

**BETWEEN****BARBARA SELIGMAN****PLAINTIFF****AND****KRZYSZTOK KUIATKOWSKI AND MARLENA JAKUBIEC****DEFENDANT****JUDGMENT of Mr. Justice Barr delivered on the 23rd day of February, 2018****Introduction**

1. This action arises out of a road traffic accident which occurred on 12th December, 2014, when the plaintiff's car was stationary on the M50 motorway in a line of traffic, when it was rear-ended by a vehicle driven by the first named defendant and owned by the second named defendant. Liability is not in issue between the parties. There is no plea of contributory negligence, as it was accepted that the plaintiff was wearing her seatbelt at the time of the accident.

2. Special damages have been agreed in the sum of €19,757.72.

**The Plaintiff's Evidence**

3. The plaintiff is 79 years of age, having been born on 16th August, 1938. She has led a varied and colourful life. Prior to 1985, she ran a number of businesses in the area of children's clothing. In 1985 she commenced practice as a barrister. There she joined her husband, who had also been a barrister for many years. The plaintiff is also a very accomplished bridge player. She represented Ireland at senior level on twenty-two occasions and she was proud of the fact that she and her playing partner, were the most successful female pairing in the history of Irish bridge. She is now a widowed lady, who has four children, eight grandchildren and three great-grandchildren.

4. There are a number of matters of relevance in her pre-accident medical history. In 1989 the plaintiff fell down a flight of four marble steps, causing a fracture to her coccyx. Two years later in 1991, the plaintiff slipped in Tesco supermarket, causing an injury to her back. She required extensive treatment at that time and came under the care of Dr. Declan O'Keeffe, consultant pain specialist. As it was not possible to get rhizotomies in Ireland at that time, she travelled to Holland for this treatment. The plaintiff stated that by the mid-1990s she had made considerable improvement and by approximately the year 2000, she was pain free and fully mobile. She says that she had no further back injury or complaints from that time until the accident the subject matter of these proceedings. In particular, in relation to an aspect that is relevant to matters which have to be considered by this Court, she stated that she had no difficulty ascending or descending steps or stairs prior to the road traffic accident.

5. In 2008, the plaintiff received a devastating diagnosis. She was told that she had bi-lateral lung cancer and that it was the opinion of her specialists, that she had only three weeks to live. She had extensive chemotherapy, which was difficult for her due to the severity of the side-effects of this drug. During her treatment, the Head of the Oncology Department in the hospital, approached her and gave her the option of being a "guinea-pig" in relation to a new drug which had been cleared for use in trials, but was not yet generally available on the market. The plaintiff accepted the offer as she felt that she had nothing to lose by participating in the trial. Thankfully the drug was successful. The plaintiff stated that while she was not in remission, her cancer was under control. She stated that she had been told in the hospital that it was regarded as a miracle cure. It is against that background, that the court must consider the injuries sustained by the plaintiff in the accident.

6. On the day of the accident, the plaintiff was on her return journey from Dublin to Co. Wexford, where her husband was a resident in a nursing home. The plaintiff had been in Dublin for the purpose of receiving an injection to her eye on the previous day, for the treatment of age related macular degeneration. She was unable to drive home on the day that she received the treatment, but was cleared to drive on the following day. The impact between the vehicles was quite severe. The plaintiff's car was shunted into the car in front and it in turn was shunted into the car in front of it. As a result of the impact, the plaintiff experienced pain and bruising to the left-side of her chest and ribs and there was also bruising on her leg and thigh. She thought that this had been caused when her body struck the steering wheel as a result of the impact. She also experienced pain in her neck and lower back. She was attended at the scene by ambulance personal, but did not require hospital treatment. She was driven home to Wexford by her son-in-law.

7. Over the following days, she developed more severe pain in the affected areas. She also found that she had a pain in her eye for approximately one month. She stated that she had not had any such pain on previous occasions on which she had received the injection treatment to the eye. The plaintiff was not able to get an immediate appointment with her G.P., so she just did the best that she could until she saw the G.P. on 17th December, 2014. She took analgesics at home during the intervening period. When seen by Dr. Sandra Clare on 17th December, 2014, the plaintiff had bruising on her right and left legs. She was tender on palpation of her trapezius muscles and on her back muscles. She was unable to raise her arms fully over her head due to upper back pain and stiffness. She complained of minor blurring of vision in the right eye, but that was beginning to improve. Her mobility was reasonable, but she was stiff after sitting. The G.P. prescribed analgesia for her pain.

8. Unfortunately, during the month of December 2014, the plaintiff's husband suffered a heart attack. He was removed to Wexford General Hospital where he was in ICU for two weeks. During this time the plaintiff remained at his bedside. She slept in a chair in the hospital for two weeks. That was clearly very difficult for her, having regard to the nature of the injuries which she had suffered in the accident.

9. After the two weeks, the plaintiff's husband was moved to another ward, where he remained for a further fifteen weeks. During that time the plaintiff had returned to her house in Courtown, Co. Wexford. She was unable to drive to the hospital due to pain in her neck, upper back and arms. Each day, she would drive to Gorey, where she would park her car in the church car park. She would then take a bus to Wexford hospital. On the return trip, she would have to take a taxi from the hospital to Redmond Square in Wexford town, where she would get the bus back to Gorey. Usually she would arrive home at approximately 20.30 hours, having left her home at 11.30 hours that morning. She had to abandon this mode of transport, due to the fact that on one occasion when she returned to the church car park, there were a group of men and women behaving in a very rowdy fashion in the car park. She stated that she got a terrible fright. She decided that she would have to find an alternative way of getting to the hospital. She discovered that she could

park her car at the train station and then take the train directly to Redmond Square, where she would take a taxi to the hospital. She would do the reverse journey in the evening. She did that for the entire of the fifteen weeks. She stated that she had to go to the hospital each day, as the catering staff would bring the food to her husband, but due to staff shortages, there was no one in a position to actually feed him. Therefore, it was necessary for her to be there to feed him his lunch and tea. The plaintiff stated that due to the severity of her neck and back pain, she found this regime very difficult. She was exhausted when she arrived home each evening.

10. The plaintiff stated that during 2015, her neck and back continued to be very painful. An MRI scan was carried out at the direction of her oncologist, to ensure that her pain was not cancer related. They were able to reassure her that that was not the case. However, the scan did reveal that there was severe arthritis in the cervical spine, with a bulging C3-4 disc. It also revealed extensive arthritis in the thoracic and lumbar spine.

11. The plaintiff stated that at that time she required a large amount of medication. She was taking approximately eight Solpadol per day and was also taking Difene. She had approximately nine sessions of physiotherapy treatment, which provided only limited improvement. She found that in 2015, her pain was getting worse. She was dragging the left leg. She had great difficulty ascending steps. She was only able to manage a maximum of 4/5 steps. She needed a wheelchair when travelling through the airport. The plaintiff stated that she did not have any problem with stairs prior to the accident. She also complained of crepitus on movement of her neck she found this very difficult, particularly when knitting and doing crochet while watching television.

12. When her pain persisted, she was referred to Dr. Paul Murphy, consultant in interventional pain medicine at St. Vincent's University Hospital. He carried out a number of rhizotomies to her spine from her neck to her lower back. These were administered under general anaesthetic. The plaintiff would be given three, four or five injections on each occasion. The first such treatment was given on 11th November, 2016 on the right side and a further set of injections were given on 18th November, 2016 on the left side. These procedures produced a very good result. The plaintiff reported that she had been pain free for a period after the treatment. She had a further set of rhizotomies from L2 to S1 on 10th February, 2017. She had further such treatment in May 2017 and again on 5th January, 2018. Unfortunately, the plaintiff reported that she had not received any symptomatic relief as a result of the most recent treatment. She stated that she had been advised by Dr. Murphy that she would require a minimum of two further such treatments.

13. The plaintiff stated that in relation to her present condition, she does not have unbearable pain. She is not totally crippled. However, she experiences a constant pulling sensation in her neck, which goes down the left side of her body as far as her hip. This produces a constant ache in these areas. She finds it difficult to get up out of a chair, out of her bed or to go to the bathroom. Her main area of disability, is her inability to manage stairs. She stated that she plays bridge on a regular basis in the Regent Bridge Club on Waterloo Road, Dublin. When doing so, she is obliged to remain on the ground floor. This means that if there is a competition and some of the tables are situated upstairs, she cannot be one of the East/West pairs, who would rotate from table to table, as she is unable to ascend the flight of stairs to the second storey. She finds this frustrating and embarrassing.

14. The plaintiff recounted how she had recently gone on a trip to New York with her daughter, for the purpose of babysitting her young great-grandson. However, when they arrived at the apartment building, she could manage the short flight of steps to the main door, but was unable for the internal flight of stairs of approximately twenty-five steps. As a result, she was not able to go up to the apartment. Her great-grandson had to be brought to the hotel where she was staying, so that she could see him. She was distressed that the trip had been somewhat of a wasted exercise. In terms of driving a car, she is able to manage the journey from Wexford to Dublin, but she is not able to drive back on the same day. She requires analgesic medication on a constant basis. She rotates between taking Solpadol, Difene and Neurofene for varying intervals.

### **The Medical Evidence**

15. By agreement of the parties, the medical reports furnished by the various doctors were submitted in evidence, without the need to call oral evidence from the doctors. It is not necessary to set out the content of these reports in extenso, a brief summary of the main conclusions will suffice.

16. As noted earlier in the judgment, the plaintiff was seen by her G.P., Dr. Sandra Clare, on 17th December, 2014. Her findings on that occasion have already been documented. The plaintiff returned to see Dr. Clare on 6th January, 2015, at which time she continued to complain of stiffness in the upper back and neck. Her range of movements had improved. She did not require analgesia as often as she had done. Her eye was improving slowly. Examination revealed that the plaintiff was tender around the scapular muscles and trapezius. Her arm raising had improved. Her bruising and general mobility had improved. Psychologically she was upset that her injuries had impacted her ability to care for her husband, who was very ill at that time and required a considerable amount of daily help. Dr. Clare's opinion was that the plaintiff might require intermittent analgesia for neck and back pain into the future. If that did not resolve, physiotherapy treatment would be necessary. Her prognosis at that time was that the plaintiff should make a full recover within approximately three months. In the course of her evidence, the plaintiff stated that she had only come under the care of Dr. Clare when she had moved to Wexford and had attended her in the aftermath of the accident. She stated that she had not been impressed with the attention given to her by the doctor. She felt that she was somewhat dismissive of her complaints. The plaintiff had not remained with her as her G.P. after that date.

17. Due to the plaintiff's ongoing pain, a query had been raised as to whether that could be due to the return of her cancer. However, investigations revealed that that was not the case. Dr. Janice Walshe, Consultant Oncologist, noted that the MRI scan indicated disc bulging from L2 to L5. However, there was no evidence of any cancer progression. It was this doctor who referred the plaintiff to Dr. Paul Murphy, Consultant Pain Specialist. He saw the plaintiff on 26th October, 2016. At that time, the plaintiff reported significant pain in the thoracic and lumbar regions bilaterally. She rated this at 6/7 out of 10. She also reported bilateral buttock pain extending to the posterior aspect of her thighs. There were no significant lower extremity radicular symptoms, nor any recent alteration in bowel or bladder habit. The pain was very much mechanical in nature. The plaintiff reported no significant neuropathic descriptors. Her pain detect questionnaire was in the negative zone for neuropathic pain.

18. Examination revealed that lumbar flexion was well maintained, however, extension and side flexion elicited discomfort. There was quite significant para-spinal tenderness extending throughout the thoracic and lumbar spine. She was noted to be tender to palpation over the sacroiliac joints bilaterally. The remainder of the examination was largely normal.

19. The plaintiff was asked to rate the impact of pain on her life generally and in the domain "mood" she rated that at 6 out of 10. She stated that she had become quite significantly upset and depressed as a result of her ongoing pain. She reported significant adverse impact with respect to the domain "walking ability" with a rating of 8/10. Sleep was adversely affected at 8/10. She reported difficulty getting to sleep and multiple episodes of waking with pain at night. Adverse impact was also noted across the domains "relations with other people", "enjoyment of life" and "ability to concentrate" with ratings of 5, 6 and 5 respectively.

20. Under Dr. Murphy's care, the plaintiff underwent a right thoracolumbar medial branch block/pulsed radio frequency ablation on 11th November, 2016, and was subsequently readmitted on 18th November, 2016, for left thoracolumbar radio frequency ablation. The procedure was well tolerated. The plaintiff reported complete resolution of her pain for a period of time following this diagnostic blockade. This confirmed that her symptoms were facet joint mediated. The plaintiff had a further right L2/S1 rhizotomy on 10th February, 2017. In her evidence, the plaintiff stated that these procedures gave her relief for approximately two months. She had had further injections in May 2017 and again on 5th January, 2018.

21. In his opinion and prognosis section, Dr. Murphy noted that the plaintiff had been involved in an RTA on 12th December, 2014. Prior to that injury, she had had a history of chronic facet mediated pain, which had been treated in excess of 20 years previously. She had not required any further interventional therapy in the intervening period. Following this accident, she reported significant bilateral thoracolumbar pain which was classically facetogenic in nature. This was confirmed by appropriate response to diagnostic medial branch radio frequency lesion. Dr. Murphy was of the view that she would require intermittent neuro destructive rhizotomy at appropriate areas on an ongoing basis as required.

22. Finally, there was a report from Dr. Peter Staunton, the plaintiff's current G.P. in Blackrock, Co. Dublin. His report is dated 7th February, 2017, but this appears to be an error and should probably read 7th February, 2018, as he makes reference therein to her attendances with him in March, April and July 2017, and he also refers to the injection treatment given on 5th January, 2018. Having reviewed the history of the plaintiff's progress since the accident, he noted that he had seen the plaintiff frequently through 2016 complaining of pain in her neck and shoulders, which were very stiff. She also complained of a grinding sensation when she moved her neck and head. He noted that the injection treatment furnished by Dr. Murphy was most successful, but began to wear off over time. He also noted that she had had multiple physiotherapy treatments. He noted that when reviewed on 5th August, 2016, things were particularly upsetting for the plaintiff as she felt that apart from the pain, the grating sound in her neck was very upsetting. At that time, she found stairs impossible and she had great difficulty doing even a few steps. She was unable to drive any significant distances.

23. In summary, Dr. Staunton noted that the plaintiff had suffered a severe impact at a time of intense psychological distress. She suffered severe injury to her spine and chest with no fractures noted, but there was exacerbation of pre-existing osteoarthritis, particularly in her cervical spine. There had been little or no improvement in her pain despite the various treatments and severe psychological distress was ongoing. She was likely to have ongoing pain and disability for the foreseeable future and her psychological upset would also be ongoing.

24. The plaintiff was seen on behalf of the defendants by Mr. Robert McQuillan, a retired Consultant in Emergency Medicine, on 15th January, 2016, some thirteen months post-accident. He reviewed her history and noted the findings on the MRI scan. At that time, she complained of pain across her low back. This was in the mid-lumbar area. It was constant over the previous three months. Symptoms were mainly aggravated by walking. There was no radiation to the legs. Her symptoms interfered with her sleep and she often had to get up to take Solpadol. She also had intermittent neck pain, with a sensation of crepitus. Symptoms were aggravated by lifting her arms, particularly when driving. She had no pain down her arms. She had difficulty going up and down stairs. Examination of the neck revealed moderate limitation of flexion, extension and rotation and very limited lateral flexion, in keeping with very advanced underlying degeneration. There was slight stiffness on shoulder movement, with minor limitation at extremes. There was no mid-arc pain. The lumbar spine showed forward flexion to the knees. Extension was reduced, but overall was satisfactory for her age. Straight leg raising was associated with discomfort on the left side. There was slightly reduced internal rotation of the right hip.

25. Mr. McQuillan was of the opinion that the plaintiff's injuries were consistent with the accident. He noted that in the accident she suffered bruising to the chest and left leg, which had settled within a number of weeks. She sustained soft tissue injuries to her neck and back. She had moderate underlying degeneration at both sites. He was of opinion that her current limitation of movement was in keeping with this degeneration. Where symptoms of degeneration had been aggravated by an accident, they tended to settle towards a baseline level within about eighteen months or so. He did not anticipate any specific long term complications.

26. The plaintiff was seen by Mr. Gary C.C. Fenlon, a retired orthopaedic surgeon on 1st July, 2017, or 1st September, 2017, (the date on his report being somewhat confusing). He noted that the plaintiff continued to have soreness on the left side of her neck, which radiated down the left side to the lumbar area. It was aggravated by climbing stairs. She had difficulty doing that when she went to play bridge. She had no difficulty when sitting and was most comfortable sitting in a car seat. However, holding the steering wheel in her hands, caused her to complain of left sided neck discomfort. He noted that on examination, the plaintiff was a vivacious elderly lady who had a good range of neck movement, with no local tenderness or muscle spasm. He could not elicit any neurological deficit in her upper limbs. She had a thoracic-kyphotic curve and there was generalised stiffness of her thoracic and lumbar spine. In particular, she had reduction of extension and lateral flexion to right and left sides. Straight leg raising was limited to 75 degrees bilaterally, but her lower limb reflexes were intact as was sensation.

27. Mr. Fenlon was of opinion that the plaintiff had sustained a significant jolting injury to her neck and back in a relatively severe rear ending incident in December 2014, in which four cars had been involved. He noted that the cost of car repair to her vehicle was €7,500. The plaintiff had returned to doing some legal work. However, she had had to stop work during her husband's terminal illness for some time. He noted the findings on the MRI scan, which were understandable given her age. He was of opinion that the plaintiff had ongoing symptoms as a result of possibly aggravating this degenerative wear, but he did not get the impression that she was trying to maximise her complaints and indeed, she was happy to get on with her life. He could not state whether the plaintiff's symptoms would eventually settle or not, but he thought progress would be slow. A curious omission from this report is any reference to the rhizotomy treatment which had been administered by Dr. Murphy to the plaintiff in November 2016, February 2017 and May 2017. It may be that he was unaware of this treatment.

28. Finally, a report was furnished by Dr. Joseph Keaveny, Consultant Pain Specialist, dated 30th January, 2018. When he saw the plaintiff on 23rd January, 2018, she complained of ongoing pain in her neck. Her symptoms were on the left side. She described a pulling sensation across her neck, with ongoing aching discomfort. Associated with this, she described cracking noises when turning her head, particularly towards the right side. She also complained of pain in her lower back. This was mainly across the lower lumbar spine and confined to the back area. She said that her symptoms were worse going up and down stairs, or getting in and out of bed. Her sleep was intermittently disrupted because of pain. She rated her symptoms at 6/10 on a verbal pain scale.

29. Dr. Keaveny noted the findings on the MRI scan and the treatment which was being administered by Dr. Murphy. On examination he noted that the plaintiff had a normal spinal alignment. She had a normal gait. She had approximately 30% reduction in both forward flexion and backward extension. Straight leg raising was slightly reduced bilaterally. However, her reflexes and power were normal. He was of opinion that the plaintiff was suffering chronic neck and back pain, which were slowly improving. She had previously had a history of back pain in 1989, which lasted for about five years, following which the patient subsequently made reasonably good improvement. MRI scans had showed general degenerative changes within the lumbar spine. Many of these would have pre-dated her

accident, although they may have been made symptomatic since the accident. He was of opinion that the plaintiff's symptoms were consistent with her trauma. She was making an improvement and was getting good improvement following rhizotomy procedures. He thought that she may require further procedures to be repeated on three to four occasions over the next twelve – eighteen months. In the long term, as her previous back problems had resolved, he expected that the plaintiff's symptoms would gradually improve over time. However, she may not get a complete resolution of her symptoms, or return to her pre-accident state, although he suspected that many of the symptoms would improve to allow her a reasonable quality of life.

### Conclusions

30. Having listened carefully to the plaintiff giving her evidence, and having regard to the content of the medical reports furnished by both the plaintiff's doctors and the defendants' doctors, I am entirely satisfied that the plaintiff has given a fair and accurate account of her injuries since the time of the accident in December 2014. She has not tried to exaggerate her symptoms at all. If anything, she has tended to underplay her symptoms and the difficulties which they caused her at a particularly distressing time in her life, when her husband was terminally ill.

31. I am also satisfied that the plaintiff is at the very opposite end of the spectrum to what may be termed a "malingerer". In the past, she has dealt with very serious health issues. It is clear that she has faced these with great courage. That she has gone on to live for almost ten years after receiving a terminal diagnosis of cancer, giving her only three weeks to live, is testament to the determination and resilience of this lady.

32. In the plaintiff's account of the actual accident, she did not try to overstate the matter. Indeed, she stated that at the time, her main concern was for the health of her female passenger, who had become hysterical as a result of the impact. Thereafter, in describing how her injuries affected her in the weeks she had to travel to and from Wexford Hospital to visit her husband, she described her difficulties at that time, which have been set out earlier in this judgment, in a very understated manner. The plaintiff's assertion that she continues to experience significant and disabling neck and back pain, in the years subsequent to the accident, is supported both by the content of Dr. Staunton's report and also by the fact that Dr. Walsh thought it appropriate to refer the plaintiff to a pain specialist in September 2016. That pain specialist, having reviewed the plaintiff and her MRI scan, decided that it was appropriate to give the rhizotomy treatment which has been described earlier in the judgment. This is significant treatment which is only given where the doctor is of opinion that the patient is in significant pain, which warrants this intervention. The defendants' pain specialist is in agreement that this was the appropriate treatment to administer to the plaintiff. He is also of the view that she will require further such rhizotomies on perhaps three to four occasions over the next twelve – eighteen months. Accordingly, there is no great dispute between the pain specialists as to the necessity for further treatment.

33. The pain specialists are also in agreement that the plaintiff's future prognosis is somewhat guarded. Dr. Murphy is of the view that the plaintiff is likely to have ongoing pain and disability for the foreseeable future. He also thinks that her psychological upset will be ongoing. Dr. Keaveny is of the view that in the long term, he would expect the plaintiff's symptoms to gradually improve over time. However, she may not get a complete resolution of her symptoms, or return to her pre-accident state, although he thinks that many of the symptoms will improve to allow her a reasonable quality of life. Insofar as there may be an issue between the content of Mr. McQuillan's report and the plaintiff's reports, due to the fact that Mr. McQuillan is of the view that the plaintiff's current level of pain and disability is in all probability due to the degeneration in her spine shown on the MRI scan, I prefer the opinion given by the treating consultant, Dr. Murphy, that the fact that she had resolution of her pain for a period of time following the diagnostic blockade treatment, confirmed that her symptoms were facet joint mediated. I accept his opinion that the significant bilateral thoracolumbar pain reported by the plaintiff was classically facetogenic in nature. This was confirmed by appropriate response to diagnostic medial branch radio frequency lesion. Even if I am wrong in that, I accept the plaintiff's evidence that she was "perfectly fine" prior to the RTA in December 2014. This supports the conclusion of Dr. Staunton and Mr. Fenlon that the accident caused exacerbation of the underlying degenerative changes in the plaintiff's spine, which had been asymptomatic for many years prior to the accident. Finally, I accept the plaintiff's evidence that she remains significantly disabled in the ordinary aspects of her life. In particular, her ability to drive long distances has been reduced and of more importance, her ability to ascend stairs has been greatly compromised. I accept her evidence that this disability came against her when visiting her great grandson in New York. In terms of the future, the plaintiff will require further rhizotomy treatments over the next few years. Even then as already stated, it is the opinion of Dr. Murphy and Dr. Keaveny that the plaintiff may not get a complete resolution of her symptoms.

34. In reaching an assessment of the appropriate level of general damages in this case, the court has been greatly assisted by the guidelines set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56, and *Shannon v. O'Sullivan* [2016] IECA 93 and in particular to the criteria set down by Irvine J. at paras. 43 and 44 thereof. The court has also had regard to the dicta of the Court of Appeal in the case of *Fogarty v. Cox* [2017] IECA 309. In the light of these judgments, this Court has had to somewhat recalibrate its approach to the assessment of general damages in personal injury cases.

35. On the basis of the findings of fact made earlier in this judgment and having regard to the principles set down by the Court of Appeal in the case as cited above, I award the plaintiff general damages for pain and suffering to date of €55,000 together with general damages for future pain and suffering of €20,000. To this must be added the agreed sum for special damages of €19,757.20, giving an overall award in favour of the plaintiff in the sum of €94,757.20.