THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 401

Appeal No. 2017/111

Irvine J.
Whelan J.
Baker J.

BETWEEN

JOANNE CULLIVAN

PLAINTIFF/

APPELLANT

-AND-

CON O'LEARY

DEFENDANT/

RESPONDENT

JUDGMENT delivered on the 21st day of December 2018 by Ms. Justice Baker

1. This is the plaintiff's appeal from a decision of Fullam J. of 10 February 2017, in her claim for personal injuries arising out of a road traffic accident on 1 September 2011. Liability was not in issue and the case proceeded as an assessment of damages. Fullam J. after over eight days of oral evidence where the central issue was the severity of the plaintiff's injuries for the purposes of the assessment of damages, awarded the plaintiff general damages of €35,000 for past pain and suffering, €5,000 for future pain and suffering, €24,499.85 for general medical expenses, and future medical expenses of €4,500.

2. The trial judge categorised the accident as "low impact" and that is not disputed in this appeal.

3. The plaintiff alleged that, as a direct result of the incident, she went on to develop a CPS (Chronic Pain Syndrome) condition, which ultimately resulted in her having to give up work, and she claimed general damages, and significant special damages including loss of earnings and medical expenses.

4. The essence of the defendant's case was that the plaintiff had sustained a soft tissue injury to her neck and shoulder and perhaps some referred pain down her arm and, more particularly, into her hand, and that, while she may have exhibited symptoms of CPS, there were competing factors for the onset of this syndrome unrelated to the accident.

5. It was also the defendant's case at the trial that the plaintiff had manifestly failed to establish, on the balance of probabilities, that she had an historical loss of earnings claim or that she had any potential claim. Fullam J. did award an element of loss of earnings, calculated at 25% of the total claim for past losses, as he took into account the multifactorial causes for the claimed loss of earnings.

6. The plaintiff appellant argues that the judgment of the trial judge was so flawed in its reasoning and its conclusions that the matter must be remitted to the High Court for re-trial. The defendant respondent argues that the trial judge had ample evidence before him to come to the conclusion that he did, and relies on the settled jurisprudence regarding the limited role of an appellate court in the review of findings of fact.

Grounds of appeal

7. The plaintiff appellant has pleaded twenty-five grounds of appeal, which can usefully be subdivided into the following categories:

> (i) the trial judge erred in holding that the plaintiff had exaggerated her symptoms and had given inconsistent evidence in relation to these symptoms (grounds 3, 10, 13, 14);
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> (ii) the trial judge erred in attaching appropriate significance to expert witnesses, in particular preferring the prognosis advanced by Dr Devitt, psychiatrist as regards the plaintiff's treatment and prognosis, and not attaching appropriate significance to the evidence of Dr McSullivan, and ultimately finding that the CPS has had a multifactorial origin (grounds 7, 8, 11, 15, 16, 17);
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> (iii) the trial judge erred in findings that the plaintiff did not need a spinal cord stimulator fitted and that she would be fit to return to work three months after the conclusion of the litigation (ground 12, 18, 19);
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> (iv) the award of general damages and special damages, including loss of earnings, was too low (grounds 1, 2, 4, 5, 6, 9, 20, 21, 25);
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> (v) the trial judge erred in his assessment of the basis for calculating damages, such as holding that there was no basis for a claim for future loss of earnings and assessing the general damages on the basis of a soft tissue injury (grounds 22 and 23);

(vi) the trial judge failed to have regard to legal authorities opened to him (ground 24).

8. In essence, the appeal is based on the broad proposition that the decision was lacking in coherence and was inconsistent in its conclusions.

9. The defendant respondent opposes the appeal in its entirety and, although counsel, in the course of argument, said that the award of damages for loss of earnings was wrong on the facts, no cross appeal was lodged. I must therefore proceed on the basis that the finding of the trial judge that the plaintiff was unable to work was, at least, partly explained by the injuries she received in the accident.

10. For the reasons that I will presently explain, this Court has come to the conclusion that the judgment delivered by the trial judge is flawed to the extent that a retrial is to be ordered.

11. First, however, it is convenient to explain the limitation inherent in the jurisdiction engaged by the appellate court.

Jurisdiction to interfere with findings of fact

12. The jurisdiction of this Court with regard to the findings of fact of the trial judge is comprehensively set out in the judgment of Irvine J. in *O'Flynn v. Cherry Hill Inns Ltd*. [2017] IECA 211, where she re-stated the justification for the rule as deriving from the fact that an appellate court does not enjoy the benefit of hearing and seeing witnesses, and held that the limited circumstances in which it may interfere with such findings are those outlined by McCarthy J. in *Hay v. O'Grady* [1992] 1 IR 210:

> a) if the findings of fact made by the trial judge are supported by credible evidence, the appellate court is bound by them, however voluminous and weighty the testimony against them;
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> b) the appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial judge.

13. The burden of proof is on the appellant to show that the trial judge was not supported in his finding of facts by credible evidence.

14. The nature of the appellate function has the logical consequence that the decision maker must give sufficiently clear reasons and explanations for the findings under appeal. I turn now to consider this proposition before analysing the facts of the present case.

The requirement to give reasons or explain a finding and conclusion

15. The existence of a statutory and constitutional right of appeal and the constitutional structure of the courts, the fact that the appeal to this court is not by way of rehearing, as well as the principle of open justice, have led to the recognition that a court must give reason for its decision. This also derives from the nature of the appellate process by which the appeal is centered on the question of whether the trial judge made findings which can be said to be "supported by credible evidence", the language of McCarthy J. in *Hay v. O'Grady* [1992] 1 IR 210.

16. McCarthy J., at page 218 of his judgment, emphasised "[…] the importance of a clear statement […] by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

17. The requirement to give reasons or explanations was recognised by Hardiman J. giving his judgment for the Supreme Court in Oates v. Judge Browne [2016] IESC 7, [2016] 1 IR 481, at paras. 42 *et seq*. of his judgment:

> "42. […] I now turn to the more general topic of the duty of a court or other deciding body to give reasons for a ruling which is adverse to a party affected by its decision, where that party has (as here) engaged with the decision making process, called evidence, and made submissions.
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> 43. -53. […]
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> 54. The duty to give reasons, in its present form, is largely a development of the decades since the 1980s. It was, however, well established by the time of the hearing of this case in the District Court. It represents a major change (in my view for the better) in legal sensibilities and in the legal obligations of decision makers who derive their power from the Constitution or the Law. In 1925, by contrast, it was possible for Sir James O'Connor, a judge of the Superior Courts of Ireland both before and after the revolutionary changes of the year 1922, to write in his preface to the second edition of his monumental work "The Irish Justice of the Peace", in a section entitled "Advice to District Justices": "Be chary of giving reasons for your judgments. If you are not sure of them, give none. A wrong reason destroys respect for a right decision". This, be it noted, was specifically written as advice to the new professional District Justices who replaced the lay Justices of the old regime, and who gave such sterling service in the Irish Free State. But it no longer represents the law and I do not think that anyone would wish that it should be reinstated. It is now second nature for a judge to give reasons."

18. But, as Hardiman J. said at para. 56 of his judgment, the "reasons" point is logically anterior, "if only for the reason that it is difficult to see how the decision on the substantive point can be either impugned or justified without being aware of the reasons which actuated the learned Respondent in what he did".

19. In delivering his judgement for the Supreme Court in *Doyle v. Banville* [2012] IESC 25, [2018] 1 IR 505, at para. 2.3, Clarke J. explained the effect of the imperative as follows:

> "Any party to any litigation is entitled to a sufficient ruling or judgement so as to enable that party to know why the party concerned won or lost".

20. The Supreme Court said that the obligation of the trial judge as identified by McCarthy J. in *Hay v. O'Grady* to set out conclusions of fact in clear terms must be seen against the background that requires a judgement to engage with "the key elements of the case made by both sides" and why one or the other side is to be preferred.

21. The judgment in *Doyle v. Banville* was an appeal in a personal injuries case where the relevant drivers had given very different accounts of how the accident happened and where the inconsistencies in the findings by the trial judge led the Supreme Court to conclude the ruling was fundamentally flawed.

22. A similar conclusion was come to in *Lynch v. Cooney* [2016] IECA 1 and in *Wright v. AIB Finance and Leasing Ltd*. [2013] IESC 55, and the principle is well established.

23. For these reasons and on the basis of these authoritative decisions, it is clear that a trial judge must give sufficiently clear reasons to enable the appellate function to be properly engaged, and I now examine the judgment of Fullam J. in the light of this requirement.

Findings of the High Court
24. In his reserved judgment of 70 pages, Fullam J. gave a narrative of the evidence, and then, in the concluding 5 pages, made the following observations under the heading "Discussion":

> i. at para. 220, that the plaintiff had been inconsistent in her presenting symptoms with her various doctors and in her evidence in relation to the extent and severity of the immediate injuries she says she suffered in the accident;
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> ii. at paras. 221-223, that the plaintiff's evidence was not born out in the records of her initial attendance at St. James's or in the physiotherapy records;
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> iii. at para. 227, that the plaintiff has not adduced any evidence which explain the ongoing complaints of neck pain;
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> iv. at para. 229, that the plaintiff does have "[…] CPS which is a condition with physical and psychological influences and that it is not possible to say at any point which influence is the greater. It is a cycle where psychological factors exaggerate physical pain which is worsened by anxiety";
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> v. at para. 229, that "[…] the appropriate treatment for the rehabilitation of the plaintiff requires intensive multidisciplinary pain management programme which includes CBT, pharmacology, physiotherapy, and occupational therapy";
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> vi. at para. 232, that the preponderance of evidence on both sides was against the insertion of the high frequency SCS (Spinal Cord Stimulator);
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> vii. at para. 233, that the plaintiff has exaggerated her symptoms and their connection with the accident;
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> viii. at para. 233, that there was agreement as to the appropriate treatment and the difference as to prognosis between the respective parties' experts was one of degree;
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> ix. at para. 234, that it was "[…] difficult to apportion the loss of earnings among the various causes given by the plaintiff for giving up her work. She listed four, three of which were found not to be connected to the accident. The most practical way is to attribute responsibility on a four-way division", and that the plaintiff was entitled to 25% of her loss of earnings to date, together with the full three months during which CBT was expected to be completed;
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> x. at para. 235, that the plaintiff did not establish on the balance of probabilities that there was a basis for a claim for future loss of earnings beyond the completion of the pain management programme;
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> xi. at para. 236, that the plaintiff was entitled to general medical expenses of €24,499.85, and future medical expenses of €4,500 for CBT (30 sessions at €150 per session);
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> xii. at para. 237, that "[t]he plaintiff is experiencing neck pain where there is no underlying physical damage" and accepted that the general damages would be assessed on the basis of a soft tissue injury to the cervical spine with a psychological overlay which is multi factorial, and the prognosis that this will fully recover.

25. As can be seen from these extracts, the question of the CPS and its connection to the accident was a central plank in the plaintiff's case, and it was of great significance in the level of damges to which the plaintiff was entitled. Notwithstanding that the diagnosis that the plaintiff did suffer from CPS was one accepted by the plaintiff's and the defendant's medical experts, the trial judge went on to say that "no witness could say when the CPS commenced", and made no finding himself as to the date and whether it was caused or contributed to by the accident.

26. In his final conclusion, Fullam J. said: "[t]he plaintiff is experiencing neck pain where there is no underlying physical damage" and that "the general damages would be assessed on the basis of a soft tissue injury to the cervical spine with a *psychological overlay* which is multi factorial, and the prognosis that this will fully recover" (emphasis added). The evidence was overwhelmingly that CPS was a disabling condition which starts with a physical injury and becomes compounded as a result of the reaction of a patient to physical symptoms, by inactivity, or reduced activity and poor sleep leading to more physical problems such that the patient finds himself or herself in a "vicious circle" of pain and anxiety. Much of the evidence was focused on this condition, its causes, and its effect on the daily life and pain reaction of the plaintiff. The trial judge said that "no medical witness could state the date the CPS commenced", albeit the medical evidence was that it had evolved over time. No finding of the causal connection between the accident and the complaint was made, although the trial judge did have before him an amount of evidence as to the nature of the condition, how it had evolved over time in the case of the plaintiff, how it might have impacted upon her pain response, and the treatment required. The trial judge accepted that the plaintiff had CPS but then made no finding that would enable this Court to understand the inferences he drew from this fact, or what his view was of the causative nexus.

27. Further, I consider the trial judge was in error in failing to weigh the plaintiff's evidence against that of Dr Devitt and to take account of the fact that other medical witnesses did not think she was anything other than a genuine patient.

The schedule
28. The trial judge annexed a long schedule to his written judgment and explained the inclusion at para. 7, where he described it as "a detailed history" of her medical history.

29. I accept, as was submitted by counsel for the plaintiff appellant, that the schedule was incomplete and that some of the matters of fact omitted were of relevance, and, by way of example, I note that there was omitted the fact that the plaintiff had attended four sessions of physiotherapy and an osteopath immediately after the accident, and that she was referred back to her treating doctor at St James' Hospital by her osteopath could have been a relevant fact in regard to the question of caution, especially as the defendant had argued that the temporal nexus showed the improbability that the pain of which the plaintiff complained was related to

the accident.

30. The function and reliability of the schedule is therefore unclear.

Credibility of the plaintiff: Fairness
31. It seems to me to be significant that the trial judge said that preferred the prognosis of Dr Devitt, who gave evidence for the defendant towards the end of the trial, that the plaintiff should be fit to return to work three months after the conclusion of the litigation and the completion of the multidisciplinary pain management programme. He expressly said that his conclusion was made in light of the finding that the plaintiff had exaggerated her injuries, but I accept the argument of the plaintiff appellant that the plaintiff herself was not given an opportunity to address the suggestion that she had exaggerated her injuries and the effect of the accident. This is a flaw that is not capable of being remedied at appeal stage, as this Court has no basis on which it could substitute its findings of fact for those of the trial judge.

32. None of the expert evidence adduced criticised either the quality or extent of the treatment the plaintiff had received, or the prescribed pain management plan which she had continued to undergo. At no time did the defendant challenge the extent to which the plaintiff's activities of daily living had been reduced. No evidence was adduced, nor was it suggested, that the plaintiff's complaints of the effects on her daily life of CPS were anything but genuine and entirely consistent with the condition.

33. The cross-examination of the plaintiff and of her experts could, in my view, have resulted in evidence which could have supported a finding that the plaintiff's evidence was not to be preferred. By way of example I refer to the following:

> (i) head swelled up immediately after accident (Transcripts, day 1, p 21, line 17) arguably contradicted by attendance records, St James' Hospital;
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> (ii) pain down the left side of her body; neck down her arm into her hand and lower back (Transcripts, day 1, p 50, line 27): Mr. Mark Edwards, in his report of 30 March 2015, reports that within a few minutes of the accident the plaintiff reported "a prickly feeling going up the left side her neck, with stiffness and numbness of her shoulder. Overnight, she had trouble sleeping due to the shoulder and neck and could not raise her left arm due to pain in her shoulder. By the next day she experienced additional pain going into the left arm and also in her low back. Over the next few days the symptoms progressed in severity and she developed increasing pain and sensitivity to touch to the left side of the neck, left shoulder and left arm". Arguably contradicted by attendance records, St. James' Hospital and by the evidence of Dr Fortune (Transcripts, day 4, pp 50-51), by her attendance with her G.P. on 3 November 2011 (Transcripts, day 4, pages 63-76; day 1, p 59, line 6, p 23, lines 20-27) and by the allegation that she informed her GP, Dr O'Connell, that she had back pain in April 2012;
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> (iii) excruciating pain (Transcripts, day 1, p 59, line 1-12; p 64, line 5): arguably not borne out by the record of examination at the St. James' Hospital, initial attendance records and physiotherapy records;
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> (iv) tinnitus, TMJ, and hearing loss (Transcripts, day 1, p 31; day 6, p 8, lines 22-26): Arguably inconsistent with the fact that the plaintiff did not make any complaint of when she attended her general practitioner on 3 November 2011 and on 16 February 2012, when she first mentioned her accident nor she did any complaint when she attended Dr Geary on 5 April 2012;
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> (v) muscle wasting (Transcripts day 7, p 5, line 17): On cross-examination, Mr. Edwards, who gave evidence on behalf of the plaintiff, acknowledged that, when examining her, he did not find any evidence of muscle wasting or of muscle weakness (Transcripts, day 7, p 15, lines 13-26). Dr. MacSullivan, the defendant's expert, also found no evidence of muscle wasting (Transcripts, day, pages 20-21, line 14).

34. The trial judge could, therefore, be said to have had credible evidence on which he could have made findings of fact. There were contradictory and not consistent medical views. These needed to be weighed and an adjudication made as to which was to be preferred. In my view, the trial judge fell into error in two respects: He failed to make a determination on the central facts and, insofar as he did make findings, his reasoning was not explained and he did not, in the course of his judgment, engage in the task of adjudication upon the contested evidence in such a way that enables an appellate court to understand why he made the inferences and findings of fact and whether these were justified on the evidence.

35. This is of particular importance in the present case in the light of the large gap between the parties as to the correct monetary award in regard to which recent jurisprudence of the Court of Appeal is of assistance.

Jurisdiction of the appellate court: The function to be performed
36. In *Nolan v. Wirenski* [2016] IECA 56, [2016] 1 IR 461, Irvine J., having considered the judgment of Lavery J. in Foley v. *Thermocement Products Ltd*. [1956] 90 ILTR. 92, held that:

> "21. [a]n appellate court enjoys jurisdiction to overturn an award of damages if it is satisfied that no reasonable proportion exists between the sum awarded by the trial judge and what the appellate court itself considers appropriate in respect of the injuries concerned.
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> 23. […] an appellate court must be cautious and avoid second guessing a trial judge's determination as to what constitutes appropriate damages in any given case. […].
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> 25. [I]t is not for an appellate court to tamper with an award made by a trial judge who heard and considered all of the evidence."

37. Irvine J. went on to outline the test an appellate court ought to follow in assessing whether the estimate of the damages by a trial judge was correct in law, namely whether it was proportionate to the injuries sustained:

> 25. […] It is only where the court is satisfied that the award made was not proportionate to the injuries and amounts to an erroneous estimate of the damages properly payable that this court should intervene."
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> 26. The assessment of damages in personal injury cases is not a precise calculation; it is not precise and it is not a calculation. It is impossible to achieve or even to approach the goal of damages, which is to put the plaintiff back into the position he or she was in before they sustained their injuries. […].

> 27. It follows that the true purpose of damages for personal injuries is to provide reasonable compensation for the pain and suffering that the person has endured and will likely endure in the future. How is that to be measured? The process of assessment is objective and rational but personal to the particular plaintiff. Obviously, it is reasonable to look for consistency as between awards in similar cases but the same kind of injury can have different impacts on the persons who suffer it. Therefore, the court should not have the aim of achieving similarity or a standard figure.
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> 31. Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries.
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> 41. […] [I]t is useful to seek to establish where the plaintiff's cluster of injuries and sequelae stands on the scale of minor to catastrophic injury and to test the reasonableness of the proposed award, or in the case of an appeal, the actual award, by reference to the amount currently awarded in respect of the most severe category of injury. Such an approach should not be considered mandatory and neither does it call for some mathematical calculation: what is called for is judgement, exercised reasonably in light of the case as a whole. Not every case will be suitable for such an analysis and that is where the trial court will want to explain the reasons why that approach may not be suitable in the particular circumstances. However, the fact that this yardstick is not absolute and may not be of universal application in all cases does not diminish its value generally.
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> 42. As to where on the spectrum of awards the injuries of an accident victim such as this plaintiff should be located will be determined by the nature and extent of the physical or psychological trauma induced by the defendant's wrongdoing and the extent to which the plaintiff may be expected to recover therefrom. There is no template or formula to be applied. Judges, I suggest, tend to look to the presence or absence of particular factors and features to guide them as to the seriousness of any particular injury. They might have regard to the likely answers to the following questions: was the incident which caused the injury one which was traumatic and caused distress? Did the particular plaintiff require hospitalisation and if so for how long? What did they suffer in terms of pain and discomfort or lack of dignity during that period? What type and number of surgical interventions or other procedures did they require during that period? Did they need to attend a rehabilitation facility at any stage and if so, for how long? While recovering in their own home, were they capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects? If the plaintiff was dependent, why was this so? Were they, for example, wheelchair bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent? What if any limitations had been imposed on their activities such as leisure or sporting pursuits? For how long were they out of work?"

38. The analysis of Irvine J. shows the degree of difficulty that trial judges face in the determination of a claim for personal injuries and her observations elegantly highlight the fact that the claim of a plaintiff for damages for personal injuries calls upon a myriad of evidential questions, the observation of witnesses and the resolution of conflicting objectives. The task is made more pressing by the existence of a statutory right of appeal and the statutory and constitutional imperative that the appellate court be provided with a reasoned and clear judgment in regard to which it must, in turn, apply its reasoning and analysis in the manner prescribed.

39. The evidence in the present case was that CPS occurs where a person has symptoms for more than three months (Transcripts, day 5, p 26). Ms. Fortune, clinical neuropsychologist, called on behalf of the plaintiff, gave evidence that there is a physical as much as an emotional component (Transcripts, day 5, pp. 24-25) and that it is very difficult to say at any point in time which percentage is greater (Transcripts, day 4, p 54). She and Mr. Edwards gave similar evidence (Transcripts, day 7, pp. 6-7) that "chronic pain syndrome starts off with a physical injury typically of some kind" and that the physical symptoms "become compounded and become chronic because of the patient's reaction to those symptoms at a physical level" (Transcripts, day, 4 p 53).

40. It was the defendant respondent's contention that it is very difficult to relate that typical pattern for the development of CPS to the plaintiff's symptoms, and, in particular, the symptoms she was exhibiting when she was seen by Mr. Mullett in August 2012, and by Mr. O'Flanagan, whose October 2012 report was admitted into evidence without formal proof.

41. Dr MacSullivan gave evidence on behalf of the plaintiff that she found it difficult to attribute any physical cause to the plaintiff's ongoing complaints of chronic pain (Transcripts, day 4, p 91) and, on the date of her second examination (May 2016), the plaintiff had by then gone on to develop symptoms of right-sided pain, in circumstances when her main complaints had previously been on the left side.

42. Dr Devitt, who gave evidence on behalf of the defendant, was of the view that the plaintiff's personality was such that she was "primed" to have these types of symptoms, i.e. CPS (Transcripts, day 6, p 46), that didn't have any physical type of corroboration. He opined that the symptoms were out of proportion to the accident, and that the plaintiff was adopting an illness role. (Transcripts, day 6, pp 41-42). He pointed out her prior diagnosis of irritable bowel syndrome, and epigastric pain, "both largely psychosomatic conditions (Transcripts, day 6, p 41).

43. Dr Fortune, on behalf of the plaintiff, gave similar evidence. She was asked on cross-examination whether she agreed with Mr. Devitt (Transcripts, day 4, p. 57) that the plaintiff was never particularly robust in psychological terms, and "that there are traits that she has had throughout life and would have made her more vulnerable to IBS, to the development of chronic pain syndrome" (Transcripts, day 4, p. 57).

44. Dr MacSullivan later agreed that the plaintiff's engagement with recommended treatments was wholly indicative of somebody who was desperately trying to find a cure or to alleviate their symptoms (Transcripts, day 5, p 35, lines 12-20).

45. Dr MacSullivan had given uncontroverted evidence that the plaintiff had been proactive in trying to treat her illness, and had undergone every single procedure that has been recommended to her including physiotherapy, osteopathy, injection treatments, inpatient ketamine trial, and methadone treatment. She could not disagree that the plaintiff had engaged with Dr Murphy in a pre-assessment for insertion of a high frequency spinal cord stimulator. When asked how could the plaintiff have been more pro-active, Dr MacSullivan replied: "It's a good point" (Transcript, day 5, p 31, line 17 – p 32, line 6).

46. The trial judge, in my view, failed to make a clear determination as to whether the accident was the direct and proximate cause of the CPS condition of the plaintiff, and whether and how it was to be treated in the assessment of damages. It was a central element in the case. The trial judge seems to have accepted that the plaintiff did suffer from CBS and, by awarding her damges to provide for ongoing cognitive behaviour therapy for that condition, did appear to accept some causative connection to the accident.

It is not possible to discern, however, how he positioned the injury in what Irvine J. called the "spectrum of awards", how her "cluster" of complaints was to be assessed, what limitations had been imposed on their activities such as leisure or sporting pursuit, and how the number of medical interventions was to be treated for the purpose of the assessment of damges, all factors regarded as relevant by Irvine J. in *Shannon v. O'Sullivan* [2016] IECA 93, where she set out a non-exhaustive list of factors that might be considered when making an assessment of damages for pain and suffering to date.

47. Such an analysis is imperative in a case such as the present, where the plaintiff suffered from a cluster of confirmed injuries and sequelae, and where the single largest issue of fact to be determined by the trial judge was the causative connection between the injuries and the accident the subject matter of the proceedings.

48. These elements identified by Irvine J. are no more than indicative of the factors that may be relevant in any given set of factual circumstances, and are not to be treated as a template. A trial judge may fairly and fully adjudicate upon the evidence without listing these or any factors, and the creation of a list is not to be treated as a favoured style of analysis. What is required is an analysis and reasoning sufficient in clarity and engagement with the facts and the contests of evidence that the parties and an appellate court can understand and in reliance on which the appellate function may properly be engaged.

49. In my view, it is unclear, from the judgment of the trial judge, how he assessed the evidence of the plaintiff regarding the devastating restriction on her day-to-day living since the date of the accident and her ability to enjoy work, life, and personal relationships which she said had been full and uninterrupted prior to the accident, notwithstanding that she did suffer from some physical infirmities that made some activities difficult at times. The trial judge made no discernible consideration of her pre-accident health and how her current condition and prognosis were to be understood in that context.

50. The trial judge did not explain how he treated all of this evidence and how it was to be reconciled. That it required to be reconciled, weighted, and adjudicated upon is obvious from the transcripts extracts I have mentioned.

Return to work
51. The trial judge preferred the prognosis of Dr. Devitt that the plaintiff should be fit to return to work three months after the conclusion of the litigation and the completion of the multidisciplinary pain management programme.

52. I accept the argument of the plaintiff appellant that the only suggestion that the plaintiff would be in a position to return to work within three months of the conclusion of the hearing was from Dr Devitt, who interviewed the plaintiff on a single occasion, six days prior to the date of the trial, and whose evidence was on this element was not put to the plaintiff in cross-examination. It had never been suggested to the plaintiff that she had been or was fit and capable of working.

Loss of earnings
53. In assessing damages, the trial judge, in my view, applied an inappropriate and formulaic methodology by calculating that the plaintiff was entitled to recover only 25% of the value of her claim for loss of earnings to the date of hearing (€19,673.10), together with future loss of earnings limited to a further three months during which she would undertake cognitive behavioural therapy, when her evidence was that she became incapable of continuing to work as a consequence of the injuries and CPS caused by the accident. The trial judge ought to have made a determination of the correctness of her view and the cause or causes of her being out of work.

54. In their replying submissions, counsel for the defendant respondent relies on the decision of the Supreme Court in *Long v. O'Brien & Cronin Ltd*. (Unreported, 24 March 1972), at p 6, where Walsh J. said:

> "It has been laid down several times in this Court that it is the duty of the Plaintiff to adduce evidence sufficient to go to the jury when he sets out to establish that the results of his injuries would be to cause him pecuniary loss in the future as in this case loss of future earning capacity."

55. The plaintiff had been asked the basis upon which she was required to give up work, and she had indicated (Transcripts, day 1, page 50, paragraphs 7-12) that the following four injuries and symptoms resulted in that decision:

(a) pain in her neck and left shoulder going down to her left hand;

(b) pain across her lower back;

(c) pain on and off in her jaws;

(d) tinnitus;

(e) high frequency hearing loss;

(f) hyperacusis.

56. It is unclear what weigh the trial judge attributed to these various factors when he calculated the *quantum* of special damages, and how the finding that the plaintiff suffered from a soft tissue injury could be reconciled with his calculation that she was entitled to 25% of her loss of earnings. This is especially so as the plaintiff's vocational consultant, Ms. Coghlan, agreed with the defendant's counsel (Transcripts, day 4, pp 96-97) that in respect of the lists of the plaintiff's complaints it was not possible to compartmentalise these separate complaints, as they had a cumulative effect.

Conclusion
57. For all of these reasons, I am satisfied that the trial judge fell into error: He failed to make sufficiently clear and coherent findings of fact on the heavily contested evidence and he failed to weight that evidence in the light of the fact that certain evidence had not been tested in cross-examination.

58. Both errors are sufficient, in my view, to allow the appeal and to warrant a re-trial.