



**UNAPPROVED
THE COURT OF APPEAL**

**Neutral Citation Number [2021] IECA 247
Appeal Number: 2018/320**

**Whelan J.
Faherty J.
Collins J.**

BETWEEN/

SARAH QUINN

PLAINTIFF/RESPONDENT

- AND -

RAFAL MASIVLANIEC AND KAMILA STANCZK

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Faherty delivered on the 5th day of October 2021

1. This is the defendants' appeal against the judgment (19 July 2018) and Order (19 July 2018 as perfected on 23 July 2018) of the High Court (Butler J.) made in a personal injuries action, awarding the plaintiff damages in the sum of €219,750, comprising general damages of €210,000 and €9,750 in special damages, together with an Order awarding the plaintiff her costs.

Background

2. The plaintiff's claim was brought in respect of personal injuries sustained by her in a road traffic accident which occurred on 2 July 2013. At the time, the plaintiff, then aged 37, was a restrained front seat passenger in a vehicle (in which her two children were also

passengers) being driven by her mother when the vehicle was struck by an oncoming vehicle driven by the first named defendant. In the court below, it was accepted that the collision was “*a horrendous accident*”. All four occupants were trapped in the car in the immediate aftermath of the accident and had to be cut out of it, the plaintiff’s daughter being removed first, then her son, followed by the plaintiff and, latterly, her mother.

3. The plaintiff sustained physical injuries to her bowel and right wrist. She was an intensive care patient in Cavan General Hospital between 2 and 10 July 2013. An exploratory laparotomy was carried out in respect of her bowel injury. This demonstrated the presence of three perforations in the small bowel and a tear in the mesentery of the small intestine. There was a 10cm ischemic segment of the small bowel present. A CAT scan had revealed free fluid in her abdomen. Surgical management of the patient consisted of a re-section and primary anastomosis of the ischemic area of the small bowel as well as primary closure of the small bowel perforations.

4. In his report of 23 January 2017, Mr. James Geraghty, Consultant Surgeon retained by the defendants, described the injury in the following terms:

“This patient developed a significant abdominal complication following the above road traffic accident. This resulted in perforation of the small bowel and ischemic segment of the small bowel. These are life threatening injuries which can occur with a blunt abdominal trauma. If the patient did not have the appropriate treatment, then this patient almost certainly would have had an adverse outcome.”

5. It is common case that the plaintiff suffered from constipation prior to the accident. The plaintiff attended Mr. Mulligan, Consultant General and Colorectal Surgeon on 13 September 2017, some four years and two months post accident. In both his report of 25 September 2017, and in his evidence to the High Court, Mr. Mulligan drew a link between the plaintiff’s much worsened constipation and the accident itself. In his report, he sets out

the plaintiff's complaints upon presentation for a consultation. He noted that the plaintiff could suffer from constipation for three to four days following which she would have episodes of urgency. She had also complained of rumbling or gurgling noises (borborygmic) particularly on eating. She described other abdominal symptoms which she never had pre-accident, as detailed in the report. He noted that the plaintiff also suffered left iliac fossa pain close to the anterior superior iliac spine which occurred a couple of times each month and which would last between thirty and sixty seconds. This pain would also occur upon sneezing. Examination of the plaintiff revealed a 7cm caesarean scar and a 14cm well-healed vertical midline scar (as a result of the laparotomy), "*still slightly red with no appreciable evidence of incisional herniation*". The plaintiff was tender in the left iliac fossa.

6. Mr. Mulligan's overall prognosis was that the plaintiff may:

"[a]t some future point, suffer adhesional obstruction to her small bowel. Adhesions form in up to 93 percent of patients with prior abdominal and pelvic surgery. The lifetime risk for adhesive small bowel obstruction after general abdominal surgery is reported as being up to 10%, with adhesive small bowel obstruction requiring re-operation in approximately 2.5% of all patients. ... It is possible that [the plaintiff] has adhesions causing her abdominal pain, her bloating and borborygmi. If her symptoms deteriorated she may require laparoscopy with adhesiolysis"

7. He considered it unlikely that the plaintiff would develop an incisional hernia. He opined that the constipation from which the plaintiff now suffered "*to a greater degree after her accident and abdominal surgery...may be related to pelvic adhesions particularly involving the sigmoid colon. Laparoscopic adhesiolysis...may be required if her*

constipation deteriorates to a significant degree.” He further opined that in the interim if her constipation dis-improved she may be required to consider taking laxatives.

8. In oral testimony, Mr. Mulligan stated that the plaintiff’s pre-accident constipation had significantly dis-improved and worsened as a result of her “*severe accident*”. He opined the most likely cause for the plaintiff’s other symptoms were “*adhesions within the abdominal cavity which will happen either through infection that she obviously suffered at the time of the accident or the effect of the surgery that she had as a result of the accident.*” He stated:

“Adhesions will form in about 93% of patients who have open abdominal surgery and obviously the fact that she has peripheral contamination at the time of surgery so she had some bowel content and blood within the abdominal cavity will increase the chances that those adhesions would be fibrous and thick and more likely to become symptomatic.”

9. Mr. Mulligan’s long-term prognosis was that her abdominal pain will continue to happen from time to time and may get worse and that because she had had a lot of peripheral contamination she would suffer small bowel obstruction episodes where she may be admitted to hospital for a number of days and thus was within the 10% of abdominal surgery patients to whom this may happen. He repeated his opinion that 25% of those patients would end up having surgery at some point in their lifetime to relieve those symptoms. Accordingly, the plaintiff “*may very well, over the course of the next 20, 30 years have two or three hospital admission related to a small bowel obstruction.*” He repeated his view as set out in his report that the plaintiff’s constipation was likely to be related to the adhesions and if it became severe laxative therapy and/or a laparoscopy/surgery may be required.

10. Mr. Geraghty, who saw the plaintiff on 21 March 2016, states in his report of 23 January 2017 that the plaintiff “*was well and appeared to have made a full recovery from the point of view of abdominal surgery in 2013*”. He found the plaintiff “*with no acute abdominal symptoms and no history of adhesions*”. Insofar as she complained of constipation and flatus, he opined that “*it is unclear if this is related to previous surgery*”. His opinion was that the plaintiff “*had made an excellent physical recovery although it is clear from reports in 2015 that the patient did suffer significant post traumatic stress syndrome*”.

11. The surgical scar with which the plaintiff was left after the laparotomy was the subject of a report by Dr. Patricia Eadie, Consultant Plastic Surgeon, who saw the plaintiff on 22 December 2016, some three years and five months post the accident. Her report of 9 January 2017 records the plaintiff advising that the scar “*was not causing her any problems*”. It was described by Dr. Eadie as a 15cm pale thin vertical scar in the midline of the abdomen. Dr. Eadie’s opinion and prognosis was that the scar, while permanent, “*overall has settled well*”. Surgical intervention would not improve it and it “*would remain as it is into the future*”. The plaintiff had been seen on 16 September 2014 (approximately a year and two months post accident) by Mr. Lawlor, Consultant Plastic, Reconstructive and Cosmetic Surgeon, on behalf of the defendant, whose opinion was that the plaintiff would be left with a permanent scar which “*in the fullness of time will fade*”, and that tenderness then evident “*will subside totally in due course*”.

12. Under cross-examination, the plaintiff agreed that she did not regularly attend her doctor in relation to her stomach complaints save that in the week prior to the trial she had been prescribed a six-day course of Buscopan.

13. The plaintiff’s wrist injury comprised both radial and ulnar styloid fractures with a dislocation of the wrist. In Cavan General Hospital, it was placed in a plaster backslab but

not otherwise treated orthopaedically. However, following her discharge from that hospital on 10 July 2013, she attended Our Lady of Lourdes Hospital, Drogheda for orthopaedic opinion on 12 July 2013 and on 13 July 2013 underwent a surgical procedure under general anaesthetic in the form of a reduction and fixation of her wrist in which a series of K-Wires were used for fixation. She was discharged on the same day. Her wrist was immobilized in plaster for six weeks. The K-Wires were required to be removed pursuant to a second procedure. When reviewed by Mr. Eamonn Kelly, Consultant Orthopaedic and Hand Surgeon, for the plaintiff, on 2 November 2016, some three and a half years' post-accident, the plaintiff's complaints were of pain after any use of her wrist and reduced lifting and carrying capacity. Examination of the wrist showed that she had full range of motion and that the overall alignment was good. There was tenderness in the carpus with some laxity of the ligamentous structures. Mr. Kelly noted that there were signs in the plaintiff's early x-rays of some separation of the scaphoid and lunate which indicated intrinsic ligament injuries despite the surgery already carried out. His report of 12 February 2017 records that the plaintiff sustained a "*very significant injury to her wrist. It was a fracture dislocation with an intra-articular fracture running into the radial fossa*". While Mr. Kelly opined that the plaintiff had done well in the short term, in the long term he was of the view that her wrist was likely to deteriorate with the development of osteoarthritis. There was also a very real prospect that the plaintiff would require a further procedure in the future namely an arthrodesis or fusion of the wrist following which she would require a prolonged period of rehabilitation after the fusion and her wrist would not return to its normal pre-accident condition.

14. The plaintiff had been reviewed on 16 March 2016 by Mr. Geraghty, Consultant Surgeon for the defendants. As documented in his report of 23 January 2017, he considered that overall the plaintiff had made a good recovery from her wrist injury.

15. At trial, the plaintiff (who is right hand dominant) testified that while her wrist was in plaster over the six-week period she was in pain and had difficulty in toileting and more generally in the context of the activities of daily living. She also testified that she was in considerable pain with her wrist after the cast was removed and required physiotherapy. It took a period of time to build up mobility in her wrist. Her evidence some five years post-accident, was that while her wrist was “*manageable*”, there were times when it was weak, such as when picking up a kettle or a chart at work or when pushing a trolley of files. As of the date of trial, the plaintiff worked as a Team Leader/Clerical Administrator in Crumlin Children’s Hospital where she had been employed since May 2000. She testified that she could not “*rely*” on her wrist. Typing for long periods resulted in wrist pain. She also testified that she was apprehensive about the possibility of a future fusion, albeit she acknowledged that she had not been given an indication by Mr. Kelly as to when that would be required to be carried out. She agreed that she had not sought or received medical treatment for her wrist following the orthopaedic intervention in 2013.

16. In respect of the plaintiff’s psychological injuries, the High Court had the benefit of five medical legal reports comprising three from Dr. Robert Daly (Consultant Psychiatrist on behalf of the plaintiff) and two from the defendants’ expert, Dr. Damien Mohan. The trial judge also had the benefit of Dr. Daly’s *viva voce* evidence.

17. The plaintiff was referred by her General Practitioner to Dr. Daly in early 2016 and was first seen by him on 16 March 2015. Dr. Daly’s first report noted that the plaintiff had experienced a number of mental health difficulties in the aftermath of the accident. From a formal psychiatric perspective, in his opinion, she developed two difficulties. Firstly, she developed a range of post-traumatic symptoms including unpleasant memories of the accident, avoidant feelings around thinking about the accident and a range of anxiety-related difficulties. His opinion was that those difficulties represented post-traumatic

symptoms (without formal/full blown post-traumatic stress disorder developing).

Secondly, the plaintiff developed a range of difficulties and symptoms in relation to anxiety and these evolved into a panic disorder. She had experienced multiple panic attacks most commonly while driving. Those symptoms caused her to become anxious and avoidant of driving. He was of the view that the stress and emotional difficulties were as a result of the traumatic nature of the accident and the serious injuries experienced by multiple family members. Dr. Daly diagnosed the plaintiff as having sustained the symptoms of post-traumatic stress disorder and also an anxiety disorder manifesting in panic attacks. He also concluded that the very traumatic nature of the accident was a contributing factor towards the plaintiff's psychological injuries.

18. Dr. Daly prescribed counselling and anti-panic medication, Xanax. As of March 2015, he was of the view that with further therapy and medication, the plaintiff's symptoms could reasonably be anticipated to improve but that the timeframe for such improvement was difficult to determine as of March 2015.

19. In a follow up report of 9 November 2015 (having seen the plaintiff on that date) Dr. Daly was of the view that the plaintiff continued to experience adverse symptoms of a psychological and psychiatric nature as a result of the accident. He noted however that both the frequency and intensity of her panic disorder had improved and that this was as a consequence of extensive psychotherapy that she had engaged in. While the panic remained evident, the plaintiff appeared to be making fair clinical progress. Furthermore, the post-traumatic stress symptoms also appeared to have decreased in intensity overall, but a number remained evident including the anxious and avoidant features in relation to driving and the intrusive worries and memories of the accident. He noted that the plaintiff was using skills gained in psychotherapy to cope with those symptoms "*to some fair affect*". While further improvement was anticipated, the exact timeframe was difficult to

definitively state. He opined that she would benefit from at least a further dozen sessions of psychotherapy.

20. The plaintiff's next attendance with Dr. Daly was in January 2017. In his report of 25 January 2017, he noted that her anxiety symptoms in relation to driving had improved and that while she drove less frequently than before the accident, she was back regularly driving. Her panic attacks had lessened both in frequency and intensity. He noted that the plaintiff had been largely panic free for many months. Following the last review in November 2015, she had attended for therapy on a fortnightly basis until September 2016. She had not taken any medications for panic or other related difficulties since November 2015. His impression was that while the plaintiff had developed a panic disorder, along with multiple post-traumatic predominantly anxiety-related symptoms, in the aftermath of the accident, "*she has received comprehensive treatment for these and her condition has now stabilized*". While there remained some lingering avoidant type symptoms and a degree of anxiety in advance of driving, nevertheless the plaintiff was able to engage in driving regularly. Additionally, he considered the panic disorder "*would now be considered to be in remission*". Dr. Daly found that "*the prognosis should be reasonable overall from a mental health perspective*".

21. Giving evidence, Dr. Daly stated that the plaintiff had responded well to psychotherapy, albeit he would not be surprised if she continued to have lingering symptoms of unease and anticipatory anxiety in relation to driving.

22. Under cross-examination, Dr. Daly acknowledged that he had diagnosed the plaintiff as having symptoms of post-traumatic stress disorder and not that she had post-traumatic stress disorder. He acknowledged that she had returned to work within four months of the accident and that when he last saw her in January 2017 the plaintiff was in a "*pretty good*

state compared to the early days after the accident". He found her *"largely recovered"* from her psychological injuries.

23. The plaintiff was first seen by Dr. Mohan (for the defendants) on 19 January 2016, some two years and six months post accident. In his report of 26 January 2016, he expressed the view that the plaintiff's post-traumatic stress disorder *"can be fully attributed to her experience and the severe physical injuries she sustained"*. Moreover, he opined the panic attacks from which she suffered *"were commonly seen with post-traumatic stress disorder"* and that *"[o]ther factors, in particular, the long term sequelae of her own physical injuries, her [children's] physical injuries [and other difficulties] have contributed to her distress"*. Dr. Mohan noted, however, that *"there has been considerable improvement in the intensity of her post-traumatic stress disorder with the passage of time"*. He expected her symptoms to improve gradually. When the plaintiff was next reviewed by Dr. Mohan on 7 February 2017, he found that *"[w]ith the passage of time and the benefit of treatment, there has been some considerable improvement in [her] condition. Her post-traumatic stress symptoms had subsided considerably"*.

24. The plaintiff herself testified as to the injurious impact which the accident had on her psychological well-being for which she had undergone twenty sessions of counselling. She was particularly affected by the injuries sustained by her children especially her daughter whose sojourn in hospital was some 99 days. In cross-examination, she acknowledged that she had ceased counselling in September 2016 and was taking no medication for any panic attacks or anxiety as of September 2018. Previously, however, she had been prescribed Xanax by her General Practitioner on two occasions. She stated that it was her decision not to rely on medication. She confirmed her return to work within four months of the accident and that, as of July 2018, she had completed two years of a four-year part time University

degree course in Project Management, commenced in 2016, obtaining first class honours on each occasion.

The High Court judgment

25. The trial judge had available to him the medical reports referred to above, as well as the benefit of oral testimony from Mr. Mulligan and Dr. Daly, the report and evidence of Ms. Patricia Coughlan, Vocational Rehabilitation Consultant, called on behalf of the plaintiff, the report of evidence of Mr. Roger Leonard, Occupational Therapist & Vocational Evaluator (for the defendants) and the evidence of the plaintiff herself.

26. The trial judge commenced his *ex tempore* judgment by stating that he had read all of the reports including those in respect of which evidence had not been given.

27. He described the accident as “*horrendous*” and opined that after having the benefit of the plaintiff’s evidence, he was satisfied that she was “*a very truthful witness*” “*although she may have had a different view in some respects of her injuries to medical people*”. He found no element of exaggeration in her testimony.

28. The trial judge proceeded to divide the plaintiff’s injury into a number of components, namely the accident itself for which she required to be compensated, the wrist injury, the bowel injury, psychiatric trauma and the scar (which he had viewed) which resulted from the abdominal surgery. He found that there was “*some overlap*” in the injuries and proposed making an allowance for that factor. He further stated that he had regard to the Book of Quantum in relation to the bowel injury and the wrist injury and had taken full account of what it had to say in relation to those injuries.

29. The trial judge then went on to address damages in the following terms:

“The accident itself, as I say, was horrendous and the immediate aftermath was horrendous, and if one were to assess damages for that alone, I would arrive at a figure of 50,000 Euro.

The wrist injury, too, I believe was serious, and she hasn't in any way exaggerated that she's had symptoms in the beginning which included dropping objects like an iron and symptoms to the wrist, and she may in the future have to undergo surgery in relation to arthritic changes. It may be in the long future, but it's today we are compensating her. So, I have taken all that into consideration in assessing damages for that alone, and as I say, its just - this is just an exercise, and I came to the figure of 60,000 Euro.

In relation to the bowel, it may sound like a simple injury, but it, too, had horrendous results for any woman or indeed, man, and she suffered acute embarrassment because of it. I appreciate that part of those draws on the evidence related to her constipation problems which pre-existed - which are pre-existing, however, they worsened as a result of the injury and as I say, she had these accidents.

In relation to the psychiatric injury, or calling it an injury, she did suffer trauma. I appreciate there is [some] ... there now with the accident itself, but she suffered separate and distinct trauma for which she saw, Mr. Daly, I think, on three occasions, and Mr. Daly has been very fair in his evidence. That, by itself, would be 50,000 Euro. Again, that is to date. There isn't a substantial future in relation to that.

In relation to the scar, I viewed this scar and its very bad and, in fact, if anyone wants to know how it looks, the photograph taken in 2016, I think, connected to her reports is a fair representation of what it looks like today."

30. The trial judge duly assessed general damages for the plaintiff's injuries in the sum of €310,000. Included in this figure is the €60,000 he attributed to the wrist injury, the €50,000 compensation for psychological injury and, apparently, €50,000 for the

“*horrendous*” accident itself. The balance of the €310,000 (some €150,000) appears, by process of elimination, to have been awarded for the plaintiff’s bowel injury and the scar.

31. Acknowledging that there was “*a degree of overlap*”, the trial judge proceeded to deduct €100,000 from the €310,000 sum, leaving an award of €210,000 by way of general damages to which he added a sum for special damages in the amount of €9,750, resulting in the total award of €219,750.

32. In their Notice of Appeal, the defendants advance the following grounds of appeal:

- The trial judge erred in law in awarding general damages that were excessive having regard to the evidence adduced;
- The amount of general damages constituted excessive compensation for the plaintiff;
- In engaging in a calculation exercise, the trial judge failed to give reasons for the figures arrived at;
- In engaging in a calculation exercise, the trial judge failed to refer to the plaintiff’s evidence and/or to medical or other evidence adduced by the parties or indicate any aspect of same that was accepted or rejected by him;
- The trial judge erred in holding, before engaging on the calculation exercise that led to the overall general damages figure and before making an overall deduction, that the simple fact of the plaintiff being in an accident warranted a figure of €50,000;
- The trial judge, in engaging in a calculation exercise, failed to decide upon the figures he deemed appropriate for the plaintiff’s bowel injury and scar, thereby rendering the calculation exercise defective and rendering the award of €210,000, apart from being excessive, similarly defective and unreliable;
- The trial judge, in engaging in a calculation exercise and having decided that general damages totalled €310,000, deducted €100,000 from this figure to produce

an award of €210,000, failed to give any reasons by reference to the evidence to explain or justify the figures or the deduction made;

- In making the award of €210,000, the trial judge erred in law in failing to indicate what part of it represented general damages to date of trial and/or what part of it (if any) represented general damages for the future.

The parties' submissions, in summary

33. The defendants appeal the general damages award on the basis that the trial judge's approach and methodology to the assessment of damages as a whole amount to a serious error of law such that this Court should set aside the Order made by the trial judge and itself assess the general damages which the plaintiff is entitled to recover. Counsel asserts that insufficient reasons were given by the trial judge to sustain his findings. He contends that it cannot be ascertained from the ruling of the trial judge what evidence was preferred in the making of the award. Furthermore, there was no indication of what constituent parts of the award were for past or future suffering and there was no reference by the trial judge to any specific medical report or any opinion expressed therein.

34. It is submitted that the award of €210,000 was excessive and not in accordance with the evidence in circumstances where the plaintiff:

- as of the date of trial required no ongoing medical treatment;
- was taking no medication;
- required no rehabilitative intervention;
- had had no disruption to her working life following her return to work some four months post the accident; and,
- faced, at most, minimum future complications.

35. The defendants contend that the calculation exercise undertaken by the trial judge was not what is envisaged by the Book of Quantum albeit it is accepted that the Book of Quantum does not address psychological injury.

36. Furthermore, they describe the €50,000 award to the plaintiff for having been involved in a “*horrendous accident*” as an entirely impermissible head of damage as the figure awarded was not for any injury and was stated to relate solely to the fact that the accident was “*horrendous*”. It is argued that on the basis of this award alone, the trial judge erred such that there is a sufficient basis for the Court to reduce the €210,000 sum by €50,000.

37. The plaintiff’s position is that while the approach and methodology of the trial judge to the overall calculation of damages could be said to be wanting, at the end of the day, the award made by the trial judge should not be disturbed as the award can be entirely sustained by this Court having regard to the guidance set by Irvine J. in *Shannon v. O’Sullivan* [2016] IECA 93.

Discussion

38. The first issue for this Court is whether the threshold for interference with the trial judge’s award of general damages is met.

39. The test to be applied by the Court in deciding whether it should interfere with an award of general damages was articulated by Griffin J. in *Reddy v. Bates* [1983] I.R. 141:

“It is well settled that this Court cannot set aside the verdict of a jury on the grounds that the damages are excessive unless, adopting a view of the facts which is most favourable to the plaintiff, no reasonable proportion exists between the amount awarded and the circumstances of the case...”

40. That test was refined in *Dunne v. Honeywell Controls Limited* (Unreported 1 July 1993) where Blaney J. noted that the Court no longer had the task of adopting the view of

the facts most favourable to the plaintiff because “*its decision is based on the findings of the High Court judge*”.

41. As said by Fennelly J. in *Rossiter v. Dun Laoghaire Rathdown County Council* (31 October 2001), [2001] IESC 85:

“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’”. (at para. 14)

42. He went on to opine:

[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 need scarcely be said – of whether the complaint is one of excessive generosity or undue parsimony. It should, of course, be recalled that this test relates only to the award of general damages...”

43. More recently, in *Nolan v. Wirenski* [2016] IECA 56, 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) She stated:

“...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.” (at para. 25)

44. The caution urged on an appellate court by both Fennelly J. in *Rossiter* and Irvine J. in *Nolan* is clearly predicated on the appellate court being satisfied that the trial judge has “*considered all 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.

45. The fundamental difficulty that presents in this case is that the reasoning and explanation for the award is not set out in the judgment to any satisfactory degree. Save for stating that he had read all of the reports including those in respect of which evidence had not been given, that he had regard to the Book of Quantum in relation to the bowel and wrist injuries, and that the plaintiff was a truthful witness who had not exaggerated her claims, the trial judge does not explain the precise engagement with the evidence which led him to the conclusions he arrived at. As I have said, that is a fundamental difficulty in this case. Even if the type of calculation exercise the trial judge engaged in could be considered appropriate (and in my view it was not), he does not explain what elements in the oral and documentary evidence led him to fix upon €60,000 as appropriate for the plaintiff’s wrist injury, €50,000 for her psychological injury or, even if compensating the plaintiff for the “*horrendous*” nature of the accident separate to the award for psychological injury were a permissible approach (and I am satisfied it was not), why an award of €50,000 was found to be appropriate for this head of damage. I should say at this juncture that I accept the defendants’ contention that the award of €50,000 for the accident (no matter how

“horrendous”) cannot be sustained, and that this award of damages, of itself, amounts to an error of law on the part of the trial judge.

46. Furthermore, the Court is simply left to deduce that some €150,000 of the initial €310,000 sum awarded was to compensate the plaintiff for her bowel injury and the scar left by the abdominal surgery, without any indication from the judgment as to why that figure was arrived at or what factors in the evidence led the trial judge to that figure.

47. It is also striking that having made the calculations he did, the trial judge nowhere explained why he picked the sum of €100,000 as the appropriate figure to subtract from the €310,000 figure, even if I were satisfied, which I am not, that either the calculation or subtraction exercise was appropriate in the first instance. All in all, the figure arrived at by the trial judge by way of general damages cannot attract any presumption of correctness given that, to paraphrase Fennelly J. in *Rossiter*, this Court is not in a position to discern from the judgment of the trial judge the findings of fact upon which damages have been assessed.

48. What was required of the trial judge was that he would engage, and be seen to engage, with the evidence tendered by the parties. As said by Irvine J. in *Nolan*:

“46. It is not sufficient for the court simply to declare that it accepts the evidence of the plaintiff or that it is satisfied that he is a truthful witness without saying why that is the case. If the question is raised whether the plaintiff is a credible witness or is exaggerating his injuries or their impact on him, that is a matter that should be resolved by reference to the evidence and not simply by an unsupported assertion based on the impression that he made on the trial judge when giving evidence. Obviously, the judge's view is very important and indeed in that respect puts the trial court in a position superior to that of the appeal court: see Hay v O'Grady [1992] I.R. 210. But for the appeal court to have the full value of the trial

judge's superior position, it needs to have available to it the reasoning process whereby the judge arrived at his conclusion.

47. This is to say no more than that the judge should give reasons for his conclusions, a precept that is of general application to tribunals and adjudicators generally. However, it is not always the case that judges in personal injury cases express the process of reasoning that leads them to their conclusions. That can leave the appeal court in darkness as to the rationale of the award.

48. It is common nowadays for the parties to agree that the medical reports should be handed into the court to be treated as evidence as if the doctors had testified in accordance with their contents. This is no doubt a very practical and convenient approach which saves time and money but it can add to the difficulties that a judge has in determining reliability and credibility of the plaintiff. There may also be significant differences between the doctors themselves. The judge has to try to analyse the documentary material presented to this fashion by reference to the testimony of the plaintiff. Discrepancies tending to undermine the reliability of the plaintiff's evidence are nevertheless present because they are contained in a report and not deposed to by oral evidence of the doctor. The practice of producing evidence in this manner does not relieve the judge of the obligation of evaluating the plaintiff's symptoms against the background of expert evidence.

49. In regard to medical reports, the Court of Appeal is in as good a position as the trial judge to understand the contents but as to their impact on the case, the judge is better located and his view superior provided he has analysed the case in light of all the evidence and has expressed his rationale. That is the most valuable assistance that the trial court can provide for the appeal." (emphasis added)

49. To paraphrase Clarke J. (as he then was) in *Doyle v. Banville* [2012] IESC 25, [2018] 1 I.R. 505, the trial judge was required to engage with the key elements of the case made by both sides and explain why one side's evidence was preferred over the other.

50. As I have observed, bar saying that he had regard to the medical reports and the evidence in the case and the Book of Quantum, it is not apparent to this Court (or indeed the parties) what factors in the evidence persuaded the trial judge to fix upon the sums he did for the components of the plaintiff's injuries in respect of which he awarded damages. The identification of such factors was required, however, particularly given the differing views expressed by the medical experts in relation to the future prognosis for the plaintiff as a result of her abdominal and wrist injuries, a matter to which I shall return in due course.

51. Given the failings of the trial judge, the restraint with which an appellate court should ordinarily approach an appeal of a damages award made by a trial judge cannot be considered as the applicable approach in the present case. Accordingly, it falls to this Court to itself review the evidence and arrive at a quantum of general damages for the plaintiff. How then is the Court to go about its task?

52. There is a plethora of case law offering guidance on this task. 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* [1984] ILRM 523;
- 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. As said by Irvine J. in *Nolan*:

“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”.

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

53. It is of course the case that 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)). However, the focus of this Court will be on the Book of Quantum, where appropriate, being the relevant guidelines for present purposes.

54. As observed by Noonan J. in *McKeown v. Crosby* [2020] IECA 242:

“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)

55. Noonan J. went on to state 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)

56. In the course of their respective submissions to this Court, counsel for the plaintiff and the defendant have both attributed value ranges for the plaintiff's injuries by reference, *inter alia*, to the Book of Quantum.

57. In cases like the present, where there are multiple injuries, the guidance provided by the Book of Quantum is that "*it is not appropriate to simply add up values for all the different injuries to determine the amount of compensation. Where additional injuries arise [in addition to the most significant injury] there is likely to be an adjustment within the value range*". This guidance would appear to chime with the *dictum* of Irvine J. in *Nolan* that the assessment of damages is not a simple calculation exercise. In *Leidig v. O'Neill* [2020] IECA 296, Noonan J.'s approach to the quantum of damages was to adopt the adjustment type approach referred to in the Book of Quantum.

58. I turn now to the task in hand, namely the assessment of fair, reasonable and proportionate general damages for the plaintiff, having regard to the medical evidence and the testimony of the plaintiff herself. Assistance for the task is found in *Shannon v. O'Sullivan* [2016] IECA 93. There, in similar vein to what she set out in *Nolan*, Irvine J. outlined "*a useful yardstick*" by which a court should decide what is proportionate in terms of 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)

59. As to the actual assessment of general damages, at para. 43, Irvine J. suggested the following roadmap:

“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?"

60. I propose, generally, to adopt Irvine J.'s roadmap.

61. Undoubtedly, the accident in which the plaintiff was involved was, as described by the trial judge, "*horrendous*". She sustained a significant injury to her bowel and a significant injury to her right wrist. She was hospitalised for eight days as a result of the bowel injury during which she underwent surgical intervention. The exact nature of the bowel injury and sequelae is already well rehearsed earlier in this judgment as is the treatment afforded to her. There is really no difference of opinion between Mr. Mulligan and Mr. Geraghty in this regard. Indeed, as put by Mr. Geraghty, the plaintiff's bowel injury was "*life threatening...If the patient did not have the appropriate treatment, then this patient almost certainly would have had an adverse outcome.*"

62. Within a day of her discharge from Cavan General Hospital, the plaintiff had to attend Our Lady of Lourdes Hospital Drogheda for orthopaedic repair to her wrist. She had pain in the wrist in the six weeks her wrist was in plaster and she was in a lot of pain after

the cast was removed and required physiotherapy. She outlined in her evidence how she was discommoded while her arm was in plaster.

63. The plaintiff was able to return to work within four months of the accident. While in her evidence she described difficulties with her wrist when pushing a trolley at work and pain if she engaged in typing for long periods, there is no evidence following her return to work that her ability to carry out her work has been impaired by the sequelae from her bowel or wrist injuries or indeed because of the psychological injury she also undoubtedly sustained, such that she had to take time off work. The counselling sessions she engaged in for her psychological injury and the medication for that injury apart, the extent of the medical treatment she has received for her physical injuries since the surgeries on her stomach and wrist has been a six-day course of Buscopan for her stomach complaints.

64. I turn now however to the long-term prognosis for the plaintiff, and the submissions made by the respective counsel as to what would constitute appropriate damages for the plaintiff having regard to the injuries she sustained and the likelihood of future pain and suffering.

65. As regards the bowel injury, in his submissions to the Court, counsel for the plaintiff points to the evidence given by Mr. Mulligan that the plaintiff's present problems, and the projected long-term problems that will arise for her, are as a result of the spillage of bowel into the abdominal cavity which occurred at the time of the accident and which, according to Mr. Mulligan, will increase the likelihood of adhesions in the future. Counsel further submits that the medical evidence suggests that the plaintiff's pre-accident constipation has moved from being physiological to being pathological, again based on Mr. Mulligan's evidence. He asserts that for all of the reasons set out by Mr. Mulligan, and having regard to the plaintiff's ongoing symptoms, the plaintiff's bowel injury must be viewed at the most serious level for which, counsel says, the upper limit of damages of €93,900 as

provided for in the Book of Quantum is inadequate as it does not factor in the surgical intervention in the small bowel which the plaintiff underwent. He submits that, at the very least, given the evidence of Mr. Mulligan, and indeed that of the defendants' expert, Mr. Geraghty that the injury was "*life threatening*", the damages award has to be at the very top of the Book of Quantum.

66. On the other hand, counsel for the defendants submits that the plaintiff's main complaint arising from the bowel injury, as of the date of trial, was that her pre-accident constipation had been exacerbated by the accident and the resultant surgery to her bowel, and that as a consequence she had had "accidents" which had caused her embarrassment. He points to the fact that the plaintiff has had little or no treatment for her condition save the course of Buscopan she was prescribed in the week leading up to the trial. Counsel also points to Mr. Mulligan's evidence that if the plaintiff took laxatives, it would reduce the incidence of accidents.

67. The defendants point to the views expressed by Mr. Geraghty in his report of 23 January 2017 wherein he concluded that the plaintiff had made "*a full recovery*" from her abdominal surgery with "*no acute abdominal symptoms and no history of adhesions*", and his conclusion that it was "*unclear*" if the plaintiff's ongoing complaints of constipation and flatus related to her bowel surgery. This is the evidence upon which the defendants primarily rely in asserting that the bowel injury was not such as merits the highest level of damages for such injury as per the Book of Quantum, but rather falls into the €70,000 to €75,000 range for such injury, inclusive of compensation to the plaintiff for the scar with which she has been left following the abdominal surgery. The defendants also rely on the fact the plaintiff made no complaint about her scar save to say that she was bothered by its presence. Counsel points out that the plaintiff's plastic surgeon, Dr. Eadie, in her report of 22 September 2016, stated that the scar had settled well. Equally, Mr. Lawlor, the plastic

surgeon for the defendant, in his report, expressed the view that the scar would fade in the fullness of time.

68. It is this €70,000 to €75,000 level of damages which, the defendants maintain, should be adjusted upwards to take account of the other injuries sustained by the plaintiff, namely that to her right wrist, and her psychological injury. Counsel suggests that an appropriate sum to compensate her for those latter injuries would be a composite €50,000 award which, when added to the compensatory amount for the plaintiff's bowel injury, would put general damages for the plaintiff somewhere between €120,000 to €150,000, at most.

69. Counsel for the plaintiff does not accept the defendants' contention that the figures for bowel injury as set out in the Book of Quantum take account of the abdominal scar with which the plaintiff has been left. He contends that the scar must attract its own importance and monetary compensation, put by counsel in the region of €30,000 to €35,000, over and above the compensatory award for the bowel injury.

70. I cannot totally accept the plaintiff's counsel's submission that the plaintiff's scar is to be treated entirely separately to her bowel injury. The plaintiff underwent a laparotomy. The Book of Quantum provides that "*the normal treatment for injuries to the intestines is surgery to open the abdomen (laparotomy)...*". Logically, therefore a surgical scar will ensue. That being said, however, the nature and extent of the plaintiff's scar, being 15cm vertical midline scar, which is permanent, is an aggravating factor to be taken account of, in addition to her other ongoing complaints arising from her bowel injury (her most significant injury), when considering which band within the Book of Quantum's guidelines on damages for bowel injuries most appropriately applies to the plaintiff's injuries, and indeed when considering whether the upper limit of €93,900 for such injuries would provide adequate compensation for the particular injury suffered by the plaintiff.

71. There is really no dispute between the parties that the plaintiff's bowel injury falls with the band of "*severe and permanent conditions*" in the Book of Quantum, which attracts a level of damages between €61,900 to €93,900. As already referred to, counsel for the defendants contends that the bowel injury including the scar should be assessed somewhere between €70,000 to €75,000, based largely on Mr. Geraghty's medical report, as referred to earlier.

72. To my mind, however, as far as the bowel injury is concerned, the view of Mr. Mulligan's (Consultant Colorectal Surgeon), as expressed in his report of 15 September 2017, is persuasive evidence that the plaintiff's present complaints of abdominal pain, her bloating and the borborygmi may well arise from adhesions caused by the accident, or the effect of the surgery that she had as a result of the accident. He also opined that "*[a]t some future point, [she will] suffer adhesional obstruction to her small bowel*" perhaps resulting in her hospitalisation on two or three occasions over the next thirty years, based on the statistical analysis he conducted, as set out in his report and oral evidence. He was furthermore of the view that the constipation from which the plaintiff now suffered "*to a greater degree after her accident and abdominal surgery...may be related to pelvic adhesions particularly involving the sigmoid colon*" and that "*[l]aparoscopic adhesiolysis...may be required if her constipation deteriorates to a significant degree.*"

73. I accept all of the foregoing on the balance of probability, and thus, Mr. Mulligan's opinion is to be preferred over that expressed by Mr. Geraghty. The prognosis for the plaintiff, coupled with the permanent scar with which she has been left, puts her firmly at the upper end of the "*severe and permanent*" damages band for bowel injury in the Book of Quantum. Therefore, this upper damages limit cannot, in the circumstances of this case, be considered as sufficient to encompass fair compensation for the plaintiff's cluster of

injuries and must, at best, be the baseline upon which to build when considering what is fair and just compensation for the entirety of the plaintiff injuries.

74. Turning next to the plaintiff's wrist injury. The defendants submit that the plaintiff had not received any treatment for the injury save the initial surgeries and plaster of paris, and some physiotherapy after the plaster of paris was removed. Counsel points to the view expressed by Mr. Geraghty that the plaintiff had made a good recovery from her wrist injury. While it is acknowledged that the fracture was intra-articular, and that osteoarthritis could arise in the long term, it was nevertheless counsel's view that the damages figure arrived at by the trial judge was excessive.

75. Counsel for the plaintiff disputes the defendants' argument and points to Mr. Kelly's report of 1 February 2017, where the injury was described as "*very significant*". It was a fracture dislocation with an intra-articular fracture running into the radial fossa. Accordingly, counsel submits that a figure of €70,000 in respect of the wrist injury would be the appropriate figure by way of damages.

76. I accept that the wrist injury was very significant. While the wrist has healed well, as of 2 November 2016, when the plaintiff was seen by Mr. Kelly, there were nevertheless concerns given that in the early x-rays there were signs of the effects of the dislocation, namely "*some separation of the scaphoid and lunate which would indicate intrinsic ligament injuries*". Mr. Kelly's view was that while the plaintiff had done well in the short term, her wrist was likely to deteriorate in the long term with the development of osteoarthritis. As set out in Mr. Kelly's report, "*this condition is known as carpal instability. It has a bad reputation and often may result in treatment by way of an arthrodesis or fusion of the wrist*". While Mr. Kelly opined that from a functional point of view the fusion would improve the plaintiff's condition, in the interim she would have lost a range of motion and have significant onset of pain. Post the fusion, the plaintiff would be

able to operate a computer and function. The fusion, however, “*would not return her back to normal*”.

77. That being said, I must, however, also take account of the fact that the plaintiff was able to return to work some four months after the accident and that she has continued to be able to function in her employment notwithstanding that on occasions her wrist causes her problems at work when typing and pushing a trolley. I also note that a grip strength test carried out by Mr. Leonard in May 2018 indicated that the plaintiff’s right-hand grip strength, albeit lower than that of her left, was within the average range for a woman of her age. Overall, however, given the orthopaedic opinion expressed by Mr. Kelly, I would nevertheless categorise the level of damages for the wrist injury as falling in the “*severe to permanent conditions*” band of damages in the Book of Quantum for which the suggested damages range from €68,400 to €78,000. This band is described as follows:

“Complex and multiple fractures to the bones within the wrist which required extensive surgery and extended healing but may result in an incomplete union and the possibility of having or has achieved arthritic changes and degeneration of the wrist and may affect the ability to use the wrist.”

I would tend to the view, given the plaintiff’s present level of functioning, while at the same time taking account of what she may face in the future, that a sum approaching the lower end of this band would be a fair supplement to the baseline figure which I have earlier indicated represents the starting point for compensatory damages in this case.

78. In relation to the plaintiff’s psychological injury, the defendants’ position is that having regard to the evidence overall, including that relating to the plaintiff’s work and career since the accident, the €50,000 awarded to her by way of compensation for psychological injury was excessive and should be set aside particularly in light of the trial judge’s failure to reason his valuation findings to any adequate extent and his failure to

take account of those elements of the evidence that would militate against the valuation at which he had arrived.

79. I am satisfied that the plaintiff's psychological injuries were very significant *for a period of time*. The reports of Dr. Daly and Dr. Mohan attest to that, irrespective of whether the plaintiff had full blown post-traumatic stress disorder or just symptoms of that disorder coupled with episodes of anxiety. Clearly, the adverse effect on the plaintiff's psychological health began with the nature of the accident itself, in particular the fear she experienced when her son was unresponsive while they were trapped in the car, the later impact on the plaintiff when she learnt of her daughter's very serious injuries as a result of which the child was in intensive care and had been given the Last Rites, and the anxiety the plaintiff herself developed after the accident, especially around driving. All of those factors resulted in her having to undergo twenty sessions of psychotherapy as recommended by Dr. Daly.

80. It is clear, however, that by and large, the plaintiff had recovered from her psychological injury by the end of 2016, albeit she may have some lingering anxieties. Indeed, even in the years 2013-2016, albeit her psychological symptoms were ongoing, she persevered with getting on with her life including returning to work as quickly as she did. Since 2016, she has embarked on a third level university degree course. All of this is to her credit. It must, however, also inform the quantum of damages for psychological injury. It is also noteworthy that the plaintiff's attendance with Dr. Daly in January 2017 was for the purpose of obtaining a medical-legal report and not for therapeutic intervention.

81. I have already determined that the trial judge's award of €50,000 for the "*horrendous*" nature of the accident (over and above the award made for psychological injury) cannot be allowed to stand. In fairness, counsel for the plaintiff is not seeking to stand over the award damages for the "*horrendous*" accident. Instead, his position is that

the €50,000 award for psychological injury given by the trial judge should be revised upwards to take account of the “*horrendous*” accident.

82. I am satisfied that the general damages award which I outline below takes fair account of the psychological injury visited on the plaintiff as a result of the accident while also bearing in mind the extent to which she has recovered from her psychological injury.

83. In passing, I note that in written submissions, counsel for the plaintiff had countered the defendants’ assertion that the plaintiff cannot be compensated for the horrendous nature of the accident by relying on the decision in *Leahy v. Rawson* [2004] 3 I.R. 12. However, the reliance on *Leahy* was not pursued in oral argument. Suffice it to say, therefore, that my own view is that reliance on *Leahy*, given its factual matrix, could never have been of any real assistance to the plaintiff in this case.

Overview and conclusion

84. Taking due account of the significant bowel injury the plaintiff sustained, together with her ongoing sequelae and the scar with which she has been left as a result of the abdominal surgery, Mr. Mulligan’s prognosis for the plaintiff consequent on the bowel injury and surgery, adding to that the fact that the plaintiff must be compensated for her wrist injury and the prognosis relating thereto, and taking account also of her psychological injury from the date of the accident to at least the end of 2016, I consider that the appropriate figure by way of compensation for the plaintiff’s pain and suffering to date and into the future is €175,000.

85. I consider that this €175,000 sum should be broken down as follows:
€135,000 to reflect the plaintiff’s pain and suffering to date, having regard to the following:

- the “*life-threatening*” bowel injury she sustained;

- the surgical intervention the bowel injury gave rise to and the sequelae arising from that surgery (including the surgical scar);
- the exacerbation of her pre-existing constipation;
- her very significant wrist injury and the surgical procedures it required;
- her ongoing significant psychological injury from the date of the accident to the end of 2016.

The balance (€40,000) of the €175,000 award is by way of compensation for pain and suffering into the future.

86. I am satisfied that the aforesaid breakdown reasonably accords with the tenor of the medical evidence of Mr. Mulligan and Mr. Kelly to which I have had regard, as outlined earlier in the judgment, as well as with Dr. Daly's evidence and the evidence of the plaintiff herself.

87. When the €9,750 special damages sum is added to the award of €175,000, this results in a decree in favour of the plaintiff in the sum of €184,750, which I now propose substituting for the €219,750 award made by the trial judge.

Costs

88. As can be seen, I have concluded that the trial judge erred, *inter alia*, in failing to set out the evidential basis for his award of general damages and/or in failing to give reasons for the figures he arrived at, with the result that this Court was required to embark upon a primary analysis of the evidence, ultimately concluding that a general damages award of €175,000 is fair and reasonable compensation for the plaintiff's pain and suffering to date and into the future.

89. At the end of the day, however, irrespective of the frailties in his methodology, the figure of €210,000 general damages which the trial judge arrived at cannot be said ultimately to have been grossly disproportionate in the sense articulated by Fennelly J. in

Rossiter by his reference to a “*rule of thumb*” of a 25% discrepancy, as had been outlined by McCarthy J. in *Reddy v. Bates*. Here, the differential between the trial judge’s award and the figure arrived at by this Court is materially less than twenty five percent. In other words, the “*reasonable proportion*” between the award of damages in the High Court and what the court sitting on appeal would be inclined to give has not been breached.

90. While therefore, I would allow the appeal in this case to the extent and for the reasons set out in the judgment, it seems to me that the less than twenty five percent differential here between what the trial judge awarded and what this Court has awarded may be a basis, firstly, for no order as to costs to be made against the plaintiff in the appeal and secondly, perhaps a platform upon which the plaintiff may wish to argue that she should be entitled to some portion of her costs in the appeal. Accordingly, the parties are hereby invited to make their submissions on costs within twenty one days from delivery of judgment, bearing in mind the Court’s preliminary observations on the issue.

91. As this judgment is being delivered electronically, Whelan J. and Collins J. have indicated their agreement therewith.