



THE COURT OF APPEAL

Ryan P.
Hogan J.
Edwards J.

Court of Appeal Record No: 238 / 2015

High Court Record No: 4728P/11

BETWEEN/

GRACE CRONIN

Plaintiff/Respondent

-AND-

EMMA STEVENSON AND DARREN RUSSELL

Defendants/Appellants

Judgment of Mr Justice John Edwards delivered on the 22nd day of June 2016

Introduction:

1. In this judgment the plaintiff/respondent will hereinafter be referred to simply as "the plaintiff", and the defendants/appellants will be referred to simply as "the defendants".
2. This is the defendants' appeal against the judgment and order of the High Court (Cross J) made in a personal injuries action on the 17th of April 2015.
3. The plaintiff was awarded a total sum for damages of €200,000 plus the costs of the proceedings, which said costs were to be taxed in default of agreement. The said sum of €200,000 was comprised of €100,000 for pain and suffering to date, €80,000 for pain and suffering into the future, and an agreed sum of €20,000 for special damages.
4. A stay of execution on the High Court's order was granted pending any appeal, conditional upon the payment to the plaintiff by the defendants of a sum of €150,000.

The background to the case

5. The plaintiff's claim arose out of a road traffic accident that occurred on the 5th of December 2007. On the early morning of that date, the plaintiff was returning home from a holiday in Dubai. Having landed at Dublin Airport some time around 5.00am, the plaintiff engaged a taxi to take her from the airport to her parents' home at Templeogue. The plaintiff sat into the rear of the taxi, which was owned and driven by the second named defendant, and fastened her seatbelt. The taxi then proceeded on its journey. When, in the course of that journey, the taxi was in the vicinity of the junction of Harold's Cross Road and Shamrock Villas, Harold's Cross, another vehicle, which was owned and driven by the first named defendant, came across the road and collided head on with the taxi in which the plaintiff was travelling.
6. The plaintiff suffered personal injuries, loss and damage in the accident, and in due course issued these proceedings against both defendants. Liability was conceded on behalf of the defendants and the case proceeded as an assessment of damages.

The medical reports

7. Before considering the judgment of the High Court, it may be helpful to review the medical evidence placed before that court. At the trial the medical reports on both sides were submitted on an agreed basis, and no doctors or other medical experts were called to give oral evidence.
8. On the plaintiff's side, three reports were handed in from Dr Ahmad Ajina, her General Practitioner; three reports from Mr Joe Sparks, Consultant Orthopaedic Surgeon; eight reports from Dr Frank Chambers, Consultant in Pain Medicine; a report from Mr Derek Hamilton, Musculoskeletal Physiotherapist and two reports from Prof Susan McKiernan, Consultant Gastroenterologist.
9. On the defendant's side, two reports were handed in from Dr John Simon, General Practitioner, four reports from Mr Robert McQuillan, Consultant in Emergency Medicine, and a report from Mr Frank McManus, Consultant Orthopaedic Surgeon.

Dr Ajina's Reports

10. The first report of Dr Ajina dated the 30th of April 2011 covers the period from the date of the accident to the date of the report, during which period the plaintiff attended him on eleven occasions. He stated (*inter alia*):

"[I]n summary Ms. Cronin has sustained very severe soft tissue injuries to her cervical, left shoulder and lower back including lumbosacral and coccyx areas. Ms. Cronin has no pre-existing spinal trouble before.

It is approximately three and a half years since the accident and so far there was no significant improvement.

This has imposed a severe restrictions on Ms. Cronin's daily life activities, house work and sleep pattern. It is possible that her acute attack of shingles is linked to the repeated steroids injections which could be avoided if there was no injuries. In addition to this Ms. Cronin's level of stress, anxiety and frustration were very obvious to during these numerous GP visits.

Ms. Cronin's final prognosis is very unpredictable and since it is more than three years I don't expect full recovery

without some residual permanent disability."

11. Dr Ajina's second report, dated 17th of March 2013, covers the period from the 20th of April 2011 to the date of the report, during which the plaintiff attended him on a further four occasions. He reported (*inter alia*):

"So in summary Ms Cronin has sustained severe soft tissue injury to her cervical spine areas and it has been five years since the accident with no recovery. This chronic pain has affected her daily activities, work, personal and social entertainment and unfortunately have not responded well to medications, physiotherapy treatments and multiple trigger points injections.

Her prognosis remains poor and I am not expecting her to have full recovery. Ms Cronin is still going to attend the pain specialist for intermittent treatment. Ms Cronin is still taking simple analgesia in a daily basis and this might continue for few years to come. This residual disability and pain is unlikely to get worse but I would expect frequent relapses of pain and reduce full range of movements."

12. Dr Ajina's third report, dated 31st of December, 2014, covers the period from the 17th of March 2013 to the date of the report, and was based on a review of the plaintiff's condition on the 27th of September 2014. He reported on this occasion:

"As a result of this accident Ms. Cronin has suffered from severe soft tissue injury involving her cervical spine area and coccyx area. In addition Ms. Cronin has sustained minor disc bulging at C4-5 level. This disc bulge extends posteriorly but no compression on either thecal sac or nerve exist. Her coccyx pain has almost resolved but her cervical pain is still severe seven years later despite all of the above treatment. Ms. Cronin has no previous injury to either her cervical or coccyx area.

Ms. Cronin has poor prognosis in so far that she has in my professional opinion, severe irreversible cervical pain which is not responding to all the above treatment. This has left her to suffer during sleep, work and housework activities. I don't anticipate any future treatment that will be of value and hence she is left with permanent morbidity. She will be in need for regular simple analgesia and intermittent physiotherapy treatment."

Mr Sparkes' Reports

13. Mr Sparkes first saw the plaintiff on the 7th of February 2011 on which occasion she was complaining of constant neck pain, coccygeal pain that had reduced in the last three months, frequent numbness in the right ring finger and intermittent shoulder and back pain. She had had a recent MRI scan and nerve conduction studies both of which were normal. Clinical examination revealed significant reduction of spinal movements, with all movements accompanied by trapezius pain which was on palpation more tender in the left than in the right. He concluded:

"There are no hard radiological or clinical findings to explain why Ms. Cronin continues to have right ring finger pain. In the circumstances the constant neck pain and intermittent shoulder and back pain would have to be attributed to soft tissue injuries as the isotope bone scan shows no evidence of any subtle bony abnormality.

On clinical examination there was no focal deficit and I would therefore be of the opinion that no surgical intervention would be required but that Ms. Cronin may require further pain management assistance ...

Given that it is over three years since the date of her accident and these symptoms are persistent and troubling it is becoming increasingly likely that Ms. Cronin will have long-term issues with pain although it is impossible to quantify the duration of symptoms exactly."

14. Mr Sparkes provided a follow up report dated the 24th of September 2014. On this occasion the plaintiff had reported significant improvement in relation to her coccygeal pain, but no improvement in relation to any of her other complaints. On clinical examination of her cervical spine the plaintiff was noted to have significant restriction of movements, all of which were limited by pain in the right posterior cervical region. Further, there was tenderness to minimal palpation throughout the trapezius and posterior cervical region. Mr Sparkes commented:

"The pain and tenderness demonstrated at clinical examination was in my opinion disproportionate to the objective findings especially with regard to the extreme pain response to minimal palpation of the soft tissues. Given that Ms. Cronin is now almost seven years since the date of her accident and continues with a pain specialist it would appear that at this stage she has developed a chronic pain syndrome but this would be better evaluated and described by the treating pain specialist."

15. In a further short report dated 5th of November 2014 Mr Sparkes commented upon the results of a recently conducted MRI scan of the plaintiff's cervical spine, stating:

"In my view there are two issues on the MRI scan, one is description of degenerative change present at C.4/5. The second is loss of normal cervical lordosis. In my opinion the description of degenerative changes on MRI scan represents normal physiological wear in the cervical spine that one would see in a thirty-seven year old female. With respect to loss of normal cervical lordosis, this is frequently interpreted as indicating muscle spasm or tightness. This soft tissue tightness or spasm may be the cause of tenderness in the right posterior cervical region however as I stated in my report the pain response to minimal palpation was disproportionate. There are no other obvious structural abnormalities reported on MRI scan that would indicate any obvious source of extreme or disabling neck pain."

Dr Chambers' Reports

16. Although there were eight reports in all from Dr Chambers a number of these were short and merely comprised letters to the plaintiff's G.P and/or her solicitors, confirming recent reviews of her condition and the nature of on-going treatment, or responding to queries raised by the said solicitors. It is only necessary for the purposes of this judgment to review the more detailed full medico-legal reports provided by Dr Chambers, of which there were two.

17. The first full medical report provided by Dr Chambers was dated the 18th of March 2011. It stated that the plaintiff had been referred by her G.P., Dr Ajina, and presented for assessment for the first time on the 18th of June 2009, when she was complaining of

pain in her neck and shoulders, which was more marked on the left. She also had pain in her right middle finger. She was found on clinical examination to have tenderness and spasm of her trapezius bilaterally, and Dr Chambers performed bilateral trapezius and suprascapular nerve blocks.

18. These were repeated six months later in October 2009. In February 2010, when she was next assessed, she had developed left sided herpetic neuralgia in the L 1 distribution. She was assessed again in June 2010 and in January 2011. When the plaintiff was seen by Dr Chambers on the 20th of January 2011 he noted:

"She has pain in her neck radiating into both shoulders. She stated that her left shoulder is predominantly affected. She stated that her symptoms are more intermittent in nature and increased by any physical or repetitive activity and she finds that driving or sitting for long periods of time further exacerbates her symptoms as does heavy physical or repetitive activity. She states that her symptoms are relieved to a degree by rest and analgesic medication.

She stated that she still suffers from pain over her coccyx while sitting on a hard surface. As stated previously she used to run regularly and finds this difficult to do at the moment. She suffers from intermittent mood disturbance though denies being clinically depressed."

19. Clinical examination on that occasion revealed that the plaintiff had a good range of movement but there was tenderness over her trapezius muscle bilaterally. There was no focal neurological deficit. She also had slight tenderness over her coccyx.

20. Dr Chambers concluded:

"Ms Grace Cronin was involved in a road traffic accident on the 5th of December 2007 as a result of which she developed chronic neck, shoulder and coccygeal pain.

Prior to the accident she had no past history of similar symptoms. I can only therefore conclude that the temporal onset of her symptoms relate exclusively to the accident.

With regards to her neck and shoulder pain her symptoms and signs are consistent with trapezius myofascial pain syndrome with associated suprascapular neuralgia.

Overall she has obtained some degree of relief from trapezius and suprascapular nerve block though she continues to be symptomatic.

With regard to the long term prognosis approximately 80% of such injuries resolve within two years of the accident and therefore due to the chronicity of her symptoms I would have to be guarded with regard to the longterm prognosis though I would feel that there is room for further improvement.

With regards to her low back pain she has pain and tenderness over the coccyx which is consistent with Coccydynia for which she has not had any invasive treatment to date. Provided she avoids sitting on hard surfaces for long periods of time or direct contact she should remain relatively symptom free in this regard.

With regards to future treatment I have advised her to continue with simple analgesic medications and should her symptoms exacerbate she may require a repeat injection in the future."

21. In a further detailed medical report dated the 29th of October 2013, Dr Chambers records that he had seen the plaintiff on a further six occasions, since January 2011. On this occasion he opined:

"With regards to her coccygeal pain this is largely subsided and I would not anticipate any significant problems in the future. With regards to her head and neck pain she still has residual tenderness particularly over her trapezius muscles bilaterally and as I stated previously approximately 80% of such injuries resolve within two years of the accident, however in this instance it is now approaching 6 years since the accident and I would therefore be of the opinion that her condition has plateaued and would anticipate little change in the future. With regards to future therapies over the last 12 months she recently had injections in July 2013, having previously had her last injections in December 2012. I would advise her to avoid any heavy physical or repetitive activity as this is likely to further exacerbate her symptoms and she may need repeat injections for intermittent exacerbations the frequency of which are difficult to predict on an individual basis."

22. In follow up correspondence he was asked by the plaintiff's solicitors to furnish, if he could, answers to the following queries:

"(a) For how long do you think it is likely that my client will continue to require steroid injections?

(b) How many times a year do you think she will require these injections?

(c) Can you please outline the overall cost of these injections ... ?

23. Dr Chambers responded in subsequent correspondence dated November 2014 that:

"...I think it is reasonable to assume that for the foreseeable future she may need such treatments once to twice a year. The current professional fees are in the region of €180.00 excluding hospital costs which would be in the region of €325.00 thus the total combined cost including the hospital cost and professional cost would be estimated in the region of €500.00."

And that:

"With regard to ongoing symptoms, approximately 80% of people who have had a chronic episode, have recurrent episodes as stated previously and it is difficult to predict on an individual basis. However it would be reasonable to assume that she may require one to two such treatments on an ongoing basis, for the next five to ten years. Specifically with regard to the longer term time frame, as a consultant in clinical practice for the last twenty years, I have very few patients that have attended for such treatment in a time span in excess of ten years."

The physiotherapist's report

24. In a detailed report dated 24th of January 2011, the plaintiff's physiotherapist stated (*inter alia*):

"She does respond to physiotherapy treatment but often it is worse in the days after the treatment before it starts to improve. Her symptoms are very easily provoked, so treatment has to be very gentle and graded.

The source of her symptoms appears to be both muscular and neurological. Abnormal muscle tension around the pelvis and shoulder blades will rotate them and abnormally load the attached musculature and ligaments. Postures which place the spine in end of range positions such as sitting in a car will provoke these already irritated structures. Treatment techniques that release the abnormal muscle tension, give Ms Cronin some symptomatic relief. However this can be a relatively slow process especially if there are high levels of irritability in the tissue and poor individual postural habits.

It is worth noting that although symptoms have stabilised they still follow a pattern of increased pain awareness with increased activity. She also reports increased stress because of this and the implications for her job. Stress and coping poorly with it have been demonstrated to negatively affect the outcome of whiplash sufferers.

The fact that she does respond to treatment is encouraging but the irritability and severity of her symptoms is worrying. Treatment is designed to reduce symptoms and to also re-educate abnormal muscle activity in the affected areas. This takes time and commitment on behalf of the patient. However this is not always possible when there is involvement of the nervous system and Ms Cronin has considerable neurological symptoms, ie paraesthesia, burning, muscle guarding, dizziness etc.

I would therefore, recommend that in order to maximise her recovery potential, she should continue with treatment until the resolution of her symptoms. Pharmacological treatment is vital to reduce symptoms in order to promote normal movement and recovery but this has been hampered by other health issues.

Based on the severity of her symptoms at this stage I think that it is unlikely that Ms Cronin will ever get full resolution of her symptoms, however I do feel that they will continue to improve over time. By adapting her activities, keeping active and managing her symptoms with physiotherapy and good pharmacological management she should improve the quality of her life."

Prof McKiernan's reports

25. Prof Susan McKiernan performed an endoscopy on the plaintiff in March 2009 in circumstances where she was complaining of peptic ulcer like pain, and intolerance of even moderate amounts of alcohol and certain foods. The plaintiff was diagnosed as having a chemical gastritis due to certain non-steroidal medications she was taking for pain relief, specifically Difene and Keral. She was prescribed PPI (proton pump inhibitor) tablets and advised to avoid alcohol and triggering foods.

26. Prof McKiernan carried out a follow up endoscopy in November 2014 which disclosed no active inflammation and minimal chronic inflammation. In her report dated 19th January 2015, she stated:

"In summary Grace is suffering from non-ulcer dyspepsia which is likely to have been triggered by her road traffic accident and the heavy use of analgesics seven years ago. She has ongoing symptoms on a day to day basis with defined periods of exacerbation for when she takes her anti-inflammatories. There are also various social factors which exacerbate the situation. It is likely that she will suffer indefinitely from this condition but it may be ameliorated by the use of Amitriptyline, cognitive behavioural therapy and regularisation of her meals."

Dr Simon's reports

27. Dr Simon carried out medico-legal assessments of the plaintiff on behalf of the defendants on the 12th of April 2010, and again on the 7th of September 2010. In his reports based on those assessments he concluded that the injuries complained of were consistent with the accident history, that clinical examinations had revealed no gross significant findings, that a full recovery was expected and that the anticipated timeframe for the achievement of full recovery was six to twelve months from assessment.

Dr McQuillan's reports

28. Dr McQuillan also carried out medico-legal assessments of the plaintiff on behalf of the defendants on the 23rd of February 2008, the 22nd of November 2011, the 23rd of April 2013 and again on the 14th of October 2014.

29. In his first report, he records:

"Following a road traffic accident this lady sustained soft tissue injuries to her low back and coccyx area and soft tissue injuries to her neck and upper back.

She has quite diffuse symptoms at this stage and awaits a bone scan in Tallaght Hospital and an MRI scan of her cervical spine and lumbar spine-

It is almost certain that these scans will not show anything of significance.

She should be encouraged to continue with her mobilization. Judging by her level of symptoms to date and her jaw tenderness and clicking I suspect that her symptom profile will be quite protracted and it will probably be some twelve to fifteen months from the time of the accident before her symptoms subside.

I would not anticipate long term complications."

30. Following his next review of the plaintiff's condition in November 2011, he reported:

Very much as suspected at the time of my examination at 2½ months this lady has gone on to complain on a very protracted basis. The complaints however have been even more protracted than I would have expected.

Her investigations do not show anything of significance and her clinical examination would not suggest any significant

pathology.

She has developed a pain syndrome that is persisting symptoms of pain which are not well explained on a physical basis. She is however showing gradual improvement in that her neck pain is quite rare and intermittent and her coccygeal pain is well settled. She is likely to continue to complain on a fairly protracted basis. No serious injury has been sustained and there will be no long term complications."

31. Following a third review of the plaintiff's condition in April 2013, Dr McQuillan reported:

This lady sustained soft tissue neck and shoulder injuries in an accident at work five years ago.

I first saw her at 2½ months when I felt the response was inappropriate and that she was likely to complain on a protracted basis.

She has complained on a protracted basis, much more protracted than I had anticipated.

To the best of my knowledge her investigations to date have been normal, particularly her bone scan has been normal indicating that there is no acute injury to the joints or the bones or detached ligaments.

She has been treated in the Pain Clinic because of pain syndrome that is persisting symptoms where no definite underlying cause can be found.

Eventually her complaints will ease. No serious injury has been sustained and as such there will be no long term complications."

32. Finally, in his most recent report, based upon his examination in October 2014, Dr McQuillan has stated:

"This lady continues to make complaints related to her neck and shoulders and continues to receive trigger point injections.

There is really no organic basis for this. At the time of my examination in April 2013 she had multiple complaints as currently but could achieve a normal range of neck movement with some hesitancy over the last 25% of movement. On this occasion she has very significant restriction in neck movement in all directions.

The treatment of choice here would be cognitive behavioural therapy combined with an exercise programme. Further physical intervention should be avoided.

No serious injury has been sustained and eventual recovery will occur. There will be no long term complications."

Mr Frank McManus's report

33. Mr McManus also conducted a medico-legal assessment of the plaintiff on behalf of the defendants, and he examined her on the 17th of December 2013. He reported (*inter alia*):

"My first observation is that it is very unusual to have a symptom profile that persists for six years following soft tissue injuries as a result of a road traffic accident.

In the context of this lady's coccygeal symptoms and she identifies the area correctly anatomically the mechanism of the injury that she sustained is very difficult to understand.

Injuries to the coccyx are primarily associated with straddle injuries i.e. when a patient falls and the injury is as a consequence of a direct impact between the legs directly onto the buttocks. This lady was sitting in a taxi when the collision occurred and I cannot understand how she would injure her coccyx under such clinical circumstances.

When I saw this lady the symptoms were in the coccygeal area and she had no symptoms in her lumbar spine and in fact on clinical examination her lumbar spine was normal.

She has symptoms in her cervical spine and it is difficult to understand why these symptoms have persisted and the reason I make that statement is because of the pattern of the symptoms she is having at the present time. Specifically this lady's cervical spine is not symptomatic under axial loading. She herself volunteered to me that when she was looking straight ahead she had no symptoms in her cervical spine and that in fact is the very clinical circumstances when the cervical spine should be painful if a significant injury was sustained in the first instance.

I also have to point out that on examination of this lady she demonstrates a significant loss of function which is very difficult to understand acknowledging her youth and the reported normality of the MRI scan carried out and referred to by Mr. McQuillan.

I am also aware on the basis of Mr. McQuillan's report that the EMG studies of the right upper limb were normal and it is therefore also difficult to explain the intermittent symptoms of altered feeling in the fourth finger of the right hand that Grace Cronin complains of."

"Overall this lady did not sustain a fracture, she sustained soft tissue injuries and I do not consider the injuries she sustained are significant primarily based on the observations listed above. This lady is not pre-disposed to the development of a post traumatic osteoarthritis and personally I would have thought a slightly more aggressive rehabilitation programme would be appropriate under the circumstances of the persistent symptoms that she has. This lady has to understand that she has to move her neck to make her neck normal. If she does not push herself then the symptoms and the loss of function that she manifests may very well continue but the pattern of the symptoms does not indicate to me that she sustained a significant injury."

The judgment of the High Court

34. In making his award the trial judge relied upon the following findings of fact, based upon his assessment the plaintiff's testimony, and the medical reports submitted. The only oral evidence adduced in the case was the testimony of the plaintiff.

35. The plaintiff was born on the 23rd of March 1977. She is a chemical engineer by profession, and at the time of the accident was working in Kildare. Prior to the accident she had had her own home in Dublin. By the time of the hearing before the High Court in April 2015 she was spending most of her time working and living in South Korea. On those occasions when she returns to Ireland, she now lives with her parents. She had moved back in to her parents' home following the accident. The trial judge noted that the plaintiff was fortunate that her employers paid for business class seats for her on her journeys to and from South Korea, which recline fully and give her rest on the journey.

36. The trial judge found that prior to the accident the plaintiff was a very sporty individual who liked jogging and physical exercise, and who moved out and about socialising, enjoying meals and the like as any young person of her age, and with a reasonable job at the time, would have done.

37. The trial judge was satisfied that the accident was a very violent collision. She was thrown back and forward, and bumped her head. After the accident, the taxi driver had kindly arranged for another taxi to take her the rest of the way to her parent's house.

38. When the plaintiff went to sit down in the second taxi she suffered sharp pain in her coccyx area and was in pain when she got to her parent's home. On the advice of her parents she went to see her local GP at nine o'clock in the morning. By this stage she had back pain and neck pain.

39. The plaintiff also developed significant bruising from her seatbelt in the aftermath of the event, photographs of which were produced in High Court, and the trial judge stated that he was satisfied that this bruising had lasted until some time in January of 2008.

40. It was initially hoped that the plaintiff's symptoms would calm down and abate, but when they had failed to do so by her second visit to her GP, he sent her to be x-rayed. By this stage the plaintiff was in such discomfort she had to travel in the passenger seat of her mother's car, with the seat fully reclined so that she was almost lying out. She was not out of work for any protracted period. She would be driven to work in Kildare a friend's car and driven home from work by her mother. She was not claiming any loss of earnings.

41. Later the plaintiff went an MRI. All of the radiological investigations that she underwent indicated that there had been no bony damage. The trial judge was satisfied that she had suffered what is described as a soft tissue injury. She had had a large number of physiotherapy sessions, about 30 in all. She went to see Mr. Sparkes, the orthopaedic surgeon, and the trial judge noted the puzzlement he had expressed concerning the extent of her symptoms.

42. The trial judge noted the plaintiff's evidence that she had been referred by her GP to Dr. Chambers, and that she had also been to some other pain specialists in his absence. He accepted that she had returned to Dr. Chambers and that she had been receiving a course of injections from him at about six monthly intervals. The trial judge noted that she had been getting two types of injections, pain killers and steroids, that were injected into up to nine places in her shoulder, her neck and her head. The plaintiff had described this procedure in her evidence, claiming it was extremely painful, and that it resulted in significant stiffness. The trial judge accepted that for a few days afterwards she had difficulty with movement but that then, happily, she got great relief. However, this relief would wear off after about three months or so.

43. The trial judge accepted that the plaintiff also takes significant amounts of other medication in an effort to delay further injections as long as possible because of pain and discomfort associated with them. He further accepted that the medication had caused the stomach upsets described by Prof McKiernan.

44. The trial judge referred specifically to the reports of Dr Chambers, and quoted the opinions he had expressed in his report dated January 2011, and in his subsequent report dated October 2013, both of which are set out earlier in this judgment at paragraphs 19 and 20 above. The trial judge stated:

"He advises her to avoid in heavy physical activity as it is likely to further exacerbate her symptoms, and indeed the plaintiff has told me and I accept that she has significantly altered her pre-accident lifestyle in that she doesn't go jogging and she doesn't take the exercises that she used to do."

45. The trial judge also quoted, with ostensible acceptance, the prognosis expressed by Dr Chambers in his letter of November 2014, to which I have referred earlier in this judgment at paragraph 22 above. The trial judge was satisfied that Dr Chambers was, in summary, saying two things. First of all, that the plaintiff's symptoms had plateaued, and secondly, that he expected the injections to be finished in five to ten years.

46. The trial judge concluded that there was insufficient evidence to link the shingles episode to the accident.

47. The trial judge went to consider the medical reports submitted on behalf of the defendants, noting in particular the opinions of Mr McQuillan and Mr McManus. He stated:

"Mr. McQuillan says, in essence, that he expected initially the plaintiff's pain was protracted but in his subsequent report he thinks that this is more protracted than he originally expected. Dr. McManus doubted whether her coccyx pain was related to the accident as she described it. The question in this regard and in regard to the defendant's cross-examination of the plaintiff and what was said by Mr. Sparkes in his report is whether the plaintiff is to be believed, whether she is a truthful witness in relation to her complaints. I have no doubt that the plaintiff is a truthful witness. I have no doubt but that she pain in her coccyx associated temporarily with the accident. I have no doubt that as she herself against interest stated that this pain has gradually subsided and by some time in 2011 it was reduced to a nuisance rather than a pain. The other pain is soft tissue in her neck and shoulders and she demonstrated to me the significant misalignment of her shoulders. I do not accept for one moment that the plaintiff is going through all the pain of the two steroid type injections in up to nine places twice a year in order somehow to increase her damages and without cause I accept that the plaintiff was honest throughout her evidence in court."

I believe she is genuine. I believe she is likely to require further injections from Dr. Chambers for up to ten years."

48. The trial judge concluded:

"The plaintiff has been significantly disabled by what she has gone through. She is working but her lifestyle has been interfered with. She has got regular pain. She has got fairly constant pain and this continues to increase over the time before the injections are carried out and then it subsides. This is likely to continue for ten years in any event, if not longer, but I will accept Dr. Chambers that the injections will cease in about ten years time."

49. Having made those findings the trial judge then proceeded to make his previously stated award.

Submissions

Submissions on behalf of the defendants

50. Acknowledging that the legal principles applicable are those laid down in *Rossiter v Dun Laoghaire Rathdown County Council* [2001] 3 IR 578, the defendants contend that the award was excessive and disproportionate to the actual injuries sustained, and that this Court should interfere to set aside the trial judge's award. It was contended on behalf of the defendants that following the *Rossiter* case "[t]he test is whether there is any reasonable proportion between the actual award of damages and what the Court, sitting on appeal, would be inclined to give. The case law indicates that the Court will not disturb an award unless there is a disparity of at least 25%"

51. The defendants have pointed out that it was agreed by all doctors involved that the plaintiff suffered no structural damage and that such injuries as she contends for are soft tissue in nature only. All MRI scans, bone scans and nerve conduction studies carried out were normal.

52. Particular reliance was placed on the clinical examinations carried out by Dr Simon following which he had reported full ranges of movement of the plaintiff's neck and back, with no tenderness and full and equal straight leg raising on both sides. Reliance was also placed on the plaintiff's own testimony that by 2011 her coccygeal pain "was down to nuisance level". The defendants also relied upon the fact that Mr Frank McManus could not understand how the plaintiff could have sustained an injury to her coccyx in the manner she described.

53. The defendants also relied upon Dr McQuillan's opinion that there was no organic basis for the plaintiff's complaints in relation to her shoulder and neck, and have pointed to Mr Sparkes' comment in his report dated 24th September 2014 that "[t]he pain and tenderness demonstrated at clinical examination was in my opinion disproportionate to the objective findings especially with regard to the extreme pain response to minimal palpation of the soft tissue ..." as being consistent with Dr McQuillan's view.

54. Much reliance was also placed on Mr Frank McManus's contention that he was unable to explain the symptom profile.

55. The defendants point to the guidance provided in the Book of Quantum in relation to neck and back soft tissue injuries, as follows:

Neck:

Substantially recovered within twelve months up to €14,400.

Substantially recovered within twenty four months €11,500 - €17,400

Significant ongoing €15,900 - €64,500

Serious and permanent conditions €59,400 - €78,400

Back:

Substantially recovered within twelve months up to €16,300.

Substantially recovered within twenty four months €11,700 - €19,600

Significant ongoing €18,300 - €69,700

Serious and permanent conditions €62,800 - €85,900

56. It was submitted that the trial judge assessed general damages at a rate which suggests that the plaintiff had significant ongoing complaints or some permanent serious condition in her neck and/or back, neither of which was justified having regard to the evidence adduced. It is submitted that the trial judge, by reference to the Book of Quantum guidelines, should have awarded damages within the "significant ongoing" range, at most. It was further contended that to the extent that it might be argued that the guideline figures in the Book of Quantum require adjustment, any increase having regard to the current economic climate and the absence of inflation, should be modest.

Submissions on behalf of the plaintiff

57. The plaintiff also accepts that the leading authority governing the circumstances in which this Court might be justified in interfering with an award of damages by the court below is *Rossiter v Dun Laoghaire Rathdown County Council* [2001] 3 IR 578. It was submitted, however, that the actual test enunciated by the Supreme Court is encapsulated in Fennelly J's statement that the appellate court "should only interfere when 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 test of proportionality seems to me to be the appropriate one, regardless - it need scarcely be said - of whether the complaint is one of excessive generosity or undue parsimony."

58. It was submitted on behalf of the plaintiff that the defendants' submissions overly relied on the defendants' medical reports and were selective with respect to the plaintiff's medical reports. Nor do they refer to her oral evidence and the photographs of her bruising produced to the court.

59. It was pointed out that the plaintiff had testified:

(i) that she had received quite severe bruising and photographs were produced to the court.

(ii) that she had suffered immediate sharp coccygeal pain once she sat down and she gave oral testimony regarding the coccygeal pain and the general low back pain and stiffness and the pain in her neck.

(iii) describing the trigger point injections and the procedures which she is now required to take every 6 months.

(iv) that there was a visible difference in the line of her shoulders which is due to muscle spasm. She had pointed to this discrepancy while in the witness box and the trial judge had noted that her right hand shoulder was indeed higher than her left. Also, the plaintiff gave evidence that her shoulder lowers at about 2 weeks into the 6 month cycle of injections and remains like that, and that it worsens towards the end of the 6 month period and is at its worst at the end of that cycle. She stated that she had dealt with the self-conscious aspects of trying to hide her raised shoulder by deliberately having long hair to cover it up. Further, she contended she also dresses to cover it up. She told the court that the difference in shoulder height was noticeable and that people do spot it and comment upon it.

(v) describing her pain killing medication and the effects of same upon her stomach and how she suffers burning sensation in her stomach. She further told the court that she had become less tolerant of oily food, alcohol and painkillers, including mild over the counter painkillers, necessitating referral to Dr. McKiernan, Consultant Gastroenterologist.

(vi) that she has had to adapt her life because of her ongoing symptoms. Prior to the accident she did quite a bit of jogging, did 10K fun runs, meeting a regular group 3-4 evenings a week and was a member of a gym and had a good circle of friends and that that is all now hampered, because, in her words, she is "the girl who goes home all the time because she feels sick or her neck hurts" and that her life has been compromised in that way.

(vii) that she now manages her life within the cycle of the necessary trigger point injections, and that she is not improving.

60. We have been further referred to the various reports of Dr Ajina, Mr Sparkes, Dr Chambers and Mr McQuillan, which I have already reviewed and summarised.

61. It was submitted that that the plaintiff's injuries are long standing and serious. She is only managing her lifestyle with the help of medication and a quite invasive six monthly cycle of trigger point injections. This has continued from the time of the accident, on 5th December 2007, to date and is likely to continue for at least ten years more.

62. The plaintiff's side points out that the defendants made no reference to the Book of Quantum during the trial of the action and it is contended that in any event the 2004 Book of Quantum does not deal with the plaintiff's particular injuries.

63. Finally, it was submitted that the injuries suffered by the plaintiff had had a major effect upon the life up to the trial, that they continued to have a major effect upon her life at that time, and that they would continue to do so for at least a further 10 years. It was submitted that the award of the trial judge was not erroneous. There had been no error in the award of damages which was so serious as to amount to an error of law. The award of General Damages was both reasonable and proportionate.

Decision

64. In *Nolan v. Wireski* [2016] IECA 56 (unreported, Court of Appeal, Irvine J, 25th February 2016) this Court addressed the jurisdiction of an appellate court to overturn an award of damages. Irvine J, with whom Ryan P and Peart J agreed, citing *Foley v. Thermocement Products Ltd* (1954) 90 ILTR 92; *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 IR 578 and *Hay v. O'Grady* [1992] 1 I.R.210 stated (at para 21) that "[a]n appellate court enjoys jurisdiction to overturn an award of 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 appropriate in respect of the injuries concerned", and further stated (at para 23) that as an appellate court does not enjoy the opportunity of seeing and hearing witnesses in the same manner as the trial judge at first instance "an appellate court must be cautious and avoid second guessing a trial judge's determination as to what constitutes appropriate damages in any given case."

65. That having been said, Irvine J noted (at paras 24 & 25) that the appeal in question was:

"... a case in which the plaintiffs medical evidence was not given via voce. The plaintiffs expert reports were, by agreement, handed in to the trial judge and in this respect this court is in as good a position as the trial judge to evaluate the weight to be attached to that evidence. I am nonetheless mindful of the fact that this medical evidence cannot be viewed in isolation and must be considered against the backdrop of the plaintiffs own evidence, which this court has not had the benefit of hearing.

Accordingly, it is fair to say that it is not for an appellate court to tamper with an award made by a trial judge who heard and considered all of the evidence. It is only where the court is satisfied that the award made was not proportionate to the injuries and amounts to an erroneous estimate of the damages properly payable that this court should intervene."

66. It seems to me that exactly the same considerations arise in the present case and that the approach must be the same.

67. Irvine J's judgment in *Nolan v. Wireski* addresses in some detail the correct approach to the assessment of damages in personal injuries cases. It points out (at para 31) that "[p]rinciple and authority require that awards of damages should 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. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries."

68. Irvine J made the further points (at paras 38 & 39) that "... it is reasonable to seek to measure general damages by reference to a notional scale terminating at approximately the current maximum award endorsed by the Supreme Court which is in or about €450,000. That is the figure generally accepted by senior practitioners and judges alike as the appropriate level for compensation for pain and suffering in cases of extreme or catastrophic injury" and that "[w]hen it comes to assessing damages I believe it is a useful to seek to establish where the plaintiffs cluster of injuries and sequelae stand on the scale of minor to catastrophic injury and to test the reasonableness of the proposed award, or in the case of an appeal an actual award, by reference to the amount currently awarded in respect of the most severe category of injury. Such an approach should not be considered mandatory and neither does it call for some mathematical calculation; what is called for is judgment, exercised reasonably in light of the case as a whole."

69. In the present case, although the plaintiff was cross-examined by counsel for defendants on the basis that the defendants' medical experts were unable adequately to explain the severity of her symptoms, it was never put to her in terms either that she was feigning or that she was exaggerating her symptoms. The trial judge expressed himself satisfied that the plaintiff was a genuine and credible witness. He so concluded having both heard and observed her in the giving of her evidence and in circumstances where he regarded it as impossible to accept "*for one moment that the plaintiff is going through all the pain of the two steroid type injections in up to nine places twice a year in order somehow to increase her damages*". I see no basis for impugning the trial judge's assessment of the plaintiff's credibility, particularly in circumstances where Dr Chambers has provided evidence that while the great majority of soft tissue injuries (80%) do settle down, typically within two years, the remainder prove more intractable and some become chronic, in the latter case taking between five and ten years to resolve. There is no reason to believe that the plaintiff is not one of the small percentage of persons with soft tissue injuries who has been unfortunate enough to develop chronic symptoms.

70. By the same token, in reviewing the award of general damages in this case, it is necessary to have regard to the objective medical evidence. The starting point is that the main injuries, i.e., those involving the plaintiff's cervical and trapezius region, and her coccygeal region, were soft tissue in nature and happily did not involve anything structural. There was also short term, but none the less extensive, bruising to the plaintiff's trunk caused by her seatbelt. In addition, she had some bruising to her head as a result of striking her head against the seat rest in front of her, as a result of which she also broke her reading glasses. She has also developed chemical gastritis due to long term use of oral pain relieving medication, and this requires to be managed with PPI tablets and dietary modifications.

71. The bruising to the plaintiff's head and trunk resolved totally within a matter of weeks. The coccygeal injury had largely resolved by mid 2011 (three and a half years post accident), by which time the plaintiff was characterising it as nothing more than a nuisance.

72. The intractable aspect of the plaintiff's injuries are those involving her neck and shoulders. It has to be accepted that she has significant ongoing symptoms, which she manages through a combination of six monthly nerve block injections administered by her pain consultant, oral medications and by lifestyle changes. There seems to be no doubt but that the nerve block injections involve an unpleasant procedure, but the benefits overall are acknowledged to outweigh the unpleasantness involved. There is a short delay following the procedure before relief is felt, then there is considerable relief which diminishes gradually over succeeding months until the point is reached where further injections are required. This is likely to continue in the opinion of Dr Chambers for at least five, and possibly up to ten years. However, he has commented that he has had very few patients that have attended for such treatment for more than ten years.

73. The injuries suffered by the plaintiff were indeed significant, and she was entitled to be properly and adequately compensated for them. However, they were not catastrophic injuries. Moreover, the prognosis for the plaintiff is for eventual recovery with time, although admittedly this is likely to take much more time than would normally be expected for soft tissue injuries. She has already recovered to some degree.

74. The plaintiff is a biochemical engineer working in the pharmaceutical industry. She did not lose any time off work as a result of the accident. Her employment at the time was in Kildare and following the accident which occurred on a Thursday on her return from a holiday in Dubai, she was able with the help of a colleague and of her mother to travel to and from work the following week. Her work subsequently took her to South Korea from December 2013. She initially went there once a month for a week at a time and gradually her periods there built up. At the time of trial in April 2015 she had been working full-time in South Korea since the previous May. The fact that the plaintiff was able to continue her work uninterrupted is a significant objective fact. Indeed, she was able to undertake a major change in her career that involved long and arduous travel. Notwithstanding the fact that her employers provided the relative comfort of Business Class flights, the fact that she was able to fly such distances and to carry on her highly responsible work so far away from home and for long periods cannot be ignored in the assessment of damages. It is, of course, to the plaintiff's credit that she kept on working and did not let the injuries prevent her doing so but it is also relevant when considering the impact of the accident and its consequences on the plaintiff's life as a whole. Many injured persons have to endure the frustrations of incapacity to work as well as the pain and suffering from their injuries. And the fact that the plaintiff was able to live and work for long periods in Southeast Asia without getting any treatment is also, firstly, to her credit and, secondly, relevant as objective information that she was able to carry on her work in those circumstances. The analysis of the award of damages has to take account of this evidence.

75. The plaintiff has undoubtedly also seen prejudice to the quality of her life outside of her work. However, while many of her pre-accident physical activities, and some social activities, remain closed off to her, it is clear that she has resilience and fortitude and with necessary lifestyle modifications pending further recovery she is in a position to limit that prejudice.

76. The defendants were right to point to the book of quantum. The Civil Liability and Courts Act 2004 requires a judge in a personal injuries case to have regard to the Book of Quantum, although he may also have regard to other factors. While the Book of Quantum requires updating, it is not so out of date as to be of no relevance. Moreover, where it is perhaps of particular help is in terms of locating where on the scale of general damages where the upper end is determined by the figure appropriate to catastrophic injuries soft tissues of various grades lie.

77. The current Book of Quantum, published in 2004, recommends an award of general damages of up to €300,000 for both quadriplegia and paraplegia. As previously indicated, Irvine J has stated in *Nolan v. Wirenski*, that today €450,000 is regarded as the upper limit for catastrophic injuries, a figure which represents a 50% increase on the 2004 figure.

78. It is clear from the indicative figures provided by the Book of Quantum, even if updated by a crude 50%, that the trial judge's award of €180,000 in respect of pain and suffering (€100,000 to date and €80,000 into the future) is difficult to justify. In the circumstances I consider that his award was disproportionate to the injuries suffered and excessive to the point that in line with the principles articulated by the Supreme Court in *Rossiter*, it should be set aside.

79. Independently of the Book of Quantum, it is appropriate also to examine the award of damages by reference to where the plaintiff's injuries fall to be located on the range that comes before the courts for assessment between minor and very severe. That is the approach that this Court adopted in *Nolan v Wirenski* and also in *Shannon v O'Sullivan* [2016] IECA 93. In the latter judgment Irvine J said at paragraph 34:

"As to how a court should decide what is proportionate in terms of damages, I believe it is useful to seek to establish where the plaintiff's cluster of injuries and sequelae are to be found within the entire spectrum of personal injury claims which includes everything from very modest injuries to those which can only be described as catastrophic. While this is not a mandatory approach, it is a useful yardstick for the purposes of seeking to ensure that a proposed award is proportionate. This type of assessment is valuable because minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages

which are likely to fall somewhere in the region of €450,000. The exercise is also valuable because awards of damages must be proportionate *inter se* and every injured party who receives an award of damages should be in a position to look to other awards made in respect of different injuries and conclude that their award was fair and just having regard to the relative severity of each. As Denham J. advised in *M.N v. S.M.*, damages can only be fair and just if they are proportionate not only to the injuries sustained by that plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. At para. 44 of her judgment she stated "there must be a rational relationship between awards of damages in personal injuries cases."

Again, I am of the view that in light of all the evidence in the case the damages awarded by the High Court are disproportionate and excessive when considered against the spectrum of damages awarded by the courts in cases of personal injury.

Conclusions

80. Taking full account of the findings of the High Court as to the credibility of the plaintiff, in my judgment a reasonable and proper award in this case would be €75,000 for pain and suffering to date and €30,000 for pain and suffering into the future, giving a total award for general damages of €105,000. To this must be added the agreed special damages of €20,000, amounting to a total overall award of €125,000. I would therefore set aside the order of the High Court and replace it with an award of €125,000.