THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 309

Record No. 2016/176

Peart J.
Irvine J.
Hogan J.

BETWEEN/

ANNA FOGARTY

PLAINTIFF / RESPONDENT

- AND –

MICHAEL COX

DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 29th day of November 2017

1. This is the defendant's appeal against the judgment and order of the High Court (Barr J.) dated respectively the 26th February and the 15th March, 2016. By his judgment, the High Court judge made an award of damages in a total sum of €121,386.11 in favour of the plaintiff, Anna Fogarty ("Ms. Fogarty") as a result of injuries she sustained in a car accident on the 25th November, 2011. That award was broken down into a sum of €85,000 in respect of pain and suffering to date, €30,000 in respect of pain and suffering into the future and special damages in the sum of €6,386.11.

2. It is important at the outset to record that the defendant conceded liability in respect of the collision that occurred between the motor vehicles of the respective parties but denied that the injuries claimed by Ms. Fogarty were the result of that event. It was the defendant's position that the principal injury contended for by Ms. Fogarty, namely chondromalacia of the right elbow, was constitutional in nature and the result of wear and tear and that a secondary condition known as synovitis, which she later developed and was identified in the course of an MRI scan in September 2013, was the result of the excessive use of steroid injections administered over an extended period by Dr. Sean McCarthy, Ms. Fogarty's physician.

Relevant background facts

3. Ms. Fogarty was born on the 28th December, 1957 and in 2011 was studying for a degree in business studies at the Limerick Institute of Technology in Thurles, Co. Tipperary. On the 25th November, 2011, she was in the process of leaving the car park of the Institute when she noticed the defendant, Mr. Michael Cox ("Mr. Cox"), reversing his car out of a car park space in a manner which caused her to suspect that he might reverse into the driver's side of her car. Consequently, Ms. Fogarty placed her right hand on the horn to warn the defendant of her presence. Regrettably, her actions did not prevent his vehicle striking her driver's door. Shortly after these events, a member of An Garda Síochána, Garda Clodagh Kenny, attended the scene of the accident.

4. Ms. Fogarty did not inform Garda Kenny that she had sustained any injury as a result of the impact between the two vehicles. At the end of her cross examination, she changed evidence earlier given by her to concede that she had not told Mr. Cox that she had been injured at the time of the accident. Nonetheless, in her proceedings Ms. Fogarty claimed that she had developed an immediate stinging sensation in her right arm and that shortly thereafter she had gone on to develop what she described as the worst pain she had ever experienced in her lifetime.

5. Ms. Fogarty attended a number of medical practitioners prior to the 11th January, 2012, that being the date on which a medical record was first made noting the fact that an accident had occurred in November 2011 which had resulted in her developing right arm symptoms. It was accepted that in December 2012 she had attended her G.P.'s surgery on a number of occasions in relation to other medical matters and that the notes made by those she had attended did not mention the type of serious pain she maintained she had developed in the aftermath of the collision. Ms. Fogarty attended her regular general practitioner, Dr. Paul O'Carroll, on the 21st January 2012 when he diagnosed tennis elbow and he gave her some steroid injections into her elbow. His note of the consultation made no reference to any car accident. When asked to explain how these doctors could have failed to note both the accident and pain of the severity she had described to the court, Ms. Fogarty maintained that she told them of her pain and that she told Dr. O'Carroll of her car accident. She protested that she could not be held responsible for the fact that they had not made a record of these matters.

Medical evidence

6. The trial judge heard evidence from Dr. Sean McCarthy, general practitioner and sports injury specialist, and Mr. Karuppiah Mahalingam, consultant orthopaedic surgeon, on Ms. Fogarty's behalf. He also heard evidence from Mr. Colin Riordan, consultant hand and plastic surgeon on behalf of the defendant.

7. Dr. McCarthy expressed himself satisfied that the injuries complained of by Ms. Fogarty were likely caused by her elbow striking the window of the car. He outlined in detail the treatment administered from the time she first attended him in July 2012 at the request of her solicitor, Mr. Cian O'Carroll. Ms. Fogarty had visited him on eighteen occasions. He had referred her for physiotherapy to her elbow and in the course of that treatment she had complained for the first time of some right shoulder pain which he later diagnosed as tendonitis and which he also ascribed to her accident.

8. Dr. McCarthy administered a total of nineteen injections to Ms. Fogarty's right shoulder and elbow between August 2012 and May 2015. The injections to the elbow were to treat chondromalacia, a condition later confirmed by MRI scan of September 2013.

9. Due to the fact that Ms. Fogarty's symptoms did not respond as fully or promptly as expected to injections of lignocaine and cortisone, she was referred by Dr. McCarthy to Mr. Mahalingam, consultant orthopaedic surgeon, who carried out an arthroscopy on her right elbow in February 2015. In the course of that procedure, he found the joint to be inflamed and considered the presentation such that he should carry out a release of one of the ligaments on the lateral side of her right elbow. Following her arthroscopy, Ms.

Fogarty regained full movement of her elbow joint, although she continued to complain of some pain and swelling. Mr. Mahalingam was nonetheless satisfied that her remaining symptoms, with the exception of the small scar to her elbow, would likely resolve within a further year.

10. Mr. Riordan, on behalf of the defendant, did not agree with Dr. McCarthy or Mr. Mahalingam as to the probable cause of Ms. Fogarty's symptoms. He considered that they were unlikely to have been the result of her car accident. He was of the opinion that any soft tissue trauma she might have sustained as a result of any impact between her elbow and the door would likely have settled within six to ten weeks. Her ongoing symptoms thereafter were not attributable to her accident. She had likely developed tennis elbow, a common complaint, which he was of the opinion is a degenerative condition which develops without trauma. Further, it was Mr. Riordan's view that her synovitis was likely the result of the injections she had received from Dr. McCarthy.

High Court Judgment

11. In his judgment, the trial judge summarised the evidence of the plaintiff and all the other witnesses. Having done so, he found as a fact that Ms. Fogarty did indeed sustain an injury to her right elbow and her right shoulder as a result of the impact to her car from Mr. Cox's motor vehicle. As to the cause of her injuries, he relied upon the evidence of Dr. McCarthy and Mr. Mahalingam and stated clearly that he preferred their evidence on causation to that of Mr. Riordan.

12. In expressing himself satisfied that the cause of Ms. Fogarty's elbow and shoulder injury was the collision, he accepted Ms. Fogarty's evidence that she had indeed told the medical practitioners whom she had attended prior to the 11th January, 2012 about her elbow injury even though that injury had not been recorded in their records. In this respect the trial judge noted that the defendant had not called any of the doctors whom Ms. Fogarty had attended prior to the 11th January, 2012 to give evidence that she had not reported her symptoms or the fact of the collision. That being so, the trial judge held that the medical records which had been discovered and put to her in cross examination could not counter her own evidence that she had so reported.

13. The trial judge found as a fact that Ms. Fogarty had developed chondromalacia of the right elbow as a result of the collision. Likewise, he accepted Mr. Mahalingam's evidence that it often took a year or more for a patient to recover from that condition following the release of the extensor carpi radialis brevis, the procedure which he had performed in February 2015. He also accepted Mr. Mahalingam's evidence that whilst the treatment afforded by Dr. Sean McCarthy was in excess of what might have been expected in terms of steroid injections, such injections were the first line treatment for that condition and it was within the permissible range of treatment.

14. In the course of his judgment, the trial judge also expressed himself satisfied that the shoulder injury as described by Ms. Fogarty, although not reported by her to Dr. McCarthy on her first attendance, had been caused by the impact between the two cars and that this injury had been treated with injections into the shoulder administered by Dr. McCarthy and other painkilling medication.

15. The trial judge then assessed damages in the manner earlier described.

The Appeal

Submissions of the defendant/appellant

16. Counsel for the defendant submits that the trial was unsatisfactory insofar as the trial judge did not explain or seek to rationalise how he came to prefer the plaintiff's causation case to that which had been pursued by the defendant. He did not explain how he had discounted the evidence of Garda Kenny who had stated that Ms. Fogarty had not reported any injury. Neither had he explained how he had come to reject the concession made by Ms. Fogarty that she had not told Mr. Cox of her injury notwithstanding the fact that she described it as the worst pain she had ever experienced.

17. Counsel submits that the High Court judge appears to have attached no weight to the fact that the first medical note recording any accident concerning Ms. Fogarty's elbow was dated the 11th January, 2012. Likewise, he would appear to have discounted the fact that Ms. Fogarty had attended three doctors in December 2011, none of whom had noted the type of pain she had described to the court.

18. Counsel further maintains that the trial was unsatisfactory insofar as the trial judge had accepted, without justifying his decision so to do, the medical evidence of Dr. Sean McCarthy who had, to use counsel's expression, been "parachuted" into the case by her solicitor to replace her treating G.P. Dr. O'Carroll, in circumstances where Dr. McCarthy had not consulted with Dr. O'Carroll and in circumstances where Dr. O'Carroll had administered a number of injections to treat Ms. Fogarty's elbow.

19. Counsel also submits that the trial judge impermissibly reversed the onus of proof in that he decided the causation issue on the basis that the defendant had failed to call Dr. O'Carroll or the other doctors Ms. Fogarty had attended prior to the 11th January, 2012 to prove that she had not reported to them the fact of her accident or any symptoms such as those she had outlined to the court. Counsel submits that the burden of proof should have remained on the plaintiff throughout and it was not for the defendant to disprove the asserted connection between the injuries contended for by Ms. Fogarty and the collision. It was for the trial judge to decide if the plaintiff had discharged the burden of proof, a burden which counsel submits, the trial judge could not have concluded had been discharged had he properly analysed the evidence. Counsel for the defendant submits that the trial judge could not credibly have concluded that the probable cause of the plaintiff's injury was striking her elbow off the driver's door of her car at the time of the impact between the two vehicles.

20. Counsel submits that the onus was on Ms. Fogarty to call Dr. O'Carroll to prove that she had, as she had maintained, reported the severity of her injuries and the fact of her accident to him when she first attended him post accident. Her failure to do so should have caused the trial judge to draw an adverse inference concerning the likely truth of her evidence and the causative connection between her injuries and her accident. In this regard counsel relies upon the decision in *Quinn (a minor) v. Mid Western Health Board & another* [2005] 4 I.R. 1.

21. Counsel also maintains that the trial judge fell into error when deciding the liability issue insofar as he incorrectly concluded that the defendant had sought, impermissibly in his view, to rely upon the doctrine of *novus actus interveniens*. Counsel submits that whilst the defendant did seek to establish that the inflammation to the plaintiff's elbow (synovitis) was probably caused by the excessive administration of injections by Dr. McCarthy, that was not for the purpose of seeking to rely on the aforementioned doctrine. What the defendant was seeking to establish was that there was an alternative cause for Ms. Fogarty's synovitis that was not dependant upon trauma to the elbow. Counsel made clear that it was the defendant's case that the plaintiff's chondromalacia was a natural and constitutional phenomenon and that her synovitis had been caused by the administration of an excessive number of injections. The defendant was not seeking to avoid compensating Ms. Fogarty for any of her elbow symptoms if the court was satisfied that the same were as a consequence of the impact of the two vehicles and injections reasonably given by way of

treatment. Rather, the defendant was seeking to establish that all of Ms. Fogarty's injuries could be attributable to events unrelated to any trauma caused to her elbow at the time of the collision.

22. As to quantum, counsel accepts that Ms. Fogarty had received treatment for her elbow which involved the administration of a significant number of painful injections and that she also required an arthroscopy in the course of which a ligament was released. However, he emphasised Mr. Mahalingam's evidence to the effect that he expected Ms. Fogarty to make a full and complete recovery within eighteen months of the date of trial. That been so, counsel argues that for the High Court judge to have awarded a six figure sum in respect of general damages was wholly disproportionate, unjust and unfair. The overall award by the trial judge was, he submitted, double that which was appropriate in the circumstances.

Submissions of the plaintiff/respondent

23. Counsel on behalf of Ms. Fogarty submits that whilst the defendant now seeks to characterise its approach to the evidence of Dr. McCarthy concerning the administration of the injections as one directed solely to the issue of causation rather than the doctrine of *novus actus interveniens* that does not accurately reflect the approach taken before the trial judge. The defendant had embarked upon a professional attack on Dr. McCarthy's involvement in Ms. Fogarty's care and his treatment. It is counsel for the plaintiff's position that that attack had not been pursued, as was now suggested, for the sole purpose of establishing an alternative cause for Ms. Fogarty's synovitis.

24. Insofar as the defendant seeks to rely upon the trial judge's failure to analyse Ms. Fogarty's failure to report any injury to Mr. Cox, counsel for the plaintiff relies upon the transcript of the evidence (Day 1, page 48) to demonstrate that her evidence was that she had complained to Mr. Cox. She stated that in the course of her second conversation with Mr. Cox on the day of the accident she had told him that she had a stinging sensation in her arm. That being her evidence, it was for the defendant's insurers to call Mr. Cox to rebut that evidence. Hence, the criticism of the trial judge for his failure to analyse this aspect of her claim was misplaced.

25. Counsel for the plaintiff submits that the principles in *Hay v. O'Grady* [1992] 1 I.R. 210 apply to this appeal. There was, he submits, credible evidence to support the trial judge's finding on causation. Counsel relies upon the evidence of Garda Kenny who noted that the driver's door of Ms. Fogarty's car could not be fully opened after the impact. He also referred to Garda Kenny's evidence to the effect that if Ms. Fogarty's hand was on the horn at the time of impact, as had been her evidence, her elbow would have been sticking out and protruding such that it would have struck the driver's door on impact. Counsel emphasised that, in coming to that conclusion, Garda Kenny had had the opportunity of seeing the internal dimensions of the Ms. Fogarty's car and the external damage to the rim of the door. He also had her evidence that in the aftermath, her arm was stinging and that she was rubbing it, facts uncontroverted by Garda Kenny allied to which there was the damage to the rim of the car door and the evidence that her elbow would likely have been protruding at the time of the impact. Thus, in terms of causation the trial judge had credible evidence that Ms. Fogarty had reported an injury to Mr. Cox.

26. Counsel submits that there was also credible objective evidence that Ms. Fogarty had sustained a *bona fide* injury to her right elbow. The MRI scan of September 2013 clearly demonstrated the existence of chondromalacia. Also, Mr. Mahalingam in the course of the arthroscopy had himself observed the structures of Ms. Fogarty's right elbow and the presence of synovitis. Further, there was evidence from both Dr. McCarthy and Mr. Mahalingam that both conditions were probably caused by trauma at the time of the collision. Counsel asked the court to note that Mr. Riordan, on the defendant's behalf, did not contest the findings concerning Ms. Fogarty's elbow even if he disagreed as to their probable cause. According to counsel for the plaintiff, there was credible evidence to support the trial judge's finding that the collision was the probable cause of the injury and in those circumstances his findings could not be upset.

27. Counsel maintains that at paras. 129 -131 of his judgment, the trial judge had, contrary to what had been asserted on behalf of the defendant, set out in detail his rationale for the conclusions which he reached. He considered the defendant's evidence that the chondromalacia had been caused by wear and tear due to age but stated that he preferred the evidence which favoured trauma as a cause of that condition. In doing so, he had relied on the fact that the findings on the MRI scan of the 9th September, 2013, as reported by the consultant radiologist, were stated to be consistent with old trauma. In circumstances where there was no suggestion, regardless of Ms. Fogarty's somewhat colourful history of accidental injury, that she had ever otherwise injured her right elbow, this was good evidence to support the trial judge's finding that the injuries had been caused by the collision, as was the opinion of Mr. Mahalingam and Dr. McCarthy.

28. Counsel submits that there is no basis upon which the defendant can legitimately argue that an adverse inference was to be drawn from the fact that Ms. Fogarty did not call her general practitioner Dr. O'Carroll. While it may be customary in many cases for a plaintiff to call their general practitioner, in addition to any specialist to whom they were referred, whether they need to do so depends on the facts under consideration. In this case Dr. McCarthy had become Ms. Fogarty's treating physician. He had administered nineteen injections, fourteen of which were to her elbow and five to her shoulder and had in effect taken over her care from Dr. O'Carroll who had only administered three injections. Further, it was Dr. McCarthy and not Dr. O'Carroll who had referred Ms. Fogarty to Mr. Mahalingam. In such circumstances no adverse inference was warranted arising from her failure to call Dr. O'Carroll.

29. Counsel for Ms. Fogarty accepts that the burden of proof always remains on a plaintiff both in respect of liability and causation. However, he submits that it is not for the plaintiff to call witnesses to assist the defendant in making its case. If the defendant wanted to make the case that Dr. O'Carroll had not been advised of the car accident when Ms. Fogarty first attended him presenting with elbow difficulties it was for the defendant to call that evidence. Likewise, if the defendant wanted to challenge Ms. Fogarty's evidence that she had, contrary to what was contained in her medical records, likely advised other doctors whom she had attended in December 2011 of her elbow injury and associated symptoms, those doctors should and could have been subpoenaed to counter her evidence. Counsel relied on the decision of Barrington J. in *Moloney v. Jury's Hotel plc* [1999] IESC 75 as authority for the proposition that where a defendant puts medical records to a plaintiff in the course of cross-examination, the cross examiner will be bound by the answer given by the witness unless they themselves then prove the truth of the content of the record. Here, when it was put to Ms. Fogarty that her medical records prior to the 11th January, 2012 did not bear out her account of her symptomology, she stated that she could not be accountable for the failure of those whom she had attended to record the complaints she had made. In light of the decision in *Moloney*, the defendant was bound by her answer that she had advised those doctors of her symptoms. Accordingly, the High Court judge had not erred in law in failing to draw an adverse inference from Ms. Fogarty's failure to call Dr. O'Carroll to support her account of events. Counsel for the plaintiff submits that she had called sufficient evidence to prove her case as the trial judge had so found.

30. Finally, counsel submits that the damages awarded to Ms. Fogarty, both in respect of pain and suffering to date and pain and suffering into the future were proportionate in all of the circumstances. He relies upon the extensive period of severe pain experienced by Ms. Fogarty, particularly in respect of her elbow and the extremely painful treatment which she underwent in terms of the repeated injections administered to her shoulder and elbow by Dr. McCarthy over a significant period. He relies also upon her need for

surgery to the elbow in February 2015 and the fact that, at the date of trial, she had not made a full recovery. Further Ms. Fogarty had been left with a permanent scar.

Principles
31. As there is no real dispute concerning most of the principles to be applied on this appeal, it is unnecessary to refer to them in any great detail. Suffice to say that when it comes to interfering with the findings of a trial judge, such as those made by Barr J. in this case concerning the cause and extent of Ms. Fogarty's injuries, the well-worn principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210 apply. If the findings of fact made by the trial judge are supported by credible evidence, an appellate court is bound by those findings, however voluminous and apparently weighty the testimony against them may be. As was stated by McCarthy J., the truth is not the monopoly of any majority. Further, 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. However, in the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge to draw such inferences.

32. As to the circumstances in which an appellate court may interfere with an award of general damages made by the trial judge, two of the most regularly cited decisions are those of Fennelly J. in *Rossiter v.* Dun Laoghaire Rathdown County Council [2001] 3 I.R. 578 and McCarthy J. in Reddy v. Bates [1983] I.R. 141. The former judgment advises it is for the appellate court to decide whether there is any "reasonable proportion" between the actual award of damages made by the trial judge and that which the court, sitting on appeal, would be inclined to give. An appellate court should only interfere with an award of general damages if it considers that there is an error in the award of damages which is so serious as to amount to an error of law. The latter decision states, *inter alia*, that as a general rule of thumb there would have to be a discrepancy of in or about 25% between what the trial judge awarded and what the appellate court itself would consider just and fair compensation before the award made at first instance could be considered to amount to an error of law.

33. As to the calculation of general damages, the prevailing jurisprudence demands that damages for pain and suffering be both just and fair. As was stated by Denham J. in *M.N. v. S.M.* [2005] 4 I.R. 461, an award must be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. When considering those requirements in *Nolan v. Wirenski* [2016] IECA 56, I stated that minor injuries should attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level that are clearly distinguishable in terms of quantum from those that fall into the other lesser categories of injury. I also observed that just because a judge describes or considers that an injury is significant does not necessarily mean that the damages should also be significant. How significant any injury is, for the purposes of the assessment of damages, must be assessed in the context of the whole spectrum of potential injuries to which any individual might be exposed.

34. As to how a judge at first instance might make a fair and just assessment of the damages to be awarded in respect of pain and suffering in any case, commencing at para. 43 of my judgment in *Shannon v. O'Sullivan* [2016] IECA 93, I advised as follows:-

> "43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as the following:-:
>
> (i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?
>
> (ii) Did the plaintiff require hospitalisation, and if so, for how long?
>
> (iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?
>
> (iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?
>
> (v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?
>
> (vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?
>
> (vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?
>
> (viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?
>
> (ix) For how long was the plaintiff out of work?
>
> (x) To what extent was their relationship with their family interfered with?
>
> (xi) Finally, what was the nature and extent of any treatment, therapy or medication required?
>
> 44. As to the court's assessment as to the appropriate sum to be awarded in respect of pain and suffering into the future, the court must once again concern itself, not with the diagnoses or labels attached to a plaintiff's injuries, but rather with the extent of the pain and suffering those conditions will generate and the likely effects which the injuries will have on the plaintiff's future enjoyment of life."

Decision
35. Having regard to the principles earlier set forth, I cannot see any basis upon which this Court could interfere with the findings of fact made by the trial judge insofar as causation is concerned.

Causation
36. The defendant certainly made significant headway, in the course of his cross-examination of Ms. Fogarty, in casting real doubt upon her claim that her elbow injury was caused by the collision. She agreed that she had not reported any injury to Garda Kenny and, contrary to what was asserted by counsel for Ms. Fogarty in the course of his oral submission; she also agreed that she had not

advised Mr. Cox of any injury. Further, she was confronted by medical records authored by Dr. Janus Knas, Dr. Eilish Kenny and others who had seen her concerning other medical issues between the date of her accident and the 11th January, 2012, none of which made mention of the collision or any elbow pain. Ms. Fogarty was also challenged concerning the record made by Dr. Paul O'Carroll, her regular general practitioner, concerning a visit on the 16th January, 2012 which, whilst it referred to right elbow symptoms, made no mention of any accident involving her elbow. I will return to the admissibility of this evidence later in the judgment.

37. It is also true to say that the defendant had strong evidence from Mr. Riordan, consultant hand and plastic surgeon, that chondromalacia in most instances occurs otherwise than in the presence of trauma and that Ms. Fogarty's synovitis could be accounted for by the number of injections which had been administered by Dr. McCarthy rather than trauma sustained in the accident.

38. Regardless of the aforementioned matters, I am nonetheless fully satisfied that there was sufficient credible evidence upon which the High Court judge was entitled to rely to come to the alternative conclusion. As was recently confirmed by Hogan J. in *Lynch v. Cooney* [2016] IECA 1, the role of the appellate court in a case such as this is as set forth in the decision of McCarthy J. in *Hay v. O'Grady*. It is not for the appellate court to reconsider the evidence that was before the trial judge and form its own conclusion as to what it considers it might have done if making that decision at first instance. When it comes to findings of fact made by a trial judge which are sustainable by reference to *Hay v. O'Grady* principles, the appellate court is bound by them, regardless of how voluminous and weighty the evidence be that would support an alternative finding.

39. As to the evidence available to the High Court judge, he first had the plaintiff's own oral evidence that her elbow struck the driver's door of her car. That claim was to some extent supported by her evidence that in the aftermath of the collision she was constantly rubbing her right arm due to the presence of a stinging sensation, evidence that was not contradicted by Garda Kenny. Garda Kenny had furthermore agreed that if Ms. Fogarty's right hand had been on the horn at the time of the impact that her elbow would have been protruding so as to render it vulnerable to injury from an impact to the driver's door.

40. The trial judge also had the benefit of expert medical opinion regarding causation from Dr. Sean McCarthy, general practitioner but more particularly from Mr. Mahalingam, consultant orthopaedic surgeon, both of whom expressed themselves satisfied as a matter of probability that Ms. Fogarty's elbow injury was caused by trauma, rather than the natural causes proposed by Mr. Riordan. Further, additional support for those opinions was to be found in the report of Dr. T. Murray, consultant radiologist, concerning the MRI scan of 19th September, 2013. He considered that the changes noted on the scan were possibly secondary to old trauma and there was no evidence that Ms. Fogarty had injured her right elbow other than as a result of the collision that occurred on the 25th November, 2011.

41. It is not necessary for a trial judge, when giving judgment, to address every issue of contested fact and credibility as may have arisen in the course of the trial. The purpose of a judgment is that the parties to the litigation know why it is that they won or lost their case (see *Doyle v. Banville* [2012] IESC 25). There is no authority to support the defendant's alleged entitlement to a retrial in this case due to the failure of the High Court judge to address the significance of Ms. Fogarty's failure to advise Garda Kenny or Mr. Cox that she had been injured or his failure to justify his acceptance of the evidence of Dr. Sean McCarthy.

42. It is a commonly known fact that in the immediate aftermath of many accidents the victim may, for a whole range of reasons, deny sustaining any injury. Regardless of that fact, it cannot, in my view, be credibly argued that the trial judge failed to consider this aspect of the case when he came to consider the causation issue and that had he done so he would have reached a different result. It is clear from his judgement that he accepted the credibility of Ms. Fogarty's claim that she injured her elbow at the time of the accident regardless of the fact that she had not reported her injury on the day and there was more than sufficient other credible evidence to entitle him to so conclude.

43. Neither was it for the High Court judge to justify his acceptance of the evidence of Dr. Sean McCarthy, even if it was Ms. Fogarty's solicitor who had made the referral. Dr. McCarthy was subjected to intense cross-examination in the course of the trial. It is to be inferred from the fact that the trial judge accepted his evidence on causation, that he considered the circumstances in which Dr. McCarthy became Ms. Fogarty's treating doctor immaterial to his conclusion. Nonetheless, I would caution against a practice whereby any solicitor would repeatedly refer clients who have personal injury claims to the same doctor who would then take over the management of their care with a view to later coming to court to give evidence on their behalf. Those are circumstances likely to place the doctor in a conflict of interest situation and are likely to expose them to a risk of being considered less than fully independent when giving their evidence.

The medical records

44. There was nothing to preclude the trial judge from accepting Ms. Fogarty's evidence as to how she had sustained her injury or the severity of her symptoms regardless of the content of the medical records put to her on cross-examination. As already stated, the defendant sought to defend the causation issue based upon the absence from those records of complaints made by Ms. Fogarty concerning her accident and the severity of her symptoms between 25th November, 2011 and 11th January, 2012. However, Ms. Fogarty did not accept that those records contained a full and complete account of her engagement with the authors of those notes. When challenged to explain how the notes for December 2011 made no mention of her accident or of the very severe symptoms which she maintained had developed post collision, she stated that she believed she had reported the accident and her symptoms and it was not for her to explain why these matters had not been recorded.

45. Perhaps the defendant did not anticipate that Ms. Fogarty might contend that she had reported her accident and symptoms and found himself unable to call the witnesses required to establish the proposition advanced in the course of cross-examination? However, this is what occurred. As was correctly conceded on behalf of the defendant, medical records, even when produced by agreement, are not proof that what is recorded therein constitutes a complete record of what took place between the person making the note and the patient on any given date. In circumstances where Ms. Fogarty maintained that she had likely reported her symptoms and the collision to those who made her records, her evidence on these issues could not be displaced unless the defendant was in a position to call the authors of each note to state that if they had been advised of such symptoms or of any such collision that they would have noted the same in the records which they had made. The defendant either chose not to pursue that option or found himself belatedly surprised such that he was unable to obtain the proof required to challenge what was said by Ms. Fogarty. That being so there is no validity to the submission that the High Court judge attached little or no weight to the fact that there was no note concerning her injuries or the collision prior to the 11th January, 2012. The trial judge could only have attached weight to those records if the defendant had chosen to call the doctors' concerned and they had sworn to the fact that the records were a complete account of their engagement with Ms. Fogarty.

46. Relevant as to the status, if any, of medical records which are put to a plaintiff in cross-examination and are not later proved is the decision of Barrington J. in *Moloney v. Jurys Hotel plc* [1999] IESC 75. In that case the plaintiff, who was a trainee chef at the

defendant's hotel, maintained that she sustained a back injury when she slipped on a wet floor while extracting a heavy ice cream container from a fridge on her employer's premises. There was a major dispute as to the state of the floor at the time. The plaintiff's accident was not witnessed but a fellow worker gave evidence that when she inspected the floor post accident it was wet and that it was regularly wet where the plaintiff had fallen. Two witnesses who had arrived on the scene shortly after the accident were called by the defendant. Both said that the floor was not wet.

47. In the course of cross-examination, the defendant put to the plaintiff a number of medical records it had procured from the Mercy Hospital where she had been treated post accident. Two of these recorded that the plaintiff had sustained a back injury when moving from a sitting position to a standing position. Neither mentioned her slipping on a wet floor.

48. The trial judge concluded that, in light of the contradictory evidence, he was not satisfied that the plaintiff had discharged the burden of proof. In coming to that conclusion and weighing the evidence, he referred to the fact that the two hospital records which had been produced undermined the plaintiff's evidence. The authors of those records had not, however, been called to prove the content thereof.

49. In his judgment on the plaintiff's appeal from the dismissal of her claim, the following is what Barrington J. stated concerning the status of the hospital records at p. 12 of his judgment:-

> "In making this analysis the learned trial judge referred to two hospital notes which he assumed tended to undermine a portion of the plaintiff's evidence and to support that of Mr. Tannion. The trouble is that neither note is evidence. While either note could have been put to the plaintiff in cross-examination (and one was) the cross-examiner would have been bound by her answer. The persons who made these notes were not called to give evidence. They were not cross-examined and the possibility that either, or both, of them might have made a mistake was not explored. There is also the fact that the notes are mutually contradictory and inconsistent with the nature of the plaintiff's injuries as described by all the doctors who gave evidence. These notes are of no evidential value and should not have been used by the trial judge to the (sic) detract from the weight of the plaintiff's testimony. It would therefore appear to me that the trial judge's finding that the plaintiff had failed to prove as a matter of probability that there was water on the floor on the night of the accident cannot stand."

50. It follows from this decision that, had the trial judge engaged in the exercise which counsel on behalf of the defendant maintains he ought to have done *i.e.* attached weight to the fact that the medical records produced prior to the 11th January, 2012 did not mention Ms. Fogarty's elbow injury, he would have fallen into error in the same manner as Kelly J. had done in *Moloney*. The records put to the plaintiff in cross-examination were not evidence but they could have been had the defendant chosen to call the authors of the notes to prove their content.

51. It follows from the discussion in the last preceding paragraph that there was no basis upon which the trial judge could have, as was submitted on the defendant's behalf, drawn an adverse inference from the fact that Ms. Fogarty did not call her general practitioner to corroborate her own evidence in light of the medical records produced by the defendant.

52. I also reject the submission made by counsel for the defendant that the trial judge had reversed the burden of proof based upon that part of his judgment where he stated that it was for the defendant to prove, through calling the authors of the medical records, that the records were indeed a complete account of what had been reported by Ms. Fogarty on each occasion she attended her G.P.'s surgery prior to the 11th January, 2012. That was no more than an accurate statement of the evidential burden that rested on the defendant if it wished to displace Ms. Fogarty's evidence that she had likely reported the collision and the severity of symptoms over that period.

53. I also reject the defendant's submission that an adverse inference ought to have been drawn by the High Court judge based upon Ms. Fogarty's failure to call Dr. O'Carroll to give evidence on her behalf concerning her injury. If she took the view that Dr. O'Carroll would not assist her case she was under no obligation to call him. Further, I am not satisfied that the decision in *Quinn (a minor) v. Mid Western Health Board and Another* [2005] 4 I.R. 1, which was relied upon by counsel for the defendant, is authority which lends any real support to his submission. It is unnecessary to outline in any great detail the facts in *Quinn*. Suffice to say the proceedings concerned a claim for damages brought by the plaintiff in respect of a brain injury which she maintained was the result of negligence on the part of the defendant concerning her care in the months preceding her birth. The defendant maintained that the plaintiff's injuries were not caused by negligence at birth; rather, that her brain damage had been caused by an acute episode which had occurred between weeks 28 and 30 of the gestation period.

54. In the High Court, O'Sullivan J. dismissed the plaintiff's claim concluding that she had not established her claim that had she been delivered by week 35 that her injuries would have been avoided.

55. One of the areas in dispute in relation to causation concerned the interpretation of an MRI scan, an opinion best provided by a paediatric neuroradiologist and that was what was described as "the gold standard". The defendant had retained a Professor Flodmark, a paediatric neuroradiologist to report on the MRI scan and the plaintiff had procured a report from a Dr. Anslow, also a neuroradiologist, who had produced a report which was not favourable to the plaintiff and was therefore not called to give evidence. In his judgment, the trial judge, when electing between the evidence of Professor Flodmark and Professor Hill, the plaintiff's obstetrician, concerning the timing of the injury to the plaintiff's brain which involved an interpretation of the MRI scan, the trial judge stated that he preferred the evidence of Professor Flodmark. He gave three reasons for doing so one of which was that he could not turn a blind eye to the fact that Dr. Anslow had not been called.

56. In the course of the appeal, the plaintiff criticised the emphasis which O'Sullivan J. had attached to her failure to call Dr. Anslow. Kearns J., in the course of his judgment, stated that he felt counsel's criticisms had little merit in circumstances where there was no countervailing evidence from a neuroradiologist to contradict Professor Flodmark's opinion. In those circumstances, the trial judge had acted quite properly in attaching particular weight to that expert's view.

57. It is clear from the decision of Kearns J. that absent evidence from Dr. Anslow, the only other expert with credentials sufficient to counter the opinion of Professor Flodmark, the court had little option but to accept the evidence of Professor Flodmark as the best qualified witness to interpret the MRI scan. The decision is not authority for the proposition that generally a judge should draw an adverse inference by reason only of the fact that a party had failed to call some medical witness that they might otherwise have called. The judgment recognises that in failing to call a medical witness with particular expertise that may have the effect of leaving the expert evidence of their opponent un-contradicted.

58. It was in this regard that Kearns J. relied upon the following passage from the decision of the House of Lords in *R. v. IRC, ex p*

T.C. Coombes and Co [1991] 2 A.C. 283:-

> "In our legal system generally, the silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances a *prima facie* case may become a strong or even an overwhelming case."

59. Applying the aforementioned reasoning to the facts of the present case, it is not clear to me what evidence the defendant contends it had established that Ms. Fogarty did not answer and which it contends was thereby converted into proof. Insofar as the silence of Ms. Fogarty is stated to have been her failure to call Dr. O'Carroll to counter the content of her medical records, the first matter to note is that those records were never proved in evidence. Second, Ms. Fogarty did not remain silent in the face of the records produced. She gave positive evidence that she believed the records were incomplete and that evidence was never countered. In the aforementioned circumstances, I consider the decision in *Quinn* to be of no application to the facts of the present case.

60. Concerning the issue of causation, the final matter that needs to be addressed is the defendant's submission based upon what he contends was a misunderstanding by the trial judge as to the nature of his challenge to the evidence of Dr. McCarthy. Counsel submits that the trial judge must have thought that the defendant was seeking to rely upon the doctrine of *novus actus interveniens* to avoid compensating the plaintiff for her synovitis which he had maintained was the result of the administration by Dr. McCarthy of an excessive number of injections, whereas his cross-examination was intended to establish a cause for Ms. Fogarty's synovitis which had nothing to do with the collision but which was important in the context of the defendant's contention that the chondromalacia was also due to natural causes.

61. Even if the defendant is correct that the trial judge misunderstood the purpose of the cross-examination of Dr. McCarthy concerning the injections which he administered, I cannot see how any such misunderstanding could afford the defendant a *bona fide* ground of appeal. The trial judge clearly accepted that Ms. Fogarty had injured her elbow in the collision and that she developed chondromalacia as a result. He was satisfied that this condition was treated by injections administered by Dr. McCarthy. Mr. Mahalingam and Mr. Riordan on behalf of the defendant, were in agreement that injections of the type administered by Dr. McCarthy were standard treatment for chondromalacia with the only reservation expressed being as to the number of injections delivered. However, even Mr. Riordan had accepted that the number of injections administered was within the permissible range. That being so, the High Court judge correctly compensated Ms. Fogarty in respect of the totality of her injuries, including her synovitis condition and the fact that the High Court judge referred to the doctrine *of novus actus interveniens* is irrelevant and did not adversely impact upon the approach of the trial judge to the issue of causation or damages.

62. In light of the findings of fact made by the trial judge and for the reasons hereinbefore referred to, I see no basis upon which the conclusions of the High Court judge on the causation issue could be disturbed.

Damages

63. Having regard to the principles earlier outlined and the guidance to be found in the decision in *Shannon v. O'Sullivan,* I am not satisfied that the award in respect of general damages in this case was just, proportionate or fair having regard to the injuries sustained. Neither do I consider the award made proportionate when viewed in the context of the overall scheme of awards commonly made to persons with greater or lesser injuries.

64. The following matters are material to my conclusion. First, Ms. Fogarty's injuries could hardly have been sustained in less traumatic circumstances. The impact between her car and that of Mr. Cox was clearly not significant. There was no obvious damage to her vehicle save for minimal damage to the door rim with the result that the driver's door could not be fully opened post impact. In terms of road traffic accidents, this was at the lowest end of the spectrum and is to be contrasted with the multitude of road traffic accidents which are extraordinarily frightening for those concerned, involving as they often do significant speed, head-on impacts, the deployment of airbags and the need for those involved to be cut out of their vehicles. Second, Ms. Fogarty's injuries required no hospitalisation or medical intervention of any type for several weeks, regardless of the fact that the trial judge accepted she was in considerable pain over that period. Third, at no stage following this accident was Ms. Fogarty's mobility compromised. She did not break any limbs such as would have required her to use a wheelchair or crutches. She remained mobile throughout the entire period of her recovery. Fourth, whilst Ms. Fogarty did require a significant number of undoubtedly painful injections into her elbow and later her shoulder and attended a number of sessions of physiotherapy, it does not appear that these treatments disabled her in any real sense. She was at all times fully self caring and her capacity for independent living was not significantly compromised, albeit that she complained of some loss of grip strength in the right hand. She appears to have been able to drive throughout the entire period when she was injured and receiving treatment. Fifth, the evidence did not establish that Ms. Fogarty was obliged to abandon any particular leisure pursuits and there was no evidence to suggest that she was unable to continue with her studies or was otherwise vocationally compromised as a result of her injuries. Sixth, insofar as Ms. Fogarty required medical intervention beyond routine analgesia and the injections administered by Dr. McCarthy and Dr. O'Carroll, once again that intervention was at the very lowest end of the surgical spectrum. Her arthroscopic procedure was carried out as a day case on 20th February 2015 after which she had no further treatment. Finally, it was Mr. Mahalingam's evidence that she would likely make a full recovery from her injury within 18 months of the trial. There was no evidence to suggest Ms. Fogarty would be curtailed in her enjoyment of life in the future or that her injuries would adversely impact on her capacity or on her ability to work or socialise in the future.

65. Undoubtedly, Ms. Fogarty had an unpleasant period of approximately three years involving significant pain and discomfort in her right elbow and a lesser degree of pain in her shoulder. It is to be inferred from the fact that Ms. Fogarty did not report any shoulder pain, not even to Dr. McCarthy, until such time as she commenced physiotherapy in August 2012, ten months post accident, that her shoulder condition was relatively benign, even if it be the case, as was Dr. McCarthy's evidence, that her elbow symptoms had masked the shoulder injury.

66. In addition, the trial judge clearly accepted that Ms. Fogarty had experienced some weakness in her right arm and hand with limitation of her ability to open bottles or jars. As he did her evidence that she had difficulty using a hairdryer. However, the evidence did not establish that Ms. Fogarty did not live a relatively normal life during that period or that she was greatly curtailed in the activities she would otherwise have enjoyed.

67. Having regard to the foregoing, I am quite satisfied that at an absolute maximum an appropriate sum for pain and suffering to the date of trial would have been be an award of €45,000. As to pain and suffering into the future, Mr. Mahalingam's evidence was that Ms. Fogarty had been left with a small scar to the elbow at the site of the arthroscopy, that she probably would not require any future treatment and would likely make a full recovery within 18 months. In those circumstances it is difficult to justify an award of future general damages of €30,000. In my opinion, a fair and just award in respect of pain and suffering into the future would be a

sum of €17,500.

68. Having carried out the aforementioned assessment, I am satisfied that the award made by the High Court judge was excessive to the point that it must be considered a legal error and as such sufficient to warrant intervention by this Court. Accordingly, I would propose that the sums awarded by the trial judge be reduced in the manner earlier referred to reducing the overall award to a sum of €62,500 general damages

Conclusion
69. For the reasons earlier set out in this judgment, I am not satisfied that the appellant has established any error on the part of the High Court judge such as would require his finding on the causation issue to be set aside. His findings of fact were supported by credible evidence. He did not reverse the burden of proof and he did not fail to analyse the evidence.

70. As to the award of general damages made by the High Court judge, I am satisfied that the award was excessive to the point that it must be considered a legal error and must be set aside. For the reasons earlier set forth I would propose that the award made in respect of damages for pain and suffering to date be reduced to €45,000 and the award for pain and suffering into the future be reduced to €17,500. Thus, having regard to the agreed special damages of €6,386.11, the total award made by Barr J. should, in my opinion, be reduced to €68,886.11.