UNAPPROVED
THE COURT OF APPEAL

Appeal Number: 2020/122
Neutral Citation Number: [2022] IECA 163

Whelan J.
Faherty J.
Collins J.

BETWEEN/

JOANNE O'SULLIVAN

PLAINTIFF/RESPONDENT

- AND –

AGNIESZKA BROZDA, MARY COUGHLAN AND JASON COUGHLAN

DEFENDANTS/APPELLANT

Judgment of Ms. Justice Faherty dated the 14th day of July 2022

1. This is an appeal against the judgment of the High Court (Barr J.) delivered on 12 March 2020 and the subsequent Order dated 22 April 2020, awarding damages to the plaintiff in the sum of €302,445.48 from which the first defendant (no order having been made as against the second and third defendants) now appeals. Hereinafter, save where otherwise appears, the reference to "the defendant" should be read as referring to the first defendant.

2. The grounds of appeal can broadly be distilled into two broad categories, firstly, that the trial judge (hereinafter "the Judge") erred in failing to dismiss the plaintiff's claim pursuant to s. 26(2) of the Civil Liability and Courts Act 2004 ("the 2004 Act"), or otherwise sanction the plaintiff for the manner in which she prosecuted her claimed future loss of income. Secondly, the Judge erred in law in the manner of his assessment of the general and special damages awarded to the plaintiff.

3. The case arises as a result of a road traffic accident which occurred on 27 August 2016. Following a hearing in the Circuit Court between the defendants, liability for the accident was admitted by the defendant. Ultimately, the plaintiff's case proceeded in the High Court as an assessment of damages. The trial of the action took place over six days in January 2020.

The evidence in the High Court

4. At the time of the accident the plaintiff was aged 27 years. She testified that she is a graduate in commerce from University College Cork ("UCC") and also holds a Masters in food marketing from UCC. As of August 2016, she was engaged in full time employment in the HR department of a major bank based in Dublin, albeit for reasons that will be shortly explained, she was on certified sick leave from her work. On 27 August 2016, the plaintiff was a front seat passenger in a motor vehicle being driven by her boyfriend which was struck from the rear by the defendant's vehicle at or near Hazelwood Shopping Centre, Glanmire, County Cork. The plaintiff described the circumstances of the road traffic accident in the following terms. The car in which she was travelling was stopped at a junction at a "stop" sign when she suddenly felt the car go forward and there was a loud bang. She stated that immediately her head "had gone forward and back" and "banged off the headrest". She felt immediate pain in her head and across her back between her shoulders. She also experienced pain in her right knee, which had struck the dashboard.

While an ambulance was called, the plaintiff declined to go to hospital, choosing instead to proceed to the social function to which the plaintiff and her boyfriend were travelling. Her evidence was that she stayed, however, only 20 minutes at the birthday party by which time the pain in her head, back and neck had increased. She then went to the Accident and Emergency Department in the Mercy Hospital Cork. X-Rays were taken, there was no bony injury and the plaintiff was prescribed analgesics.

5. Apart from the plaintiff's evidence, the only other evidence in relation to the severity of the impact between the vehicles were the photographs of the two vehicles which were before the High Court. They showed very minor damage to the rear of the vehicle in which the plaintiff was travelling. There was minor denting evident to the front number plate of the defendant's vehicle. The only other evidence was the repair bill for the vehicle in which the plaintiff had been travelling, in the sum of €249.70. No engineering evidence was called by either side at the trial.

6. An important issue in this case concerns the plaintiff's pre-accident medical history.

The plaintiff's pre-accident condition

7. It is accepted by all concerned that the plaintiff was a bad candidate for the accident in which she was involved on 27 August 2016. On 1 June 2016, some three months or so prior to the accident, she underwent extremely invasive surgery to correct a Chiari 1 malformation. This condition is described at para. 8 below.

8. The events which led to the identification of the Chiari 1 malformation, and the plaintiff's subsequent surgery, are also of some consequence. In November 2015, the plaintiff struck her head against an electricity box while she was retrieving post from her post box at work. She developed a headache in the days after that incident. Initially, the plaintiff's Dublin-based GP, Dr. Sheila Byrne, diagnosed a sinus infection and prescribed antibiotics. Her headaches persisted, however, including over the Christmas holiday

period. In January 2016, the plaintiff returned to Dr. Byrne in relation to her headaches on this occasion explaining that she had banged her head in November 2015. The GP arranged for an MRI scan to be carried out and certified the plaintiff for sick leave. The scan revealed a pineal cyst. On account of this, the plaintiff was referred to Mr. Chris Lim, Consultant Neurosurgeon at Cork University Hospital. The plaintiff was seen by him in March 2016. While the cyst was not greatly significant, Mr. Lim observed that the plaintiff had a Chiari malformation at the base of her skull. As he described in evidence on Day 3 of the trial, this was a malformation of her brain whereby a portion of the brain grew downwards from the base of the skull into the area of the spinal cord at the top of the C1 vertebra. Mr. Lim described it as a congenital malformation of the brain of which persistent headaches are the main symptom. He was satisfied that the cause of the plaintiff's ongoing headaches in late 2015/2016 was the Chiari 1 malformation.

9. The operation (described by Mr. Lim as the decompression of the foramen magnum) was carried out on 1 June 2016. The surgery involved the cutting of the main bulk of all muscles that connected the plaintiff's head to her spine, disconnecting bone from muscles and tendons, until reaching the cervical spine, thereafter excising bone from the base of the skull and cervical spine and re-attachment afterwards of all musculature and tissue. It involved making a wider opening at the junction between the base of the skull and the top of the C1 vertebra. In order to do so, Mr. Lim had to make an incision from the back of the skull down to approximately the middle of the neck. He then had to cut through the tendons and muscles surrounding the upper vertebrae in the neck. These had to be dissected and removed from the bones of the skull and the spine. When that was done, Mr. Lim then removed a portion of the posterior part of the bone of the cervical spine and part of the foramen magnum in the occipital bone. The purpose of the operation was to widen the channel so as to enlarge the area and allow spinal fluid to flow freely without being

impeded by the tonsil of brain which had grown downwards. The operation also involved opening the outer covering of the brain known as the "dura" to enhance enlargement of the area. The next step was the closing-up stage by closing the various layers of muscles. This was done by means of soluble sutures, 30 in all. Finally, the outer layers of the skin were closed. The operation lasted two to three hours. It was a profoundly invasive and serious surgery for which a recovery period from about 6 to 12 months was envisaged. Mr. Lim testified that in the immediate post-operative period, one would expect a patient to experience nausea and considerable pain which could last for a number of weeks. Thereafter the pain would ease, and physiotherapy for which the plaintiff was referred to rehabilitate her neck would then commence. It was anticipated that in the ordinary course, the plaintiff would not have returned to work until the end of 2016.

10. The plaintiff was reviewed by Mr. Lim on 14 July 2016. She reported that she had been very miserable for the first five weeks post-surgery but that she had made considerable improvement in the week prior to seeing Mr. Lim. Mr. Lim testified that the plaintiff was quite good when he saw her at that examination. He next saw the plaintiff at the end of July 2016 and she had further improved by that time. By that stage, the plaintiff had recovered sufficiently to attend physiotherapy.

11. The plaintiff was first seen by Ms. Rachel Ormond, Chartered Physiotherapist, on 29 July 2016. In a letter to Mr. Lim dated 8 August 2016, Ms. Ormond referred to the plaintiff as presenting with "poor posture with her head tilted in a slightly lateral orientation to the right". She continued: "Active range of movement of the cervical spine was grossly restricted as one would expect with ranges as follows: flexion 60%, extension 30%, rotation 70% bilaterally, lateral flexion 50% bilaterally."

12. Ms. Ormond also reported that the plaintiff presented with significant weakness of the posterior cervical stabilising muscles, worse on the right side. She was shown

exercises to improve the stability of the posterior cervical, sub-occipital and deep neck flexor musculature in addition to strengthening exercises for the peri-scapular muscles. She did not receive any manual therapy at that stage. Ms. Ormond sought guidance from Mr. Lim as to when she could commence manual therapy. In reply on 9 August 2016, Mr. Lim suggested commencing manual therapy three months post-surgery.

13. Ms. Ormond next saw the plaintiff on 5 August 2016, when she reported that she had improved and was managing her exercise programme. She was seen again by Ms. Ormond on 22 August 2016, some five days before the road traffic accident. On that occasion, it was noted that she had recovered a significant degree of cervical movement. Ms. Ormond was satisfied that her findings in this regard demonstrated that the plaintiff had begun to make significant progress with her post-surgical rehabilitation. It was anticipated that manual physiotherapy would begin in September 2016.

14. The plaintiff's own evidence was that she had made considerable improvement by 22 August 2016. Her headaches were reducing, and her neck pain had dramatically reduced. She envisaged going back to work by December 2016.

The plaintiff's injuries and progress post the road traffic accident

15. The plaintiff's case was that albeit the road traffic collision on 27 August 2016 was of a relatively minor nature, it was significant enough to cause serious harm to her by then post-operative and vulnerable neck and cause injury to her back and right knee. She testified that in the days following the accident on 27 August 2016 she had a lot of pain in her neck, back and right knee. The pain in her lower back extended up her whole spine. Her headaches were also more severe post-accident and were constant in nature. She felt dizzy and nauseous.

16. On 31 August 2016, the plaintiff attended for physiotherapy where she was seen by Ms. Long, Ms. Ormond's partner. Her complaints were of cervical thoracic pain and

stiffness, with symptoms worse on the left side. She also reported the onset of lower back pain and an increase in the severity and duration of her headaches. Ms. Long recorded the plaintiff's posture as markedly antalgic, with pseudo-winging of the left scapula and marked elevation of the right shoulder girdle. There was complete reversal of the normal lumbar lordosis, with paraspinal muscle spasm noted bilaterally in the thoracolumbar region. The range of movement in her neck was recorded as follows: flexion 50%, extension 10%, right rotation 60%, left rotation 60%, right lateral flexion 50%, left lateral flexion 50%. The range of movement in her thoracic spine was as follows: flexion normal, extension nil, right rotation 60% with pain, stiffness and spasm, left rotation 60% with pain, stiffness and spasm. While movement of her shoulder joints were within normal limits, there was pain over the scapulae at end of range of internal rotation bilaterally. The range of movement of the lumbar spine was recorded as: flexion 50%, extension nil, right lateral flexion 75%, left lateral flexion 75%, both of which were limited by pain and spasm. Ms. Long noted that trigger points of tenderness and significant spasm were detected in the lumbar paraspinal and gluteal musculature. Neurological examination was normal.

17. In the court below, Ms. Ormond stated that what was of note as of 31 August 2016 was that there was diminution in the range of movement in the cervical spine, together with the addition of limited movement in the thoracic spine and the onset of severe limitation of movement in the lumbar spine. There was also loss of lumbar lordosis. She stated that the lordosis was completely reversed, which was indicative of muscle spasm in the area. Overall, Ms. Ormond's evidence was that this represented a significant deterioration in the plaintiff's condition since she had been last seen, some five days before the road traffic accident.

18. The plaintiff re-attended Ms. Ormond on 19 September 2016. At that time, she continued to complain of severe headaches, neck pain, shoulder pain, back pain and pain in her right knee. Ms. Ormond made a working diagnosis of cervico-thoracic and lumbar hypo-mobility with findings implicating neural irritation at the L4 and L5 levels consistent with whiplash associated disorder based on the objective assessment findings. In respect of the right knee, she made a working diagnosis of tendinopathy which was confirmed on an MRI scan carried out on 25 October 2016.

19. Ms. Ormond duly apprised Mr. Lim of the "unfortunate deterioration" in the plaintiff's progress.

20. The plaintiff was seen by Mr. Lim on 13 October 2016 for a routine appointment. By that time, she had been prescribed anti-depressant medication due to her low mood and she had four sessions of counselling. Mr. Lim's evidence was that when he saw the plaintiff on 13 October 2016, she had significant neck and shoulder pain and associated headaches which had increased since the accident. He was of the view that while the plaintiff had been making a good recovery from her surgery on 1 June 2016, the road traffic accident had increased her neck and shoulder pain and headaches. Back pain was also a feature. Effectively, she had received a soft tissue injury to the area that had been compromised due to the surgery. It was an area that was particularly vulnerable to trauma. This was in circumstances where the Chiari 1 malformation surgery had involved electrocautery to detach muscles and ligaments from the bone which had resulted in quite an amount of injury and inflammation to the bone, muscles and tendons. Mr. Lim was of the view that the complaints with which the plaintiff presented on 13 October 2016 were caused by the road traffic accident. Because of the nature of the plaintiff's complaints, Mr. Lim referred her to Dr. Donal Harney, Pain Specialist.

21. On 20 October 2016, a week after her visit to Mr. Lim and prior to being seen by Dr. Harney, the plaintiff was assessed by her Dublin-based GP, Dr. Byrne. Prior to that, on 9 September 2016, Dr. Byrne had received a telephone call from the plaintiff in the course of which she was advised of the plaintiff's low mood. While the potentiality of anti-depressant medication was discussed none was prescribed on that occasion. On 16 September 2016, the plaintiff consulted with a colleague of Dr. Byrne's and on that occasion, she was prescribed anti-depressive medication (Escitalopram) and advised to attend counselling. There was a further telephone consultation on 30 September 2016.

22. The plaintiff's physical attendance on Dr. Byrne on 20 October 2016 is recorded in a medical report dated 24 November 2016, which was admitted in evidence in the court below. The report records, *inter alia*, as follows:

> "On 20/10/2016, Ms. O'Sullivan attended me to say that she was making good progress with her physiotherapy, and that she no longer required muscle relaxant medication. Her overall range of movement at her neck and back was improving steadily, and her pain was lessening. As a result, her mood was also improving. However, Ms. O'Sullivan reported that she still had ongoing pain in her right knee that required further investigation. … I arranged for her to have an MRI scan done."

23. Dr. Byrne concluded her report by giving the following opinion and prognosis:

> "It is my medical opinion as her GP that Ms. O'Sullivan suffered a significant set-back in her post-operative physical recovery, and that the added pain and anxiety following the accident had an adverse effect on her mental health. I would hope and anticipate that Ms. O'Sullivan will make a complete recovery from the injuries she sustained in the road traffic accident in August 2016. However, at present, I am unable to be more specific with a time frame for this recovery."

24. The plaintiff had her first attendance with Dr. Harney on 22 November 2016. Her complaints at that time were of persistent ongoing left-sided neck pain radiating to the left shoulder, in addition to lower back pain and pain in the right knee. She reported that with physiotherapy intervention the pain in her right knee and lower back had eased in the interval between the date of referral and review by Dr. Harney. Her major issue was pain with respect to the left side of her neck and left shoulder. Clinical examination on 22 November 2016 revealed straight leg raising was 90 degrees bilaterally, lumbar spine, hip and sacroiliac joint examination was normal. Thoracic spine examination was normal. There was a good range of movement in both shoulders. There was no nerve root tension signs in the lower or upper limbs. However, as noted in Dr. Harney's report of 14 February 2017, "[s]pecifically, there was marked tenderness facet joints left side, C3, C6. There was also mechanical allodynia in the distribution of right and left greater occipital nerves slightly worse on the right than on the left side". This was the area of her most significant pain. Dr. Harney's clinical impression was that the plaintiff was suffering with ongoing whiplash associated disorder as a consequence of the road traffic accident. He arranged to carry out treatment on the plaintiff's neck the following month.

25. Prior to receiving that treatment, a number of events occurred. Firstly, the plaintiff experienced severe headaches after riding on a Ferris Wheel in early December 2016. Secondly, she fainted due to the level of pain in her head following which she spent two weeks in Cork University. The plaintiff described her head as spinning and that her brain was "flipping". She described the pain in her head as very severe. The plaintiff's presentation at that time and the medical findings are discussed in more detail later in the judgment.

26. The plaintiff received her first treatment from Dr. Harney on 23 December 2016. He performed a pulsed radiofrequency lesioning (PRFL) on the left and right greater occipital

nerves at 42 degrees centigrade for four minutes. That was done to help manage her severe headaches. In addition, he also performed simple left and right C 3/C 6 diagnostic facet joint blocks. The lesioning of the occipital nerves was done under sedation and administered by needle, a procedure the plaintiff found frightening. It was also painful, as were the facet joint blocks. The plaintiff was given morphine for the pain. Her evidence was that she received no immediate relief from the treatment.

27. The plaintiff was seen by her family GP in Cork, Dr. Kieran Donovan, on 30 December 2016. At that time her complaints were of considerable pain in her neck, shoulders, back and left arm and of severe headaches. Dr. Donovan's impression was that her condition was due to her surgery and the superimposed injury from the road traffic accident. He considered the road traffic accident a "hugely significant" component of her symptoms.

28. The plaintiff was reviewed by Dr. Harney on 7 February 2017. By that stage, her headaches persisted but she had made good progress in relation to her neck pain. Dr. Harney's clinical impression at that juncture was that the plaintiff was suffering with predominant severe left-sided greater occipital nerve neuralgia and to a lesser extent right-sided greater occipital nerve neuralgia. He noted that she had responded to a diagnostic facet joint block on the right side at C 3/C 6. As Dr. Harney reported on 14 February 2017, the plaintiff had made "excellent progress overall with respect to her headaches following [the surgery of 1 June 2016] but as a consequence of [the] road traffic accident on 27th of August 2016, [the plaintiff] is suffering with predominant left and right greater occipital nerve neuralgia."

29. On 21 April 2017, Dr. Harney performed PRFL on the left and right greater occipital nerves. When seen on 6 June 2017, Dr. Harney noted that the plaintiff had gleaned some relief from the treatment administered in April 2017. He again performed PRFL of the left

and right greater occipital nerves on 1 September 2017. When reviewed by Dr. Harney on 17 October 2017 she reported that the treatment given on 1 September 2017 had not improved her pain significantly. Her major issue at that juncture was right-sided greater occipital nerve neuralgia and ongoing hemicranial pain on the right-hand side. When next seen on 8 December 2017, the plaintiff underwent IV Lidocaine and Ketamine infusion over two hours.

30. The plaintiff's testified that she only got temporary relief from the treatment afforded by Dr. Harney in 2017. She never got any lasting benefit. However, she acknowledged some improvements during 2017 including being permitted by Mr. Lim to return to driving in February 2017.

31. Throughout 2017, the plaintiff continued with her physiotherapy in the intervals between seeing Dr. Harney, albeit she could not receive physiotherapy treatment immediately after receiving his treatments. She reported some improvement after her 1 September 2017 treatment by Dr. Harney in relation to her cervical spine and left scapular pain. Her headaches however remained static. She had also suffered an exacerbation of lumbar region pain, with associated radicular symptoms to the lower limbs.

32. Acupuncture treatment in the Autumn of 2017 ultimately did not prove beneficial.

33. When reviewed by Ms. Ormond in January 2018, the plaintiff reported no improvement in her headaches from the treatment afforded by Dr. Harney, and that her left-sided scapulae-thoracic and lumbar spine pain with associated lower limb symptoms had deteriorated without physiotherapy treatment. On 2 February 2018, the plaintiff had in-patient treatment from Dr. Harney in the Bon Secours Hospital by way of a further Lidocaine and Ketamine infusion. Additionally, she underwent a trial of Cefaly, external neuro modulation, in an effort to manage her headaches and improve her sleep and mood.

She found some benefit from this treatment in respect of her headaches and sleep, as noted by Ms. Ormond when the plaintiff attended her at that time.

34. The plaintiff was reviewed by Dr. Harney on 20 March 2018 at which time her major issue was pain in the left shoulder and pain in the distribution of the left suprascapular nerve. She was also complaining of pain in the facet joints on the right side at C 2/C 6. An MRI scan of the cervical spine at that time revealed the previous surgery and a minimal stable disc bulge at C 5/ C 6. An MRI of the left shoulder revealed mild rotator cuff impingement.

35. She was next reviewed by Dr. Harney on 20 April 2018. He performed PRFL of the left suprascapular nerve and also performed left-sided C 2/C 6 diagnostic facet joint blocks. On that occasion, her right-sided facet pain was not too bad.

36. On 21 September 2018, Dr. Harney performed targeted facet joint blocks on the right side at C 2/ C 6, PRFL of the left suprascapular nerve and also left and right-sided L 4 /S 1 diagnostic facet joint blocks.

37. A repeat MRI of the left shoulder on 23 October 2018 revealed a supraspinatus tendon which was attenuated. An MRI of the lumbar spine on the same date revealed a broad posterior disc bulge at L 4/L 5. There was no evidence of nerve root compression.

38. Dr. Harney reviewed the plaintiff on 25 January 2019. At that time, he performed simple left-sided C 2/ C 6 diagnostic facet joint blocks and PRFL to the left suprascapular nerve. On 26 April 2019, he performed left and right L 3/S 1 diagnostic facet joint blocks and left and right C 3/C 6 diagnostic facet joint blocks under image guidance. He also administered a left-sided C 7 to T 2 paraspinal injection. Dr. Harney noted that one week following these interventions, the plaintiff developed severe acute lower back pain and had severe lower back spasm. An MRI of the lumbar spine on 27 May 2019 revealed stable imaging.

39. The plaintiff was seen by Dr. Harney for the fifteenth time on 11 June 2019. On that occasion her complaints were severe left and right-sided lower back pain, left-sided neck pain and left shoulder pain. She reported that her headaches were very, very severe. Clinical examination on that occasion revealed tenderness of the facet joints on the left and right side at L 3/S 1, marked tenderness of the facet joints on the left side C 3/C 6 and reduced movements of the left shoulder in adduction internal rotation and abduction external rotation. There was also tenderness in the distribution of the left and right greater occipital nerves and also nuchal line tenderness left and right-side C 3/T 1. There was no evidence of nerve root tension signs in any of the plaintiff's limbs.

40. Dr. Harney's clinical impression as of June 2019 was that the plaintiff had ongoing whiplash associated disorder as a consequence of the road traffic accident on 27 August 2016. That was with the background of a foramen magnum decompression for management of the Chiari 1 malformation on 1 June 2016. While the plaintiff had made excellent progress with respect to her surgery, she continued to suffer with persistent ongoing daily headaches/transformed migraines. As of June 2019, the plaintiff also had persistent ongoing neck pain in the distribution of the facet joints on the left side at C 2/C 6 and ongoing pain in her left shoulder. She also had persistent ongoing lower back pain, with tenderness in the facet joints left and right side at L 3/S 1 on clinical examination.

41. Dr. Harney's view at that time was that the plaintiff's prognosis was poor in that she would continue to suffer with ongoing pain in the medium to long term. He envisaged that she would not be able to return to work for some time.

42. Throughout 2018, by which time she had relocated back home to Cork, in addition to being under the care of Dr. Harney, the plaintiff was also attending her GP practice in Cork. On 5 January 2018, she was seen by Dr. Jordan of that practice when she was complaining of headaches, left-sided rib pain due to a respiratory tract infection. When

reviewed by Dr. Jordan on 27 March 2018, it was noted that the plaintiff's mood was very low with poor sleep as a result of which he increased her anti-depressant medication. When reviewed on 18 May 2018, the plaintiff was complaining of what Dr. Jordan thought was an acute migraine attack (the plaintiff had had migraines as an adolescent) for which she was referred by Dr. Jordan to Dr. Sean O'Sullivan, Consultant Neurologist.

43. Dr. O'Sullivan, first saw the plaintiff in July 2018. He noted that she had been suffering from constant daily headaches since November 2015 with occasional exacerbations. She had obtained temporary relief after her surgery on 1 June 2016. The plaintiff had reported to Dr. O'Sullivan that in the month prior to the accident, her headaches had improved to approximately 5 out of 10 severity immediately prior to the accident. However, matters had deteriorated after the accident. The exacerbations had increased to "an average severity of 9 or 10 out of 10". The plaintiff's most severe headaches were around her eye; she would get tunnel vision before her headache. Dr. O'Sullivan testified that neurological examination of the plaintiff in July 2018 was normal apart from a slightly reduced acuity. His diagnosis at that time was that she had "a severe refractory chronic daily headache, with a likely post-traumatic headache exacerbation".

44. As documented in his medical report of 27 September 2019, on examination of the plaintiff on 3 September 2019, Dr. O'Sullivan found that the plaintiff had tenderness to palpation over the posterior cervical muscles and left shoulder muscles including the trapezius. She had a reduced range of horizontal neck movement beyond 60 degrees from the mid-line, particularly looking over her left shoulder. She had an elevated BMI. Visual acuity was 6/12 bilaterally, otherwise, neurological examination was normal. Dr. O'Sullivan's opinion was that the plaintiff had suffered a traumatic brain injury on 27 August 2016. He considered that her symptoms were consistent with post-traumatic exacerbation of an underlying chronic daily headache, post-traumatic grade 2 whiplash

associated disorder, post-traumatic shoulder and lower back pain, all of which resulted from the road traffic accident. While the plaintiff had had a history of chronic daily headaches prior to the accident, the severity of her headaches had deteriorated immediately after the accident.

45. Dr. O'Sullivan testified that an apparently normal MRI brain and cervical spine scan was entirely compatible with post-traumatic headache. His view was that the injuries sustained in post-traumatic headache and whiplash associated disorder were often microscopic, affecting the nerve cell functioning, without necessarily altering their gross appearance on routine MRI scans. He testified that the plaintiff's headaches were her number one problem. She had also complained of neck and left shoulder pain after the accident, advising that prior to the accident she had had mild neck pain which had deteriorated significantly immediately after the accident. She had described her shoulder pain as being present constantly with a baseline severity of approximately 6 out of 10 which could deteriorate to 9 out of 10 on occasions. Her lower back pain (which she did not have pre-accident) was described as a frequent daily pain of 8 out of 10 in severity. The plaintiff had also discussed her mood disturbances and her consequent retreat from social activities.

46. Dr. O'Sullivan considered the plaintiff's Chiari 1 malformation surgery as a significant neurosurgical procedure stating that clinically, "it would be quite well documented that people would have increased vulnerability to headaches if there is even very apparently minor trauma to the head and neck because of the underlying surgical defect that is essentially being made deliberately in order to alleviate the …Chiari 1 malformation". Over the course of 2018/2019, Dr. O'Sullivan administered three courses of Botox injections, totalling 39 injections in all. While there had been some limited

benefit to the plaintiff from the second course of injections, there was no lasting benefit from this treatment and it was then ceased.

47. In Dr. O'Sullivan's view, the plaintiff fell into the small but significant category of patient (25%) suffering from post-traumatic headaches who would have refractory or persisting headaches. For that proposition, Dr. O'Sullivan's report referred to a 2010 paper by Tad Siefer and Randolph W. Evans, *Post Traumatic Headache: A Review*. His prognosis was that it was unlikely that she would make a full recovery. He estimated that 50% of the plaintiff's headaches at the time of the trial and continuing into the future could be attributed to the road traffic accident.

48. The plaintiff's attendance at the practice of her Cork-based GP, Dr. Donovan, which had re-commenced in January 2018, continued throughout 2019 and she continued to be prescribed various analgesic medications and anti-depressants.

49. As of 5 October 2019, Dr. Donovan was recording that the plaintiff had been symptomatic for over three years since the accident "and continues to be symptomatic with musculoskeletal -type symptoms, chronic headache, exacerbation of her migraine and poor mood… She has been unable to work since early 2016. She unfortunately had neurosurgery on the base of her skull as a result of a congenital abnormality and subsequently had a road traffic accident. She has been very symptomatic since. She has chronic musculoskeletal pain, etc. she appears to have an exacerbation of her migraine and has now chronic anxiety and depression as a result of the whole situation. I find it very difficult to be definite about her outcome, but it is now over three years since the accident, and she continues to be symptomatic. Her life is on hold as she finds difficulty with making important decisions, including getting married or starting a family".

50. In cross-examination, in response to the suggestion by counsel for the defendant that the plaintiff's complaints did not make sense four years after the index accident, Dr.

Donovan stated that the plaintiff's family had been patients of his practice for over 35 years. He had known the plaintiff since she was a child. He described her as "a genuine person". In his opinion, the quagmire of medical difficulties in which the plaintiff found herself were caused by the road traffic accident. He disagreed with the proposition that it was difficult to ascribe all of the plaintiff's medical difficulties to the road traffic accident, stating that the plaintiff was only shortly post-serious neurosurgery at the time of the accident. Accordingly, she was not in the category of a normal healthy patient who might be involved in such an accident. He stated that when he saw the plaintiff on 2 October 2019, she continued to be symptomatic and had psychiatric difficulties and was in considerable pain. She was unable to return to work at that time although she wanted to do so. He did not agree with the defendants' physiotherapist's opinion that the plaintiff was prone to catastrophizing her level of pain and disability. In summary, Dr. Donovan's opinion was that the plaintiff's ongoing difficulties were caused by the road traffic accident, albeit she had serious surgery in June 2016, the changing point was the accident on 27 August 2016.

51. Evidence was given by Dr. John Dennehy, Consultant Psychiatrist, on Day 4 of the trial. He saw the plaintiff on one occasion on 14 September 2017 at the request of the Personal Injuries Assessment Board ("PIAB"). He testified that after taking a detailed history from the plaintiff he "came to a diagnosis of a moderately severe depressive episode." He went on to state:

> "She had low mood, she had loss of pleasure, loss of libido, very disruptive sleep…And she had, at that stage, she had still rather active passive death wish and fleeting kind of thoughts of self-harm but not actively suicidal. But on examination, depressed effect and I thought she certainly had experienced a depressive episode. I also thought that the symptoms that she described in terms of re-experiencing the

> accident in dreaming, avoiding car travel during the period in which she was prohibited from driving, she restricted travel where possible. And she also described detaching from other people, numbing her emotions in terms of not being able to relate emotionally as well as she might normally do with other people. The hyper vigilance, the hyperarousal in the car, sleep difficulties, poor concentration and so on, would all speak to a post-traumatic stress disorder. It had been diminishing the re-experiencing had subsided substantially, but she remained very anxious in the car situation and I felt she would certainly have benefited from a therapeutic engagement and more specifically through CBT".

The plaintiff duly underwent a CBT course with Mr. Liam Herlihy.

52. In cross-examination, Dr. Dennehy accepted that the plaintiff had not been referred to him at any stage for treatment by her GP. He stated that while the plaintiff's PTSD was only present for a few months post the accident, her depression had continued for some considerable time.

Medical evidence given on behalf of the defendant

53. Evidence was given on behalf of the defendant by Mr. George Kaar, Consultant Neurosurgeon. He saw the plaintiff on one occasion, on 13 August 2019, almost three years post the road traffic accident.

54. Mr. Kaar testified that on clinical examination of the plaintiff, he could not find any discomfort being exhibited by her when walking, sitting or lying. She had a full range of movement in her neck without spasm. Extension movement of the back was slightly reduced. Balance and gait were normal. He had reviewed the imaging scans in her case, which were essentially normal, save for the operative treatment that had been carried out in June 2016.

55. Overall, Mr. Kaar's view was that the road traffic accident was a very minor one with little damage done to either vehicle and no physical injury to the plaintiff. There was nothing to indicate that major symptoms would arise from the accident. If there was minor strain of the plaintiff's muscles and ligaments surrounding her spine post-accident, these symptoms would have been maximal after the accident and would have improved thereafter. Mr. Kaar's view was that the natural course of a minor strain injury would be marked improvement over 3 – 6 months at most. He was of the opinion that any injuries sustained in the accident would have recovered within a short time because the reported scans did not reveal any injury. Mr. Kaar was not aware of any changes in physical examination or on MRI scanning between the date of the road traffic accident and the present. The scans had all been stable. He stated that had there been a serious rear-ending impact on a person who had surgery in the recent past, a scan would have shown haemorrhage, ligament damage and a possible spinal fracture. He accepted that one might see loss of lumbar lordosis and muscle spasm within weeks, but it was difficult to understand how that could last for a number of months. In those circumstances, Mr. Kaar did not think that the road traffic accident was a major factor in the plaintiff's subsequent symptoms. He was of the view that the level of her complaints was out of proportion to his physical examination of her. He could not localise her symptoms or find any spinal instability or neurological change.

56. In his opinion, the plaintiff had symptoms of chronic pain syndrome which was "a functional disturbance not a physical one". He described persistent unexplained restricting pain lasting longer than six months, lack of response to treatments and restriction for work as all features of chronic pain. The outstanding feature was the severity of symptoms and restriction of work rather than the severity of an injury. He stated that post-traumatic headaches were normally maximal within days of the accident and would then improve.

He opined that some 80 – 90% of the population generally suffer headaches and 20% have chronic headaches, but these are not due to any accident. Commenting on Dr. O'Sullivan's evidence that the plaintiff had suffered brain damage at a micro or cellular level and that this had caused her symptoms, Mr. Kaar stated that if this were the case, there should be minor symptoms. He did not agree that 50% of the plaintiff's headaches were due to the road traffic accident.

57. Insofar as the plaintiff had been treated by a pain specialist, Mr. Kaar opined that pain was defined by pain specialists as being a disease: it was not a post-traumatic condition. His view was that there was an element of overreaction on the plaintiff's part in relation to the injuries sustained in the accident, which, together with the loss of fitness and the ongoing court case, were all contributing to her ongoing pain. While he was not suggesting that the plaintiff was exaggerating her symptoms and while he accepted that they were real to her, he disagreed with the plaintiff's medical experts in relation to the cause of these symptoms. According to Mr. Kaar, the plaintiff was suffering from chronic pain disease long before she had her surgery on 1 June 2016 or the road traffic accident on 27 August 2016. This was evidenced by the fact that she had suffered chronic headaches since November 2015 and had been out of work since January 2016. Commenting on the plaintiff's surgery on 1 June 2016, Mr. Kaar considered that the degree of her Chiari malformation was quite mild. There were no neurological symptoms: yet the plaintiff had had chronic pain ongoing for over six months prior to the surgery of 1 June 2016. Accordingly, he was of the view that the symptoms which the plaintiff had were the disease itself. In this case, there was a tendency for the plaintiff to develop symptoms after minor trauma (as shown by the fact that the plaintiff was out of work following a minor blow to the head in November 2015).

58. It was not clear to Mr. Kaar why the plaintiff could not return to work. While he accepted that Dr. O'Sullivan believed she could return to work on a phased basis within two years, he could not understand how these further two years was required. In Mr. Kaar's view, it was not possible to implicate the road traffic accident as being responsible for the plaintiff's symptoms. Based on the contents of Dr. Byrne's assessment in October 2016, (two months post-accident), if Dr. Byrne was right, the plaintiff should have returned to work at that stage.

59. Evidence was also given on behalf of the defendant by Professor Michael O'Sullivan, Consultant Neurosurgeon. He saw the plaintiff on one occasion on 27 April 2018, some one year and eight months post the accident. At that stage, she complained of "vertex headache" (meaning headaches at the top of her head), inter-scapular pain, neck pain, low back pain and right knee pain. She told Professor O'Sullivan that the road traffic accident had exacerbated her pre-existing symptoms. On examination she had no abnormal neurological signs, with spinal movement full and free.

60. Professor O'Sullivan was of the view that the plaintiff's headaches were of a post-traumatic origin from the time she hit her head against an ESB box in November 2015 which had progressed into a chronic daily headache. He did not think that her headaches were consistent with a Chiari 1 malformation because such headaches were tussive headaches (i.e. brought on by sneezing and other head movements). Like Dr. Kaar, Professor O'Sullivan did not share Dr. O'Sullivan's view that 50% of the plaintiff's headaches were as a result of the road traffic accident due to possible micro-trauma in the brain. He opined that as the plaintiff complained of vertex headaches but had not struck the vertex of her head in the accident, it was possible to infer that the headache was not caused by the road traffic accident. Had her headache been caused by the road traffic accident, it would have been a cervicogenic headache which is a headache going up the

back of the head to the occiput. While Dr. Harney had treated the plaintiff on the assumption she had cervicogenic headaches, that treatment had not worked, which implied again that the plaintiff's headache was not in fact of that type or caused by the road traffic accident. Professor O'Sullivan was also of the view that if the plaintiff had hit her head off the car headrest in the accident, any resultant headache would have been for a maximum of two weeks and would have settled within a period of six months.

61. With regard to Dr. O'Sullivan's assessment that the plaintiff had suffered a cellular type brain injury in the accident, Professor O'Sullivan stated that to have an axonal type injury to the brain, one would need a very severe impact leading to loss of consciousness. Moreover, the plaintiff had a vertex headache, not a cervicogenic headache albeit Professor O'Sullivan accepted that the plaintiff complained of a cervicogenic headache after the accident. There had been vertex headaches after the plaintiff struck her head in November 2015 and some cervicogenic headaches after the road traffic accident.

62. While Professor O'Sullivan accepted that the plaintiff continued to suffer the symptoms of which she complained, he thought that much of her symptomology was from the affective component of pain, thus it was difficult to say what would happen after the litigation was over. He was of the view that the plaintiff should attempt to "de-medicalise" and return to normal activities.

63. Professor O'Sullivan was of the opinion that a return to work would improve the plaintiff's condition substantially, as it would be beneficial for her socially, physically and mentally. He found no reason as to why she could not return to work immediately.

64. The trial court also heard from Ms. Lowry O'Mahony, Chartered Physiotherapist, who reviewed the plaintiff on 25 September 2019 on behalf of the defendant for the purposes of carrying out a functional review. She did not carry out any assessment of the plaintiff's headaches. Ms. O'Mahony conclusion was that the plaintiff was reporting pain

and restriction of movement at a higher level than was actually warranted. According to Ms. O'Mahony, the plaintiff's view of her level of disability did not match the level of functionality that Ms. O'Mahony had found on testing. She gave a number of reasons for her findings. Firstly, on physical examination, the plaintiff's range of neck flexion was less than Ms. O'Mahony had observed of the plaintiff while she was filling in a questionnaire prior to commencing the physical part of the assessment. Secondly, on examination, lateral rotation of the neck was limited bilaterally, whereas when carrying out other tasks such as pushing and pulling objects the plaintiff was able to look left without apparent discomfort. Thirdly, when doing the cardiovascular step test whereby she had to step onto a box at a preordained rate for a set period of time, the plaintiff's level of reported effort and pain did not match her physical signs. Fourthly, the plaintiff had been administered the standard pain catastrophizing scale. On that scale, she had scored very highly, reaching a total of 97%. Ms. O'Mahony stated that patients who scored highly tended to over evaluate the degree of pain and the negative aspects of performing certain activities. She recommended CBT as an effective treatment in dealing with catastrophic thinking together with exercise therapy as being beneficial in bringing about rehabilitation. She also recommended a graduated return to work for the plaintiff, as that would provide exercise and a social outlet and would have psychological benefits.

65. In cross-examination, she accepted that the plaintiff's surgery in June 2016 had been significant and involved considerable cutting of the soft tissue structures around the cervical spine in the area of the C 1 and into the base of the skull. She accepted that as a result, the plaintiff's neck and soft tissue around it was in a weakened state post-surgery. She accepted that the muscle spasm was generally a preventative mechanism which would arise following injury.

66. On Ms. O'Mahony's assessment of the plaintiff's range of movement, she had found limitation of movement in all plains except for right neck rotation. Ms. O'Mahony also accepted in cross-examination that her collation of information in respect of the treatments afforded to the plaintiff was somewhat deficient. However, she stood over her comments in relation to the plaintiff's catastrophic thinking.

The defendant's application for the plaintiff's case to be dismissed

67. At the close of the evidence, counsel for the defendant sought to have the plaintiff's case dismissed pursuant to s. 26 of the 2004 Act on the basis that evidence given by the plaintiff on affidavit in relation to her loss of earnings was misleading to a material extent such that the provisions of s. 26(2) of the 2004 Act were engaged. The defendant also advanced an alternative argument, namely that if the Judge did not hold with the defendant on the s.26(2) application, the manner in which the plaintiff had pursued her alleged loss of earnings was such as to affect the credibility of her overall claim. That defendant's application was addressed by the Judge in his judgment and was duly dismissed. The refusal of the defendant's application constitutes ground 1 of the appeal and is referred to later in the judgment.

The Judge's assessment of the plaintiff's injuries

68. On behalf of the plaintiff, the Judge had available to him the medical reports and oral testimony from Dr. Harney, Dr. O'Sullivan and Mr. Lim, the oral testimony of Ms. Ormond and her reports, and the evidence given by Dr. Donovan and Dr. Dennehy and their respective reports. He had Dr. Byrne's report which had been agreed. He also had the evidence of the plaintiff herself. On behalf of the defendant, he had the reports and oral evidence of Professor O'Sullivan and Mr. Kaar as well as the report and oral testimony of Ms. O'Mahony.

69. In the first instance, the Judge was satisfied from Mr. Lim's evidence that the surgery the plaintiff had for the Chiari 1 malformation on 1 June 2016 was serious surgery which involved considerable disruption to the bones at the base of her skull and at the top of C 1 and involved substantial displacement of the muscles and ligaments in her neck. Accordingly, he found that her neck was "significantly compromised" as a result of that operation. He accepted Mr. Lim's evidence that at the six-week post-surgery mark, the plaintiff was making good progress in her rehabilitation from the surgery. He accepted the evidence of Ms. Ormond that from the assessments she carried out on 29 July 2016, 5 August 2016 and 22 August 2016, the plaintiff was improving. He concluded, therefore, that the plaintiff was following the expected recovery path after her surgical treatment up to the time of the road traffic accident on 27 August 2016. He found that but for the accident, in all probability the plaintiff would have made a full recovery from the surgery within approximately six months and that she would have returned to work in or about January 2017.

70. The Judge found that the plaintiff's condition "deteriorated significantly" (at para. 163) as a result of the accident on 27 August 2016. He so concluded having regard to Ms. Ormond's testimony, who had seen the plaintiff both prior to and after the accident. He noted that her assessments were accepted by the defence medical witnesses. The marked deterioration in the plaintiff in the weeks and months post the accident was also supported by Ms. Ormond's action in referring the plaintiff back to Mr. Lim and further supported by Mr. Lim's decision, after reviewing the plaintiff on 13 October 2016, to refer her to Dr. Harney.

71. The Judge noted that the defendant had accepted a number of important factors in the case, including that the plaintiff was a bad candidate for soft tissue injury to her neck due to her being in the post-operative stage after her surgery and that some soft tissue injury to

the plaintiff's neck was caused by the accident, albeit the defendant disputed, based on the evidence of the car damage and the repair bill, that any major forces were inflicted on the plaintiff's neck in the collision. He noted that, most importantly, the defendant's witnesses accepted that the plaintiff had the symptoms of pain of which she complained at the hearing of the action and that she was not exaggerating her symptoms. As the High Court judgment discloses, significant concessions were made by Mr. Kaar, Professor O'Sullivan and Ms. O'Mahony in these regards in the course of their respective cross-examinations. Professor O'Sullivan in particular had accepted that the symptoms of neck and shoulder pain which were referred to at conclusion No. 5 in his report, and which he deemed to be consistent with the diagnosis of soft tissue strain, referred to the soft tissue injury in the road traffic accident. He had also accepted that the lower back soft tissue strain referred to at paragraph 6 of his conclusions, had been caused by the accident.

72. The Judge did not think that it could be extrapolated from the photographs of the car damage that there had not been a significant impact between the vehicles. No engineering evidence had been called by either side. Nor had the first or third defendant given evidence. The only evidence of the impact was given by the plaintiff. The Judge accepted her evidence that she heard a loud bang and felt her head being propelled forward and then backwards, and that she struck her head against the headrest. He also found it significant that the plaintiff suffered an injury to her right knee when it struck against the dashboard due to the impact. This, the Judge considered, was indicative of the fact that the impact was significant. Moreover, even if it was a low impact, he stated that he could not make assumptions about the likely degree of injury to the plaintiff "because the plaintiff was not in a healthy state at the time that the trauma was inflicted on her neck".

73. The Judge noted that the defendant's medical experts had based their opinion not only on the photographs of the car damage and the low repair bill but also on the fact that

scans taken of the plaintiff's neck post the accident were largely clear (allowing obviously for the previous surgery). The defendant had also relied on the findings of Professor O'Sullivan and Mr. Kaar that the plaintiff had full movement in her cervical and lumbar spine when they examined her. In the latter regard, the Judge observed: "One has to remember that these doctors saw the plaintiff on one occasion each in respect of this case in April, 2018 and August, 2019 respectively."

74. He preferred the findings of Dr. Harney and Dr. O'Sullivan "which were made much closer to the time of the accident". Moreover, these doctors had the benefit of seeing the plaintiff far more frequently over the following years.

75. The Judge also found noteworthy the fact that immediately prior to the accident, the plaintiff's complaints largely concerned neck and shoulder pain and headaches, whereas post-accident, she also complained of thoracic and lumbar pain and knee pain "together with a deterioration in her neck pain and headaches". He was satisfied that the findings made by Dr. Harney in November 2016 were consistent with a soft tissue injury to the spine caused by the road traffic accident. He found support for the significance of the plaintiff's presenting injuries in the fact that Dr. Harney commenced treatment in December 2016. He also found it significant that Dr. Harney had found tenderness in the occipital nerve. The Judge was thus satisfied that the plaintiff's headaches were "cervicogenic in nature" and were caused by the accident. He went onto state:

> *"*Accordingly, I find that the plaintiff's condition was significantly exacerbated by the RTA in August, 2016 in terms of her neck and shoulder pain and headaches and also by the additional new complaints in relation to thoracic and lumbar pain and knee pain." (at para. 171)

76. With regard to the extensive invasive treatment the plaintiff had undergone with Dr. Harney and Dr. O'Sullivan, the Judge accepted Dr. Harney's evidence that he would only

administer treatment which he felt was warranted. He noted the divergence of opinion between the plaintiff's medical experts and the defendant's doctors on the efficacy of the invasive treatment given to the plaintiff but opined that this did not mean that the plaintiff was wrong to undergo that treatment which had been advised to her by Dr. Harney and Dr. O'Sullivan.

77. He next addressed the defendant's principal attack on the plaintiff's case and duly rejected the claim that such a minor impact could not have caused the injuries complained of, finding that on the balance of probabilities, the deterioration in the plaintiff's neck and headaches and the onset of new symptoms were caused as a result of the accident, "notwithstanding that there may have been a relatively minor impact between the vehicles."

78. He then addressed the finding of Professor O'Sullivan that when he saw the plaintiff on 27 April 2018 she had a full range of movement in her neck, shoulder and lower back. The Judge considered however that these findings had to be seen in the context that only seven days' earlier, on 20 April 2018, the plaintiff had been seen by Dr. Harney in the Bon Secours Hospital where she had received PRFL to the left supra scapular nerve and left-sided C 2/C 6 diagnostic facet joint blocks. He noted that Ms. Ormond had testified to the plaintiff having reported a decrease in her cervico-thoracic and scapular pain after that treatment, an improvement that had lasted until May 2018. The Judge thus opined:

> "Accordingly, it would appear that the findings made by Professor O'Sullivan, were probably due to the beneficial effect of the treatment administered by Dr. Harney on 20th April, 2018." (at para.175)

79. Assessing Mr. Kaar's finding that when seen by him on 13 August 2019 the plaintiff had a good range of movement in her neck, the Judge considered that this had to be contrasted with the findings recorded by Dr. Harney when he saw the plaintiff two months

earlier on 11 June 2019 at which time she reported severe left and right-sided lower back pain, left-sided neck pain, left shoulder pain and very severe headaches which were corroborated by Dr. Harney's clinical findings.

80. He found that the findings of Mr. Kaar also contrasted sharply with the findings of Dr. O'Sullivan when he saw the plaintiff on 3 September 2019, some three weeks after she was seen by Mr. Kaar. At that time, clinical examination revealed tenderness to palpation over the posterior cervical muscles and left shoulder muscles including the trapezius. There was also a reduced range of horizontal neck movement beyond 60 degrees, particularly looking over the left shoulder. The Judge further noted that when the plaintiff was examined by Ms. O'Mahony on 25 September 2019, there was limitation of movement in her lower back, in flexion and extension and limitation of movement in her neck to the extent described by Ms. O'Mahony. He went on to state:

> "In considering this aspect of the case, the Court accepts the evidence given by the plaintiff's medical advisors, and in particular by her Cork based GP, Dr. Donovan, and her treating physiotherapist, Ms. Ormond, that she is a genuine and well-motivated patient. Insofar as there is a conflict of evidence between the two doctors who examined the plaintiff on behalf of the defendant and the plaintiff's medical advisers in relation to her disability and in particular the range of pain free movement of her spine, I prefer the evidence of the plaintiff's doctors and physiotherapist in this regard. I am satisfied that she has followed a fluctuating course, whereby her symptoms have waxed and waned over time, but overall I am satisfied that she has experienced the pain and disablement as described by her in her evidence and as described by the various medical witnesses who gave evidence on her behalf". (at para. 179)

81. The defendant's second line of argument was that even if it was accepted that the plaintiff was a bad candidate for the accident owing to her neck, any soft tissue injury would have been of relatively short duration, such that her ongoing complaints could only be explained by the fact that she had engaged in catastrophic thinking in relation to her level of pain and disability. The defendant's argument in this regard was based on Mr. Kaar's opinion that chronic pain is a disease, not a post-traumatic condition.

82. The Judge did not accept Mr. Kaar's hypothesis or the similar findings made by Ms. O'Mahony. He did not consider that the plaintiff was deliberately catastrophizing either her injuries or her symptoms of pain. He accepted the evidence of Dr. Donovan, who had known the plaintiff since childhood, that she was a genuine well-motivated person who was keen to return to normal life and to return to work. He found Dr. Donovan's opinion supported by the evidence of Ms. Ormond, who testified that the plaintiff at all times had complied with her treatment regime and presented as anxious to go back to work as soon as her symptoms allowed. In this regard, the Judge noted that the plaintiff had made contact with her employer enquiring about the possibility of a return to work on a phased basis.

83. The Judge found no evidence that the plaintiff had ever engaged in any activities which were incompatible with her reported restrictions. He noted that she was a very well-educated person who at the time of her accident was doing well in her job. There was no history of psychiatric illness. In those circumstances, "there was no question that the accident may have produced a convenient 'bus stop' for her to leave her pre-accident life and adopt a different lifestyle". The judge was satisfied that the plaintiff did not attempt to exaggerate her level of disability.

84. He also rejected the defendant's contention that the plaintiff's ongoing complaints were the result of catastrophic thinking in relation to her level of pain and disability. He preferred the evidence of the plaintiff's treating doctors, Dr. Harney, Dr. O'Sullivan and

Dr. Donovan and the evidence of her treating physiotherapist, Ms. Ormond, who were all of the view that her symptoms stemmed from the road traffic accident. He found their evidence was supported by "the temporal onset of symptoms after the accident". The duration of the symptoms could be accounted for by the fact that the plaintiff's neck was in a significantly weakened state at the time of the accident.

85. The Judge also accepted Dr. O'Sullivan's evidence that the explanation for the plaintiff's MRI scans being largely clear was that damage may occur at a cellular level, which can produce symptoms while not showing on imaging. He also noted that the defendant's medical witnesses' opinions were based on just one examination of the plaintiff by each of them, whereas the evidence of the plaintiff's treating doctors was based on their interaction with her over a protracted period.

86. He further found that even if he were to accept the defendant's medical evidence at its high water mark and find that the plaintiff's ongoing pain and disablement were largely caused by psychological factors such as an overestimation of perceived or anticipated pain, "once a Court can be satisfied that a plaintiff is not deliberately exaggerating or malingering [of which the Judge was satisfied] the defendant had to take her victim as she finds her". Thus, even if he were to accept that the plaintiff was prone to suffer chronic pain due to her tendency to catastrophic thinking, as long as that was not done deliberately "the defendant must compensate the plaintiff for the chronic pain from which she suffers". (at para. 188)

87. That the plaintiff was not catastrophizing her pain and disability was also supported by the fact that she had had an experience of severe neck pain in the five weeks immediately post-surgery (and prior to her accident). The Judge also had regard to the contents of Ms. Ormond's report to the effect that a combination of chronic spasm and over activity leading to shortening of the anterior neck musculature and overstretching and

weakening the posterior neck and scapular muscles, contributed to the development of postural dysfunction with the consequence that the normal lordotic curvature of the cervical spine was caused to be flattened or reversed. Such a finding was revealed on the MRI scan of the plaintiff's cervical spine. Those changes also resulted in a gross reduction in active cervical movements which were demonstrated on Ms. Ormond's assessment of the plaintiff. The Judge thus concluded that "there is an interaction between the mental component and protective postures adopted by the plaintiff, which can actually end up increasing rather than reducing pain in the long term." (at para. 191)

88. Accordingly, while the defendant's doctors may have been right to opine that there was a large psychological component in the symptoms of chronic pain suffered by the plaintiff "that does not of itself mean that the pain which the plaintiff is experiencing does not exist". Quoting from the judgment of Clarke J. in *Walsh v South Tipperary County Council* [2011] IEHC 503 at para. 5.6, the Judge opined that even if he were to find that the plaintiff's chronic pain was a disease in itself, which was due primarily to psychological factors within the plaintiff, "I would have to find that such chronic pain arose due to the fact that the plaintiff had that inherent psychological susceptibility at the time she had her accident. In legal terms she would be seen as being a person who had an 'eggshell skull' and the tortfeasor must take his victim as he finds him." (at para. 192) Accordingly, he was satisfied that the plaintiff's personal injury was a foreseeable consequence of the accident. The fact that she might have a more severe injury than might have been expected due to a predisposition on her part towards catastrophic thinking, as a result of which she had gone on to suffer chronic pain, "does not prevent her recovering compensation from the defendant in respect of that pain".

Quantification of damages

89. Having made the aforesaid findings, the Judge turned to the issue of damages. He found that in the absence of the road traffic accident, the plaintiff would have suffered headaches and neck pain on a diminishing scale for approximately six months and that she would have returned to work in January 2017. Consistent with his finding that the plaintiff was symptomatic from her surgery prior to the road traffic accident, accordingly, for the period 27 August 2016 to end December 2016, she was only entitled to be compensated for the exacerbation of her condition which arose as a result of the road traffic accident.

90. The Judge was satisfied that the plaintiff had suffered constant and at times severe pain in her neck, shoulders and lower back and also had knee pain as a result of the accident. He also accepted Dr. O'Sullivan's evidence that 50% of her headaches were due to the accident. He noted the extensive treatment the plaintiff had had for all her conditions.

91. On the evidence of Dr. Dennehy, he was satisfied that the plaintiff suffered depression and PTSD after the accident. While the PTSD was of relatively short duration, the depression, which was moderate, had been persistent since the time of the accident. He noted that at the date of trial, the plaintiff continued to be on antidepressant medication. He had regard to the fact that the plaintiff was being treated for her depression by her GP who did not feel that the intervention of a psychiatrist was necessary.

92. The Judge accepted that the plaintiff had been unfit for work since the accident. Her inability to work from January 2017 to date was due to the accident. He noted that her evidence regarding her inability to work was supported by the evidence of her medical experts. Additionally, given the nature of the treatments carried out by Dr. Harney and Dr. O'Sullivan, the plaintiff would not have been fit for work in the immediate aftermath of such treatments.

93. The Judge considered the prognosis for the plaintiff as somewhat uncertain. He noted Dr. Harney's opinion that the plaintiff would require further treatment in the form of oblation of the occipital nerve and that she may need nerve stimulation, which may have to be carried out abroad. He noted that if beneficial results were obtained from this treatment, the plaintiff would be in a position to return to work in two years. He found, on the balance of probabilities, that with the appropriate multi-disciplinary treatment, the plaintiff would make a reasonable recovery so as to enable her to return to work and lead a normal life in two years.

94. In his assessment of general damages to date and into the future, the Judge had regard to the Book of Quantum but found it of no great assistance.

95. Turning to the issue of quantum, he noted that the plaintiff had had her life "totally disrupted for the last three years" and that her injuries had affected her in every aspect of her life and that she had been "rendered very considerably disabled during this period". Taking all of these matters into consideration, he assessed general damages to date in the sum of €96,000 and made an award of €50,000 in respect of general damages for the future.

96. Special damages were assessed at:

- €17,648.98 for medical and other expenses to date.
- €105,480.54 by way of loss of earnings from January 2017 to 2020, based on an agreed net loss of earnings per annum of €33,315.96.

97. The Judge found the amount for future loss of earnings difficult to assess given the uncertainty as to what progress the plaintiff would make in her attempts to return to work and the amount of days per week she would be able to work on her return. He accepted that given the level of her present disability, the plaintiff might have to start returning to work slowly, perhaps on a voluntary basis at a friend's or family business, or in the charity

sphere, where she would not be under pressure. As at the date of the assessment of damages, the judge did not see the plaintiff earning much in the coming year. Thereafter, it was "somewhat up in the air" as to what her earning capacity would be in the following year. Ultimately, he allowed, as future loss, 50% of the plaintiff's loss of earnings on a total incapacity basis over two years, which amounted to a loss of €33,315.96.

98. The total damages awarded to the plaintiff was €302,445.48.

The appeal

The alleged error of the Judge in failing to apply s.26(2) of the 2004 Act or otherwise sanction the plaintiff for the manner in which she prosecuted her loss of income claim (ground 1)

99. This ground of appeal is addressed in the judgment of Collins J. For the reasons set out in his judgment he would dismiss this ground. I agree with his judgment and do not propose to say anything more about this ground.

The alleged error in the assessment of general damages for pain and suffering (ground 2)

100. The defendant appeals the level of general damages awarded to the plaintiff on the basis that the general damages are too high and are not explained in detail. In his submissions to the Court, counsel for the defendant acknowledged that the principles of *Hay v. O'Grady* [1992]1 IR 210 apply in relations to the findings of fact made by the Judge. These principles are too well known to merit repeating here. Suffice it to say, as observed by McCarthy J. in *Hay v. O'Grady*, an appellate court does not enjoy the opportunity of seeing and hearing witnesses in the same manner as a trial judge. Thus, if the trial judge makes findings of fact that are supported by credible evidence, then an appellate court is bound by those findings.

101. While the defendant's counsel prefaced his submissions by accepting that *Hay v. O'Grady* applied, it was nevertheless strongly advocated that the Judge had erred in finding that 50% of the plaintiff's headaches were attributable to the road traffic accident. She also takes issue with certain other findings. These complaints are addressed later in the judgment.

102. The defendant's principal contention is that the Judge erred in law in his assessment of general damages such that the principles set out in *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 IR 578 come into play. She says that the requisite threshold required by *Rossiter* for intervention by this Court has been reached in this case. She further contends that the basis for intervention in the present case is also underscored by the pronouncements of this Court in *Payne v. Nugent* [2015] IECA 268, *Shannon v. O'Sullivan* [2016] IECA 93, *Nolan v. Wirenski* [2016] IECA 56 and *McKeown v. Crosby* [2020] IECA 242 to the effect that damages in cases such as the present should be measured in an open, objective and consistent fashion, which it is submitted, was not done in this case.

103. The task of an appellate court when asked to interfere with an award of general damages was succinctly set out by Fennelly J. in *Rossiter* in the following terms:

> *"The more or less unvarying test has been, therefore, 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 test is one for application as a general principle - even if McCarthy J, in Reddy v Bates ...suggested a possible rule of thumb, the need for at least a 25% discrepancy. That is no more than a highly pragmatic embodiment of his very proper counsel against 'relatively petty paring from or adding to awards'...[The*

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 an appropriate one, regardless, it needs scarcely to be said, whether the complaint is one of excessive generosity or undue parsimony". (at para. 14)

104. In *M.N. v. S. M.* [2005] 4 IR 461, Denham J., with reference to *Sinnott v. Quinnsworth* [1984] ILRM 523, opined that there should be a *"rational relationship"* between awards of general damages in personal injuries cases:

"In assessing the level of general damages, there are a number of relevant factors to consider. Thus an award of damages must be proportionate. An award of damages must be fair to the plaintiff and must also be fair to the defendant. An award should be proportionate to social conditions, bearing in mind the common good. It should also be proportionate within the legal scheme of awards made for other personal injuries. Thus the three elements, fairness to the plaintiff, fairness to the defendant and proportionality to the general scheme of damages awarded by a court, fall to be balanced, weighed and determined."

105. This *dictum* was echoed by Irvine J. in *Nolan v. Wirenski*:

"Thus it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages, and more severe damages of a level which are clearly distinguishable in terms of quantum from those that fall into other, lesser categories." (at para. 42)

106. Irvine J. opined that *"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"* (at para. 23) As she explained at para. 25:

"…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."

107. The caution urged on an appellate court by both Fennelly J. in *Rossiter* and Irvine J. in *Nolan v. Wirenski* to refrain from tampering with an award of general damages is clearly predicated on the appellate court being satisfied that the trial judge has *"considered all of the evidence"* and that the damages award ultimately made is proportionate to the injuries sustained, having regard to the evidence upon which the award is based and account being taken, where appropriate, of the guidance provided by case law and (in recent times) the Book of Quantum.

108. The principles that can be derived from the authorities can be summarised as follows:

- Fundamentally, the objective is to arrive at a figure for general damages which is fair and reasonable (as per O'Higgins C.J. in *Sinnott v. Quinnsworth*);
- The award must be proportionate, taking account of societal factors, bearing in mind the common good and ensuring fairness for the plaintiff and fairness for the defendant. (Denham J. in *M.N. v. S.M.* [2005] 4 IR 461, at p. 474);
- Proportionality must be assessed firstly against the yardstick of the cap (presently €500,000) set for the most serious personal injuries. Secondly, as a general principle, the award should reasonably align with awards given by the courts for similar injuries (*M.N. v. S.M.* [2005] 4 IR 461, at p. 474), always, however, bearing in mind that the award is personal to the particular plaintiff and that the overall

objective is to provide that plaintiff with reasonable compensation for the pain and suffering that he or she has endured (per Irvine J. in *Nolan v. Wirenski*);

- Where applicable, regard should be had to the Book of Quantum.

109. The Book of Quantum has now been replaced by the Personal Injuries Guidelines issued pursuant to s. 90 of the Judicial Council Act 2019. These Guidelines have the same objective as the Book of Quantum, that is to promote consistency in the level of damages awarded for personal injuries (s.90(3)(d)). As the focus of the defendant's argument before this Court was on the Book of Quantum, that is the document which is the subject of consideration here.

110. How the Book of Quantum is to be utilised was considered in *McKeown v. Crosby*. There, Noonan J. (writing for this Court) prefaced his remarks by stating that *"fundamental"* to the guidelines set out by Denham J. in *M.N v. S.M.,* and to fairness in the operation of any system of monetary compensation for personal injuries, is *"consistency and predictability".* In this context he regarded the Book of Quantum as an aid to the court albeit acknowledging that it is *"most suited to relatively straightforward cases where the injury falls more clearly into one or more of the defined categories".*

111. As observed by Noonan J. at para. 23 *"the subjective element of an injury is inherently difficult to assess"*, thus, *"the Court has to look at the objective medical evidence in particular to arrive at the fair compensation in a given case".* He went on to state:

> *"The Book of Quantum seeks to introduce a measure of predictability, at least where it can be said that the injury in question is capable of categorisation and is one that has affected the plaintiff in a way that it might affect most people. There will of course always be points of departure from the norm and a relatively minor finger injury for example, may affect a*

concert violinist very differently from, say, a clerical worker. This is something that the range of damages for a particular injury is designed to accommodate." (at para. 25)

112. Noonan J. considered that in cases where the Book of Quantum is clearly relevant:

"it would assist the court's considerations to hear submissions from the parties about how it should be applied, or perhaps whether it should be applied at all. Recent judgments of this court, such as Nolan v Wirenski, have drawn attention to the fact that it is important for trial judges to explain how particular figures for damages are arrived at, since otherwise the appellate court is left in the dark about the trial judge's approach and whether it ought to be regarded as correct or not. The review process on appeal would be greatly assisted by reference to the categorisation and severity of the injury provided for in the Book of Quantum, assuming that to be feasible. If on the other hand the trial judge considers that the Book has no role to play in the particular circumstances of the case, it would be very helpful for the appellate court to know why that is so." (at para. 31)

113. The efficacy of the Book of Quantum as the appropriate guide for the measurement of general damages in this case will be considered in due course.

114. In *Shannon v. O'Sullivan*, in similar vein to what she set out in *Nolan v. Wirenski*, Irvine J. outlined *"a useful yardstick"* by which a court should decide what is proportionate in terms of general damages. She stated:

"...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 [now €500,000] *..."* (at para. 34)

115. At para. 43, Irvine J. outlined her suggested "roadmap" for the assessment of general damages in the following terms:

"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?"

116. As to the appropriate award for damages for pain and suffering into the future, Irvine J. stated that the court must not concern itself 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"* (at para. 44). At para. 45, Irvine J. cautions that a trial judge must act *"rationally"* and take into account, *"in summary, the severity of the injury, how long it has taken the plaintiff to recover, whether it has short-term or long-term consequences and if so the impact on the plaintiff's life…"*

117. Counsel for the plaintiff does not take issue with the defendant's reliance on the principles set out in *Payne v. Nugent, Nolan v. Wirenski, Shannon v. O'Sullivan* and *McKeown v. Crosby*, namely that general damages ought to be (i) fair to the plaintiff and the defendant, (ii) objectively reasonable in the light of the common good and social conditions in the State and (iii) proportionate within the scheme of awards for personal injuries generally. Neither does he take issue with the series of questions posed by Irvine J. in *Shannon v. O'Sullivan* when attempting to measure the scale of effects on a plaintiff as a

consequence of an injury sustained and, thus, the appropriate level of compensation for that injury. The plaintiff's position is that the list set out by Irvine J. is not exhaustive but merely an indicative one. It is further contended that the trial judge was correct to find that the Book of Quantum was an insufficient tool for the assessment of general damages in this case.

The specific arguments advanced by the defendant

118. As already alluded to, while the defendant complains about the failure of the Judge to abide by the guidelines which the jurisprudence referred to above and the Book of Quantum offer in respect of the assessment of general damages, she also maintains that a real and substantial issue which arises in this case is the effect of the road traffic accident on the plaintiff. Essentially, she disputes the Judge's findings as to the nature of the injury suffered in the accident and the effect of that injury on the plaintiff's pre-existing condition.

119. The defendant takes issue with the Judge's finding that the plaintiff's good progress in the two months post her surgery and expected full recovery within six months was significantly set back as a result of the accident and argues that, on the contrary, the plaintiff was in fact presenting with significant difficulties well before the date of the accident. She points to the contents of Ms. Ormond's letter of 8 August 2016 to Mr. Lim wherein Ms. Ormond outlined her assessment of the plaintiff as of 29 July 2016 (a month or so prior to the accident). As of that date, the plaintiff was presenting to Ms. Ormond with poor posture and with active range of movement of the cervical spine grossly reduced. Moreover, she presented with significant weakness of the posterior cervical stabilising muscles, worse on the right side. The defendant's submission is that Ms. Ormond's letter demonstrates that the plaintiff had very significant difficulties prior to the road traffic

accident which were not caused by the accident and which, accordingly, cannot be the subject of compensatory damages.

120. While the defendant points to Ms. Ormond's letter of 8 August 2016 as evidence of the plaintiff's pre-accident condition, the evidence of the plaintiff, as corroborated by Ms. Ormond in her report and evidence, was that by 22 August 2016 (some five days prior to the accident) she had recovered a significant degree of cervical movement and had made significant progress in her post-surgical rehabilitation including that her headaches were intermittent. By mid-August 2016, for example, she was in a position to socialise with friends. Moreover, she had been advised by Mr. Lim the she should be back at work by December 2016.

121. However, when seen by Ms. Ormond's colleague on 31 August 2016, four days *post* the road traffic accident, the situation was otherwise. The plaintiff's complaints as of that date were described by Ms. Ormond in evidence on Day 4:

> "My colleague noted subjectively a significant increase in reported levels of neck and left shoulder pain. Also, headaches and a new presentation regarding lower back painful."

122. Ms. Ormond also testified that the plaintiff reported "constant and severe cervical spine and upper thoracic pain worse on the left side. Also, intermittent sharp shooting pain which radiated to the neck. [the plaintiff] reported an increase in the severity and duration of headache symptoms. Also reported associated dizziness and nausea and her sleep was considerably disturbed."

123. Significantly, in the course of his submissions to this Court, counsel for the defendant acknowledged that the thrust of Ms. Ormond's evidence in the court below was that there had been a significant change (for the worse) in the plaintiff's presentation after the road traffic accident. Counsel did not dispute that, on *Hay v. O'Grady* principles, the

trial judge was entitled to rely on that evidence. Counsel could scarcely have said otherwise given that all the defendant's medical witnesses accepted Ms. Ormond's assessment that the plaintiff had deteriorated significantly after the accident.

124. The Judge found as a matter of fact that post the accident, the plaintiff's pre-existing neck condition worsened with also considerably worsening headaches. He noted her attendance on Ms. Ormond colleague on 31 August 2016 when she was noted to have a significant increase in the level of reported neck and left shoulder pain together with headaches and lower back pain. He thus considered that the plaintiff was entitled to be compensated for the exacerbation of her pre-existing condition that arose as a result of the accident. In my view, he had more than ample evidence to sustain his finding in this regard and his rationale for so finding is more than adequately set out in the judgment.

125. In truth, the defendant does not really dispute the exacerbation to the plaintiff's pre-existing neck pain that the accident caused, or the fact that the plaintiff's knee and back injuries were caused by the accident. The main rallying point for the defendant are the plaintiff's headaches, post-accident and the continuing nature of the plaintiff's neck, shoulder and back symptoms.

126. It is argued that the Judge was wrong to find that fifty percent of the plaintiff's headaches were attributable to the accident in circumstances where, it is said, there was a history of headaches prior to the accident, where there was no great evidence of the onset of headaches in the immediate post-accident period, and where the evidence suggested that another event in December 2016 may have been responsible the headaches from which the plaintiff was suffering at that time.

127. The defendant contends that the Judge's finding with regard to the question of the plaintiff's headaches was arrived at by excluding from consideration the evidence of the defendant's experts, Professor O'Sullivan and Mr. Kaar. She says that in fact Mr. Kaar's

evidence in this regard was not referenced by the Judge. Moreover, he did not assess Professor O'Sullivan's evidence that the plaintiff should not have had the treatment administered by Dr. Harney. Counsel also points to the fact that this treatment had no beneficial effect on the plaintiff. It is submitted that this outcome is consistent with the view expressed by Professor O'Sullivan, whose opinion it was from the outset that the plaintiff would have been better advised to cease this treatment. The defendant's written submissions refer to the "absolute exclusion" of Mr. Kaar's evidence which, it is said, was all the more unfair in circumstances where Mr. Lim had agreed with Professor O'Sullivan's and Mr. Kaar's view that the plaintiff head hitting off the headrest in the collision would not have caused a traumatic injury to her head.

128. Counsel contends that Professor O'Sullivan's evidence was particularly important in this context. He refers, in particular, to the evidence given by Professor O'Sullivan in cross-examination on Day 6. It was put to Professor O'Sullivan (Qs. 87-90), with reference to the aetiology or genesis of the symptoms of which the plaintiff complained when under the care of Ms. Ormond and Dr. Harney, that those witnesses had stated that the symptoms they were treating emanated, by and large, from the road traffic accident on 27 August 2016 and that Dr. O'Sullivan, Consultant Neurologist, had attributed fifty percent of the plaintiff's headaches to the accident. Professor O'Sullivan's response to this was in the following terms:

> " A. …there is a lot of opinion and then there is fact. The facts are that the patient complained of a headache as a consequence of striking her head in November 2015, prior to the accident. It's a fact that an MRI scan revealed a Chiari malformation which, in my opinion, was asymptomatic. It's a fact that she underwent surgery for that Chiari malformation and had a bad time for five weeks postoperatively. It's a fact that she was involved in a road traffic accident, but insofar as we can determine

the forces that applied to the patient were minimal. It's a fact that she said her symptoms had deteriorated after the accident in terms of spinal pain. But that's different to the traumatic headache pain. So there were several pains and with respect the senior counsel were jumbling them all up.

Q. Very good. So perhaps in ease of-

A. It's a fact that she was assessed by Rachael Ormond, who noted a deterioration in her spinal findings after the accident. It's a fact that she was seen by her GP in October 2016 and matters were improving. It is my experience that if we assume there was a soft tissue injury to the spine, knee, et cetera, those symptoms would be maximum at two to three weeks after the accident and thereafter resolve, not deteriorate. It is a fact that in my 35 years of full-time neurological experience, and having performed thousands of cranial-spinal operations I have never referred a patient for a ketamine infusion of pain.

Q. But Dr. Harney, apart from ketamine infusion, you're aware gave several modalities, in particular to the greater occipital nerve right and nerve, gave facet joint injections related to C1 and C4. This is where the plaintiff primarily complained of, that her neck pain was worse after the RTA. So if we take them individually. If we take, perhaps, the neck pain. The neck pain, the plaintiff said, was worse after the RTA. Now, this was the finding and the clinical history given to the three experts that I've referred to, namely, Ms. Ormond, Dr. O'Sullivan and Dr. Harney. If the neck pain was worse after the RTA what, in your view, caused the neck pain to be worse after the RTA?

A. Might be a soft tissue -soft tissue injury to a neck that had already been operated upon.

Q. But you accept the evidence that if His Lordship accepts that in terms of the clinical history given the findings of our experts…and they said that this was caused by the RTA, you won't take issue with that, will you?

A. No, but the subsequent course of the symptoms are beyond my experience."

At this juncture, it will be recalled that the thrust of Professor O'Sullivan's evidence was that the plaintiff's headaches insofar as they could be classified as post traumatic arose from the time she hit her head off an ESB box in November 2015. He was also of the view that the nature of her headaches were vertex headaches, and as the plaintiff had not struck the top of her head in the accident, it was possible to infer that her headaches were not caused by the accident.

129. The defendant also contends that support for the position that the plaintiff's ongoing headaches cannot be attributed to the road traffic accident is found in the evidence of the plaintiff's own expert Dr. O'Sullivan who testified to the effect that if the plaintiff was suffering from post-traumatic headaches, they would have been expected to come on within a week or so of the accident. Counsel also points to the evidence of Mr. Lim in cross-examination on Day 3 that while the plaintiff had headaches leading up to her surgery in June 2016 (and had an earlier history of migraine headaches), post the road traffic accident, Mr. Lim never treated her for headaches. It was contended that Mr. Lim himself broadly agreed with the evidence of Professor O'Sullivan and Mr. Kaar that they found it difficult to see how the plaintiff would have sustained a significant traumatic injury to her head even if she banged her head in some way in the accident. Mr. Lim further agreed that the plaintiff's primary injury in the accident was to her neck. The defendant's position was that that if one takes the evidence of Mr. Lim, who was the surgeon who operated on the plaintiff some eight weeks prior to the road traffic accident, together with that of Professor O'Sullivan and Mr. Kaar, the finding of the trial judge that

fifty percent of the plaintiff's headaches were attributable to the accident cannot be sustained.

130. The defendant also points out that the likelihood of the plaintiff's headaches (even fifty percent of them) being attributable to the accident was further negated by the fact that following the plaintiff's ride on a Ferris Wheel in December 2016 and her subsequent hospitalisation, in a report dated 6 December 2016 addressed to Dr. Murphy of the Emergency Department of Cork University Hospital, Dr. Nina Marshall also of Cork University Hospital had documented a "new bitemporal headache after [F]erris wheel ride". On 7 December 2016, in a letter to the "Pain Team", Dr. Murphy had requested that the Pain Team see the plaintiff. He referred to the plaintiff presenting to the Emergency Department "with LOC and new exacerbation of her chronic headache…" and referred to the plaintiff having "a chronic background headache since February 2016". Counsel also relies on the fact that the headaches the plaintiff had in early 2016 were what tipped the balance in the decision to carry out surgery for the Chiari 1 malformation in June 2016. It is also submitted that there is no substantial evidence of a complaint of severe headaches being recorded between the date of the road traffic accident and the plaintiff's December 2016 hospital attendance.

131. It is in the context of all these factors (and in the context where the plaintiff's PTSD abated after a short period and where no psychiatric intervention was considered necessary for the treatment of her depression) that the defendant complains that the award of general damages of €146,000 is too high. She says that she has reached the threshold set out in *Rossiter* that the Judge erred in law in assessing general damages at the level he did, which was considerably in excess even of the maximum amount (€92,000) for soft tissue injuries to the upper spine as set out in the Book of Quantum.

132. It is argued that, as per Noonan J. in *McKeown v. Crosby*, the requisite degree of objectivity in the assessment of the level of general damages in this case was absent, even allowing for the defendant's acceptance that she has to take the plaintiff as she was on the day of the accident, that is to say, a vulnerable person. The defendant also asserts that there was no evidence that the plaintiff was suffering from any kind of psychiatric injury or psychological condition that might affect her perception of the injury. Regarding the plaintiff's depression and PTSD, the defendant emphasised that the plaintiff had had no treatment from a consultant psychiatrist for these conditions. Dr. Dennehy saw the plaintiff for the PIAB, he never treated her. Moreover, he diagnosed only very short-term PTSD.

133. It is contended that the proper measure of damages in this case is not what the plaintiff believed she suffered but rather for the injury she actually suffered in the accident. Accordingly, the defendant argues that in accordance with *McKeown v. Crosby*, the plaintiff falls to be compensated not by reference to her perception of her injuries, but rather in an open and objective fashion and, in particular, by reference to the actual injuries suffered as a consequence of the accident. Thus, the defendant cannot be responsible for problems which arose as a result of the plaintiff's earlier head injury and subsequent surgery, from which a full recovery could never be guaranteed. It is in all these circumstances that the defendant asserts that the level of damages awarded the plaintiff cannot be sustained by reference to the evidence as a whole, or, indeed, the medical evidence adduced on behalf of the plaintiff.

134. I consider that with regard to the plaintiff's headaches, the bases upon which the trial judge arrived at his finding that they were attributable to the road traffic accident (to the extent of 50%) bear repeating. Firstly, some four days post the road traffic accident on 27 August 2016, Ms. Ormond's colleague, Ms. Long, recorded that the plaintiff reported "an increase in the severity and duration of headache symptoms". This was against a backdrop

where the evidence was that post her surgery on 1 June 2016, the plaintiff's headaches were intermittent. Secondly, on 13 October 2016, following a review of the plaintiff by Mr. Lim, he noted that the plaintiff had significant neck and shoulder pain with associated headaches. Her condition was significantly worse than when he had seen her pre-accident. Mr. Lim felt it necessary to refer the plaintiff to a pain specialist, Mr. Harney. The letter of referral to Dr. Harney noted the following:

> "Unfortunately, [the plaintiff] was involved in a car crash in August which has compounded her recovery. She seems to have suffered a whiplash injury and she has been complaining of significant neck and shoulder pain and associated headaches".

Thus, the plaintiff's headaches were a feature of her complaints immediately following the accident and well before she presented at Cork University hospital in December 2016.

135. Thirdly, on Day 3, opining on the plaintiff's ongoing chain of symptoms post the accident, Dr. Harney testified that, as borne out by the report of Ms. Ormond, going into July and August 2016, the plaintiff had been making a good recovery from her surgery but that following the accident she developed severe left sided neck pain, which significantly exacerbated her headaches.

136. The fact that Dr. Harney's first medical report of 14 February 2017 makes no mention headaches is of no particular significance, given the contents of Mr. Lim's referral letter of 13 October 2016 and the evidence of Dr. Harney himself. Dr. Harney described his clinical findings at the plaintiff's initial presentation on 22 November 2016 in the following terms:

> "My clinical findings at this stage was that [the plaintiff] had severe left-sided facet joint pain C2, C6 and also <u>left and right greater occipital nerve neuralgia,</u> and in

addition also had pain in the distribution of the left suprascapular nerve". (emphasis added)

As he described it:

"…basically, the occipital nerve is the largest afferent nerve in the body emanating from the C2 posterior dorsal ramus and it runs to the occipital muscles, semispinalis and capitis, and comes out then on to the head over the nuchal line and it's medial to the occipital artery…In terms of the sensory supply over the hemicrania both right and left-hand side and when you get irritation of this nerve you get severe headaches".

137. Dr. Harney described the plaintiff's pain in the following terms:

"After the RTA, when she suffered…when the rear ending took place and she suffered a flexion-extension injury, her neck pain became absolutely unmanageable. Her headaches increased in intensity and she developed significant shoulder pain and significant left sided neck pain, in addition to left shoulder pain and subsequent to that, as a consequence of her neck pain, she also developed pain in her lower back. She also had right knee pain at the time of the accident but that resolved."

138. When he was cross-examined about the contents of Dr. Byrne's report of 24 November 2016, which stated that the plaintiff was improving when seen by Dr. Byrne on 20 October 2016 (and where there was no reference to headaches), Dr. Harney reiterated his view that when he reviewed the plaintiff in November 2016 "her pain was very, very severe…particularly with respect to her occipital nerve pain." (emphasis added) Dr. Harney's view was that the plaintiff had ongoing persistent neuropathic pain. His evidence was that the aggravation of her headaches and her persisting shoulder pain was directly attributable to the accident.

139. It must also be recalled that following his examination of the plaintiff on 17 July 2018, the plaintiff was diagnosed by Dr. O'Sullivan with a severe refractory chronic daily headache with a likely post traumatic headache exacerbation. By this time, she had been under the care of Dr. Harney since November 2016 (some three months post the index accident) against the backdrop where she had had constant daily headaches from November 2015 albeit that post the 1 June 2016 surgery until the road traffic accident, there had been a distinct improvement in her headaches. According to Dr. O'Sullivan, her headaches were severely exacerbated after the road traffic accident reaching to ten out of ten on the pain scale. It will be recalled that Dr. O'Sullivan considered her symptoms consistent with post-traumatic exacerbation of an underlying daily headache.

140. The plaintiff's headaches immediately prior to and post the accident were described by Dr. O'Sullivan in evidence on Day 2 as follows:

> "…[The plaintiff] told me that in the month prior to the accident, the headaches had improved to approximately 5 out of 10 severity, but since the accident they had increased in severity to an average severity of 9 or 10 out of 10. She was requiring ongoing treatments with various analgesics. The headache, she described as being severe and debilitating for her. They are present constantly and they were occurring on a daily basis. They were associated with other features such as reduced concentration, which was affecting her recall of conversations. She had alteration in her vision associated with the headaches. She described tunnel vision where her peripheral vision would constrict as part of a visual area associated with the headaches. Her headaches were associated with photophobia, a kind of discomfort on normal lit environments. This made driving at night difficult because of the uncomfortable glare from oncoming car lights, and her sleep pattern was also

> disturbed because of the headaches so these were the characteristics and the frequencies she described to me."

141. Dr. O'Sullivan ascribed 50% of the plaintiff's headaches to the accident. This was in circumstances where the plaintiff "obviously had an underlying tendency towards headaches." His understanding from the plaintiff however was that her headaches had begun to improve following her surgery on 1 June 2016 and that her headaches "post-accident had more of a migraine type feature and were certainly more severe than previous to the decompression surgery".

142. It is also the case that the defendant's expert, Professor O'Sullivan, himself acknowledged that the plaintiff's headaches had been exacerbated by the road traffic accident. Conclusion No. 4 of Professor O'Sullivan's Opinion as set out in his report states as follows:

> "[The plaintiff's] headache was exacerbated by a road traffic accident on 27.08.16. She has undergone multiple interventions by Dr. Donal Harney which resulted in partial relief of the cervical pain and no relief of the headache."

In evidence, Professor O'Sullivan stated that that conclusion related to a cervicogenic headache which he opined the plaintiff had as a consequence of the surgery she underwent on 1 June 2016. The salient issue, however, is irrespective of when the headaches began, Professor O'Sullivan accepted at the very least that "the cervicogenic headache was exacerbated [by the accident]". It is also of note that Professor O'Sullivan accepted in cross-examination that Dr. Harney's targeting of the greater occipital nerves by way of treatment for the plaintiff was with a view to treating her occipital headache.

143. By reason of all of the foregoing, and notwithstanding the various arguments canvassed on behalf of the defendant, I am satisfied that there was more than a sufficient basis for the trial judge's finding that trauma-induced headaches were a feature of the

plaintiff's presentation immediately following the road traffic accident and that such headaches were manifest well before December 2016 when the plaintiff presented at Cork University Hospital following a ride on a Ferris Wheel. Secondly, there was ample grounds for the Judge's finding (at para. 163) that there was "a marked deterioration in the plaintiff's condition [including her headaches] in the weeks and months following the accident". Thirdly, and more fundamentally, there was more than ample credible evidence for the finding at para. 170 of the judgment that the plaintiff's headaches were cervicogenic in nature and were caused by the road traffic accident, given, especially, Dr. Harney's evidence regarding the irritation of the plaintiff's occipital nerve.

144. In evidence, Dr. Harney described the plaintiff's progress as of August 2019 (which was some three years on from the accident and some four months prior to the trial) in the following terms:

> "As I said, her functional capacity was significantly reduced. Her capacity to, in terms of activities, daily living, socialising were very significantly reduced. Severe ongoing neuropathic pain which I would grade at about 8 to 9 out of 10. She had great self-efficacy at all times doing her best to get on in terms of her life and to do things and proceed and has engaged with various vocational rehabilitation. In summary from my perspective as I mentioned earlier in terms of treatments, we will be looking at radiofrequency ablation therapy to the facet joints, left of C2-C6. The other side as well would be an occipital nerve stimulation, a trial of that. This would be treatment that may have to be accessed abroad. There wouldn't be the expertise in Ireland…"

145. As to the defendant's overarching complaint that in finding that 50% of the plaintiff's headaches were attributable to the road traffic accident the Judge effectively excluded the evidence of Professor O'Sullivan and Mr. Kaar, there is no substance in this

argument. The first thing to be observed is that the judgment is replete with references to Professor O'Sullivan and Mr. Kaar and the views they expressed in relation to the likelihood of the plaintiff's headaches being caused by the accident. Their evidence was recorded in detail by the Judge (see paras.103-131). Both those witnesses are also referenced in the "Conclusions" section of the judgment. It is the case that when reaching his conclusions on the issue of the plaintiff's headaches (see paras. 170-171), the Judge only expressly references Dr. Harney's findings and evidence. That, however, does not lead inexorably to the conclusion that he somehow excluded or ignored the evidence given by the defendant's experts with regard to the plaintiff's headaches. The Judge was fully *au fait* with their evidence as the judgment demonstrates. He took account of all the evidence, as is apparent from the judgment overall. Moreover, at para. 174, he alludes to the defendant's argument that the low impact collision on 27 August 2016 could not have caused the plaintiff's injuries and rejects that argument. This can only be a reference to the defendant's medical experts, including the opinions they put forth in relation to the cause of the plaintiff's headaches.

146. Here, there was no *"non-engagement"* by the Judge with the evidence in the sense articulated by Clarke J. in *Doyle v. Banville* [2012] IESC 25, [2018] 1 IR 505. On the issue of the plaintiff's headaches, the Judge clearly engaged with *"the key elements of the case made by both sides"* (per Clarke J. at para. 10), as he was required to do. To my mind, the defendant's complaint that Professor O'Sullivan's and Mr. Kaar's evidence on the headaches issue was excluded from the weighing exercise undertaken by the Judge appears to be the type of *"rummaging in the undergrowth"* (in an attempt to overcome the constraints of *Hay v. O'Grady*) that Clarke J. cautions against in *Doyle v. Banville.*

147. For the reasons he set out, the Judge preferred the evidence of the plaintiff's medical experts, Dr. Harney and Dr. O'Sullivan, over that of the defendant's expert on the

causative effect of the accident with regard to fifty percent of the plaintiff's headaches. The findings of Dr. Harney's, and the basis put forth by the Judge for his preference for Dr. Harney's evidence have already been set out in this judgment. Similarly, the Judge was satisfied to accept Dr. O'Sullivan's evidence that the fact that the plaintiff's MRI brain scan was clear did not preclude Dr. O'Sullivan's finding that the plaintiff had sustained a traumatic brain injury on 27 August 2016 which had exacerbated an underlying chronic headache the severity of which had deteriorated immediately after the accident. As explained by Dr. O'Sullivan, the injuries sustained in post-traumatic headache and whiplash associated disorder were often microscopic, affecting nerve cell functioning, without necessarily altering their gross appearance on routine MRI scans. That was credible evidence which the Judge was entitled to accept, coming as it did from a consultant neurologist. The fact that Mr. Lim, and indeed Dr. O'Sullivan, may have agreed with certain propositions put by the defendant in cross-examination does not detract from the entitlement of the Judge to prefer the evidence of Dr. Harney and Dr. O'Sullivan on the issue of the plaintiff's headaches, bar any suggestion of irrationality in the Judge's findings, which does not arise here. The Judge was also entirely within his discretion to reject, at para. 174 of his judgment, the defendant's argument that a minor impact could not have caused the injuries complained of by the plaintiff.

148. The defendant also seeks to persuade this Court that the Judge was wrong to reject the defendant's experts' testimony that even if the plaintiff was a bad candidate for the accident because of her subsisting neck condition any soft tissue injury thereto from the accident would have been of relatively short duration such that her ongoing complaints can only be explained by the fact that she engaged in catastrophic thinking in relation to her level of pain and disability. However, again, the Judge made a principal finding of fact that the plaintiff was not catastrophising her injuries. He did so for stated reasons. Each of the

plaintiff's doctors rejected the suggestion that the plaintiff's injuries could not be responsible for her ongoing complaints. The Judge was entitled to reject Mr. Kaar's evidence that the plaintiff suffered from chronic pain disease prior to the accident, on the basis of the plaintiff's doctors' evidence, including that given by her Cork-based GP, Dr. Donovan. He did so by reference, *inter alia*, to the fact that they were the plaintiff's treating doctors. He rejected these arguments in a reasoned judgment yet, the defendant (impermissibly) asks this Court to re-evaluate the effects of the plaintiff's injury on her on the basis that the Judge was not entitled to prefer (for the reasons he set out at paras. 172-188) the evidence of the plaintiff's treating specialists, Mr. Lim, Dr. Harney, Dr. O'Sullivan, Ms. Ormond and Dr. O'Donovan over the evidence of the defendant's experts Professor O'Sullivan, Mr. Kaar and Ms. O'Mahony each of whom saw the plaintiff only once.

149. The Judge's conclusions, and the manner in which he came to them, are logical and were entirely within his jurisdiction.

150. It is worth emphasising that, unlike in *Payne v. Nugent*, the present case is not one where all the medical reports had been agreed and where this Court would be in as good a position as the trial judge to assess the weight to be given to the evidence contained in those reports. Here, the Judge had the benefit of oral testimony from each side's medical witnesses (save the plaintiff's Dublin-based GP, Dr. Byrne whose report was agreed). Ultimately, all of the findings of fact made by the Judge were supported by the oral evidence of the plaintiff's medical witnesses. *Hay v. O'Grady* applies to the findings of fact made by the Judge supported as they were by credible oral evidence.

151. Insofar as the defendant suggests that this Court should draw inferences of fact on the issue of causation of the plaintiff's injuries from photographic evidence (which the Court has not seen) and the low repair cost to the vehicle in which the plaintiff was

travelling, that is not permissible in circumstances where the Judge heard oral evidence from the plaintiff about the nature of the collision and where no similar evidence was tendered by anyone on the defendant's side directly involved in the collision. The Judge also had oral testimony from Dr. O'Sullivan (for the plaintiff) and Professor O'Sullivan and Mr. Kaar (for the defendant) on the issue of whether even a "low impact" collision (as the defendant described the collision) could have caused or contributed to the plaintiff's headaches. As already referred to, the Judge preferred Dr. O'Sullivan's evidence which was to the effect that an apparently entirely normal MRI brain and cervical spine scan (which was the case here) was entirely compatible with post-traumatic headache this being because injuries sustained in post-traumatic headache and whiplash associated disorder were often microscopic, affecting nerve cell functioning, without necessarily altering their gross appearance on routine MRI scans. While Mr. Kaar held a different view on the issue to that of Dr. O'Sullivan, the principles set out in *Hay v. O'Grady* preclude this Court from supplanting either the Judge's findings (at para. 166) arising from the plaintiff's evidence of the collision or the findings he made (at para. 187) with respect to Dr. O'Sullivan's evidence.

152. Another matter with which the defendant takes issue is the basis upon which the Judge rejected Professor O'Sullivan's evidence that the plaintiff had full and complete movement in her neck shoulders and back when saw her on 28 April 2018. The Judge found that the findings of Professor O'Sullivan were probably due to "the beneficial effects" of treatment that Dr. Harney had administered to the plaintiff some seven days earlier on 20 April 2018. The defendant says that the Judge's finding at para. 175 of the judgment could not properly be arrived at absent the proposition that the plaintiff's symptoms may have been masked by the short-term benefits of Dr. Harney's treatment first having been put to Professor O'Sullivan.

153. There is no merit in the submission that it was necessary for it to have been put to Professor O'Sullivan in cross-examination that he may have been misled about the plaintiff's true condition at the time he examined her because of the treatment Dr. Harney had administered on 20 April 2018. In rejecting Professor O'Sullivan's assessment of the plaintiff's presentation on 28 April 2018, the Judge was fully entitled to have regard to the likely benefit (albeit short-term) to the plaintiff which Dr. Harney's treatment a week earlier had brought. His rejection of Professor O'Sullivan's evidence was supported by the plaintiff's own evidence and that of Dr. Harney who both testified Dr. Harney's treatments had brought some short-term benefits to the plaintiff. Additionally, Ms. Ormond testified to the plaintiff having reported a decrease in her thoracic and scapular pain after treatment which had lasted to May 2018.

154. There appears also to be a general complaint levied at the Judge that he did not give the appropriate weight to the fact that Dr. Byrne's report of 24 November 2016 recorded the plaintiff as stating, when seen by Dr. Byrne on 20 October 2016, that she was making good progress. While Dr. Byrne's report is not specifically referenced by the trial judge in the "Conclusions" section of his judgment, it is certainly alluded to earlier. In any event, this Court is entitled to assume that the Judge has taken account of all the evidence. That assumption has not been displaced here, particularly when Dr. Byrne's report is referenced at paras. 40-42 of the judgment, as is Dr. O'Sullivan's response to that report when it was put to him in cross-examination. Dr. O'Sullivan described Dr. Byrne's assessment of the plaintiff on 20 October 2016 as "a snapshot from a particular day" and he stated that it was necessary to look at the plaintiff's condition over time. (at para. 94). A similar view was expressed by Dr. O'Donovan in his evidence when he explained the improvement noted by Dr. Byrne on 20 October 2016 on the basis that improvement was not always linear over time: people could improve, then reach a plateau and dis-improve.

155. As is apparent from the High Court judgment, the severity of all the injuries the plaintiff complained of was largely conceded by the defendant but not their cause. As already alluded to, the Court is constrained to find, as counsel for the plaintiff argued, that the defendant's arguments in the appeal, while nominally related to the Judge's quantification of damages, were more concerned with causation. For the reasons already set out above, the defendant has no basis to impugn the Judge's findings as to causation. He found as a fact that the plaintiff's pre-existing neck and shoulder pain was exacerbated by the accident, that she suffered injury to her back and right knee in the collision and that 50% of her headaches were caused by the accident. He was also satisfied that her PTSD and her depression (the latter still subsisting at the time of the trial) arose as a result of the accident.

156. Clearly, the Judge was faced with conflicts of evidence in this case. Having listened to and observed the witnesses, he resolved the conflicts in favour of the plaintiff in a reasoned fashion. In particular, he found that the plaintiff had made good progress after her Chiari 1 malformation surgery and found that but for the accident, she would have in all probability made a good recovery from her surgery within six months of the surgery.

157. As alluded to previously, notwithstanding the defendant's assertion that she accepts that *Hay v. O'Grady* applies, the defendant's submissions nevertheless purport to suggest that the Judge was wrong in the manner in which he evaluated the discrepancies between the oral evidence given by the plaintiff and her medical witnesses and the medical witnesses called on behalf of the defendant. In violation of the principles of *Hay v. O'Grady,* the defendant's submissions are tantamount to requesting that this Court take a different view of the medical evidence heard and evaluated by the Judge. This, however, cannot properly be done, this Court not having heard that evidence save as recorded in the *"arid pages of a transcript"*. The relevant principles debar this Court from interfering with

the Judge's reasoned findings on all fronts in circumstances where he clearly engaged with all the evidence and where he has provided a clear statement of his findings of fact, the inferences he drew and the conclusions that followed. It bears repeating that there was no suggestion in this case that the Judge's findings were not supported by credible evidence.

Were the general damages awarded excessive?

158. The essential question for the Court is whether, having regard to the findings of fact arrived at by the Judge, the general damages awarded to the plaintiff bear no reality (the defendant's position) to the sum that might have been awarded.

159. Much reliance is placed by counsel for the defendant on the roadmap set out by Irvine J. in *Shannon v. O'Sullivan*. The defendant's argument is that the Judge in assessing general damages failed to apply the guidelines set out at para. 43 of that judgment and this Court should have regard to those guidelines in assessing whether the award of general damages complied with the established principles. Counsel points out that all of the factors alluded to by Irvine J. in *Shannon v. O'Sullivan* at para. 43 were in fact put to the plaintiff in cross-examination (Day 2 Qs.426-448) and elicited the following concessions from the plaintiff:

- The accident was a minor impact;
- The plaintiff did not need to be hospitalised as a result;
- She did not suffer any lack of dignity as a result of the accident such as being unable to care for herself or attend to her personal needs;
- She did not require surgical intervention as a result of the accident (excepting the pain-relieving procedures done by Dr. Harney and Dr. O' Sullivan);
- She did not have to attend in any meaningful way at any form of rehabilitation facility (excepting physiotherapy and some acupuncture);
- She was not dependent in any way on a wheelchair or crutches.

160. The defendant submits that the plaintiff barely meets the threshold for each aspect of the test set out by Irvine J. in *Shannon v. O'Sullivan.* Counsel argues that on any fair reading of the accounts of the accident, together with the nature of the damage to the vehicle in which the plaintiff was travelling, the impact must have been minor or modest at most which, in the normal course of events, would not be likely to give rise to serious injury, albeit it is accepted that the plaintiff was a poor candidate for the potentiality of injury. Counsel points in particular to the answers the plaintiff herself gave in cross-examination Day 2 (Q. 189) where she acknowledged the minor nature of the impact.

161. In all the circumstances of this case, the defendant's argument that the Judge's assessment of general damages should be impugned for not quantifying the general damages awarded to the plaintiff solely be reference to the answers the plaintiff gave in cross examination to Qs.426-448 on Day 2 has not been made out, for reasons shortly to be explained. Before doing so, it is apposite to consider the factual circumstances at issue in *Shannon v. O'Sullivan.*

162. There, the plaintiffs (a husband and wife) sustained injury in a road traffic accident. Mrs. Sullivan sustained a stretching/bruising type injury to a nerve in her neck, which was stated to have become chronic with the possibility of requiring surgery in the future. The injury was said to have rendered symptomatic a pre-existing asymptomatic degenerative change in her neck. Mr. Shannon also sustained a stretching type injury to a nerve in his neck, which was said to have begun prior to the accident. Both plaintiffs also alleged psychological injuries.

163. Applying the "roadmap" she had set out at para. 43 of her judgment, Irvine J. considered as not fair or proportionate the general damages the High Court had awarded (€130,000 to Mrs. Shannon and €90,000 to Mr. Shannon). With regard to the sum awarded for pain and suffering to the date of trial (€50,000 to Mrs. Shannon and €35,000 to Mr.

Shannon), Irvine J. found it *"difficult to see much evidence of pain, suffering, treatment or limitation of lifestyle as would support [such an award] in respect of the two-year and four-month period between the date of the accident and the date of trial".* This was in circumstances where the accident on 7 November 2012 had not precluded these plaintiffs from going to work and leading a relatively normal life until they attended a GP on 1 December 2012 when the extent of their treatment was painkilling medication for a month and where the GP did not consider their complaints sufficiently serious to refer them for further opinion or advise them to return for a review. Both plaintiffs remained able to work and were able to engage in a normal life and neither plaintiff returned to seek further medical advice or treatment until February 2014, some fourteen months later. While it is the case that both had medical interventions post February 2014, they remained able to work and continued their lives in much the same way as they had in the previous fourteen months. Irvine J. also observed that it was only in 2014 that they were referred for psychological review.

164. Equally, Irvine J. considered the award of general damages for pain and suffering into the future (€80,000 to Mrs. Shannon and €55,000 to Mr. Shannon) as not fair or proportionate, finding, with regard to Mrs. Shannon, that the trial judge did not have sufficient evidence to conclude that she would require surgery in the future and that the trial judge's conclusion that she had developed a depressive illness that would affect her into the future was not supported by the evidence given that up to the date of trial her psychological symptoms had not adversely affected her from a vocational or social perspective. With regard to the €55,000 awarded to Mr. Shannon for future pain and suffering for his physical injures, Irvine J. was equally satisfied that the award was not justified, finding that there was *"nothing in the evidence to suggest that Mr. Shannon would experience much by way of pain or discomfort into the future".*

165. Ultimately, Irvine J. awarded Mrs. Shannon by way of general damages, €40,000 in respect of pain and suffering to date and €25,000 for pain and suffering into the future. Mr. Shannon was awarded €25,000 for pain and suffering to date and €15,000 in respect of pain and suffering into the future.

166. The factual context in *Shannon v. O'Sullivan* bears no comparison to the present case. While it is the case that the plaintiff here was not detained in hospital owing to the nature of the injury sustained in the accident or confined to a wheelchair and did not suffer the indignity of being unable to attend to her personal needs, she did, however, suffer persistent pain and discomfort post the road traffic accident to the extent that it affected her mood and caused her to be depressed at the loss of her ability to be able to return to work and enjoy her leisure time. This was against a background where the plaintiff had already undergone severely invasive surgery on 1 June 2016 which left her neck "significantly compromised" albeit she was making a recovery from that surgery by the time the accident occurred. As a result of her level of pain post the accident, the plaintiff had extensive invasive procedures from Dr. Harney and Dr. O'Sullivan with only temporary and limited effect. She had also undergone, and continued to undergo, physiotherapy as of the date of the trial. In the instant case, there has been continuous substantial medical treatment afforded to the plaintiff from the outset of the accident and which has continued over a number of years and in respect of which there was credible evidence from Dr. Harney that the plaintiff would continue to suffer in the medium to long term and may need to have further medical treatment, possibly abroad. Moreover, there was credible evidence that the plaintiff was in constant pain post the accident having been in an already vulnerable state after her surgery on 1 June 2016. The plaintiffs in *Shannon v. O'Sullivan* did not have the extensive pre-accident medical history the plaintiff here presented with. Their pain and suffering bore no comparison to that of the plaintiff here. Hence, those plaintiffs were

entirely suitable candidates to be assessed in accordance with the "roadmap" which Irvine J. devised at para. 43 of her judgment. That is not the case here for the reasons set out above. Accordingly, the answers which the defendant elicited from the plaintiff in cross-examination using the template set out at para. 43 of Irvine J.'s judgment cannot be said to represent the parameters of the plaintiff's case and the Judge did not err in not assessing general damages solely by reference to the answers the plaintiff gave on Day 2 to Qs.426-448.

167. Reliance is placed by the defendant on the Book of Quantum as the appropriate tool in this case to assist in the quantification of the general damages to be awarded to the plaintiff. While the defendant accepts that over and above the upper spinal injury the plaintiff sustained in the accident she also complains of back injury and headaches together with PTSD and depression, and that these factors might accordingly allow for the level of damages to be increased over and above that provided for upper spinal injuries in the Book of Quantum, she makes the case that the plaintiff received no special treatment for her PTSD and that her depression was considered by her GP not to merit referral to a psychiatrist. Insofar as the plaintiff was seen by Dr. Dennehy, Consultant Psychiatrist, that was purely for the purposes of the application to the PIAB: Dr. Dennehy provided no treatment for the plaintiff's depression. Counsel also highlights the requirement for such damages to be assessed in an objective and open fashion, emphasising the requirement for fairness to the plaintiff and the defendant and for the damages to be proportionate to the general scheme of damages awarded by a court. Particular emphasis was put on the approach of Noonan J. in *McKeown v. Crosby.*

168. In *McKeown v. Crosby,* the plaintiff's car had been struck by an overtaking jeep. As described by Noonan J., the plaintiff suffered soft tissue injuries primarily to her lumbar spine. She also suffered injuries to her thoracic and cervical spine affecting her left

shoulder, arm and hand (not unlike the physical injuries sustained by the plaintiff here). All her symptoms resolved fairly quickly save those relating to her lower back. Two years post injury, the plaintiff was left with intermittent low back pain but enjoyed a full range of movement. The High Court awarded the plaintiff €65,000 in general damages to date with a further €5,000 for future damages together with €6,000 by way of special damages, leading to a total award of €76,000.

169. On appeal, Noonan J. looked at comparable cases. He noted that in *Nolan v. Wirenski*, *Payne v. Nugent* and *Shannon v. O'Sullivan,* this Court in all these cases had reduced the damages the High Court had awarded. Noonan J. did likewise in *McKeown v. Crosby.* He was satisfied that the Book of Quantum had a "*clear role to play"* in cases dealing with back injury and spinal fractures. He held that of the five categories in the Book of Quantum dealing with back injuries and spinal fractures (i.e., minor-substantially recovered, minor-a full recovery expected, moderate, moderately severe and severe and permanent) the plaintiff's injury fell into the "moderate" category for such injuries which was defined as "moderate soft tissue injuries where the period of recovery has been protracted and where there remains an increased vulnerability to further trauma. Also within this bracket would be injuries which may have accelerated and/exacerbated a pre-existing condition over a period of time, usually no more than five years." Noonan J. did not consider that the plaintiff fell into the "moderately severe" band of damages described in the Book of Quantum as involving "soft tissue wrenching type injury of the more severe type resulting in serious limitation of movement, recurring pain, stiffness and discomfort and the possible need for surgery or increased vulnerability to further trauma. This should also include injuries which may have accelerated and/exacerbated a pre-existing condition over a prolonged period of time, usually more than five years resulting in ongoing pain and stiffness."

170. Noting that moderate injuries to the back attracted damages within the range of €21,400 and €34,400 inclusive of past and future damages, Noonan J. did not consider the High Court award proportionate when viewed against the measure of the maximum for the most serious injuries, or when viewed against comparable awards. Accordingly, he considered an award of €25,000 by way of general damages for the plaintiff's back injury for pain and suffering to date, adding €5,000 to take account also of the plaintiff's shoulder and neck pain, noting that *"as the Book of Quantum itself recognises, where the injuries fall into more than one category, it is not appropriate to simply add up the totals but rather carry out an adjustment to the overall award to fairly reflect the effect of all the injuries on the plaintiff".* Together with the trial judge's award of €5,000 for future pain and suffering, that came to a total amount for general damages of €35,000 to which the agreed special damages of €6,000 was added, leading to a total award of €41,000 in *McKeown v. Crosby*.

171. Clearly, in *McKeown v. Crosby,* as far as general damages are concerned, Noonan J. was satisfied to regard the Book of Quantum as a sufficient template by which general damages could be assessed. This was clearly in circumstances where the nature of the injuries fell easily into one or other of the categories for back and spinal injuries addressed in the Book of Quantum.

172. In the present case, the Judge did not consider the Book of Quantum of assistance in the quantification of general damages, a finding with which the defendant takes issue.

173. While this Court is cognisant that both the jurisprudence already referred to (and the Book of Quantum to some limited extent) emphasise that the appropriate way to compensate a litigant for multiple sites of injury is to make an adjustment in the overall award (in other words, to adjust upwards the relevant band of damages in the Book of Quantum for the principal injury), this approach cannot be viewed as being set in stone.

174. Indeed, support for the Judge's finding that the Book of Quantum was of little assistance is found in the pronouncements of Irvine J. in *Nolan v. Wirenski,* at paras. 26-27:

> *"26. The assessment of damages in personal injury cases is not a precise calculation; it is not precise and it is not a calculation. It is impossible to achieve or even to approach the goal of damages, which is to put the plaintiff back into the position he or she was in before they sustained their injuries. In most cases, where the injuries are not severe, a plaintiff will in fact get back to their pre-accident condition but that is not because they have been awarded damages but rather by the natural process of recovery. On the other hand, for some plaintiffs, an award of damages is a very imperfect and inadequate mode of compensation and is a poor substitute for the change in circumstances brought about by the wrongdoing of a defendant, particularly where they will not make a full recovery from their injuries.*
>
> *27. It follows that the true purpose of damages for personal injuries is to provide reasonable compensation for the pain and suffering that the person has endured and will likely endure in the future. How is that to be measured? The process of assessment is objective and rational but personal to the particular plaintiff. Obviously, it is reasonable to look for consistency as between awards in similar cases but the same kind of injury can have different impacts on the persons who suffer it. Therefore, the court should not have the aim of achieving similarity or a standard figure".* (emphasis added)

175. It is not unreasonable to expect there will always be some cases where the bands of general damages provided for in the relevant guidelines will prove an insufficient mechanism for the assessment of general damages. Indeed, this is acknowledged in the

case law relied upon by the defendant here. When such a case arises (as arose here), a trial judge cannot be expected to shoehorn the pain and suffering (past and, if applicable, future) of a particular plaintiff into a category of damages in the Book of Quantum (or the Personal Injury Guidelines) that may be ill-equipped to meet the exigencies of a particular case. It must be recalled that the fundamental premise is that the process of assessment of general damages is *"personal to the plaintiff"* albeit this process is imbued with the requirement for objectivity and rationality.

176. Where it is considered that the relevant guidelines as to general damages do not assist in a given case, the task of the trial judge is to say why this is so and to arrive at a figure that is proportionate and rational. That task fell to the Judge in the instant case. He did what was required. He set out why the Book of Quantum did not assist him in the assessment of general damages. Albeit his rationale was set out in summary form in para. 201 of his judgment, any reader of the judgment would well understand why he considered the Book of Quantum to be of little assistance in this case.

177. In the circumstances of this case, the Judge was well within his discretion in finding the Book of Quantum of no great assistance. This is because, as noted by the Judge, the plaintiff's multiple sites of injury "were superimposed on an already weakened neck". (emphasis added) As stated by Mr. Lim in the court below, the plaintiff had received a soft tissue injury to that area of her body that had been severely compromised due to the surgery she underwent on 1 June 2016. As Mr. Lim explained, the nature of the surgery meant that the plaintiff was particularly vulnerable to trauma. Given the plaintiff's multiple injuries sustained in the accident, coupled with her pre-accident medical history, this could not be characterised as the *"straightforward"* case that Noonan J. identifies in *McKeown v. Crosby* as being the type of case to which the Book of Quantum is best suited. Thus, as he was entitled, nay obliged, to do, the Judge looked to the circumstances of this particular

plaintiff, as someone who sustained extensive soft tissue injury to a neck already weakened from very invasive surgery (the *"egg shell skull"* scenario referred to by Clarke J. in *Walsh v. South Tipperary County Council*, as quoted by the trial judge at para. 192), coupled with soft tissue injuries to her back and knee she sustained in the accident, in respect of all of which (save her knee) she continued to complain at the time of the trial, not to mention her ongoing headaches and depression which also persisted as of the date of trial. It will be recalled that (unlike the now adopted Personal Injuries Guidelines) the Book of Quantum with which the Judge was concerned makes no provision for PTSD or depressive illness.

178. The Judge was entitled to take the view that the present case was one where neither the bands of damages for specific injuries set out in the Book of Quantum nor the methodology advocated therein for assessing multiple sites of injury constituted an adequate guideline for the assessment of general damages in this case.

179. In the absence of the categories of damages set out in the Book of Quantum being of assistance to the Judge, the requisite objectivity and rationality which he was obliged to employ, in conjunction with the requisite consideration of the plaintiff's personal circumstances, was achieved *via* the consideration given by the Judge to the plaintiff's doctors' and physiotherapist's clinical findings in relation to her complaints and their prognosis for her future, to which the Judge quite obviously had regard when he assessed general damages of €96,000 for the plaintiff's pain and suffering to the date of trial and €50,000 for pain and suffering in the future. In light of the medical evidence upon which he was entitled to rely, coupled with the findings he made regarding the plaintiff, there is nothing to suggest that the figures arrived at were otherwise but reasonable and proportionate.

180. For the reasons set out above, the defendant has not made out a persuasive case that the Judge erred in law in his assessment of general damages such as would warrant the intervention of this Court.

The alleged error in the calculation of the plaintiff's loss of income (ground 3)

181. Ground 3 of the Notice of Appeal asserts that the Judge erred in fact and/or in law in respect of the manner in which he calculated the plaintiff's loss of income not by reference to the annual amount arising (it having been agreed) but rather in respect of the period of three years loss on income which was allowed up to the date of trial (allowance having been made for the six months period the plaintiff would have been out of work) and the further period of two years factored in by the Judge. It is asserted that this cannot be sustained by reference to the evidence as a whole and/or by reference to the medical evidence adduced on behalf of the plaintiff.

182. The plaintiff disputes any error on the part of the Judge.

183. There is no merit in this ground of appeal. In the first instance, the plaintiff's net yearly earnings were agreed by the parties. The issue therefore to be decided was whether the injuries sustained by the plaintiff prevented her from returning to work to the date of the trial and whether she should also be compensated for future loss of earnings. The Judge outlined clearly and rationally the basis upon which he arrived at the figure of €105,480.54 by way of loss of earnings to the date of trial, namely that a period of three years and two months had elapsed from January 2017 (the Judge having discounted the period from 27 August 2016 to 31 December 2016 on the basis that the plaintiff would have been out of work in any event in this period because of the surgery she underwent on 1 June 2016). Based on the findings he made with regard to the plaintiff's condition from January 2017 to the date of trial (which was supported by medical evidence), the Judge could not but compensate the plaintiff for her loss of income during that time.

184. As he stated in his judgment, the Judge found the assessment of the plaintiff's loss of earnings more problematic. Dr. O'Sullivan's evidence (which was accepted by the trial judge) was that as the plaintiff had made some improvement from the treatment he had administered in September 2019, he was hopeful that if that improvement continued, the plaintiff would be in a position to return to work on a phased basis in the next two years. As of the date of trial, she continued to be symptomatic, thus the trial judge could not see her earning very much should she consider returning to work on a phased basis. Equally, he found it "somewhat up in the air" as to what her earning capacity would be in the following year. He resolved the dilemma presenting by allowing the plaintiff 50% of her loss of earnings (on a total incapacity basis) for the two years in question. Based on the evidence before him, the Judge was entirely within jurisdiction in approaching the matter as he did.

The alleged error in the assessment of special damages (ground 4)

185. This ground of appeal asserts that the Judge erred in allowing the entirety of the plaintiff's special damages. The defendant's written submissions assert merely that the award in respect of special damages "should be reduced/varied in the light of any findings which this Honourable Court may make in relation to the nature and consequences of the personal injury which the Plaintiff suffered in the index accident." As the Court has not found any basis upon which any of the Judge's findings and conclusions should be disturbed, this ground of appeal falls away.

Summary

186. As the defendant has not made out any of the ground challenging the Judge's decision on quantum, I would dismiss the appeal, accordingly.

Costs

187. The defendant has not succeeded on any of the grounds in the appeal. It follows that the plaintiff should be awarded her costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

188. As this judgment is being delivered electronically, Whelan J. and Collins J. have indicated their agreement therewith and the orders I have proposed.