THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 200

[2018/59]

Costello J.
Ní Raifeartaigh J.
Murray J.

BETWEEN

DOLORES O'DOHERTY

PLAINTIFF

AND

ANNE CALLINAN AND TOM CALLINAN

DEFENDANTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 24th day of July, 2020

1. This appeal, brought by the defendants in a personal injury action, relates solely to the part of the judgment and order of the High Court (Reynolds J.) awarding the plaintiff €250,000 in damages for future loss of earnings. The judgment of Reynolds J. ([2018] IEHC 14) was delivered on 12th January, 2018 and the order was perfected on 19th January, 2018. The defendant appealed, but I will refer to the parties throughout as the plaintiff and defendant.

Background facts

2. The plaintiff sought damages in the High Court for personal injuries, loss and damage sustained as a result of a road traffic accident which occurred on 14th June, 2014. The action proceeded by way of assessment of damages only, as liability had been conceded by defendants.

3. The plaintiff, a secretary by occupation, was 44 years of age and working on a full-time basis at a school in Co. Meath on the date that her motor vehicle was rear-ended by the defendants' motor vehicle while sitting in a stationary line of traffic. The plaintiff's car seat was broken and her vehicle was written off as a result of the damage caused by the impact. She sustained multiple soft tissue injuries to her neck, back and knee and most significantly, she sustained an injury to her coccyx bone and has subsequently developed a condition known as coccydynia. The plaintiff was initially treated by her General Practitioner ("GP") who referred her for x-rays which revealed no abnormalities. However, some days after the accident, she complained of severe coccygeal pain which gave rise to difficulties sleeping, driving and sitting for long periods; so much so that she was prescribed anti-inflammatory, relaxant and pain killing medication and has been out of work since the accident.

4. On 24th March, 2015, the plaintiff met with an orthopaedic surgeon and underwent the first of three procedures under anaesthetic in an attempt to alleviate the ongoing coccygeal pain. Despite receiving a further two injections, she remained in constant pain.

5. On 23rd December, 2015, the plaintiff met with a consultant spinal surgeon who opined that coccydynia is "a notoriously difficult condition to treat" and, following a clinical examination and MRI scan, revealed that she had a prominent coccyx with tenderness at its tips, as well as some instability of the sacrococcygeal disc. It was made clear to the plaintiff that while surgical intervention was an option, it was contra-indicated at that time as one of the associated risks was double incontinence.

6. While it was initially anticipated that the plaintiff's symptoms would fully resolve in the long-term, it was accepted by all of the medical advisors at the time of the hearing of the High Court action (three and a half years post-accident) that the plaintiff remained in constant pain. Indeed, a report compiled by the plaintiff's orthopaedic surgeon dated 29th August, 2017 revealed that he was of the view at that point that her symptoms were unlikely to resolve completely. The view was expressed by another treating consultant orthopaedic surgeon that it would take another few years for the plaintiff's complaints to fully resolve. At the time of the hearing, the plaintiff was regularly attending her GP who was of the view that despite the plaintiff's best efforts to adapt her lifestyle and manage her situation, it was likely that the plaintiff would remain symptomatic for the foreseeable future. She had been unable to date to return to her pre-accident employment as a secretary at the local school - a job which she had held for fifteen years - as it involved work of a sedentary nature and required her to work for six/seven hours a day, five days a week. Furthermore, the plaintiff's GP had been unable to certify her as fit to return to work.

7. Evidence was given by the principal of the school in which the plaintiff had worked before the accident. The main features of her evidence are summarised in the submissions set out below.

Summary of actuarial evidence

8. On the final day of the hearing, the High Court was furnished with an updated handwritten report by the plaintiff's actuary. The view was expressed in that report that but for the plaintiff's injuries, she would be earning €495 net per week. This appears to have been calculated on the basis of her being paid an hourly rate of €17 (that being the hourly rate in her job at the school). The report proceeded to break down the plaintiff's future loss of earnings to age 65 and to age 68 on the basis of a number of different working scenarios: (i) should the plaintiff be unable to work again at all, her future loss of earnings would total €386,595 (aged 65) or €441,045 (aged 68); (ii) should the plaintiff work part-time (20 hours) at €9.55 per hour, her future loss of earnings would total €237,424 (aged 65) or €271,776 (aged 68); and (iii) should the plaintiff work part-time (20 hours) at €10.50 per hour, her future loss of earnings would total €223,725 (aged 65) or €255,075 (aged 68). It is not entirely clear to me where the figure of €9.55 per hour in the second scenario comes from but it may be a reference to a minimum wage rate at a particular point in time.

Judgment of the High Court

9. Having considered all of the evidence put before the court, Reynolds J. was satisfied, on the balance of probabilities, that it was likely that the plaintiff would continue to suffer ongoing pain and discomfort in the short to medium term. At paragraph 18 of her judgment, the trial judge said: "It is further clear from the evidence that even if her work environment was adapted to suit her needs, it is unlikely that the plaintiff would be in a position to resume work on a full-time basis." She also said, at paragraph 20, that "the plaintiff is likely to resume employment of a non-sedentary nature on a part-time basis only". It therefore seems clear that she was ruling out a scenario where the plaintiff would never work again. She may also have been ruling out a scenario where the plaintiff would work full-time at some point in the future, although the latter proposition is less clear, given the use of the word "resume" in the above comments; it may be that she anticipated that the plaintiff would work part-time for some period and then full-time thereafter (which might be consistent with her finding that the pain would continue in the short to medium term, i.e. not long-term). The trial judge did not explicitly say that what she envisaged in the long-term.

10. In assessing damages to be awarded for future losses, the trial judge acknowledged the plaintiff's strong work ethic and efforts to engage in other types of employment and was satisfied that, with the provision of certain aids and appliances, the plaintiff would soon be in a position to resume employment, but of a non-sedentary nature and on a part-time basis only. She awarded a total sum of €530,860 which included a sum of €250,000 for future loss of earnings and indicated that the figure took into account "some small deduction having regard to the decision in *Reddy v. Bates*" [1983] IR 141. The trial judge did not indicate what the pre-adjustment figure was or how it had been calculated, nor did she explicitly state which of the scenarios posited by the actuarial report she was basing the figure upon, including which rate of pay she was applying.

The submissions on appeal

Defendants' submissions

11. Counsel for the defendants submits that the trial judge erred in a number of respects in assessing the plaintiff's future loss of earnings in the amount of €250,000.

12. First, it is contended that the trial judge erred in calculating the plaintiff's future loss of earnings on the basis of open market rates, as opposed to the rates that would be available to the plaintiff in the event that she is in a position to return to work in the school. Counsel submits that there is clear evidence to demonstrate a hope and expectation that the plaintiff would eventually return to her pre-accident employment with the school, including (*inter alia*): (1) that the plaintiff remains an employee of the school and has not sought, nor has she been served with, a P45; (2) that discussions had been had with another employee at the school about the possibility of the plaintiff's return; (3) that the plaintiff had repeatedly expressed a desire to return and had explained that the school has been holding the job open for her until she was in a position to return; (4) that the plaintiff has not been replaced by a full-time employee; rather her hours have been divided between the plaintiff's sister (who is otherwise a full-time farmer) and a person engaged on a community employment scheme; (5) that the plaintiff has not engaged in

any meaningful enquiry into the possibility of changing jobs; and (6) that the school principal (who gave evidence) spoke highly of the plaintiff's skills, expressed a willingness to look into possible modifications to facilitate the plaintiff's return and did not rule out the possibility of the plaintiff returning to work in the school on a part-time basis.

13. Counsel for the defendants submits that the totality of the evidence supports the contention that, on the balance of probabilities, when the plaintiff returns to work, she will in fact to return to her pre-accident employment at the school. Counsel says that in light of this fact, the trial judge's calculations are erroneous; she also submits that they are internally inconsistent. The actuarial evidence called by the plaintiff was to the effect that, but for the injuries, the plaintiff would be earning €495 net per week; this is based on the school's rate of €17 per hour. However, the trial judge's allowance for future earnings on a part-time basis of 20 hours per week was calculated using the figure of €10.50 per hour (the market rate). Counsel for the defendants submits further that the trial judge erred in applying two different hourly rates; the higher to calculate the plaintiff's weekly loss and the lower when crediting the hours that she is likely to work in the future. Counsel submits that in doing so, the trial judge failed to give adequate consideration to the evidence that if the plaintiff does return to work, she is most likely to return to her pre-accident employment at the school.

14. Second, counsel for the defendants submits that the trial judge failed to identify the appropriate actuarial calculation when making the award for future losses in light of her own findings that while the plaintiff will likely continue to suffer ongoing pain and discomfort in the short to medium term, she is likely to return to work at the school, on the balance of probabilities, in the short to medium term. Counsel submits that in the likely event of the plaintiff returning to part-time work in the school at 21 hours per week and, if the situation were to remain unchanged to age 68, the actuarial calculation in the report prepared by the plaintiff's actuary that most closely reflects that scenario is €118,140. Future loss of earnings in the medium term (a reasonable period being ten years) on the basis of part time work at 21 hours per week, counsel submits, yields an actuarial calculation of €64,680. Counsel submits that owing to the trial judge's finding that the plaintiff is likely to continue to suffer ongoing pain and discomfort in the short to medium term, the correct period for future loss of earnings is 10 years; to award loss of earnings to the age of 68 (2039) on the basis that the plaintiff is unlikely to be in a position to resume work on a full-time basis is not, she says, internally consistent having regard to the trial judge's factual findings with regard to the effects of the accident being short-to-medium-term. Counsel submits that the trial judge's determination at paragraph 20 of her judgment that "this Court is of the view that the plaintiff is likely to resume employment of a non-sedentary nature on a part-time basis only" does not bear the meaning that the plaintiff would not be in a position to return to her pre-accident employment at the school, particularly in circumstances where evidence was given that her environment could be adapted to accommodate her (for example, through the use of a standing desk). Counsel submits that the trial judge was referring to the plaintiff's former role at the school at paragraph 18 of her judgment where it was stated:

> "It is further clear from the evidence that even if her work environment was adapted to suit her needs, it is unlikely that the plaintiff would be in a position to resume work on a full-time basis."

In that event, counsel submits that future loss of earnings in the long-term (21 years – from 2017 to 2038), on the basis of part-time work of 21 hours per week at *school rates* (€17 per hour), produces an actuarial calculation of €135,828.

15. Third, counsel for the defendants submits that the trial judge failed to apply the appropriate deduction to the figure she considered proved in respect of the plaintiff's future loss of earnings to take into account the specific factors outlined by Griffin J. in the Supreme Court case of *Reddy v. Bates* [1984] ILRM 197 (discussed further below). Counsel submits that the trial judge failed to apply the deduction of between 20% and 25% frequently applied in practice following the decision in *Reddy v. Bates* which, if applied to the actuarial figure of €255,075 (the figure which appears to have been accepted by the trial judge as that most closely reflecting the plaintiff's future loss of earnings on the basis of part-time work until the age of 68 on open market rates), would reduce the award to between €191,306.25 and €204,060. In the alternative, counsel for the defendants relies on the decision of this court (Irvine J.) in *Walsh v. Tesco Ireland Limited* [2017] IECA 64 in which it was determined that an appropriate deduction at the *lower* end of the parameters is often applied by the Court where the trial judge has taken an optimistic view as to the market which would otherwise have been available to the plaintiff as being a 15% deduction. Counsel submits that no less than a 15% deduction should have been applied.

16. Fourth, counsel submits that the trial judge offered no explanation or breakdown of what her headline figure was, or what deduction she applied. Counsel says it is not possible to ascertain how the final figure was reached, and that as a consequence the trial Judge failed to comply with the obligation to give reasons, in which regard she refers to the judgment of Henry LJ in *Flannery v. Halifax Estate Agencies Ltd* [2000] 1 All ER 373 and the case of *Nolan v. Wirenski* [2016] 1 IR 461 (a decision of this Court concerning the giving of reasons in the context of an award of damages in a personal injuries case). Reference was also made to the general principles set out in *Doyle v. Banville* [2018] 1 IR 505 (at paragraphs 8-9) concerning the duty of the trial judge to give reasons, and the relationship between the trial judge's assessment of the evidence and the role of an appellate court.

17. Fifth, counsel for the defendants submits that insufficient weight was given to the evidence of the plaintiff and her witnesses that the plaintiff is a particularly skilled, valuable, adaptable, competent and hard-working employee. It is submitted that it is incorrect to calculate the future earnings of such a person at a rate of €10.50 per hour and that such a calculation is not in accordance with the evidence adduced.

18. Finally, counsel for the defendants submits that there are grounds for impugning the finding of the trial judge on the sole issue of the award in respect of future loss of earnings. It is submitted that it is open to this court to interfere with the limited findings

of fact implicit in the use by the trial judge of the market rate when calculating the future loss of earnings and limited to this sole issue, notwithstanding the principles laid down in *Hay v. O'Grady* [1992] 1 IR 210. In that regard, counsel relies on the decision of this court (Hogan J.) in *Lynch v. Cooney & Winkworth* [2016] IECA 1 regarding the extent to which an appellate court may revisit findings of fact and inferences by a trial court.

Plaintiff's submissions

19. Counsel for the plaintiff submits that the trial judge made no errors of law or fact in arriving at the findings in her judgment.

20. First, counsel submits that it is abundantly clear from all of the witnesses and from comments made by the trial judge in her judgment that the plaintiff was extremely well motivated and has worked very hard to ameliorate her situation. However, despite these efforts, the plaintiff's GP did not feel she could certify the plaintiff's return to work because of her pain level at that time.

21. Second, counsel for the plaintiff refutes the defendants' contention that the trial judge found that the plaintiff was likely to return to work at the school by reference to paragraphs 18 and 19 of her judgment; rather, it is submitted the trial judge's sentiments at paragraph 18 effectively rule out the plaintiff returning to work at the school. Counsel submits that the evidence of the plaintiff's GP was that the plaintiff's pain would not resolve and that the plaintiff would most likely not return to full time work.

22. Third, counsel for the plaintiff submits that the evidence presented by the plaintiff and her witnesses demonstrated that, notwithstanding the school being very well-disposed to the plaintiff, it was not plausible that the plaintiff could return to her pre-accident employment at the school. This is based on a number of factors including the plaintiff's own concern about her ability to engage with parents and students; her ability to cope with the pain from which she generally suffered, regardless of whether she was sitting or standing; and her ability to manage in a busy school environment. Counsel says that similar concerns were echoed by the principal of the school regarding the viability of the plaintiff returning to work at the school including the fact that the plaintiff's former role was almost entirely desk-based, together with some uncertainty surrounding what other non-sedentary duties could be performed by the plaintiff.

23. Fourth, counsel for the plaintiff submits that the defendants' contention that the plaintiff could return to work in a part-time capacity in a position where she is standing for seven hours a day flies in the face of the evidence given by the plaintiff. The plaintiff gave evidence that she is in constant pain both when sitting and standing. It is submitted that based on the evidence of the school principal, the school – while extraordinarily well-disposed towards the plaintiff – is not in a position to offer the plaintiff part-time work; and a return to her former position would require a full day's work which the plaintiff would not be able to complete.

24. Counsel for the plaintiff refutes the defendants' submission that the correct period of reckoning for future loss of earnings is ten years; rather, counsel submits that the trial

judge's use of 21 years as the appropriate period of reckoning is entirely consistent with both the evidence and her findings of fact that (i) the plaintiff will never be fit to resume full-time work; and (b) the plaintiff will, in the short to medium term, be fit for part-time work at best.

25. Finally, counsel for the plaintiff submits that the trial judge applied the appropriate deduction in line with the expert evidence put before her by the plaintiff's actuary which outlined that the plaintiff held a permanent and pensionable job as a school secretary which was a secure post.

Authorities

26. The Court was referred to the decision of this court (Hogan J.) in *Lynch v. Cooney & Winkworth* [2016] IECA with regard to the proper scope and application of the Supreme Court decisions in *Hay v. O'Grady* [1992] 1 IR 210 and *Doyle v. Banville* [2012] IESC 25 concerning the extent to which an appellate court may revisit findings of fact and inferences by a trial court.

27. The Court was also referred to the Supreme Court case of *Reddy v. Bates* [1983] IR 141 in support of the proposition that the trial judge failed to discount the sum reached for future loss of earnings in a manner consistent with the factors outlined in the judgment of Griffin J. In that case, the defendant in a High Court personal injuries action appealed an award of general damages by a jury to the plaintiff who had been struck by the defendant's car and severely injured. The Supreme Court considered the sums awarded by the jury to be excessive and the parties agreed that the amount to be awarded under the heading of general damages should be assessed by the appellate Court as opposed to being sent back to the High Court for a retrial.

28. Addressing the heading of loss of earnings, Griffin J. explained that the jury were required to assess the prospective value of the earnings which the plaintiff, if uninjured, would have been likely to earn and that actuarial evidence should be given in this regard. He went on to note that such evidence had been provided in that case and that in calculating the figure reached, the actuary had allowed for certain factors including "the possibility of death, using standard mortality tables, having regard to the sex of the plaintiff, and allowing for changing interest rates." In reaching a figure of £123,000 as a total estimate of future loss of earnings using the age of 65 as a multiplier, the actuary assumed that the plaintiff, if uninjured, would have continued to work, "week in and week out, until retirement"; in effect, that figure was based on the assumption that "there would have been guaranteed employment, at a constantly increasing annual rate of wages, until retirement or prior death". Griffin J. noted however that the £123,000 figure did not take into account the marriage prospects of the plaintiff, nor did it take account of any risk of "unemployment redundancy, illness, accident or the like."

29. Griffin J. went on to say that when actuarial evidence first came into regular use in Irish courts in cases such as that then before the Court, employment in Ireland had been reasonably stable and juries could apply actuarial figures with reasonable confidence, even though such figures are intended only as a guideline for the assistance of juries and

they are not bound by the figures. He said that while the mathematical calculations made by an actuary may be constant and correct, "they should be applied in the particular circumstances of every case with due regard to reality and common sense." Griffin J. then alluded to the changed societal landscape in the following terms:

> "There is now a high rate of unemployment not only in this country but in Great Britain and in most of the member States of the European Economic Community. The great increase in recent years in the number of employees becoming redundant and in the number of firms being closed – firms which would have been regarded hitherto as of unshakeable financial soundness – must inevitably lead to the conclusion that there is no longer any safe, much less guaranteed, employment. In my view*, this is a factor which juries should be required to take into account in assessing future loss of earnings in any given case, but the matter should be canvassed in evidence and in argument.* In the case of a seriously injured plaintiff, experience shows that there is a tendency for the jury to take the highest multiplier and the highest possible multiplicand to arrive at the prospective loss of earnings; this is understandable when they have a seriously injured plaintiff before them." (emphasis added)

30. In that case, the Court reduced the jury's award of £144,000 for loss of earnings to £123,000, a figure arrived at by the actuary and which had been accepted by counsel for the plaintiff as the highest sum. Even though that figure failed to take account of the other factors identified by Griffin J., he was disinclined to reduce the award any further as those matters had not been canvassed at the hearing.

31. More recently, this Court in *Walsh v. Tesco Ireland Limited* [2017] IECA 64 (judgment delivered by Irvine J.) discussed the *Reddy v. Bates* deduction in the following terms (paras 67-70):

> "67. As to the submission made that the trial judge erred in law in his failure to make any deduction from his award in respect of future loss of earnings for the exigencies of life as referred to in *Reddy v. Bates*, that I fully accept.
>
> 68. While the trial judge was entitled to take a very optimistic view of the work market that would likely have been available to Ms. Walsh had she not been injured and thus to conclude that work would always have been available to her, what he failed to take into account is that for reasons completely unrelated to the work market, she may not have been in a position to avail of that work.
>
> 69. The reasons why a well motivated person may find themselves not working continuously or full time into the future are too numerous to mention. However, by way of example, they might be injured in a road traffic accident with the result that they cannot work or they might fall prey to some illness with similar unfortunate consequences. Their husband, partner, one of their children or an elderly relative might, for some period of time, need their care and support such that they would not be able to work or work fulltime as they had hoped. As people advance in life

the risk of these occurrences cannot be ignored or ruled out. Nobody is immune from such risks. Nobody can say with certainty that they will be able to work continuously for the following eighteen year period, that being the duration of Ms. Walsh's claim for future loss of earnings in these proceedings.

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

32. The Court was referred to the decision in *Flannery v. Halifax* [2000] 1 WLR 377 in relation to the duty of a trial judge to give adequate reasons for her decision, as well as *Nolan v. Wirenski* [2016] 1 IR 46, which discussed the same principle in the context of a personal injuries action. The fundamental principle with regard to the necessity to give adequate reasons for a decision was not in dispute between the parties; rather, the defendants submitted that the trial judge's reasons for her decision were not adequately set out while the plaintiff submitted that they were. Of significance also is the decision in *Doyle v. Banville*, where the Supreme Court included the following comments in its statement of general principles:

"2.3 … Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost... Where a judge decides the facts there will be a judgment or ruling whether orally given immediately after the trial, or in writing after a period. To that end *it is important that the judgment engages with the key elements of the case made by both sides* and explains why one or other side is preferred…

2.4 In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence *it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling*. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case.

[…]

2.6 … The extent to which the trial court is influenced by the credibility of eye witness accounts, forensic evidence or expert engineering evidence is largely a matter for

the trial judge in the assessment of that evidence. *The trial judge should, however, address the main arguments put forward by the competing parties* as to how the relevant accident actually occurred by reference to such evidence of the categories to which I have referred as the parties choose to place reliance on.

2.7 Finally, before moving on to the specific issues which arise in this appeal, it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this Court to seek to second guess the trial judge's view." (emphasis added).

Decision

33. Unfortunately, in respect of the future loss of earnings (and this aspect of her decision only), the learned trial judge did not make clear the basis upon which she was awarding a sum of €250,000. A number of figures had been suggested in the actuarial report, but each of them depended upon certain factual assumptions or (in the context of a trial) factual findings to be made. This was not a case in which the end figure arrived at was self-evident having regard to a single set of figures set out in the actuarial evidence. On the contrary, a number of scenarios had been suggested in the actuarial report, each of which in turn depended upon factual findings to be made on the basis of the rest of the evidence in the case.

34. Key factual matters upon which findings were necessary included: (a) whether the plaintiff would ever return to full-time work; whether she would be fit for part-time work only for the entire period until her retirement; or whether she would have to work part-time for a period followed by a period of full-time employment; and (b) whether she would have to seek work on the open market or would be able to return to the school in which she had previously worked on a part-time basis; and (c) the choice of the age of retirement (65 or 68) also would have had an effect on the figures. It may be noted that the question of whether the plaintiff would return to work at the school was of importance because the open market rate of pay appears to have been posited at an hourly rate of €10.50, in contrast to her hourly rate of pay at the school at €17.00. The potential effect of the difference between full-time work and part-time work, and of retirement at age 65 or 68, is self-evident.

35. Unfortunately, the trial judge did not make it clear whether she was finding that the plaintiff would, on the balance of probabilities, be able to return to work at the school or not. The evidence on this issue was not clear-cut and a decision on this issue was required to be reached and the basis for that conclusion identified. As can be seen from the description set out above, the evidence of the school principal encompassed a variety of factors that would affect the likelihood of the plaintiff returning to her job, but the trial judge did not explicitly reach a finding on this issue, a matter which was highly relevant

to the rate of pay to be used for the actuarial calculation. Indeed, it was a difference almost by a factor of two.

36. Nor did the trial judge explicitly say whether she envisaged that the plaintiff was likely to return to full-time work at any stage, although she clearly found that she would *resume* work on a part-time basis; this left open the possibility that she might have envisaged the plaintiff commencing on a part-time basis and later moving on to full-time work.

37. Further, the trial judge did not indicate by what percentage she was reducing the figure she had in mind before making the *Reddy v. Bates* deduction to arrive at the final figure of €250,000. Where the Court has an 'end figure' but not a 'starting figure', it is not possible to calculate the percentage applied.

38. In all the circumstances, there would be a large element of guesswork on the part of this Court as to how the trial judge arrived at the figure of €250,000.

39. It does seem safe to assume that the first scenario presented in the actuarial report, that of the plaintiff never being able to work again at all, was ruled out by the trial judge, not only because the figures suggested by the actuary for that scenario were €386,595 (retirement at age 65) or €441,045 (retirement at age 68) but also because of the trial judge's comments about the plaintiff resuming part-time work. However, even having regard to the two remaining scenarios, it is still not clear where the trial judge's figure of €250,000 came from; the second scenario was a figure of €237,424 (retirement age 65) or €271,776 (retirement age 68) on the assumption that she would work part-time at €9.55 per hour, while the third scenario yielded figures of €223,725 (retirement age 65) or €255,075 (retirement age 68) should the plaintiff work part-time (20 hours) at €10.50 per hour. Without knowing the percentage deduction employed by the trial judge in light of *Reddy v. Bates*, or the pre-adjusted figure, it is not possible to know what factual assumptions underpinned the trial judge's award for loss of earnings. While the Court has sought to reconstruct the possible basis upon which the trial judge arrived at her final figure, it has not been able to do so with any certainty; it was necessary to provide an explanation, even a brief one, outlining the assumptions and calculations underlying the final figure and how that figure related to the actuarial evidence. In this particular area of the judgment, there was a failure "to engage with a significant element of the evidence put forward" and a failure "address the main arguments put forward by the competing parties" as described in *Doyle v. Banville* [2012] IESC 25 and the appeal must be allowed.

40. Where there has been such a failure, then it appears to me that – at least presumptively – the appropriate order is one remitting the action (see for example *Healy v. Ulster Bank* [2015] IESC 106). Of course, there may be cases in which an appellate court can itself resolve an issue not addressed by the trial court through the construction of documents, or by reference to facts that are not disputed or were found by the trial judge. This, unfortunately, is not one of them. There are too many issues which were not addressed and there was a considerable amount of witness testimony. I do not consider that it would be appropriate for this Court to make primary findings of fact and then to proceed to make choices based on the actuarial evidence based upon those findings. While I have

the greatest of sympathy for the parties in this unfortunate situation, it seems to me that regrettably but necessarily, the case must be remitted to the High Court. However, unless there is good reason to the contrary, it seems to be that the remittal should be solely for the purpose of assessing damages for future earnings, and that it should be based upon the evidence already given in the High Court when the case was at trial.

41. That being so, the Court will allow the appeal and will remit the matter to the High Court on the limited basis described above.

42. Both Costello J. and Murray J. agree with the judgment and the order I propose. It is the provisional view of all three members of the Court that the costs of this appeal should be reserved to the hearing of the action, as the High Court may ultimately conclude that the amount ordered by way of special damages was the correct one. If either party wishes to contend otherwise they must do so within twenty-eight days of the date of this judgment in default of which application the order for costs shall be that they be reserved to the trial.