THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 171
Record Number: 2020/54
High Court Record Number: 2018/10179P

Donnelly J.
Noonan J.
Binchy J.

BETWEEN/

LOUIE DUNPHY

PLAINTIFF/RESPONDENT

-AND-

HELEN O'SULLIVAN

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 11th day of June, 2021

1. This claim arises out of a road traffic accident that occurred at about 8:15pm on Saturday the 11th February, 2017 at Cuffe Street in Dublin. The respondent (the plaintiff) was driving his taxi when it was struck from behind by the appellant (the defendant) in a relatively low speed impact. The plaintiff claims to have suffered personal injuries as a result. While the defendant does not deny that she drove negligently, the primary issue in the case is her claim that the impact was so minor or trivial as to be incapable of causing injuries to the plaintiff. Liability is accordingly denied on this basis. The facts and evidence are set out in detail in the judgment of the trial judge (O'Hanlon J.) and accordingly I propose to refer only to the salient features relevant to this appeal.

Evidence on liability

2. The plaintiff's evidence was that immediately prior to the impact, he was stationary at a yellow box as there was a line of traffic in front of him. As this line began to move, he took his foot off the brake but before he began to move, the defendant's vehicle collided with him propelling him forward. His vehicle was a Mercedes E-Class and the defendant was driving a Volkswagen Golf. Post-accident, the defendant apologised saying she was completely at fault. The plaintiff took photographs of the vehicles on his mobile phone. It was not in dispute that the damage to the plaintiff's Mercedes was relatively slight. The cost of repairs was estimated at €563.82. This consisted primarily, if not entirely, of labour and paint, no parts on the Mercedes requiring replacement.

3. The situation regarding damage to the Volkswagen Golf was however different. It suffered quite extensive frontal damage estimated to cost €4,128.82 to repair and this rendered the vehicle an economic write-off. As was pointed out in the evidence of the various experts, while the front plastic and metal parts of the Golf, designed to crumple in an accident, were extensively damaged, the centre section of the front bumper reinforcement bar, made of what was described as "Wolfsburg steel", was damaged by being indented and pushed back in the centre.

4. Evidence was given on behalf of the plaintiff by Mr. Pat Culleton, a Chartered Engineer, Chartered Physicist and Chartered Scientist with 35 years' experience in forensic investigations and expert testimony. His primary degree is in physics and maths and he also has a master's degree in physics and a master's degree from the Department of Mechanical Engineering in UCD. He has three post-graduate qualifications in civil, structural and environmental engineering. He said he is a forensic engineer who investigates accidents for a living. Mr. Culleton met the plaintiff at the locus of the accident, interviewed him and took photographs.

5. He was advised by the plaintiff that his car travelled about a car length as a result of being struck from behind. Mr. Culleton estimated that this meant the Mercedes went from 0 to 11.5 miles per hour during the impact and then stopped. He noted from the photographs of the defendant's car that it had sustained substantial damage. There was distortion of the heavy steel box section behind the plastic front bumper which was pushed rearwards. The bonnet was crumpled. He said the front cross-member behind the front bumper of the Golf was made of heavy gauge Wolfsburg steel which was distorted rearwards, indicating a substantial impact.

6. In cross-examination, Mr. Culleton accepted that the bumper on the Mercedes was not deformed by the impact. He agreed that this indicated that the impact was not that severe. However, he said that the Mercedes had taken a hit sufficient to cause injury. It was put to Mr. Culleton that the defendant's experts would say that the Golf had been subjected to heavy frontal damage costing some €14,000 to repair in an earlier accident in 2010, in effect suggesting that this might explain the extent of the damage in the index accident. Mr. Culleton strongly refuted this thesis which he described as "staggering". It was put to him that it was a very minor impact and in response, Mr. Culleton said that he was not saying it was severe but rather agreed it was a minor impact but sufficient to cause injury.

7. The defendant gave evidence that she was 37 weeks pregnant at the date of the accident. She said she sits quite close to the steering wheel normally but had possibly allowed a little more room because of the pregnancy bump. She said that she did not make contact with the steering wheel as a result of the impact nor did the airbags in her car inflate. She described the impact as "mild".

8. Two experts were called on behalf of the defence on the liability issue. Mr. John Barnwell was described as a motor engineer employed by Aviva Insurance, the defendant's insurer. He had prepared the estimate of damage in respect of the plaintiff's car. He described the impact to the Mercedes as "light" with no distortion of the rear bumper reinforcement. It

required no replacement parts. He described the damage to the Golf as being "moderate impact damage".

9. The defendant's second expert was Mr. Seamus Walsh, a forensic collision investigator. He is a former Garda Sergeant who had been in the force for 35 years, mostly spent as a PSV Inspector. He had a City and Guilds level certificate in Forensic Collision Investigation and investigated many accidents. He had studied the involuntary movement of persons in road traffic accidents as part of routine collision investigation. Contrary to Mr. Culleton's view, Mr. Walsh was of opinion that the impact had the effect of increasing the speed of the Mercedes by a nominal 4.3 km/h.

10. He said this would have such little effect on the occupants of the Mercedes as to be barely noticeable. He described the impact as "relatively light". Such an impact would, in his opinion, give rise to a level of movement of persons in the car only marginally greater than they would experience in normal driving. In cross-examination, Mr. Walsh accepted counsel's suggestion that the impact was not minimal and he conceded that it was a little more than that.

Evidence on quantum

11. The plaintiff was born on the 10th July, 1952 and was thus 64 years of age on the date of the accident. He claims to have suffered soft tissue injuries to his left shoulder, chest and lower back. The plaintiff did not immediately appreciate that he was injured and the damage to his car was comparatively slight so that it could still be driven. Accordingly, he continued to work that evening, dropping his fare to her destination. His evidence was that it was on the following Thursday that he found himself unable to get out of bed as a result of pain and limitation of movement.

12. The plaintiff attended his general practitioner, Dr. Alison McDonald, whose report was agreed, a few days later complaining of pain in the chest, left shoulder, neck and low back. Dr. McDonald referred the plaintiff to Naas General Hospital for X-ray assessment which showed degenerative changes in his lumbar spine and he appears to have been diagnosed by the hospital with muscular back and neck pain. He subsequently underwent a MRI scan of his lumbar spine on the 6th June, 2017 which again showed multi-level disc protrusion, facet joint hypertrophy and spinal stenosis. He was treated with oral analgesics, muscle relaxants and physiotherapy.

13. When reviewed by Dr. McDonald in November 2017, nine months' post-accident, he complained of swelling and pain in the left anterior chest which was subsequently established as a benign lipoma unrelated to the accident. He also complained of intermittent low back pain, which was worse on walking and radiating into his shins. This pain interfered with his ability to sleep and walk his dog. Although he was referred by Dr. McDonald for orthopaedic assessment at Naas General Hospital, the waiting list meant that he was unlikely to be seen for 18 to 24 months.

14. On examination he had restriction of his neck and back movements. Dr. McDonald felt that the plaintiff's symptoms were consistent on each occasion he was examined and were also

consistent with the accident. Of importance, Dr. McDonald's evidence was that the plaintiff was a patient at her practice since 2005 but he had no previous complaints of back pain except for a brief mention of backache during a consultation in April 2010, some seven years before the accident.

15. Her opinion was that his low back pain was attributable to an exacerbation of the spinal stenosis and the usual history would be of deterioration with the passage of time.

16. The plaintiff gave evidence of his complaints as I have described them and his treatment to date. He described the pain in his shins as though they were "on fire". He said that he had been out of work for approximately a month and since then, there had been days when he hadn't been able to work. He was challenged about this on cross-examination by reference to the fact that over a 16 day period between the 27th February and 15th March, 2017, his Mercedes travelled 2,286 km. He agreed that he could not dispute this. It was also put to him that his earnings were not adversely affected in any way post-accident and if anything, the converse was the position. He agreed that he could not explain this. It was also put to him that the impact to his car was so minimal that he did not suffer any injury.

17. The plaintiff had been referred by his solicitor to Professor Gary O'Toole, consultant orthopaedic surgeon, whose two reports were put in evidence and Professor O'Toole also gave *viva voce* evidence. He first saw the plaintiff on the 12th May, 2018, fifteen months' post-accident. He referred to the various imaging investigations of the plaintiff noted above. The plaintiff was complaining of intermittent pain in his neck, shoulder and particularly low back. The pain, while intermittent, could increase in severity at times.

18. Professor O'Toole noted that even though his wife had been ill, the plaintiff was unable to help out with domestic chores. His walking was restricted. As a taxi driver, he could no longer tolerate long shifts and needed regular breaks during the day. His back pain was both waking him and giving him difficulty getting to sleep. He had pain and soreness in his shins. Professor O'Toole's impression was that the plaintiff's pain remains constant in nature and he is debilitated by this on an ongoing basis. He did not expect his pain to improve in the future.

19. Professor O'Toole reviewed the plaintiff on the 4th June, 2019, now two years and four months' post-accident. The plaintiff continued to complain of pain that was intermittent but severe in nature. On bad days, this could be a six or seven out of ten in intensity. His sleep continued to be interrupted and he had to take time off work regularly but was reluctant to give up work completely as he felt his back would "seize up" on him completely. He continued to complain of a burning sensation in his legs which keeps him awake at night. He had difficulty standing on his toes and some limitation of straight leg raising bilaterally.

20. Professor O'Toole's summary was that the plaintiff's clinical situation had by then plateaued and he did not expect him to improve into the future. He would therefore be pessimistic about the plaintiff ever achieving his pre-morbid level of mobility. In his oral evidence, Professor O'Toole discussed the plaintiff's imaging noting that he had degenerative disc

disease throughout the lumbar spine. All of these discs had facet joint hypertrophy. The indications were that the plaintiff was suffering from a chronic condition of his spine related to his age and normal wear and tear which was quiescent before the accident but once he was hit and suffered the trauma, he was vulnerable to the outcome described.

21. He noted that the plaintiff was pain free before the accident and his pain had been brought about by it. When he saw the plaintiff for the second time, his pain had got worse, increasing from four to five out of ten to six to seven out of ten. He noted that the plaintiff's examination was extremely similar on both occasions he had seen him. Professor O'Toole felt that the plaintiff was doing everything in his power to cope with his symptoms but he did not expect him to improve. He noted the plaintiff's spinal stenosis and degeneration and said that it was not unexpected that someone who would be considered vulnerable radiologically should have sequelae after an accident despite it appearing to be low velocity.

22. In cross-examination, Professor O'Toole was asked would it be fair to describe the plaintiff's injury as a muscular type strain or sprain. He said this would be an unfair description and it is skeletal pathology rather than anything muscular. Professor O'Toole agreed that somebody with a perfectly good spine might not have problems following a low velocity injury but the outcome was unsurprising in a spine that has inherent pathology.

23. The only medical witness called on behalf of the defence was Professor Garry Fenelon, Consultant Orthopaedic Surgeon. Professor Fenelon saw the plaintiff once on the 14th May, 2019. On examination, Professor Fenelon noted the plaintiff to have some restriction of rotation of his neck but this was pain free. He described the plaintiff's lower back as "extremely stiff" with marked limitation of movement. He reviewed the plaintiff's MRI Scan. His summary was that the plaintiff had suffered a low velocity accident and he was surprised that he had not made a full recovery. He did not think treatment would be of benefit as the plaintiff had "severe arthritis". His conclusion was: -

> "I do not believe that this mild rear-ending incident which only caused €900 damage to the rear of his car will result in advancing degenerative wear developing in his neck or back."

24. Professor Fenelon also gave oral evidence. He felt that the trauma of the accident should settle down within a matter of weeks. He would not have expected the plaintiff to have ongoing pain which is relative to the accident. He felt that any ongoing pain was from wear and tear in his back. It was put to Professor Fenelon in cross-examination that the plaintiff had no back pain for a period of at least 7 years before the accident. Professor Fenelon's response was that just because the plaintiff hadn't pain before, this did not necessarily imply that a very mild rear-ending incident had resulted in ongoing pain. Although Professor Fenelon had referred to the plaintiff's car having been damaged to the extent of €900, when in fact it was about €500, significantly, he had not been told of the extent of the damage to the defendant's vehicle. He nonetheless maintained the opinion that the plaintiff's complaints now are unrelated to the accident but are the consequence of the degeneration already present in his spine.

Judgment of the High Court

25. The trial judge in her "Findings of Fact" noted that the entire case was defended on the basis of this being a minimal impact collision and thus, there could not be the degree of injury claimed. She accepted that the plaintiff was a credible witness who did not exaggerate his injuries and she expressed a preference for the evidence of Professor O'Toole which she described as "impressive". He had stressed that the injury complained of was not a soft tissue injury as alleged. She considered that it was relevant that the plaintiff had no back difficulty for 7 years prior to the accident but now had marked problems.

26. On the liability question, the trial judge's central conclusion (at para. 64) was that she was satisfied on the balance of probabilities that the impact of the defendant's vehicle could have exceeded the threshold of velocity which could result in the plaintiff suffering the injuries he described. She accepted the evidence on behalf of the plaintiff that an impact can occur with minor damage which can cause injury to the occupant of a vehicle. Construction of bumpers is such that relatively severe bumper to bumper impacts can occur where no visible exterior damage is evident. She assessed the plaintiff's damages, having regard to the Book of Quantum, at €50,000 for pain and suffering to date and €15,000 for pain and suffering into the future together with special damages agreed at €4,193.82. The total award was thus €69,193.82.

The Appeal

27. The defendant's notice of appeal is, it has to be said, somewhat uninformative and essentially boils down to a complaint that the trial judge erred in her assessment of the medical and engineering evidence in holding that the accident could have caused the injuries complained of by the plaintiff. There is further a complaint about the quantum of the award and although not expressly so stated, presumably it is that it was excessive.

28. Counsel for the defendant invited this court to overturn the trial judge's award on the essential basis that the collision was so trivial that it could not reasonably be concluded that it was responsible for the plaintiff's injuries. It was suggested that this court could have regard to the circumstantial evidence such as the photographs so as to draw the necessary inferences and was in as good a position as the High Court to do so on the basis that the trial judge's finding were not findings of primary fact. Counsel invited this court to use its common sense to conclude that such a minimal impact could not have caused injury.

29. This argument was supported by the contention that in using its "common sense", this court should look beyond the expert evidence of Mr. Culleton by reference to the photographs and the surrounding circumstances to reach a conclusion that this evidence was simply not credible. The legal basis for this contention was said to be founded in the judgment of this court in *Byrne v Ardenheath Company Limited* [2017] IECA 293. Particular reliance was placed on passages in the judgment of Irvine J. (as she then was) with which the other members of the court agreed. The following paragraphs were opened to the court: -

> "31. It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of

the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for (*sic*) trial judge.

32. I mention these facts because they highlight the need, particularly in cases where the court is not dealing with a complex specialist field of activity, for the trial judge, not only to consider the expert evidence tendered by the parties but to bring ordinary common sense to bear on their assessment of what should amount to reasonable care. The present case would, in my opinion, fall into that category insofar as it concerns the care to be expected of the owner of a shopping centre car park for visitors seeking to exit the car park on foot."

Conclusions

(a) Liability

30. These comments must of course be viewed in the context of the facts of the case in which they were made. The defendants in *Byrne* were the proprietors of a shopping centre with a car park attached. The plaintiff drove into the car park and parked her car there. She did not, in fact, intend to visit the shopping centre but rather to distribute leaflets in the locality. In order to do so she had to access the public footpath which was adjacent to the car park. The car park was in a raised position relative to the footpath and separated from it by a steep grassy bank which was wet at the material time. Rather than walk out the entrance to the car park, the plaintiff elected to go down the grassy bank and in doing so slipped and suffered an injury.

31. Evidence on behalf of the plaintiff was given by a consulting engineer who said that the car park had a design defect insofar as there was no designated safe pedestrian access from the car park to the adjoining footpath. The trial judge accepted this evidence and found in favour of the plaintiff but on appeal, this court found that he erred in doing so. This conclusion was arrived at by Irvine J. on the basis that the expert evidence of an alleged design fault was simply not credible and should not have been accepted by the trial judge on the facts of the case.

32. It is of course true to say that the court is not in any sense bound to slavishly follow the opinion of experts, especially when they fly in the face of common sense regarding everyday matters with which most people would be expected to be familiar. As Irvine J. pointed out, the situation would of course be different where the court is dealing with the evidence of experts in a very specialised field of activity outside of ordinary everyday experience. I commented on this issue in *Naghten (a minor) v Cool Running Events Limited* [2021] IECA 17 (at para. 38) where I noted that when experts are dealing with matters well within the range of experience of ordinary people, the court may, as a matter of common sense, be in just as good a position to form a view about the issue at hand as the expert. *Byrne v Ardenheath* was such a case.

33. Expert evidence is thus a guide which informs the court on the ultimate issue. The court of trial is entitled to accept the evidence of an expert that it finds persuasive, once in doing so, it engages with that evidence, provides its reasoning for accepting it and why it is to be preferred over other expert evidence. That does not always call for a very detailed elaboration. In cases of conflict between experts, the trial judge should at least "indicate in brief terms the reasons why the views of one expert was preferred" – see the judgment of Clarke J. (as he then was) in *Donegal Investment Group plc v Danbywiske*, Wilson & Ors [2017] IESC 14 at para. 7.4.

34. *Byrne v Ardenheath* is not, as the defendants appear to suggest, authority for the proposition that an appellate court is free to substitute its own "common sense" view of the expert evidence where the trial judge has accepted that evidence, has explained why he or she has done so and the evidence is manifestly credible. To do so would be at variance with the function of an appellate court, long since settled by *Hay v O'Grady* [1992] 1 IR 210.

35. In the present case, the trial judge was perfectly entitled to accept the evidence of Mr. Culleton and it is clear that she did. He was eminently qualified to give that evidence and did so in a coherent and logical fashion. What is more, his evidence was not contradicted to any significant degree by the defendant's expert, Mr. Walsh. Although there was some divergence of calculation between the two experts regarding the speed of the plaintiff's vehicle following the impact, Mr. Culleton agreed that this was a minor impact and Mr. Walsh agreed that it was more than a minimal impact, perhaps in reality a distinction without a difference.

36. Mr. Culleton was of opinion that the impact was sufficient to cause injury whereas Mr. Walsh thought not. At the end of the day, the trial judge had to make a choice between the two alternatives having regard to all the evidence in the case and she made that choice, properly in my view, expressing her reasons for so doing. Central to that analysis was the evidence of the plaintiff himself and his medical experts. The plaintiff's complaints have been consistent throughout and also consistent with the objective imaging evidence. There was no dispute about the fact that the plaintiff had no back pain in the seven years prior to the accident and that within days, he manifested complaints which have persisted to the present time.

37. The trial judge was entitled to have regard to this evidence also in arriving at the conclusion that Mr. Culleton's view was to be preferred. His evidence was consistent with an asymptomatic condition becoming symptomatic as a result of trauma. As I note below, it is perfectly possible that the plaintiff might in any event have developed symptoms at some time in the future but the timing of the onset here must be viewed as a matter of probability as being caused by the accident as opposed to coincidence. That was Professor O'Toole's evidence and the trial judge accepted it. The alternative hypothesis advanced by Mr. Walsh necessarily implied that the symptoms occurred spontaneously and again, the trial judge was entitled to conclude that this was inherently less probable and reject it.

38. Defendants' insurers are naturally and properly vigilant about the potential for fraud in relatively trivial rear end impacts. Complaints of whiplash are easily made in the aftermath of such accidents. Because such soft tissue injuries are highly subjective, it can be difficult to establish that what a plaintiff says is not merely improbable, but downright fraudulent. It is to be expected that such claims will be subjected to particular scrutiny. However, on the other side of the coin, a plaintiff may suffer a genuine injury in what appears at face value to be a dubiously slight impact. Such a plaintiff will undoubtedly be met with considerable scepticism by insurers, and perhaps from time to time by judges too. As here, a plaintiff's credibility will often be a central feature of the case and courts will consider carefully any potential inconsistencies in the evidence.

39. Although this plaintiff was not outright accused of fraud, that is undoubtedly the primary thrust of the defence. Originally, the defence merely put quantum in issue, but it was subsequently amended to expressly plead that the impact was of such low velocity that it was denied that the plaintiff suffered any injury. The defendant accordingly fairly nailed her colours to the mast. Efforts were made to discredit the plaintiff's evidence in cross-examination, quite legitimately, but these largely failed. It is true that the plaintiff's evidence was somewhat unsatisfactory about his taxi driving activities immediately after the accident and his earnings situation in general, but that did not undermine his overall credibility in the eyes of the trial judge and her finding on the credibility issue was, in my view, one that was clearly open on the evidence as a whole.

40. It is not for this court to second guess that conclusion by what has been described as "a rummaging in the undergrowth of the evidence" to see if some support for the defendant's thesis can be found – see the judgment of Clarke J. in *Doyle v Banville* [2012] IESC 25 at para. 2.4. The trial judge's finding that the plaintiff was credible in relation to his complaints for the reasons she gave is not a finding with which this court can interfere once there was credible evidence to support it and I am satisfied that there was such evidence.

41. At the end of the day, the defendant staked her case on the lack of damage to the plaintiff's car. As I have noted, that, in and of itself, cannot be determinative of the matter, as the defendant sought to suggest. To take, perhaps, an extreme example, an armoured car might sustain no damage in an appreciable impact but that does not mean that the force of the impact was not transferred to the occupants such as to cause them injury. It cannot be doubted here, particularly having regard to the extent of the damage to the defendant's vehicle, that a reasonably appreciable impact did occur.

42. As Professor O'Toole noted, a person with a younger spine might well have been able to absorb the impact without suffering any evident injury or symptoms. It was, however, the defendant's bad fortune to collide with a plaintiff who had quite significant degenerative changes already present in his spine at the time of the accident, which rendered him much more susceptible to injury than a person who did not manifest such changes. Here again, I am satisfied that the trial judge was perfectly entitled to prefer the evidence of Professor O'Toole over that of Professor Fenelon and she gave her reasons for doing so. Indeed, as is evident from the cross-examination of Professor Fenelon, it seems his evidence was

coloured to a significant extent by the fact that there was only a few hundred Euros worth of damage to the plaintiff's Mercedes. It is unfortunate that he was not told by the defendant when his opinion was sought that the defendant's car on the other hand had suffered quite substantial damage, leading to it being written off.

(b) Damages

43. This court has on a number of occasions in recent years restated the principles to be applied in the assessment of damages. In *McKeown v Crosby* [2020] IECA 242, I summarised the principles arising from these judgments. The award of damages must be proportionate in two respects, both in relation to the maximum damages that are awarded for the most serious injuries and also must be proportionate to other injuries on the spectrum of damages. Some emphasis was laid on the Book of Quantum and the statutory mandate to take account of it when a court comes to assessing damages.

44. I offered the view that courts would be assisted by submissions in relation to where a particular injury fell in the Book of Quantum. In *McKeown*, I applied the relevant category to which the plaintiff's injury conformed in assessing the damages to which she was properly entitled. That assessment also involved a consideration of awards for similar injuries in the recent jurisprudence of this court. It is therefore perhaps somewhat surprising that little or no reference is to be found in the parties' written submissions in this appeal to the Book of Quantum at all and was only dealt with by way of oral submission at the invitation of this court.

45. Counsel for the defendant submitted that the trial judge delivered her judgment less than three years after the date of the accident and in that context, having regard to the plaintiff's injuries, the sum of €50,000 in respect of damages to date was grossly excessive. He suggested that the overall award was probably about double the value of the case. Counsel for the plaintiff fairly conceded that the damages to date could be viewed as somewhat on the high side but countered this by contending that the damages into the future were very much on the low side, accepting of course that there was no cross-appeal in this regard.

46. Section 3A of the Book of Quantum deals with back injuries by reference to the usual categorisation. It is of course important to remember that the Book of Quantum only gives an overall figure for damages and does not purport to distinguish between damages to date and into the future. The moderately severe category is described in the following terms: -

> "These injuries involve the soft tissue or wrenching type injury of the more severe type resulting in serious limitation of movement, recurring pain, stiffness and discomfort and the possible need for surgery or increased vulnerability to further trauma. This would also include injuries which may have accelerated and/or exacerbated a pre-existing condition over a prolonged period of time, usually more than five years resulting in ongoing pain and stiffness."

47. The range for damages in this category is from €32,100 to €55,700. The category below this, "moderate", applies to injuries of less than five years' duration. In the present case, I am satisfied that the moderately severe category is the appropriate one to have regard

to in considering the proper assessment of the plaintiff's damages. Of course it must be remembered that the plaintiff's injuries were not confined solely to his lower back but he suffered injuries to his shoulder, neck and chest which also caused a degree of pain. This plaintiff enjoyed a pain free and relatively asymptomatic back prior to the accident. The accident had quite a significant effect on his day to day activities, his working ability and his quality of life on a more or less permanent basis and the trial judge accepted this.

48. It may be the case that in the absence of the accident, the plaintiff might at some time in the future have gone on to develop symptoms, but no evidence was offered to the court on this issue and it is perfectly possible that the plaintiff might have continued without symptoms for a number of years and perhaps even indefinitely. However, the defendant chose to lead no evidence on this point, preferring, as counsel for the plaintiff put it, to place all her eggs in the basket of no injury having been suffered, predicated on the thesis of there being no impact of consequence.

49. In all the circumstances therefore, I am of the view that while this award could be viewed as being somewhat on the generous side overall, it cannot be said to be so disproportionate as to amount to an error of law, that being the relevant test – see *Rossiter v Dun Laoghaire Rathdown County Council* [2001] 3 IR 578.

Order

50. I am therefore satisfied that this court should not interfere with the award in all the circumstances and I would accordingly dismiss this appeal.

51. My provisional view on the issue of costs is that as the plaintiff has been entirely successful in this appeal, he should be entitled to his costs. If the defendant wishes to contend for an alternative order, she will have liberty to apply within 14 days to the Court of Appeal Office for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in the order proposed, the defendant may also be liable for the costs of such additional hearing.

52. As this judgment is delivered electronically, Donnelly and Binchy JJ. have indicated their agreement with it.