Neutral Citation [2015] IEHC 791

THE HIGH COURT

[2011 No. 9271 P.]

BETWEEN/

GERALDINE BARRY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE AND

MERCY UNIVERSITY HOSPITAL LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 16th day of December, 2015

Introduction

1. The plaintiff in this case is the former partner of one Christopher Sayer, who died on 19th April, 2010, as a result of the breach of duty by Mercy University Hospital ("MUH") in the post-operative care provided to him on 16th and 17th March, 2010. Mr Sayer and the plaintiff had been in a relationship since 2005 and had been living together since June 2006. The plaintiff brings this action, as a dependent of the deceased, for damages pursuant to the provisions of Part IV of the Civil Liability Act 1961, as amended. In addition, the plaintiff claims damages for personal injuries in the form of psychiatric symptoms caused by the circumstances of Mr Sayer's death.

2. MUH admitted that there was a breach of duty on its part which caused Mr Sayer's death. The case therefore proceeded as an assessment of damages against MUH.

Background

3. The plaintiff, Geraldine Barry, was born on 31st December, 1970. She grew up in West Cork. She attended Dublin City University and graduated with a 2:1 degree in Applied Languages (French and German). She subsequently completed a Higher Diploma in Education at University College Cork in 1999, and worked as a teacher from 1999 to 2002. However, she found teaching stressful and instead took up work as a dental receptionist and administrator in O'Brien's Dental Surgery in Skibbereen. She remained working there from 7th October, 2003, to 28th April, 2014. She felt that she performed well at her job, at least up until 2009 when Mr Sayer's illness began to affect her work. Her responsibilities included practice administration, and doing the accounts and wages. She described the work environment as "*robust*", but said that she was confident enough in her role to manage it well.

4. The plaintiff experienced some episodes of depression and anxiety during her twenties, for which she was prescribed antidepressant medication. She explained that these episodes were usually a reaction to a particular stressor – a new job, or some other such event. When life was going well for her, depression was not an issue. The plaintiff was on medication in 1995 for around twelve months; again in 1998 when she was completing her Higher Diploma; and again in the early 2000s, for around eight months. She saw a consultant psychiatrist, Dr. Clare O'Connell, in 2002, who encouraged the plaintiff to socialise more and to engage with the community. The plaintiff said that she took this advice.

5. In November 2005, the plaintiff was introduced to Christopher Sayer in a restaurant in Skibbereen. The plaintiff explained that, at this point, she was thirty-four, while Mr Sayer was sixty-five; she said that Mr Sayer was more concerned about this age gap than she was. She said that she enjoyed his company and that they had similar interests; she found him witty, funny and attractive. Their relationship developed quite quickly after this and the plaintiff moved into Mr Sayer's house at Church Cross, Skibbereen, on 18th June 2006.

6. Mr Sayer lived on the proceeds of his property investments in the United Kingdom and he had a small British pension. He was also very interested in music and earned a living as a musician. The plaintiff stated that her partner regularly played in local pubs and clubs. The plaintiff stated that this work was seasonal, and varied according to demand. She said that during the summer, he would have been doing gigs almost every night, but that during the winter this was reduced to one or two nights a week, mainly at weekends.

7. The plaintiff said that she and Mr Sayer were very happy together. She said that she envisaged staying with Mr Sayer for the rest of her life. She conceded that marriage was not discussed until after her partner was diagnosed with cancer. The plaintiff stated that after his cancer diagnosis on 22nd February, 2010, Mr Sayer had said to her that they would get married. The plaintiff stated that there was a very definite intent that they would be married.

8. As regards their living arrangements during the course of their relationship, the plaintiff stated that she was at work from 09.00 to 17.00 hrs, while Mr Sayer worked in the evenings. He was therefore at home during the day. The plaintiff stated that the housework, which included hovering, cleaning and shopping, was done by Mr Sayer. He also did the gardening and any general maintenance. The plaintiff stated that her partner paid all the utility bills. During this period, she stated that her earnings were devoted to securing a mortgage. She secured approval for a mortgage and purchased a house in 2008 in Drimoleague. She rented this house to two of her sisters for several years. This is the house in which she now lives.

9. The plaintiff stated that, as regards his general health, Mr Sayer was a fit man. He was a member of a gym; he played squash and tennis regularly, and he was part of a competitive tennis league in Schull.

10. In October 2009 Mr Sayer fell ill. It was the October bank holiday weekend and he was scheduled to play several gigs, including some in the Kinsale Jazz Festival. He was complaining of bowel cramping and attended his GP who diagnosed irritable bowel syndrome and prescribed Colofac. However, his symptoms deteriorated, and he was unable to eat. He was experiencing a great deal of abdominal discomfort and had a severe attack of hiccups that lasted for a few days. The plaintiff said she recalled having to ring to

cancel some of Mr Sayer's musical gigs, which had never happened previously.

11. The plaintiff took Mr Sayer to the out of hours GP service on the bank holiday Monday. The doctor who saw Mr Sayer confirmed that he did not have cancer of the oesophagus, which had been a concern for the deceased on account of his family medical history. Mr Sayer returned home, but his condition worsened. The next day, the plaintiff took him to the accident and emergency department in Bantry General Hospital. Here they met Dr Olivier de Buyl, a neurologist, who is a general physician in Bantry General Hospital. In the accident and emergency department, Mr Sayer became somewhat confused and disorientated. He was unable to answer basic questions, such as his name and date of birth. A CT scan of his thorax, abdomen and pelvis was performed, and he underwent a gastroscopy examination. These tests came back clear. No colonoscopy was performed at this stage.

12. A CT scan of Mr Sayer's brain showed a thrombosed aneurysm in his middle cerebral artery. The main focus of the care provided to Mr Sayer at this point, therefore, was on addressing the aneurysm. On 18th December, 2009, a procedure known as "coiling the aneurysm" was performed. This procedure successfully treated the aneurysm.

13. Following this procedure, Mr Sayer returned home, where his condition deteriorated. He continued to complain of abdominal symptoms. He spent a great deal of time in bed. He was uncomfortable when he walked and used a hot water bottle constantly, which resulted in mottled skin on his stomach. He was unable to eat solids and was restricted to a diet of soups, Complan and boiled eggs. The plaintiff said that her partner started to look very gaunt and drained at this time.

14. In mid-January, Mr Sayer started passing blood. At this point, he went to his GP, Dr Mary O'Neill. She referred him to Bantry General Hospital for a colonoscopy, which was performed on 22nd February 2010; an endoscopy was also performed. Dr de Buyl informed Mr Sayer that there was a tumour in his bowel, which was likely to be cancerous.

15. Mr Sayer was therefore sent to Mr O'Riordan, who was a colorectal surgeon in MUH, Cork. Mr Sayer's first appointment at MUH was on 26th February, 2010, with Mr Zeeshan, who was one of Mr O'Riordan's registrars. The plaintiff stated that this doctor explained the colonoscopy and the attendant risks.

16. There had, at this point, been a four-month delay in the diagnosis of Mr Sayer's colon cancer, and the plaintiff stated that this caused him unnecessary suffering. The plaintiff recounted that the colonoscopy proved to be traumatic for her partner, as the sedation did not work. The plaintiff complained that the communication skills of various doctors, nurses, and other staff with whom she and the deceased came into contact in MUH were poor. On 9th March, 2010, the plaintiff and Mr Sayer, and the plaintiff's sister, Ms Jane Barry, who is a nurse, attended a meeting with the colorectal team at MUH. Mr O'Riordan's SHO communicated the biopsy results and treatment plan. The plaintiff was dissatisfied with this meeting as she felt that matters had not been properly explained to them.

17. On 11th March, 2010, Mr Sayer was admitted to MUH for surgery. The surgery appeared to be a success, though the plaintiff recalled that the SHO had stated that the deceased's bowel was "*a mess*". The plaintiff complained that, again due to poor communication, the fact that sixty lymph nodes had been removed from her partner was not explained.

18. In the days following surgery, Mr Sayer was categorised as self-caring and was expected to be discharged on 18th March, 2010. However, he required a blood transfusion on 13th March, 2010. The plaintiff stated that in her view her partner's condition seemed to have worsened. She complained that nursing staff were rarely in the room. Nevertheless, by 16th March, 2010, the information the plaintiff had about her partner's condition was such that she felt it was appropriate for her to return to work in Skibbereen.

19. The plaintiff stated that she visited Mr Sayer on the evening of 15th March, 2010, and that his condition had deteriorated. She said that he was "*breathy, weak, cold and clammy*" and it was an effort for him to talk. The plaintiff stated that there were two student nurses on duty, who assured her that there was no problem; the nurse responsible for Mr Sayer's care similarly dismissed her concerns. The plaintiff stated that, with the benefit of hindsight, she very much regretted not having insisted on speaking to a doctor at this point.

The events of 16th March, 2010

20. On 16th March, 2010, the plaintiff telephoned MUH from her place of work at 09.00 hrs. She said that she spoke briefly to her partner, who said that Mr O'Riordan had seen him and had mentioned discharge from hospital. The plaintiff stated that she was surprised by this because her partner sounded unwell, and it was an effort for him to talk.

21. The plaintiff stated that at 10.45 hrs she received a telephone call from Tommy Nolan, a friend of Mr Sayer, who informed her that her partner was incoherent and making no sense. The plaintiff stated that she telephoned St. Patrick's ward in MUH and was informed by a nurse, who did not identify herself, that her partner was fine. The plaintiff attempted to ring his mobile telephone but received no answer.

22. Two of the plaintiff's sisters, Ms. Aileen Barry, who is a hospital pharmacist, and Ms. Jane Barry, who is a nurse, visited Mr Sayer at 15.00 hrs. The plaintiff stated that they were shocked by his condition and telephoned her to warn her that he was very ill.

23. The plaintiff stated that she arrived at the MUH at 19.00 hrs. She was deeply upset by what she saw. In her evidence to the court, she described the scene that greeted her in the following terms:

> *"I remember running from my car park where I parked my car to the hospital and running up into St. Patrick's Ward and I got into the room where Chris was. The curtain was open. There was a nurse standing there… there were two doctors standing nearby. He had a tube coming out of his nose. He had brown gunk covering his Jeanie Johnston t-shirt and he was in an extraordinary amount of distress… I have never seen anything like that and his eyes were rolling in his head, he was all clammy, he was covered in this stuff and I was just standing there and I just had nothing… to say just watching this and one of the doctors patted Chris on the head and then those two doctors walked past me. I think I was so shocked; I'm just looking at this and they walked past me into the corridor and they weren't actually going to stop to talk to me, so I followed them out. But then one turned around and said 'No, he's okay, he just needs fluids.' So I went back in then and I'm just standing there doing nothing because… Chris couldn't speak… and at one point he was clinging to my hand a bit… I have never seen anything quite like that level of distress in Chris' face."*

24. The plaintiff stated that, after some hours, Mr Sayer was moved to an observation bed in St. Patrick's ward. She recalled that it was at 23.00 hrs that the night sister first mentioned sepsis to her. The plaintiff said that a doctor told her that they could not do a CT scan that night to discover the cause of Mr Sayer's deterioration, as he was too unstable. The doctor told the plaintiff that Mr Sayer would receive the best treatment in ICU, but it was another twelve hours before he was moved there and ventilated. The

plaintiff stated that it seemed that her partner suffered a brain injury at some point on 16th March, 2010.

The events of 17th March, 2010
25. The plaintiff stated that she and her sister spent the night of 16th/17th March, 2010, at her partner's bedside. At around 07.30 hrs on 17th March, 2010, Mr Sayer was moved to the Coronary Care Unit, as no ICU bed was available. The plaintiff was advised that there was a bowel leak, sepsis was mentioned, and she was told that her partner needed urgent surgery, which he was unlikely to survive.

26. Mr Sayer went into surgery at around 10.15 hrs and came out around 14.00 hrs. The plaintiff had a discussion with Mr. O'Súilleabháin, who had performed the surgery. In the course of the operation, it was discovered that there was gross faecal contamination of the peritoneal cavity, which had emanated from a perforation at the top of the sigmoid colon at the anastomosis. Mr Sayer's stomach was washed out and an ileostomy was fashioned. He now had a stoma and would have had a bag in due course.

27. Mr Sayer survived this operation and was transferred to ICU. However, he had had a stroke at this stage, either in the operation, or because of it. The medical team seemed to be unaware at this time that Mr Sayer had these infarcts in his brain; awareness of this only came about later, after a CT scan had been performed.

28. The plaintiff explained that she did not take issue with the original surgery or the emergency surgery. She accepted that sepsis was always a risk. The plaintiff was happy with the manner in which these surgeries were performed and she accepted that the leak, which caused the sepsis, was nobody's fault. Her complaint was with the poor post-operative observation of her partner on 16th and 17th March, 2010, which allowed the sepsis to progress, with the result that it caused a serious brain injury. Counsel for the plaintiff pointed out that this was the basis upon which the trial was proceeding.

Subsequent events
29. The plaintiff stated that she met Mr O'Riordan on 19th March, 2010. He told her that he was still awaiting the results of the biopsies of the lymph nodes removed during surgery. The plaintiff stated that this was the first she had heard about cancer having reached Mr Sayer's lymph nodes. The plaintiff said that Mr O'Riordan was not forthcoming about what had happened to her partner on 16th/17th March, 2010.

30. The plaintiff stated that over the next few days, her partner was no longer sedated, but did not recover consciousness. A CT scan was performed on 26th March, 2010. This showed that Mr Sayer had suffered a new and recent brain injury in the form of a series of small infarcts in the blood vessels of the brain.

31. The plaintiff stated that she met with Mr O'Riordan and his team in ICU again on 2nd April, 2010. The plaintiff stated that from 26th March, 2010, to 8th April, 2010, she continually tried to get honest and clear information about the extent of the deceased's brain injury. The plaintiff stated that a second CT scan on 2nd April, 2010, indicated that the deceased's brain injury may have been caused by sepsis. An EEG was performed on 6th April, 2010, which showed little or no brain activity. This information was not properly communicated to the plaintiff.

32. The plaintiff also recounted that on one occasion a junior doctor examined Mr Sayer and said to the plaintiff: "*I suppose you will want a post mortem done*", or words to that effect. The plaintiff found this very upsetting as her partner was still alive at that stage.

33. Mr Sayer was taken off the ventilator on 9th April, 2010, and transferred immediately to St. Finbarr's ward. The plaintiff expressed dissatisfaction with the palliative care provided to her partner in his final days; she stated that she had to throw a tantrum to get the palliative care required in the first place.

The effects of Mr Sayer's death and the surrounding events on the plaintiff
34. Mr Sayer died on 19th April 2010. His body was cremated and the plaintiff brought his ashes home. She returned to work the following week. The plaintiff said that she was running on adrenaline at this time. She stated that her life felt surreal and different. She tried to return to her familiar routine so that she could have some level of normality in her life. She said she made an effort to see people she knew and liked, so as to help her get through this difficult period. However, she said that she was already starting at this stage to try to get answers about her partner's treatment and death, and she was preparing for the inquest.

35. The plaintiff stated that she felt she needed to get back to work because of financial pressures. She said her workplace had called on a number of occasions to see when she would be back. The plaintiff stated that she had been off work for about five weeks from 16th March, 2010. She said that she did not fare well in terms of performance after her return to work. She said she was at work in body but not in spirit; her mind was elsewhere: she had people to ring, letters to write, and freedom of information requests to make. She said she spent her lunchtimes writing out a draft of her account of the events leading up to Mr Sayer's death for the inquest. She said she would regularly cry at the reception desk at work.

36. The plaintiff stated that although it was a tough work environment, she had been able to do her job effectively. After Mr Sayer's death, however, this was no longer the case. She said she used to stay late, as she had fallen behind with her work. She said she was stressed about this. The plaintiff stated that some evenings the other staff would be gone home and she would sit at her desk thinking about what she was going home to. She said she hoped that by trying to carry on with her life and work, that things would come right. But, in fact, it got worse. She said it took time for her to become completely incapacitated. The plaintiff stated that the above was an accurate description of her experience at work from Mr Sayer's death in April 2010 until she gave up work in April 2014.

37. She added that there may have been up periods, but that the workplace became increasingly difficult for her. She said that the level of shouting increased. She did not receive a Christmas bonus the first year after Mr Sayer's death – she was told that this was because her work rate had dropped off. She said that this upset her greatly; she was upset about her own performance and the fact that she had allowed her circumstances to get the better of her. She said that some days she could not get out of bed and would ring in sick.

38. The plaintiff said that her productivity was down, her concentration was poor, and her short-term memory had deteriorated. She double-charged a patient on one occasion, about which she was acutely embarrassed. She was asked by a colleague on another occasion, "*Can you not remember anything?*" She said this was an ongoing feature of her work, which was getting worse. She said her self-confidence in her ability to do her job was disappearing. Before Mr Sayer's death, the plaintiff had none of these problems.

39. The plaintiff was invited to comment on the fact that her employer's letter recording her absences from work during the time after Mr Sayer's death did not disclose a very large number of days upon which she was on sick leave. The plaintiff replied that employees

at her workplace did not receive paid sick days and so a lot of the days that she took off were days she had swapped with other employees who, she said, were carrying her. She said that she took annual leave for the sick days, particularly in 2012. She recalled a period of two weeks where she could not even speak or function. In broad terms, however, the plaintiff stated that she dragged herself into work and tried to keep going.

40. The inquest into Mr Sayer's death was held on 14th October, 2010. The cause of death was identified as postoperative sepsis. The verdict was death by medical misadventure. The plaintiff was present at the inquest, but was not legally represented. She stated that MUH did not advise the coroner that they accepted that their acts or omissions on 16th and 17th March, 2010, led to Mr Sayer's death. She said it would have been helpful if MUH had done so, because it would have given her the sense that her partner's life counted for something in that the hospital was aware that they needed to improve their level of care.

41. The plaintiff stated that her home life in 2010 and early 2011 was chaotic and disorganised. She found it difficult to get up and go to work; she started going to the chipper all the time, because she felt unable to be in her kitchen cooking and eating alone. She said that Mr Sayer's death used to hit her particularly hard when she would arrive home and she was confronted by what she described as the "*soundless horror*" of the house, empty and in darkness.

42. The plaintiff stated that she struggled to do ordinary everyday tasks like shopping. She felt tired and was unable to sleep. The plaintiff stated that while she would love to get eight hours' sleep, the most she can manage, even now, is four or five hours.

43. The plaintiff said she used to suffer from nightmares, where she would find herself shouting around hospitals, looking for her partner. She recalls finding her partner in her dreams and remonstrating with the hospital staff for having told her that he had died months ago. The plaintiff said she found this dream extremely upsetting.

44. The plaintiff stated that there is not a day when she does not think of the events of 16th and 17th March, 2010. She said the image of her partner in the bed with the contents of the nasogastric tube spewed over his t-shirt was particularly upsetting; she had frequent flashbacks to that image.

45. The first anniversary of Mr Sayer's death fell on 19th April, 2011.The plaintiff said she was very depressed from that point. She recalled sitting in the doctor's surgery and being asked by the doctor whether she was suicidal; the plaintiff said she may have told the doctor that she was suicidal at this time, because she could not see the point in going on. The doctor prescribed antidepressants and suggested that she see a bereavement counsellor, who was attached to the surgery.

46. The plaintiff said that from April 2011 her mental state gradually deteriorated; by early 2012, she felt that she was becoming more alienated from the world. She said she was getting angrier and more upset. Her sleep was getting worse to the point where, in October 2012, she could not relax or, as she put it, "*turn off her head*" – she said she was overwhelmed by worry and anxiety. She would ring her siblings and the Samaritans in the middle of the night. She became angry with her family, as she felt that nobody cared. She got to the point where she was in a spiral of panic and felt profoundly depressed. The plaintiff was on antidepressant medication consistently during this period.

The plaintiff leaves work
47. In April 2014, the plaintiff decided to leave work. She said that the reason for this was that her short-term memory, her concentration, and her hypersensitivity to things which previously would not have upset her, made work too difficult for her. She described, for example, how she ended up crying because someone had already booked the annual leave dates that she wanted. The plaintiff said that she found herself crying at work quite regularly in the run-up to her resignation in April 2014. She described an upsetting incident where she came out of the clinic and drove in the wrong direction up a one-way street in Skibbereen. The plaintiff also experienced what her GP recorded as "*major conflict at work*" including verbal abuse by colleagues.

48. The plaintiff resigned on 24th April, 2014. She said that over the following months she felt anxious and worried about her finances. She decided to sell the house at Church Cross, which she had shared with her partner from 2006 until his death in 2010. She said she could not afford to keep it; her injury benefit at this time was €188 per week.

49. The plaintiff felt that leaving her job took the pressure off her, because she no longer had to perform. She said that she no longer had to be alert after a particularly poor night's sleep. But there was another side to this: the plaintiff said that she had defined herself through her work and that without work she had no role in life and nowhere to go every day.

The plaintiff's current condition
50. As regards her current condition, the plaintiff agreed that the report of Ms Tolan, the vocational rehabilitation assessor, accurately summed up her condition. Ms Tolan noted that the plaintiff complained of impaired concentration and short-term memory, and high levels of anxiety, with symptoms of grinding her teeth. Ms Tolan also noted that the plaintiff had a feeling of debility, tiredness, aches and pains as well as reduced pleasure from life, and loneliness. Ms Tolan further noted that the plaintiff complained of depression, with a loss of motivation and self confidence; disturbed sleep; horrendous dreams, which she found distressing; early morning waking; low activity tolerance; and a feeling of always being tired. The plaintiff agreed that this was a fair description of how she was feeling at the present time.

51. The plaintiff also suffers from panic attacks, which she described as "*…sweating, heart beat racing and your mind affecting your heart. It doesn't matter what you can do about it, everything seems in that moment catastrophic… at that moment you think you are actually about to die…"* The plaintiff said that she is too tired to be angry anymore.

52. The plaintiff further stated that she is trying to put her life back together. She has started going to the gym, she goes walking most days, and she attended the Chelsea Flower Show by herself. The plaintiff is currently doing a FETAC Level 5 Horticulture course. She said that she does not have a particular career plan arising from this; she is doing it because she wants to find some purpose, some reason to leave the house in the morning and do something with her day.

53. As regards her future, the plaintiff said she did not feel able to seek work at the present time. She is still on antidepressants: ten milligrams of Lexapro daily.

Loss of earnings claim – the plaintiff's evidence
54. In cross examination, it was put to the plaintiff that a significant claim, of around €300,000.00, was being made on her behalf on the basis that she would never work again. The plaintiff replied that she was taking life day by day, and was not thinking about the future at the present time. She said that at the moment she is not able to work and she expressed doubt as to whether she had the short-term memory or concentration to be employable.

55. Counsel for the second named defendant asked the plaintiff about her characterisation of the work environment at the dental surgery as "*robust*". The plaintiff explained that nobody stood on ceremony there; that the boss could be difficult, but that this did not upset her at the time because she had confidence in her ability. It was put to her that she was able to return to work fairly soon after Mr Sayer's death. The plaintiff replied that she was, at that point, desperate to be normal and that her work was important to her. The plaintiff said that her sense of herself and being useful and having a purpose, were tied up in her job; and this was all the more so in circumstances where she had no partner or children; she stated that, in fact, the only thing she had was her job. It was put to the plaintiff that the fact that she had returned to work, and continued working for four years after Mr Sayer's death, showed that she was resilient. The plaintiff agreed that she was a resilient person.

56. The plaintiff also accepted counsel for the second named defendant's suggestion that there is a value in work besides the financial aspect, and that this was why she had taken up the horticultural course. The plaintiff replied:

> *"I have to find some reason to get up in the morning, something to do, so that I can kind of get myself out into the world so you can talk to people, because otherwise you spend an extraordinary amount of time on your own."*

57. Counsel suggested to the plaintiff that she could work in the horticultural field, if she did not wish to return to work as a receptionist. The plaintiff replied that this would depend on whether she started feeling better than she did now, and she stated that she had been feeling this way for quite some time. Counsel asked the plaintiff whether she would like to get back working. The plaintiff replied: "*Of course. Everybody wants to be useful, to contribute… I would like to work, I would like to get reward for my work, but I can't say that I can.*"

Evidence of Dr Mairead O'Leary

58. The plaintiff was seen by Dr. Mairead O'Leary for the purpose of providing a Medico Legal report. She was seen in February and March 2014 and also in July 2015. In fact, the plaintiff had been referred to Dr. O'Leary by her GP in 2011 for treatment. However, she did not attend with Dr. O'Leary at that time, as she did not feel that treatment would be beneficial to her.

59. Dr. O'Leary stated that prior to October 2009, the plaintiff appeared to be an intelligent woman who had a very happy life with her partner. She was contented and seemed to have found her life partner. The doctor noted that in her previous medical history she had episodes of anxiety and depression which had been treated by her GP with antidepressant medication and she had also seen a psychiatrist. She appeared to have made a full recovery from those previous episodes of depression and was not on antidepressant medication at the time that her partner became ill in October 2009.

60. Dr. O'Leary stated that the plaintiff was a good historian, who appeared to her to be very genuine. She had been very attentive to her partner when he got sick. The plaintiff was balanced and articulate when she recounted the events surrounding the death of her partner.

61. Dr. O'Leary noted that the plaintiff was exhausted after the ordeal of Mr Sayer's illness and death. She returned to work three days after her partner had been cremated. She had done this because she felt she might loose her job, as she had been out for some five weeks at that stage; she was also groping for normality and wanted to give some structure to her day. Dr. O'Leary noted that she had a very difficult time when she returned to work. She could not concentrate, was breaking down crying and had memory difficulties. She was making errors in her work. The plaintiff was a very exacting woman and this caused distress to her. In the months after her partner's death, she wrote to various hospitals trying to seek answers to her questions in relation to the treatment which had been afforded to her partner. She was on antidepressant medication at that time.

62. Dr. O'Leary noted that the first anniversary of her partner's death was very traumatic. Her mental state deteriorated. She felt anxious and numb. She could not feel emotions. Dr. O'Leary said that this was indicative of profound depression and PTSD. She had no happiness at the time and had anehodonia, which was indicative of depression. The plaintiff felt detached and emotionally numb. This was a symptom of anxiety states and also of depression.

63. Dr. O'Leary stated that while she appeared to cope in the period from April 2010 to April 2011, it was not uncommon to get delayed symptoms after a traumatic event. The plaintiff found it hard to function at this time, which was a symptom of depression and PTSD. In 2012, she attempted to come off the antidepressant medication, but was not successful and had to be restarted on the medication later that year. At this time, she was very unwell. She would call her sisters in the middle of the night. This was consistent with her symptoms. She had difficulty sleeping and had upsetting memories of her partner in hospital; in particular she remembered vividly the sight of the contents of the nasogastric tube on his t-shirt.

64. In autumn 2012, she had a severe relapse in her condition. She had to take Zanax to deal with her anxiety and to enable her to go out shopping. This showed how difficult it was for her to perform daily functions. The doctor stated that it would have been very difficult for her to cope at work at that time.

65. Dr. O'Leary stated that from her examination of the plaintiff, she felt that the plaintiff had been deeply affected by what had happened to her partner. She stated that the plaintiff was very honest in recounting her symptoms. She felt that the plaintiff had a depressive disorder and PTSD and a prolonged grief reaction in relation to the way in which her partner had died. The plaintiff felt powerless in her everyday life, which was a symptom of depression. The doctor was satisfied that the plaintiff had recognised psychiatric conditions.

66. When Dr. O'Leary saw the plaintiff in 2014, she still had symptoms of depression, even though she had been on antidepressant medication for some years. It was her opinion that the plaintiff would require such medication on a long-term basis. The plaintiff had feelings of futility and numbness at that time. Dr O'Leary felt that the plaintiff would not make a full recovery from the depression.

67. To make a diagnosis of PTSD, there must be a life situation of danger of death. This traumatic event was when the plaintiff saw her partner on the evening of 16th March, 2010. That was a shocking and traumatic event for her. She had a complicated grief reaction due to the manner in which her partner met his death.

68. Dr O'Leary stated that if a meaningful apology had been given at the time of the inquest, this would have been of benefit to the plaintiff. Subsequently, the defendants' solicitors wrote to the plaintiff's solicitors, stating that if the plaintiff asked for an apology, they would pass this on to their client. Dr. O'Leary stated that this was, in effect, asking the plaintiff to beg for an apology.

69. When Dr. O'Leary saw the plaintiff on 13th July, 2015, she had given up work since April 2014. Dr. O'Leary thought that this was a wise decision. She was having severe difficulty coping at work. Work was a source of stress for her at that time. When she had seen the plaintiff in 2014, she was struggling at work more and more. She thought that it was reasonable for the plaintiff to give up work.

She stated that the plaintiff was very conscientious and hardworking and she thought that the plaintiff had stayed in the job for as long as she possibly could.

70. Dr. O'Leary stated that the plaintiff had been feeling better since she ceased working. She said that this was not surprising. She noted that the plaintiff had taken up a horticulture course and she thought that this was a positive step. It was good for the plaintiff to have some structure in a flexible situation. However, Dr. O'Leary did not think that the plaintiff would be capable of the demands of work. She stated that the plaintiff could not take the pressure. She still had symptoms of PTSD, and she was still very distressed by any reminders of how her partner was treated in hospital.

71. In relation to her present condition, Dr. O'Leary stated that the plaintiff had gone to the Chelsea Flower Show and had also gone on holidays with her sister. These were positive developments. The plaintiff's mental state had improved. However, she still had symptoms of a depressive disorder and she remains on antidepressant medication. Dr. O'Leary was of the opinion that the plaintiff should not return to work, as it would put her at a risk of relapse. She will require antidepressant medication in the long term. In relation to future care, the plaintiff will require a consultant review once per annum. She will remain in the care of her GP for ongoing treatment.

72. In cross examination, it was put to Dr. O'Leary that the plaintiff had made significant improvement in the last year. The doctor accepted that there had been some improvement in her condition. It was put to Dr. O'Leary that seeking and obtaining paid employment would be beneficial for the plaintiff's recovery. Dr. O'Leary stated that the plaintiff was somewhat "*broken*" when she had recurrent depression. The doctor did not think that it would be appropriate for her to return to work. She continues to suffer from depression, notwithstanding that she is on antidepressant medication. At present, she is preventing any decompensation in her mental state by avoiding the stress of work. In order to protect herself, she should not return to work. As she had suffered significant depression in the past and as she continued to suffer from this condition, the doctor thought that she should not work again.

73. Dr. O'Leary noted that the plaintiff also finds her horticultural course somewhat stressful, even though there is very little pressure on her to perform well. Dr. O'Leary stated that the plaintiff was at high risk of relapsing into depression. Work was a stressor which may cause a further relapse in her depressive condition. When pressed on the matter, Dr. O'Leary conceded that if the plaintiff could find work where there was not a high level of stress and where her employer was kind and supportive towards her, that would be good for the plaintiff. However, she did not know if such jobs existed in the marketplace.

Evidence of Dr Kenneth Sinanan

74. Evidence was given on behalf of the defendant by Dr. Kenneth Sinanan, Consultant Psychiatrist. He had seen the plaintiff on 15th May, 2014. At that time, because she had felt very stressed at work, she had given up her work. However, he did not get the impression that the plaintiff had given up work forever. He noted that the plaintiff had a past history of depressive episodes. If a person has a predisposition to depression, then in adverse circumstances they are likely to suffer depression again. If a person had a depressive adjustment disorder, it was possible for them to come off medication and then, if there are further adverse circumstances experienced, they are likely to have a relapse in their condition. He noted that the plaintiff was on a dose of Lexapro of 10mg per day. This was a low to medium therapeutic dose. The maximum dose was 20mg per day. He noted that the plaintiff had not taken Zanax for approximately one year. This suggested that her level of anxiety was not too severe.

75. Dr. Sinanan stated that in May 2014, the plaintiff told him that in October 2012 she had been feeling somewhat better, but that seeing him for the medical examination, brought it all back to her. Dr. Sinanan stated that it was reasonable for the plaintiff to feel that way. He was of opinion that when the current litigation was over, this would bring another level of closure to her and would enable the plaintiff to further address her symptoms. He thought that she would make further improvement and that when she was well, it would be appropriate for her to come off the antidepressant medication. However, she was unlikely to come off the medication in the next two years. When adverse circumstances bring on depression, then when the adverse circumstances are resolved, it is possible for the patient to come off medication.

76. In May 2014, the plaintiff had told him that she felt somewhat stuck in the litigation. Dr. Sinanan was of opinion that when the stress of the case was over, she would make further improvement. He was of opinion that the plaintiff had a prolonged grief reaction complicated by depression, to which she was pre-disposed.

77. Dr. Sinanan stated that when he saw the plaintiff in September 2015, she was much happier. She was still grieving the loss of her partner. However, her grief was lighter and she was more engaged. This case had brought things back to her in relation to the death of her partner. He was of the view that the sale of the the home, which she had lived in with her partner, brought a further element of closure to her. She was starting to sell her partner's antiques; this too was helping to process her distress.

78. The fact that the plaintiff had taken up a course of study indicted that she was trying to move forward. He saw this as a good transitional move. When she has completed the course, she may go on to do other things. He had noted that she had been on holidays with her sister and had gone to the Chelsea Flower Show on her own. These events showed that the plaintiff had the intention of taking control of her life again.

79. In terms of treatment, Dr. Sinanan noted that the plaintiff had seen Dr. O'Leary for medico legal purposes, but had not been treated by her. She had attended bereavement counselling on two occasions, but did not like it. She also had some four sessions of psychotherapy. Dr. Sinanan thought that she required more of this type of treatment.

80. Dr. Sinanan stated that in September 2015, the plaintiff was still a bit anxious and that was not unusual. She had agreed with him that she was in fairly good humour. She was much better than when he had seen her in 2014. The depth of her grief was less. He thought that when the case was over, there would be a further reduction in her anxiety. He thought that in twelve/eighteen months she would be able to come off her antidepressant medication.

81. In relation to work, he said that this often had a therapeutic value for patients. It was good for their self-esteem and was also good for them socially. He thought that when the case was over, the plaintiff would be able to return to work slowly. She will have to get a job that suits her. This will probably not be a job that involves dealing with the public. This will help her to see herself in a more positive light. By going on the course, she had taken the first steps to achieve better mental health. It would be detrimental to her to return to work in a toxic work environment. But if it was a supportive workplace, then it would be beneficial for her to return to work. Even if she were to remain on antidepressant medication, this would not prevent her working. Dr. Sinanan stated that he had many patients who were on higher doses of medication, who could hold down high-powered jobs without difficulty.

82. In cross examination, Dr. Sinanan stated that he was aware that the plaintiff had been subjected to a very traumatic event. He agreed that such an event was necessary to trigger PTSD. He stated that he did not ask the plaintiff to recount all the details

surrounding her partner's death, as he did not want to re-traumatise the plaintiff by making her revisit those matters.

83. He stated that the symptoms of grief, PTSD and depression overlap somewhat one with the other. He stated that her symptoms could be accounted for by a grief reaction, rather than PTSD. He accepted that the plaintiff had gone through a very traumatic event, and that this had caused her psychiatric symptoms. There was no doubt but that the plaintiff had suffered considerable trauma as a result of the traumatic events surrounding her partner's death. He stated that the plaintiff was somewhat of a perfectionist, and she liked to be given the facts. He accepted that she would have been very frustrated and upset by not being given information about her partner's medical condition. The fact that she had to wait outside ICU to meet the treating doctor was wrong. He agreed that the plaintiff had suffered a major trauma in distressing circumstances. As a result of that she had suffered psychiatric injury.

84. Dr. Sinanan noted that the plaintiff had worked for almost four years, before she had to give up work. He did not dispute that the plaintiff had to take days off as holidays, due to the fact that she was unable for the stress of work on those days. He did not know the cause of her problems at work and so could not say whether she was wise to give up work. He said that he could not disagree with the description given by Dr. O'Leary in her report of the difficulties experienced by the plaintiff at work. He accepted that her symptoms were still present. He stated that these could be grief rather than PTSD.

85. The fact that she had taken up a horticultural course, and had been to the Chelsea Flower Show, indicated that the plaintiff was making an improvement. He thought it would be very therapeutic for her to take up paid employment. He stated that the plaintiff had a high level of self-worth and for her to get back into work which she saw as meaningful, would be very worthwhile for her. He thought that there were many jobs which the plaintiff could do, which would not expose her to high levels of stress and would be therapeutic for her. Self-employment would also be of benefit to her. He stated that many people with depression feel better and work better in the evenings. If the plaintiff was self-employed she could work when it suited her.

86. While he thought that the plaintiff would make further improvement when the case was over, she had a prolonged grief reaction and this was still present. It was an adjustment disorder. He noted that in September 2015, she still experienced panic attacks on a weekly basis. He was of opinion that the plaintiff needed treatment with cognitive behavioural therapy.

Assessment of General Damages

87. There is a divergence of opinion between the doctors as to the psychiatric conditions which afflict the plaintiff. I prefer the evidence of Dr. O'Leary, who stated that the plaintiff has suffered PTSD, depression and a prolonged and complex grief reaction. The plaintiff's symptoms as recounted by Dr. O'Leary support this diagnosis. I am satisfied that the plaintiff was subjected to a very traumatic event relating to the negligent care given to the plaintiff's partner by the second named defendant. This caused the plaintiff to suffer PTSD and a prolonged depressive disorder. The plaintiff was vulnerable to such psychiatric injury, having suffered episodes of anxiety and depression in the past. I accept the evidence given by the plaintiff in relation to how the PTSD and depression has affected her in the work and social aspects of her life since the death of her partner. I am satisfied that the plaintiff has given a truthful account in this regard.

88. I accept that due to her continuing symptoms, she was not able to cope with the demands of her work as a receptionist/administrator in a dental practice. It was reasonable for her to give up this employment in April 2014.

89. The evidence of both psychiatrists is that the plaintiff has made significant improvement since giving up work. There have been a number of developments which indicate that the plaintiff is regaining control of her life and has taken significant steps on the road to recovery. Enrolling on the horticultural course, meeting friends and family members for lunch, taking holidays with her sister, looking after her small nephew, attending the Chelsea Flower Show on her own, selling the house which she shared with her partner, starting to do some training for a 5k run, and not requiring anti-anxiety medication, were all positive indicators that the plaintiff is gradually getting better.

90. Dr. Sinanan was of the view that when these proceedings are over, that will be one less stressor in the plaintiff's life, which will allow her to focus on getting better. Dr. Sinanan and Dr. O'Leary differed in their opinion of whether the plaintiff will require antidepressant medication for the rest of her life. Dr. O'Leary was of the view that, having regard to the plaintiff's past history of anxiety and depression and the level of her psychiatric injury following the death of her partner, she will probably require antidepressant medication for the rest of her life.

91. Dr. Sinanan stated that, as the plaintiff had been on antidepressant medication in the past and had been able to come off it, she would probably reach a stage again where she would be well enough to come off the medication. Even if she could not do so, he pointed out that many people had to take antidepressant medication on an ongoing basis, yet they are able to hold down good jobs and function at a high level.

92. Insofar as there is a conflict between the doctors on this issue, I prefer the evidence of Dr. O'Leary, that having regard to the plaintiff's past medical history and having regard to the level of psychiatric difficulties experienced by the plaintiff since the death of her partner, it is likely that the plaintiff will require antidepressant medication on an ongoing basis. However, the significance of this may not be that great, as I accept Dr. Sinanan's evidence that many people can perform at a high level while requiring such medication.

93. The key area of disagreement between the doctors was in relation to the plaintiff's capacity for work in the future. Dr. O'Leary was of the view that work has been a significant stressor in the plaintiff's life. As already noted, the plaintiff had been unable to cope with the demands of her job as a receptionist/administrator in a dental practice. Her concentration and memory had been badly affected. She had made mistakes in relation to the charging of patients. She had missed time from work, which she had taken as holidays. She would break down crying on a frequent basis. In these circumstances, Dr. O'Leary was of the view that it was reasonable for the plaintiff to give up work in April 2014. Since taking that step, she had made significant improvement. Dr. O'Leary was firmly of the view that the plaintiff will never be fit to return to work. She stated that to do so would only place additional pressure on the plaintiff, which would lead to a relapse of her symptoms. Dr. O'Leary was of the opinion that the plaintiff could fill her time by attending courses and doing voluntary work.

94. In cross examination, Dr. O'Leary accepted that the horticultural course had given structure to the plaintiff's day. She had made improvement from a psychiatric point of view. She acknowledged that the plaintiff had told Ms. Tolan, the vocational assessor, that she was taking time out from paid employment, but had not said that she was going to stop working permanently.

95. It was put to Dr. O'Leary that if the plaintiff could find a job where there were supportive employers, and it was not a particularly stressful environment, she would be able to cope with that sort of employment. Dr. O'Leary stated that it would be great to find a job

where the employer would mind the plaintiff and look after her. She did not know whether there were such jobs in existence.

96. As already noted, Dr. Sinanan was of the opinion that it would be enormously therapeutic for the plaintiff to return to paid employment in the future.

97. All the witnesses agreed that the plaintiff is a highly intelligent and articulate woman, who has a strong work ethic. She comes from a family of high achievers. She herself has obtained an honours degree in French and German from Dublin City University, and following this she obtained a higher diploma in education. She had spent some years teaching, followed by approximately eleven years working as a receptionist/administrator in a dental practice. Prior to the death of her partner, she had been able to cope with the stress of this employment. After her partner's death, she struggled in her job, but eventually it had got too much for her and she resigned in April, 2014.

98. As already noted, the plaintiff has made significant improvement in the last year. In relation to the plaintiff's capacity for work in the future, the picture painted by each of the doctors were at opposite ends of the spectrum. Dr. O'Leary thought that the plaintiff would never work again, while Dr. Sinanan thought that, in time, she would be fit to return to work. I cannot accept the evidence of Dr. O'Leary that this intelligent and highly educated woman of forty-four years of age, who speaks two foreign languages, who has a strong work ethic, and who was able to continue working for four years after the death of her partner, will never be fit for any form of gainful employment.

99. I prefer the evidence of Dr. Sinanan that in time, given her improvement to date, and having regard to her level of intelligence and educational qualifications, she will be fit for work in the future.

100. However, I accept that the plaintiff has suffered a significant psychiatric injury, which continues to cause her distressing symptoms. She is making a slow recovery from her injury. I accept that she is not fit for employment on the open market at the present time.

101. I find that the plaintiff will remain unfit for work for a further period of two years. Thereafter, she will be in a position to go back out into the marketplace to seek paid employment. I accept the evidence of Ms. Tolan that she will probably have to begin by doing part-time work. It is reasonable to assume that she will only be fit for part-time work for a further period of two years. Thereafter, it is likely that she will be fit for full-time employment. The consequences of this finding on the claim for past and future loss of earnings is dealt with below.

102. In assessing general damages, I am satisfied that the plaintiff suffered an extremely traumatic event in connection with the death of her partner. This has caused her to suffer PTSD, depression and a prolonged and complex grief reaction. I accept the plaintiff's account of her symptoms. She has given her evidence in a straightforward and honest manner. I am satisfied that she has suffered significant psychiatric injury, which has been present since March 2010 down to the present time. While there has been improvement in her symptoms over the last year, she continues to suffer from PTSD, depression and a grief reaction. It is hoped that she will continue to improve when this court case is over and when she completes her horticultural course. In the circumstances, I award the plaintiff general damages for pain and suffering to date of €95,000.00.

103. The plaintiff continues to have distressing symptoms on a daily basis. Her mood is up and down and she finds it distressing to recall the events which surrounded her partner's death. She frequently recalls these events. She continues to suffer from depression and requires anti-depressant medication. She continues to have feelings of anger and frustration. She continues to suffer panic attacks, with sweating, raised heartbeat, and a feeling that everything is catastrophic. There are times when she feels totally exhausted. She feels lonely and sad at the loss of her partner. I am satisfied that it will take a further number of years for these symptoms to abate. In the circumstances, I award the plaintiff €75,000.00 for future pain and suffering.

The claim for loss of earnings

104. Turning now to the special damages aspect of the plaintiff's nervous shock claim, I am satisfied that it was reasonable for the plaintiff to give up work in April 2014 due to her psychiatric difficulties at that time. Accordingly, the plaintiff is entitled to the sum of €33,411.81 in respect of her past loss of earnings. As I have found that she will remain unfit for paid employment for a further two years, she is entitled to the sum of €39,397.00 in respect of the capital value of her loss of earnings during this period.

105. In relation to future loss of earnings beyond the two year period already allowed, I have indicated that the plaintiff is likely to be fit to return to part time work in two years' time. She is likely to remain in part-time employment for a further two years. According to Ms. Tolan, the plaintiff will probably earn the sum of €200.00 per week from such employment. This would give the plaintiff a loss of €193.97 per week while she is doing part-time work. Allowing this loss for two years comes out at €20,172.88.

106. In relation to the loss of earnings thereafter, Mr Lynch was asked what the capital value of the loss would be if the plaintiff did not work for a further two years and then secured employment at an annual salary of €23,000.00. He estimated this loss at €47,377.00, which he later corrected to €46,579.00. This was made up of €39,397.00 for the two years that the plaintiff was not earning any money and circa €7,980.00 for the difference in her pre-accident earnings and the salary that she would earn of €23,000.00 per annum. I think that it is reasonable to assume that the plaintiff will probably secure employment at this rate in four years' time, rather than in two years. In these circumstances, an appropriate figure would appear to be €7,000.

107. The defendant submitted that there should be a reduction in the figure awarded for future loss of earnings having regard to the principles laid down in *Reddy v. Bates* [1984] ILRM 197. However, this was in the context of the court possibly making a finding that the plaintiff would never be fit for work again. As I have found that the plaintiff will be fit for part-time work in two years' time, and will be fit for full-time employment in four years' time, the figure allowed for future loss of earnings is only in relation to the differential between what she will earn in the future, and her pre-accident earnings. In these circumstances, it is not necessary to make any deduction to the figures allowed for future loss of earnings. The defendant also submitted that such a deduction shall be made having regard to the overall award to the plaintiff. This submission will be dealt with later in the judgment.

108. The other items of past special damage came to €2,272.08.

109. In relation to future medical costs, Dr. O'Leary is of the opinion that the plaintiff will require one consultant visit per annum at a cost of €120.00. This will bring the annual medical costs to €700.00, which is the equivalent of €13.46 per week. The capital value of the ongoing medical costs at a rate of €700.00 per annum amounts to €17,161.00 on a two and a half percent actuarial basis. The plaintiff is entitled to this sum in respect of future medical costs.

The fatal injury claim

110. It is appropriate now to turn to the fatal injuries claim brought by the plaintiff. The loss of dependency aspect of this claim is based on the assumption that Mr. Sayer earned an average of €400.00 gross per week. The plaintiff stated that the deceased earned approximately €200.00 per gig. In the summer months he could play seven or eight gigs in a week, while in the winter months he would perform once or twice per week.

111. In cross examination, the plaintiff stated that her partner's earnings varied from week to week and from gig to gig and also depending on the time of year. She was not certain how much he earned for each gig, but thought that it was about €200.00 on average. She stated that she did not have any documentary evidence of her partner's earnings. She estimated that he earned approximately €400.00 on average per week. This declined somewhat in 2008. She stated that maybe there was only one gig per week in the winter and probably more than two gigs per week in the summer at that time.

112. The plaintiff stated that the deceased kept documents in relation to his earnings. However, she did not have any such documentation. He made tax returns and all tax was paid up to date at the time that probate of his estate was taken out.

113. The plaintiff said that she was physically not able to get details from Revenue. This was due to the fact that she was totally exhausted. She did not feel that she could do a forensic analysis of his earnings. She did not know if €400.00 was a gross or net figure. She stated that a neighbour did the deceased's accounts. The deceased also kept a calendar of the gigs that he was scheduled to perform. The plaintiff stated that there were bank statements available.

114. The defendant submitted that the plaintiff's evidence in relation to the deceased's earnings was so vague as to make it unreliable and unsafe. The defendant submitted that as there was no documentary evidence at all to support the claim to loss of earnings, this element of the plaintiff's claim should not be allowed.

115. The defendant stated that the plaintiff had made no reasonable effort to provide documentary support for a very large claim and offered no reasonable explanation for that failure.

116. The defendant also pointed to the fact that, in evidence, the plaintiff had admitted that her partner had a medical card. Apparently, he was entitled to hold a medical card because he was a British pensioner. The defendant did not take issue with his entitlement to hold a medical card. In their submissions, the defendant pointed out that under EU Regulation 883/04, certain EU insured people are entitled to avail of a medical card in this jurisdiction, to include an individual entitled to a British state pension. However, such individuals are no longer entitled to a medical card where they are engaged in work in Ireland and subject to PRSI. In respect of self employed persons, he/she would only be subject to PRSI for earnings over €3,174.00.

117. The defendant submitted that the plaintiff was completely unable to provide any explanation as to why the deceased did not loose his medical card when his income apparently exceeded €3,174.00. The defendant submitted that the only reasonable inference that the court should make is that the deceased's income as a musician did not exceed €3,174.00.

118. The defendant referred to the decision in *McKenna v. McElvaney* [1998] IEHC 121, where the plaintiff made a claim for loss of dependency in a fatal case, but was unable to expand on her statement in relation to the deceased's financial affairs. The court considered that the deceased could not have been paying the plaintiff the amount of money she claimed, having regard to the independent evidence available, to include the deceased's VAT registration status. The defendant submitted that the independent evidence available in this case, which included the deceased's medical card status, indicated that the deceased was not earning what the plaintiff believed. The defendant submitted that the court should be very reluctant to award damages on the basis of vague and uncertain estimates of income.

119. The defendant also questioned the validity of the assumption made by the actuary that, had he lived, Mr. Sayer would only have suffered a fifty percent reduction in his earnings from age seventy-five onwards. The defendant submitted that it was wholly unrealistic for the court to award damages to the plaintiff on the basis that a man in his late seventies and early eighties would continue to make this level of contribution per week to the household from his earnings as a musician.

120. On behalf of the plaintiff, it was submitted that the plaintiff had given evidence that during the winter months, Mr. Sayer would have performed approximately two gigs per week. During the summer months, he was doing considerably more gigs each week. It was submitted that the plaintiff had acted reasonably in putting forward a claim based on the "winter earnings" as opposed to his average earnings during the summer months.

121. In relation to the question of his holding a medical card, it was submitted that while it was put to the plaintiff that Mr Sayer could not have held a medical card if he had earnings as a self-employed musician in excess of €3,174.00, the defendant had not actually called any witness from the HSE to prove this assertion.

122. It was also submitted on behalf of the plaintiff, that they had taken a reasonable approach to the question of the deceased's future earnings as a musician. In particular, the actuary had built in a fifty percent reduction in such earnings as and from his seventy-fifth birthday onwards. It was submitted that this was a reasonable basis on which to approach the matter.

123. Having considered these submissions, I am of the view that the plaintiff's submission in relation to the question of the medical card is correct. As no evidence was called to prove that one would loose the medical card where the earnings exceeded €3,174.00, I do not propose to make any finding in relation to the deceased's earnings based on the fact that he held a medical card.

124. In relation to the issue of the deceased working on until he reached eighty-four years of age, I accept the submission made on behalf of the plaintiff to the effect that where a person was doing something which they passionately loved, such as playing music, it was reasonable to find that they would continue to perform at various venues. I accept this submission. Furthermore, I think that the approach of the actuary in reducing the amounts of such earnings by fifty percent from age seventy-five onwards, is a reasonable approach.

125. The burden of proof rests on the plaintiff to prove that the deceased had earnings of €400.00 per week. The plaintiff did not produce any documentary evidence to support this. No tax returns or annual accounts were submitted. Although the plaintiff said that bank statements were available, none were produced in evidence. Nor was there any diary submitted showing any of the dates on which Mr. Sayer was engaged to perform. No evidence was called from any of the other musicians, who may have worked with the deceased from time to time. Nor were any hotel or pub owners called to give evidence in relation to dates when the deceased would have been engaged to perform at their venues. In these circumstances, it was almost impossible for the defendant to carry out any sort of meaningful examination of this aspect of the plaintiff's case.

126. While I accept that the plaintiff has been a truthful witness, it would be unfair to the defendant if I were to accept the figure of €400.00 as the deceased's weekly loss of earnings, where there is absolutely no documentary evidence to support this assertion. This places the court in a very difficult position. On the one hand, I accept the plaintiff's evidence that her partner did have some earnings from his activities as a musician. On the other hand, I cannot accept the figure of €400.00 per week without some documentary evidence or viva voce evidence to support it.

127. As already noted, in *McKenna v. McElvaney* [1998] IEHC 121 the plaintiff claimed that the deceased gave her €300.00 per week from her earnings. The trial judge found that the accounts produced by the deceased's accountants were "absolutely and completely unreliable." He characterised the plaintiff's evidence as "unreliable" and "unconvincing." Nevertheless, he found that the plaintiff was in receipt of some money from the deceased. Johnson J. stated that doing the best that he could to do justice between the parties, he would make a finding that the plaintiff was paid €120.00 per week by the deceased.

128. In his calculation of the dependency loss in this case, the actuary came to the conclusion that allowing for an earning component of €400.00 gross per week plus €97.00 in respect of a British pension, the plaintiff suffered a dependency loss of €118.00 per week. This took account of a fifty percent reduction in the dependency loss as and from the deceased's seventy fifth birthday. Doing the best that I can to be fair to both parties, I propose to allow fifty percent of the dependency loss claimed, giving a loss of €59.00 per week under this heading.

Loss of deceased's services

129. In relation to the issue of the loss of the deceased's services, the defendant disputed that the deceased provided weekly services to the value of €200.00 as claimed by the plaintiff. The defendant further submitted that it was wholly unrealistic for the court to award damages to the plaintiff on the basis that the deceased would have continued to provide this level of services into his late seventies and early eighties.

130. The defendant pointed to the fact that initially in the pleadings, the plaintiff made a claim for loss of services in the sum of €90.00 per week. The defendant submitted that the plaintiff's explanation for the increase under this heading from €90.00 to €200.00 per week, was vague and unsatisfactory. The plaintiff stated that it was only over time that she realised the increasing cost of maintaining a house as it got older and as things needed more maintenance, such as the purchase of solar panels, the purchase of items such as lawnmowers, and she found that costs generally increased. It was submitted that the plaintiff's explanation for this sudden increase in the claim was totally unsatisfactory.

131. The plaintiff's counsel submitted that what was at issue was the value of the deceased's services to the household. There was no dispute that he was, in effect, a stay-at-home partner during the day and largely ran the household. Neither was there any real dispute as to the quantum of the services provided. The essence of the dispute was as to their value. It was submitted that the initial claim of €90.00 per week was made in replies to particulars delivered in January 2013, when the plaintiff was suffering from a particularly bad bout of depression at the end of 2012. In the circumstances, she was not able to give it her full attention. She stated that it was only subsequently when she went back over the issue, and realised the increasing cost of maintaining a house as it got older, that she became aware that the true value of her partner's services was in and around €200 per week.

132. I accept the plaintiff's evidence that Mr. Sayer did all the repair and maintenance work around the house, that he did all the general housework and looked after the garden. In such circumstances, the valuation placed upon these services of €200 per week is reasonable. The actuary has built in a fifty percent reduction in the value of the services provided as and from the deceased's seventy-fifth birthday. I think that that is a reasonable manner in which to value this head of loss.

133. This gives an overall dependency loss of €259.00 per week. I accept Mr. Lynch's evidence that the capital value of each euro per week dependency loss to the plaintiff to be €521.00. The capital value of a weekly loss of €259.00 amounts to €134,939.00.

Past special damages

134. In relation to the plaintiff's claim for past losses, the defendant has denied any liability for items 2, 3, 5 and 6, in the plaintiff's schedule of special damages dated 1st October, 2015. These items are essentially probate costs incurred by the plaintiff as a result of the death of Mr. Sayer. The defendant submits that the plaintiff is not entitled to recover sums in respect of the grants of probate as these were costs that would have been incurred, in any event, by the estate upon the death of the deceased. It was submitted that they were not expenses incurred "*by reason of the wrongful act*" within the meaning of s. 49(2) of the Civil Liability Act 1961, which provides:-

> *"In addition, damages may be awarded in respect of funeral and other expenses actually incurred by the deceased, the dependants or the personal representative by reason of the wrongful act."*

135. The plaintiff submitted that at common law no damages could be recovered in respect of funeral expenses. That position was changed, first by the Fatal Injuries Act 1956, and was re-enacted in s. 49 of the 1961 Act. The plaintiff submitted that the expression "*funeral and other expenses*" was specifically wider than the equivalent English provision which was simply confined to "*funeral expenses*".

136. The plaintiff submitted that the probate costs concerned, were costs incurred by the reason of the death of the deceased and, as such, were properly recoverable from the defendant. The plaintiff's counsel referred to the decision in *Courtney v. Our Lady's Hospital* [2011] 2 I.R. 786, where O'Neill J. had to consider whether the costs of attending an inquest into the deceased's death were properly recoverable in a fatal injury action. He held that the words "other expenses" included the costs of attendance at the inquest. In the course of his judgment, he stated as follows:-

> *"To ascertain whether the claimed expense can come within the ambit of 'other expenses', one must ask the question whether it is an expense, which, as an item of damage, can be recovered in an action for negligence. This in turn means that it must be ascertained whether the expense in question was one, which, arising from the tort committed was reasonably foreseeable.*
>
> *…In determining whether a particular item of damage was reasonably foreseeable, the reasonableness of the conduct of the plaintiff is a relevant factor in determining whether the loss in respect of which damage is claimed was foreseeable."*

137. The plaintiff submitted that the cost of extracting a grant of probate was entirely foreseeable; indeed, it was virtually inevitable. In such circumstances to argue that it was not a reasonable expenditure was totally unstatable.

138. I am satisfied that items 2, 3, 5 and 6 in the plaintiff's schedule of special damages, which are costs associated with the

extraction of a grant of probate to the deceased's estate, properly come within the meaning of the words "*other expenses*" in s. 49(2) of the Civil Liability Act 1961. In such circumstances, I hold that they are properly recoverable from the defendant.

139. The figure for past special damages in the fatal case is €13,449.34. The plaintiff submitted that interest pursuant to s. 22 of the Courts Act 1981 should be added to this sum. The interest rate under that Act is set at eight percent per annum. In response, the defendant submitted that to apply such an interest rate was unrealistic and unfair to the defendant because in reality the plaintiff would not have been able to earn such an amount of interest without investing her money in a particularly risky venture. It was submitted that such a rate of interest would not be available from any of the main lending banks.

140. I think that the defendant's argument in this regard is reasonable. It is unrealistic to apply an interest rate of eight percent to past losses. The plaintiff is only entitled to recover the amount of the past losses without any interest thereon.

Inheritance tax

141. As part of her action, the plaintiff made a claim for €76,761.00 in respect of the inheritance tax that she was obliged to pay on receipt of her inheritance from the deceased. The plaintiff's case was that she and the deceased had planned to marry and that, had they done so, she would not have incurred this tax liability.

142. The defendant submitted that the plaintiff's replies to particulars dated 30th January, 2013, provided detailed particulars in relation to the claim for special damages, but made no mention whatsoever of the claim for inheritance tax. Similarly, the plaintiff's special damages statement dated 22nd October, 2014, made no mention of the claim in this regard. Her updated special damages dated 27th January, 2015, made no claim for the inheritance tax. The plaintiff's first actuarial report dated 7th November, 2014, did not record that the plaintiff and the deceased planned to marry. The defendant stated that the first indication that there was a claim for the inheritance tax was in the plaintiff's statement of special damages dated 1st October, 2015. The plaintiff was unable to offer any explanation for the late entry of this claim.

143. The defendant submitted that there were a number of contingencies which would have had to occur before the plaintiff would not have been obliged to pay the inheritance tax. First, it was submitted that it had to be assumed that the plaintiff and the deceased would stay together as partners. It was noted that the deceased was divorced and had had a previous partner, one Rita Minehane, to whom he had left a substantial bequest. Although the deceased had lived with Ms. Minehane for almost 27 years, he had never in fact married her.

144. The second assumption was that the plaintiff and the deceased would actually get married. The defendant submitted that, in her evidence, the plaintiff had stated that she only had one conversation with Mr. Sayer about the prospect of getting married. In her evidence, the plaintiff stated as follows:-

> *"A. Prior to him being diagnosed with cancer, it wasn't discussed but shortly after 22nd February, 2010, after he was diagnosed, he did say to me, very clearly in one conversation before he went into hospital, that if his illness got – that we would be getting married, particularly if his illness got worse."*

145. The defendant conceded that the plaintiff had mentioned to her doctor, Dr. O'Leary, that she and the deceased planned to marry. They also conceded that the plaintiff's sister, Jane Barry, also gave evidence of having a conversation with the deceased, wherein he stated his intention to marry the plaintiff.

146. The defendant submitted that there was insufficient evidence to find, on the balance of probabilities, that the plaintiff and the deceased would have married. The defendant also submitted that in the ordinary way, the plaintiff's loss was so remote as not to be compensatable in damages. The contingencies that would have to be resolved in favour of the plaintiff were so great that damages could not reasonably be awarded.

147. Alternatively, the defendant submitted that each of the contingencies warranted being treated as "*chances*" in respect of which a mathematical discount to the claim should be made. The defendant referred to *Davoren v. HSE* [2011] IEHC 460, which was a wrongful death case in which the defendants had argued that the wife should not recover the loss of her deceased husband's inheritance from his mother, because there were too many contingencies. The contingencies relied upon included that the deceased would survive his mother and that she would have to have left the entire of her estate to the deceased. In the course of his judgment, O'Neill J. stated as follows:-

> *"49. In respect of all of these contingencies, it was submitted that where a discount has to be made in respect of more than one contingency, it must be done, as it were, on a compound basis. In other words, if the first contingency diminishes the chance to 80% and, second, diminishes the chances by 50%, in effect, the second diminishes the 80% down to 40%. In this regard, Mr. McCullough S.C. placed reliance on Magregor on 'Damages', where, at para. 8-091, the following is said-*
>
> > *'Where in calculating the last chance, two discounts have to be made, it is now established that the proper method to use is to make the first discount and then, to the figure thus reached, to apply the second discount.'*
>
> *50. I would readily agree with Mr. McCullough S.C. that this is the correct approach where multiple discounts must be made in respect of a variety of contingencies or future chances.*
>
> *51. Mr. Eoin McCullough S.C. then went on to submit that insofar as the plaintiff's case in this case was concerned, the number and the weight of the contingencies was so great that, in effect, the plaintiff's chance of ultimately succeeding to the enjoyment of the inheritance from Maura Davoren was reduced to disappearing point. In this regard, he cited the case of Barnett v. Cohen [1921] 2 K.B. 461, where McArdle J. said the following:-*
>
> > *'Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight of multiplied contingencies. The action therefore fails.'"*

148. In their submissions, the defendant conceded that in the *Davoren* case, the court held that as a matter of probability the contingencies outlined would resolve in favour of the plaintiff, as rather than chances, each contingency was a probability. However, the defendant submitted that in this case, each contingency could only be described as a possibility and not a probability. No steps had been taken to indicate that the deceased and the plaintiff would marry. Rather, there was a suggestion that they might marry should a number of other circumstances come to pass, thus rendering this aspect of the claim "*pressed to extinction by the weight of*

multiplied contingencies".

149. The plaintiff submitted that the defendant's complaint in relation to the late presentation of this claim was not a determining factor. Indeed, they submitted that it was not even a relevant factor. In respect of the defendant's argument, the plaintiff stated that there were, in fact, only two contingencies, namely that they would have married and that they would have stayed together.

150. The plaintiff submitted that on the evidence before the court, it was an irresistible conclusion that the plaintiff and Mr. Sayer would have married and would have stayed together as a couple. It was submitted that there were no other unidentified contingencies to deal with. It was submitted that there was no need for arcane assessments of speculative, unspecified and multiplied contingencies on the facts of this case, as contemplated (though not found on the facts) in the *Davoren* case upon which the defendant relied. The plaintiff submitted that the view taken by O'Neill J. in *Davoren* was entirely supportive of the present claim. In particular, they referred to the following portion of the judgment:-

> *"38. …I do not see the plaintiff's claim for the loss of the inheritance of the estate for Maura Davoren as falling into the category of cases considered as 'loss of chance' cases, for the simple reason that the inheritance by Michael Davoren deceased, of his mother's estate was not a matter of chance, but was, as already said, an event that was highly probable and the succession to his estate by his dependents, either by gift or inheritance was also highly probable. Loss of chance cases deal with a probable loss of an opportunity to secure a less than probable benefit…."*

151. The plaintiff submitted that the issue in this case was one of fact and causation: but for the death, the plaintiff would have married and stayed with Mr. Sayer until his death and inherited the family home and would done so without liability to inheritance tax.

152. The plaintiff submitted that the essence of a fatal injury action lay not merely in the death of the deceased but in its prematurity. It is death at a particular time which causes the losses that sound in damages. It was submitted that the present claim for damages in the amount of the inheritance tax paid on the particular facts of this case, was entirely in accordance with that rationale in *Davoren*; but for Mr. Sayer's premature death, the plaintiff would have married Mr. Sayer and inherited the house without liability to inheritance tax. Accordingly, the liability for tax was, in the words of s. 49 of the 1961 Act, a loss "resulting from the death" of the deceased.

153. The plaintiff inherited the family home and the sum of €78,117.81 from the deceased. However, because she was not married to the deceased, she suffered inheritance tax in the sum of €76,761.00. The plaintiff has given evidence that after his diagnosis with cancer, Mr. Sayer made it clear that he intended to marry her. This was supported by the evidence of Jane Barry, the plaintiff's sister, who stated that Mr. Sayer had told her that he was thinking of getting married to the plaintiff. I am satisfied that the plaintiff and Ms Jane Barry have given truthful evidence in this regard. I find that had Mr. Sayer not died, he and the plaintiff would in all probability have married. In such circumstances, the plaintiff would not have had to pay the inheritance tax on her bequest under the will. In these circumstances, the plaintiff is entitled to recover the sum of €76,761.00 paid as inheritance tax.

Benefits arising from death

154. The defendant submitted that it was well established that there should be a deduction for benefits conferred on the plaintiff in the form of the value of the accelerated receipt of the deceased's estate. The benefits arising which are not deducted when assessing damages, are those as outlined in s. 50 of the Civil Liability Act 1961. A family home was not included in the list of items to be considered non-deductible.

155. The defendant stated that there was a body of case law which had developed on this topic, with the result that the marital family home has come to be regarded as a non-deductible asset. The defendant referred to the decision in *Heatley v. Steel Company of Wales Limited* [1953] 1 WLR 405, where in the course of his judgment, Lord Goddard C.J. stated as follows:-

> *"What the court has to ascertain in these cases is: how much have the widow and family lost by the father's death? This is not a case where by the death of the father, the widow will come into some large sum of money of which she never before had the handling. She will simply continue to live in this house and provide a home there for the children until it is sold and if it is sold, she will get another house. The court cannot see that there is really any sum to be deducted for the value of the house at all. It is true that a successful sale of the house might produce as much as £1,200.00. But if it were sold and she went out she would have to go somewhere else. To get accommodation for these children she would have to get another house and she would be lucky if she could get another house for rent. The fact is that she is in the same position as she was, she has not benefited, save possibly by some nominal amount by her husband's death."*

156. In *O'Sullivan v. CIE* [1978] I.R. 409, the Supreme Court approved of the decision in *Heatley v. Steel Company of Wales Limited*, and held that the family home was a non-deductible asset, stating:-

> *"The house was the family home; if it were sold, the plaintiff would have to find another house so there is no element of 'gain' to the family in inheriting the house."*

157. The defendant noted that in *Davoren v. HSE* [2011] IEHC 460, O'Neill J. quoted with approval the Supreme Court decision in *O'Sullivan v. CIE* and continued as follows at para. 18:-

> *"18. There can be no doubt but that this case establishes unequivocally the principle that in arriving at damages to compensate for loss of support as a result of a wrongful death, benefits or advantages which accrue to the dependents arising from the death must be taken into account and deducted so that the ultimate compensatable loss is the net loss giving credit for the benefits or advantages that have accrued from death."*

158. The defendant submitted that the plaintiff came into her inheritance many years earlier than would otherwise have been the case. In such circumstances, a benefit was conferred on her in the form of the value of the accelerated receipt of the estate. The plaintiff's actuary has provided a calculation for the deduction in respect of the accelerated benefit of her pecuniary bequest. The defendant submitted that the acceleration of the benefit of that bequest was clearly a deductible benefit.

159. The defendant further submitted that the inheritance by the plaintiff of the deceased's house was a deductible benefit as there was a tangible financial gain to the plaintiff in inheriting the house. It was submitted that the undisputed facts are:-

> (a) the deceased and the plaintiff were not married;

(b) the deceased was the sole owner of his house at Church Cross;

(c) the plaintiff had no legal interest in the deceased's property prior to his death;

(d) the plaintiff had purchased a property in her own name in 2008;

(e) the plaintiff sold the deceased's house in 2014; and

(f) the plaintiff did not need to use the sale proceeds to purchase a house to live in.

160. It was submitted that, in her evidence, the plaintiff had accepted that the sale of the deceased's house at Church Cross, had effectively provided her with a financial windfall.

161. The defendant submitted that in the *Davoren* case, O'Neill J. held at para. 26 that the plaintiff in that case had:-

> *"been put in possession by way inheritance of an asset which is readily disposable, and it is a matter of personal choice on her part, as she sees fit, whether or not she retains the land or disposes of it."*

162. The defendant submitted that that statement was on all fours with the plaintiff's inheritance of the deceased's house in this case. The plaintiff sold the deceased's house for €295,000.00 and moved into her own house. The defendant submitted that in such circumstances there was an accelerated financial gain of €295,000.00 to the plaintiff which must be deducted by the court in arriving at the ultimate compensatable loss.

163. In response, the plaintiff argued that it was well established that the inheritance of the family home was not an accelerated benefit. The plaintiff referred to the Supreme Court decision in *O'Sullivan v. CIE* [1978] I.R. 407.

164. The plaintiff submitted that the defendant was seeking to distinguish the decision in *O'Sullivan v. CIE* on the basis that the plaintiff did not need to use the proceeds of sale of the house at Church Cross to purchase a new house to live in. She moved into her own investment property at Dromoleague. The plaintiff's counsel submitted that this argument was entirely misconceived. He submitted that but for the defendant's negligence, the plaintiff would probably have done the following: continued to live in Mr. Sayer's home at Church Cross as his partner in life; married Mr. Sayer; inherited his house on death; not been liable for inheritance tax; continued to receive an income substantially greater than the sum received as social welfare of €188 per week; and continued to enjoy the capital value and income of her investment property in Dromoleague. It was submitted that before Mr. Sayer died, the plaintiff, in effect, had both her home at Church Cross and an investment property.

165. It was submitted that due to the defendant's negligence, the plaintiff was left the house at Church Cross, but she had had the benefit of this house whether Mr. Sayer died or not. She was reduced by her own injuries to an income of €188 per week disability allowance and she was burdened with a large inheritance tax bill; as a result, she could not afford to keep the house at Church Cross and had to sell it. The plaintiff's counsel submitted that had the defendant's negligence not led to the death of Mr. Sayer, the plaintiff would still live in the house at Church Cross and would still have her investment property in Dromoleague.

166. It was submitted that having had to sell her home, as was observed in *O'Sullivan v. CIE*, the plaintiff had to find another home. She could, as envisaged in the *O'Sullivan* case, have used the proceeds of sale to buy a replacement home. It was submitted that in that event, the defendant could not have objected to the non-deductibility of the value of the dwelling and the plaintiff would still have been left with her investment property in Dromoleague.

167. It was submitted that the plaintiff did, indeed, "*spend*" on a new home because, in effect, by moving into her own property, she thereby lost the investment value of the house in Dromoleague. It was submitted that the defendant's submissions ignored the fact that the plaintiff no longer has an investment property, being forced to make it her home. In these circumstances, it was submitted that the plaintiff falls squarely within the *ratio* of *O'Sullivan v. CIE* and no deduction should be made for an accelerated benefit of the home at Church Cross.

168. I am satisfied that the plaintiff's contention is correct. This case falls squarely within the parameters of the decision in *O'Sullivan v. CIE*. Due to financial hardship, the plaintiff was obliged to sell the house at Church Cross and move into her own investment property at Dromoleague. There was a cost to the plaintiff in making this move: rather than applying the proceeds of sale of the house at Church Cross to buy a new property, the plaintiff lost the value of her investment property at Dromoleague. In these circumstances, I am satisfied that the inheritance of the house at Church Cross is not a deductible benefit.

169. The question has arisen as to whether there should be an asset deduction by virtue of the fact that due to the death of the deceased, the plaintiff inherited assets earlier than would have been the case had Mr. Sayer lived a normal lifespan of 84 years. I am satisfied that some deduction must be made for the early inheritance of the pecuniary bequest. Mr. Lynch has valued this at €39,895.00. It is appropriate that there should be a deduction of this amount from the damages payable to the plaintiff.

The deceased's wife

170. Mr. Sayer was married in the United Kingdom in 1972, to one Ms. Irene Florence Genn. They were divorced in England in 1978. As far as is known, Mr. Sayer did not have any contact with Ms. Genn after 1978. It does not appear that he was making any payments to her by way of maintenance or otherwise. I am told that the plaintiff's solicitor has tried to contact Ms. Genn, but without success. In the circumstances, I declare that Ms. Genn is entitled to be included as one of the deceased's statutory dependents. However, on the evidence before me, it would appear that she was not receiving any payments from the deceased prior to his death. Accordingly, she is not entitled to receive any damages arising out of the death of Mr. Sayer.

171. As far as is known, the deceased did not have any children.

Solatium

172. Finally, there is the issue of the Solatium damages. The plaintiff had co-habited with the deceased for more than three years prior to his death. She therefore comes within the class of his statutory dependants. She has suffered great mental distress as a result of his death. In the circumstances, it is appropriate that the entire sum of €25,394.00 be paid to the plaintiff.

Reddy v. Bates [1984] ILRM 197 deduction

173. The defendant submitted that in assessing the plaintiff's award in both the fatal injuries case and the personal injuries case, the court should apply the principles in *Reddy v. Bates* [1984] ILRM 197. It was submitted that in that case, the Supreme Court held that

in assessing damages, the court should look at the total sum for the purpose of ascertaining whether the total sum awarded is, in the circumstances of the case, fair compensation for the plaintiff, or whether it is out of all proportion to such circumstances.

174. It was submitted that the Supreme Court held that there should be deductions for future risks and uncertainties unrelated to the circumstances giving rise to the claim. The defendant referred to the decision in *O'Sullivan v. Telecomm Éireann* [DPIJ 1998] where Barr J. made a substantial *Reddy v. Bates* deduction in assessing the future loss of earnings of a semi-professional FAI footballer. They also referred to the decision in *Laffan v. Quirke* [2012] IEHC 250, where Hogan J. made a reduction of twenty percent in an award for future loss of income because of the economic recession.

175. It was submitted that the *Reddy v. Bates* principle encompasses factors such as the plaintiff's own past medical health and personality. In *O'Connor v. O'Driscoll* [2004] IEHC 19, the plaintiff was a bank executive who was injured in a road traffic accident. He suffered physical injuries and developed serious PTSD. In the High Court, it was held that a deduction should be made for the risks to the plaintiff's future earning capacity that existed in the absence of an accident. In the course of his judgment, Ryan J. stated as follows:-

> *"The Supreme Court did not intend in Reddy v. Bates and other cases to give an exhaustive list of the matters that are to be taken into account in considering future loss of earnings. The principle is that life's uncertainties and exigencies have to be taken into account in general terms so as to modify the certainties implied by actuarial calculations, which are based on the assumption that events will progress to a particular date without any disruption or interruption. If there are particular circumstances in a case, then they obviously must be taken into account."*

176. In that case, Ryan J. made a *Reddy v. Bates* reduction of "*between one quarter and one third*" in the compensation award for loss of earnings. Ryan J. explained this as follows:-

> *"Having regard to the evidence of the psychiatrists and particularly Dr. Dunne as to the risk of burn-out in a person in the plaintiff's position, the evidence of the severe stresses to which his work exposed the plaintiff, the evidence of his own personality with its high demands made on himself, his perfectionist tendencies and intolerance of failure, a substantial reduction has to be made."*

177. The defendant submitted that the court should make a *Reddy v. Bates* deduction to the plaintiff's compensation award to provide for risks which existed in the absence of the circumstances of the death of the deceased.

178. In response, the plaintiff made the case that the defendant was asserting that the court, in assessing damages, should look at the total sum for the purpose of ascertaining whether the total sum awarded is, in the circumstances of the case, fair compensation for the plaintiff, or whether it is out of proportion in all the circumstances. The plaintiff submitted that the defendant was suggesting that there should be a generalised "pairing back" on some vague basis of proportionality. It was submitted that this submission confused two separate aspects of *Reddy v. Bates* – the "proportionality" assessment applied only to the award of general damages. It was further submitted that as regards the quantification of general damages, the only relevant factors include the following: the social burden of large awards; general economic circumstances; comparison with the general trend in awards of damages in similar cases; proportionality to social conditions bearing in mind the common good; the effect on increased insurance costs; and taxation or perhaps a reduction in some social service.

179. The issue as to whether there should be any *Reddy v. Bates* deduction made to the sum awarded for the plaintiff's future loss of earnings, has already been dealt with in this judgment. In relation to the proportionality issue in *Reddy v. Bates*, the plaintiff submitted that this was only relevant to the award of general damages. However, in looking at the overall award, it was submitted that the court could take into consideration the fact that the plaintiff was under-compensated for damages for mental distress due to the limit that exists in relation to an award of solatium damages.

180. It was submitted that the defendant had baldly asked the court to make a *Reddy v. Bates* deduction "to the plaintiff's compensation award" – not confined to that part of the award referable to future loss of earnings – to provide for "risks which existed in the absence of the circumstances of the death of the deceased" – without identifying those risks. The plaintiff submitted that no such deduction should be made; the plaintiff (who was well qualified and experienced in many positions throughout her life) was in stable employment for nearly a decade in a dental surgery and was content in her job.

181. I am satisfied that the general damages awarded in this case have been set at a moderate level and are not out of line with personal injury awards in similar cases. In the circumstances, I decline to make any general reduction based on the principles set out in the *Reddy v. Bates* case.

The plaintiff's legal status

182. The defendant made the following submission in relation to the plaintiff's legal status. It was pointed out that the plaintiff was not married to the deceased, but until the date of his death, she had been living with him for a continuous period of not less than three years. Therefore, the plaintiff was a dependant within the meaning of s. 47(1)(c) of the Civil Liability Act 1961, as amended by s. 1 of the Civil Liability (Amendment) Act 1996. Section 47(1)(c) of the Act of 1961, as amended, provides that a "*dependant includes*":-

> *"a person who was not married to the deceased but who, until the date of the deceased's death, had been living with the deceased as husband or wife for a continuous period of not less than three years"*

183. The defendant pointed out that the deceased had died on 19th April, 2010. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, came into operation on 1st January, 2011. That Act made certain provisions for cohabitants. However, the provisions of the 2010 Act relating to cohabitants did not apply to the plaintiff. The deceased had died before that Act came into operation.

184. In these circumstances, the defendant submitted that it was important to keep in mind the provisions of s. 49(5) of the Civil Liability Act 1961, as amended by s. 2 of the Civil Liability (Amendment) Act 1996. The plaintiff, as the deceased's unmarried partner, had no legal right to financial maintenance by the deceased. In this regard, the defendant referred to Shatter's "*Family Law*" (4th Ed.) 1997 at paras. 19.34 and 19.79, wherein the author noted the absence of a legal right to maintenance in situations similar to the plaintiff's situation.

185. Section 49(5) of the Act of 1961, as amended, requires the court to take the plaintiff's lack of an enforceable right to financial maintenance by the deceased into account in determining the damages to be awarded. Section 49(5) of the Act of 1961, as

amended, provides as follows:-

> *"Where a person referred to in paragraph (c) of the definition of 'dependant' in section 47(1) had no enforceable right to financial maintenance by the deceased, the court shall take that fact into account, together with any other relevant matter, in determining the damages to be awarded to the person by virtue of subparagraph (i) of paragraph (a) of subsection (1) of this section."*

186. In her submissions, the plaintiff accepted that she had no legally enforceable right, as of the date of death, to maintenance from Mr. Sayer. However, it was submitted that the defendant had misinterpreted s. 49(5) of the Act of 1961, as amended. It was submitted that this section only requires that the court shall take into account the fact of there being no enforceable right to maintenance when considering, as a matter of probability, whether the loss of financial support was caused by the death. It was submitted that fatal injury damages turn not on findings of law as to legal entitlements to financial benefits, but on findings of fact as to "*reasonable expectation*" of benefit. The following passage from the decision in *Dalton v. South Eastern Railway* (1858) 4 C.B. (N.S.) 296 was referred to:-

> *"…legal liability alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act 9 & 10 Vict C. 93; but that the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed and the probable pecuniary loss thereby occasioned."*

187. The plaintiff submitted that the issue is one of factual causation. The fact of there being no enforceable right to maintenance is expressly identified as a factor to be taken into account "together with any other relevant matter". The question of weight as between all relevant matters is for the court, and the section does not mandate any conclusion as to fact.

188. The plaintiff referred to the following extract from the textbook "*Law of Torts*" (4th Ed.) by McMahon and Binchy at para. 42.81 where they point out that s. 49(5):-

> *"…gives no guidance as to how the court is to proceed. Since assessments of financial loss are essentially factual, it seems that the absence of a legal basis for the support that the cohabitant was receiving and would, in future, have been likely to have received from the deceased should not, in short, be any reason for reducing the award."*

189. It was submitted that once it is found as fact, as the plaintiff submitted in this case it must be, taking the absence of legal entitlement into account with all other relevant matters, that there was a reasonable expectation of benefit, then the section has no further application. It was submitted that the plaintiff was in no different a position to many other dependants who suffer a loss which is not a legal entitlement, e.g. an adult child of the deceased living with or supported by the deceased.

190. While it has been accepted that the plaintiff had no enforceable right to maintenance from the deceased at the time of his death, I am nevertheless satisfied that in all the circumstances of the case, if the deceased had not died, he would in all probability have continued during his lifetime to make maintenance payments towards the upkeep of the house and the support of the plaintiff. In this regard, I have had particular regard to the evidence given by the plaintiff's sisters Ms. Jane Barry and Ms. Jacinta Barry, who both gave evidence to the effect that the deceased and the plaintiff were in a deeply loving and committed relationship. I have no doubt that if Mr. Sayer had not died in April 2010, he would have gone on to marry the plaintiff and would have made a significant contribution from his earnings towards the upkeep of the house and of the plaintiff. In these circumstances, the plaintiff had more than a reasonable expectation of receiving continuing support and maintenance from the deceased had he not died.

Conclusion

191. The plaintiff is entitled to the following damages:-

(i) Nervous shock claim

General damages to date €95,000.00

General damages (future) €75,000.00

Loss of earnings (past) €33,411.81

Loss of earnings (next two years) €39,397.00

Loss of earnings (following two years) €20,172.88

Loss of earnings (after four years) €7,000.00

Other special damages (past) €2,272.08

Future medical costs €17,161.00

Total €289,414.77

(ii) Fatal Accident Claim

Loss of dependency and services €134,939.00

Special damages €13,449.34

Inheritance tax €76,761.00

Solatium damages €25,394.00

Total €250,543.34

Less asset deduction (€39,895.00)

Total €210,648.34

Grand Total €500,063.11