THE COURT OF APPEAL

Appeal No. 2016/274

Irvine J.
Hogan J.
Hedigan J

BETWEEN/

PATRICIA WALSH

PLAINTIFF / RESPONDENT

- AND -

TESCO IRELAND LIMITED

DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 3rd day of March 2017

1. This is the defendant's appeal against the judgment and order of the High Court (Barr J.) dated 6th May 2016. By his order the High Court judge awarded the plaintiff a total sum of €1,439,495 damages in respect of injuries sustained by her in a fall which occurred at the defendant's premises on 28th August 2012 and in respect of which liability was conceded.

2. The damages awarded were as follows:-

General damages for pain and suffering to date: €125,000

General damages for pain and suffering into the future: €135,000

Past special damages: €110,987

Loss of earnings for two years: €20,000

Loss of earnings thereafter: €373,030

Future Urology costs: €132,750

Future home help: €110,000

Miscellaneous expenses: €192,882

Aids and appliances: €239,846

TOTAL: €1,439,495

3. In its notice of appeal the appellant seeks to challenge the lawfulness of the award made in respect of each category of loss.

4. Before engaging with the submissions of the parties, it is necessary to briefly engage with the relevant background facts as found by the trial judge. These are extensively set out in the lengthy and careful judgment. That being so, I will only refer to those facts which I consider material to the main issues to be addressed on this appeal.

Background facts

5. The respondent, Ms. Patricia Walsh, is a married lady who was born on 3rd March 1968. She and her husband run a stud farm in Co. Clare and they have two daughters.

6. On 28th August 2012, Ms. Walsh slipped and fell heavily to the floor on the appellant's supermarket premises at Kilrush, Co. Clare. At the time of her fall, Ms. Walsh was in robust good health. She had recovered fully from the effects of a fall in which she had injured her back in 2008.

7. Ms. Walsh was hospitalised following the events the subject matter of these proceedings. She had severe pain in her low back radiating into her left leg. Strong pain relieving medication and frequent injections were required. Ms. Walsh developed urinary symptoms and a loss of sensation in the genital area. She had problems both with urine retention and leakage. Ultimately self catheterisation was commenced three times daily and the trial judge accepted that she will require to self catheterise in this fashion for the rest of her life. It was not contested that Ms. Walsh has lost the enjoyment of normal intimate sexual activity by reason of her injuries and that this situation would be permanent.

8. Insofar as Ms. Walsh's back is concerned, in February 2013 she underwent surgery in the course of which a disc fragment was removed from the spine. The benefit of this surgery was short lived in terms of pain relief. In 2014, she undertook an eight week in-house extensive rehabilitation programme in the National Rehabilitation Hospital. This was not successful. Ms. Walsh also undertook a series of pain relieving injections and spinal blocks in an effort to bring her pain under control. In February 2015 she had surgery to insert a spinal cord stimulator in her back. The trial judge accepted Ms. Walsh's evidence that her pain has been significantly reduced as a result, but it has not resolved. She continues to have ongoing pain and this will likely be permanent with the result that she will require repeated rhizotomies and the ongoing replacement of her spinal cord stimulator over the course of her life.

9. It is clear from the judgment of the trial judge that as a result of her physical injuries, Ms. Walsh also developed severe psychological sequelae. She was diagnosed with post traumatic stress disorder and depression. She has required and will continue to

require significant anti depressant medication and continues to need the support of ongoing counselling. It was accepted by the trial judge that her psychiatric problems were unlikely to resolve themselves.

10. It is clear from the evidence recited by the trial judge in the course of his judgment that the plaintiff's social and recreational life has been grossly curtailed. She lost many friends and found herself unable to participate in any of the sporting activities she formally enjoyed. She had participated in a number of mini triathlons and had played GAA at an extremely high level. She was an experienced horsewoman and was capable of breaking horses for the purposes of her business. Further, Ms. Walsh has been left with an ataxic gait and she requires a stick to assist her for a wide range of activities. Her life is now to be punctuated by ongoing medical treatment and review.

The submissions
11. I will now summarise the submissions of the parties. For the ease of the reader, each of the headings which follow, insofar as they relate to the appellant's challenge to a particular award of damages made by the trial judge, are those which he used to describe the relevant head of claim at para. 214 of his judgment and which I have replicated at para. 2 of this judgment.

The appellant's submissions

General damages for pain and suffering to date: €125,000

General damages for pain and suffering into the future: €135,000
12. As to the overall award of general damages in the sum of €260,000, the appellant submits that the respondent's injuries did not merit an award of such magnitude. It contends that the award was disproportionate in all of the circumstances such that it should be set aside and varied downwards. In this regard it relies on the decision of this court in *Payne v. Nugent* [2015] IECA 268 and *Nolan v. Wirenski* [2016] IECA 56.

13. While the appellant acknowledges that the respondent suffered serious injuries it nonetheless submits that in assessing general damages the trial judge did not have sufficient regard to an injury which she had sustained to her back in 2008 which was severe enough to warrant an orthopaedic review and which was a negative prognosticator in terms of her health.

14. The appellant also submits that the level of general damages awarded fails to reflect the significant improvement in the respondent's level of pain since the insertion of her spinal stimulator and in addition the range of activities which she is capable of enjoying. Counsel for the appellant, Mr. Lynch S.C., relies upon Ms. Walsh's evidence concerning her ability to ride a bicycle, drive a car and attend social events. He also seeks to rely on the fact that she scored 16 out of 20 on the Barthel ADL Index test, a test which measures a person's capacity for independent living.

15. Counsel also draws the court's attention to the current Book of Quantum and in particular to the range of values provided in respect of severe and permanent soft tissue spinal injury (€52,300 - €92,000). He does so in an effort to demonstrate that the award made in this case was excessive, it being almost three times the upper end of the range advised. It is submitted that even taking into account the respondent's other injuries and possible future surgeries that the ultimate award of general damages is excessive.

The management of the trial
16. While not argued with any great enthusiasm, the second submission advanced is that the trial judge erred in law when he permitted the interruption of the respondent's examination in chief to allow two of her expert medical witnesses give their evidence, despite objection. This was unfair to the appellant in that it was denied the opportunity of putting to these experts any admissions that the respondent might have made concerning her condition or her activities while under cross examination. This inherent unfairness was a ground which might, depending upon the court's conclusions on the other grounds of appeal, warrant a retrial.

RRR
17. The appellant submits that the High Court judge, in calculating future special damages, used excessively high multipliers because he accepted as applicable an impermissible RRR ("RRR") on investment income. No evidence had been adduced to warrant a departure from the 3% or 2.5% RRR advised in *Boyne v. Dublin Bus* [2006] IEHC 209 and *McEneaney v. Monaghan County Council* [2001] IEHC 224. The respondent had made out no specific case to support the calculating of her various claims for future special damages by reference to an assumed RRR on investment income of either 1% or 1.5% per annum. She had done no more than provide actuarial reports calculating her losses by reference to different discount rates. The decision in Russell *v. Health Service Executive* [2015] IECA 236 could not, counsel submits, be relied upon to support a RRR on investment income of 1% or 1.5% as in its judgment the court had stated that a consideration of the appropriate RRR to be used in non-catastrophic injury cases would be left over to be decided in a case where it arose. Further, the respondent was not under the same level of disability as the plaintiff in *Russell*.

Loss of earnings for two years: €20,000. Future loss of earnings: €373,030:
18. The appellant submits that in calculating the respondent's loss of future earnings the trial judge erred in law and/or in fact in failing to afford the respondent some future income generating capacity, having regard to the evidence. The evidence established that the respondent had significant occupational skills and would be capable of working from home with the result that the trial judge should have given Ms. Walsh an assumed income generating capacity of circa €100 net per week.

19. The second submission advanced by the appellant concerning this head of claim is that the award was excessive by reason of the failure on the part of the trial judge to make his calculation by reference to an assumed RRR of 3% or 2.5%.

20. The appellant further argues that the sum of €20,000 allowed by the trial judge under the heading "Loss of earnings for two years" was included in Ms. Walsh's claim for future loss of earnings in respect of which the trial judge had awarded €373,030. Accordingly, the award had to be reduced by €20,000 to avoid double recovery.

21. Finally, counsel submits that the trial judge erred in law in failing to reduce the respondent's future loss of earnings to take account of the exigencies outlined in the decision in *Reddy v. Bates* [1983] I.R.141.

Future Urology Costs: €132,750
22. The appellant submits that the trial judge's calculation of future urological costs was not supported by the evidence. In addition, it maintains that the trial judge applied the incorrect multiplier based upon an impermissible assumed RRR on investment income.

23. The trial judge allowed in full the capitalised costs of the respondent's participation in what is commonly known as the Drugs Payment Scheme. The terms of that scheme require the patient to pay the first €144 of the cost of their drugs or other specified medical needs each month. The respondent's expert witnesses accepted that the recurring costs of the equipment she required for

self catheterisation were covered by the scheme. Hence, in circumstances where the trial judge had awarded her the full capital costs of participating in the scheme in future years, it was said that he should not have allowed for her future catheterisation costs as a separate item of special damage. It is submitted that the evidence only supported future urology costs in the sum of €900 per annum. This would reduce the award under this heading to €26,550.

Future Home Help: €110,000
24. The first complaint made by counsel for the appellant is that the sum awarded for past home help (€29,000) was excessive. That care had been provided by family members who had not been paid. Counsel submits that the trial judge impermissibly allowed the cost of that care at commercial rates.

25. The appellant also submits that insofar as the sum awarded in respect of future home help is concerned (€110,000), the same was excessive by reason of the fact that the loss was calculated using a multiplier reflecting an assumed RRR of 1%. Nonetheless counsel, very fairly in my view, accepts that the appellant's own evidence in respect of this head of claim valued the respondent's claim at €95,937 using a 3% RRR. Thus, he accepted that if this court was satisfied that the appropriate RRR was 1.5%, his client's figure would come in at €116,844, a sum slightly above that which was actually awarded by the trial judge.

Miscellaneous Future Expenses: €192,882
26. Counsel for the appellant submits that the trial judge failed to calculate the capital costs of the items dealt with under this head of claim by reference to the evidence as a whole as is apparent from para. 186 and 187 of his judgment. He appears to have had no regard to the evidence of the defendant in relation to this head of claim, which comprised a significant number of separate elements, and which was allowed in full. In addition, he submits that the evidence did not support the plaintiff's claim for the cost of two rhizotomies procedures per year. The evidence was that they would likely be required every nine to twelve months on average. Likewise, the trial judge, when valuing the respondent's claim for the cost of visiting her general practitioner twelve times a year, had failed to discount that claim to take account of the fact that people ordinarily visit their general practitioner a number of times per year.

Aids and Appliances (including cost of home adaptation): €239,846
27. Counsel submits that the evidence did not support Ms. Walsh's need for all of the aids and appliances which were allowed in the sum awarded by the trial judge. He ignored the evidence that Ms. Walsh was not using some of the equipment which had already been provided. He instanced in this regard a trolley and perching stool. Further, the trial judge had allowed for the cost of a mobility scooter, which Ms. Walsh had stated she would not use.

28. Other than to have removed one or two items from the respondent's list of aids and appliances, the trial judge would – or so the argument ran - appear to have accepted in full all other items and their proposed cost and had paid no regard to the evidence of the appellant's occupational therapist, Ms. McElwain.

29. Counsel submits that the trial judge ought to have made his assessment based upon what he considered "a reasonable individual with an appropriate level of resources" would likely expend on their own care in terms of aids and appliances inflicted with similar injuries to those of Ms. Walsh. The appellant ought not to have been fixed with the cost of a surface level hob, built-in oven, drawer dishwasher and standing freezer as these were all items that a householder might be expected to purchase for themselves in any event. Given the functional capabilities of the respondent no reasonable person spending their own money would have made the changes at the cost allowed by the High Court judge.

30. Counsel submits that this Court is in a position to determine what should have been awarded in respect of this head of claim and he invites the court to reduce the sum awarded in line with the evidence of Ms. McElwain, the appellant's occupational therapist, to take account of the practical realities of the respondent's daily requirements and her functional capacity.

31. In addition to the foregoing, the appellant submits that the sum awarded in respect of this head of claim was excessive due to the fact that the calculation was based on an impermissible assumed RRR.

Respondent's submissions

General Damages
32. Counsel for the respondent, Mr Edward Walsh S.C., submits that the trial judge's award of general damages was fair, just and proportionate having regard to his client's injuries. The overall award was well within the permissible range for injuries which were significant and lifelong. The award was not inconsistent with the fact that the plaintiff's level of pain had been reduced since the insertion of the spinal stimulator and neither was it inconsistent with her results on the Barthel ADL Index test. The sum was in accordance with the recent decisions of this court concerning the requirement that damages be proportionate not only to the plaintiff's injuries but to the damages commonly awarded by the courts in respect of other injuries of a lesser or more severe nature.

Management of the trial
33. The decision of the trial judge to permit two of the respondent's experts to give evidence prior to the completion of her evidence was an unavoidable consequence of the manner in which litigation of this nature is conducted in our court system. Whilst the imposition of these witnesses, prior to the completion of the plaintiff's evidence, was not ideal, the appellant had not demonstrated that its capacity to properly cross-examine the plaintiff had been diminished. No prejudice had been established and in such circumstances the defendant could not realistically claim an entitlement to a retrial.

RRR on Investment income
34. Counsel submits that the trial judge was correct to apply the law as set out in *Russell v. Health Service Executive* having regard to the circumstances of this case and the permanent nature of the respondent's injuries. The decisions in *Boyne* and *McEneaney* were decisions of the High Court and were made in a different economic climate when both inflation and interest rates were higher. At the time of the hearing of the present case Russell represented current law and it was not open to a judge of the High Court to depart from the guidance set forth in that judgment. It could not be said that the failure of the respondent to call expert evidence to establish the likely RRR she might achieve on any capital sum awarded to her in respect of future financial loss denied her the entitlement to have the court apply the RRR as advised in *Russell*. To require such evidence would defeat all logic and would lead to an abuse of the Court's limited resources and would also impose an intolerable costs burden on the parties to litigation of this nature. The court should assume a RRR of 1.5% per annum on all sums awarded in respect of claims for future special damage save for future care where the assumed RRR should be 1% per annum. Counsel submits that the onus was on the defendant to seek to differentiate this case on its facts such that it might demonstrate that the RRR as advised in *Russell* should not apply.

Loss of Earnings

35. The respondent accepts that the overall award must be reduced by €20,000 to reflect the double count referred to at para.15 above.

36. Counsel submits that having regard to the evidence as to the respondent's physical and mental limitations the trial judge was entitled to find that she would not return to work and that she had no realistic future earning capacity. It was agreed that the respondent would have no capacity to work outside the home. While there was evidence that Ms. Walsh could carry out some work of a limited type within the home there was credible evidence upon which judge was entitled to conclude that he should treat her as having a nil future earning capacity.

37. Counsel accepts that it is customary for trial judges to discount claims for future loss of earnings based upon the exigencies referred to in *Reddy v. Bates*. However, he submits that there were no particular circumstances that would mandate the discount in this case given the type of employment the trial judge considered Ms. Walsh would likely have pursued and the prevailing economic climate. If he was incorrect in that submission, counsel argues that the discount to be applied on the facts of the present case should be at the lowest end of the relevant spectrum.

Urology Costs
38. While not so accepted in the written submissions, counsel for Ms. Walsh now accepts that having allowed in full the claim for the capital cost of her participation in the Drugs Repayment Scheme, that no sum should have been awarded by the trial judge in respect of the cost of equipment required for her future self catheterisation, which was €3,600 per annum. However, he referred to the fact that the evidence given by Mr Raymond Rogers on behalf of the respondent was to the effect that including the catheters the annual costs of meeting Ms. Walsh's ongoing urology needs would be something in the region of €6,000 - €8000. That being so, the only sum to be deducted was the capitalised cost of the catheters. Counsel also submits that the multiplier used by the trial judge in his calculation was in conformity with that advised in *Russell*.

Home Help
39. Counsel submits that the sum awarded in respect of this head of claim was in accordance with the evidence. In any event, if the court were to apply a multiplier reflecting a 1.5% RRR to the sum which the appellant proposed as reasonable in respect of this head of claim, the award made by the trial judge would have been slightly higher than that which he actually made. Accordingly, there was no basis for interfering with his award.

40. As to the submission that the trial judge in calculating Ms. Walsh's claim for past care should have adopted an hourly rate significantly below the then prevailing commercial rate to reflect the fact that such care had been provided by family members, that argument could not succeed. First, the evidence led by both sides had valued the care at Health Board rates. Second, as a matter of law, the trial judge was required to make his assessment based upon the prevailing commercial rates.

Miscellaneous Future Expenditure
41. The trial judge was entitled to accept in full Ms. Walsh's claim for each of the individual items of expenditure which fall within this head of claim. Insofar as it is submitted that the trial judge included within his award sums in respect of which an evidential basis had not been laid, this was incorrect. Insofar as the appellant complained that the trial judge had allowed for the cost of two rhizotomies per year, it had been the evidence of Professor Harmon that two - three pain relief and spinal block procedures per year would be reasonable. The finding that one GP visit a month was required was based on the evidence of Ms. Walsh's general practitioner, and as such could not be interfered with.

Aids and Appliances
42. The trial judge carefully examined and gave detailed consideration to the respondent's future needs for each of the aids, appliances and adaptations proposed by her occupational therapist. The sums he allowed were all to be found in the evidence. The trial judge was entitled to prefer the evidence tendered on behalf of the respondent to that which had been advanced by the appellant. It was clear from his judgment that he had not allowed such claims as he considered were not justified.

43. As to the appellant's complaint that the trial judge allowed the respondent the future cost of items of equipment which she was not using and had instanced a trolley and a perching stool, the respondent's occupational therapist had given evidence that just because the trolley and perching stool may not have been used by Ms. Walsh during the visit from the appellant's occupational therapist, it could not be said that these items of equipment were not needed. The equipment would likely be required in the future for tasks that had not been undertaken on that specific day. As to all of the other items allowed by the trial judge in his costing including, for example, a bidet, a particular type of oven, hob and dishwasher, and certain building works to the value of €12,000, there was evidence upon which the trial judge was entitled to find that these items were required. As to items which would commonly be purchased by people for their own home such as a freezer, dishwasher and mattress, in each instance the trial judge had allowed the claim on a once off basis to meet the health and safety requirements of the respondent.

The jurisdiction of the appellate court
44. There is no dispute between the parties concerning the jurisdiction enjoyed by an appellate court when asked to overturn or interfere with the findings of the original trial judge at first instance. The restrictions on the appellate court are best described by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 when he stated as follows:-

> 1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
>
> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
>
> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *"Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.
>
> 4. A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper

> inference - in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

45. Accordingly, it is important that an appellate court does not take it upon itself to re-engage with the evidence available to it via the transcript and come to its conclusions as to its preferred view on the outcome of the proceedings. It is not for the appellant court to weigh the evidence of one party against that of the other. That is the privilege solely enjoyed by the judge at first instance. Accordingly, once there is any credible evidence to support a finding of fact this court is not entitled to interfere with it.

General

46. I will now consider in turn the submissions advanced on behalf of the appellant in support of its claim that this court should reduce each of the separate awards of damages made by the trial judge. However, insofar as the appellant seeks to argue that each such award should be set aside on the basis that the trial judge erred in law in calculating the respondent's loss based on an impermissible RRR, I will deal with that overall submission after I have dealt with the other arguments advanced in support of the appellant's appeal.

Decision in respect of general damages

47. An appellate court only enjoys the jurisdiction to interfere with an award of general damages if it is satisfied that no reasonable proportion exists between the sum awarded by the trial judge and what the appellate court itself considers would be an appropriate award, having regard to the injuries sustained. In making that assessment the appellate court must keep in mind that it has not had the advantage of seeing the witnesses and in particular hearing and seeing the plaintiff give evidence: see *Foley v. Thermocement Products Ltd* (1954) 88 I.L.T.R. 92. It is for this reason that an appellate court should not readily make relatively modest alterations to an award of damages made at first instance. It should only interfere when it considers that the sum awarded was erroneous to the point that it should be viewed as an error of law: see *Rossiter v. Dún Laoghaire Rathdown County Council, p*er Fennelly J.. The rule of thumb advocated by McCarthy J. in *Reddy v. Bates* suggests that unless the award made departs from the court's own view of the value of damages by 25% or more, the appellate court ought not interfere. This is because the appellate court is operating at a disadvantage in assessing the effect of the injuries on a plaintiff as it does not have the opportunity of seeing and hearing the witnesses and must operate from what has been described as the dry and arid pages of a transcript. It is important also that the award made can be stated to be proportionate to the injuries sustained by the plaintiff and can be seen as proportionate when placed within the scheme of awards for personal injuries: see generally, *M.N. v. S.M*. [2005] IESC 17 per Denham J. and the decision of this Court in *Nolan v. Wirenski* [2006] IECA 93.

48. Having considered the submissions advanced by the parties and the evidence available to the High Court judge, I am fully satisfied that the awards which he made in respect of pain and suffering to date and pain and suffering into the future are proportionate to the injuries sustained by the plaintiff and are also proportionate, just and fair when viewed in the context of awards of general damages made to litigants who have suffered lesser or substantially more significant injuries than those inflicted on Ms. Walsh.

49. At the time of the events the subject matter of this claim Ms. Walsh was a highly energetic mother and wife who enjoyed life to the full. She was in robust good health and participated in a wide range of sporting and leisure activities. She was fit to the point that she was participating in mini triathlons. She enjoyed cycling and dancing and, in particular, horse riding. She had the energy to assist her husband breeding, breaking and training horses. She carried out a wide range of physically demanding activities on the stud farm yet managed to engage fully with the demands of parenthood. As a result of her fall her life changed overnight and she became a woman afflicted by significant disability.

50. For all of the three years prior to the trial Ms. Walsh suffered from significant pain principally caused by the injury to her back. In order to overcome that pain and to improve her functionality she undertook a wide range of treatments and interventions. She had regular injections and spinal blocks. She underwent spinal injury in February 2003 to remove a disc fragment from her lower back. This was unsuccessful. Following an unsuccessful eight week rehabilitative programme in 2014 Ms. Walsh ultimately had a spinal cord stimulator inserted in February of 2015. Over the same period she was diagnosed with what has been described as cauda equina syndrome. The result of this condition is that she lost sensation in the perineal area with the result that her ability to enjoy sexual intimacy was brought to an end with consequential adverse effects for her personal relationship with her husband.

51. Over the same period she was diagnosed with nerve damage such that function to her bladder became impaired. Her inability to empty her bladder resulted in the need to self catheterize three times a day and she was doing this for in excess of two years prior to the trial. That self catheterisation had diminished and restricted Ms. Walsh's quality of life in the manner described by the trial judge in his judgment. Everywhere she went, she had to bring with her a supply of pads and wipes added to which she was restricted in both her functional and social activities.

52. Finally, during all of the period prior to trial Ms. Walsh had had to cope with the physiological consequences of the change in her physical condition brought about by her injuries. The trial judge accepted that she developed post traumatic stress disorder, an adjustment disorder and also a grief reaction to her injuries. To enable her cope she was put on anti depressive medication and required counselling.

53. Taking all of these factors into account it simply cannot be argued with any cogency that the award of €135,000 for pain and suffering to the date of trial was excessive or disproportionate.

54. As to the award made by the trial judge in respect of damages for pain and suffering into the future, it is unnecessary to re-visit in any great detail what the trial judge considered the future would hold for the plaintiff. The evidence was stark as to her likely prognosis. As of the date of trial Ms. Walsh was forty eight years of age. But for her injuries she looked forward to perhaps thirty or more years of good health during which she might hope to enjoy a seriously good quality of life. She had hoped to return to the work place, to continue assisting her husband with their stud farm and enjoy all of the benefits of marriage and family life. All that is now changed. As is clear from the findings of fact made by the trial judge, Ms. Walsh will require ongoing medical intervention and she is unlikely ever to be pain free. Pain will be kept at a manageable level by the use of a spinal stimulator which will need to be periodically replaced in future years. She will also carry the scar which is the result of the initial surgical procedure to insert the stimulator. Ms. Walsh will also likely require rhizotomies every nine to twelve months. For the rest of her life she will have to self catheterise three times a day and endure all of the resulting complications and restrictions. She is to obtain no enjoyment and emotional fulfilment from such sexual intimacy as she would otherwise have enjoyed with her husband in future years. The trial judge also accepted that Ms. Walsh will continue to suffer from significant psychological problems as a result of her physical injuries, and that she will require ongoing counselling throughout her life to help her cope.

55. It is clear from the judgment of the trial judge that he was satisfied that the respondent's injuries would impact on every aspect of her life. Having regard to the number of years ahead of her, and to what she has lost, it cannot be said that the award of damages in the sum of €135,000 in respect of pain and suffering into the future is disproportionately large.

56. In coming to my conclusion that the overall award made by the trial judge in respect of general damages is well within the appropriate range for what can only be described as a serious life long injury, I have considered the submissions advanced by the appellant based upon the guidance to be found in the book of quantum. However, as in many of the more complex personal injuries cases, the book of quantum is only of limited value in a complex case of this kind. This is particularly so where a plaintiff sustains injuries which fall into a number of categories. In the present case the respondent sustained an acute injury to her back with life long consequential effects for not only the functioning of her back but of her bladder. To this must be added the grave psychological consequences which flow indirectly from her physical injuries. Thus, this is not a case which falls neatly within the confines of any particular injury within the book of quantum. The totality of the injuries must be considered and the overall figure awarded must be just and proportionate in that regard.

57. As to the submission that the trial judge in making his award for damages for future pain and suffering, failed to have regard to the fact that the level of pain originally experienced by Ms. Walsh had been reduced by the spinal stimulator, with the result that his award of €135,000 was excessive to the point that it should be set aside, that is a submission that I roundly reject. First, the evidence was that while her pain had been reduced by 50% - 80% she has nonetheless been left with pain that requires significant ongoing daily medication, the use of the spinal cord stimulator, nerve root injections and occasional rhizotomies. Second, the fact that she has had a reduction in back pain, does not disturb her evidence and that of her experts as to the gross limitation her back injury has placed on her life in general, e.g., the loss of all of her sporting activities, the fact that she has an ataxic gait and the need to use a walking stick to support her participation in certain activities. I am quite satisfied that the award made by the trial judge is not inconsistent in any way with the evidence concerning the improvement in the plaintiff's level of pain post the insertion of the spinal stimulator.

58. I also reject the submission that the award made by the trial judge in respect of damages for pain and suffering into the future is excessive by reason of the evidence as to Ms. Walsh's performance on what is described as the Barthel ADL index test, a test in which she scored 16/20. The relevance of the test, as is clear from the evidence, is to establish whether an individual is capable of independent living and what assistance they may need in terms of equipment or otherwise, to allow them remain independent. Ms. Walsh never made the case that she was incapable of independent living. The case she made was that her activities were curtailed and her life permanently and irrevocably changed. The fact that the evidence was that, notwithstanding injuries, she is capable of living independently albeit with significant supports in terms of aids appliances and future medical treatment, in no way diminishes the significance and severity of the injuries earlier described.

59. The trial judge was also entitled to take into account and find as a fact that she recovered from the injury to back in 2008 with the effect that it was not relevant to the assessment of general damages in the case. That was a finding of fact he was entitled to make on the evidence.

60. For the aforementioned reasons I am satisfied that the award made in respect of general damages to date and for general damages into the future are fair and just to both parties and represent a proportionate response to the respondent's injuries.

The management of the trial

61. It is undoubtedly true to say that justice is best served in a personal injuries action by the evidence of the plaintiff being heard in full before any other witness/witnesses are called. Ideally all other witnesses as to fact should then be called and only thereafter should the expert witnesses give their evidence. However, it has to be accepted that the manner in which cases are listed and called on for hearing in the High Court make it impossible to predict the precise date upon which some particular witness will be required. Expert witnesses, particularly treating doctors and consultants, have lengthy lists to attend to and cannot, in fairness to their patients, cancel these lists and wait in court for a day or possibly more so that they might take their appropriate place in the queue of witnesses. These realities have led to a situation where the parties to litigation invariably agree that witnesses can be interposed out of turn. If the result is some prejudice to one or other party, that can normally be overcome by recalling witnesses. It should be said that it is rare that any real prejudice arises as a result of this give and take, particularly in circumstances were the exchange of expert reports usually means that a witness can be cross examined on evidence which, from the reports, it can be assumed will be given later in the trial.

62. In my view, significant deference must be afforded to decisions made by a trial judges such as those which permit a witness or witnesses to be interposed where he or she considers the same necessary to ensure that the litigation is conducted in an efficient manner. Unless it can be demonstrated that such a decision has put justice to the hazard and has led to an unfair an appellate court should not interfere with that type of decision.

63. In the present case the appellant has not been able to demonstrate any real prejudice arising out of the fact that two of the respondent's expert witnesses were called, prior to the conclusion of her own evidence. While it is stated that the appellant lost the possibility of putting to the respondent's experts concessions that she made in the course of her own evidence, the concessions were so modest, one being her ability to do a girth of her daughter's horse, that the submission that the court should order a new trial is simply untenable.

Loss of Earnings

64. The first complaint made by the appellant is in respect of the sum awarded by the trial judge in respect of "Loss of earnings for two years" is accepted by the respondent. It is agreed that the award of €20,000 under this head of loss must be deducted from the overall award as it represents double recovery.

65. The second complaint made by the appellant is that the trial judge failed to reduce the award which he made in respect of future loss of earnings to reflect what the appellant contends was the evidence to support the respondent having some future income generating capacity.

66. This submission is one which, *in my view, is defeated by the principles long since established in Hay* v. O'Grady. Unless it can be established that there was no evidence which could have justified the High Court judge taking the view which he did, which was that Ms. Walsh was unlikely to be in a position to obtain remunerative employment into the future, this ground of appeal must fail, regardless of the weight which the appellant suggests the court should have attached to its evidence. There was clearly sufficient evidence as to the respondent's ongoing medical problems to justify his conclusion that she would not re-enter the work market. The fact that there was evidence that Ms. Walsh was able to carry administrative work at home for their own business was not inconsistent with the conclusion of the trial judge that she was unlikely to be employed in that capacity by anybody else. I am quite

satisfied that the decision of the trial judge not to afford Ms. Walsh any future income generating capacity was amply supported not only by the medical evidence but by the evidence of her rehabilitation and employment consultant, Ms. Anne Doherty, who considered it unlikely that she could return to any remunerative employment.

67. As to the submission made that the trial judge erred in law in his failure to make any deduction from his award in respect of future loss of earnings for the exigencies of life as referred to in *Reddy v. Bates*, that I fully accept.

68. While the trial judge was entitled to take a very optimistic view of the work market that would likely have been available to Ms. Walsh had she not been injured and thus to conclude that work would always have been available to her, what he failed to take into account is that for reasons completely unrelated to the work market, she may not have been in a position to avail of that work.

69. The reasons why a well motivated person may find themselves not working continuously or full time into the future are too numerous to mention. However, by way of example, they might be injured in a road traffic accident with the result that they cannot work or they might fall prey to some illness with similar unfortunate consequences. Their husband, partner, one of their children or an elderly relative might, for some period of time, need their care and support such that they would not be able to work or work fulltime as they had hoped. As people advance in life the risk of these occurrences cannot be ignored or ruled out. Nobody is immune from such risks. Nobody can say with certainty that they will be able to work continuously for the following eighteen year period, that being the duration of Ms. Walsh's claim for future loss of earnings in these proceedings.

70. In these circumstances, having regard to the prevailing jurisprudence, I must conclude that the trial judge erred in law when he failed to discount the figure which he considered proved in respect of future loss of earnings to take into account the factors outlined in *Reddy v Bates*. In circumstances where the trial judge clearly took an optimistic view as to the market which would otherwise have been available to the plaintiff, I consider that the reduction to be made should be at the lower end of the parameters often applied by the court and I would propose a reduction of 15% having regard to the overall findings of fact made by the trial judge.

Urology costs
71. It goes without saying that in order for a court to interfere with any award made by the trial judge in respect of any item of future special damage the onus is on the appellant to demonstrate that there was no credible evidence to support the sum so awarded.

72. Having considered the appellant's submission, I am satisfied that the trial judge erred in law and in fact when he included within the sum allowed in respect of "future urology costs" a sum to reflect the future cost of the equipment required by Ms. Walsh for daily self catheterisation. In his submissions counsel for the respondent could not dispute that the evidence established that this equipment would be covered by the Drug Repayment Scheme. That being so, in circumstances where the trial judge allowed in full the capital cost of €144 per month, that being the full extent of Ms. Walsh's future liability in respect of the cost of her medication and equipment under the Drug Repayment Scheme, the award must be reduced by the additional sum which the trial judge allowed under this heading. For the purposes of clarity the annual cost of the equipment for the purposes of any such calculation is €3,600 per annum.

73. What is clear from paras 178 and 179 of his judgment is that the trial judge concluded that Ms. Walsh would have to expend €3,600 per annum on the equipment for catheters and that she would face additional charges of €900 per annum, in accordance with Dr. O'Sullivan's evidence concerning her need for ongoing ultrasound and other examinations. The capital costs allowed in respect of the catheters must be deducted in accordance with the calculation used by the trial judge. He took the overall annual cost at €4,500 per annum and using the multiplier of 29.5 on an assumed RRR of 1.5% made a total award of €132,750. Excluding that element of the claim which relates to catheters (€106,200), the total award under this heading should in fact be only €26,550.

Home help
74. The defendant seeks to challenge the award of €29,000 in respect of the cost of the past home help/care which he concluded had been required by Ms. Walsh as a result of her injuries. Much of that care/ help was needed because she was not in a position to do heavy domestic work such as hovering, changing beds and heavy cleaning. This work was done by her mother-in-law, husband, family and friends.

75. It should be said that the only dispute between the parties in the court below appears to have been as to the number of hours work that Ms. Walsh had reasonably prevailed upon friends and family to carry out as a result of her incapacity up to the date of trial. Ms. Walsh's expert advised eight hours and the appellant's witness seven hours.

76. While the appellant now seeks to argue that the trial judge impermissibly valued this aspect of Ms. Walsh's claim by reference to commercial rates that argument does not appear to have been pursued in the High Court. In this regard it is to be noted that Ms. Sabrina O'Carroll, the appellants nursing consultant, valued the respondent's claim on the basis of prevailing commercial rates.

77. It is true to say that the law is not clearly settled as to whether a plaintiff who is cared for through gratuitous services provided by their family and friends, is entitled to recoup at commercial rates, what that help would have cost them had they had to buy it in. What is clear nonetheless, is that there is no authority which would condemn the approach taken by the trial judge. His approach is consistent with that of Quirke J in *Yun v. MIBI and Tao* [2009] IEHC 318, a case in which he remunerated the plaintiff's boyfriend who had provided her with comprehensive care on the basis of commercial rates. That being so and the absence of the appellant being able to point to any specific facts in this case which would bring this case outside the rubric of that decision, I would reject this ground of appeal.

78. As is clear from the submissions recorded earlier in this judgment in respect of the award for "future home help", the only sustainable argument that the appellant can pursue is based upon establishing that the award was excessive, in circumstances were his calculation was based upon a multiplier which assumed a RRR on investment income of 1%. As already noted the appellant valued the capital cost of the plaintiff's claim for future care in the sum of €95,937. That was a figure achieved using a RRR of 3%. It is accepted that if a RRR of 1.5% were to be applied to the claim is calculated by the appellant it would have resulted in an award of €116,000, and that accordingly, it cannot be said that there is any basis for interfering with the award unless it be established that a 3% RRR was warranted in respect of this head of claim.

Miscellaneous Future Expenses
79. The trial judge made an award of €192,882 in respect of the capital cost required to meet the plaintiff's future costs of:

(i) replacing her spinal cord stimulator;

(ii) rhizotomy procedures;

(iii) GP visits;

(iv) physiotherapy;

(v) blood testing, and

(vi) counselling.

80. As for the appellant's submission that the award of the trial judge was impermissible because it failed to reflect any discount to reflect the appellant's challenge to the evidence presented on behalf of Ms. Walsh in respect of these heads of claim, that argument cannot succeed by reason of the restraint placed upon an appellate court as per Hay *v. O'Grady.* It is clear that the award made by the trial judge is supported by the respondent's evidence in relation to each of the six component elements which go to make up his award of €192,882. An appellate court cannot second guess why a trial judge may have preferred in its entirety the evidence of Ms. Walsh's witnesses over those of the appellant. The evidence clearly supported the claim for the cost of twelve visits to Dr. Ellis each year, regardless of any other medical issues she might have.

81. I do, however, accept the appellant's submission that the foundation for the claim of the cost of two rhizotomy procedures per year was not made out. The evidence of Dr. Paul Murphy, Ms. Walsh's pain specialist, was that she would need such a procedure every nine to twelve months on average. Whilst Prof. Harmon mentioned the possibility of Dr. Murphy carrying out two to three such procedures per year, his evidence was based on what he had been told by Ms. Walsh as to Dr. Murphy's intentions in terms of future treatment. Given that the height of Dr. Murphy's evidence was that Ms. Walsh would require a rhizotomy every nine months, I consider that the award should be adjusted to reflect that fact. I would propose, therefore, that the sum awarded under this heading should be reduced by one quarter, such that the €70,912 becomes €53,169.

Aids and appliances

82. The trial judge made an award of €239,846 in respect of the cost of the future aids and appliances that would be required by Ms. Walsh, by reason of her injuries. He noted at para. 189 of his judgment the large discrepancy between the figure sought by the respondent, namely €232,640 (based on a 1.5% RRR) and €80,527 proposed by the appellant (based on a RRR of 3%).

83. Having considered the written and oral submissions of the parties, I am not satisfied that the appellant has demonstrated that the sum awarded by the trial judge under this head of loss is unsupported by credible evidence.

84. First, the trial judge is to be commended for the careful manner in which he approached this very large aspect of the claim. He went individually through each item of equipment claimed where the appellant either disputed the need for it or its cost.

85. I reject the submission that the proper approach for the trial judge to this aspect of Ms. Walsh's claim was to consider the list of aids and appliances and then determine which of those items a "reasonable individual" who has what the appellant describes as an "appropriate level of resources" would purchase out of their own funds to ease their comfort if afflicted by the plaintiff's injuries. That is never been the basis upon which the court has assessed such claims. The court invariably hears expert testimony from an occupational therapist on behalf of both the plaintiff and defendant as to whether, in their professional opinion the aids and appliances are required to meet the welfare, safety and comfort of the plaintiff having regard to the injuries. Accordingly, I am satisfied that the approach adopted by the trial judge in this case was entirely consistent with how the courts for decades have approached claims for special damages for plaintiffs who have suffered life changing injuries.

86. The purpose of an award of damages is to place the plaintiff in a position as close as is practicable to that which they would have enjoyed but for the defendant's wrongdoing. If a plaintiff proves through expert testimony that their life would be closer to that which they would otherwise have enjoyed but for their injuries by having available to them such items as may be advised by their occupational therapist, then that is her entitlement. The fact that, absent their entitlement to recover the cost of those items from the defendant, they might not have purchased them for themselves is irrelevant. It is inevitable that the purchase by someone such as Ms. Walsh of aids and appliances such as those involved in the present case from her own funds would significantly diminish the resources available to her to meet other financial demands. Take, for example, the future costs to be incurred on her children's education, extracurricular activities and health insurance to mention but a few. When faced with the choice of promoting their own health over the needs of their children, I venture to suggest that most parents would skimp on their own care and would deprive themselves of equipment that might significantly improve their quality of life. If compensation were to be awarded on the basis proposed by the appellant, plaintiffs would not receive full compensation for their injuries. Accordingly, I reject this submission.

87. It is for the appellant to demonstrate that the trial judge allowed a number of claims which were unsupported by any credible evidence. While in its submissions the appellant states that the trial judge should not have allowed Ms. Walsh's future claim for the costs of a trolley and a perching stool, because those had already been provided and were not used, the evidence does not support that contention. The evidence led by Ms. Walsh was that whilst these items were not used on the day the appellant's occupational therapist carried out her inspection, that this did not mean that they were not required for use on other occasions. As to the submission that the trial judge should not have allowed for the cost of items such as a stand-up fridge, or under counter dishwasher, because these were items which a householder might reasonably be expected to purchase for themselves, Ms. Walsh's occupational therapist gave evidence that these items were claimed on a once off basis because, for health and safety reasons, Ms. Walsh needed to change the equipment she had to that which was more suitable having regard to her injuries. Thus, it cannot be said that there was not credible evidence to support the sums allowed in respect of such items.

88. While it is true to say that the trial judge included within the sum allowed the cost of providing Ms. Walsh with an electric scooter, and that she stated that she wanted to persevere without it, even the defendant's expert appeared to be of the view that the she ought to have and available of such a scooter. That being so, I am satisfied that there was sufficient evidence to justify the trial judge taking the view that, if he allowed her the cost of the scooter, Ms. Walsh might well use it to attend horse shows and like events. That being so he was entitled to allow her the cost of portable telescopic ramps which would be required to permit her cope with small variations in the height of various floor surfaces.

89. For the aforementioned reasons, I am not satisfied that the appellant has demonstrated any clear basis upon which this court could legitimately interfere with the award made by the trial judge under this head of claim.

The RRR assumed by the trial judge

90. On the basis of the submissions earlier identified in this judgment, the appellant submits that the trial judge erred in law and in

fact when he failed to apply, when calculating the plaintiff's claim for future pecuniary loss, the decision of Finnegan P. in *Boyne v. Dublin Bus* in which it was held, *inter alia*, that having regard to the circumstances of that case and the prevailing economic and investment conditions, the court should assume a 3% RRR on investment income for the purposes of calculating that loss.

91. In order to consider the validity of that submission it is perhaps of some value to reflect briefly upon the objective of the trial judge when faced with a claim for a capital sum to reflect one or more heads of future pecuniary loss. This is how that exercise was described by Lord Oliver in *Hodgson v. Trapp* [1989] A.C. 807, 826:

> *"Essentially, what the Court has to do is to calculate as best it can the sum of money which will, on the one hand, be adequate, by its capital and income, to provide annually for the injured person a sum equal to his estimated annual loss over the whole of the period during which that loss is likely to continue, but which, on the other hand, will not at the end of that period, leave him in a better financial position than he would have been apart from the accident.."*

92. It goes without saying that when considering a claim for future pecuniary loss any court must seek to ensure that sum awarded when invested will be sufficient to provide the plaintiff with the funds they would have had but for the defendant's negligence and/or, as in the present case, with the cost of meeting their tortuously inflicted future needs despite the likely impact of inflation on their award over the period of the loss. If a plaintiff is not so protected, he or she will not receive full compensation, as is their lawful entitlement.

93. It is next important to reflect upon the approach of the courts in recent times to claims for pecuniary loss and, in particular, to consider the assumptions made as to the type of investor a plaintiff ought to be considered to be for the purpose of predicting the likely RRR on the investment of any lump sum to be awarded under this heading.

94. In *Boyne*, the plaintiff, a 28 year old man, received injuries which rendered him permanently incapacitated in terms of work. Finnegan P., in determining the appropriate RRR to be assumed for the purpose of selecting the multiplier to be used in the calculation of his claim for future loss of earnings, concluded that he should treat him as a prudent investor. He expressed himself satisfied that the prudent investor would invest such a sum in a mixed portfolio comprising 70% equities and 30% gilts, a split which he acknowledged might not be appropriate in every case given that the amount to be invested in equities would necessarily be determined by the duration of the fund. On that basis, the court could assume a RRR on investment income of 3% per annum

95. It should be stated that in the course of his judgment in *Boyne* Finnegan P. noted that there were no securities available within this jurisdiction that were equivalent to the Index Linked Government Stock (ILGS) then available in the U.K., a factor which was central to the decision of the House of Lords in *Wells v. Wells* [1999] 1 A.C. 345 where the House of Lords unanimously decided that the plaintiffs were entitled to have their claims for future pecuniary loss calculated based upon the RRR they would likely achieve if their awards were invested in risk adverse U.K. ILGS.

96. Thus, from the date of the decision in *Boyne* up to the time of the decision of the High Court in *Russell*, the courts in this jurisdiction proceeded to calculate awards in respect of future pecuniary loss on the basis that the plaintiff should be assumed to be capable of obtaining a RRR of 3% per annum on any capital sum awarded in respect of future pecuniary loss.

97. As was stated by this Court in *Russell*, there are obvious and easily recognisable problems with the court adopting a "one size fits all" RRR to all claims for pecuniary loss regardless of the amount which will be available for investment following the court's award, the period over which it will likely be invested and the extent to which a plaintiff may need to access the fund so invested to meet their ongoing needs. The RRR on the investment of a modest sum for a short duration is unlikely to match the RRR achievable where the sum to be invested is extremely large and where access to the greater part of that fund may not be required for many years or perhaps a decade or more. However, to do otherwise would be to impose an entirely unacceptable burden on litigants and create additional and unwarranted demands upon the scarce resources of the court itself. If the plaintiff in every case had to lay the evidential foundation for establishing the likely RRR to be applied having regard to the individual circumstances of their case, additional expert witnesses would have to be called by both sides with the result that cases would become even more protracted than they are at present and with the result of greatly increasing the overall legal costs bill to the unsuccessful party.

98. That said, from the time of the court's decision in *Boyne*, plaintiffs with claims for future pecuniary loss invariably took the pragmatic and practical approach of advancing their claims based upon an assumed RRR of 3% and the courts, for equally pragmatic reasons, settled upon the practice of calculating such claims on that basis. There was no question of the parties calling economists or investment analysts to give evidence as to the appropriate RRR to be applied in their particular case. It was assumed by all concerned that the legal considerations and the economic climate which had led the trial judge in *Boyne* to assume a RRR of 3%, namely that the plaintiff should be treated as a prudent investor who would likely invest such a fund in a portfolio comprising 70% equities and 30% gilts, should be applied to all claims for future pecuniary loss.

99. Notwithstanding the decision in *Boyne*, it of course remained the entitlement of any plaintiff to seek to argue that the court should assume a lesser RRR than 3% having regard to the individual circumstances of their claim. However, this did not happen for well over a decade during which period it became common practice for parties to content themselves with procuring expert reports to support what they maintained was the annual sum which the plaintiff would require to meet each head of claim. Thereafter they engaged actuaries to capitalise the total value of such claims based on an assumed RRR of 3%.

100. Such was the position that pertained until the plaintiff in *Russell* decided to pursue his claim for pecuniary loss, contending that the RRR as advised in *Boyne*, if assumed for the purpose of calculating the capital sum required to meet the annual sum required by him in respect of his various needs, would leave him substantially short of the 100% compensation to which he was entitled. He maintained that a RRR of 3% was unduly optimistic. He argued, in line with the decision of the House of Lords in *Wells* that he should not be expected to invest his award in the same way as a prudent investor who was not dependant upon the monies so invested to meet their ongoing needs. He should not be required to take unacceptable investment risks including the risk of investing in a mixed portfolio of gilts and equities of the type deemed acceptable in *Boyne*.

101. The facts in *Russell* were that at the time of his birth, the plaintiff sustained catastrophic injuries. These left him quadriplegic with the result that he required life long care and the support of a vast array of technical equipment, aids and appliances. In the High Court, Cross J. concluded that the appropriate RRR to be used when calculating all categories of claim for future pecuniary loss was 1.5% with the exception of his claim for future care which was to be calculated on the basis of an assumed RRR of 1%. That lesser assumed rate of return was to render inflation proof any capital sum awarded in respect of future care in circumstances where the expert evidence anticipated that wage inflation would exceed general inflation for the foreseeable future thus leading to an anticipated increase in the rates of pay of those in the health care sector.

102. In the High Court Cross J. was satisfied, in line with the decision of the House of Lords in *Wells* that the plaintiff was not to be treated as an ordinary "prudent investor" when it came to determining the likely RRR he might obtain on the investment of his lump sum. He stated that what was prudent for this plaintiff was different from that which would be prudent for other investors and possibly other plaintiffs. This was because the funds to be invested were principally required for his essential future care rather than to meet any other type of pecuniary loss. Prudence required that the RRR be determined having regard to his right to invest his award in the most risk adverse manner possible and, in his view, this was in Eurozone ILGS, which had become available since the decision in *Boyne.*

103. It is true to say that the High Court judge contrasted the plaintiff's position in *Russell* not only with that of the prudent investor as had been accepted as valid by Finnegan P. in *Boyne,* but also with the position that *might* pertain for another plaintiff whose claim for future pecuniary loss was in respect of *some diminution in their earning capacity*, a matter to which I will later return (my emphasis).

104. This Court in its judgment in *Russell* expressed itself satisfied that Finnegan P. was wrong in *Boyne* when he concluded that relevant to the consideration of the appropriate multiplier was the plaintiff's obligation to mitigate his loss by reference to the manner in which he, as a prudent investor, might invest his award. In coming to its conclusion the Court noted that Finnegan P. had followed the line of argument that had been adopted by the English Court of Appeal in *Wells.* However, the House of Lords had unanimously rejected that approach on the basis that it was unreasonable to expect the plaintiffs (of whom there were three) to gamble their compensation on the equities market. In this regard it is important to record that the Law Lords did not distinguish one type of plaintiff from another when considering the risk they might be expected to absorb when investing their award. They distinguished the position of the injured plaintiff who must invest to provide the sum necessarily required each year to meet their needs from the position of the ordinary prudent investor who has surplus funds available to invest. The following is what Lord Steyn stated at p. 368, of his judgment in *Wells* where he contrasted the position of the plaintiffs in those three cases to the position of the ordinary investor:-

> *"On the other hand, the typical plaintiff requires the return from an award of damages to provide the necessities of life. For such a plaintiff it is not possible to cut back on medical and nursing care as well as other essential services. His objective must be to ensure that the damages awarded do not run out. It is money that he cannot afford to lose. The ordinary investor does not have the same concerns. It is therefore unrealistic to treat such a plaintiff as an ordinary investor. It seems to me entirely reasonable for such a plaintiff to be cautious and conservative. He does not have the freedom of choice available to the ordinary investor. If a comparison is to be made — and in this field all comparisons are inexact — the position of the plaintiffs is much closer to that of elderly, retired individuals who have limited savings which they want to invest safely to provide for their declining years. Such individuals would generally not invest in equities. But for plaintiffs the need for safety may often be more compelling."*

105. What is clear from the decision of this court in *Russell* that it was satisfied that Finnegan P. in *Boyne* had approached his consideration of the RRR to be assumed on an incorrect premise, namely that he should treat the plaintiff who had lost all of his future income generating capacity at 28 years of age, as a prudent investor. Thus he was drawn away from a consideration of any more risk adverse investment alternatives than the mixed portfolio laden with 70% equities that he ultimately endorsed.

106. In Russell, having regard to the extensive expert evidence adduced before the High Court, this Court recognised, *inter alia,* the risks for plaintiffs if they were to be expected to follow a strategy which involved the investment of their award for pecuniary loss in a portfolio containing any significant percentage of equities, as had been deemed acceptable in *Boyne*. It noted the evidence concerning the manner in which share values rise and fall with extreme unpredictability and as to the crucial importance of timing when it comes to sale. A plaintiff requiring access to funds on an ongoing basis might have no option but to sell when the share price is depressed and might not be able to sit out a dip as might prove possible for the ordinary investor. For this reason, amongst many other economic considerations that need not be repeated here concerning likely inflation rates and the likely performance of various different investments in the foreseeable future, this Court agreed with the conclusion of Cross J. that the RRR to be assumed when calculating claims for future pecuniary loss ought to be assessed on the basis that the plaintiff was entitled to adopt the most risk free and inflation proof strategy consistent with his needs. In that case the investment strategy was one to be based on the RRR the plaintiff would likely achieve if his award was to be invested in Eurozone I LGS over the period of his loss.

107. I find it difficult to see how, in light of the Court's conclusions in Russell where the approach taken in *Boyne* to the investment risk expected to be absorbed by a plaintiff who requires a stream of funding to meet their ongoing needs was rejected, the appellant can maintain that the High Court judge erred in law in failing to follow Boyne when it came to determining the RRR to be assumed for the purposes of his calculations. To have calculated Ms. Walsh's claim for future pecuniary loss on the basis of a RRR of 3%, the trial judge would have to have been satisfied that her circumstances were wholly distinguishable from those of the plaintiff in *Russell.* He would have to have been able to treat her as an investor with the capacity to absorb the type of risks required to achieve a RRR of 3% per annum on the investment of their award. At the very least, he would have to have had evidence to satisfy him that all of Ms. Walsh's future needs could be met without recourse to the sum awarded such that it could be invested in the type of high yield portfolio considered unacceptable in *Russell*.

108. While it is true to say that Ms. Walsh was not nearly as significantly injured as the plaintiff in *Russell* and that she is capable of independent living, I see no basis upon which Barr J. could realistically have distinguished her case so as to depart from the overall guidance given in *Russell* concerning the RRR to be assumed when calculating claims for future pecuniary loss. He was charged with calculating the annual sum required to compensate Ms. Walsh for being unable to work for a period of eighteen years as well as the annual sum required by her to fund her ongoing needs in terms of equipment, medical treatment and care for life.

109. The defendant has pointed to no evidence to demonstrate how the trial judge could, having regard to the stream of income denied Ms. Walsh by reason of her injuries and that required by her to meet her ongoing needs, have lawfully calculated her claims for pecuniary loss based on a RRR greater than 1.5%. If he had done so he would have placed her in a position whereby, in order to meet the annual loss found by the court and her ongoing needs, she would have to accept the type of investment risk of the type condemned as unsuitable in *Russell*.

110. It follows that I am satisfied that in order to come to the decision which he did, it was not necessary for the trial judge to hear any evidence from economists or investment analysts. He was entitled to adopt the same approach as his High Court colleagues had done following the decision in *Boyne* when they assumed that until further challenge the court should assume a 3% RRR on all claims for future financial loss until otherwise challenged and some other case, as occurred in *Russell.*

111. In light of the decision of this court in *Russell*, there are good policy reasons as to why when calculating claims for future pecuniary loss the court should assume a 1.5% RRR on investment income for all categories of future financial loss and a 1% RRR in

respect for future care, without requiring the court to hear any evidence from economists or investment analysts. An actuary should suffice. Knowing that the court will calculate future pecuniary loss on such a basis is important in terms of ensuring the consistency of awards. This in turn makes litigation more predictable and capable of resolution by agreement. To require the plaintiff, as submitted by the defendant in this appeal, to call economic experts to support Ms. Walsh's entitlement to have her future pecuniary loss calculated on the basis of the RRR advised in *Russell*, would – as I have already had occasion to point out - have very significant adverse consequences for the administration of justice. It would lead to a huge increase in the costs of any case wherein a claim for pecuniary loss was made. Not only would the parties incur the costs of retaining additional financial experts, but the likely duration of the trial would also be significantly extended with adverse costs implications for the losing party apart altogether from the additional demands that any such approach would make on the already scarce resources of the court itself.

112. While a plaintiff with claims for future pecuniary loss, such as those which arise for Ms. Walsh by reason of her injuries, should accordingly customarily be entitled to have any such losses calculated on the basis of an assumed RRR of 1.5% save for future care where the assumed RRR should be 1%, it remains open to either party in any case to contend that the claim for future pecuniary loss should be calculated by reference to a lesser or greater assumed RRR. That financial markets, investment products and opportunities will change with time is a matter of certainty. The financial assumptions made when the decision in Russell was handed down may prove, with the benefit of hindsight, to have been overly optimistic or for that matter pessimistic. Periods of boom and bust have always been the order of the day and the stability of the Eurozone and other financial markets may well change as a result of a wide range of ever-changing political and economic factors. So, in the same way as Gill Russell challenged the court's decision in Boyne to the effect that a plaintiff in his position should have the RRR fixed on the assumption that he should be considered a prudent investor as opposed to a risk averse investor, there is nothing to stop the plaintiff or defendant in any case, whether for legal and/or economic factors, from seeking to contend that that the assumed RRR in their case should deviate from that indicated in *Russell*.

113. For the aforementioned reasons I have no difficulty in upholding the approach of the trial judge when it came to his calculation of future pecuniary loss using an assumed RRR of 1.5%. However, he appears to have fallen into error when it came to his calculation of the claim for future loss of earnings. This appears to have happened because of the evidence given by Ms. Maura Carter, the plaintiff's actuary. She was asked if, in preparing a report she had made her calculations in accordance with the court's decision in *Russell*, to which she replied in the affirmative. She stated she had valued Ms. Walsh's claim for future loss of earnings and future care using an assumed RRR of 1% with 1.5% for all other costs. The decision in *Russell* does not support the use of a RRR of 1% in relation to a claim for future loss of earnings. Accordingly, the trial judge impermissibly awarded a sum of €373,030 based upon a 1% RRR whereas assuming a RRR of 1.5% the capital value of that claim should have been €334,110. A deduction of €38,920 is accordingly required from the overall award.

Conclusions

114. For the reasons earlier indicated in this judgment, I am satisfied that the award made by the trial judge in respect of pain and suffering to date and pain and suffering into the future is proportionate and fair having regard to the plaintiff's injuries.

115. I am also satisfied that the decision of the trial judge to permit, two expert witnesses be interposed prior to the completion of the plaintiff's evidence was a decision that he was entitled to make in the lawful exercise of his discretion. In circumstances where the appellant can not demonstrate any real prejudice as a result of this decision, it is not one which an appellate court could entertain.

116. As to the sum awarded in respect of Ms. Walsh's future urology costs, I am satisfied that the evidence was such that the maximum sum to which she was entitled in respect of this head of loss was €26,550 and that the overall award must be altered so as to reflect that fact.

117. The parties are agreed that the overall award must be reduced by the sum of €20,000 which was allowed under the heading "loss of earnings for two years", but which is included within another head of claim.

118. I am also satisfied that the evidence of Dr. Murphy, the plaintiff's pain specialist was such that it was only permissible for the trial judge to allow Ms. Walsh the cost of one rhizotomy procedure every nine months rather than twice a year, as was provided for in his award with the result that €17,723 must be deducted from the sum allowed under the heading of "miscellaneous expenses."

119. As to the RRR assumed by the High Court judge, for the purposes of calculating the plaintiff's claim in respect of pecuniary loss, I am satisfied that he did not err in law or in fact when he calculated the plaintiff's claim for pecuniary loss on the basis of the RRR, as advised in *Russell.* That said, he impermissibly assumed a RRR of 1% in relation to the loss of earnings claim as opposed to the 1.5% advised in Russell, with the result that the sum so awarded must be reduced in line with the table, hereinafter set forth. However, for the reasons earlier advised, it of course remains open to the parties in any future case to assert, that for the purposes of calculating the plaintiff's claim for future pecuniary loss, the court should assume different real rates of return to those advised by this court in *Russell.*

120. For the reasons just stated I would allow the appeal to the limited extent I have already indicated and I would reject all other grounds of appeal.

121. I would therefore propose that the order of the High Court be varied in the manner set out below that the result that the total award to the plaintiff should be €1,256,652:

High Court Varied

General damages for pain and suffering to date: €125,000 €125,000

General damages for pain and suffering into the future: €135,000 €135,000

Past special damages: €110,987 €110,987

Loss of earnings for two years: €20,000 €0

Loss of earnings thereafter: €373,030 €283,993

Future Urology costs: €132,750 €26,550

Future home help: €110,000 €110,000

Miscellaneous expenses: €192,882 €175,159

Aids and appliances: €239,846 €239,846

TOTAL: **€1,439,495 €1,206,535.50**