THE COURT OF APPEAL

APPROVED

Record Number: 2023/326
High Court Record Number: 2022/4816P
Neutral Citation Number [2024] IECA 78

Noonan J.

Allen J.

Meenan J.

BETWEEN/

DEREK COUGHLAN

PLAINTIFF/RESPONDENT

-AND-

CGR CONSTRUCTION LIMITED AND NIALL O'SULLIVAN

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 16th day of April, 2024

1. This is a quantum appeal in a personal injuries claim arising under the Personal Injuries Guidelines. In a judgment delivered on the 17th November, 2023, the High Court awarded a sum of €90,000 for general damages together with a sum of €6,758 for special damages.

2. The plaintiff, who was born on the 12th May, 1963, was involved in a road traffic accident on the 13th August, 2020. On that occasion, he was the driver of a motor vehicle which was stationary in traffic on Malahide Road in Dublin when he was rear ended by the defendants' lorry. The impact was a substantial one which shattered the rear window of the

car and damaged it to the extent that it was deemed an economic write-off. Liability was admitted and as the plaintiff was wearing a seatbelt, no issue of contributory negligence arose. After the accident, the plaintiff was brought to the Emergency Department of Beaumont Hospital where he was assessed and discharged into the care of his General Practitioner. It is accepted that when the plaintiff attended Beaumont Hospital, he displayed no outward signs of injury. His injuries at that time, and as they evolved subsequently, appear to be as follows:

1. A head injury. This is described in the Beaumont Hospital medical notes as *"minor"*. The plaintiff was complaining of headache and was accordingly assessed for a head injury. His Glasgow Coma Scale was normal at 15/15 and there were no neurological signs. It seems therefore that the only basis for concluding that he had suffered a head injury was his complaint of headache.

2. An injury to the chest wall. The plaintiff initially thought that he had sustained two fractured ribs but this appears to be based on the content of a discharge letter from the hospital which was clearly erroneous, as the radiological evidence demonstrated that the plaintiff had in fact suffered no bony injury to his chest.

3. A strain of the right trapezius muscle. Although not expressly referred to in the Beaumont notes, it is common case that the plaintiff suffered a whiplash injury to his neck.

4. A soft tissue injury to his left wrist which appears to have been caused by gripping the steering wheel at the moment of impact.

5. A soft tissue injury to the right shoulder which appears to have become the plaintiff's most troublesome injury.

3. It is relevant at this juncture to note that the plaintiff had worked as a floor installer for all his working life from the age of 17 up until 2016. In that year, he suffered a significant myocardial infarction which led to his retirement from the heavy work of installing floors and he has not worked since.

Medical reports

4. In personal injuries litigation, medical reports are often agreed and this is a laudable practice which is to be encouraged. It saves significant time and cost and greatly assists the efficient conduct of litigation. It avoids bringing busy doctors to court where it is not strictly necessary to do so.

5. The fact that such reports are agreed does not however mean that everything they contain must be accepted without question by the court. The court is not obliged to accept the evidence of an expert, even where it is uncontradicted - see *Duffy v McGee* [2022] IECA 254 at para. 80. Normally, this will not give rise to difficulty but it is not uncommon for conflicts in medical reports to emerge. Ideally such conflicts should be resolved by the doctors concerned giving oral evidence but that is not always practicable.

6. Such conflicts are not confined to disagreement between healthcare professionals, but may also arise from the evidence of non-expert witnesses and, in particular, claimants who are the subject of the relevant report. Subjective complaints by claimants which are not borne out, or even contradicted, by medical evidence must be carefully scrutinised by the court, always bearing in mind that the onus of proof rests on the plaintiff – see *O'Daly v Bus Eireann* [2023] IECA 232 at paras. 1 - 8.

7. Where such conflicts emerge, the court must endeavour to resolve them in the context of the evidence as a whole, and where that is not possible, by reference to the onus of proof. This applies equally to appellate courts where medical reports are agreed, it being by now well-settled that in that situation, the appellate court is in as good a position as the court of trial to assess the reports.

8. Before considering the oral evidence given before the High Court, I propose to summarise the agreed medical reports, of which there are six, in chronological order.

1. Professor Abel Wakai, Department of Emergency Medicine, Beaumont Hospital, examination date 20th October, 2020 (two months post-accident):

   Professor Wakai, who did not see the plaintiff on initial attendance at Beaumont, sets out the clinical findings as described above and the plaintiff's prior medical history. Treatment consisted of the administration of two oral painkillers and the application of a local anaesthetic skin patch. He was given a prescription for two further oral painkillers on discharge. He was advised to attend his GP for follow up. At the time of Professor Wakai's examination, the plaintiff had seen his GP twice.

   Professor Wakai noted the plaintiff's present complaints at the time of examination as including what is described as migratory pain on the head – which I understand to mean moving to different parts of the head – right shoulder pain and numbness of the left ring and little fingers. With regard to his neck, the plaintiff had a full range of movement but some tenderness and pain on movement. Of note, the range of movement in his right shoulder was limited and painful in the range of 60% to 80% of normal. On the PIAB Medical Report Template, Professor Wakai noted in the tick box section that

the plaintiff's condition was mild in the context of mental health with complaints that he was irritable and forgetful. He had mild pain in the right shoulder on climbing stairs. His reaching was moderately affected – again as a result of his right shoulder – and his lifting and carrying was severely affected for the same reason. Professor Wakai was of the view that the plaintiff urgently required physiotherapy intervention. Because of the shoulder impingement, he requested an ultrasound scan of the right shoulder and advised a further consultation in two years.

2. Dr. Nigel Salter, Consultant in Emergency Medicine, who examined the plaintiff on the 19th June, 2021, ten months post-accident.

Dr. Salter's examination was carried out at the request of PIAB. At that stage, the plaintiff had seen his GP on three occasions, *i.e.*, one further visit since Professor Wakai's examination, and had had no physiotherapy as he was awaiting an appointment. Dr. Salter's report is again set out on the PIAB template. Under the heading *"Occupational"* Dr. Salter has noted *"Not applicable"* presumably on the basis that the plaintiff was retired on health grounds. Under *"recreational"*, he noted the plaintiff's complaint that he had been an avid fly fisher prior to the accident but was now unable to enjoy this pursuit, as he experiences an exacerbation of shoulder pain after 30 minutes of such activity. Under *"Domestic/Personal"* he was noted by Dr. Salter to have reported difficulty with dressing and putting on shirts. In the tick box section, Dr. Salter notes his complaints relating to mental health and carrying as mild, with reaching described as moderate.

On clinical examination of the right shoulder, Dr. Salter found the plaintiff's movements to be limited with flexion at 90 degrees and abduction at 90 degrees, around half of normal. Movements of the plaintiff's neck were full, although some caused an exacerbation of the right shoulder discomfort. He appeared to have no complaints regarding either his right chest or left wrist at that stage. Regarding anticipated treatment, Dr. Salter noted that the plaintiff was awaiting physiotherapy and appeared not to have had the ultrasound scan advised by Professor Wakai. Dr. Salter advised that he should undergo an MRI scan. If that showed a rotator cuff tear, he considered the plaintiff to be a suitable candidate for steroid injection therapy and further physiotherapy to optimise his recovery. In his opinion, Dr. Salter said that a full recovery was expected, subject to what he had said about the shoulder, and late complications were not expected. Dr. Salter noted that as regards the plaintiff's soft tissue injuries to his lower neck, his left wrist and his right chest wall, these had gradually healed over a period of two to three months.

3. Mr. Darragh Hynes, Consultant Orthopaedic and Upper Limb Surgeon, who examined the plaintiff on behalf of the defendants on the 26th of November, 2022, two years and three months post-accident.

Mr. Hynes gives the history as before. He notes that the plaintiff had ongoing shoulder pain in keeping with impingement. He also had ongoing headaches. Mr. Hynes says the plaintiff told him that these headaches persisted for over six months but gradually reduced. He complained of continuing to have some headaches in the posterior aspect of his head. He noted the plaintiff's current complaints of ongoing pain in his right shoulder aggravated by dressing or

showering. The shoulder is particularly painful if he lies on it at night time. He has difficulty carrying grocery bags etc. with his right hand and felt his symptoms might be getting *"a little worse"*. He was significantly restricted in his ability to undertake fly fishing. Range of movement of the shoulder was reduced and painful and there was tenderness at the tip.

Mr. Hynes refers to the fact that an MRI scan undertaken in December 2021 showed *"almost a complete tear of the rotator cuff"*. His summary was that the plaintiff appeared to have made a good recovery in relation to most of his injuries except for the shoulder. Mr. Hynes was of the view that the plaintiff would benefit from injection therapy followed by physiotherapy. He had some neck symptoms which physiotherapy should also be able to address. Mr. Hynes said that if the plaintiff continued to have significant ongoing symptoms following conservative treatment – which presumably includes injection treatment – he would be a candidate for keyhole surgery to the shoulder. The success rate of this surgery is generally very good and long term *sequelae* such as arthritis are not anticipated.

4. Mr. Hannan Mullett, Consultant Orthopaedic Surgeon, who examined the plaintiff on the 11th October, 2022 and reported on the 15th February 2023, approximately two and a half years post-accident.

The history is as before. The plaintiff said he had a number of sessions of physiotherapy with no improvement. On examination he had a normal range of neck movement without any tenderness. He had prominent impingement of the shoulder. Mr. Mullett also refers to the findings of the MRI scan and notes that the plaintiff subsequently had an image guided steroid injection

into his shoulder on the 19th January, 2023. Mr. Mullett's opinion was that if the plaintiff failed to improve, the next stage in treatment would be an arthroscopy with subacromial decompression and rotator cuff repair. This would involve an in-patient stay of one night, wearing a sling for three weeks, and full rehabilitation in the order of six to twelve months.

5. Mr. Steven Young, Consultant Neurosurgeon, who examined the plaintiff on the 18th April, 2023, two years and eight months post-accident.

It is not clear who referred the plaintiff to Mr. Young but it would appear from the tenor of his report that he was solely concerned with the plaintiff's complaint of headaches. Mr. Young gives the plaintiff's occupation as *"Floor Installer"* and says at para 3.1 *"Mr. Coughlan **is** a floor installer who told me that he enjoyed excellent health prior to the accident in question…"* (my emphasis). He notes the cardiac history.

There is virtually no mention of the plaintiff's shoulder in Mr. Young's report beyond a reference to him having *"soft tissue changes in the right shoulder"* as a result of the accident. Although Mr. Young did not examine the plaintiff's shoulder or refer to any investigations or treatment of the shoulder, he did examine the plaintiff's neck and found that there was restriction of neck movement on rotation and abduction to the left side and this provoked pain at the base at the right side of his neck. The plaintiff was also found to be tender in the soft tissues here. This finding is of considerable significance, not least because it appears to be contradicted by the findings of all the other doctors who examined the plaintiff.

Professor Wakai, who examined the plaintiff two months after the accident, found that he had a full range of active movement in his neck in all directions, albeit with some right suprascapular pain. Dr. Salter, who examined the plaintiff ten months after the accident, found that he had a full range of movement in his neck, again albeit with some right shoulder discomfort. The plaintiff told Dr. Salter that he had recovered from the soft tissue injuries to his neck, left wrist and right chest wall over a period of two to three months. Mr. Hynes, at over two years post-accident, found that the plaintiff did have slight restriction of lateral rotation to the right-hand side of his neck with pain in the right scapular area which appears to be the opposite of what Mr. Young found, being that rotation to the left side was restricted. As against that, Mr. Mullett, who had examined the plaintiff about a month before Mr. Hynes, found that he had a normal range of movement of the cervical spine with no localised tenderness. And, as we shall see, Doctor O'Sullivan, the plaintiff's own GP, who examined the plaintiff less than three weeks after Mr. Young, found that examination of his neck was unremarkable, and that he had a normal range of movement.

The dramatic difference in Mr. Young's findings from those of the other doctors mentioned is unexplained. It must, at the very least, cast considerable doubt on Mr. Young's opinion that the accident had left the plaintiff with a chronic whiplash syndrome, normally an orthopaedic diagnosis.

The plaintiff complained to Mr. Young that he had three different types of pains in his head: first, in his left temporal region radiating around to his forehead; second, a pulsing headache in the forehead; and third, an ache at

the back of the head. Mr. Young's opinion was that these resulted from a tendency to spasm and tightness in the suboccipital muscles as a result of his injury and, as these muscles are located in the neck, this can only mean the injury to his neck. Mr. Young's diagnosis of a chronic whiplash syndrome appears to have led him to the conclusion that it was unlikely that there will be any significant improvement, presumably in his headaches. At the end of his report, Mr. Young includes a statement of his view that the plaintiff's ability to return to his work as a floor installer must be called into question. From this and his previous recording of what he was told by the plaintiff, Mr. Young appears to have been under the impression that the plaintiff was working as a floor installer at the time of his accident. The only source from which Mr. Young could have derived this information was the plaintiff himself, so that the plaintiff either informed Mr. Young incorrectly, or Mr. Young misunderstood what he was being told. Either way, it appears to significantly undermine the views he expresses, and this is particularly the case when one factors in that Mr. Young's findings on examination are contradicted by five other doctors, including two consultant orthopaedic surgeons.

6. Dr. Mark O'Sullivan, General Practitioner, who examined the plaintiff on the 8th May, 2023, at two years and nine months post-accident. This is the final medical report obtained before the trial proceeded on the 8th November, 2023.

As already noted above, Dr. O'Sullivan examined the plaintiff's neck and back and found both unremarkable with a normal range of movement in each. Of considerable importance however, Dr. O'Sullivan examined the plaintiff's

right shoulder. This appears to have been the only examination of the plaintiff's shoulder subsequent to him receiving injection therapy from Mr. Mullett in January 2023. Although Mr. Young saw him after that, he did not examine the plaintiff's shoulder. Dr. O'Sullivan's findings were that the plaintiff had nearly a full range of movement in his right shoulder with pain on extremes of motion, including flexion to 170 degrees, abduction to 160 degrees and extension past 20 degrees. He experienced pain on lowering his arm on each of these positions.

Dr. O'Sullivan's findings in this regard are to be contrasted with Dr. Salter's findings above some two years earlier, when the plaintiff had 90 degrees of flexion and 90 degrees of abduction in his shoulder. It is clear therefore that the plaintiff had regained almost full movement of his right shoulder which had functionally recovered to almost normal, albeit with some complaints of pain on lowering his arm from the extremes of movement. Dr. O'Sullivan also noted that the plaintiff experienced darting pains in the right shoulder provoked by pressure on cervical discs on examination.

Dr. O'Sullivan's prognosis includes a statement to the effect that the plaintiff had begun to have physiotherapy which was improving his shoulder pains and he felt the plaintiff would benefit from regular physiotherapy. He also recommends a surgical review to assess the symptoms resulting from rotator cuff damage. Rather surprisingly, given that the plaintiff had seen Mr. Young only a few weeks earlier, Dr. O'Sullivan records no complaint of headaches by the plaintiff, nor that he had referred the plaintiff for further assessment of his headaches.

Evidence in the High Court

9. The only witness to give evidence before the High Court was the plaintiff himself. In opening the case to the court, counsel for the plaintiff stated twice that the plaintiff had been treated with injections – plural – which had not really helped him and only for a temporary period of time. Counsel told the judge that the plaintiff will have to have an arthroscopy to repair the rotator cuff but was putting that off and coping with the pain. Counsel said that the injections (plural), and physiotherapy were not working for the plaintiff. The plaintiff would be claiming the cost of this surgery at €6,696.00 as an item of special damage.

10. In the course of his evidence, the plaintiff referred to the fact that he had got an appointment in St. Vincent's Hospital for assessment of his headaches which he said could be quite severe. The appointment was for the week following the trial. It was not clarified who had referred the plaintiff for this assessment but his evidence was that he had drawn his headaches to the attention of his GP *"many, many times"*. As I have already noted, it is surprising in that event that the only report from the plaintiff's GP, being a final medical report, makes no reference to headaches.

11. Under cross-examination, the plaintiff was asked about physiotherapy and he confirmed that in the two years and four months since the accident, he had had one session only. He was asked about the reply to particulars which advised that *"the plaintiff consulted a physiotherapist for one session … but did not attend for further treatment … as he found it was not helpful … He was recommended a regime of home exercises … which he carried out on some five or six occasions."*

12. Despite that statement, the plaintiff said he was waiting for further physio but had not yet received an appointment. With regard to his shoulder, the plaintiff confirmed that since receiving the injection from Mr. Mullett, he had not returned. When asked why he did not

do so in circumstances where he was claiming that he would have to undergo surgery and Mr. Mullett had not confirmed this, the plaintiff said that his pain had not gone away and something would need to be done to alleviate it. That would probably be surgical intervention. On re-examination, he confirmed that his symptoms in his shoulder were getting worse. He also agreed with the suggestion by counsel that Mr. Mullett's advice was that he was going to require an arthroscopy with subacromial decompression and rotator cuff repair.

13. At the conclusion of the hearing, both parties addressed the judge on the question of damages, with particular reference to the Personal Injuries Guidelines. Counsel for the plaintiff appeared to contend that the plaintiff had two dominant injuries, being the complaints in relation to the shoulder and the headaches. As regards the shoulder, the plaintiff's counsel contended that it fell into the serious bracket under the Guidelines, whereas counsel for the defendants suggested it was in the moderate category. The parties also referred the Court to a number of relevant authorities on the proper approach to the assessment of damages in multiple injury cases and to comparator cases, in particular *McDonnell v Upton Foods Limited* [2022] IEHC 680 involving a similar injury.

Judgment of the High Court

14. The Court delivered a written judgment on the 17th November, 2023. The judge referred to the factual background and the plaintiff's evidence, including to the effect that he was concerned that the chest injury could impact on a cardiac stent inserted at the time of the cardiac event in 2016. In her introductory remarks, the judge referred to the plaintiff having received steroid injections (plural) which gave him relief temporarily but he was disappointed that they didn't provide lasting relief. The judge did not however clarify the basis for the statement that the plaintiff had multiple injections and it appears on its face to

be plainly incorrect. The medical evidence established that the plaintiff had one injection in January 2023. The judge also referred to the fact that the plaintiff was under Mr. Mullett's care and the ultimate plan is for orthopaedic (*recte.* Arthroscopic) surgery for a repair of a rotator cuff injury. Again, the basis for this statement appears questionable because there was in fact no evidence from Mr. Mullett or anyone else that the plaintiff would in fact require surgery. This was because the plaintiff never returned to Mr. Mullett at any time prior to the hearing in the High Court, despite the fact that the injection, which he claimed did not work, had been administered 10 months earlier.

15. The judge rehearsed the plaintiff's evidence concerning the various kinds of headaches from which he alleged he was suffering and noted that the plaintiff does not take any medication for these headaches. The judge also stated that the plaintiff was referred approximately two years ago by his GP to St. Vincent's Hospital Neurology Department.

16. The judge referred to the parties' submissions and argument and that of the plaintiff that there were two dominant injuries, namely to the shoulder and persistent headaches. On the shoulder injury, the plaintiff's counsel submitted that an award at the upper end of the *"serious category"* was warranted. On the headaches, counsel for the plaintiff submitted that these should fall into Category (c)(iv) of the head injuries section of the Guidelines. This section deals with brain damage where the claimant is able to return to a level of work materially similar or the same to that which he/she was able to carry out prior to the injury. The range here is €25,000 to €60,000. The judge noted that section (d) of the same part of the Guidelines deals with *"minor brain damage or head injury"* where the ranges vary up to a maximum of €25,000. The judge referred to *McDonnell v Upton Foods*, where a sum of €55,000 was awarded for a similar shoulder injury, but considered that could be distinguished because there the surgery had taken place within months and had brought about

a significant improvement. The judge said that in the present case, the surgery recommended by Mr. Mullett was not available to the plaintiff due to financial constraints, but having read the Transcript, I have struggled to find any basis for this statement.

17. In her conclusions, the judge said that she found the plaintiff to be a reliable and credible witness. She regarded the shoulder injury as the dominant injury for the purpose of assessment. She was satisfied that the plaintiff will in due course require to undergo surgery as suggested by Mr. Mullett and Mr. Hynes. She said that since the injury, the plaintiff has been unable to participate in his lifelong hobby of fly fishing. She expressed herself satisfied that without surgery the plaintiff will continue to suffer from ongoing shoulder pain. She categorised the injury as being serious, within Guideline D(b)(iii), *"i.e., a rotator cuff injury with persisting symptoms."* She placed it at the upper end of the scale and awarded a sum of €75,000 for general damages being €50,000 for pain and suffering to date and €25,000 into the future.

18. With regard to the headaches, the judge expressed herself satisfied that they amounted to a type of head injury. As such, it was not fully captured within the categories identified in the Guidelines. She was of the view that it was now in excess of three years since the accident and the headaches persist with no improvement likely. This was presumably based on Mr. Young's report. She believed a sum of €30,000 would be appropriate if it was a standalone award. Regarding each of the soft tissue injuries to the left wrist, neck, which she agreed were in the minor category, and chest, she awarded a sum of €1,000 in respect of each. In arriving at a final conclusion, the judge proposed to uplift/increase the award of €75,000 by a further €15,000 to take account of all the other injuries apart from the shoulder. She went on to hold that a figure of €6,758 should be awarded by way of special damages – all bar €62 for the purpose of the plaintiff obtaining the requisite surgery to his shoulder.

The Appeal

19. The essential thrust of the appeal is that the damages awarded were excessive because the judge misdirected herself as to the appropriate category in the Guidelines to have regard to and was further in error in her approach to the assessment of damages in the light of various authorities.

20. The proper approach to the assessment of damages, particularly in the context of multiple injury cases, has been the subject of a number of recent decisions of the High Court and this Court and it is unnecessary to revisit those in any detail. Proportionality remains the overriding consideration and, in that context, needs to be viewed in the light of the maximum amount available under the Guidelines for the most serious injuries and also to awards for greater, lesser or similar injuries. It is legitimate for the court to have regard to previous awards for similar injuries, but always mindful of the fact that no two cases are exactly alike and it is never realistically possible to apply an exact analogue of any case. It is not in general for the appellate court to carry out a *de novo* reassessment of the damages, save to the extent that is necessary to determine whether the award under appeal is so disproportionate to what the appellate court might be inclined to give so as to amount to an error of law. Before undertaking the proportionality exercise, it can be helpful to carry out a *"reality check"* of the kind mentioned in *Zaganczyk v John Pettit Wexford Unlimited Company* [2023] IECA 223 at para. 27. Such an exercise was undertaken in that case which illustrated the mismatch between the award of the High Court and the amounts available under the Guidelines at the same level for ostensibly much more serious injuries.

The plaintiff's injuries

(a) Headaches:

21. There were significant inconsistencies in the evidence of the plaintiff concerning headaches. As of the date of trial, the plaintiff's evidence was that he still suffered very significant headaches which he classed as sometimes severe and occurring in different parts of his head. This, he said, could happen quite frequently a number of times within minutes or hours and on the other hand, he might not have any headache for days. He was however clear that this constituted a significant issue on an ongoing basis about which he had repeatedly complained to his own GP and which ultimately led to the referral to the Neurology Department in St. Vincent's Hospital. Why the plaintiff did not go back to Mr. Young is not explained.

The plaintiff's oral evidence in the High Court is to be contrasted with the varying accounts of his headaches given to doctors. He told Dr. Salter at about 10 months post-accident that he had intermittent left sided headaches. In his personal injuries summons, the plaintiff pleads that he was assessed by Mr. James Colville, Consultant Orthopaedic Surgeon, on the 27th October, 2021, 14 months post-accident. Mr. Colville's report was not put in evidence. The plaintiff pleads that he told Mr. Colville at that time that he *"still got headaches at times but they seemed to be getting less frequent and he had difficulty localising the exact site of the headaches, but it appeared to be various parts of his head."* This contrasts with what he told Dr. Salter about the pain being on the left side of his head.

The plaintiff's account to Mr. Hynes is also consistent with a pattern of improvement, as was said to have been advised to Mr. Colville. Mr. Hynes was told that his headaches persisted for over six months but gradually reduced. At the time he was seen by Mr. Hynes, he continued to have some headaches; now described as being in the posterior aspect of his

head, rather than the left side or various parts as advised to the previous doctors. When he saw Mr. Young, the plaintiff's complaints were different again, being of pain in the left side of his head, his forehead and the back of his head. He apparently did not advise Mr. Young that his headaches were either intermittent or improving.

22. As noted already, the plaintiff's own GP, who saw him only two and a half weeks after Mr. Young, made no note of a complaint about headaches, despite the plaintiff's insistence in his evidence that he was on to his GP frequently about the headaches and looking for a referral. None of these inconsistencies or anomalies were identified or, less still, considered by the trial judge as to their impact on the reliability of the plaintiff's evidence in this regard and, consequently, the reliability of Mr. Young's views based on what he was told by the plaintiff, including apparently that he was still working.

23. An important feature of Mr. Young's report is his opinion that whatever headaches the plaintiff had were coming from spasm and tightness in the suboccipital muscles, which form part of the neck. In other words, the headaches were not as a result of any head injury suffered by the plaintiff; the evidence for which was in any event very tenuous. While the plaintiff was described in the Beaumont Emergency Department notes as having suffered a minor head injury, that conclusion appears to have been based on nothing more than a complaint of headaches. His GCS was normal, there was no outward sign of injury and neurological examination was unremarkable. Therefore, it would seem clear from Mr. Young's report that the headaches of which the plaintiff complained were a component of the injury to his neck, described by Mr. Young as a chronic whiplash syndrome.

24. Accordingly, in my view, section 3 of the Guidelines dealing with head injuries is of no relevance to this case. It is unsurprising that the judge felt it was not possible to fit the plaintiff's complaints into any of the categories because they all deal with brain damage and

of course, as it was common case, there is absolutely no question of the plaintiff having suffered brain damage. I sympathise with the judge's dilemma in this regard because there is no direct guidance to be found in the Guidelines on the issue of headaches *simpliciter* caused by a whiplash injury to the neck. As such, it seems to me that the plaintiff's headaches fell more properly to be assessed on the basis of them being a sequel of a neck injury under the relevant section of the Guidelines dealing with such injuries.

25. I am therefore satisfied that the judge's finding that the plaintiff's headaches amounted to a type of head injury was erroneous and not supported by the evidence. This led the judge into the further error of finding that there was no clear category into which the headaches could be slotted as part of a head injury. She held that it was now three years since the accident and the headaches persisted with no improvement likely. In reaching that conclusion however, the judge was simply accepting at face value what was contained in Mr. Young's report without any regard to the many inconsistencies in the evidence regarding the headaches and neck injury. The judge did not engage with these in any shape or form as she ought to have done, in my view. It equally follows that there was no basis for her conclusion that a sum of €30,000 compensation for the headaches was an appropriate amount in the case of a stand alone award.

(b) The neck injury:

26. Here again, there were very significant inconsistencies in the findings of the doctors concerning the plaintiff's neck. It would be surprising if the plaintiff had not suffered some injury to his neck given the circumstances of the accident which were a classic whiplash mechanism. The Beaumont Hospital notes do not refer to any neck injury although they do describe right trapezius muscle strain. When Professor Wakai examined the plaintiff two months after the accident, he found him to have a full range of movement in his neck, albeit

that there was an element of pain accompanying certain movements. A very similar finding was made by Dr. Salter who again found the plaintiff to have full movements of his neck, some of which exacerbated his right shoulder discomfort. Having said that, the plaintiff told Dr. Salter that his soft tissue injuries, including to his neck, have gradually healed over a period of two to three months. When Mr. Hynes examined the plaintiff's neck, he found a slight restriction in one of the movements, being lateral rotation to the right. This caused pain to develop in the right scapular area. On the other hand, Mr. Mullett, who examined the plaintiff very shortly before Mr. Hynes, found that he had a normal range of neck movement with no localised tenderness.

27. All of this contrasts very much with what Mr. Young found, being restriction of neck movement on rotation and abduction to the left side which provoked pain at the base of the right side of his neck. This, as I have said, was characterised by Mr. Young as a chronic whiplash syndrome. It must be remembered however, that two orthopaedic surgeons had already reviewed the plaintiff and found nothing of the kind: neck injuries of this type being within their area of specialisation more so than that of Mr. Young.

28. Perhaps more significant however is the fact that a few short weeks from Mr. Young's examination, the plaintiff was seen by his own General Practitioner who found entirely to the contrary that examination of the plaintiff's neck was unremarkable and he had a normal range of movement. The overwhelming preponderance of the medical evidence therefore was entirely contrary to Mr. Young's diagnosis of a chronic whiplash syndrome and, although the judge did not really engage with these conflicts, she did however classify the whiplash injury as being minor, awarding a sum of €1,000 in respect of it.

29. However, of key importance in the context of the complaint of headaches, as Mr. Young's diagnosis of a chronic whiplash syndrome was undermined by all the other medical

evidence, then it must inevitably follow that his conclusions about the plaintiff's headaches and their prognosis was equally undermined. Given that the headaches more properly fell to be assessed as a component of the plaintiff's whiplash injury, it becomes clear that the award of €1,000 for the neck injury versus €30,000 for the headaches are totally incongruous and must be viewed as erroneous. The judge assessed a sum of €1,000 in respect also of the wrist and chest injuries. That implies a total of €33,000 in respect of all the injuries except the shoulder injury. The judge however awarded a sum of €15,000 for all these injuries combined but offered no explanation as to the basis for doing so beyond describing it as a form of *"uplift"*.

30. Be that as it may, I am not satisfied that the defendants have established that the award of €15,000 for all these injuries combined, however viewed, could be regarded as so disproportionate as to amount to an error of law and in my judgment therefore, despite the many issues I have identified, interference is not warranted under these headings.

(c) The shoulder injury:

31. There is no doubt to my mind that the shoulder injury was the dominant injury in this case, and as such attracted full value under the Guidelines before any discounted uplift was applied in respect of the other injuries. This was, in effect, what the judge held. It was urged on her by counsel for the plaintiff that there were two dominant injuries in this case, being the shoulder and headaches. That, however, is a contradiction in terms. There can only be one dominant injury, and if that is not established, then there is none. The authorities and the Guidelines themselves recognise that there may be cases where it is not possible to identify a single dominant injury. How the Guidelines are to be applied in that scenario is something that has not yet arisen for consideration and how it is to be approached is something I would reserve for a case in which it does.

32. Shoulder injuries are provided for in Part D of the Guidelines under the headings of severe, serious, moderate and minor respectively. The lowest subcategory of serious, (b)(iii) is to *"rotator cuff injury with persisting symptoms notwithstanding surgery."* (Emphasis added.) The range for serious shoulder injuries is €40,000 to €75,000.

33. The judge placed the plaintiff's injury within this category and awarded him the maximum available *i.e.*, €75,000. Quite apart from the fact that it is difficult to see how the least serious of the three categories could attract the maximum available, it is in any event plainly erroneous to place the plaintiff's injury in this category because he has not had surgery. This category is explicitly designed to cater for rotator cuff injuries which have not been cured by appropriate surgery as a result of which the plaintiff has persisting symptoms.

34. There is nothing in the present case to suggest that, if the plaintiff had surgery, he is likely to have persisting symptoms. Indeed, the opposite is the case. Of the two Orthopaedic Surgeons involved here, Mr. Mullett does not offer a view as to the likely success of surgery. On the other hand, Mr. Hynes states in his report *"The success rate of this surgery is generally very good."*

35. There is accordingly no conceivable basis upon which it can be said that, as a matter of probability, the plaintiff will have persisting symptoms after surgery. The likelihood is that if he were to have surgery, he would not.

36. However, even this is on the assumption that the evidence establishes that the plaintiff will be required to undergo such surgery, as the judge held. I have carefully considered the medical evidence in this case and can find no basis for the suggestion that the plaintiff will probably have to undergo surgery. The orthopaedic surgeons on both sides agree that if injection therapy followed by physiotherapy proves unsuccessful, then the plaintiff may be a candidate for surgery. Before that point can be reached however, the plaintiff requires to

be medically assessed, and, in the absence of such assessment, there is no basis in the evidence for the suggestion that the plaintiff will, or probably will, require surgery. It is of course true to say that the plaintiff himself claims not to be improving and concludes from this that he needs surgery and will, at some unspecified time in the future, have it. That is no more than speculation by the plaintiff unsupported by any medical evidence.

37. Although reference was repeatedly made by counsel for the plaintiff to him having *"injections"* which only gave temporary relief, and the judge appears to have accepted this, there is, as I have previously pointed out, no evidence that the plaintiff had more than one injection. That injection was administered in January 2023 under the care of Mr. Mullett. If that injection was unsuccessful and gave only temporary relief – as the plaintiff himself says – it is entirely unexplained why he did not return to Mr. Mullett for further assessment of his suitability for surgery. It might well be the case that had that happened, Mr. Mullet would have advised a further injection coupled with physiotherapy before arriving at a conclusion that surgery was necessary.

38. The only available medical evidence regarding the success or otherwise of the injection is that of Dr. O'Sullivan, which I have already highlighted. Prior to the injection, the plaintiff had been examined by various doctors who found quite significant impingement of his shoulder movements, being approximately half normal. However, when examined by Dr. O'Sullivan post-injection, the plaintiff showed quite a dramatic functional improvement so that he now had almost full range of movement of his shoulder, albeit with pain on the extremes. Nonetheless, this represents a very significant improvement in the plaintiff's condition and therefore it entirely remains to be seen whether, in the light of that, the plaintiff would in fact, as a matter of probability, have been advised to have surgery. I am therefore satisfied that the judge's conclusion that the plaintiff will require surgery is not sound.

39. However, even were it the case that the plaintiff himself was correct in saying that he needs surgery, there is again absolutely nothing to indicate that such surgery would not be entirely successful. The plaintiff appears to have advanced no convincing reason in his own evidence as to why he would not undergo such surgery if advised to do so and therefore any complaints of ongoing pain and limitation of movement must be viewed in the light of this decision by the plaintiff and his obligation to mitigate his loss. The judge appears to have thought that this had something to do with the plaintiff not having the surgery because of financial constraints, but again I can find nothing in the evidence to support that conclusion. Part D(c) of the Guidelines deals with moderate shoulder injuries defined as:

> *"Frozen shoulder with limitation of movement and discomfort with symptoms persisting for some years and other soft tissue injuries where intrusive symptoms will be permanent."*

40. It is at least arguable that the plaintiff falls more closely into this category than the serious one. However, it must be accepted that, strictly speaking, the plaintiff's injury was not that of a frozen shoulder but of a rotator cuff tear which, in my understanding, are different things. There is however at least a broad overlap in the type of symptomatology concerned and a key element is that there should be limitation of movement and discomfort persisting for some years and that would appear to correspond more closely with the plaintiff's symptoms. Here again however, for the reasons already set out, it cannot be said that he suffered a soft tissue injury where intrusive symptoms will be permanent. The next category (d) deals with minor shoulder injuries, with the most serious of the subcategories referring to a substantial recovery taking place within two years. Again, the plaintiff does not clearly fall into this category either and I think, as was accepted by counsel for the defendants, the moderate category provides a closer analogy.

Comparators

41. As this Court has recognised in the past, it is a legitimate exercise to consider awards given in similar cases, with the defendants placing reliance on the judgment of the High Court in *McDonnell v Upton Foods*.

42. Mr. McDonnell was a 65 year old engineer who was involved in a road traffic accident on the 30th November, 2019. The judgment was delivered by Barr J. three years later on the 6th December, 2022. As in the present case, the plaintiff was involved in a road traffic accident in which he suffered a tear to the rotator cuff in his right shoulder which was agreed to be his dominant injury. He was coincidentally treated by Mr. Mullett. Unlike the present case however, the plaintiff had surgery at an early juncture on the 23rd March, 2020, four months post-accident.

43. It is of relevance to note that when Mr. Mullett performed the surgery, he found that the tear to the affected structures was revealed as being 5cm x 4cm. This stands in significant contrast to the tear in the present case which is described in an ultrasound scan ordered by Professor Wakai which was undertaken on the 21st October, 2021. This found that there was a 6mm x 3mm bursal surface partial thickness, partial width tear of the supraspinatus tendon. Thus, on a pure measurement basis, the plaintiff's tear in *McDonnell* was of the order of 10 times larger. Indeed in the present case, Mr. Mullett's report confirms that MRI showed that the plaintiff had what is described as a small full thickness tear of the rotator cuff.

44. Mr. McDonnell was reviewed eight months after the surgery when he was found to have had about a 40% recovery in his symptoms. However when seen 19 months post-surgery, he had improved to an 80% recovery. He was found to have an almost full range of movement in his shoulder joint. Despite that however, he continued to complain of

discomfort lying on his right side and a lack of strength doing overhead activities. Mr. Mullett's evidence to the court was that these residual symptoms were to be expected because of the size of the tear and while Mr. McDonnell had a reasonably good result, he would be left with permanent residual symptoms of the kind described.

45. The trial judge here sought to distinguish *McDonnell* on the basis that the plaintiff in that case had access to immediate surgery within months which resulted in an 80% improvement. The judge went on to say:

> *"In the case before me, the private surgery recommended by Mr. Mullett to the plaintiff was not readily available to him due to financial constraints, and he continues to suffer from an almost complete tear of the rotator cuff. His symptoms are ongoing."*

46. Unfortunately there are a number of errors in this statement. First, there is no evidence that Mr. Mullett ever recommended the plaintiff to have surgery, as the plaintiff never returned to Mr. Mullett having had the injection. Secondly, there was no evidence given by the plaintiff that the surgery was not available to him due to financial constraints. What may have led to this error was a statement by the plaintiff in answer to a question in cross-examination asking about him not seeing a specialist at all until Mr. Mullett in October 2022. In answer to that, the plaintiff said:

> *"Yeah, well I had been to my GP, I have, I, I don't have the financial means to go to specialists."*

47. The plaintiff's evidence was that he had a medical card but there was no evidence to suggest that he had sought or obtained a place on the public waiting list for surgery. Thus, there was no logical basis in the evidence for a suggestion that *McDonnell v Upton Foods*

Limited could be distinguished on the basis identified by the trial judge, less still that it could be distinguished on the basis that the plaintiff's injury here was more serious. It is clear to my mind that the opposite is the case. As an appropriate comparator therefore, it must be recognised in my view that the plaintiff's injury falls well short in terms of severity of that which attracted an award of €55,000 in *McDonnell*. Indeed, counsel advised us that this case had been appealed and the appeal settled. This goes to highlight the fact that this Court, as an appellate court, must treat first instance decisions with some care but nonetheless, it has previously been observed by this Court that plaintiffs should be able to look at awards given in other cases for similar injuries and understand the basis on which their own award was arrived at.

48. Counsel for the defendants also referred us to a number of other recent High Court decisions where significantly lower awards were given than in the present case for injuries which were ostensibly substantially more serious – see *Keogh v Byrne* [2024] IEHC 19 and *Crum v MIBI* [2023] IEHC 656. When viewed in the light of these awards, I do not think it can be said that the award for the shoulder injury in this case can be regarded as proportionate either to the maximum available under the Guidelines or to awards in cases involving greater, lesser or similar injuries.

49. In *Zaganczyk v Pettit* [2023] IECA 223, I drew attention to the fact that the award, also by coincidence of €90,000 in that case, bore no relation to examples given which would attract an award in that range under the Guidelines and, in my view, the same applies here. Unfortunately, it seems to me that the judge misdirected herself on the evidence in a number of important respects to which I have alluded and this appears to have led her to the conclusion that an award at the maximum level of the serious category was warranted. I cannot agree. While the plaintiff's injury does not fit precisely into either the serious or

moderate category of shoulder injuries in the Guidelines, I am satisfied from all the evidence that an award at the upper end, or slightly above, the moderate level and/or at the very bottom of the serious level is warranted and is represented by a sum of €40,0000.

50. The appropriate figure for general damages in this case therefore amounts to €55,000. For the reasons I have already explained, contrary to the view of the trial judge, the plaintiff has not established that he will, as a matter of probability, require surgery and therefore there is no basis for allowing the cost of that as an item of special damage. Of the €6,758 awarded for special damage, €6,696 was in respect of the cost of surgery. The difference is €62.

51. Accordingly, I would allow this appeal and substitute for the order of the High Court a decree in the sum of €55,062.

52. With regard to costs, the Court directs that the defendants furnish written submissions not exceeding 1,000 words within 14 days of the date of this judgment and the plaintiff will have a similar period to respond likewise.

53. As this judgment is delivered electronically, Allen and Meenan JJ. have authorised me to record their agreement with it.