



THE COURT OF APPEAL

APPROVED

Record Number: 2022/117
High Court Record Number: 2019/6715P
Neutral Citation Number [2023] IECA 232

Noonan J.

Binchy J.

Allen J.

BETWEEN/

GEAROID O'DALY

PLAINTIFF/RESPONDENT

-AND-

BUS EIREANN – IRISH BUS AND DECLAN SHEEHAN

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 28th day of September, 2023

Introduction

1. An ever-present issue in personal injury litigation is how the court is to assess complaints of pain and disability. A particular difficulty arises where such complaints are not apparently supported by medical evidence. How an injury affects a claimant will always be to a large extent subjective, but the court has to use its best endeavours to gauge the impact of an injury on the particular claimant. That in turn often involves the question of credibility. Judges sometimes remark that they believe the plaintiff, or the plaintiff did not exaggerate

their injury, or the plaintiff was a bad candidate for the accident and in many cases, that may suffice to arrive at a reliable conclusion.

2. Judges are fallible like everyone else and while the vast majority of plaintiffs are honest and truthful about their complaints, that is not invariably the case. Human nature being what it is, how people perceive their injuries will naturally vary. Some will be of a stoic disposition and wish to be seen not to complain unduly. Some at the other end of the scale may complain bitterly about things that most would take in their stride. But the law must treat everyone fairly and equally. Fairness means being consistent in one's approach to particular injuries, even if, to some extent, they may affect different people differently. Were it otherwise, assessment tools such as the Book of Quantum and the Personal Injuries Guidelines would be of little value.

3. These give value ranges for particular injuries to enable the court to take account of variable factors, such as how the particular plaintiff has been affected, the age of the plaintiff, the amount of treatment necessary and a host of others. A young person may have to live with the consequences of an injury for longer than an old person. Conversely, an older person may be more seriously impacted by an injury from which a younger person might recover more fully and quickly. These are all considerations to be put in the mix when the court comes to assess what is fair compensation in a given case.

4. For obvious reasons, the assessment of damages cannot solely depend on the purely subjective perception of the injury by the victim, although that is not to say that such perception is not relevant and important. It is of course easy to make a complaint of pain, whether you have it or not. I suspect most if not all judges who hear personal injuries claims from time to time experience exaggeration of varying degrees and indeed outright fraud. Courts therefore must necessarily adopt a robustly sceptical attitude towards complaints for which there appears to be no objective medical explanation.

5. None of this should be taken to suggest that where a victim of trauma complains of pain that is medically unexplained, he or she is to be assumed to be malingering. While that is certainly a possibility, in a small minority of cases victims of trauma may complain of physical pain that they perceive to be genuinely experienced, but for psychiatric or psychological reasons. Here again, medical evidence is critical to the court's understanding of the origin of a plaintiff's complaints and while they may have no obvious organic basis, evidence from, for example, a psychiatrist or psychologist may satisfactorily explain the symptoms complained of. It is not unusual, for example, for plaintiffs who develop depression following an accident to perceive more keenly their physical complaints than someone with a positive outlook unaffected by such mental disability.

6. Medical witnesses not uncommonly give evidence that the effects of litigation itself can have a significant impact on how a plaintiff perceives his or her injury. A striking aspect of the medical evidence given by one witness in this case was that research shows that where litigation is involved, only 3% of plaintiffs with orthopaedic injuries continue to attend orthopaedic clinics after the conclusion of the litigation. In the case of plaintiffs attending chronic pain clinics, the figure is even lower, at 2%.

7. While one might be tempted to take a sceptical view of this, it cannot be the case that 97% and 98% respectively of plaintiffs in such categories are all malingering. The alternative explanation that the conclusion of litigation has a significant beneficial effect must be correct. This is to do no more than illustrate the difficulty with which the court is faced in many cases where there is an apparent mismatch between what is subjectively claimed by the plaintiff, and what can be objectively verified by medical evidence.

8. At the end of the day however, sight must not be lost of the fact that the onus of proof is on the plaintiff to establish that whatever complaints they claim to have were caused by the defendants.

The Plaintiff's Evidence

9. The plaintiff is a bank official who was born on the 12th April, 1983. On the 8th June, 2016, he was cycling along the quays in Dublin near the Custom House when he was knocked off his bicycle by a bus which passed by too close to him. The trial judge heard and determined the liability issue first and held the defendants 100% liable. There is no appeal against that finding.

10. The plaintiff fell from his bicycle onto the footpath on his left hand side. After having a discussion with the bus driver who had stopped further up the road at a bus stop, the plaintiff subsequently reported the accident to a Garda he saw in a nearby shop who asked him if he was alright and the plaintiff said that he had pain in his left arm and left leg and ankle. He continued into work but had to leave shortly after to seek medical attention at the Mater Rapid Injury Clinic in Smithfield. He was told that an X-ray of his left elbow confirmed a fracture and he had suffered a sprain of his left ankle. He also said that he had suffered bruises, cuts and gashes on his legs and hands and ribs. He also says he complained of pain in his lower back. He was discharged with his arm in a sling and went home.

11. The next day he attended the Orthopaedic Unit in the Mater Hospital, having been referred for assessment of his fracture by the Rapid Injury Clinic. The plaintiff said he was sent for an X-ray of his right hand and the consultant confirmed that the three medial fingers were sprained. He said that when he woke up the next morning, he had shooting pains over his entire body from his neck all the way down the back of his legs and ankles.

12. He said that through the summer of 2016, he had constantly broken sleep, waking frequently with pain in the neck, the back or the ankle. He was receiving prescriptions from the consultants in the Mater to alleviate pain. He gave evidence of having undergone extensive treatment which included physiotherapy, chiropractic treatment, acupuncture, dry

needling, massage therapy, prescribed exercise, yoga and Pilates, as well as pain killing medication. In addition, the plaintiff underwent a large amount of investigation of his injuries and multiple MRI scans of the areas of complaint.

13. He complained of suffering from fatigue since the accident, which was ongoing at the time of the plaintiff giving evidence in the High Court, almost six years post-accident. He was previously very active, enjoying running and hiking prior to the accident, but had been unable to do so since and gained weight as a result. He said that shortly after the accident, he was suffering from daily low back pain and tightness in his neck with pain extending into his shoulders. He described his pain as being seven to eight out of ten and constant. He also complained of pain in his right wrist and was told that he had a fracture of the wrist by one of the doctors in the Mater.

14. He also complained of pain in his left knee. He said that when he fell off his bicycle, the first point of contact was his left elbow and left knee. He also injured his right knee which was painful. He confirmed that the physiotherapy regime commenced some six months after his accident in the winter of 2016. He had over one hundred sessions. He said the physio treatment was for his entire body, being everything from his neck to his back, legs, shoulder and ankles. A year later, he started attending a chiropractor. He had forty five sessions with that therapist. He also had two or three sessions of yoga and Pilates per week together with regular swimming and exercises.

15. The plaintiff said that he was referred to Mr. Daragh Hynes, consultant orthopaedic surgeon, at the Mater Hospital under whose care he was through 2016 and 2017. He had no surgical treatment but was sent for many X-rays and MRIs and also received a number of injections. He says he received three into his left ankle and one into his right ankle as recommended by Mr. Hynes. Mr. Hynes subsequently referred the plaintiff to the pain clinic

in the Mater Hospital where he came under the care of Dr. Hari Gopal, consultant in anaesthesia and pain medicine.

16. He first saw Dr. Gopal in 2018. The plaintiff said that Dr. Gopal wanted to have a number of sessions with him initially to understand exactly what was going on with his body and that there was extensive pain throughout. He said that Dr. Gopal prescribed a medication called Baclofen for him which he increased in June 2019 to three times per day. This helped him a bit to sleep at night although he continued to suffer from broken sleep notwithstanding. He was also taking a prescribed medication called Lyrica. Dr. Gopal further recommended that he try TENS therapy.

17. He attended a multi-disciplinary meeting on the 11th December 2019 arranged by Dr. Gopal which involved pain medicine consultants, a clinical psychologist, a pain physiotherapist, a chronic pain clinical nurse specialist and fellow in chronic pain medicine. At that time, now three and a half years post-accident, the plaintiff complained of still having very significant diffuse pain all over his body. The plaintiff was initially put forward for a pain management programme which ultimately did not proceed due to the advent of the pandemic in early 2020.

18. When asked about his current position, the plaintiff said that there had been a significant improvement and although he had less pain, he still has ongoing symptoms of pain, the main areas being the left ankle and the right wrist into the fingers together with occasional back pain and pain in the right shoulder. When asked about medication, the plaintiff said he was still taking four to six tablets of Solpadeine every day and also Duloxetine to help him sleep at night. He said that he continues to undertake a regime of exercises, yoga, Pilates and swimming.

19. He confirmed that all of these activities were being done for rehabilitation rather than leisure. He said that some days he has less pain and some days more pain and similarly is more mobile on certain days and not on others. While he conceded that a lot of doctors had said that he should have made a full recovery at this stage, he said that he knew his body better than anybody and he was prepared to undertake any treatment that might help him become as mobile and agile as he was before the accident. He confirmed that he had to give up running, even though he had tried to enter a number of races post-accident.

The Medical Evidence

20. Medical evidence was given by three doctors on behalf of the plaintiff and two on behalf of the defendants. When the plaintiff attended the Mater Hospital Rapid Injury Clinic on the morning of the accident, he came under the care of Dr. Adrian Moughty, consultant in emergency medicine. Dr. Moughty provided a medical report which was admitted into evidence by agreement of the parties, but he did not give oral evidence. He examined the plaintiff for the purposes of the report on 25 October 2016, some four and a half months post-accident. The report suggests that Dr. Moughty may not have seen the plaintiff on the day of the accident and was reliant on the medical notes of the doctor on his team who saw the plaintiff that day for the purpose of compiling his report.

21. The initial assessment disclosed that the plaintiff had a swollen and painful left elbow without visible bruising or a break in the skin. This was tender to palpation and painful on movement. There were superficial abrasions over his left knee and ankle. Examination of the knee appears to have been normal although his ankle was tender. He was apparently noted to be fully weight bearing. Those appear to be the extent of the complaints noted by the doctor who initially saw the plaintiff.

22. When Dr. Moughty saw him some months later, the plaintiff said that at the time of the accident he had pain in the medial three fingers of his right hand together with abrasions on his hands and thighs although these were not noted in the clinical notes. He also claims to have had difficulty weight bearing on the left ankle, which appears to conflict somewhat with the note that he was fully weight bearing. The plaintiff also suggested to Dr. Moughty that at the time of his initial examination, he was experiencing back pain and neck stiffness although, again, these appear not to have been noted by the examining doctor.

23. Dr. Moughty noted that X-ray assessment showed him to have a fracture of the radial head of his left elbow and he was referred to the orthopaedic service who the plaintiff says told him that he had a fracture of his right wrist but this was never confirmed and no evidence of such a fracture was adduced at the trial.

24. When Dr. Moughty examined the plaintiff, he was complaining of ongoing fatigue and pain at various points in his body. Somewhat confusingly, Dr. Moughty says that the plaintiff was getting occasional low back pain along the length of his back which the plaintiff claimed was regular and constant. He complained of pain, discomfort and reduced movements in his neck, this pain extending to his shoulders and causing poor sleep. He was on average getting four and a half hours sleep per night. He complained of pain in his left forearm with starting pain present mainly on the left but sometimes he gets the same sensation in the right arm. He complained of pain in both his left and right elbow, although the pain in his right elbow appears never to have been explained. Similarly, while complaining of pain in his left knee, he also complained of pain in his right knee and right ankle. Again, there appears to have been no particular explanation offered for the latter symptoms.

25. Dr. Moughty's clinical findings on examination were that the plaintiff was tender over the left trapezius. Although Dr. Moughty referred to the plaintiff having no tenderness in

the midline of his “*vital*” spine, I take this to be a typographical error for “*cervical*” spine. In that respect, the patient’s range of motion was normal with some pain on right rotation. There was no tenderness in either elbow and there was a full range of motion. There was some tenderness over the interphalangeal joint of his right ring finger with a normal range of movement. There was some local tenderness to palpation of the right patella but otherwise no abnormality. The left knee exhibited a normal clinical assessment.

26. Dr. Moughty’s report is prepared using the standard PIAB medical report template which includes a list of ‘tick boxes’ under various headings used to describe the effects of the injury. Five categories are given; normal, mild, moderate, severe and profound. Where the plaintiff had any symptoms, Dr. Moughty describes these in the relevant tick boxes as ‘mild’. Dr. Moughty was of the view that the plaintiff’s symptoms were in keeping with soft tissue injuries and he expected they would continue to improve with significant if not full recovery over the next year. He recommended physiotherapy and swimming.

27. The first medical witness to give *viva voce* evidence was Mr. Daragh Hynes, consultant orthopaedic and upper limb surgeon. A report dated the 28th July, 2020, four years post-accident, from Mr. Hynes was also admitted into evidence. In his report, Mr. Hynes indicated that the plaintiff was first seen about a week post-accident on the 16th June, 2016 having been referred by the Emergency Department in the Mater Hospital. X-Ray at that time revealed a minimally displaced fracture of the radial head of his left elbow which was conservatively treated in a sling.

28. Mr. Hynes, or his team, appear to have reviewed the plaintiff on about eight occasions over an approximately 17 month period between the initial consultation and the 16th November, 2017. I think it fair to say that on each review, the plaintiff complained of widespread diffuse pain in various areas of his body including the left elbow, right shoulder, right wrist, right forearm, the fingers of his right hand, back, right knee, neck and legs. Mr.

Hynes refers to the fact that on the 28th September 2018, the plaintiff was seen by another orthopaedic surgeon, Mr. Paul Moroney, in relation to his left ankle injury, although Mr. Moroney did not give evidence either by way of report or orally.

29. In his summary and prognosis, Mr. Hynes essentially focuses on the plaintiff's elbow injury from which Mr. Hynes considered that he had made a good recovery. However, he offers no prognosis in relation to the plaintiff's many other complaints other than to say that the plaintiff developed multi-site symptoms of pain and he referred him to the pain clinic at the Mater Hospital for assessment and treatment. In his oral evidence, Mr. Hynes referred to the fact that the plaintiff had been referred for a large number of MRI scans and X-Rays of various parts of his body and the results of these were all essentially normal.

30. Mr. Hynes confirmed in his oral evidence that he did not see the plaintiff after 2017.

31. The plaintiff's final medical witness was Dr. Hari Gopal, consultant in anaesthesia and pain medicine at the Mater Hospital. Dr. Gopal saw the plaintiff for the first time on the 17th December, 2018, 13 months after his last visit to Mr. Hynes and two and a half years post-accident. The plaintiff made similar complaints to Dr. Gopal as those recorded by Mr. Hynes, although he was by then complaining of left hip pain which radiated down to his left ankle, an apparently new complaint. On general physical examination, Dr. Gopal's findings appear broadly to have been that this was essentially normal in terms of range of motion but there were widespread tender points in various areas.

32. At the first consultation, Dr. Gopal advised physiotherapy and exercises and prescribed Baclofen. Notably, Dr. Gopal referred the plaintiff to a clinical psychologist, Dr. Damien Lowry, for a psychological consultation. Six months later, in June 2019, Dr. Gopal saw the plaintiff again when he had largely similar complaints and was due to be seen by the clinical psychologist.

33. The plaintiff was seen again after a further six months on the 11th December, 2019 for the purposes of a multidisciplinary meeting which involved pain medicine consultants, a clinical psychologist – presumably Dr. Lowry – a pain physiotherapist, and chronic pain clinical nurse specialists. The plaintiff was still complaining of widespread body pain which Dr. Gopal characterised as “*widespread myofascial pain*” although his neurological examination was unremarkable. Dr. Gopal’s final review was some eight months later on the 18th August, 2020 which appears to have been purely for the purposes of a medico-legal report. The plaintiff’s complaints were the same.

34. In the concluding opinion and prognosis section of his report, Dr. Gopal expressed the view that the plaintiff’s examination was consistent with non-specific chronic widespread body pain following a road traffic accident. He said it was extremely difficult to give a prognosis in relation to these injuries and said that he understood that his complaints are temporally associated with the accident and improvement was unlikely given the duration of his symptoms. Importantly again, Dr. Gopal states that it would be vital for the plaintiff to explore psychological strategies and he recommended that a report be obtained from Dr. Damien Lowry. Significantly, following an enquiry by the trial judge, the court was informed that no psychologist would be giving evidence on behalf of the plaintiff. It is not known whether the plaintiff ever attended Dr. Lowry or any other psychologist.

35. In his direct examination, Dr. Gopal was taken through his medical report and was asked what the conclusions of the multidisciplinary meeting were. His answer was that “*the multidisciplinary meeting agreed that it was a widespread body pain syndrome and sometimes it’s also called as medically unexplained pain.*” Dr. Gopal went on to confirm that the plaintiff had undergone multiple investigations “*without any meaningful result which is treatable*”.

36. Under cross-examination, Dr. Gopal agreed that he had stated that the plaintiff's complaints were "*temporally*" associated with the accident, but he also agreed that the plaintiff's complaints had no identifiable cause. Dr. Gopal also confirmed that such complaints as were made by the plaintiff could occur without any injury. The views of one of the defendants' doctors, Mr. Aidan Gleeson, was put to Dr. Gopal in the following terms:

"Q. Well, without going through all of his findings then I can tell you on examination that Mr. Gleeson says that 'the multitude of reported injuries and his ongoing clinic complaints' - 'clinical complaints ... are not consistent with the likely injuries sustained ... in my opinion'.

A. That is probably, I think, to a certain extent, yes, and he says, I do agree with that, it is sometimes, his symptoms are beyond the initiating event. So we generally, as Mr. Hynes said, we all expect them to have healed by then. There is a certain group of patients where they have an emotional component which actually manifests itself in a widespread body pain and that is the problem with chronic pain."

37. It was further put to Dr. Gopal that Mr. Gleeson had formed the view that the plaintiff was exaggerating:

"Q. '... when I examined him today he had many recognised features of exaggeration'?"

A. Probably I think I would not, actually I am not the right person to answer that question. Exaggeration --

Q. -- Alright --

A. -- That would be a clinical psychologist who can actually do those things."

38. The first medical witness called on behalf of the defendants was Mr. Aidan Gleeson, consultant in emergency medicine. He examined the plaintiff on two occasions, the first

being the 21st November, 2019 some three and a half years post-accident. Mr. Gleeson noted that at that juncture, the plaintiff had had 103 physiotherapy sessions and 33 with a chiropractor in addition to attending yoga and Pilates on an ongoing basis.

39. On examination, the plaintiff was unable to extend his neck at all, which he told Mr. Gleeson was due to pain. In examining the plaintiff's right wrist, Mr. Gleeson asked him to grip Mr. Gleeson's fingers tightly but he could not make a full fist. However, when the plaintiff was asked to make a full fist at a later time in the examination, he did so easily. There was some restriction of straight leg raising on the right side which the plaintiff advised Mr. Gleeson was due to pain in his right groin, a previously unrecorded complaint. Mr. Gleeson observed that the plaintiff's general movements were atypically jerky and cogwheel in nature. He said that axial compression on top of his head caused him low back pain. He was disproportionately tender to light touch in his lower back.

40. Mr. Gleeson's opinion was that the multitude of reported injuries and ongoing clinical complaints were not consistent with the likely injuries sustained. The plaintiff reported that on the date of examination by Mr. Gleeson – three and a half years post-accident – he continued to suffer from daily pain in his neck, his back, his right shoulder, his right wrist, his right hip, his right knee and both ankles. In concluding his report, Mr. Gleeson made the following comments:

“Further, when I examined him today he had many recognised features of exaggeration, such as complete inability to extend his neck, disproportionate tenderness to light touch in his neck and back, general jerky movements, inconsistency in making a full fist and unexplained pain in the right groin when he elevates his left leg.”

41. Mr. Gleeson again saw the plaintiff about a year later in October, 2020, now four years and four months post-accident. The plaintiff informed Mr. Gleeson that he continued to suffer from all of the same complaints as indicated on the previous examination. On this occasion, on examination the plaintiff had a full range of neck movements and the overall examination was generally normal. The behaviours identified by Mr. Gleeson at the time of his first examination do not appear to have been repeated. Mr. Gleeson offered the view that the injuries sustained by the plaintiff in the accident would in the normal course be expected to resolve within a period of months. He could find no recognised physical basis for his complaints and certainly nothing that could reasonably be attributed to the accident.

42. In his oral evidence, Mr. Gleeson essentially rehearsed the contents of his reports. When asked about his observation concerning axial loading on the top of the plaintiff's head causing him low back pain, Mr. Gleeson said:

"... if you press on the top of the head lightly or relatively firmly and ask the patient does it cause pain in their back and they [say] yes, there's a non-organic source for the pain. And it's either a psychological thing or it's malingering."

43. He agreed with the views expressed in Dr. Moughty's report that the plaintiff should recover within about a year of the date of that report, four and a half months post-accident. Mr. Gleeson suggested his view was a period of six to nine months after which the plaintiff could have some minor symptoms. In cross-examination, Mr. Gleeson made reference to medical literature concerning follow up attendance post-litigation by patients at orthopaedic and pain clinics to which I referred in the introduction.

44. The defendants' final witness was Mr. James Colville, consultant orthopaedic surgeon. Mr. Colville provided a report and gave oral evidence. He examined the plaintiff on one occasion on the 18th February, 2020, some three years and eight months post-accident. Mr.

Colville recorded the plaintiff's various complaints and the very extensive therapy he had undergone. Among the complaints made to Mr. Colville, the plaintiff stated that his right hip was painful and he pointed to the posterior aspect of his right groin stating that overall this would be his biggest problem. Mr. Colville undertook a "head to toe" examination and this was, in essence, normal. He commented, *inter alia*, that there was no muscle wasting in any of the areas of complaint.

45. In the summary and prognosis section of his report, Mr. Colville says that the plaintiff made a full recovery in respect of the fracture of his left elbow. With regard to the plaintiff's other complaints, Mr. Colville said the following:

"It appears that a number of other injuries were reported over time but these would be difficult to relate to the incident as described.

Nevertheless, multiple soft tissue injuries would be expected to resolve over a period of time - perhaps six - nine months. Beyond that time, I find it very difficult to relate his musculoskeletal complaints to the incident which occurred so long ago.

Overall, in my opinion, this patient's problem is not musculoskeletal but he has issues which are outside my expertise."

46. In his oral evidence, Mr. Colville said that he did not find any significant objective abnormal findings when he examined the plaintiff. In particular, the absence of muscle wasting indicated that there was no part of his body which was not being moved, as a consequence of injury. He was of the view that the diffuse pain that the plaintiff was complaining of was not related to his accident. In cross-examination, Mr. Colville was asked about CRPS, Chronic Regional Pain Syndrome, and he said that in such cases, there are definite objective findings which were not present here. He agreed that complaints of a widespread body syndrome or something like that were outside his area of expertise.

Judgment of the High Court

47. At the conclusion of the hearing, the judge proceeded directly to give a short *ex tempore* judgment extending over five pages of the transcript. He started by noting that he had read the medical reports and observed that “*the camps here could not be more sharply divided*” and this meant that he was obliged to prefer one over the other. The judge accepted that the plaintiff’s complaints are “*way out of proportion to his physical injuries*” and this was conceded by all the doctors. The judge then said:

“Dr. Gopal must prevail to a certain extent because he has approached this as treating doctor and he has approached it from a multidisciplinary viewpoint. And he accepts he has to take the plaintiff as he finds him. He can offer no psychological insight into what has happened to the plaintiff or why the plaintiff is complaining to the extent that he does, and has consistently complained, and to the extent that has very properly excited the scepticism of Mr. Gleeson and the bewilderment of Mr. Colville.

So on the evidence Mr. Gopal and the plaintiff’s doctors, Mr. Hynes, and the plaintiff’s general practitioner, must win by a very short head.”

The reference to the plaintiff’s general practitioner, who did not give evidence, appears here to be erroneous.

48. The judge referred to the plaintiff having attended physiotherapy well beyond what anyone could have contemplated as being usual and the unprecedented level at which he had gathered together items of special damage, to which I will refer further. The judge said the plaintiff “*struck me as someone who is [recte. has] let this entire accident come down at him like a ton of bricks.*”

49. The judge repeated that the plaintiff's symptoms were way out of proportion to the injuries he suffered and would not have been surprised to have found psychological support for the fact that the plaintiff has gone nearly "*manic with this accident*". The judge then said:

"But having said that, I believe he believes that he is suffering from them and I think he is suffering from them and I must, as I say, by a short head, go along with what Mr. Gopal says. So Mr. Gopal is of the opinion that the plaintiff is suffering with a consistent and non-specific chronic widespread body pain, following a road traffic accident. There is no other identifiable cause for this. I do not accept that the plaintiff is exaggerating or making it up and the only other identifiable cause, on the evidence, is the road traffic accident. Therefore - and it's link is, of course, temporal - but in my view, on the balance of probabilities it is also causative. So in those circumstances the plaintiff must succeed."

50. The judge considered that the plaintiff's reaction to the accident was "*over the top*" and that he is "*just obsessed about it*". The judge noted that there was no evidence that the plaintiff has any physical impairment apart from his belief that he is suffering from physical impairments.

51. The judge went on to say that "*I am absent any psychological support for this, but I am applying my impression and giving the plaintiff the benefit [of the] doubt.*"

52. The judge went on to allow two thirds of all special damages claimed by the plaintiff and all of the costs associated with X-Rays, MRI Scans or any other diagnostic imaging. The judge concluded his judgment as follows:

"As regards general damages, obviously he has a, concrete injuries which involve the fracture of the elbow, soft tissue ligamentous injury, and I am prepared to accept

he suffered all over problems that physically probably would have continued for perhaps a year or two at most. And I am satisfied he has, he is suffering from pain syndrome, that it is improving, and that going along with what Dr. Gleeson suggests, once these proceedings are out of the way I greatly expect the plaintiff to go on to a full recovery.

But nonetheless his life for many years has been seriously and, as far as he is concerned, genuinely impacted by these injuries. And I feel that the appropriate award of damages in this case is an award of general damages to date in the sum of €75,000 and in the future, €25,000 ...”

53. The parties agreed that the appropriate calculation of the special damages in line with the court’s judgment amounted to €24,795.51 and accordingly, the court awarded the plaintiff a total sum of €124,795.51.

The Appeal

54. In their grounds of appeal, the defendants complain that there was no evidence to support the judge’s conclusion that there was a causative link between the accident and the complaints of widespread body pain syndrome or medically unexplained pain. The defendants suggest that the trial judge erred in failing to properly interpret the medical evidence on both sides in coming to his conclusions. The defendants further submit that the general damages were excessive, unsupported by the evidence and awarded without reference to the Book of Quantum. There was no basis for the trial judge awarding the special damages on a two thirds basis which was unsupported by the evidence. The defendants suggest that the overall level of general damages in this case having regard to the Book of Quantum should have been in the region of €30,000 to €40,000 and invite this Court to substitute an order to that effect for that of the High Court.

The Special Damages

55. For a case involving a fairly minor fracture of the elbow requiring only conservative treatment, and relatively modest soft tissue injuries, the claim for special damages advanced by the plaintiff in this case is worthy of some note. With the vouchers, it runs to 230 pages. It includes many claims of a kind that one might find in a case of this nature such as prescription medications, physiotherapy, chiropractor and travel expenses. While these are the normal sort of things one would expect to see claimed, their extent is far from normal.

56. Furthermore, there are headings of claim that are, to say the least, unusual. Thus, a sum of €682.26 is claimed for “*sports gear/equipment*”. The items claimed include things such as yoga equipment, swimming togs, goggles and hat, and a book on pain management. Over €5,000 is claimed for prescriptions and over €7,000 for physiotherapy. In addition, over €2,000 is claimed for chiropractor expenses and another €4,380 for “exercise” expenses. There are other claims for a wide variety of treatments which appear to include body massages and acupuncture which total over €4,300. Subscriptions to Laya Healthcare – a medical insurance company – are claimed at almost €7,000. Gym memberships are claimed at €910. The total amount claimed under all these headings is almost €36,000. No claim for loss of earnings was advanced.

The Medical Evidence analysed

57. It seems clear from his judgment that the judge relied primarily on the evidence of Dr. Gopal to ground his conclusions on both causation and quantum. There was no real dispute about the actual injuries suffered by the plaintiff as recorded in the report of Dr. Moughty, whose team were the first to see and treat the plaintiff after the accident.

58. When Dr. Moughty examined the plaintiff four and a half months post-accident, his elbow injury had largely recovered in that there was no focal tenderness on palpation of either elbow and he had a full range of motion of both of them without restriction. With regard to the plaintiff's other injuries, Dr. Moughty's view was that they would continue to improve with significant if not full recovery over the next year, *i.e.* within about a year and a half of the accident.

59. Both Mr. Gleeson and Mr. Colville expected that in the normal course of events, the plaintiff ought to have recovered within a matter of six to nine months in respect of his soft tissue injuries; although Mr. Gleeson was prepared to go along with the slightly longer time frame suggested by Dr. Moughty. Mr. Hynes did not offer any prognosis in relation to any of the plaintiff's injuries with the sole exception of his elbow and in that regard, expressed himself satisfied that he had made a good recovery in respect of his elbow and was unlikely to have any severe adverse sequelae in the future.

60. That was the clear preponderance of the medical evidence and in fairness to Dr. Gopal, he did not disagree with any of that. In fact, Dr. Gopal only saw the plaintiff for the first time about two and a half years after the accident, by which time according to all the other doctors the plaintiff should long since have recovered. Dr. Gopal is a pain specialist and the plaintiff was making complaints of pain which he was obliged to accept at face value and attempt to treat them, which he did. He readily conceded that there were no objective signs or symptoms which confirmed any physical or organic origin for these complaints beyond what the plaintiff himself said. Indeed, this was a point that Mr. Gleeson made in the course of his evidence and the judge criticised him for it on the basis that he was attempting to undermine the expertise of Dr. Gopal.

61. In fairness to Mr. Gleeson, I think that was something of a mischaracterisation of his evidence by the judge. Mr. Gleeson was merely pointing to the fact that pain specialists are

called upon to treat patients who complain of pain, whether there is an organic explanation or not. Dr. Gopal himself emphasised the importance of the psychological or emotional component in such presentations and thus the importance of the intervention of a clinical psychologist, to whom the plaintiff was referred. The following points, to my mind, emerged clearly from Dr. Gopal's evidence:

- (a) The only association between the plaintiff's complaints as expressed to Dr. Gopal and the accident was "*temporal*".
- (b) The same complaints could occur in the absence of any injury.
- (c) The plaintiff's complaints were not consistent with the injuries he suffered in the accident.
- (d) There was no medical explanation for the plaintiff's complaints.
- (e) It was put to Dr. Gopal that the defendants' doctors would say that the plaintiff was exaggerating and rather than disagree with that proposition, Dr. Gopal said he was unable to offer any view on this as he felt it was outside his area of expertise and one for a clinical psychologist.

62. It is to my mind of considerable significance in this case that no evidence was led from a clinical psychologist despite the fact that the plaintiff was clearly referred to one. Dr. Gopal considered that the intervention of such an expert was essential and expressly advised that a report be obtained from the clinical psychologist concerned, Dr. Lowry.

63. In my judgment, the High Court erred in coming to the conclusion that there was a conflict in the medical evidence which required the judge to opt for one side or the other. In truth, it seems to me that no such conflict actually arose. Dr. Gopal clearly accepted that there was no organic basis for the plaintiff's complaints and I think it is evident from his evidence as a whole that he considered that there might be a very real psychological element

to those complaints. He readily accepted that whether the complaints could be considered to be genuine or not was a matter for a clinical psychologist.

64. As I have said, Mr. Gopal was duty bound to accept the plaintiff's complaints at face value and endeavour to treat them as he thought appropriate, whether by pain management interventions or referral to a psychologist or both. In my view, the judge was wrong to conclude that because Dr. Gopal recited the plaintiff's complaints and endeavoured to deal with them, this must be taken to mean that the plaintiff had genuine, as opposed to exaggerated, complaints; the latter being the very thing Dr. Gopal expressed himself unable to comment upon.

65. In contrast, Mr. Gleeson was very firmly of the view that the plaintiff was exaggerating and he simply did not believe him. Mr. Gleeson gave very specific reasons for reaching that conclusion and gave a number of examples of things that occurred during his examination of the plaintiff which could only be consistent with malingering. The judge appears to have largely ignored that evidence.

66. With regard to Mr. Colville's evidence, the judge appears to have latched on to the comment by Mr. Colville that the plaintiff's problems are not musculoskeletal but he has issues which are outside Mr. Colville's experience. The judge seems to have taken that as a concession by Mr. Colville that his expertise did not extend to the issues with which the plaintiff presented. However, I think Mr. Colville was strongly suggesting that since there was no organic basis for the plaintiff's ongoing complaints, even accepting them to be genuine, they must stem from a psychological origin, an area in which Mr. Colville did not profess expertise.

General Damages

67. As noted at the outset, the onus of proof rests on the plaintiff to prove that whatever complaints he makes have been, on the balance of probabilities, caused by the accident. That is primarily a matter for medical evidence and the medical evidence in the present case does not, in my view, support the conclusion that the plaintiff's ongoing complaints were caused by the defendants. The judge appears to have considered that the causal nexus between the accident and those complaints was established by the evidence of Dr. Gopal but, for the reasons I have explained, Dr. Gopal's evidence fell well short of demonstrating that causal link. The fact that the complaints were said to have a temporal nexus with the accident is to my mind not enough, as a merely temporal link is as consistent with malingering as it is with a genuine complaint.

68. All the medical evidence, including that of Dr. Gopal, establishes in this case that there is no verifiable organic basis for the complaints that the plaintiff now makes. They are, as Dr. Gopal said, "*medically unexplained*". That in turn can only mean that either the plaintiff's complaints are genuine and have a psychological origin, or they are not. The plaintiff conspicuously chose not to lead any evidence from a psychologist which would account for the plaintiff's claimed ongoing symptoms and accordingly, failed to establish that the defendants are responsible for anything beyond the injuries that were established by the medical evidence. While the judge may well have believed that the plaintiff believed he had these symptoms, that cannot, without more, establish causation for the many reasons alluded to in the introduction to this judgment.

69. The defendants complain that the judge himself sought to diagnose the plaintiff as suffering from a pain syndrome in the absence of any evidence and there is some merit in that contention. There was no evidence which would justify a finding that the plaintiff was suffering from a pain syndrome, for example CRPS, which, as explained by Mr. Colville, is

a specific discrete finding that is medically verifiable. That was certainly not Dr. Gopal's evidence. Indeed, the judge himself recognised that there was no psychological support for his conclusion, which unfortunately undermines it.

Comparable Cases and the Book of Quantum

70. The approach the court should adopt to the assessment of general damages for personal injuries is by now well-rehearsed in many recent judgments of this Court in particular. The concept of proportionality has been repeatedly stressed, and in this context, proportionality requires that the award be proportionate to the maximum available in the most serious cases and also to awards for other injuries be they more or less serious or at an equivalent level. It is relevant in that regard to consider comparable cases, where available.

71. In the present case – leaving to one side for the moment the plaintiff's fractured elbow – the plaintiff suffered various soft tissue injuries already described to his neck and back and to upper and lower limbs. The medical evidence to which I have already referred was to the effect that in the normal course, these injuries ought to have resolved within, at most, two years of the accident. In *McKeown v Crosby* [2020] IECA 242, the plaintiff was a 30 year old woman who suffered soft tissue injuries to her shoulder, neck and back in a road traffic accident. At two years post-accident, most of the plaintiff's symptoms had largely resolved although she was still getting some treatment and had intermittent complaints related to activities. It was considered that she should largely recover subject to some low-level persisting symptoms. The High Court awarded €70,000 for general damages which was reduced to €35,000 by this Court on appeal.

72. Similarly, in *Payne v Nugent* [2015] IECA 268, an award of €35,000 was made by this Court in favour of a plaintiff who suffered soft tissue injuries of broadly speaking two years' duration.

73. With regard to the elbow injury, the plaintiff suffered a simple fracture to his radial head which was treated with a sling and appears, as already noted, to have recovered by the time of Dr. Moughty's examination at four and a half months' post-accident. The Book of Quantum, to which the judge did not refer, categorises fractures of the radius and ulna bones into minor, moderate, moderately severe and serious and permanent conditions. The minor category is stated to comprise:

"A simple fracture to either the radius or the ulna, with no joint involvement which has substantially recovered - €22,100 to €38,300."

74. Having regard to the foregoing, I consider that the appropriate sum to compensate the plaintiff for his soft tissue injuries is, in line with the cases to which I have referred, a sum of €35,000. I would allow a further sum of €20,000 in respect of the fracture of the radius. This clearly falls towards the lower end of the "*minor*" category in the Book of Quantum but it is appropriate to discount the full value as this is a multiple injuries case to which the principles recently identified in *Zaganczyk v Pettit* [2023] IECA 223 apply, albeit that that was a post-Guidelines case unlike the present appeal.

75. Accordingly in my view, the appropriate award for general damages in this case is €55,000.

The Special Damages assessed

76. None of the special damages in this case were agreed and accordingly, it fell to the plaintiff to prove that each item claimed was properly recoverable from the defendants. Unfortunately, it would appear that the judge did not engage with these claims in any

meaningful way beyond simply saying that he would allow the claims for all the scans and two thirds of everything else. There was no basis in the evidence or elsewhere for adopting such an approach which I am satisfied was erroneous.

77. As previously explained, the evidence established that the plaintiff ought to have made a full recovery from all his injuries within a period of two years post-accident at the latest. Accordingly, in respect of treatment fees, medications and the like, I propose to allow any appropriately recoverable claims up to and including the 7th June, 2018. I set these out hereafter as they are to be found in the schedule furnished by the plaintiff's solicitors:

- Prescriptions - The amount claimed up to the cut-off date comes to €1,655.
- Physiotherapy - On the same basis, the amount I propose to allow is €4,252.
- Chiropractor - The appropriate figure here is €761.00.
- Podiatrist - €55.00.
- Osteopath - €29.00.
- GP - €295.00.
- Exercise expenses to the cut-off date, these come to €1,601.
- Sports gear/equipment - It does not appear to me that any of these items are properly recoverable as items of special damage.
- Travel - €40.10.
- Untitled - but relates to massage and acupuncture. Only the first two items are within the two year period amounting to €110.00.
- Laya Healthcare - No proper basis was established in the evidence for recovery of any of the premiums paid. When asked in evidence to account for the reason

for these claims, the plaintiff responded that he would have to consult with his counsel.

- Medical expenses - Although it is a little unclear how precisely these arose and despite some of them post-dating the cut off, I propose to allow them as claimed in the amount of €1,680.
- Further items are claimed in respect of additional prescriptions, travel, treatment and Laya Healthcare which are long after the cut-off date.
- Consultation Fees - which are undated but presumably relate to medical consultations are allowed at €210.00.
- Gym membership - is clearly not an appropriate item of special damage.
- Miscellaneous - is unidentified and therefore cannot be allowed.
- Swearing - Presumably relates to the completion of an affidavit. It is not a proper item of special damage.

The total therefore comes to €10,688.10.

Conclusion

78. The foregoing results in a net decree in favour of the plaintiff in the sum of €65,688.10. To that extent, I would allow this appeal and substitute for the order of the High Court judgment for €65,688.10.

79. With regard to the question of costs, I would direct that the defendants deliver written submissions not exceeding 1,000 words within 14 days of the date of this judgment and the plaintiff will have 14 days to respond likewise.

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