back pain suffered by the plaintiff before her diagnosis, was likely referred pain from the tissue in the area behind the uterus being affected.

95. Mr. Clements stated that endometriosis would be a difficult condition for a G.P. to diagnose, but it should not be for a gynaecologist following a digital examination.

96. He stated that an alternative treatment of the condition was the creation of a menopause medically induced by prescribed medication. This must be done for an extended period of time to be effective and would not be a good option for a young woman, such as the plaintiff. It would normally be used in a woman nearing the menopause to bring it forward by 2 or 3 years. The removal of the ovaries resolves the problem. A total hysterectomy is only needed where the endometrial tissue is affecting the muscle of the uterus, a condition called adenomyosis. As the plaintiff was in severe pain at the time, it was likely she was suffering from this condition.

97. He outlined the importance of the removal of both ovaries to get rid of endometriosis. He stated that at the current time she would not have any endometriosis left, but that there would be many adhesions, where it had left scarring and tissue damage, making any future pelvic surgery more difficult.

98. He stated that if the hysterectomy was carried out without the damage being done to her urinary tract, he would have expected, for her, the same recovery time as for any other woman having this operation, of approximately 6 weeks. The only side effect she would have suffered as a result of the operation, would have been a sudden menopause, which would require "careful handling" but the physical issues would have been resolved after 6 weeks.

99. In evidence Dr. Clements set out that he had limited expertise in operating on bladders. He stated that he does not go above the bladder, or treat damage to the bladder. He stated that the bladder and uterus are very close to each other, and by necessity of its location, he occasionally has to operate on the bladder. He stated that once a bladder is disturbed, issues develop with the bladder.

100. Mr. Clements stated that the plaintiff currently suffers from not fully emptying her bladder. This has resulted in an issue with frequency, as the bladder is not emptying fully. This incomplete empting of the bladder increased her risk of urinary tract infections, as urine is not sterile.

101. He stated that the menopause does not have any particular effect on weight gain. During the menopause many women have non-physical symptoms that may have an effect on weight. These issues include anxiety, a change of role and changes in sexuality. He suggested that these issues may lead to comfort eating and weight gain as a result.

102. In cross-examination, Mr. Clements stated that he did not remember her telling him anything about a past history of urinary tract infections before the hysterectomy, or that she was considered for urodynamics. In relation to her past history of urinary tract infections, he stated that 2 or 3 urinary tract infections over a period of 2 or 3 years is not uncommon, as the bladder is vulnerable because it is very close to the vagina and the uterus. In re-examination, Mr. Clements agreed that some people are more prone to urinary tract infections that others and there is no simple explanation for this.

103. In cross-examination, when it was put to Mr. Clements that the urodynamic study carried out in 2014 showed there was no post void residue, he stated that if she was completely empting her bladder post void, then her risk of urinary tract infections was significantly decreased. Mr. Mills B.L. conceded that the results of a ureterogram carried out in 2017, showed urinary retention of 92mls in one and 150 mls in another.

The Evidence of Dr. Ronald Miller.

104. Evidence was given by Dr. Ronald Miller, consultant urologist, who had furnished two reports, dated the 4th January, 2017 and the 10th January, 2017. He noted in evidence that on 14th October, 2009, the plaintiff was admitted to W.U.H., where a diagnostic laparoscopy was carried out. This revealed that the plaintiff had extensive endometriosis and two cysts on her ovaries. The surgeon did not remove the cysts at that time, but he did drain them. Following this, the surgeon wrote to the plaintiff's G.P. setting out her treatment options. He stated that the plaintiff elected to have a total abdominal hysterectomy and a bilateral salpino oophorectomy. The plaintiff was on a waiting list for the surgery. The operation took one hour and 45 minutes, as noted in the anaesthetic chart. That was the normal length of such an operation. The note stated that the first named defendant inserted sutures and a drain.

105. Dr. Miller stated that the plaintiff should have had some pain after the operation, but her ongoing pain was not normal. He stated that she should have been asked was there any drain pain, or back pain, and if there was, that would have been an indication of a problem with the urological system.

106. On 29th April, 2010, the plaintiff contacted the first named defendant and complained of severe cramping and abdominal pain. It would be necessary to do a C.T. scan to find the cause of this pain. Dr. Miller noted that blood from the urethra, indicates something going on in the urinary tract. He said that he would have been concerned because the plaintiff had a distended abdomen and pain when passing urine. He thought she was having a large amount of pain at that time. He would have been worried that there was some infection in the pelvis.

107. Dr. Miller stated that a C.T. scan revealed a moderately large left sided hyrdonephrosis. The collecting of water expanded and could have expanded the urethra. The scan could show an obstruction at the dilated end of the urethra. Dr. Miller thought that it could have been at the S1 level. The first named defendant and Dr. Ahmed decided to commence the plaintiff on antibiotics and put in a double JJ stent. The plaintiff was in a lot of pain at that time.

108. On 4th May, 2010, the operative procedure was carried out. Dr. Miller thought that the defendants took a fairly relaxed approach to the matter. He thought that she should have been brought to theatre sooner, once it was known that the kidney was obstructed, as if the kidney became infected this could have been life threatening. The plaintiff would be feeling very unwell because she had an obstructed kidney.

109. Dr. Miller stated that the operation note recorded that the guide wire became stuck. The doctor used a ureterescope to ascertain the obstruction, it revealed a complete obstruction 8cm from the uretic orifice. It was at the top of the lower third of the ureter.

110. They spoke to Mr. Jones about the possibility of re-implantation. A retrograde pylogram was carried out, which involves putting

radioactive dye up the ureter to see if the obstruction is complete. Mr. Jones was of the opinion that while they might have done a less invasive procedure, there was a high failure rate, so the doctor had opted for re-implantation. Dr. Miller agreed with that decision. He stated that the plaintiff would have been in a lot of pain at that time. He also stated, based on his consultation with the plaintiff, that she was very frightened about the blocked kidney, as she was quite an anxious person, who had a major complication requiring further surgery.

111. Dr. Miller stated that a laparotomy involves looking into the stomach. He stated that Mr. Jones did a phanensteil incision Dr. Miller stated that he would have done a midline incision. It was his opinion that the operation is much more difficult if one opts for the lower incision. He stated that Mr. Jones did very well to do the operation through that incision. This involved a left ureteric re-implantation.

112. At that operation, Mr. Jones found a lot of sutures in the ureter so he decided to re-implant the ureter using the Boari flap. That procedure involved partially cutting the top of the bladder, by means of an incision on three sides. The piece of tissue is then lifted up and formed into the shape of a tube. The ureter is then inserted into this portion of the flap. Dr. Miller stated that this portion does not have any muscle, or any valve, so urine can go down into the bladder, and also back up into the kidney. He stated that as a result of the lack of natural functioning, if the urine is infected this will cause infection of the kidney. Dr. Miller stated that it was a very difficult operation, which was done very well.

113. The next step was to carry out a cystogram and if it showed that everything was ok, they could pull out the double JJ stent. He stated that at that time, the plaintiff had the JJ stent and catheter in situ, which was very uncomfortable and causes patients to feel very insecure. A cystogram involves inserting a contrast material into the catheter, which allows you to see the bladder and ureter. If no leak was shown, one could remove the catheter. On 29th May, 2010, the double JJ stent was removed. An ultrasound carried out was negative, showing that everything seemed reasonably well at that time and an ultrasound of the kidneys was normal. A renogram measures kidney function. It should normally read 50/ 50 on left and right. In this case the renogram showed the left kidney only had 30% function. After the stent and the catheter had been removed, by 29th May, 2010, the plaintiff no longer had any instrumentation inside her.

114. On 8th June, 2010, the plaintiff's G.P. noted that the plaintiff was angry and complaining of an increase in urinary frequency. Dr. Miller stated that that was to be expected due to the Boari flap, which could cause an increase in frequency for six to eight months. There had been a lot of surgical work on the bladder, creating the flap and closing the other hole, which could have longer term problems. He stated he would usually expect an increase in urination for about three months and thereafter regain normal function.

115. Dr. Miller noted that on 3rd September, 2010, Dr. Jones wrote to the plaintiff's G.P. indicating that she had a U.T.I., loin pain and urinary frequency. She had had inflammation and reflux. He stated that infected reflux can give a patient pain and pyelonephritis. The plaintiff had been prescribed Kentera patches. Dr. Miller stated that this was a slow release anticholinergic treatment, which "dampens down" bladder contractions and therefore reduces frequency.

116. Dr. Miller stated that a test was carried out on the 30th September, 2010 where an I.V.P. injection was given into the arm. He stated that following this, one can see contrast in the kidney, going down the ureter into the bladder and see how much is subsequently passed in urine. He stated that the I.V.P. suggested anestomosia, showed narrowing at the Boari flap and dilation of the kidney. Dr. Miller stated that this was difficult to interpret and that there could be a number of different reasons for dilation. He stated that Mr. Jones did the right thing as a 4mm charier scope, which he stated is a wide scope as the ureter is only 5mm wide, revealed no obstruction. He stated that the possibilities were that there was either a reflux of urine from the bladder into the kidney, or the Boari flap was not working.

117. Dr. Miller noted that the plaintiff's G.P. wrote to Mr. Jones on the 11th February, 2011 and asked him to again exclude the obstruction and consider giving a prophylactic antibiotic. In the meantime, the plaintiff had had a lot of pain.

118. On the 24th February, 2011 an I.V.P. test revealed that the plaintiff had a dilated upper tract. Dr. Miller noted that Mr. Jones was of the opinion that this was probably caused by prolonged obstruction for 4 – 5 weeks prior to intervention.

119. A renogram taken on 8th November, 2011, showed that kidney function was 33% on the left and 66% on the right, which was largely the same as previously. Dr. Miller noted that the plaintiff was given an injection of Lasix, a diuretic; this did not wash out as expected.

120. Dr. Miller noted that on the 11th March, 2011 the plaintiff was suffering from a U.T.I.. It was important that this was controlled, because as the plaintiff suffered from reflux, this could damage the kidney. At this time Mr. Jones put her on Macrodontin, which was an antibiotic, which had a side effect of possible damage to the lungs. He thought that this was an appropriate drug to prescribe at that time. Dr. Miller stated that there was reference to "cystitat bladder installations" in the notes, which would flush antibiotic into the bladder, but was somewhat controversial as the catheter could cause infection. He stated that this showed that Mr. Jones was trying all available treatments.

121. It was stated in the clinical notes that an ultrasound taken on 27th June, 2011 showed increased dilation, suggesting the obstruction was getting worse. Dr. Miller stated that this was probably caused by the narrowing of the Boari flap and the reflux. It was a serious situation as it was going into the kidney.

122. It was stated in the notes that on the 7th July, 2011, the plaintiff had been seen by Dr. O'Malley, Dr. Miller thought that he was a very competent doctor. By this time, the plaintiff had got to a critical stage, where the kidney was operating at 30% and had a large number of symptoms. The options were to replumb the system, which was a massive operation, or take out the kidney. He also noted that the inactive ureter could cause infection.

123. On the 11th October, 2011 when Mr. Jones inserted a catheter, he found the urethra was minimally dilated, so he stretched the urethra. It was sensible to dilate the urethra to try to address the issue of post void residue.

124. By this time the plaintiff had had a lot of invasive treatment and she was worried that she would never get better. Dr. Miller noted that these interventions had an effect on the plaintiff, as she had been through a lot of treatment and the situation was not improving. She was put on antidepressant medication, he thought that this was probably for a reactive depression.

125. Dr. Miller noted that on 21st April, 2012, the plaintiff was referred to Dr. Hegarty and he directed a micturating cystogram be carried out. This procedure involved the bladder being filled with contrast and the plaintiff being asked to pass urine while screening, this allows the doctor to see if urine was going back up from the bladder.

126. On 9th July, 2012, Mr. Jones wrote to the plaintiff's G.P. stating that the plaintiff had pyelonephritis. That infection had spread from the ureter to the kidney. That was a serious condition. It could cause a lot of pain and damage the kidney. It was noted in the clinical notes that at this time renal function remained the same at 30% on the left side. Mr. Jones still favoured reconstruction at that time. Dr. Miller stated that this was a difficult question, as the plaintiff had a working kidney so a doctor should try not to remove it. He stated that at 30% if one did a reconstruction, you would probably get 25% function. However this was a very difficult procedure. An additional consideration was that the plaintiff here was prone to U.T.Is. and that after the operation one would almost certainly get reflux, potentially leading to further U.T.Is.. He noted that all that the plaintiff had been through would have to be considered and that reconstruction surgery had a failure rate of 50% or more. He stated that a potential option was try and do something to reconstruct the whole anastomosis. Dr. Miller stated that another a potential option was to autotransplant the kidney and attach it straight onto the bladder. He stated that this was a very rare operation. Alternatively, one could put the ureter from the right to the left kidney, but this would create a risk of loosing both kidneys. Alternatively, one could do balloon dilation, but this would have to be done a number of times. Another option was to put in a Memokath, which is a steel spiral, like a stent, but it has the problem that it is invariably associated with infection. It is something used in cases of malignant disease. It was not suitable in this situation.

127. Dr. Miller stated that given the plaintiff's age and what she had been through, she needed a definitive operation. The decision to perform the nephrectomy was mandated by the circumstances.

128. Dr. Miller noted that on 6th September, 2012 the plaintiff had a consultation with Dr. Hegarty for the purpose of a second opinion. Dr. Miller noted that multiple procedures could be attempted, but the plaintiff would probably have required a nephrectomy anyway. Considering this Dr. Miller thought it was reasonable to do a nephrectomy given the plaintiff's medical history and the effect of the infections she had had and treatment on her, as she was nearly suicidal at this time

129. Dr. Hegarty referred the plaintiff to Prof. Lynch. Dr. Miller stated the reason for the delay in operating at this time was due to the 30% renal function in the left kidney. One would not usually remove a kidney with that level of function. He stated that in this situation the plaintiff had multiple U.T.I's. and reflux. It was Dr. Miller's opinion that a clinical decision was taken after a number of options were suggested to the plaintiff by Mr. Jones, some of which had a high failure rate. He stated that in the circumstances it was reasonable for the plaintiff to opt for a nephrectomy. Dr. Miller thought that it was entirely reasonable to do a nephrectomy based on the entirety of the case and not just having regard to renal function.

130. Dr. Miller stated that on the 15th April, 2013 the nephrectomy, which was a very complex operation, was carried out very skilfully. The histopathology results supported the decision to do the nephrectomy. He thought that if they had re-implanted, or retained the left kidney, this would almost certainly have caused problems in the form of ongoing infection, inflammation and pain, which would ultimately have led to the necessity to have a nephrectomy.

131. Dr. Miller stated that he did a number of tests on the plaintiff when he examined her in London in January 2017. The x-rays and scans were reported upon by a specialist radiologist with a special interest in urology. At the time of the examination the plaintiff appeared constipated. He stated that this was common when one was taking analgesics. He stated that an ultrasound can detect minor abnormalities in the kidneys and bladder. They also did an examination of the urinary tract and of the plaintiff's flow rate. The ultrasound of the kidney showed it to be 14cm, which was within normal range. It appeared well and there was no evidence of obstruction. Her capacity was 512ml, which was normal, but it had a post void residue of 92ml, which was far in excess of normal, which was 10-20ml. The plaintiff's flow rate was measured. If there was an obstruction in the urethra, you would expect the flow rate to be slow; the readings were 31.2ml/ sec average 20.7. He stated anything above 15ml/ sec was normal, so it was evident the urethra was not obstructed.

132. He stated that the cause of plaintiff's post void residue was not known; as there was no obstruction. He believed it might have been due to some bladder malfunction. It could have been due to damage to the bladder, caused by the operations and scar tissue, together with some nerve damage. In relation to the plaintiff's bladder capacity, Dr. Miller stated that if she had post void residue of 100ml in the bladder and her total capacity was 500ml, you have been left with a 400ml capacity. He stated that in this situation, one would need to go to the toilet at 300ml. The 100ml residue will result in a person needing to go to the toilet more often. He stated that the level of frequency would be increased if there was inflammation.

133. A urodynamics test was carried out, this involved a catheter being placed into the bladder which had a pressure gauge, this allowed one to see how well the bladder muscles were working. He stated that this test was important, as if nerves were damaged, they may not work well and various things could happen as a result of nerves being damaged. These included having a bladder which did not contract terribly well. Alternatively you may have a bladder where the nerve endings of the bladder become hypersensitised and they give rise to involuntary contractions. This is called an unstable bladder. Dr. Miller stated that the plaintiff described how she knows she has emptied her bladder, but then suddenly needs to go the toilet. He thought that her bladder volume would reach a certain stage, which would spark bladder instability in the form of an irresistible need to void her bladder. This was consistent with the plaintiff's description of being nervous about going out, due to the urge to use the toilet.

134. He noted that medication can be used to alleviate an unstable bladder. Having spoken with the plaintiff, he noted that she has the problem of frequency both day and night. He ascribed this problem to the bladder filling very quickly leading to a full bladder. Dr. Miller stated that this was probably caused by unstable contractions. Howevwe at the time of his examination, the plaintiff was not incontinent.

135. Dr. Miller stated that if creatine levels were raised in a normal patient, this meant that they had lost 50% of their renal function. The plaintiff had a creatine level of 101, the normal level was 92.

136. Dr. Miller stated that the plaintiff was at a disadvantage, as her renal reserve had gone. He stated that the remaining kidney could be affected by infection, scar tissue, stones, high blood pressure and diabetes. The plaintiff does not have her renal reserve, but he did not think she would loose renal function. She needed to be monitored by a urologist, who would carry out an ultrasound, x-rays and renal function tests, as well as tests for infection and he should check for diabetes and stones. This should be done annually. He believed she has sufficient renal function for the rest of her life.

137. In discussing the issue of frequency of urination Dr. Miller stated that before the index operation the plaintiff had a normal level of frequency of 5 - 6 times per day. He stated that as people get older they tend to urinate more at night because they produce more urine. He stated that after the index operation, she had an increase in frequency to 10 - 15 times per day and 4 - 5 times per night. That was quite abnormal. He highlighted that if a person was anxious, this could cause an increase in frequency during the day. The increased frequency at night, was probably due to physical abnormality. In relation to U.T.I's. he stated that the plaintiff had some infections before the index event, but they were not particularly severe. He highlighted that she has had some since the event,

but these were at a normal rate.

138. Dr. Miller stated that the plaintiff indicated to him that sometimes she had to wait to start the flow of urine and she had to strain to get urine flowing. She also complained of urgency and the onset of pain. He stated that this indicated unstable contractions. Her symptoms were consistent with an insult to the bladder. He stated that normally after a total abdominal hysterectomy, bladder symptoms may last for three months and after a Boari flap procedure, symptoms could last for six months. So these ongoing symptoms indicated that there had been damage to the ureter.

139. The plaintiff's post void residue indicated that her bladder was not working properly and that she only uses part of her potential capacity in her bladder. He also stated that it was acknowledged that she was susceptible to multiple infections and as her bladder had been operated on, she was more prone to infection. He stated that there was evidence of bladder instability and a risk of stone formation. He discussed the dangers of extensive U.T.I's. potentially leading to septicaemia, with the infection potentially leaving the urinary tract and going into the bloodstream, he stated this was potentially a very serious condition.

140. A letter from Prof. Lynch to Dr. Byrne dated 24th September, 2015, indicated that he was concerned about the plaintiff suffering from U.T.I's., as he had ordered ultrasound and a flexible cystoscopy to investigate this. These tests were detailed in a report from Tallaght hospital dated 22nd February, 2016. Dr. Miller stated that urodynamics involved putting a catheter with a pressure transducer in the bladder and another pressure transducer in the rectum. To get the actual bladder pressure, you must subtract the abdominal pressure from the pressure reading in the bladder, to get the detrusor pressure, which is the muscle of the bladder. The results of these tests displayed that the plaintiff had good bladder capacity. The capacity of the bladder was 600mls. The bladder had been stable during filling, with no unstable contractions.

141. Dr. Miller stated that scar tissue makes the bladder more rigid and can also affect functioning of the detrusor muscle. He stated that normal post-bladder disturbance is 3/ 6 months, but can last longer and can be variable over time. He highlighted that urodynamics only gives a snapshot on the day of testing and that there will be variations over time.

142. In assessing the plaintiff's current condition Dr. Miller summarised that she has had very major surgery, she has an affected bladder and disruption of the detrusor muscle. He highlighted that the plaintiff has a tendency to U.T.Is. and these may cause polynephritis, which can be serious. She has complaints of frequency and urgency. She does not have the normal sensation of her bladder filling, instead she gets a sudden sensation that she needs to go to the toilet right away, or will be incontinent and this affects her ordinary life.

143. Dr. Miller accepted that she has frequency and urgency. He stated that she has one kidney, has a bladder which has had a major insult, has fibrosis and that she has been left with pain in her side where the kidney was.

144. In relation to sexual function, she complains that when she has sex she tends to get U.T.Is. After sex, bacteria can get into the bladder and she may have a deficiency in her immune system in the bladder leading to U.T.I's.

145. Dr. Miller stated that the plaintiff suffers from pain when her bladder is full. She also suffers from bladder spasms. He stated that these spasms were probably unstable contractions. He was not surprised that she has supra-pubic pain.

146. He stated that she also has left sided pain in the area of the sub-costal nerve. This could have been affected by the nephrectomy operation, which can cause the emergence of a pain syndrome. She highlighted to him that her pain can be variable or constant, can cause numbness, can be from the back and extend around to the front, or anywhere along that line. He stated that this can be intractable pain and was very difficult to treat.

147. He outlined the possible treatments available to her. She could try treatment in the form of steroid injections. They can cause the pain to go away, but for 40% of patients the pain does not go away. Alternatively, she can use neurostabilising medication, or antidepressant medication, such as Amitriptyline. He stated the potential difficulty with this was that an increased dose leads to an increase in side effects.

148. In relation to thigh pain, the plaintiff stated that she had numbness in her thigh. Dr. Miller did a general examination; he thought that there could be a problem with the lateral cutaneous nerve [hereinafter; L.C.N.]. The numbness was in the distribution of the L.C.N.. However, he had not done a detailed examination of this aspect. If the numbness was in the anterior of the thigh, it related to genitofemoral cutaneous nerve [herinafter; G.C.N.] or if lateral numbness was present, it related to the L.C.N.. The nerve comes from the back, behind ureter and into the pelvis. It was very difficult to say which operation caused this pain, as the syndrome can arise a period of time afterwards. He was of the opinion that the sub-costal pain syndrome, happened due to the operations. It should be treated by steroid nerve blocks, which would have a 50% chance of success. Similar treatment would be used for the L.C.N. syndrome.

149. In relation to the plaintiff's weight gain Dr. Miller stated it could be connected with the onset of the menopause.

150. In his opinion there were risks to the good right kidney. However, on balance he did not believe this kidney was likely to suffer damage. He stated, he would put the risk at 5%. The plaintiff was due to have an M.R.I. to investigate if any endometriosis remains, as she currently suffers with abdominal symptoms. Dr. Miller stated that it was unlikely that she is still suffering from endometriosis after onset of the menopause. He stated he would not advise any further operative treatment for the plaintiff, unless she was in a life threatening situation. He stated that if a person only has one kidney, they have to be careful of any operations on the kidney or the ureter, for example for stones or cancer.

151. Dr. Miller stated that the loss of one kidney does not generally affect a person at work, but the pain syndrome might limit her capacity to work. He acknowledged that her bladder frequency may also do so. He stated that different nephrologists may give different advice in relation to playing contact sports. He acknowledged that there would be some risk, if there was a road traffic accident, however it would be unusual to injure the kidney because of its location within the body.

152. From a psychological perspective, loss of a kidney can cause a person to become very anxious and worried. Dr. Miller stated that C.B.T. can be very helpful in this regard. However it was not unreasonable for a patient to have these concerns. Also if a person has frequent infections, it was reasonable for her to be worried by U.T.I's. She has had a lot of U.T.I's. and has often had to take antibiotics. The plaintiff faces a risk of becoming resistant to antibiotics as a result of this.

153. Dr. Miller thought that the plaintiff has frequency, urgency and a post void residue. He believed she needed a further cystoscopy and urodynamics test. The plaintiff had been tried on anticholinergic medication. He described an anticholinergic drug, as a drug which

affects the nerves that innervate the muscles and slows down the bladder. So if a patient suffers from unstable contractions, it can suppress them and can help with frequency and in particular urgency. He noted that there were side effects to the use of these drugs, including dry mouth and loss of balance. He noted that originally the plaintiff was put on a Kentera patch (or oxybutynin). She was subsequently tried on Mirabegron, a new potent anticholinergic drug. He stated that this drug did not appear to have the desired results, as evidenced by the notes made by Prof. Lynch's team.

154. He stated that injections of botox could be used as a further treatment for frequency, but this causes paralysis of the muscles inside the bladder. There was a serious risk of 20% that it would paralyse the whole bladder, which would require her to self catheterise. Dr. Miller was of the opinion that this was a drastic treatment, considering that the side effects can last 6 – 12 months. There was also a risk of further infection by self catheterising. He did not think that the plaintiff was at a level where botox injections were required yet, because he did not think that they were likely to improve her life. Dr. Miller believed that she should continue to try anti-cholonergic drugs, in particular she could try amitriptyline.

155. In relation to her capacity for work, he acknowledged that it would be affected due to urgency and frequency, which can be influenced by fluid intake. Dr. Miller stated that patients who suffer with infections are recommended to have a high fluid intake. However this would cause an increase in urine production leading to increased frequency.

156. Dr. Miller stated that the plaintiff has ongoing pain in her abdomen and side and this could also affect her ability to work. The effects of the injuries and subsequent operative treatment, can affect each person differently. Some cope better than others.

157. In his report Dr. Miller noted that the plaintiff was not at great risk of U.T.I's.; however, that was without sight of the G.P. records from Tramore Medical Centre. Dr. Miller accepted that between 2015 and 2017 the plaintiff only attended with her G.P. in relation to three U.T.I's.

158. It was put to Dr. Miller that matters had now stabilised, but he did not agree. He stated that the plaintiff had been on a lot of antibiotics from hospital and from her G.P. between 2015 and 2017. These would affect the possibility of having infection in the urine. He stated the she suffered from sporadic infections more than normal. He accepted that she had said that she only had one infection in the last year.

159. Dr. Miller stated that he was aware that she had had some infections pre-operatively. He mentioned in his report that she had had one in 2001. However, she had not told him that she had seen Dr. Tuthill in 2010 in relation to a U.T.I.. Nor had she told him that she had had some symptoms in her leg in 2009. However she had told him of chronic fatigue and fibromyalgia.

160. Dr. Miller stated that on his examination of the plaintiff, she had complained of frequency and urgency and thinking that her bladder was empty. She also complained of cramping when her bladder was full. When urinating she said it was slow in the beginning, normal mid stream and she had to push to finish. Dr. Miller outlined that the potential cause of this was either a bladder issue or a urethra issue. He stated that Mr. Jones had ruled out a urethra issue, so the cause was probably a bladder issue, in the form of a nerve issue, or scar tissue issue. This was contributed to by being on anti-depressant medication. Although her bladder was smaller post-operatively, that was not an issue here. He stated that she was not emptying her bladder fully and that scarring to the bladder would be permanent, but stable. He stated that nerve issues are not stable and they depend on what is going on inside the bladder. He agreed that there was no new scar tissue being formed and it was stable. He outlined that nerve issues caused by scarring are permanent, but can change over time.

161. In relation to the plaintiff's fluid intake Dr. Miller stated that she could keep a diary of what she was taking in and what she was expelling. He advised that she should drink circa 2 litres of fluids per day. From what she told him, he thought that she was drinking about that level. This was a relatively high fluid intake. A normal fluid intake would be circa 1/ 1.5 litres per day. She told him that she drank tea, but not coffee and did not drink a lot of alcohol.

162. Dr. Miller accepted that in his report he had said that following the nephrectomy in 2013, the plaintiff had made a substantial but not complete recovery. However he stated that this opinion was given without the benefit of the full G.P. notes. He accepted that the plaintiff was considerably better after the nephrectomy. She had been having reflux and kidney pain, but those were gone post-operatively. She does have pain caused by sub-costal nerve damage. This was general pain in the front and left side of her abdomen and back, it was variable in intensity.

163. Counsel put it to Dr. Miller that Dr. Flood had done two scans in 2015 and 2017 and both showed post void residue at 0%, the witness stated that he had seen that, but that there were 3-4 scans in the records of circa 100ml of residue, which was a significant volume. He stated that an explanation for this was that the residue could vary from day to day. Mr. Jones had done an ultrasound where the residue was 167ml. There was no reason to disbelieve these results. He accepted that one uridynamics test in September 2014 showed a post void residue of 0%.

164. Considering the future, Dr. Miller was optimistic that the plaintiff's frequency problem could be treated medically. This would depend on her being compliant and willing to try medication. In relation to pain, Dr. Miller was confident that that could be improved by treatment, but he was not sure that it could be eradicated completely. However he thought that there would be a reduction in her overall level of pain, to a level where it would not affect her life as a whole. He stated that her psychological condition could have a large effect on her physical symptoms and the treatment thereof.

165. In relation to her capacity for work, considering her back pain and other symptoms, he thought that it should be possible to have the plaintiff back at work within 3 – 9 months from January 2017. Her capacity for work would depend on the improvement in the plaintiff's issues of frequency and urgency. He stated these issues could be decreased to a level where she could manage some types of work. Her urology symptoms had two impacts: (i) a need to go to the toilet frequently and (ii) lack of sleep due to frequency. This caused her to be tired and lacking in motivation. He stated that people with frequency problems can do some types of jobs where frequency may not be a problem, for example office work.

166. In relation to the potential risk to her remaining kidney, Dr. Miller agreed that people with one kidney can do very well and may never even know that they only have one kidney. However, the plaintiff has two risks to her good kidney, firstly U.T.I's. and secondly the number of operations that she has had. This has caused a lot of adhesions and scar tissue, but the risk of that obstructing the kidney was less than 5%.

167. In relation to the plaintiff's anxiety about her remaining kidney Dr. Miller had tried to reassure her as best he could. He thought that the plaintiff was psychologically at the end of her tether. It was difficult for her to believe that further damage to the kidney was unlikely. She did not fully accept what doctors told her after all that she had been through.

168. Dr. Miller accepted in relation to the note from St. James Hospital dated 12th June, 2014, that there was no mention of frequency in it and that the doctor, Prof. Lynch, recorded the plaintiff as being "considerably better, except for very minor issues". Dr. Miller highlighted that the doctor ordered three expensive tests to be carried out, so he must have suspected that something was wrong. He added the caveat that "considerably better" did not mean completely well.

169. In the uryodynamic report of 29th September, 2014 the plaintiff's frequency was recorded as 3 – 4 hourly, the witness stated that this was a different figure to the history he was given in 2017, which was approximately one per hour. He noted that her frequency had been variable over time. He accepted that in September 2014 her frequency was 3 - 4 hourly, which would equate with 6 - 8 times per day; he accepted that 6 times per day was the upper limit of normal. However, that was quite different to what she had told him in January 2017. He accepted that the plaintiff had good peak and mean flow and no instability of the detrusor muscle and bladder capacity was satisfactory. The report stated that the plaintiff did not have a very small bladder and did not have any post void residue.

170. Dr. Miller accepted that Dr. Flood had done an ultrasound in 2014 to assess if the plaintiff had any post void residue and no residue urine was found.

171. In relation to the doctors note of February 2015 which stated "UTS improved! U/E – very happy at present with LUTS – no problems", the witness stated that that was slightly contradictory. He noted the doctor may have been very happy with LUTS and problems connected therewith, but that was not the same as saying that the plaintiff was happy. He did not accept that the plaintiff had no problems at that time. He stated that she seemed to have problems with urgency and frequency. Counsel suggested that the logical interpretation of that note was, that the plaintiff was happy and had no problems Dr. Miller stated that the plaintiff may have been happier than on previous occasions. The note gave the doctor's conclusion that the plaintiff had improved, however, he listed the symptoms from which the plaintiff still suffered.

172. The urodynamics study of November 2014 referred to there being "no residual" urine, there was also reference to fluid management and bladder training. Dr. Miller thought that it was possible to train people in relation to their bladder, but could only advise them to void every hour and then move the period on by 15 minutes progressively, learning to void less frequently. He stated that this process required a lot of compliance by the patient. He stated that bladder training was a good option and was sensible advice.

173. Dr. Miller accepted that the plaintiff had been given the correct advice to monitor fluid intake. However, when she had had an infection, she had been advised by her G.P. to increase fluid intake. He noted that she was going to be tried on oxybutynin, but this had the unfortunate side effect of causing dry mouth. Counsel asked Dr. Miller how the plaintiff could get better, if she did not reduce her caffeine intake and had not taken medication as advised. Dr. Miller said some people do not like the side effects of anticholinergic medication. She had been offered Mirabegron recently. Dr. Miller stated the advice given in 2016 in relation to Oxybutynin was absolutely appropriate and he accepted that some people do not take the advice they are given. He thought that it was a good idea for her to reduce fluid intake and to try anticholinergic medication, but compliance was largely a psychiatric matter for the patient.

174. Dr. Miller stated that from a urological point of view the plaintiff would be ready to work in a couple of months. He thought her symptoms would be considerably improved, if she were to control her fluid intake and take the appropriate anticholinergic medication.

175. In re-examination Dr. Miller explained the concept of bladder compliance in, he discussed the ability of the bladder to stretch. He stated that post operatively there is scar tissue, which does not expand easily. He described how a normal bladder relaxes, so pressure does not go up. If a person has scar tissue they loose elasticity and the bladder cannot relax and this can cause an increase in pressure causing unstable contractions.

176. Dr. Miller stated that the plaintiff has genuine fears after all she has been through in relation to the health of her right kidney. She may not be in a rational condition to understand, appreciate or believe, what the doctors are saying to her in relation to her remaining kidney.

177. In relation to the plaintiff's left sided flank pain, Dr. Miller stated that he believed that a pain management specialist was the more appropriate person to address this issue, rather than an orthopaedic surgeon.

178. Dr. Miller described the e.G.F.R. as a calculation of overall kidney function and it is used to compare what your kidney function is at any particular time. He stated that based on the e.G.F.R., you can classify the patients into one of five stages of renal failure and the plaintiff has just gone into stage 3. This was not abnormal for patients in their middle age, He stated that some people may be in stage 3 without knowing it. He advised that the plaintiff should have a yearly follow-up to monitor her stage 3 renal failure. He stated that it was vital that her blood pressure was controlled and that she does not become a diabetic. She was at risk of becoming a diabetic, because she was very overweight. All of those factors would to be taken into account. He stated that monitoring was independent. If she went, for instance, from CKD3 to CKD4, that would be very significant and would require the help of a nephrologist.

The Evidence of Dr. Austin Byrne.

179. Evidence was given by the plaintiff's G.P., Dr. Austin Byrne, from the Tramore Medical Clinic. He stated that the plaintiff had come to their practice in or about March 2009. Prior to the operation in April 2010, she was not a frequent attendee at the practice. This was due to the fact that she had lived with the condition, which had not at that time been diagnosed as endometriosis. She had had that since her late teens and was largely self-managing at that time. The operation in April 2010, as well as removing the uterus, also involved removal of the ovaries. This would cause a significant drop in estrogen, which was a food source for the endometriosis. Normally, this operation would have caused the complete removal of the symptoms that she had had up to that time. If the operation had been successful, she would probably have had normal renal and bladder function. Any problems with renal pain, bladder discomfort and sexual dysfunction would probably have been removed by the operation. Due to removal of the ovaries, she would experience the immediate onset of the menopause, but other than that she would have been fully fit for work and for her leisure activities.

180. Dr. Byrne stated that prior to the operation in 2010, the plaintiff had been at the upper end of the number of urinary tract infections a patient would be expected to suffer. If the infection was in the lower urinary tract, that could be treated easily. However, if the infection was in the upper urinary tract, that could be serious. The plaintiff was seen a number of times both prior to the operation and subsequent thereto, with urinary tract infections. He noted that on one occasion in June 2012, when she had attended at the practice complaining of pain. A urine sample taken at that time, came back clear. However, when she was seen approximately one week later, she had a serious case of pylonphritis, which was a serious life threatening event. Without antibiotics being administered, the patient would die. When she had attended them in the middle of 2012, she described having chills when lying down. Dr. Byrne stated that she was probably getting mild self-limiting bacteria. When there was reflux back in to the kidney, this

could cause a serious injury. The plaintiff had had a very difficult time in the period from April 2010, until the nephrectomy in April 2013.

181. After the nephrectomy operation, she was seen on a fairly frequent basis in their practice. In 2014, she had had approximately 20 visits to the clinic. Things seemed to get better in 2015, as she was not seeing them as regularly. She described her symptoms at that time, as having "snake like" feelings inside her. That could have been caused by adhesions. She also complained of a right sided pain in 2015 and 2016. A C.T. scan taken at that time did not show any endometriosis.

182. In relation to her bladder, the plaintiff had variable symptoms. She experienced irritable unpleasant symptoms connected with her bladder, especially after sex, which could cause vomiting and discomfort. Her bladder was unreliable and for this reason she had to be near to a toilet at all times. In relation to post void residue, Dr. Byrne stated that the bladder was dynamic and that a person's post void residue could vary. If a person was stressed at a particular time, the bladder contracts which would cause them to have urine in the bladder, but they may not be able to void the bladder. A post void residue can vary greatly from day to day.

183. Dr. Byrne stated that the plaintiff has had a number of different episodes of reflux giving rise to symptoms ranging from mild to moderate severity. Her complaints of frequency and urgency in relation to her bladder were significant. He stated that if a middle aged man with a prostate was getting up four times per night, they would need medical attention. If they were up six times per night they would need intervention. The plaintiff was getting up 6 - 9 times per night, which had the effect of causing her to have disturbed sleep, leading to tiredness on the following day. He stated that they had tried a number of agents to deal with this problem, including a patch, medication in the form of amitriptyline, but all without success. They had not tried the drug cmybalta. He had suggested that drug in 2010, but the plaintiff was not keen on taking antidepressant medication. He accepted that cmybalta did have anti-colinogeric properties, but they had not tried that medication. They had tried amitriptyline, without success, which was used due to the side effect of being anti-colinergeric. Another treatment which could be tried was the use of botox injections. This was a very invasive treatment, wherein a catheter was put into the bladder and botox was injected in, causing paralysis of the bladder. It only lasts a number of months. It would have to be repeated approximately three times each year. It was not without risks, as the plaintiff would have to attend in hospital, thereby exposing herself to the risk of infection. There was also a risk of ureter damage and stenosis.

184. In relation to the plaintiff's current condition, Dr. Byrne was of the view that the plaintiff's bladder was probably too irritable to be successfully treated with medication. While time is a healer, he was of the opinion that the plaintiff had reached a plateau in terms of her overall recovery. In relation to only having one remaining kidney, Dr. Byrne stated that a lot of people only had one kidney, without any problems. The person's lifespan and risks to that kidney were the same as for the rest of the population. However, he noted that the plaintiff had a somewhat raised creatanine level, which was measured at 113 on 22nd March, 2017. This was an indicator of kidney function, where the creatanine level was raised this indicated that the kidney may not be functioning fully. A rise in the creatanine level is an indicator of renal impairment. The best indicator of renal function is given by measuring a person's estimated glomerular filtration rate [hereinafter; e.G.F.R.] in the kidney. The plaintiff had a reduced e.G.F.R., which should be circa 70. At 50, a doctor would take notice and if it reduced to 30, the doctor would be concerned and make a referral to a specialist. At present, the plaintiff was just below the 50 level, which meant that she needed to avoid taking anti-inflammatories, she should keep hydrating and avoid injury to the right kidney.

185. From a psychiatric point of view, Dr. Byrne noted that, while the plaintiff had had significant events in her childhood and prior to 2010, she did not have any history of an affective disorder, such as depression, prior to her operation in 2010. She had been thought, at one time, to have fibromyalgia syndrome and it was known that depression was a common sequela of that condition, but the plaintiff did not have any history of depression, apart from some post-natal depression after the birth of her daughter.

186. Since the operation in 2010, she had experienced significant mental health issues. She had been terrified and frightened initially and then became angry and then disturbed. She stated that she felt like a part of her had died. She was very frightened about the future. While she had become somewhat more upbeat by the end of 2010, she had disimproved during 2011 and 2012, at which time she had become quite depressed. She had also lost a lot of hair around that time due to stress. On one occasion, she had brought in a bag with a significant amount of her hair in it, which had fallen out. That condition had been self-limiting over a number of months. Dr. Byrne stated that he had made a referral for the plaintiff to the psychiatric services. A Dr. O'Sullivan had written back to him, who noted that the plaintiff had a significant depressive symptom cluster. He was not able to give her further treatment, due to the length of the waiting list. He recommended that the G.P. should treat her with antidepressant medication. He had noted that on 21st December, 2011, the plaintiff had presented to them and stated "I feel like ending it all", but had no definite plan to commit suicide. He stated that he was not too concerned by the plaintiff's statement. That was the only appearance in his notes of any reference to suicide. He stated that the plaintiff had not informed him of any suicide attempt at the weir in Kilkenny in or about New Years Eve 2011.

187. Dr. Byrne stated that he thought that the plaintiff had had moderate/ severe clinical depression in the period 2011 to Spring 2013. She remained depressed, but she may not be at the level of requiring antidepressant medication. He was of opinion that she would be categorised as being clinically depressed, although she was not withdrawn or socially isolated. In terms of further treatment, he thought that the plaintiff may have had some C.B.T. in the past, although that may have been limited due to the fact that she could not afford to pay for it. He noted that he had made referrals for counselling in the past, in particular to a Ms. Mandy Fox, but the plaintiff had not taken up that suggestion at that time. He thought that the plaintiff would benefit from a course of C.B.T. at this stage.

188. Finally, in terms of the plaintiff's capacity for work, he stated that the plaintiff had done reasonably well in 2015. He stated that on the open market, an employee would be expected to work from 9am to 5pm with only limited breaks. The plaintiff needed additional toilet breaks, of perhaps 6 - 9 per day. She may also have periods out sick due to infections. She had an unstable condition, which would vary from time to time. She needed a job where she could control the hours and in particular the number of breaks she could take during the day to go to the toilet and where she could miss days from work as necessary. He did not think that such work was generally available on the open market. The type of work which the plaintiff had done in relation to her online business, was probably the type of work best suited to her needs.

189. In the course of cross examination, Dr. Byrne was asked to explain the continuance of the plaintiff's symptoms, when her level of attendance at their practice had decreased markedly in 2015 and 2016. He stated that this was partly due to the advice which he had given to the plaintiff, to the effect, that they had no further treatment to offer her. Having regard to their frustration at not being able to help the patient further, they would try to limit frequent attendees. He pointed out that the plaintiff had a medical card, in respect of which the practice would be paid a set amount per patient per annum, so where they could not do anything further for a patient, they would try to limit the frequency of their visits. In these circumstances, he did not think that her level of attendance at his practice, could be taken as an indication of a reduction in her physical and mental symptoms.

The Evidence of Mr. Hugh Flood.
190. Mr. Hugh Flood, consultant urologist handed three reports in to the court. He first assessed the plaintiff on the 9th December, 2014 and his first report was dated the 27th January, 2015, his second report was dated the 13th January, 2017 and his final report was dated the 7th February, 2017.

191. During his first assessment of the plaintiff, she told him her main concern at that time was not urinary, but was that she was waking up crying at night. He did not get a precise figure for how frequently she urinated, but was aware that at night time she was up two or three times. He noted in his report of the 27th January, 2015 that she had made a good physical recovery from her surgical procedures. He also noted her degree of frequency was relatively minor and would be expected after a Boari flap procedure that reduced bladder capacity initially by 10-20%. He noted that bladder capacity usually recovers slowly as the bladder heals and stretches. He also noted that the plaintiff's remaining kidney was healthy and her prognosis for kidney and bladder function was excellent.

192. In 2014 Dr. Flood carried out a urinalysis, the results of which were normal. He described how a urinalysis involves a nurse procuring a mid-stream specimen of urine, which is then dipped and placed in a machine for analysis for white cells, red cells and nitrates. Dr. Flood stated that if there were nitrates in the urine, this raised the possibility of contaminated or infected urine.

193. He measured her post void residue at that time. He described the procedure carried out in assessing post void residue; firstly, he got her to empty her bladder in a room 2 meters across the corridor from his consultation room, she then returned to the consultation room and lay on the couch. Using an ultrasound machine, a scan of her pelvis was carried out. Dr. Flood stated that he would locate her bladder and estimate if it contained any residue of urine. He stated that the result of this test indicated that this was a normal functioning bladder and he would expect her to empty it effectively and there be no residue of urine. He stated that it was important that a patient immediately returned to him after voiding, as if there was a delay in time, they may refill their bladder. He was satisfied that there was no delay in her returning to him and she had no residue urine at that time. Dr. Flood stated that he had trained other hospital staff how to estimate post void residue and it was surprising how inaccurately people could estimate post void residue. He stated that the reasons for post void residue can be a delay in emptying and technical.

194. Dr. Flood conceded that the scan carried out by Dr. Cleverley was probably proper and that if she stated that she found 92ml, that was what she found. He stated that in relation to the testing scenario, he was not saying that she was incompetent, but highlighted that due to the test being carried out in a radiology department, there may have been issues with lines and waiting queues, that may have given rise to a delay between voiding and scanning. Dr. Flood reiterated that he found no post void residue twice when he tested the plaintiff and he confirmed this by using a catheter. He stated that 42cc, as a post void residue, is almost inconsequential, if normal bladder capacity is 600-700cc. Dr. Flood stated that her P.V.R. going down from 168 to 42 was reassuring.

195. In relation to the suggestion by Dr. Miller that the ultrasound machine used to carry out his test was not of such a technologically advanced standard, as that used during the tests carried out on the plaintiff in London, Dr. Flood described the ultrasound machine he used. He stated that the ultrasound machine which he used to carry out the scan, could deliver very good quality images. He stated that the machine was purchased in 2011 through the Sisk Company. It had a standard 5 hertz transabdominal probe with digital recording and excellent imaging capabilities. He acknowledged that the machine was not as expensive as ones that would be found in an x-ray department in a hospital, but it provided images close in quality to these machines and was far superior in quality to those commonly found in outpatient departments. His machine, similarlar to those in radiology departments, provided a real-time image, which some of the cheaper scanners did not. He stated that using this machine he was certain that he could see the bladder clearly and that he could do an accurate assessment of its volume.

196. Dr. Flood was asked about the result of a scan carried out in London, at the behest of Dr. Miller, that recorded the plaintiff's post void residue as 92ml. Dr. Miller was not present for the scan as it was carried out by Dr. Joanne Cleverley. Counsel for the defendants stated that when he asked the plaintiff about this scan, she outlined that she remembered being asked to drink fluids before the scan and that there was a degree of "hanging around" and she could not remember any further details. Dr. Flood stated that it was very likely that on that occasion she was in a busy x-ray department, where she was asked to rehydrate and her kidney would have been producing urine at a high physiologic rate. He stated that he could conservatively estimate that she would make 85-100 cc of urine in as little as 10 minutes.

197. The plaintiff attended with Dr. Flood again on the 9th January, 2017. He outlined that during late 2014/ early 2015 he felt that her bladder function had returned to normal. She had no incontinence, she did not complain of urgency and she did not complain at the time of bothersome frequency. She had emptied her bladder with 100% efficiency when her post void residue was assessed, her urinalysis was completely normal, her wound was well healed and she had no other abnormalities on abdominal examination at that time. She informed him she was going to the toilet 2-3 times per night. He stated that he though this could be addressed with management of her fluid intake. He stated that by 2014, he would have expected her condition to be stable, as she had had plenty of time for recovery after the bladder surgery.

198. Dr. Flood he stated that in January 2017, in contrast to the other times he had met with Mrs. Browne, she was quite tearful, agitated and distressed. He stated that her frame of mind was "a lot less comfortable" compared to the previous time he had met with her. He stated that at this meeting the most notable change she complained of, was that she was now getting up 4-10 times per night compared to 3-4 on the previous occasion he had met her. He stated that she had not developed any other new symptoms, such as incontinence, or not emptying her bladder fully. He stated that when he discussed it further with her, he found that she was actually going to bed and not sleeping and would be awake until 3am and that she would have a glass of water beside her bed, which she was drinking. He was of opinion that the Amitriptyline which she was taking, likely contributed to this increase in fluid intake, as it causes dry mouth and it also causes her to be sleepy in the morning. He stated that there was no clinical need for her to have a glass of water beside her bed to drink. In his report of 7th February, 2017 he stated that if the plaintiff stopped taking Amitripyline, her thirst and daytime sleepiness would be eliminated, or significantly reduced, and it would be easier for her to alleviate her over drinking. He stated that he could not see any urological reason for the deterioration in her symptoms from 2015 to 2017, unless a new condition had arisen. In his report of 13th January, 2017 he noted that the plaintiff had made a good physical recovery and that her near- morbid obesity was likely to be contributing to her back problems. Her over drinking of fluids was a significant contributing factor to her nocturia.

199. He stated that she had what he would consider a very large daily fluid intake comprising of 3-4 cups of tea, 6-8 glasses of water and one glass of Diet 7up. He stated that he used her frequency volume chart of 2014, where she actually documented the volume of tea and water she drank on each occasion. Dr. Flood described that a frequency volume chart is a document that is handed blank to a patient and they are instructed to document their fluid intake and their urinary output typically over a three day period and it is usually done shortly before a urodynamic test. The patient would bring it to the urodynamic suite with them and give it to the nurse, who would log it. The purpose of this document was to inform the treating doctor of exactly how much urine the patient is producing

in a 24 hour period, what the average voided volume was and the distribution of voiding frequency and volume between day and night and to see what the quantity of input was. This document was the self reporting, by the plaintiff of her symptoms.

200. From this document Dr. Flood concluded that he plaintiff's average fluid intake at that time in 2014, was a little above normal, but not excessive, and it was significantly less than what she reported it was in 2017. Dr. Flood applied the frequency volume chart to the 2017 consultation. He calculated that the 4 cups of tea as 250cc, eight glasses of water at 3000cc and one glass of Diet 7up at 330cc. That was a total intake of just over 3700cc in 24 hours. He stated that additionally when the water content of ingested food was added to this, he estimated that her total fluid intake in a 24 hour period would be greater than 3.7 litres, probably just under 4 litres. He stated that this was a substantial fluid intake and that there was no clinical reason for having such a high intake. Using the frequency volume chart from 2014 he stated that her average voided volume was about 250cc, which was normal. He estimated that this would amount to a minimum of 16 voids in a 24 hour period. He estimated that if the plaintiff halved her fluid intake, she could probably get her frequency down to half of what it is currently, resulting in 8 trips to the toilet a day. Dr. Flood stated that 8 voids a day was at the upper end of normal. In his report of the 7th February, 2017 Dr. Flood stated that if she reduced her fluid intake, such that her 24 hour urine output was less than a manageable 1500ml, then her nocturia would be certain to diminish significantly.

201. Dr. Flood outlined that it was a significant factor that many of the drinks the plaintiff consumed were tea rather than water. This is a concern because of the diuretic effect of caffeine on the bladder. It was inclined to fill more precipitously, so the bladder is more likely to get an urge episode if people were taking a caffeinated drink, rather than water.

202. He stated that it was likely that Mrs. Browne had been given advice in relation to decreasing her caffeine intake. If this was done, she would reduce her frequency. In the chart the plaintiff reports herself as going to the toilet 7-8 times in a 24 hour period. Dr. Flood stated that this was within the normal range. He stated that her average voided volume is 260ml and this is average in the population. In the chart her fluid intake was 2500ml per day. He knew of no reason why she would have increased her intake from that to the higher level she was currently at. Dr. Flood believed the cause of the plaintiff's frequency as reported to him in January 2017, was her substantial fluid intake. Dr. Flood's explanation for the plaintiff increasing her fluid intake, was due to her distressed state and that if she was awake at night, she may be drinking the glass of water, she left beside her bed, to pass the time. He stated that the advice given to the plaintiff in St. James Hospital about fluid management and caffeine intake, was correct.

203. In January 2017, the plaintiff stated to him that she experienced intermittent episodes of low back pain and a pain in her left flank as though the kidney was still there. He stated that the low back pain was something the plaintiff suffered from intermittently for some time, even prior to her surgery and that low back pain may have many causes. It may be phantom pain, that people occasionally experience in an area where they once had a painful organ that was removed.

204. In relation to Dr. Miller's assertion that the plaintiff could be ready for work within 3 - 9 months, given the proper treatment. Dr. Flood stated that no approach to treatment was going to be successful, unless the fluid intake issue was addressed first. Only then would he contemplate putting her on drug treatment or urodynamics. On the assumption that some bladder dysfunction remaind a problem after fluid management, Dr. Flood stated that there were many potential treatments available. However, he was of the opinion that her high volume of fluid intake was the cause of her disturbed sleep and nocturia. If she were to engage with fluid management, she would return to the symptomatic level she was at when he first spoke with her. He stated that even at the 2014/ 2015 level her nocturia could be reduced from 2-3 times per night, as in the 2014 chart she was still consuming a relatively high fluid intake of 2.5 litres.

205. Dr. Flood examined her post void residue again in 2017 and he once again found that she emptied her bladder with 100% efficiency. He stated that this examination took place under identical conditions to those of the examination in 2014.

206. Mr. Mills B.L. directed Dr. Flood to a note made by the gynaecological department on the 26th August, 2016, where it was noted that the plaintiff was drinking 6 cups of caffeine per day and that the prospect of reducing her caffeine intake was discussed as well as a trial of Oxybutynin. Dr. Flood commented that this was a lot of caffeine and that he would agree with the advice in relation to reducing caffeine intake. He stated that she had not reduced her caffeine intake by the time she came to see him in January 2017. He stated that medication was a key ingredient in managing symptoms of bladder dysfunction.

207. Dr. Flood described to the court what happens during a urodynamic study, where firstly the patient is asked to come with a fluid load, then empty their bladder sitting on a machine rather than a toilet, which measures flow rate. The patient then comes into the urodynamic room where they lie on a couch and a catheter is placed within the bladder, this tells the operator if there is any residual urine in the bladder. The bladder is then filled moderately slowly and any abnormal changes in bladder responses during filling are assessed. At the end of the filling, if the patient can, they are asked to empty the bladder and the pressure and flow rate are measured during empting. Residue urine is checked by having a patient void and then lie on a table, where a catheter is inserted to confirm the bladder is empty and if residual urine is in the bladder, it is measured.

208. Dr. Flood disagreed with Dr. Miller's suggestion that a person may sometimes have a substantial post-void residue and on other occasions may have no post-void residue. He stated that that does not happen in clinical practice. If you have an abnormal bladder, it remains abnormal and the only incidents where a normal bladder would not empty properly, was if the person was interrupted in the act of voiding. Dr. Flood he stated that there were at least four occasions where the plaintiff's residual urine volume was confirmed to be zero; twice in St. James Hospital, as recorded in the notes, and twice by himself. He stated that if a bladder empties with 100% efficiency with zero P.V.R., that is strongly indicative of a normally functioning bladder. He stated that bladders, that are dysfunctional in some way do not empty with 100% efficiency on some occasions and not on others. He also stated that the environment of a urodynamic study is a testing one for the patient, as they are being observed and that even in that testing scenario the plaintiff voided with 100% efficiency. Dr. Flood acknowledged that if there was a persistent post-voiding residue, it increases the plaintiff's risk of future urinary tract infections. However he reiterated that the test results indicated that the plaintiff did not suffer from a post void residue.

209. In relation to the frequency of U.T.I's. suffered by the plaintiff, Dr. Flood stated that he had assessed the plaintiff's G.P. notes for the last 10 years. From 2000 to 2010 there were 21 instances of consultation for actual or suspected urinary tract infection, which represented a rate of just over 2 per year. He then assessed the next 6 years together, from 2010 to 2016, where there were 20 episodes, which would represent just over 3 episodes a year. He stated in the first three of these years, 2010- 2013, a lot of surgery was going on and between the last two operations there were 23 episodes, which represented 4 per year. In the 2013- 2016 period there were 7 episodes which was back to just over 2 per year.

210. This meant that the plaintiff had reverted to her baseline for urinary tract infections. It was put to Dr. Flood in cross examination that this was a rather curious exercise and that in reality the plaintiff did not suffer any U.T.I's. from 1997- 1999, one in 2000, one

between 2000- 2003, none in 2004, one in each year of 2005 and 2006 and none between 2007- 2009; Mr. Counihan S.C. suggested that the proper conclusion to draw from this, was that the plaintiff had no more than one U.T.I. per year in some years and none in others. In response to this Dr. Flood stated that the nature of recurrent urinary tract infections was that it was episodic and the longer the period under which examination occurs, the more accurate the assessment. It was put to Dr. Flood that between July 2015 and April 2016 the plaintiff had had two U.T.I's. in one year and that there was no other year where she had two infections in the same 12 month period. Dr. Flood stated that he did not know if she had or had not, but that it was unimportant. It was put to him that Dr. Miller stated that before the operation she was within the normal range of U.T.I's. and now she is in the high range. In response to this Dr. Flood stated that you needed to make an assessment over an extended period of time. He stated that 25% to 30% of his patients, who suffer from U.T.I's., can go an extended period of time without a U.T.I. and if they then suffer a U.T.I., they are likely to suffer from more than one.

211. In relation to the plaintiff's future health, with one kidney, Dr. Flood stated that she should be compared to other people in a similar situation with one kidney, such as those who have elected to donate a kidney. He stated that there have been many studies carried out and there was no long term risk to the remaining kidney after a unilateral nephrectomy, where the other kidney is a normal kidney, with no ongoing disease process within it, in somebody who does not have any ongoing generalised disease. Dr. Flood agreed with Dr. Miller's evidence in relation to the potential future health of her remaining kidney.

212. In relation to the serial evolution of the plaintiff's creatinine levels and the potential impact this may have, Dr. Flood discussed e.G.F.R which he described as the best non-invasive way of assessing kidney function. He sated that this test was based on the age, sex, race and creatinine level of the patient. He stated that this was the accepted, standard way of doing this assessment. In 2010 the plaintiff was normal on the e.G.F.R. scale. Following her hysterectomy, this dropped significantly. He stated that that was what you would expect when a kidney was acutely disabled for a period of time. He stated that after the Bori flap procedure, the e.G.F.R. recovered fairly substantially. Following the nephrectomy, there was a further consequent fall in the e.G.F.R.. He stated that this leaves her with a kidney function that falls exactly within the space you would expect as set out in the literature of, 65% - 70%, of normal for somebody with two kidneys, so the remaining kidney had partially compensated for the loss of the injured kidney. Dr. Flood stated that in patients with a high B.M.I., such as the plaintiff, the kidney function is under estimated. He stated that in practical terms this means that her actual e.G.F.R. was much more likely to be greater than 60%, which would be a level considered within the normal range.

213. Dr. Flood stated that he would be confident that her remaining kidney would see the plaintiff through for the rest of her life, provided she did not develop significant hypertension, or diabetes, or get a transient or permanent incidental condition of her other kidney.

214. It was put to Dr. Flood, in cross-examination, that it was Dr. Miller's view that as a result of the surgical interference with the bladder, it has been left compromised, firstly because of the scarring and secondly because of the probability of nerve supply damage. Dr. Flood totally disagreed with the assertion that the plaintiff's bladder was compromised because of nerve supply damage. He stated that the bladder had a nerve supply that came from the right and from the left. These supplies cross over and supply both parts and when the bladder contracts on one side, its conduction spreads to the other side of the bladder. He stated that an operation on one side of the bladder, was not going to cause destabilisation of the bladder. It was also put to Dr. Flood that in Dr. Miller's opinion the plaintiff's bladder was suboptimal now, as it was more rigid and inflexible and was reduced in size to some degree, Dr. Flood also disagreed with this. He also disagreed with Dr. Miller in relation to the vulnerability of the bladder after the Boari flap procedure. It was put to him that Dr. Miller and Mr. Clements were not surprised by the issue of urine retention following the Boari flap procedure; he disagreed with this.

215. Dr. Flood acknowledged that pyelonephritis was a very debilitating condition but stated that he had never seen it kill a patient.

216. He agreed with Dr. Miller that the plaintiff should be monitored annually, but felt most G.Ps. would be competent to do this. He stated that the most important factor of this was to monitor her serum creatinine and any other potential things that might interfere with her kidney function.

217. Her serum creatinine should be around 80/ 87, but last year it was raised at a level of 107. In May 2010, when she had the laparotomy, it rose to 133; in May 2013 the plaintiff's level dropped to 87/ 87; in September 2015 it was 98 and in May 2016 it was 98. Dr. Flood stated that these figures were elevated, because she only had one kidney now. In May 2013 it went up, but it came back down in May 2016. It was put to Dr. Flood that the plaintiff's G.P. was very concerned with the consistently high level of creatinine, because it indicated that the remaining kidney was not functioning as it should. Dr. Flood stated that this was not an indication that the kidney was not functioning properly. Actually the kidney had increased its own function by about an additional 15%- 20%. Dr. Flood stated that if the kidney was not a healthy kidney, it would not increase its level of functioning. It was easier to see kidney effects when you only had one kidney. He would not dismiss Dr. Miller and the G.P's. concerns that the patient's creatinine level was high and the e.G.F.R. readings were lower than they should be, until another one or two more creatinine results are available. Dr. Flood said that if these results continue in the same manner, he would have her return to Prof. Lynch to investigate the potential causes, such as has she developed hypertension or diabetes, or has she developed a stone in her kidney, or something else troublesome.

218. Her creatinine level was recorded to be 120 and her e.G.F.R. was 43 on the 15th June, 2017 at St. James hospital. These measurements were taken at the start of the plaintiff developing meningitis. Dr. Flood stated that her being unwell with fever, chills and headache, were all likely factors to contribute to the rise in her creatinine and fall of her e.G.F.R. and the primary factor would be dehydration. Dr. Flood also stated that Cox-2 inhibitors, a group of drugs commonly used in patients with fevers and chills, such as Difene, Nurofen and Brufen, will also cause an increase in creatinine.

219. Dr. Flood disagreed with the assertion made by Dr. Miller that one of the risks to the plaintiff was that if she had recurrent infections, either via the bladder or the blood, that that would give rise to a risk to the viability of the remaining kidney. He stated that she does not have reflux and so it would be very rare for bladder infections to go to the kidney; acknowledging, however, that it could happen. He stated that infections in the bloodstream would be extremely unusual, but he acknowledged that she did have a history of pyrlonephritis, he acknowledged that there was a small risk that this could happen. Dr. Flood acknowledged that if the plaintiff were to develop diabetes, then that would have an adverse effect on the remaining kidney, as she would have less nephrons than if she had two kidneys and if insulin controlled diabetes was poorly managed, it could harm the kidney. He stated that Type 2 diabetes rarely threatens the kidney within 30 years, but he acknowledged the risk factor.

220. It was put to Dr. Flood that the plaintiff was advised to maintain a high fluid intake to reduce her risk of U.T.I.. Dr. Flood acknowledged that this was the commonly given advice, but stated that there was no scientific basis for it. There was actually scientific evidence to negate the usefulness of this advice, because the two main strategies in recurrent U.T.I's. were antibiotic

prophlaxis, a low dose of antibiotic taken every morning and every evening and the use of over the counter agents such as cranberry juice, which have a scientific basis in that they prevent bacteria adhering to the bladder. He stated that if on one hand you recommend these agents, but on the other hand tell patients to drink 2-3 litres of water a day, you are diluting the effect of your most powerful therapy. Dr. Flood stated that this advice was contained in a book that he had published.

221. In relation to compliance with therapy, it was put to Dr. Flood that Dr. Miller was of the opinion that it was very difficult to effect compliance with a patient who has a psychological make-up of anxiety, agitation and depression. Dr. Flood suggested that after the resolution of the court case, the plaintiff would probably be less stressed and she might make more progress with therapy. He agreed that it would be difficult to get a patient, who has had difficult past experiences with medical intervention and a substantial amount of invasive treatment, to be compliant. The solution to this may be a new voice from a different doctor.

222. Dr. Flood stated that generally in cases of lateral cutaneous nerve thigh injury, such as the plaintiff suffers from, the result of the transverse incision, are likely to be permanent and is a sensory rather than a motor problem. He stated this causes a loss of sensation rather than pain.

223. Dr. Flood stated that the plaintiff's kidney was freely draining in the re-implanted ureter, so there was no obstructive element and she never had pus or an abscess in the kidney. Considering this, he stated that he would be surprised at the intensity of the pain experienced, but he would not be surprised if she was suffering from reflux type symptoms, as she had a ureter now connected to her bladder in an open fashion, so urine can travel up and down into the kidney and this would cause distension and discomfort in the kidney. Dr. Flood stated that the plaintiff was wrong in describing her kidney as a "bag of puss", as that was a condition called pyelonephrosis and she was never diagnosed with that condition. Pyelonephrosis was a condition where the kidney or ureter was backed up with infection and pus, like in an abscess on a kidney. Dr. Flood felt that the plaintiff believed she had this condition, as a result of bad advice, possibly in the form of a throw away comment by some medical professional at some time in the past.

224. Dr. Flood accepted that the plaintiff suffers from loin pain, a type of neuropathic pain or phantom pain. He accepted that Dr. Miller also found she suffered from suprapubic pain, but she never informed him of this while taking her history.

225. In his report of the 7th February, 2017, Dr. Flood stated that further surgical therapies or botulinum toxin treatment would be very unlikely to be of help to the plaintiff, as her issue was not predominately a functional bladder disorder.

226. In relation to a note made by Dr. Thomas stating "very happy at present. Very happy re LUTS – mo problems" Dr. Flood stated that where the doctor states "very happy at present", he believes this to be a very emphatic description of his assessment of the patient at that time, as he had said it three times. Dr. Flood believed that the doctor was expressing what he thought of her and her state at that time.

The Evidence of Dr. Elizabeth Cryan.

227. Evidence was given on behalf of the plaintiff by Dr. Elizabeth Cryan, Consultant Psychiatrist, who stated that the plaintiff had given her a detailed history of the events between April 2010 and the carrying out of the nephrectomy in April 2013. Immediately after the hysterectomy operation in April 2010, she had experienced severe ongoing pain. At first, the doctors and medical staff had thought that this was merely post operative pain, which would pass within a reasonably short period of time. However, when her symptoms continued, a scan taken at St. Luke's, indicated that she had a blockage of the ureter. On 6th May, 2010, a cystoscopy and an ureteroscopy were carried out. This was done in an attempt to put a stent into the ureter. However, this was not successful. This was particularly distressing for the plaintiff. On the same date, Mr. Jones carried out the Boari flap operation. The plaintiff indicated how she had awoken after the operation in severe pain. Due to a malfunction of the morphine pump, she was not able to administer the requisite pain killing medication to herself. On 13th May, 2010, a JJ stent was inserted. The plaintiff was sent home after that, with a urinary catheter in place. On 26th May, 2010, the plaintiff had a further cystoscopy, endoscopy and removal of the stent. The plaintiff found this very distressing, in particular, because she had expected to get better, rather than worse after the operation in April 2010.

228. Later that year, when she had returned from a holiday in Tunisia, during which she had been sick, a renogram indicated that her left kidney was not operating satisfactorily. The plaintiff had recurrent medical problems, including difficulty having sexual relations with her husband, due to the fact that after sex, she found that she would develop U.T.I's. within days. These could cause her severe pain and cause a foul smell in her urine. These episodes were diagnosed as phylonephritis, which was a serious condition, which required treatment. The plaintiff was advised to abstain from sexual relations. She was also informed that she had a B12 deficiency. She understood the plaintiff had recurrent urinary tract infections during 2010 and 2011, which caused painful symptoms.

229. The plaintiff had been sent to Dr. Hegarty in W.U.H. in 2012. He had given an injection of cystostat into her bladder. In June of that year, she had a renogram and an ultrasound due to phylonephritis. It was at that time that the possibility of a nephrectomy operation was brought up. She was referred to Prof. Lynch in St. James Hospital for that operation. Dr. Cryan stated that the plaintiff's life in the period 2010 to 2012 was dominated by hospital visits and financial problems, as she was not able to work. She had been subjected to a very large number of tests by various doctors during these years. The plaintiff was concerned about the number of general anaesthetics that she had had. In December 2012, she had such a severe episode of phylonephritis that her husband had driven her to the accident and emergency department of St. James Hospital. She was placed on I.V. antibiotics and was subsequently discharged home on antibiotics.

230. The plaintiff recounted a suicide attempt, which she thought had occurred on 31st December, 2011. On that occasion, she had gone out with her husband and friends and had drunk quite a lot of alcohol. She left the pub and went to the weir in Kilkenny. She stood on the bank of the river and contemplated committing suicide by jumping into the river. However, she decided against it when she remembered her grandmother. Some short time later, a friend came from the pub and brought her back from the water's edge. By that stage, she had been living with her physical problems for approximately two and a half years and it had been indicated that she needed further operative treatment in the form of the nephrectomy. Her quality of life was very poor. Her sleep was disrupted, she could not work, she was attending hospitals regularly, and she could not have sexual relations with her husband. Dr. Cryan was satisfied by that time she had developed P.T.S.D. The plaintiff described how she felt sad, numb, empty, helpless and angry. Her doctor had been concerned that at that time she was a suicide risk.

231. On 13th April, 2013, the plaintiff had had the nephrectomy operation, which was three years after the index operation. She recalled that she became hysterical on the trolley after the operation. She had thought that she was going to die. Post-operatively, she felt she made some progress. However, as she was placed on the drug oxycontin, this caused her to have hallucinations. In the period April 2013 to April 2014, the plaintiff complained of loin pain and lower back pain, together with twitches in her bladder and a feeling of urgency when she needed to go to the toilet. She also suffered from frequency in urination. She felt very tired. She felt that her bladder condition had been altered by the various operations, such that she would need renograms and cystoscopies going

forward. She was also concerned that she felt there was some risk to her right kidney.

232. Dr. Cryan stated that she first saw the plaintiff in June 2014, at which time she complained of feeling sad and numb and feeling detached from other people, including from her husband. She was irritable with the people around her. She experienced feelings of anger. The plaintiff, who had had severe endometriosis, had thought that the first operation was going to be a solution to her problems. Instead, things got worse rather than better and she was placed on a merry-go-round of medical examinations, doctors and hospitals, wherein she had to undergo distressing tests, ending up with the nephrectomy in April 2013. When she saw Dr. Cryan, she was not working, or enjoying herself as a young woman. She was unable to enjoy boxing, or fashion as she had done previously. She had put on a lot of weight, approximately 4 stone. She was unable to connect with her husband and daughter. She felt that she was in a very bad place. Her sleep was disturbed due to the fact that she had to get up to go to the toilet numerous times during the night, resulting in her being very tired on the following day.

233. Due to the stress of these events, a lot of her hair had fallen out, which she found particularly distressing. This, allied to her weight gain, caused her to have a negative view of herself. She had taken steps to address this by joining a gym in 2015, to tackle her weight problem. She also complained of poor concentration and had become forgetful. She was not keen on taking antidepressant medication, due to a family history of one of her uncles, who had been committed to a mental institution.

234. Dr. Cryan noted that the plaintiff had been very preoccupied with her medical condition and had ruminated on that and had had a number of "what if" thoughts, over the previous four years. She had also done a number of internet searches in relation to her physical symptoms. When Dr. Cryan first saw her, she had just opened her shop, which she felt was a good thing, as it gave the plaintiff something to do. However, she remained somewhat preoccupied about her medical condition. She was also concerned for the future, particularly in relation to risks to her right kidney. The plaintiff was always on the look out for future medical treatment, but was distrustful of the medical opinion and treatment which had been given to her, having regard to her experiences with the medical profession over the previous four years.

235. Dr. Cryan stated that the plaintiff had a significant prior psychiatric history in that she had suffered from post-natal depression after the birth of her daughter. In addition, she had had adverse childhood experiences, in that she had been abandoned as an infant by her mother and there were allegations of childhood sexual abuse at the hands of another family member. The details of this are set out in Dr. Cryan's report. Dr. Cryan felt that these issues would adversely affect both the severity of her psychiatric illness and its duration. Prior to the operations, she had had an underlying psychiatric vulnerability due to these prior experiences.

236. In relation to her pre-morbid personality, Dr. Cryan noted that she had been a sociable and outgoing person, who had been interested in boxing, horses and fashion. When she saw the plaintiff in June 2014, the plaintiff stated that she felt vulnerable and sensitive. She found it hard to trust people and to confide in them. However, she did not use alcohol as a crutch. At the consultation, she had been fluent and well presented. However, she was distressed giving the history of events. She described her mood as being low, detached and anxious. She had had suicidal thoughts. Objectively, she appeared very tearful, had a low mood and appeared distressed, all of which was consistent with the history given. The plaintiff was not delusional, and there was no evidence of cognitive impairment. She had strong feelings of detachment from those around her, which could be very distressing for a patient. The plaintiff considered that her negative medical experiences had destroyed her life.

237. Dr. Cryan stated that her impression at that time, was that the plaintiff was suffering from P.T.S.D. She fulfilled the criteria for this psychiatric condition. Dr. Cryan was satisfied that she had very significant P.T.S.D. at that time. She also made a diagnosis that the plaintiff was suffering from a depressive disorder. At that time, she felt that opening the shop was very good for the plaintiff.

238. Dr. Cryan next reviewed the plaintiff on 30th January, 2017. She was still very fearful of contracting U.T.I's. and would take a shower after having sex with her husband. She continued to be monitored for endometriosis and her right kidney was also being monitored. She was concerned about the health of that kidney. Dr. Cryan noted that her G.P. had said that her e.G.F.R. level was less than 50, which would be a cause of some concern. In addition, her creatine levels had risen from 98 to 107 to 120, which was also a cause of worry to the plaintiff.

239. When Dr. Cryan saw her in January 2017, the plaintiff stated that she was going to the toilet approximately 4 – 8 times per night. This caused her to be very tired in the morning. She complained of feeling unwell and having back pain. She had gained a lot of weight. She had managed to lose some weight in 2016, but the stress of the impending court case had caused her to engage in comfort eating. Her psychiatric complaints were similar to the previous occasion. She felt that she had become detached from other people and that they were moving on, but she was not doing so. She was very concerned about her health and her right kidney. She regretted having lost the best years of her life. She tended to relive the morning of the original operation in April 2010 and the conversation which she had had, on that occasion, with the first named defendant, in relation to a possible retention of one of her ovaries. The plaintiff also stated that she felt like a beggar in relation to having to move from doctor to doctor to obtain treatment under the National Treatment Purchase Fund. The plaintiff stated that she had not been able to afford counselling in previous years, but had since located a counsellor, who was prepared to provide counselling at a reduced rate of €35 per hour. She hoped to engage with this counsellor as soon as the counsellor came back from her honeymoon.

240. Dr. Cryan stated that in relation to her mental state, her mood was still low, she was very sad; she felt that the medical experiences had destroyed her life. While these thoughts were similar to the previous occasion, they did not appear to be as severe, nor were the thoughts as intrusive, as before, but they were still present. Dr. Cryan was of opinion that she still had symptoms of P.T.S.D. and depression. This was over seven years since the first operation. The prognosis for future recovery was not good. She stated that 50% of those suffering with P.T.S.D. would never return to work. She stated that 60% would have a co-morbid depression and here the plaintiff had suffered from depression previously. Taking all of these things into account, the prognosis for her psychiatric health was poor. Dr. Cryan stated that she was pessimistic of the plaintiff making a full recovery. She did not think her symptoms would completely go away, they were likely to rumble on into the future due to the constant monitoring of the right kidney. The loss of her life in her 30's and 40's, coupled with the loss of the relationship with her husband and her loss of self confidence, would be difficult to recover. She thought that the plaintiff was likely to have recurrences of P.T.S.D. and depression in the future.

241. In cross examination, it was put to Dr. Cryan that while she had recommended C.B.T. in 2017, she had not done so in 2014. She stated that that had not been addressed in her first report. At that time, the plaintiff had been very low and did not want to reopen the whole episode. Nor did she want antidepressant medication. However, at that time she had been upbeat about the opening of her shop. Dr. Cryan said she may have recommended medication at that time. The plaintiff had told her that she had tried counselling, but had not continued, as she had not got on with her counsellor. She had stated that she may do counselling when the case was over. In relation to holidays, the plaintiff had mentioned to her that she had been on holidays to Tunisia after the operation. She had not mentioned that she had been on two other holidays in 2010 and had gone on three foreign holidays in 2011.

242. It was put to the witness that the plaintiff had made no mention of any suicide attempt to her G.P. Dr. Cryan stated that she could not comment on that, as she had not seen the medical records. It was put to her that if she was feeling so low that she had contemplated suicide, was it not unusual that she had not mentioned this to any doctor. Dr. Cryan did not agree that that was unusual, she stated that people who actually complete suicide, usually have not mentioned it to anyone beforehand. Counsel for the plaintiff interjected to point out that the plaintiff had mentioned the suicide attempt to her G.P. She had also been to Dr. Foley Nolan, who had been concerned by her low mood and feared that she may be a suicide risk. She had told them that she had thought about suicide, but had had no definite plan. Dr. Cryan stated that the fact that she had not mentioned that event had not been particularly significant.

243. Dr. Cryan stated that her opinion, in 2017, was that the plaintiff had suffered mild to moderate P.T.S.D. She also had a depressive disorder which persisted, but without current suicidal ideation. She accepted that intrusive reminders of the distressing events had decreased and that the plaintiff's enjoyment of life had improved a little. She had recommended C.B.T. and hoped that it might be helpful. It might provide a structure to the plaintiff's day and improve her feelings of self-worth. She accepted that C.B.T. would be helpful after the case was over.

244. It was put to the witness that if the G.P. had been concerned about the plaintiff's mental health in the years after the operations, he would have referred her to a psychiatrist. Dr. Cryan stated that some G.Ps. would try to treat the mental health issue themselves first, prior to making any referral to a psychiatrist. Also, the G.P. may have to consider whether the local psychiatric services would have anything to offer. Some areas had no capacity for giving C.B.T. treatment. The G.P. would also have to take into account the plaintiff's attitude towards obtaining such treatment due to the ongoing stigma within society in relation to people with mental health issues. Counsel noted that the G.P. had made a referral in 2011, but that since then Dr. Byrne had not referred the plaintiff to any psychiatrist. He put it to the witness that the plaintiff had complaints about significant psychiatric symptoms, yet the G.P. had made a decision not to refer her on to a psychiatrist and, this was a factor to consider in relation to the severity of the symptoms complained of by the plaintiff. Dr. Cryan stated that that depended on a number of factors. Her opinion was that the plaintiff had quite severe symptoms. Also, if the local psychiatric services did not have a C.B.T. therapist, this may dissuade the G.P. from making a referral. Most G.Ps. would be aware of what the local psychiatric services in their area had to offer. If there was no counsellor or therapist available locally, he may elect not to refer the plaintiff to that service.

245. Dr. Cryan accepted that the plaintiff's past history, involving abandonment as an infant, childhood sexual abuse and post natal depression, did give her a vulnerability to psychiatric illness. Childhood experiences could give a vulnerability to such issues in later life.

246. It was put to the witness that generally if C.B.T. is done earlier, this would give a better outcome. Dr. Cryan agreed with that proposition, but stated that in this case there was a continuing stressor, in that the medical trauma rumbled on from 2010 until at least 2013. She agreed that trauma focused C.B.T. could have been used earlier. However, at the present time, some seven years after the first operation, any treatment was less likely to be successful. In this case, earlier intervention may not have been that beneficial, given that the trauma had been continuing over a prolonged period. However, taking all matters into consideration, she was still of opinion that it would be worth giving C.B.T. a try. She did not think that this therapy would cure all the plaintiff's problems, but it was certainly worth trying. It was put to the witness that the defendants' psychiatrist, Dr. Sinanan, felt that her future prognosis was too gloomy and that with treatment, the plaintiff was likely to improve. Dr. Cryan stated that his opinion was different to hers. Here, the plaintiff had had a very distressing time, extending some seven years to the present and had an uncertain future in terms of her health; taking all of that on board, she did not think that one could give a good prognosis in respect of her mental health going forward. The prognosis for P.T.S.D. was not generally good. She did, however, accept that the plaintiff had not taken psychiatric medication and had had very little counselling to date. This was explicable by the cost of C.B.T. which was very expensive privately.

247. In re-examination, the witness stated that post natal depression was present in approximately 20% of cases. Such condition was more likely when a person had had adverse childhood experiences. The plaintiff had suffered from post natal depression in 1994 and had had no depression since then. However, once a person has had depression, they are always more likely to have a subsequent episode of depression if they had a subsequent stressor, or adverse life event. She felt that the impact of the last seven years had had a major effect on the plaintiff, who had suffered very severely both physically and psychiatrically. In her opinion, the plaintiff's prognosis was likely to be poor.

The Evidence of Dr. Kenneth Sinanan.

248. Evidence was given on behalf of the defendant by Dr. Kenneth Sinanan, Consultant Psychiatrist. He stated that he had seen the plaintiff on one occasion, on 16th November, 2016. The significant features in her past medical history, from a psychiatric point of view, were the abandonment by her mother as an infant, the incidents of child sexual abuse and the previous occurrence of post natal depression. She told him that she had sold a horse to fund the set up of the Sparkle Closet business. In terms of counselling, she told him she had had some counselling in 2015, however, she was a bit vague about that. The witness thought that the counselling may have been bereavement counselling after the death of her grandmother. Such counselling is different to C.B.T., which examines the thinking processes and tries to get each patient to validate or invalidate their thoughts. It also teaches a person how to relax and how to avoid catastrophising. A person is given a programme to follow to enable them to get over negative thought patterns. He stated that C.B.T. was practiced all over the world. Research has shown that it has a very high success rate of circa 80%.

249. In relation to the diagnosis of the plaintiff's psychiatric issues, there was a large amount of agreement between him and Dr. Cryan. Dr. Cryan thought that the plaintiff suffered from a depressive disorder, whereas he thought she had a depressive adjustment disorder. The difference was that in the latter condition, the depression was triggered by a specific event. In the more general depression as diagnosed by Dr. Cryan, there was no specific event, or cause for the depressive episode. Dr. Sinanan stated that in this case there was a specific event which had caused the depression. When one was dealing with a depressive adjustment disorder, once one got rid of the event that was the stressor, the depression would usually go on to resolve. Dr. Sinanan also noted that where there were legal proceedings in being, it would be unusual for a patient to recover until the case was disposed of. This was due to the fact that plaintiffs tended to hold on to their symptoms until their case was over. He stated that a lot of people tended to recover from mental illness within approximately six months of the end of their case.

250. In terms of treatment of this condition, the treatment would be multifactorial involving resolving the "event", or cause of the depression, medication may also have a role and could be further augmented by counselling or C.B.T. The exact number of sessions would depend upon the severity of the depression, but one would usually be expecting less than 20 sessions. The plaintiff may need approximately 10 to 12 sessions initially, to be followed by one session of C.B.T. every 3 to 6 months thereafter.

251. Dr. Sinanan stated that he also agreed with Dr. Cryan that the plaintiff had suffered from mild-moderate P.T.S.D. This condition

can fluctuate from time to time. Treatment involved behaviour therapy, C.B.T. and medication for P.T.S.D. in the form of selective serotonin reuptake inhibitors [hereinafter: S.S.R.Is.] medication. In mild P.T.S.D., medication may be too strong, so they would steer patients towards C.B.T. If patients suffer from flashbacks or nightmares, Eye Movement Desensitisation Reprocessing [hereinafter; E.M.D.R.] can be used to treat these.

252. In terms of the plaintiff's capacity for work, Dr. Sinanan stated that if a person has mild/ moderate P.T.S.D., in general, they might not have to give up work, as usually the level of distress would diminish in 3 to 6 months. One might not get rid of the nightmares altogether. Where a person had been out of work, this could last for a number of weeks. If the person was out for months, they may need antidepressant medication and C.B.T. to increase their level of sleep without nightmares. Where a person had mild/ moderate P.T.S.D., they would use medication in the form of S.S.R.I's. and C.B.T. They would expect the patient to return to work in three to six months. If a person had very severe P.T.S.D., they may have to be hospitalised and they may be somewhat, treatment resistant. Such patients may never leave hospital, or leave their home. That would be a very severe case. If a person had tried various forms of treatment, but did not get better, that would indicate a severe condition. However, if the person recovered without specific treatment, then the condition had been mild.

253. Dr. Sinanan stated that the fact that the plaintiff had run an online business for three years, with a physical shop component for eighteen months, would tend to suggest that the plaintiff's P.T.S.D. was not severe, but was moderate, as it had not been severe enough to prevent her working. It appeared that the plaintiff had been able to motivate herself, she could concentrate on her work and could deal with customers, so she was functioning reasonably well.

254. It was put to the witness that from the G.P. records, it appeared that the plaintiff had been referred in 2011 to the psychiatric services, but there had been no such referrals after that date by her G.P. Dr. Sinanan stated that her G.P. appeared to be a competent doctor, who had been of the opinion that the plaintiff did not need psychiatric referral after 2011. There had been one referral in 2011, but they had not been able to take the plaintiff on as a patient, due to the long waiting list at that time. It did not appear that her symptoms were severe enough to warrant psychiatric referral thereafter. Dr. Sinanan stated that even where the psychiatrist had a long list, they would evaluate the plaintiff and if she urgently needed treatment, they would prioritise her. If she did not need urgent treatment, they would refer her back for treatment by her G.P. It was essentially a question of resources and demand thereon. Only some areas had public C.B.T. available.

255. In terms of her prognosis, Dr. Sinanan stated that he felt that if the plaintiff followed the treatment recommended to her, there was a high probability that she would return to her pre-morbid level of functioning. He thought that C.B.T. had a lot to offer her. She would be taught strategies to deal with her psychiatric stressors. In terms of work, he noted she had been able to return to work in January 2014. He thought that when she had the treatment recommended, and had improved as a result thereof, she would be able to return to her pre-operative level of functioning.

256. In cross examination, Dr. Sinanan accepted that he was in broad agreement with the views given by Dr. Cryan. He agreed that the plaintiff had P.T.S.D. and also that she had a form of depression, although they differed slightly on the precise form of that condition. This essentially related to the precise cause of her depression. He was also of opinion that people, who had a lack of B12, would often get depression. This deficiency was a risk factor for depression. He accepted that the plaintiff was on supplements to make up for that.

257. Dr. Sinanan also accepted that the plaintiff's post natal depression had been a self limiting condition, within approximately one year of the birth of her daughter. It was put to him that as the plaintiff continued to have symptoms seven years after the index event, this indicated that her condition was chronic. Dr. Sinanan accepted that the condition had been present since 2010, but he thought that it would not resolve until her case was over. He was of the view that litigation often prevented resolution of depression. He was also of the view that C.B.T. may produce a resolution of the depression. He thought that there was a good chance it would be successful. He accepted that the cost per session of such treatment was approximately €100/ €150 in Dublin and between €75/ €100 outside Dublin.

258. It was put to the witness that Dr. Cryan was of opinion that the P.T.S.D. had lasted so long, it was chronic in nature and less than 50% of those suffering from chronic P.T.S.D. would recover. Dr. Sinanan stated that it depended on the severity of the symptoms. In general, 75% of patients recover, although the recovery rate may be less if the condition is severe. He was not in a position to say that treatment would not be beneficial for the plaintiff in the future. It was put to him that Dr. Cryan said that 50% of patients do not return to work, rather than do not recover. Dr. Sinanan stated that his recollection was that Dr. Cryan had said that 50% did not recover from P.T.S.D., rather than did not return to work, which he had found surprising.

259. It was put to him that in this case the stressor event was the risk to the remaining kidney, which was an ongoing stressor in the plaintiff's life. He stated that if the plaintiff had an ongoing belief that there was a risk to her kidney, these beliefs could be helped by C.B.T. He accepted that the plaintiff presented as an anxious person in general. He thought that her anxiety in relation to her remaining kidney was understandable, but he felt that C.B.T. could help her adapt to the changes in her life caused by the operations. He accepted that the G.P. records tended to indicate that the plaintiff had been somewhat of a worrier even prior to 2010. She needed C.B.T. to help her get over some of her psychiatric difficulties. He noted that she had had M.E. previously for which the current treatment was C.B.T. and Amitriptyline medication. However, he accepted that these conditions were not specifically diagnosed prior to 2010, and that her various difficulties were put down to these causes, until the endometriosis was finally diagnosed in 2009. Dr. Sinanan accepted that given the plaintiff's experience of the medical profession prior to 2010, her experience of the negligent operation carried out in 2010 and all the medical intervention since that time, it was understandable that she would not accept the medical reassurance given in relation to her remaining kidney. He accepted that the plaintiff may not want C.B.T. as it was a therapeutic challenge, but he pointed out that C.B.T. was non-invasive. The treatment would be given by a trusted therapist. He disagreed with Dr. Cryan that the prognosis was very negative. He thought that there was cause for optimism as regards the plaintiff's future treatment.

260. In relation to the shop owned by the plaintiff, he did not have details of any work actually done by her in the shop. She had given him some details. She told him she used to open on a Thursday, Friday and Saturday for customers to collect items. She said that her business "broke even". He accepted that it was a form of rehabilitation programme, rather than full blown commercial work, but it was relevant that she had not been working prior to the operations, so it was good that she had actually started the shop in 2014. He felt that that had been very good for her. He recalled that her eyes had lit up when talking about clothes. He was asked as to whether the ultimate failure of the business was something which leaned against a positive prognosis. Dr. Sinanan stated that if the plaintiff had had a bad business model, she should learn from that and hopefully have a more successful business in the future. She had been enthusiastic about the shop when he had seen her.

261. It was put to the witness that when a patient had severe physical difficulties, coupled with psychiatric difficulties, that person

may have a distorted view of their condition. He accepted that that could be the case, except for pain.

262. The witness was asked about the apparent suicide episode in 2011. The plaintiff had told him that 2011, she had been on antibiotics and had drunk alcohol on the night in question. She had had a row with her husband and had gone to the weir in Kilkenny and had thought about jumping in. A friend came along and brought her back into the pub. She told him that she had thought about committing suicide when she got to the weir, but it was only a vague suicidal thought. On the scale of severity, he placed it at mild. He stated that people could get feelings of hopelessness when depressed.

263. He accepted that the plaintiff had real worries, particularly regarding her right kidney. She had been through a lot physically and that would cause upset to anyone. He accepted that it would be a challenge for a doctor to get her to trust him and comply with treatment. He accepted that her trust of the medical profession would be limited.

264. Dr. Sinanan stated that the issue of lack of sleep could be a problem, particularly if a person had mental difficulties. However, there was a drug, Cymbalta, which relieves stress incontinence, which is used as an antidepressant and also helps sleep. He thought that this medication could be very helpful to the plaintiff. He accepted that she had not been keen on it, when it had been suggested to her previously. She had tried two weeks on Amitriptyline, but that would only have been prescribed for sleep given the short duration. He accepted that that medication would have made her mouth dry, which would have caused her to drink more.

265. It was put to the witness that when Dr. Byrne had referred the plaintiff to the psychiatric services, they had written back stating that they did not provide C.B.T. Dr. Sinanan stated that while all psychiatric services must provide urgent and necessary psychiatric treatment, they were not obliged to provide C.B.T. If the plaintiff had psychiatric problems when referred to the psychiatric service, it was their duty to evaluate her problems and provide the necessary treatment. However, if treatment could be given by the G.P., they were entitled to refer the patient back to the G.P. for treatment by him e.g. if she only needed treatment in the form of mild antidepressant medication. Finally, in relation to sexual dysfunction due to a fear of contracting infection, she could be advised to take an antibiotic before having sex. He accepted that mental difficulties could affect a person's sexual function.

The Evidence of Mr. Gary Fenelon FRSCI

266. The plaintiff was examined by Mr. Fenelon on 1st February, 2017. At that consultation, she had told him that she had run a shop in the past. However, she had not told him that it had ceased trading due to any economic circumstances. He had got the impression that the shop was less than a full blown business.

267. Examination on that occasion revealed a good mobile spine, with a good pain free range of movement therein. Mr. Fenelon stated that in his opinion, the plaintiff was fit to work from an orthopaedic point of view. He had viewed the boxing video, which had been taken in late 2015 or early 2016, wherein the plaintiff came across as quite an accomplished boxer. She was able to move in an athletic manner and could punch freely. There was no sign of any significant physical disablement.

268. In relation to her weight, the plaintiff had told him that she had put on 40kg over the previous years. However, he noted from her chart that she weighed 80kg pre-operatively, which would suggest that her weight gain was actually in the order of 20kg.

269. In cross examination, Mr. Fenelon accepted that his opinion that the plaintiff was fit to work, was based on his orthopaedic assessment of the plaintiff and of her orthopaedic history as set out in her notes. It was put to the witness that the plaintiff's expert, Dr. Miller, had stated in relation to her complaint of loin pain, that that was probably sub-costal pain, which was probably caused by the nephrectomy operation, as the sub-costal nerve was frequently interfered with in the course of such an operation. This would cause a pain syndrome, which appeared chronic in the plaintiff's case and affected her ability to work. Mr. Fenelon stated that having looked at the boxing video, if there had been a sub-costal problem, the plaintiff would have complained of pain, when in fact she was able to do the boxing exercise for a significant length of time. While the witness stated that he thought that the video had been approximately 30 seconds in length, the defendant's counsel indicated that it had, in fact, been of one minute and ten seconds in duration. Mr. Fenelon stated that if the plaintiff had had sub-costal pain, he did not think she would have been capable of doing the boxing exercise as shown on the video.

270. It was put to the witness that Dr. Miller was of opinion that the numbness in the plaintiff's left thigh was probably caused by surgery, which had caused damage to the lateral cutaneous nerve, as a consequence of the prolonged nature of the surgery. Mr. Fenelon stated that the condition was usually caused by the nerve getting caught at the front of the spine. He expected that it was caused by one of the surgeries carried out to the plaintiff. This was a cutaneous nerve, it did not supply the muscles. It was put to the witness that the plaintiff did not maintain that this condition prevented her working and the witness agreed with that.

271. Mr. Fenelon agreed that if a person was psychologically vulnerable, their perception of pain could be worse. He stated that from an orthopaedic point of view, he thought that the plaintiff was fit to do part time work and would be able to go on to do full time work in time. It was put to the witness that, while it was his opinion that from an orthopaedic point of view there was no reason as to why the plaintiff could not get back to full time work in due course, there may be urological and gynaecological explanations for the plaintiff's ongoing pain, which may affect his opinion as to her capacity for work. The witness stated that that was fair enough.

The Evidence of Mr. Marius Cassidy, Vocational Assessor.

272. Evidence was given by Mr. Marius Cassidy, Vocational Assessor, retained on behalf of the plaintiff. He had interviewed the plaintiff in March 2017. She had given an account of her work history. In relation to her work with The Kingfisher Club, his notes indicated that she had told him that she worked for a "short period" with that company, for approximately one/ two months. In his report, he had stated that the plaintiff had worked for "a short period as a sales representative with The Kingfisher Club, a franchise which runs leisure club facilities. She left this club after a short time for reasons related to her health, for which she decided to seek medical advice and to work differences with a supervisor". In relation to the online clothing business, he had stated in his report "She also tried to set up an online clothing sales business, in order to use her marketing skills. She reports that she found that she had not got the energy to run this business and had to shut it down".

273. Mr. Cassidy stated that the plaintiff had come across to him, as being committed, determined and engaged in relation to finding work. He stated that if the initial surgery had been successful, she would have been competing for work during the recession when a lot of people were unemployed, although the unemployment rate was higher for males. Women tended to be in a better situation, because they were working in the services and retail areas, which were less affected by the recession. He felt that the plaintiff had a reasonably good work history. He felt that by the end of 2010/ 2011, she would have got back into the work force relatively quickly. He pointed out that there had been a government strategy to promote jobs growth in the south east of the country. This area had the highest rate of jobs growth e.g. a number of call centres had been set up in the Waterford area. Things improved generally after 2011. The government also had a number of retraining programmes. The plaintiff could have done one of these through FÁS and would have obtained E.U. funding for such projects. She could have used that to obtain employment in the Waterford area. In these

circumstances, he thought that her prospects of getting employment would have been fairly good.

274. In relation to the plaintiff's current position, Mr. Cassidy stated that as the plaintiff had physical and psychiatric difficulties and in particular her requirements in relation to bladder frequency, this would be an issue for many employers. For example, in call centres, people would be expected to be manning the phones constantly during working hours. It would be unlikely that an employer would choose to employ the plaintiff, if there were other able bodied applicants. If the plaintiff did not disclose her medical condition to her prospective employer, he may let her go subsequently. If she did disclose it, he thought that she would be much less competitive in the labour market.

275. In addition, the length of time that the plaintiff had been out of work, since 2009, would be a negative factor. People loose their skills when out of the employment market for a prolonged period. Any absence from employment of greater than one year was significant. An absence of three years would be considered a long time. An absence of longer than that and the person would have to be retrained. He noted that any absence greater than one year was termed "long term unemployed".

276. Mr. Cassidy stated that given her physical condition and limitations, the plaintiff would need retraining to get a job in an area that could accommodate her. In summary, he felt that the plaintiff's access to employment was seriously compromised, such that she would be confined to short time work and casual work. People with low skill levels were confined to these types of work. Due to her physical condition, she would have much less chance to obtain employment than other able bodied applicants. She would be confined to short time work or casual work, such as work in a call centre or in security monitoring. Such jobs would pay the minimum wage of €9.50 per hour.

277. In relation to the issue of Disability Allowance, the plaintiff was currently in receipt of this payment at €193 per week. With the agreement of the Department of Social Protection, a person was able to retain that social welfare benefit, while also having earnings of up to €120 per week. There was no restriction on the number of hours that they could work. If they earned from €120 to €350 per week, 50% of this sum would be deducted from the disability allowance payment. This would be done up to a maximum of €427.50. This equated to an annual salary of €22,230. If they earned more than €427.50 per week, the person would not be entitled to receive Disability Allowance.

278. In relation to the receipt of capital sums, the first €50,000 is disregarded, but the person must inform the Department of Social Protection. Where they receive between €50,000 to €60,000, each €1,000 is assessed as €1 of means. Between €60,000 to €70,000, each €1,000 is treated as €2. Over €70,000, each €1,000 is treated as €4. Once a person reaches the threshold, the Disability Allowance and ancillary allowances, such as fuel allowance, would cease. It does not matter where the capital payment comes from e.g. an inheritance, or an award of damages. A person is not entitled to give away the capital sum, so as to re-qualify for Disability Allowance. However, they can apply the sum to discharging any mortgage on their family home and this would not be counted against the receipt of Disability Allowance.

279. In cross examination, Mr. Cassidy stated that where a person received a lump sum, this would be included as part of their means, which would be assessed for determining whether there was any entitlement to Disability Allowance. He accepted that a person could spend their damages in the ordinary way, such as by buying a car or discharging their mortgage. Once the award was dissipated and if she came below the threshold, she could re-qualify for Disability Allowance. The person must also continue to suffer from a disability, in order to have a continuing entitlement to the payment. If a person had urinary problems and psychiatric problems, which were subsequently removed by treatment, her entitled to Disability Allowance would cease. This is based on a medical assessment which lasts for one year and is reviewed yearly thereafter.

280. Mr. Cassidy accepted that a person's pre-accident work history was an indicator of their likely capacity for work, if there had been no accident or specific event affecting their capacity for work. In relation to the clothing shop which the plaintiff had run, he stated that a person receiving Disability Allowance must notify the Department of Social Protection if they are earning money over and above the social welfare payment. He understood that she had operated a business that was mainly an online business, and she also had a small shop premises. He did not think it was open full time. He stated that he had not known that it had been open four days per week. He thought that it was mainly an online business. She had told him that she had difficulty lifting and moving stock. She did not say that there were any financial considerations in closing the business. It was put to the witness that the plaintiff had run the shop element of the business for eighteen months, which indicated that she was fit for work. He stated that the plaintiff had told him that she had ceased trading due to health reasons. He did not know the level of income earned by the plaintiff from this activity, nor the level of her active engagement in the business. She had told him that it was health issues, rather than the economic climate, that had been the reason for closing the business.

281. Mr. Cassidy stated that it was possible for an injured person to engage in "rehabilitative work", wherein, a person could do some work, without actually being deemed fit for work generally. He thought that the plaintiff's shop business could be seen as being rehabilitative, rather than indicating that she was generally fit for work. He though that she had described it as being something to keep her occupied.

282. Mr. Cassidy stated that at p. 5 of his report, he had set out the conditions which currently existed, which he thought made her unfit for work at the present time. These were; her physical and mental disability, the length of time she had been out of work and her lack of accredited qualifications. He accepted that if her level of disability resolved after receiving further treatment, that would affect her capacity for work in the future. He stated that if Dr. Miller was of opinion that the plaintiff's urinary frequency could be alleviated, he would accept that opinion. If the plaintiff's psychiatric symptoms and the issue of bladder frequency could be satisfactorily addressed by treatment, then with appropriate retraining, he felt that the plaintiff could return to work. He accepted that the plaintiff was not undergoing any retraining, or looking for any other work, at the present time.

283. It was put to the witness that since April 2010, to the present time, the plaintiff had not sought any work. Mr. Cassidy stated that while he accepted that the plaintiff had not looked for paid employment during that time, she had engaged in a business activity, which was an attempt to do some work. He understood that her condition did not make it possible for her to apply for a job on the open market. He accepted that having regard to the online and high street clothing business, she was able to do some form of rehabilitative work, but he thought that it was rehabilitative in nature, rather than being full blown employment. Finally, it was put to the witness that C.S.O. figures for 2012, and subsequent years, showed that the south east of the country had the highest unemployment rate. Mr Cassidy agreed but stated that the rate of return to employment also showed that the south east area did well.

284. In re-examination, the witness stated that the plaintiff's work history prior to 2010 was probably affected by the fact that in the period since approximately 2007, she had been experiencing physical difficulties, which were later diagnosed as endometriosis. These would have affected her capacity for work at that time.

285. After the operation in 2010, she had applied to be enrolled on a nurse's training course. This indicated a willingness on her part to return to work. He was of the view that she was quite willing to return to work. He agreed with the opinion given by Ms. Ciara McMahon, the defendants' vocational assessor in her report at p. 10, to the effect, that the plaintiff was currently unsuitable for the demands of commercial employment.

The Evidence of Ms. Ciara McMahon, Vocational Assessor.
286. Evidence was given by the defendants' vocational assessor, Ms. Ciara McMahon. She met the plaintiff on one occasion on 23rd November, 2016. The plaintiff gave her an account of her work history prior to 2010. She was able to indicate the type of work she had done, but was very vague in relation to dates and the duration of each employment. In relation to her employment with The Kingfisher Club and in particular her reason for leaving the company, the plaintiff told her that she had had health issues, particularly at the time of menstruation, and also had personal difficulties with her manager in relation to time off and sick leave. For this reason, she had given up the job. She did not report that she had actually had any specific difficulties with her manager up to that time, but thought that such difficulties might arise, as they did not get on. Ms. McMahon noted that prior to 2010 the plaintiff had had frequent changes in employment. A lot of it had been part time and in the clerical field. Frequent changes of job and short periods of employment would be a cause for concern on the part of prospective employers.

287. In relation to the "Sparkle Closet" shop, it did not seem to have been fully established. The plaintiff said that it was part time and largely home based. She described the actual shop premises as being a "pick up location" for people who had ordered dresses online. However, from examining the transcripts of the plaintiff's evidence, Ms. McMahon was of the view that the premises were, in fact, more like a normal shop.

288. Ms. McMahon noted that the postings from the plaintiff's Facebook page showed there was activity throughout most days, with regular uploads and posts to maintain the profile of the business. The plaintiff put up regular photographs showing the dresses for sale, which showed good attention to detail. There were various queries from customers in relation to sizes, colours, etc, which the plaintiff was able to answer, thereby showing a good knowledge of her stock. Overall the Facebook posting suggested a significant time commitment, as she was available at various times throughout the day.

289. The fact that the plaintiff had closed the physical shop premises but continued the business online, showed that she may have had a customer base, but it was not large enough to keep the shop going. Ms. McMahon stated that her impression of the plaintiff's evidence and the Facebook pages, indicated that the plaintiff had a greater capacity for work than had been presented to her at the consultation.

290. Ms. McMahon stated that following the consultation in November 2016, she had given the opinion that the plaintiff was probably not suitable for commercial employment. The main issues at that time were her complaints of pain in the lower back. She had difficulties with her wrist, she complained of low mood and also reported difficulty sleeping due to pain and having to go to the toilet during the night. At the time of the consultation, the plaintiff had been wearing a wrist splint. This was due to carpel tunnel syndrome, for which she had received treatment. She thought that it had been largely resolved by the time of the consultation and was therefore not an issue at that time. It would have affected her ability to engage in clerical work. In relation to the complaint of low back pain, she stated that from the plaintiff's evidence it did not seem to be a significant issue. In relation to the difficulties involving bladder frequency, if these could be treated successfully by medication, this would change the opinion she had given in November 2016, such that the plaintiff would have a greater capacity for work. If the frequency issues were resolved, the tiredness issue would lessen, thereby increasing her capacity for work.

291. In relation to the issue of the plaintiff's low mood, Ms. McMahon stated that if that had been the only complaint, it would affect her motivation to seek employment and could cause periods of absence from work and may also render a person unsuitable for high stress jobs. She pointed out that there are people functioning perfectly adequately in the workplace who suffer with low mood.

292. Her current opinion was that the plaintiff had a greater capacity for work than she had indicated in her written report. She accepted that she would still experience some difficulties in obtaining employment, due to her work history and her prolonged absence from the work market. She would need the support of community employment schemes. However, if she had the relevant supports, she believed that the plaintiff had a capacity for work and would be capable of progressing to full time work in the future. This would be contingent on the resolution of her physical and psychiatric difficulties. If her bladder frequency difficulties were to remain, this would impact on the type of work that could be undertaken by the plaintiff. She would not be able to do a "front of house" roles, such as working at a reception desk, or at a cash register. But general office work would not have the same issues.

293. In cross examination, Ms. McMahon was questioned about the change in her opinion as to the plaintiff's capacity for work from that given in her written report, wherein she had given the opinion that the plaintiff was unsuitable for the demands of commercial employment. The witness stated that that opinion had been based on the plaintiff's carpel tunnel syndrome difficulties and the various difficulties that had been indicated by her. Having reviewed the transcript of the plaintiff's evidence, she was now of opinion that the plaintiff had a greater capacity for work, than had been stated in her report.

294. It was put to the witness that Dr. Cryan had stated as the plaintiff had P.T.S.D. for seven years, it was unlikely to abate in the future. She had also indicated that statistics revealed that 50% of those suffering with P.T.S.D., did not manage to return to work. Ms. McMahon stated that she was not aware of that statistical data. However, she accepted that 50% of sufferers of P.T.S.D., did not return to work. It was put to the witness that having regard to the plaintiff's complaints of lower back pain, her frequency/ urgency difficulties and her difficulty sleeping at night leading to excessive tiredness, that when all of these were taken together, it was unlikely that the plaintiff would be able to return to work. Ms. McMahon accepted that the plaintiff's ability to return to work was currently impaired. She accepted that the plaintiff needed some support to return to work, but did not need specific retraining, as the plaintiff had kept herself up to date. It was put to the witness that it was likely that the plaintiff would only be able for part time work. Ms. McMahon stated that without improvement in her medical condition, she would agree with that assessment. She also accepted that if the plaintiff's condition deteriorated, or if she developed problems with her remaining kidney, that would adversely affect her capacity for work.

295. In relation to the clothes shop run by the plaintiff, she recalled that the plaintiff had said in evidence that she had had to close the shop on occasions to go to the toilet and would have to ask customers to leave while she did so. She also stated that on occasions she was too ill to open the shop. She accepted that those matters would not be ideal for starting up a business. She had not been aware that the plaintiff had had a shop as such, rather than merely a collection point. She thought that it had been a good idea for the plaintiff to try the online business. It had been presented to her as a business, as an attempt on the part of the plaintiff to get back to work in a serious way. She accepted that the business venture may not have succeeded. She also accepted that rehabilitative employment may not lead to someone returning to full employment. She agreed that any form of return to work was rehabilitative in nature. The plaintiff had used her experience and talents and interest in fashion to set up the project. She could not

comment on the economics of the business, as she had not been given that information. The plaintiff had not given her the impression that it was a full blown business, rather that it had been a hobby which she had pursued online with a drop off point in the city. Ms. McMahon accepted that the plaintiff would have difficulty in running a business in her current condition.

296. It was put to the witness that the plaintiff's vocational assessor, Mr. Cassidy, thought that with support, the plaintiff could do part time work. She agreed with that assertion. She stated that the plaintiff would be suitable for clerical roles. It was put to her that the plaintiff's poor self image, e.g. feeling overweight and feeling a failure, would be negative factors for her in seeking employment. The witness accepted that they would be factors for a person trying to return to work. They could cause difficulties at interview. They could make it difficult for a person to obtain employment, rather than presenting a difficulty to them to retain any work actually obtained. She accepted that if there were two candidates for a job, the employer was likely to go for the person who did not have such issues.

The Plaintiff's Claim for Special Damages

297. The case made by the plaintiff at the trial in respect of her past special damages can be set out relatively briefly. The defendants have agreed the sum of €3,153.25, in respect of certain identified past medical expenses and past travel and accommodation expenses. In addition, thereto, the plaintiff has claimed the sum of €6,500 in respect of unvouched travel and subsistence expenses. The final aspect of the claim in respect of past losses, concerns the claim in respect of past loss of earnings. In a notice of updated particulars of special damages dated 4th October, 2016, the plaintiff pleaded that she had been earning circa €26,000 in her last job. She was in receipt of disability benefit in the sum of €188 per week at that time. It was pleaded that the plaintiff could obtain part time or casual employment at a rate of circa €9.15 per hour. If the plaintiff worked 20 hours per week, she would, therefore, earn €183 per week. It was further pleaded that if the accident had not occurred, the plaintiff would have earned circa €461, net of deductions, per week. As the plaintiff was unfit to work full time in her previous employment, or suitable alternative work, it was pleaded that she would have a net weekly loss of €278.

298. By a notice of further particulars of special damage dated 30th January, 2017, it was pleaded that the plaintiff's past loss of earnings were estimated at €111,490.66, being €26,000 per annum for a period of six years and ten months, less weekly disability benefit of €188 over six years and ten months.

299. In closing submissions on behalf of the plaintiff, Mr. Reidy, S.C., conceded that the question of the plaintiff's past loss of earnings was a difficult one. This was due to the fact that prior to the time of her husband's incapacity in 2007, she had not been needed as a bread winner for the family. Thereafter, her situation had changed, but it was accepted that her pre-operative work history was somewhat lacking. He stated that if she had managed to work a full year with The Kingfisher Club, or somebody else, the plaintiff anticipated that she would have been earning somewhere in the region of €26,000. It was submitted that that was reasonable given the fact that the minimum wage would have given her an annual salary of approximately €20,000. So it could not be said that her figures constituted any form of exaggeration. Counsel noted that in opening the case, the comment had been made to the court that given her work history and all relevant factors, the plaintiff's legal advisers did not think that the court could possibly give her full loss of earnings to date. He repeated that assertion in his closing remarks. Instead, he invited the court to make an award of general damages, to compensate her for loss of opportunity on the job market. He put that submission in the following terms:-

> "What I do say, judge, and I think this is the best way of approaching this case is that insofar as a loss of earnings to date is concerned, there must be a factor of loss of job opportunity up till the present time, which I would ask the court under a separate heading to give a small figure under that heading."

300. The plaintiff's claim in respect of future special damages was set out in the schedule prepared by the plaintiff's actuary, Mr. Tennant. In that schedule he gave a capital value of a future net weekly loss of €279, up to the age of 65 years of €286,812. Up to the age of 68 years, it amounted to €314,991. Alternatively, the capital value of the loss of Disability Allowance for the plaintiff for life, amounted to €213,265.

301. There were also a number of items of future costs. These consisted of future G.P. fees, at a rate of €50 per month, which resulted in a capital value of that cost for life of €18,923. There was a claim for future consultant's fees at a cost of €600 per annum, yielding a capital value of €18,858. Finally, it was asserted that as a result of receiving an award of damages, the plaintiff would lose her entitlement to a medical card, which would mean that she would become liable for payments under the Drugs Payments Scheme of €144 per month, giving a capital value of that cost for life of €54,498. This gave a total value for future medical and ancillary costs of €92,279.

302. Finally, in relation to the claim for future loss of earnings, it was submitted at the conclusion of the trial, that on the balance of probabilities, the plaintiff would be able to get part time work at some stage in the future similar to the work that she had done in the past, when she was working a minimum number of hours and earning a minimum figure that did not interfere with her social welfare payments. Counsel submitted that having regard to the fact that she would lose her entitlement to Disability Allowance once she received an award of damages, as she would exceed the income threshold for such a payment, the loss of such payment should be allowed in full. In relation to the loss of earnings into the future, counsel stated as follows:-

> "The position of loss of earnings part time loss of earnings, given that she has ongoing, for the next number of years ongoing symptoms that should somewhat abate, I think some figure over and above that should be allowed for the next five years, or so, in relation to earnings. This is a matter that the court traditionally always, because it is difficult to assess doesn't make impossible to assess but the court would have to use its experience in this regard."

303. While the court is slightly unclear as to the exact case being put forward by the plaintiff in this regard, it would appear that she is seeking full loss of earnings for the next five years, based on an earning capacity of €26,000 per annum, less any Disability Allowance that would have been paid in that period. Secondly, the plaintiff appears to be seeking loss of earnings thereafter, measured as the difference between the earnings that she will obtain on a part time basis and the earnings which she would have earned on a full time basis, again assuming an earning capacity of €26,000 per annum.

Conclusions

1. The defendant's application pursuant to section 26 of the Civil Liability and Courts Act 2004

304. Having set out the evidence in this case in some detail, it seems appropriate to deal firstly with the defendants' application that the court should make an order dismissing the plaintiff's case pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004.

305. At the conclusion of the trial, counsel for the defendant submitted that the plaintiff had put forward a fraudulent claim in relation to both her past and future loss of earnings. In essence, he submitted that the plaintiff had put forward a past loss of earnings claim in the order of €111,490.66. This was apparently based upon pre-accident earnings of €26,000 per annum for a period of six years and ten months, less weekly disability benefit of €188 for the same period. In relation to her future loss of earnings, the plaintiff had pleaded, by means of a notice of further particulars dated 30th January, 2017, that based on an earning capacity of €26,000 per annum, this gave rise to a net weekly wage of €461. Allowing for disability benefit of €183 per week, this gave rise to an ongoing net weekly loss of €278. On the basis of a 1% real rate of return, the capital value of the plaintiff's future loss of earnings was pleaded as €309,136 (to age 65) or €340,272 (to age 68). On a real rate of return of 2.5%, her loss was pleaded at €266,324 (to age 65) or €288,286 (to age 68).

306. The defendant submitted that the plaintiff's claim to both past and future loss of earnings was based on an entirely fraudulent premise. It had been based on an assertion that the plaintiff had pre-accident earnings of €26,000 per year. However, after discovery of documents had been obtained, it transpired that the plaintiff had in fact only worked for a number of months in 2009, with The Kingfisher Club with whom she alleged that she had a contract under which she would be paid €26,000 per annum. Discovery of her bank accounts, had revealed that, in fact, there had only been one payment from this company to the plaintiff in June 2009 in the sum of €961. The plaintiff had never produced any copy of this contract. At the opening of the action, counsel for the plaintiff conceded that having regard to the very short duration of her employment with The Kingfisher Club, while the plaintiff remained adamant that she had had a contract with them under which she was to be paid €26,000 per annum, the plaintiff was withdrawing her specific claim to past loss of earnings and would instead invite the court to make an award of general damages to compensate her for loss of opportunity on the job market during the years 2010 to 2017. Counsel for the defendant submitted that this concession was only made by the plaintiff, when, having regard to the matters disclosed on discovery, she realised that "the game was up" and she elected not to proceed with her fraudulent claim in relation to past loss of earnings.

307. Counsel for the defendant further submitted that notwithstanding the fact that, on her own evidence the plaintiff had only worked with this company for a number of months, possibly as little as three or four months, she had not been able to produce any contract from the company, she had not called any witness from the company to prove the terms of the contract, and had not been able to explain why there was only one lodgement to her bank account in June 2009, yet she persisted in formulating her claim for future loss of earnings on the basis of the difference between what she was likely to earn in the future on a part time basis and the amount which she claimed she would have earned under the contract with The Kingfisher Club.

308. Counsel for the defendant further pointed out that in an affidavit sworn by the plaintiff on 10th February, 2017, she had stated that she had worked for The Kingfisher Club "for a time". She stated that when she worked with that company in 2009, she understood and had assumed they were responsible for and would in fact make the appropriate returns and payments in respect of PAYE and PRSI. She stated that as a result of inquires which she had made with the revenue authorities, it appeared they had not done so. She stated that it appeared that no proper paperwork was processed, nor payments made to the Revenue Commissioners by Kingfisher on her behalf. She went on to state that the best estimate of her earnings around that time had been furnished to the defendant. She stated that although it may not be entirely accurate, she estimated that her annual income would have equated to a salary of about €25,000 per annum. She went on to state that she had been paid "mostly in cash", but she had been able to give the defendant some bank statements showing lodgements from Swimworld (Waterford) Leisure Limited trading as Kingfisher.

309. Counsel submitted that in view of the fact that this was a reputable company, operating gyms and other such facilities on behalf of local authorities and universities throughout the country, it was simply untenable and untrue for the plaintiff to suggest she had been paid in cash by that company. It was submitted that taking all of these matters into account, the court should come to the conclusion that the plaintiff had attempted to put forward a fraudulent case in relation to her past loss of earnings, which had only been withdrawn when she realised that the documentation disproved her assertions in that regard and that the plaintiff had persisted in putting forward a fraudulent claim in relation to her alleged future loss of earnings, as that was based upon an unproven contract under which she had only worked for a number of months and in respect of which there was no proof before the court. It was submitted that in these circumstances, the court should dismiss the plaintiff's case pursuant to s. 26 of the Civil Liability and Courts Act 2004.

310. Section 26 of the Civil Liability and Courts Act, 2004, is in the following terms:-

> "(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—
>
> (a) is false or misleading, in any material respect, and
>
> (b) he or she knows to be false or misleading, the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—
>
> (a) is false or misleading in any material respect, and
>
> (b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.
>
> (4) This section applies to personal injuries actions—
>
> (a) brought on or after the commencement of this section, and
>
> (b) pending on the date of such commencement."

311. In response to these submissions, counsel for the plaintiff stated that the plaintiff had not given any false or misleading evidence

in relation to her earnings with The Kingfisher Club. While the plaintiff had withdrawn her claim to past loss of earnings as pleaded on 30th January, 2017, she had not done so due to any realisation on her part that any fraudulent claim had been exposed by the defendants. Rather, taking a realistic view of the totality of her pre-operative work history and in particular the short duration of her employment with The Kingfisher Club, a decision was made that it would not be realistic to pursue a past loss of earnings claim on the basis of such a short period of pre-operative employment with that company. Instead, while the plaintiff always maintained that she had in fact had a contract for €26,000 with The Kingfisher Club, she would instead invite the court to make an award of general damages under the heading of "loss of opportunity" in respect of her loss of earnings for the period 2010 to the trial of the action.

312. Counsel pointed out that in her evidence, the plaintiff had been adamant that she had always had such a contract with The Kingfisher Club. She had candidly stated that while she had searched her house thoroughly, she had not been able to unearth a copy of her contract with that company. She had, however, been able to find a copy of the Employee Handbook issued by the company, which she had handed into court. Counsel further pointed out that the level of earnings provided for under the contract was only marginally in excess of the minimum legal wage, which was circa €20,000 per annum. In such circumstances, it could not be alleged that the plaintiff was exaggerating her claim for loss of earnings into the future.

313. Counsel for the plaintiff referred to the decision of the Court of Appeal in *Nolan v. O'Neill* [2016] IECA 298 and in particular to the judgment of the court delivered by Irvine J. at para. 92:-

> *"I have no hesitation in dismissing the defendants' application under s. 26 of the Act of 2004. I would like to add that this section is there to deter and disallow fraudulent claims. It should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled. There is a world of a difference between this plaintiff's case and the fraudulent claims that have been exposed in the cases that were opened to this court in dealing with this s. 26 application…"*

314. Counsel also referred to para. 56 of the same judgment:-

> *"56. I find myself in significant agreement with the submission made by Mr. Counihan S.C. on the plaintiff's behalf that claims for loss of earnings post dating any particular accident are always a matter of some speculation and that this is why actuaries, when they prepare their reports, often offer a range of options to a court as to the level of earnings which a plaintiff might have expected to earn had they not been injured. I am quite satisfied that s. 26 was never intended to be used to deny a plaintiff their lawful entitlement to compensation because they had taken an overly optimistic view as to the earnings they might have enjoyed but for their injuries. While it might be relatively easy for the injured civil servant to anticipate what they might have earned but for injuries which they received, the same cannot be said for those employees whose wages may vary for a whole range of reasons. Thus, the fact that Mr. Nolan swore an affidavit verifying the truth of the schedule of loss of earnings, which included Mr. Tennant's reports, should not be the subject of an adverse finding against him for the purposes of s. 26 of the Act.*
>
> *57. I fear that the trial judge in the present case fell into error in failing to draw a distinction between the onus of proof that rests on a plaintiff to prove their claim for loss of earnings on the balance of probabilities, and the onus that is on a defendant who seeks to have the entire claim dismissed under s. 26. A trial judge who receives inconsistent evidence as to a plaintiff's pre-accident or likely post-accident earnings is perfectly entitled to reject the claim advanced where, as in the present case, the plaintiff did not seek to resolve discrepancies in the figures advanced in support of such claim. Alternatively, the trial judge might calculate the plaintiff's loss of earnings claim based upon whatever earnings figures they consider most accords with the evidence. What they are not entitled to do is to dismiss the otherwise meritorious claim for damages on the basis that the plaintiff failed to resolve the conflicts in his own evidence. It is for the defendant to establish that the plaintiff intentionally sought to materially mislead the court."*

315. Counsel submitted that where the plaintiff had established in her evidence, that she had had a contract with The Kingfisher Club and while she had only kept that job for a short period, due to the fact that she did not get on with her immediate supervisor and she feared that if she were to seek time off due to her medical complaints at that time in 2009, she thought she would not be given such time off and had therefore left the job. However, it was submitted that it was reasonable in these circumstances for the plaintiff to base her claim for future loss of earnings on the level of pay that had apparently been agreed under that contract. This was particularly so, as the agreed salary was only marginally in excess of the minimum legal wage.

316. In considering this issue, the court has had regard to the dicta in various cases which have set out the level of evidential proof which is required, before a court can dismiss a plaintiff's claim pursuant to s. 26 of the 2004 Act. The Court of Appeal has recently addressed this issue in *Platt v. OBH Luxury Accommodation Limited* [2017] IECA 221, which judgment was delivered on 28th July, 2017. Delivering the judgment of the court, Irvine J. referred to what she had said at paras. 43 and 44 of her judgment in Nolan *v. O'Neill*, wherein she had cited with approval the dicta of Fennelly J. in *Goodwin v. Bus Éireann* [2012] IESC 9, where he had stated as follows at para. 62:-

> *"For this section to apply, the defendant must discharge the burden of showing that some material evidence has been given which is false or misleading and that the plaintiff knew that it was false or misleading. (See the judgment of Denham C.J. of 2nd December 2011 in Ahern v Bus Éireann [2011] IESC 44). Counsel for the defendant correctly accepted that this amounted to an allegation that the claim was fraudulent."*

317. Irvine J. had gone on at para. 44 of her judgment in Nolan v. O'Neill to state as follows:-

> *"However, this does not mean that a defendant must establish that the entirety of a plaintiff's claim is false or misleading in order to succeed on such an application. It is clear that proof that a plaintiff's claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim."*

318. To deal firstly with the plaintiff's claim for past loss of earnings, it was submitted that where a plaintiff abandons a substantial loss of earnings claim without any adequate explanation, the court is entitled to draw the inference that such claim was fraudulent in nature. It is certainly true that where a plaintiff simply abandons a large loss of earnings claim, without adequate explanation, this can indeed be taken into account by the court when considering an application pursuant to s. 26 of the 2004 Act; see comments of Quirke J. in *Farrell v. Dublin Bus* [2010] IEHC 327 and judgment of the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56.

319. However, in this case, I do not think it is correct to say that the plaintiff simply abandoned her past loss of earnings claim. What

seems to have happened, is that when the case was looked at in depth, a decision was made that it would be unrealistic in the circumstances of this case, for the plaintiff to put forward a claim for past loss of earnings based on the level of earnings under the Kingfisher contract in 2009. The matter had originally been pleaded on that basis, probably due to the fact that the plaintiff's pre-operative work history was patchy. She had done a number of short term jobs, some of which were somewhat part time in nature and were paid on a commission basis. She had also worked on a number of community employment schemes. The only normal full time job which she had had, was her period of employment with The Kingfisher Club. It was probably for that reason, that the decision had initially been made to plead her loss of earnings on the basis of her earnings under that contract. As she had only worked for that company for a very limited time period, of possibly two to three months, and as there was only evidence of one payment by the company into her bank account in June 2009, it would have been unrealistic in the light of her other pre-operative work history, to maintain a claim for past loss of earnings on the basis of this contract. By the end of the case, the plaintiff's legal advisers conceded that there was no reality to seeking past loss of earnings on the basis of the Kingfisher contract and instead asked the court to make an award by way of general damages for loss of opportunity on the job market. In so doing, I do not think that the plaintiff was abandoning a fraudulently based claim, but was rather adopting a realistic approach to the issue of her probable loss of earnings in the period 2010 to 2017.

320. In relation to the claim for future loss of earnings, which was calculated using a baseline figure of €26,000 as the level of earnings which she would probably have earned, had she not been injured; the defendant has submitted that having regard to the absence of any objective proof in relation to her contract with The Kingfisher Club and having regard to the very short duration of her employment with that company, this constitutes a fraudulent claim being made by the plaintiff, in which circumstances the court is invited to dismiss her claim entirely.

321. At all times, the plaintiff has remained adamant that she did have a contract with The Kingfisher Club under which she was to be paid an annual salary of €26,000. She accepts that she has not been able to produce a copy of this contract, although she has searched her house thoroughly. She was able to produce a copy of the Employee Handbook which she says was given to her at the time that she commenced employment with the company. It seems to me that in these circumstances, the defendant is perfectly entitled to argue that her loss of earnings claim into the future is based on a somewhat unrealistic footing and should not be allowed; but I do not think it is open to the defendants to argue that that claim, or any evidence connected therewith, was fraudulently given by or on behalf of the plaintiff.

322. When one looks at the reality of the claim being made by the plaintiff, she is not claiming that she was earning in the past, or will earn in the future, a salary greatly in excess of the minimum legal wage. In effect, what she is submitting is that having regard to the level of earnings which she had with The Kingfisher Club, albeit for a short period in 2009, which was €6,000 over the legal minimum wage, that it is reasonable to assume that but for her injuries, she would have obtained work at a similar salary level and would have continued to do such work until reaching normal retirement age. Again, while it may be argued that having regard to her entire pre-operative work history, it is somewhat unrealistic to base her claim for future loss of earnings on the strength of a couple of months spent working with a particular company in 2009, that does not render the claim fraudulent in nature. In the circumstances, I refuse the defendant's application to dismiss the plaintiff's claim pursuant to s. 26 of the Civil Liability and Courts Act 2004.

323. In both his oral and written submissions, counsel for the defendants also submitted that the plaintiff's case should be dismissed pursuant to s. 26 of the 2004 Act, having regard to the allegedly false and misleading evidence given by the plaintiff in relation to her activity in running her online clothing business known as Sparkle Closet. For the reasons set out later in this judgment, the court has come to the view that while the plaintiff was somewhat unforthcoming about her business activity carried on between January 2014 and November 2016, it is not satisfied that the plaintiff has gone as far as giving false and misleading evidence in relation to this business activity, such as to warrant dismissal of her case pursuant to s. 26 of the 2004 Act.

324. Counsel for the defendants further submitted that the court should dismiss the claim pursuant to s. 26, having regard to the fact that in the course of her pleadings, the plaintiff had sworn an affidavit in which she averred that she had multiple physical symptoms giving rise to her inability to work, including pain and limitation of movement. While the plaintiff had verified this information on affidavit, she had not advanced the claim in evidence. Counsel submitted that her affidavit evidence had been contradicted by the content of the boxing video and by the plaintiff's own evidence, which was to the effect that it was only her urinary symptoms, including tiredness caused by nocturia, which were preventing her from fully participating in the workplace.

325. Counsel submitted that the evidence of the plaintiff in relation to her physical limitations was false and misleading in a material respect, when looked at in light of a number of contradictory facts, including: her entry in a dancing competition in 2015, the level of physical activity associated with the operation of the Sparkle Closet business, the level of physical activity demonstrated on the boxing video and the frequency of holidays taken by her at a time when she claimed to have been dreadfully affected by the consequences of the operation carried out in 2010. Counsel submitted that in the light of these facts, her evidence in relation to her physical impairments since 2010, could only be construed as being fraudulent or misleading evidence, which justified dismissal of her action pursuant to s. 26 of the 2004 Act.

326. While these submissions are not without substance, the court is of the view that having regard to the findings which are made later in this judgment as to the plaintiff's mental and physical capacity in the years subsequent to 2010, the court does not find that her evidence as to her physical and mental capacity during the period from 2010 to date, has been false or misleading in a material respect. Accordingly, the court declines to dismiss her case under this heading.

327. I turn now to the award of general damages. In calculating this sum, it is appropriate to divide the plaintiff's claim into different blocks of time.

(a) The period April 2010 to the end of 2013

328. There is really very little dispute between the parties in relation to this period of time. The defendants have accepted that the plaintiff suffered considerable pain and discomfort as a result of the blockage of her ureter and that even after the Boari flap operation in May 2010, she continued to experience distressing internal pain in the following years. They also accept that during this time she was subjected to a large number of invasive tests. The deterioration in her physical and mental condition is evidenced by the very large number of attendances with her G.P. in the years subsequent to the index event in 2010. The deterioration in her mental health was evidenced by the suicide episode at the Weir in Kilkenny, which it appears probably occurred in or about New Years Eve 2011. It is also noteworthy that she was referred by her G.P. for specialist psychiatric evaluation at that time. However, due to the excessive length of the waiting list for such psychiatric services, she was evaluated and referred back to the G.P. for treatment with the appropriate medication.

329. While the defendants accept that she had a miserable time during these years, they point to the fact that she was able to go

on approximately three foreign holidays in 2010 and in 2011. They also point out that, while antidepressant medication had been suggested to her by her G.P., she declined this offer apparently on the basis that she had had an uncle who had been committed to a psychiatric institution. Furthermore, while it is possible that she may have had some brief period of counselling around that time, it does not appear that she had any significant counselling, or any C.B.T., at that time.

330. In relation to this period, the court accepts the account given in evidence by the plaintiff as to how she was during the years 2010 to the end of 2013. The court accepts that during this period, she had difficulty with frequency and urgency of urination, both during the day and at night. She also suffered constant and at times, severe pain in the general area of her abdomen and kidneys and also had back pain. The court accepts the evidence given by Dr. Cryan that the plaintiff was suffering from P.T.S.D. and depression during that time.

331. The court is satisfied that having regard to the extent of her physical and psychiatric symptoms at that time, she was incapable of working in the period April 2010 to December 2013.

(b) The period from January 2014 to December 2016

332. This is the critical period in this case. The findings that are made on this issue will have a profound effect on the award of general damages both to date and into the future and on the award of damages for loss of earnings, both in the past and into the future and on the ancillary losses which are claimed into the future. It is in relation to this period, that there is the greatest level of dispute between the parties.

333. The case made by the plaintiff is that she remained in considerable pain and discomfort during these years. While she accepts that she set up an online clothing business in January 2014, and opened a small retail premises on the Quay in Waterford at the same time, this was not a business enterprise in the usual sense. She states that it was really more of a hobby than a business enterprise. She had an interest in fashion and she had set up this business to give her something to occupy her days and to occupy her mind. She states that the shop itself was very small, measuring some 4m x 5m. This was evident from the photograph of the shop taken on 23rd November, 2014, as shown in the folder of Facebook postings at p. 395. She stated that she had three mannequins and a couple of rails of clothes. It was only open from 11am until 5pm, from Thursday to Saturday. She stated that it was not really a shop as such, but was really a collection point, to enable customers to pick up dresses that they had ordered online.

334. The plaintiff stated that the business was run on a very informal basis. She paid rent to her landlord of €75/ €80 per week. Her landlord was very easy going, so she could pay the rent on a weekly or monthly basis. She stated that she had never had any formal accounts drawn up by an accountant, as she could not afford to employ someone to do so. She stated that on a good week she would earn circa €100/ €150. She had never made any returns to the tax authorities in respect of this business venture.

335. The plaintiff stated that in the years in question, she continued to be very unwell. On a significant number of occasions, she had been so unwell that she had not been able to open the shop at the appointed time. Instead, she had had to telephone her aunt, who owned a shop nearby, and asked her to go down and put a notice on the front door of the shop stating that she would not be in until a certain time that day. She stated that on occasions, her landlord used to give out to her, due to the fact that she was not opening the shop during her stipulated opening hours.

336. The plaintiff also referred to the G.P. records from Tramore Medical Clinic in support of this contention. These showed that in 2014, she had twelve visits to her G.P. for various complaints connected to the injuries sustained in 2010 and in the years subsequent thereto. She also had six other visits to her G.P. in that year for unrelated matters. There were also referrals to the urology department of St. James Hospital during that year.

337. The plaintiff stated that she had had to close her shop in July 2015, due to her continuing health difficulties. She accepted that on her Facebook page, she had placed the following post on 9th July, 2015 announcing the closure of her shop:-

> "As most of you know, I had been ill for a few years and had 11 operations, due to health reasons plus the economic climate, I have decided to make Sparkle Closet an online shop only. So from 31st July, all sales will be on www.sparklecloset.co.uk. Thank you for all who have supported me."

338. The plaintiff stated that after the closure of the shop, she felt somewhat of a failure. However, she managed to continue with her online business for a further eighteen months, until November 2016. She stated that she had eventually closed the business due to the fact that she could not cope with the physical demands thereof.

339. It is the plaintiff's case that having regard to the relatively low level of business she had undertaken during those years and having regard to the fact that she was not even able to continue such work, the court should find that she continued to be symptomatic and significantly disabled in the work aspects of her life. It was submitted that such disability would continue for at least another five years into the future. Thereafter, she would be capable of doing some part-time work on the open market.

340. The defendants countered these assertions by submitting that from a perusal of her Facebook postings, it was clear that the plaintiff had put considerable effort into her business during those years. They submitted that it was clear from these postings, that she had set up a relatively sophisticated business in which she took considerable interest. She had managed to keep the online business going for a period of three years, which was significant. The fact that the business had to be closed after three years, was not due to the fact that she was in any way disabled in coping with the demands thereof, but in all probability was due to the failure of the business from an economic point of view, as she was trading within a very competitive sector of the clothing market.

341. In support of this contention, the defendants pointed to the fact that in the extensive Facebook postings for the period September 2014 to May 2016, running to some 508 pages, there was, in fact, only one mention of her being sick. While the plaintiff had had to close the shop premises in July 2015, she had stated on Facebook that this was due to a combination of health reasons and the economic climate.

342. The defendant submitted that in addition to the Facebook postings, there were other factors which indicated that the plaintiff had in fact made quite a substantial recovery, certainly by 2015. In that year, she had announced on Facebook that she had entered the Strictly Deise Dancing Competition, which was going to be held in late spring of that year. She had also got involved in organising a fashion show, which was going to be held in conjunction with the dancing competition, but she did not ultimately go ahead with either of these projects. This was not due to any injury or illness relevant to these proceedings, but was due to the fact that she had a partial tear of the medial meniscus in her left knee, which had to be operated on in or about June 2015.

343. The defendant also referred to entries which had been made in the records of St. James' Hospital by doctors who had treated

the plaintiff in the outpatients department of the Department of Urology Surgery. In a note dated 12th June, 2014, a Dr. Arun Thomas stated, "considerably better except for very minor issues". In a further note from the same department dated 26th February, 2015, while the note had recorded under the heading "UTS", that the plaintiff complained of urgency and frequency, the note had gone on to record "U/E, very happy at present. Very happy re LUTS – no problems". The defendant submitted that these were entries made by doctors who were totally unconnected with this case and as such their independent assessment that the plaintiff was doing reasonably well, should carry considerable weight.

344. The defendants also pointed to the fact that in 2016, the plaintiff participated in a video showing her engaging in a boxing exercise with her personal trainer, Mr. Twomey. This video had been posted on YouTube as part of the marketing for his gym. Although the video had been taken down from YouTube just prior to the hearing of the action, the defendants had managed to obtain a copy of same. It was played to the court. It showed the plaintiff moving in a general circular motion, while punching vigorously at pads, which were held chest high by the personal trainer. The defendants submitted that while the plaintiff had never alleged that she was unable to engage in physical exercise, the existence of the video lent credence to the assertion that by 2016, she had continued to make a significant physical recovery.

345. In relation to the plaintiff's psychiatric symptoms, the defendants pointed out that in cross examination, the plaintiff had accepted that it was only her issues in relation to urinary frequency/ urgency, which held her back from working. The defendants also pointed out that in 2015, there were only two recorded visits to her G.P. for complaints arising out of the injuries, the subject matter of these proceedings; both in the month of July. The records further disclosed that in 2016 up to the month of May, the plaintiff had had three visits to her G.P. in relation to various complaints, but there was some suggestion that these were in relation to gynaecological problems. On this account, the plaintiff had been examined in the gynaecology outpatients department on 9th May, 2016. The plaintiff had also attended with her G.P. in April 2016, but in relation to an unrelated matter of a small lump on her right breast. The defendants submitted that taking all of these factors into account, there was no objective evidence to support the plaintiff's assertion that she remained considerably symptomatic and disabled in 2015 or 2016.

346. In order to reach a conclusion as to the plaintiff's physical and mental condition in the years in question, it is necessary to examine in some detail the clothing business which she ran for three years from January 2014 until November 2016. Unfortunately, the plaintiff has not been able to produce any documentation at all in relation to this business venture. All that she could provide to the court was her own oral evidence to the effect that this was not a full blown business venture in the usual sense, but was really just a hobby, which she had pursued in an effort to rehabilitate herself and give her something to do during the day and give her something to occupy her mind. In essence, she stated that this was a very low key business, which only opened for a number of hours, three days a week and had a very small turnover.

347. The only other evidence which the court has before it in relation to the business conducted by the plaintiff during these years, was the extensive booklet of Facebook postings made by the plaintiff in the period September 2014 to May 2016, which had been obtained by the defendants from the internet.

348. From a detailed consideration of these postings, the court has been able to come to a number of conclusions. Firstly, the court is satisfied that this was a reasonably sophisticated operation. The pictures on the plaintiff's Facebook page, which appeared to be taken from her website, show that the dresses were modelled by professional models and the photographs were taken by professional photographers. The photographs were taken in a professional manner, to show off the dresses to their best advantage. Thus, while the plaintiff had stated in her evidence that she had trawled through various websites and had purchased dresses from shops that were closing down, or had gone into liquidation, it is clear that she had access to high quality photographs to show off her produce. The photographs of the models were supplemented from time to time by photographs showing her customers at various functions, wearing dresses that had been sourced from Sparkle Closet. It is also clear that her website and Facebook pages were somewhat dynamic, in that new photographs were uploaded on a frequent basis.

349. In terms of payment, the plaintiff had provided her customers with a number of payment options. She had a visa machine which enabled credit card payments at the shop. She was also able to furnish them with an invoice. Alternatively, they were able to pay via credit card, or via pay pal on the website, or they could pay by means of a postal order within the Republic of Ireland. In terms of the opening hours, in a posting on 1st December, 2014, she informed customers that the shop was open from Wednesday through to Saturday from 11am to 5.30pm. At a later date, she posted that she was thinking of opening on Mondays, as a lot of her potential customers would be on their day off that day. The court also noted that on a number of occasions, when customers made enquiries in relation to specific dresses, the plaintiff replied that she had sold out of the particular ranges. There were messages to this effect on pages 88, 93, 99, 101, 111, 121, and 129 of the relevant folder. This indicated that, while the plaintiff may not have been able to get her hands on sufficient quantities of stock, she was certainly able to select dresses which her customers wished to purchase.

350. On 11th April, 2015, the plaintiff announced that she was now on Instagram and on 19th April, 2015 she announced that she was on Twitter.

351. The court also noted that the plaintiff's online business may have been part of a larger online enterprise, in that in a number of the postings, there was reference to particular dresses being sold by Sparkle Closet in the Tictail Store. The postings further stated "Tictail lets you create a beautiful online store for free – Tictail.com". The court is not clear as to the exact relationship between the plaintiff's website and the Tictail website. However, it would not appear that the plaintiff's online business was a one-man effort on the part of the plaintiff, but may have been an online facility, whereby she was in fact affiliated to a larger franchise or business, which had access to professional models and photographers, etc.

352. The court was also struck by the fact that the plaintiff showed considerable business acumen in increasing her customer base. She did this by means of regular competitions, wherein any customers following her on Facebook, could be put in for a draw with a chance of winning a free dress, all they had to do was click on a photograph of a dress, indicate that they liked it and share it with a number of their friends. This was a very clever strategy, as it meant that her dresses were, effectively, being marketed by her existing customers, within their own circle of friends. This marketing strategy was clearly successful, because in a Facebook posting of January, 2015, the plaintiff indicated that she had acquired 6,000 "likes" at that time. By March, 2015 it had risen to 7,000 "likes" and on 17th September, 2015, it had risen to 11,000 "likes". Given that she was operating in the geographical area of Waterford city and county, this was a considerable achievement.

353. The plaintiff continued to organise regular competitions throughout 2015 and into 2016. In February, 2016, the plaintiff ran a competition known as the "5, 4, 3, 2, 1 … WOW!" competition. In this competition, she would put up a dress at random on her Facebook page and the first person to comment "buy" would get the dress for €5. This would happen with other items, which would be sold sequentially for the lower prices. Her customers following her on Facebook were told to keep watching and that they must like and save the page to get further notifications in relation to the competition. In the following month, she put up a posting on 17th

March, 2016, thanking her customers from Ireland, Cyprus, Denmark and the United Kingdom for supporting Sparkle Closet. When asked about this in evidence, the plaintiff stated that while she did have customers in Ireland and the United Kingdom, she only had one in Denmark. She stated that this posting was put onto her Facebook page as a purely marketing ploy. She denied that she had any extensive European aspect to her business.

354. In relation to her profit margins, the plaintiff had stated in evidence that she usually bought the dresses for £5 stg and sold them for €15. The court noted that on the Facebook page, when queries were raised by various customers in relation to various dresses, a number of these were retailing at €74.95 and similar prices. In April, 2016, the plaintiff ran a larger competition which involved other businesses such as Mel Hair Extensions, Jayne Carey Makeup Artist, Sweet Temptations and the Kazbar. This indicated that the plaintiff was able to act in a coordinated way with other businesses.

355. From a consideration of these Facebook pages, the court is satisfied that Sparkle Closet was a reasonably sophisticated online business. It had its own website and had the usual methods of payment available to customers. It would appear that the stock was of a reasonably high quality, it changed regularly and the marketing was at a sophisticated level. Having regard to the frequency of changes of the photographs on the website and the level of interaction by the plaintiff with her customers on Facebook, it is clear that she was actively engaged in the business, particularly in 2015 and 2016. The material on her Facebook page does not indicate that this was a low key operation which was more of a hobby than a business.

356. The court is satisfied that in running this enterprise on her own, the plaintiff was operating at a reasonably high cognitive level, so that her injuries did not prevent her at that time from undertaking work which demanded a reasonably high level of mental functioning. In fairness to the plaintiff, she conceded in cross-examination that it was only her bladder frequency/ urgency difficulties, which had led to the closure of the shop premises in July, 2015.

357. The plaintiff's assertions that she was unreliable in relation to the opening of her shop, was not supported by the Facebook postings. The court noted that on 14th January, 2015, the plaintiff had made a posting stating that due to illness the shop would be closed that day. The court also noted that in a posting dated 10th June, 2015 the plaintiff informed her customers that on Friday 12th June, she would have to close early at 2.30pm and that the shop would be closed all day Saturday, 13th June, 2015. The court could find no other similar postings. It is also noteworthy that the plaintiff did not call evidence from either her landlord or her aunt, to support her assertions in this regard.

358. It is also noteworthy that the plaintiff has not furnished any documentary evidence to show the level of business which she was doing during this period. The court only has her evidence that she earned circa €100/ €150 per week. While one can understand the absence of formal annual trading accounts, it is hard to see why not a shred of documentary evidence, in the form of orders placed, invoices, receipts, bank statements, credit card statements, or any other documents, could not be provided to show the level of turnover which she had at that time. Indeed had it not been for the ingenuity of the defendants' legal advisors in obtaining the Facebook postings, the court would not have had any objective evidence as to the nature of this business venture.

359. The plaintiff was also somewhat reticent about giving any concrete details in relation to this business activity, either in her dealings with the defendant's vocational assessor, Ms. McMahon, or in her pleadings, or in her affidavits. When she was assessed by Ms. McMahon on 23rd November, 2016, she furnished some fairly vague details in relation to the business. These are summarised at p. 23 of Ms. McMahon's report. The vocational assessor noted that the plaintiff was unable to provide accurate figures regarding her income from the business. The plaintiff described the business as "*very part-time work*" and stated that at times her stock was sold at a loss. She told Ms. McMahon that figures relating to this business were held by her accountant. However, as already noted, she did not produce any such figures to the court.

360. In a detailed notice of further particulars of personal injury and loss of earnings, dated 30th January, 2017, it was pleaded *"The plaintiff has not worked since the operation".* This assertion was corrected some days later in an affidavit of verification sworn by the plaintiff on 6th February, 2017, wherein she stated as follows at para. 2:-

> *"2. I wish to make one correction in respect of the particulars delivered 30th January, 2017. The statement that I had not worked since the accident was taken from a previous report and added in error. In fact, I made an attempt to sell celebrity dresses following the operation. I did this as a self-employed person. I rented a premises and I tried to operate the business online. Unfortunately, due to the injuries sustained in the operation the subject of these proceedings, the business was unsuccessful and I had to close same."*

361. On 10th February, 2017, the plaintiff swore a further affidavit in relation to the adequacy of the discovery of documents which she had made in relation to her claim for loss of earnings. At para. 12 of the affidavit, she gave the following description of her online clothing business:

> *"I tried to start a business selling party type dresses following the surgery, but I had to close it down. I admit that with my symptoms, it was a bad choice at the time. If I was otherwise well, I believe it would have attracted more customers. My efforts were thwarted, however, by the surgery and the business failed due to my ongoing symptoms."*

362. Finally, the plaintiff was interviewed by Mr. Marius Cassidy, the vocational assessor who had been retained to give evidence on her behalf. He met with her on 27th March, 2017. As a result of what she told him at that interview, he gave the following account of the clothing business which she had operated from January 2014 to November 2016:-

> *"She also tried to set up an online clothing sales business in order to use her marketing skills. She reports that she found that she had not got the energy to run this business and had to shut it down."*

363. Later in his report, Mr. Cassidy noted that the plaintiff had attempted to set up an online sales business, but that was for the purpose for rehabilitation rather than as a career.

364. Having considered the Facebook postings, the accounts given by the plaintiff as outlined above and the account of the business given by her in her evidence, the court is compelled to draw the conclusion that, while the plaintiff admitted setting up and running this online business, she was careful never to give any concrete details to anyone about the business. The Court is of the view that the plaintiff withheld giving such details, due to the fact that she wished to brush aside this period of employment by describing it as merely a part time business, which was more in the nature of a hobby than a full blown business. The court is compelled to draw the conclusion that on this issue, the plaintiff has been less than fully forthcoming. The plaintiff has made the case that this online business was really a hobby or rehabilitative work, rather than a full blown business. The burden of proof rests on her to prove that assertion. She has not established this to the satisfaction of the court.

365. The court is of opinion that the handwritten entries in the records from St. James's Hospital, as referred to earlier, have to be approached with some caution. They are very brief hand written comments, which appear to have been made by some doctor, who was running a busy outpatients clinic. They are supportive of the defendant's assertion that the plaintiff was doing reasonably well on the dates specified, however the court cannot attach a great deal of weight to them.

366. However, the fact that the plaintiff was able to enter the Strictly Deise Dancing competition in 2015 and was able to participate in the organisation of a fashion show to be run in conjunction with the dancing competition, demonstrates that she was operating at a reasonably good physical level in early 2015. That she had to subsequently pull out of these projects, was not due to any physical complaint connected to these proceedings.

367. After the knee operation in or about June, 2015, it appears that the plaintiff went to the gym and engaged the services of a personal trainer to regain strength in her knee and in an effort to regain her overall fitness. It appears that she completed a twelve week programme at that time and achieved a reasonable level of fitness as demonstrated by the video posted on YouTube in 2016, which showed the plaintiff participating in a vigorous boxing exercise. In fairness, the plaintiff does not make the case that she is unable to engage in physical activities, her main difficulty is that she has bladder frequency/ urgency difficulties and it is these which prevent her from obtaining employment in the open market.

368. Having considered the Facebook postings, the G.P. records, the records from St. James's Hospital and the activities undertaken by the plaintiff in 2015, I am satisfied that while she did have considerable on-going problems during 2014, by 2015, things seemed to have changed substantially. While the shop premises closed in July 2015, the online business continued for another eighteen months. I am satisfied that the physical shop was merely a small adjunct to the online business, which had been set up in January, 2014. I accept the plaintiff's evidence that it was not so much a shop, as a collection point for customers, who had made purchases online, or were interested in trying on dresses which were shown on the website.

369. I am not satisfied that the closure of the online business in November 2016, was due to any disability on the part of the plaintiff. As the shop premises had closed eighteen months previously, the fact that she may have had frequency/ urgency difficulties, would have had virtually no effect on the operation of the online business. In fact that was probably the ideal type of business for her. In short, she could go to the toilet as often as she needed to do so. The plaintiff has not produced sufficient evidence to persuade the court that the closure of her business was due to a disability on her part, rather than due to the vagaries of an extremely competitive market. On the balance of probabilities, I am of opinion that her online business failed for commercial reasons, namely that her business model was not able to survive in an extremely competitive sector of the clothing market.

370. As was pointed out by this court in *Svajlenin v. Kerry Group Services Limited* [2016] IEHC 439 and in *Dardis v. Poplovka (No. 1)* [2017] IEHC 149, a plaintiff is not entitled to carry on a business for a period, and when that business closes for whatever reason, turn around and bill the defendant for their loss of wages for the period that they were self-employed. If a plaintiff wishes to make the case that they had to give up their business activity because they were not capable of the demands thereof, due to their physical or mental injuries, they bear the burden of proving that that was in fact the reason why the business venture did not succeed.

371. In this case, having regard to the factors mentioned above, I am not persuaded that the plaintiff had to close her online clothing business due to her physical difficulties in having to go the toilet frequently and with urgency. As already stated, I am of the view that on the balance of probabilities, the plaintiff's Sparkle Closet online clothing business closed for commercial reasons unconnected with any on-going physical difficulties which the plaintiff may have had in the years 2014 to 2016. I find that by 2015 the plaintiff had made a reasonably good physical recovery. She did have frequency/ urgency difficulties, but they did not prevent her doing "back office" or online work.

(C) The Present and the Future.

372. In relation to the plaintiff's present condition, I accept her evidence that she continues to experience some frequency/ urgency difficulties with her bladder. This was explained by the plaintiffs' expert; Dr. Miller, on the basis that as her bladder had undergone surgery, it, and the nerve supply to it had suffered damage, including extensive scarring, an increase in rigidity and reduction in size and elasticity; which explained the instability of the bladder, causing frequency and urgency of urination.

373. During the hearing there was considerable debate as to whether the plaintiff continued to have any residual urine left in her bladder after micturition. This is known as Post Void Residue [hereinafter: "P.V.R."]. There were considerable discrepancies in the various documents and tests which were submitted to the court. In the records from St. James Hospital, there was a handwritten note on an outpatient record from the Department of Urology Surgery dated 12th June, 2014, wherein some medical person, possibly Dr. Arun Thomas, had noted "*P.V.R. 165ml*". In a document headed Urodynamic Report, from Tallaght Hospital dated 29th September, 2014, under the heading "*Findings*", there were two references to there being "*no RU*", meaning no residual urine. Finally, in a consultation note, which appears to have been made by a Dr. Idder, at the outpatients clinic at the Department of Urology in St. James Hospital on 24th September, 2015, it was noted that in November 2014, the plaintiff had "*stable detrusor and no residual*".

374. Dr. Flood, who had examined the plaintiff on two occasions on behalf of the defendants, stated that when he examined the plaintiff on 9th December, 2014, he carried out a test in relation to the plaintiff's ability to void her bladder, which showed that after micturition there was no urine left in her bladder. He carried out a further similar test on 9th January, 2017, which also showed that she was voiding her bladder completely. On the basis of the records referred to above and on the basis of these tests, Dr. Flood was of the view that there was no evidence that the plaintiff was not able to void her bladder completely. The significance of this, was that if she was able to void her bladder completely, there was no residual urine left in the bladder which would lead to an urge to go to the toilet sooner that might otherwise be the case. Secondly, the absence of residual urine removed one possible source of infection from the bladder.

375. On 6th January, 2017, the plaintiff attended with Dr. Miller in London. He had an ultrasound investigation carried out by Dr. Joanne Cleverley, who is a Consultant Radiologist with a special interest in urology, attached to the hospital of St. John and St. Elizabeth in London. She carried out an ultrasound investigation which showed that following micturition, there was an estimated residual volume of 92ml. Based on this finding, Dr. Miller formed the view that the plaintiff continued to have a significant P.V.R., which would contribute to her having an unstable bladder, giving rise to her complaints of frequency and urgency. He stated that it was not unusual for patients to have a variable P.V.R. reading from day to day. He stated that the fact that there had been prior readings showing a nil P.V.R., did not invalidate the results found by Dr. Cleverley.

376. In the course of his evidence, Dr. Flood cast doubts on the test carried out by Dr. Cleverley, on the basis that if she was carrying out such tests as part of a busy outpatient's department in a hospital, a situation could arise whereby there was an interval of time between the time when the plaintiff voided her bladder and when she was scanned with the ultrasound machine. During this

interval it was possible that the kidney would have produced further urine and that this would have collected in the bladder, which was then incorrectly taken as being the plaintiff's P.V.R..

377. The court does not accept this criticism of the test carried out by Dr. Cleverley. It is not at all unusual for consultants to request that tests be carried out by other specialists, such as radiologists, physiotherapists, and optometrists. The consultant then relies on the results of these tests to form his or her opinion in the matter. Civil litigation would become inordinately expensive and prolonged, if every person who carried out a test at the request of a consultant, had to be called to prove the efficacy of their test procedure. If the defendants wished to make the case that Dr. Cleverley's test was in some way deficient or misleading, for whatever reason, they should have indicated this to the plaintiff's solicitor, so that the plaintiff would have been in a position to call the necessary evidence to prove the method by which the test had been carried out. As this was not done, I decline to make any finding that the tests carried out by Dr. Cleverley were deficient in the manner suggested by Dr. Flood.

378. Thus, one is left with the somewhat unusual position that on 6th January, 2017, the plaintiff was shown to have a P.V.R. of 92ml, whereas on 9th January, 2017, she was recorded as having a zero P.V.R.. In these circumstances, the court prefers the opinion of Dr. Miller that a person's P.V.R. can be variable from day to day. This supports his opinion that the plaintiff continues to have a somewhat unstable bladder down to the present time.

379. The defendants' expert, Dr. Flood, has put forward the hypothesis that the plaintiff's present difficulties are in fact related to a marked increase in her fluid intake since 2014. His theory is that when he examined the plaintiff in January 2017, she gave him a verbal account of the amount of fluid that she was ingesting on a daily basis. By reference to a Frequency Volume Chart, which had been completed by the plaintiff in or about September 2014, which was contained in the records from St. James's Hospital, Dr. Flood was able to ascertain the approximate quantity of liquid that was contained in each cup of tea or glass of water as indicated by the plaintiff. On this basis, he noted that in 2014, her average daily fluid intake was circa 2,400ml. Applying the units set out in that chart to the number of drinks indicated by the plaintiff in 2017, he estimated that her fluid intake had risen to circa 3,700ml, and that allowing for the fluid content of ingested food, her daily intake would be in the region of 4,000ml. He stated that this was an extraordinary quantity of fluid to intake on a daily basis. He stated that if the plaintiff simply moderated her fluid intake, this would cause an automatic reduction in the number of times that she would have to void her bladder both during the day and at night. On this basis, he was of opinion that her continuing frequency/ urgency difficulties could be ameliorated, if not removed completely, by simply effecting a reduction in her fluid intake.

380. In closing submissions, counsel for the plaintiff argued strongly that this evidence of Dr. Flood, should not be considered by the court, due to the fact that his hypothesis, to the effect that the plaintiff was currently drinking an extraordinary amount of liquid on a daily basis and that her current condition could be significantly ameliorated by simply reducing the level of her daily fluid intake, was not put to the plaintiff's doctors and in particular was not put to either Dr. Miller or Dr. Byrne. It was argued that Dr. Flood's opinion was both radical and simple. They argued that this should have been put in a clear fashion to the plaintiff's doctors, so as to give them a fair opportunity to comment on this hypothesis. As this had not been done; it was submitted that the court should exclude his evidence in this regard.

381. In support of the submission that the court should not have regard to such evidence from Dr. Flood due to the failure of the defendant to put this evidence to the plaintiff's doctors in the course of cross examination, counsel referred to the following extract from the textbook, McGrath (2014) *Evidence, 2nd Ed.,* (Dublin: Thomson Reuters Round Hall) at para. 3-139:-

> *"As a general rule, a party who intends to call evidence to contradict the testimony given by a witness on examination – in – chief is required to put that evidence to him during cross examination so that he or she has an opportunity of providing an explanation in relation to that evidence. In Browne v. Dunne, Lord Herschell explained the rational for this rule as follows:-*
>
> > *'Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do so, if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box to give an opportunity to making any explanation which is open to him; and, it seems to me, that it is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'*
>
> *If a party fails to do this, then the trial judge has a discretion as to whether to admit the contradictory evidence but, in general, it will not be admitted unless the witness is recalled and the evidence put to him or her and an opportunity given of commenting on it."*

382. Counsel also referred to the decision of the Supreme Court in *McDonagh v. Sunday Newspapers Limited* [2017] IESC 46, which was a judgment delivered by Charleton J. on behalf of the court on 28th June, 2017. That decision was one of a number of decisions handed down by the Supreme Court in June and July 2017. In this particular judgment, the court was looking at whether the plaintiff had put certain matters sufficiently to garda witnesses in relation to his explanation for certain statements that were ascribed to him as having been made during his period in garda custody. In the course of his judgment, Charleton J. stated as follows in relation to the general obligation to put matters to the opposing witnesses in the course of cross examination, at paras. 40 *et seq:-*

> *"40. …In McNamee v Revenue Commissioners [2016] IESC 33 , the judgment of Laffoy J. approves the decision of the House of Lords in Browne v. Dunn (1893) 6 R 67 which is encapsulated in the following statement of Lord Halsbury at pages 76-77:*
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> > *'To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.'*
>
> *41. The extent to which fairness requires cross-examination is essentially dependant on how a trial runs. Fairness,*

however, is what the law requires both in relation to procedures that are dedicated towards achieving a correct conclusion in a trial and in relation to the right of a witness to be given a real opportunity to comment on a verdict the implication of which may only be interpreted as adverse."

383. It seems to me that the plaintiff's submission has considerable weight. The opinion given by Dr. Flood, was both simple and far reaching in its effect. His proposition that if the plaintiff simply reduced her daily intake of fluid, that she would immediately experience a reduction in the number of times that she would have to go to the toilet, both during the day and at night, and that in such circumstances, there was really no question of her having significant ongoing symptoms for the rest of her life, was such an important part of the defendant's case that it should have been put explicitly and clearly to the plaintiff's two doctors. While there were certain vague assertions that the plaintiff may have been drinking too much liquid, the stark proposition put forward by Dr. Flood was not adequately put to the plaintiff's doctors.

384. The court was impressed by both Dr. Miller and in particular by the plaintiff's G.P., Dr. Byrne. The latter doctor had been her G.P. for a number of years. He appeared to the court to be both a conscientious and intelligent doctor. The court is of the view that if such a simple remedy was available to cure the plaintiff's continuing problems, he would undoubtedly have put that in place before now. At the very least, Dr. Flood's stark opinion should have been put to him for his comment thereon. In these circumstances, the court is of the view that it would be unfair to the plaintiff, if it were to proceed on the basis of Dr. Flood's effectively unchallenged opinion. I should add that this finding does not infer any criticism of counsel for the defendants. The stark opinion given by Dr. Flood in evidence, was not readily discernable from the medical reports and letter furnished by Dr. Flood, on which counsel would have prepared his cross-examination of the plaintiff and her medical witnesses.

385. However, the court does not rest its opinion solely on the exclusion of this aspect of Dr. Flood's evidence, due to the fact that it was not adequately put in cross examination to the plaintiff's witnesses. The court is further of the view that, even if this evidence was admitted, the court is not satisfied that Dr. Flood's hypothesis as to the cause of the plaintiff's current symptoms, is in fact based upon a credible test. The court is of opinion that merely basing this opinion on the plaintiff's verbal account, given at a consultation in January 2017, as to the number of cups of tea and water that she drinks in a day, and then estimating the volume of fluid intake by reference to a chart completed by the plaintiff in 2014, is not a scientific basis on which to correctly estimate the level of her daily fluid intake.

386. Nor do I think that this was a fair basis on which to calculate the plaintiff's current daily fluid intake. The chart which she completed in 2014 was a detailed record over a period of three days, of the amount of fluid taken in by her each day. From my analysis of that record, it would appear that she ingested 2,150ml on day one, 2,430ml on day two and 2,650ml on day three, giving an average daily intake of 2,410ml. I find it very hard to believe that a plaintiff, who suffers from an unstable bladder, with frequency/ urgency difficulties, would on a voluntary basis, and for no very good reason, increase her daily intake to almost 4 litres per day. That would be an extraordinary amount of fluid to intake in a day, given that the average adult daily intake in 1L/ 1.5L. I am of the view that in the absence of such a detailed daily record, it would be unsafe to estimate her current fluid intake on the basis of her verbal estimate given at a consultation as to the number of cups of tea and glasses of water that she has on an average day. I do not think that any patient can be relied upon to give an accurate estimate in such circumstances.

387. If Dr. Flood formed the view at the consultation, that the plaintiff was ingesting an alarming quality of fluid each day, he should have given her a fluid volume chart and asked her to fill it out over three days. She could then have posted it back to him. This would have given him a far more accurate account of her daily fluid intake. In the absence of such scientific calculation, I decline to find that the plaintiff is in fact ingesting almost four litres of fluid per day.

388. It was put to Dr. Flood in cross-examination that the plaintiff had been advised by various doctors that in view of the recurrent urinary tract infections which she had suffered from over the years, she should maintain a reasonably high level of hydration. Dr. Flood stated that he did not agree with such medical advice. He stated that where a person had such recurrent infections, the appropriate treatment was by means of prophylactic antibiotics and cranberry juice. If this was done, the last thing which a patient should do, was ingest large amounts of fluid, as that would only serve to dilute the effect of the antibiotics and the cranberry juice. While the court appreciates that that may well be a valid medical opinion held by Dr. Flood, the court accepts that other medical opinion may be in favour of the plaintiff maintaining a reasonably high fluid intake.

389. In summary, the court accepts the evidence of Dr. Miller and Dr. Byrne that the plaintiff has probably reached something approaching her end zone or plateau. However, the court is of the view that with some moderate fluid reduction, there may be room for an improvement in her frequency/ urgency difficulties. In addition, the court notes that the plaintiff has not as yet taken any anti-colinageric medication. The court accepts the view of Dr. Sinanan that the drug, Cymbalta, can be beneficial in relation to psychiatric symptoms, and also has an anti-colinageric side effect. The court notes that this drug had, in fact, been recommended by Dr. Byrne in the past. Accordingly, the court is of the view that on the balance of probabilities, it can be expected that the plaintiff will make progress in relation to her frequency/ urgency issues. Obviously if she does so in relation to night time episodes, this will reduce the level of disturbance of her sleep and will lessen the consequential tiredness she feels on the following day.

390. The court finds that the plaintiff is continuing to experience some symptoms of P.T.S.D. and depression. However, as already noted, this does not appear to affect her from a mental functioning point of view, nor do they affect her capacity to work. The court prefers the views of Dr. Sinanan, to those of Dr. Cryan in relation to her future prognosis. The court accepts his evidence that with the use of appropriate medication, such as Cymbalta, and the use of C.B.T., the plaintiff should go on to make a reasonably good recovery from the psychiatric difficulties which she currently has.

391. Having regard to the evidence of Dr. Miller and Dr. Sinanan, the court finds that within a further one year, the plaintiff will probably make substantial progress with her remaining psychiatric symptoms. She will also make progress with her physical symptoms; though she will be left with some frequency/ urgency issues, but not at a severe level. The court also takes account of the fact that the plaintiff has concerns about her remaining kidney, notwithstanding medical opinion that that kidney is performing perfectly and does not bear any additional risks, other than those applying to a healthy kidney.

The Award of Damages.

392. Taking all of these factors into account, the court is of the view that the appropriate sum to award by way of general damages for past pain and suffering and disability is €140,000. In terms of general damages for future pain and suffering and disability, the court awards the sum of €45,000.

393. In relation to the claim for past special damages, the defendants have agreed the sum of €3,153.25 in respect of various medical, travel and subsistence expenses. In addition to that the plaintiff has claimed the sum of €6,500 in respect of unvouched travel and subsistence expenses. The court notes that out of the sum which has been agreed, a figure of €1,030 was included therein

in respect of travel and accommodation. It is hard to see how the plaintiff incurred a further €6,500 in addition thereto. In the circumstances, the court proposes to allow the sum of €2,500 for unvouched travel and subsistence expenses.

394. The next matter to be considered is the plaintiff's claim for past loss of earnings. In this regard, as already noted, the plaintiff has put forward the proposition that the court should award a sum by way of general damages for loss of opportunity on the job market in the years 2010 to the date of the hearing of the action. Having regard to the plaintiff's pre-operative work history, I am of the view that this is the proper approach to take in this case. I am satisfied that she was rendered totally disabled from work from April 2010 until the end of 2013. As already stated, by 2015 the plaintiff was not disabled in the work aspects of her life, as long as she was doing "back office" work, or working online. In these circumstances the court awards the sum of €20,000 for loss of opportunity on the job market prior to the trial of the action. This gives an overall figure of €25,653.25 in respect of past special damages.

395. In relation to the quantum of future special damages, the plaintiff has put forward a claim based on the assumption that, but for the negligence of the defendants, she would have been in a position of employment with a salary of circa. €26,000 per year. Having regard to my findings in relation to the level of business activity carried on by the plaintiff in the years from January 2014 to November 2016, I am not satisfied that the plaintiff has been rendered totally unfit for work as a result of her injuries. I do, however, accept that the plaintiff is somewhat disabled in the work aspects of her life at the present time and will remain so while the further treatment, as outlined previously in this judgment, is carried out.

396. Even with that treatment, I accept the evidence given on behalf of the plaintiff that her frequency/ urgency difficulties will never be completely eradicated. In other words, she will be a person who will always need to have the facility of going to the toilet on a frequent basis during the working day. I accept the evidence given by the vocational assessors, that these limitations will rule her out of a number of jobs, such as "front office" jobs e.g. cashier in a shop, or receptionist. However, she will be able to undertake "back office" work, wherein she does not have to deal continuously with members of the public and will have the facility to go to the toilet on a regular basis. Such work would include work in a call centre, clerical work carried out in a back office, or other work of a similar nature. It would also, of course, include work that is carried out solely online.

397. Thus, the court is of the view that, the plaintiff will be able to source suitable employment, although she will be at a disadvantage in that she will be confined to seeking and obtaining "back office" work. However, there does not appear to be any basis on the medical evidence before the court, for the proposition that, if she should secure such work, she would only be able to manage part-time work. The court is of the view that if she gets such a job, she will then be able to work full-time and will receive the normal salary for such work.

398. Given those findings, the court is of the view that on each occasion on which the plaintiff is forced into the job market to seek employment, she will be at a competitive disadvantage. In these circumstances, it is appropriate to make an award of general damages in respect of loss of opportunity which the plaintiff will experience in the job market for the remainder of her life. The court awards the sum of €30,000 under this heading.

399. Turning to the quantum of future medical costs, the court does not accept that the plaintiff will require a visit to her G.P. once per month for the rest of her life. The court proposes to allow the plaintiff six G.P. visits per annum for the next two years at the rate of €50 per visit. This gives an overall figure of €600.00. The court accepts the figure proposed by the plaintiff of €600 per annum for consultant reviews, giving an overall figure of €18,858 for the rest of her life.

400. The court is of the view that in relation to the charge payable under the Drugs Payment Scheme, as the court has already found that the plaintiff was fit for "back office" work from 2015 onwards, it would appear that the plaintiff would not be eligible under the scheme once she resumes such employment. Accordingly, the court declines to make any award under this heading.

401. Finally, there is the claim in relation to loss of the Disability Allowance. In view of the fact that the court has found that the plaintiff was fit for "back office" type work since 2015, and she has been compensated for her loss of opportunity in being confined to such work, and as she will receive the full normal wage once she obtains such work, in such circumstances it would not appear that she is entitled to the welfare payment. Accordingly, the court declines to make any award under this heading.

402. Adding the various heads of damages together, the plaintiff is entitled to judgment against the defendants in the sum of €260,111.25.