THE COURT OF APPEAL

Ryan P.
Peart J.
Irvine J.

Appeal No.: 2014/1341

[Article 64 Transfer]

Mary Nolan

Plaintiff/Respondent

- and -

Rafal Wirenski

Defendant/Appellant

Judgment of Ms. Justice Irvine delivered on the 25th day of February 2016

1. This is the defendant's appeal against the judgment and order of the High Court (Barr J.) made in a personal injuries action on 4th July 2014.

2. On that date the High Court judge awarded the plaintiff the total sum of €125,680 damages and directed that the defendant pay the cost of the action, the same to be taxed in default of agreement. A stay on that order was granted on terms that the defendant pay a sum of €60,000 to the plaintiff pending this appeal.

Background
3. The plaintiff's claim was brought in respect of personal injuries sustained by her in a road traffic accident which took place on 8th September 2010 when she was a passenger in a motor vehicle driven by her husband that was struck from the rear by the defendant's motor vehicle on the N7 near Naas, Co. Kildare.

4. The High Court judge awarded the plaintiff a sum of €90,000 in respect of pain and suffering to date, €30,000 in respect of pain and suffering into the future and an agreed sum of €5,680 in respect of special damages.

Judgment of the High Court
5. In making his award the trial judge relied upon the following findings of fact. The plaintiff was born on 24th February 1964 and was fifty years of age at the date of the hearing. He found that at the at the time of the impact the plaintiff placed her right hand against the windscreen to protect her head and that as a result of the collision she suffered significant injuries to her right shoulder, right hand and thumb. The plaintiff was prescribed pain killing medication and was advised to undergo physiotherapy. She was referred to three orthopaedic surgeons; Mr. John Quinlan, Mr. Joseph O'Beirne and Mr. Diarmuid Moloney. The last of these, Mr Moloney, has a special interest in upper limb injuries.

6. As to treatment, the trial judge noted that the plaintiff had undertaken approximately sixty sessions of physiotherapy and that as of the date of trial still required painkilling medication on a daily basis. In February 2012 her right shoulder had been manipulated under general anaesthetic and the affected area injected. In November 2012 she had had a further subacromial injection. In May 2013 she underwent an arthroscopic subacromial decompression and rotator cuff repair.

7. The trial judge accepted that the plaintiff remained symptomatic as of the date of the hearing. In particular he found that she continued to have some restriction in relation to the internal rotation of her shoulder and that she suffered from ongoing right shoulder and wrist discomfort. The trial judge expressed himself satisfied that the plaintiff was unable to lift her right arm above shoulder level and could not do tasks which demanded overhead work. He also accepted her evidence that she had difficulty finding a comfortable sleeping position and that as a result she suffered from disruptive sleep leading at times to fatigue and irritability. He further concluded that the plaintiff was restricted in her ability to perform certain activities of everyday living such as ironing, hanging out washing, hoovering and dressing. However, he noted that she continued to undertake all of these activities subject to suffering discomfort and as a result was of the opinion that she would continue to carry out these chores into the future.

8. As to her prognosis, the trial judge was satisfied that while the plaintiff would likely achieve a good functional outcome in terms of her right shoulder she would not return to her pre accident status. She would continue to have some restriction in internal rotation and might experience what he referred to as "occasional pain".

9. In the course of his judgment the trial judge also referred to the fact that the plaintiff might require further injections into her right thumb to determine the likely cause of her radial hand pain. It is not clear from this part of his judgement whether he compensated the plaintiff in respect of radial hand pain and the possibility that she might require such injections. However, it is clear from what he said about the plaintiff's radial hand pain that he had insufficient evidence from which he might have concluded, that the same could be ascribed to the plaintiff's accident.

10. It is clear from the transcript of the evidence and indeed from the judgement of the trial judge that the credibility of the plaintiff as to the extent of her injuries was a live issue in the case. In this regard the trial judge referred to the evidence which had been advanced by the defendant for the purposes of seeking to establish that the plaintiff had exaggerated the extent of her injuries. By this I mean the photographs and video proved by the defendant in evidence and which showed the plaintiff engaging in a number of activities which in the course of her own evidence she had maintained caused her difficulty including ironing, lying on her right side and raising her right arm overhead. When dealing with the plaintiff's credibility the trial judge also referred to that aspect of the evidence given by the defendant's orthopaedic surgeon, Mr Michael O'Riordan, to the effect that he could find no abnormality with the plaintiff's right wrist function nor any abnormality in her shoulder which might explain the restriction she contended affected her ability to undertake those activities of daily living to which I have already referred.

11. Having referred to these aspects of the evidence he stated:-

> "I am satisfied that the plaintiff is an honest person, and has not sought to exaggerate her present symptoms. I accept her evidence and that of her husband that she is a person who will not let pain get the better of her. She would do the ordinary chores of daily living even though this will cause problems for her later on."

Submissions
12. Mr Maher, S.C. on the defendant's behalf maintains firstly that a number of the findings of fact made by the trial judge were not supported by credible evidence thus impugning the validity of the award of damages based on those findings. Secondly and independently he argues that, even accepting the appropriateness of the facts as found by the trial judge, the sum awarded in respect of both categories of general damages was excessive. Accordingly he seeks to have the said award set aside.

13. As to the trial judge's finding that the plaintiff's evidence as to the extent of her injuries was credible, Mr Maher argues that he either failed to engage with or failed to have proper regard for the following matters, namely:-

> (i) The Plaintiff in her evidence stated that the road traffic accident had had no effect on a pre existing back injury which had caused her to have a spinal stimulator fitted. However, in her application form to PIAB and also in her Replies to the Defendant's Notice for particulars she claimed that her back pain had been exacerbated.
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> (ii) While the plaintiff maintained that the collision had been "ferocious" the photographs of the car damage and the cost its repair (€1,161.02) suggested that the contrary was the case.
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> (iii) The plaintiff had advanced a claim for past and future care of in or around €350,000 (€38,306.24 for past care and €17,103.69 per annum for future care) which she withdrew, according to the defendant, without adequate explanation, on the morning of the hearing. The sum so claimed was based upon a report that had been prepared by Ms Noreen Roche, Nursing Consultant.
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> (iv) The plaintiff had asserted and had further demonstrated in the course of her evidence in chief that she could not raise her right hand above the horizontal. However, video evidence advanced by the defendant showed the plaintiff fully extending her right arm overhead and waving enthusiastically on three separate occasions within a very short period of time.
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> (v) The defendant had produced a video showing the plaintiff ironing for upwards of 25 minutes and photographs and other evidence depicting her resting on a beach on her right shoulder for in excess of 10 minutes in circumstances where she had told the court, in the course of her own evidence, that each of these activities caused her significant pain and discomfort.

14. The defendant accordingly submits that the trial judge's findings as to the extent of the plaintiff's injuries and the restriction which they imposed on her activities were not supported by credible evidence and thus could be interfered with by this court on appeal.

15. Counsel for the defendant further argued that the trial judge had erred in compensating the plaintiff on the basis that she could not raise her right arm beyond the horizontal and that her pain was such that she was required to take substantial ongoing medication on a daily basis. The video evidence had conclusively established that the plaintiff was able to raise her right arm above the horizontal and under cross examination she had accepted that the medication she was taking as of the date of the trial was the same as that which she had been taking for her back injury prior to the accident.

16. Finally counsel submitted that even if all of the findings of the trial judge were supported by credible evidence the sum awarded in respect of both categories of damages was excessive. The same was disproportionate to the plaintiff's injuries. In this regard he relied upon the decisions in *M.N. v. S.M.* [2005] IESC 17 and *Kearney v. McQuillan and North Eastern Health Board* [2012 IESC 43.

17. Mr McGrath S.C on the plaintiff's behalf submitted that there was credible evidence to support the trial judge's findings as to the extent of the plaintiff's injuries. He reminded the court that the defendant had not sought to make the case, as he might have done, that the plaintiff's injuries were inconsistent with the damage to the defendant's car and he relied upon Mr O'Riordan's evidence that the plaintiff's shoulder and arm injuries were consistent with a hyperextension injury caused by the collision as described by the plaintiff.

18. As to the late withdrawal of the claim for care, counsel referred to the explanation which the plaintiff had advanced while under cross examination, namely, that she had only seen Ms. Roche's report for the first time on the morning of the hearing and in circumstances where she felt that it was not accurate she had advised her lawyers to withdraw it, a decision that was entirely appropriate.

19. As to the level of the plaintiff's disability, the trial judge had seen the plaintiff give her evidence and was best placed to adjudicate on the nature and severity of her injuries. An appellate court was not entitled to interfere with such findings given that they were, he submitted, supported by credible evidence. He relied heavily on certain aspects of Mr O'Riordan's evidence to the effect that each of the procedures which had been carried out on the plaintiff's shoulder would not have been undertaken lightly and the fact that the plaintiff had been willing to undertake them was significant evidence of the severity of her injuries and of her efforts to recover therefrom.

20. As to the overall level of damages Mr McGrath submitted that the total award of €120,000 (€90,000 to date and €30,000 into the future) was within the range of damages proportionate to the plaintiff's injuries. He again emphasised Mr O'Riordan's evidence to the effect that the plaintiff would likely continue to experience discomfort in her shoulder and wrist into the future. That being so the sum of €30,000 awarded for future pain and suffering was modest in all the circumstances.

Decision

The Jurisdiction of the Appellate Court.
21. An appellate court enjoys jurisdiction to overturn an award of damages if it is satisfied that no reasonable proportion exists between the sum awarded by the trial judge and what the appellate court itself considers appropriate in respect of the injuries concerned. In *Foley .v. Thermoement Products Ltd* [1954] 90 ILTR 92 Lavery J. stated that the task of the judge in an appellate court was:-

> "To make his own estimate of the damages he would award and then compare this estimate with the verdict and say whether there is any reasonable proportion between the sums or whether the verdict is an entirely erroneous estimate of the damage or is plainly unreasonable. In making his estimate the judge must adopt all points most favourable to the

> plaintiff and must keep in mind that the jury had the advantage, which he has not had, of hearing the evidence and of seeing the witnesses and in particular hearing and seeing the plaintiff.
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> No one will deny that this is a most difficult task. It is especially difficult in a case where personal injuries are the subject of the claim. There is no standard by which pain and suffering, facial disfigurement or indeed any continuing disability can be measured in terms of money. All that can be said is that the estimate must be reasonable and different minds will inevitably arrive at wildly differing conclusions as to what is reasonable. The task must, however, be undertaken."

22. In *Rossiter v. Dun Laoire Rathdown County Council* [2001] 3 IR 578 Fennelly J. took a slightly different approach to the same issue. This is how he described the role of the appellate court:

> "The more or less unvarying test has been whether there is any "reasonable proportion" between the actual award of damages and what the Court, sitting on appeal, "would be inclined to give" (*per* Palles C.B. in *McGrath v Bourne*). Lavery J, in *Foley v Thermocement Ltd* slightly inverted the language by posing the question *"whether there is a reasonable proportion between the sum (awarded and the appeal court's assessment) or whether the verdict is an entirely erroneous estimate of the damage or is plainly unreasonable."* The test is one for application as a general principle, even if McCarthy J, in *Reddy v Bates* (page 151) suggested a possible rule of thumb, the need for at least a 25% discrepancy. That is no more than a highly pragmatic embodiment of his very proper counsel against *"relatively petty paring from or adding to awards".* In this respect, it seems to me that this Court is no longer bound by the special respect due to a jury verdict. On the other hand, it is not a court of first instance. It should only interfere when it considers that there is an error in the award of damages which is so serious as to amount to an error of law. The test of proportionality seems to me to be an appropriate one, regardless, it needs scarcely be said, of whether the complaint is one of excessive generosity or undue parsimony. It should, of course, be recalled that this test relates only to the award of general damages, as explained by McCarthy J in a further passage from the same judgment."

23. It is undoubtedly the case, as was advised by McCarthy J. in *Hay v. Grady* [1992] ILRM, and Lavery J. in *Foley,* that an appellate court does not enjoy the opportunity of seeing and hearing witnesses in the same manner as the trial judge at first instance and that "arid pages of a transcript seldom reflect the atmosphere of a trial". Thus an appellate court must be cautious and avoid second guessing a trial judge's determination as to what constitutes appropriate damages in any given case. That is certainly true insofar as the plaintiff's evidence is concerned and indeed in respect of any other oral evidence given in the course of the trial.

24. However, this is a case in which the plaintiff's medical evidence was not given via voce. The plaintiff's expert reports were, by agreement, handed in to the trial judge and in this respect this court is in as good a position as the trial judge to evaluate the weight to be attached to that evidence. I am nonetheless mindful of the fact that this medical evidence cannot be viewed in isolation and must be considered against the backdrop of the plaintiff's own evidence, which this court has not had the benefit of hearing.

25. Accordingly, it is fair to say that it is not for an appellate court to tamper with an award made by a trial judge who heard and considered all of the evidence. It is only where the court is satisfied that the award made was not proportionate to the injuries and amounts to an erroneous estimate of the damages properly payable that this court should intervene.

Assessment of Damages in Personal Injury Cases.

26. The assessment of damages in personal injury cases is not a precise calculation; it is not precise and it is not a calculation. It is impossible to achieve or even to approach the goal of damages, which is to put the plaintiff back into the position he or she was in before they sustained their injuries. In most cases, where the injuries are not severe, a plaintiff will in fact get back to their pre-accident condition but that is not because they have been awarded damages but rather by the natural process of recovery. On the other hand, for some plaintiffs, an award of damages is a very imperfect and inadequate mode of compensation and is a poor substitute for the change in circumstances brought about by the wrongdoing of a defendant, particularly where they will not make a full recovery from their injuries.

27. It follows that the true purpose of damages for personal injuries is to provide reasonable compensation for the pain and suffering that the person has endured and will likely endure in the future. How is that to be measured? The process of assessment is objective and rational but personal to the particular plaintiff. Obviously, it is reasonable to look for consistency as between awards in similar cases but the same kind of injury can have different impacts on the persons who suffer it. Therefore, the court should not have the aim of achieving similarity or a standard figure.

28. The spectrum of personal injuries claims includes everything from a minor sprain to the most severe and catastrophic brain injury which may deprive a plaintiff from birth of most if not all of life's joys, while leaving them acutely aware of their predicament. Their injuries may result in a great deal of physical pain and suffering. They may suffer from spasticity, quadriplegia and incontinence. Some require peg feeding and most are completely dependent. Plaintiffs falling within this category have no prospect of engaging with normal society as we know it. They can never hope to hold down a regular job, enjoy a loving relationship or aspire to becoming a parent. In many cases these plaintiffs face personal indignity on a daily basis and have a substantially reduced life expectancy.

29. Another type of serious personal injury which the courts are regularly called upon to value are cases of harrowing and repeated sexual assault which oftentimes have life long consequences for the victim. One such example is the case of MN v. SM to which I have already referred. In that case the plaintiff was abused by the defendant and sexually assaulted on a regular basis by the defendant in her own home when she was between twelve and seventeen years of age. The abuse started with inappropriate touching, kissing and digital vaginal penetration. Later the defendant forced the plaintiff to masturbate him. He became more insistent and aggressive and his sexual abuse became painful. On many occasions he forced the plaintiff to have full penetrative sex with him. Apart from the physical abuse attached to these ongoing assaults the plaintiff developed panic, anxiety, nightmares and depression. She had spent years on anti-depressants, had low self esteem and had enormous difficulties with emotional and physical intimacy. The jury awarded the plaintiff damages in the sum of €600,000, an award reduced by the Supreme Court on appeal to €350,000 at a time when Denham J. noted that general damages for the most serious type of personal injuries awards including paraplegia and quadriplegia were at that time €350,000.

30. The brain damaged child and the victim of sexual abuse are but two examples of the types of claims which fall into the most serious end of the personal injuries spectrum and for whom compensation for pain and suffering is far from open ended.

31. Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries.

32. It can however generally be said that insofar as cases which involve catastrophic or life changing injury have come before the Courts in recent years, the level of general damages awarded in respect of injuries of this type has generally been somewhere in or around €450,000 . That is not to say that €450,000 is a maximum. There has been the rare case in which a sum in excess of that figure has been awarded.

33. There has also been some debate over the years as to whether it is reasonable to consider the potential return on investment of the sum awarded in respect of general damages as being relevant to the assessment, but it seems to me to be safer and more just to ignore that possibility. Any plaintiff may choose to invest a sum awarded to them as compensation in respect of pain and suffering, but they ought not to be obliged to do so.

34. Another suggestion is that the notional maximum award of €450,000 in cases of extreme or catastrophic injury is less than would otherwise be the case because the plaintiff in those cases will recover in full a very large sum in respect of all areas of special damage such as loss of earnings, future care, aids and appliances etc. That cannot be correct in principle; an injured person is entitled to be compensated in full for all losses flowing from the injury he sustains. Special damages represent the calculation of actual losses past and future, which leaves the matter of general damages to be assessed entirely separately. Although there are undoubtedly some dicta in the cases supporting this approach, which I would reject as being unjust and even perhaps irrational, the leading authority would not appear to justify that approach.

35. The plaintiff in *Sinnott v. Quinnsworth*, [1984] ILRM 523, had to be compensated for injuries that rendered him a quadriplegic and which O'Higgins C.J. described as:-

> "Probably the most serious condition that a person can suffer as a result of personal injuries."

36. The Chief Justice said that in assessing a sum to compensate the plaintiff for his injuries "the objective must be to determine a figure which is fair and reasonable". He also cited a relevant consideration, namely, that the court should have regard to the fact that all of the plaintiff's losses and expenses would be provided for in the capital sum in his damages. Therefore:-

"What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation."

37. The Chief Justice was careful in expressing this principle to ensure that there should be a proper distinction drawn between the sum to be provided for losses, cost and expenses, past and future, which it was the purpose of special damages to cover in full, and the award for compensation over and above those elements. That decision does not appear to be authority for the proposition that an injured plaintiff is to have his general damages reduced because he has received due recompense for his out of pocket expenses and future needs.

38. Moving back to the present case, the essential point is that it is reasonable to seek to measure general damages by reference to a notional scale terminating at approximately the current maximum award endorsed by the Supreme Court which is in or about €450,000. That is the figure generally accepted by senior practitioners and judges alike as the appropriate level for compensation for pain and suffering in cases of extreme or catastrophic injury. In the exercise if its wardship jurisdiction the High Court regularly approves settlements for injuries of this type at this level of compensation.

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

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

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

42. As Denham J. advised in *M.N v. S.M.* damages can only be fair and just if they are proportionate not only to the injuries sustained by that plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. As she stated at para. 44 of her judgement "there must be a rational relationship between awards of damages in personal injuries cases." Thus it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories. In this regard, just because a judge describes an injury as significant this does not mean that the damages must be substantial. Any injury to an otherwise healthy individual is significant. However, when it comes to assessing damages, what is important is how significant the injury concerned is when viewed

within the whole spectrum of potential injuries to which I have earlier referred.

43. Central to this process is the evaluation of the plaintiff's evidence as to all these matters. The plaintiff's accuracy and reliability are very important, as indeed is his credibility. The last feature is not always a major issue but the others will usually need to be considered. The court usually has only the plaintiff's evidence as to the effects of the injury on his life so it is important that it should be carefully evaluated. This does not mean that the court should adopt a sceptical approach but it should bear in mind that the onus is on the plaintiff to prove his case and that applies to each particular element. The defendant does not have to disprove the plaintiff's assertions and it is often in practical terms impossible for the defendant to do so.

44. The plaintiff's evidence has to be considered against the background of the objective medical evidence. That may come in the form of oral testimony from the plaintiff's treating doctors and the defendant's examining and reporting doctors. If there is radiological evidence of scientific tests that back up the plaintiff's account, obviously that is important. The doctors' opinions and the factual basis for their views also represent objective material evidence that the court will want to consider.

45. If the plaintiff's own evidence conflicts with other testimony or documentary material, it is a matter for the court to seek to reconcile the difference. That may not be possible in a particular case for a variety of reasons but the process of objective consideration of the case requires this analysis. The court will want to look for a reason for any inconsistency between the subjective experience described by the plaintiff and the objective evidence available from the medical sources.

46. It is not sufficient for the court simply to declare that it accepts the evidence of the plaintiff or that it is satisfied that he is a truthful witness without saying why that is the case. If the question is raised whether the plaintiff is a credible witness or is exaggerating his injuries or their impact on him, that is a matter that should be resolved by reference to the evidence and not simply by an unsupported assertion based on the impression that he made on the trial judge when giving evidence. Obviously, the judge's view is very important and indeed in that respect puts the trial court in a position superior to that of the appeal court: see *Hay v O'Grady* [1992] I.R. 210. But for the appeal court to have the full value of the trial judge's superior position, it needs to have available to it the reasoning process whereby the judge arrived at his conclusion.

47. This is to say no more than that the judge should give reasons for his conclusions, a precept that is of general application to tribunals and adjudicators generally. However, it is not always the case that judges in personal injury cases express the process of reasoning that leads them to their conclusions. That can leave the appeal court in darkness as to the rationale of the award.

48. It is common nowadays for the parties to agree that the medical reports should be handed into the court to be treated as evidence as if the doctors had testified in accordance with their contents. This is no doubt a very practical and convenient approach which saves time and money but it can add to the difficulties that a judge has in determining reliability and credibility of the plaintiff. There may also be significant differences between the doctors themselves. The judge has to try to analyse the documentary material presented to this fashion by reference to the testimony of the plaintiff. Discrepancies tending to undermine the reliability of the plaintiff's evidence are nevertheless present because they are contained in a report and not deposed to by oral evidence of the doctor. The practice of producing evidence in this manner does not relieve the judge of the obligation of evaluating the plaintiff's symptoms against the background of expert evidence.

49. In regard to medical reports, the Court of Appeal is in as good a position as the trial judge to understand the contents but as to their impact on the case, the judge is better located and his view superior provided he has analysed the case in light of all the evidence and has expressed his rationale. That is the most valuable assistance that the trial court can provide for the appeal.

50. This court greatly appreciates the assistance of the trial judge's evaluation of the case and accords it great respect. The more carefully the trial judge approaches his task, the greater the reluctance that the appeal court has in interfering with the award. The settled jurisprudence of the Supreme Court emphasises this point. At the same time, the Court of Appeal cannot abrogate its own responsibility to entertain an appeal which a party has a constitutional right to bring.

51. Turning to this particular case, it is clear that the plaintiff's credibility as to the extent of her complaints was a major issue. The accident was not a particularly severe one but that did not exclude the possibility that the plaintiff would suffer a significant injury. The real question was how severe were the problems that the plaintiff was suffering from as a result of the injuries she sustained in the accident. Counsel for the defendant cross-examined the plaintiff on the basis that she was grossly exaggerating her complaints. He put to her evidence that was subsequently adduced from a private investigator who had obtained video footage that counsel suggested was wholly in conflict with her testimony in court. This court had the opportunity of seeing some of the video evidence, which demonstrated that the plaintiff appeared to have no difficulty in raising her right arm and hand above her head and waving to family members in a playful and seemingly entirely painless manner and doing so repeatedly on a family occasion of a summer trip to the beach. Moreover, the plaintiff appeared to be able to lie on her right side without difficulty. These two particular features were points that the plaintiff had described in her evidence.

52. In the circumstances, there were issues of credibility and reliability that were general and specific. Did this video evidence undermine the plaintiff's credibility overall? How could the plaintiff's presentation on this summer outing be reconciled with the evidence she gave about specific disabilities in regard to the use of her right arm and lying on her right side? I am afraid that it was insufficient and unsatisfactory for the trial judge simply to declare that he believed the plaintiff and not have engaged in a process of analysis on these important questions that were raised in the trial. It does not follow that the result had to be wholly adverse to the plaintiff but it is difficult to see how this objective video footage did not impact upon the plaintiff's reliability to some degree at least. Unhappily, the judgment does not deal with this.

53. The problem in the case is that this court is left with a very unsatisfactory situation. The judge took a favourable view of the plaintiff, as he was undoubtedly entitled to do. He could assess damages by reference to the medical reports and to the plaintiff's evidence, accepting the latter as being substantially true if that was his conclusion following his analysis of the issues and ultimate resolution of the conflicts in evidence.

54. In my view, the proper approach in this case is to accept that the trial judge was satisfied as to the general credibility of the plaintiff and to examine the award of damages against the background of the medical reports but making allowance for the clear evidence that was demonstrated as mentioned above. I do not think that this court should independently make allowance for a diminution of the plaintiff's credibility generally, notwithstanding my view that the trial judge should have embarked on that consideration. I confess that I am uneasy not only about the video evidence but also because of the withdrawal on the morning of the hearing of a very large capital claim for past and future care. However, in deference to the judge's superior position as to the plaintiff's evidence, I would merely engage in a correction exercise as to the particular findings that the judge made and then consider the damages award in that light.

55. My approach accordingly is to accept the trial judge's general evaluation of the plaintiff at its height and to see whether his award of damages was on that basis wholly disproportionate, as the defendant submits.

Damages

56. Having considered the judgement of the trial judge against the backdrop of the evidence, I am satisfied that he made two findings of fact that cannot be supported by the evidence. The first of these was his finding that the plaintiff could not lift her right arm over the horizontal. The evidence was clearly to the contrary as shown on the video where she is to be seen vigorously waving overhead on a number of occasions in relatively quick succession. It would seem to follow that his related finding that the plaintiff was thus unable to carry out any overhead work was also misplaced. Secondly, he found as a fact that the plaintiff was still taking medication in respect of her injuries as of the date of trial. However, under cross examination she conceded that the medication she was taking was the same as that which she had in any event been taking for her unrelated back condition as of the date of her accident. These erroneous findings would have had the effect of significantly increasing the award of damages to which the plaintiff was lawfully entitled.

57. As to whether the award made by the trial judge was proportionate having regard to the findings of fact, findings which were in any event in error to the extent referred to in the last preceding paragraph, I regret to say that I am satisfied that the award was disproportionately large.

58. The first matter worth noting, in terms of the assessment of damages, is that the accident itself, a rear ending of the vehicle in which the plaintiff was travelling, would have to be considered relatively un-traumatic when compared to most other road traffic accidents, where, at the top end of the spectrum one finds the high speed head on collision in which passengers may be killed, thrown from their vehicles or trapped in mangled or burning cars.

59. Next, of significance is the fact that the plaintiff had no injuries that required hospitalisation or immediate treatment. She did undoubtedly require a number of surgical interventions. She had a manipulation of her shoulder under a general anaesthetic as a day case in February 2012, an injection into the shoulder in November 2012 and in May 2013 underwent an arthroscopic decompression and rotator cuff repair. Once again this procedure was carried out as a day case. These were, according to Mr O'Riordan, all minimally invasive procedures and to put it bluntly, were of an extremely modest nature when compared to the types of significant surgery often required by those involved in much more traumatic and serious accidents.

60. It is without contest that the plaintiff required extensive physiotherapy and assistance from pain killing medication for some unascertained period, but the restriction on her day to day activities up to the date of trial, a period of somewhat more than three and a half years, was very modest in the context of the type of restrictions faced by many plaintiffs who sustain personal injuries. As already stated, the medication she was taking as of the date of the trial was no different to that which she had been taking in respect of her back condition as at the date of her accident, a good indicator for the purposes of assessing damages for pain and suffering to date and indeed into the future.

61. On the evidence the plaintiff was not in any major way restricted by her injuries. She was mobile from the outset and she remained able to enjoy normal family life and leisure activities, facts readily ascertainable from the video which this court had the benefit of viewing and in which she is shown engaging fully with her family in the context of a day out on the beach.

62. While the plaintiff asserted that she had difficulty carrying out certain household activities and that she had recruited the help of friends and family to help her with these because they would otherwise have caused her discomfort, it must be remembered that the plaintiff did not carry out these activities herself and thus was not placed in a position of experiencing the pain and discomfort she might otherwise have experienced if she had done so. It seems likely that the claim advanced for past care and which she withdrew for reasons that remain somewhat unclear, in all likelihood, encompassed such assistance.

63. At trial the plaintiff advised the court and the trial judge proceeded to find that she was capable of carrying out all of the normal activities of daily living even if these caused her some discomfort. It must be assumed that the plaintiff's discomfort in this regard will be no more than minimal. If the position were otherwise she would hardly have withdrawn the entirety of the claim she had made for future care. The only logical inference to be drawn from that decision is that she is capable of doing all that is required with no more than minimal discomfort.

64. As to her future in respect of her shoulder and arm function, the plaintiff's own doctors advised that she would improve further even if she was unlikely to fully return to her pre accident status. It was not in dispute that she would continue to have reduced internal rotation but this was not expected to interfere with her day to day activities. Such a restriction, as was advised by Mr O'Riordan, was usually only relevant in the context of sporting activity, a matter to which the plaintiff did not refer in the course of her evidence.

65. The trial judge accepted that the plaintiff had suffered a significant injury and awarded her a total sum of €120,000 in respect of pain and suffering (€90,000 to date and €30,000 into the future). In all the circumstances that sum was wholly disproportionate to her injuries. Although they might have been characterised as significant in so far as they reflected a departure from the state of health which she had enjoyed prior to the accident, they are undoubtedly at the lower end of the scale ranging from the minor to the most severe. For my part I am satisfied that the award was disproportionate and excessive to the point that it should be set aside.

Conclusion

66. To conclude, this is a case concerning injuries which can at best be described as relatively modest when considered in the context of the entire spectrum of personal injury claims. Adopting the approach set out above and thus giving all credit to the plaintiff for the credibility finding in her favour, the reasonable and proper award is in my judgment €50,000 in respect of pain and suffering to date and a sum of €15,000 in respect of pain and suffering into the future.

67. I would allow the appeal and vary the Order of the High Court accordingly.