THE COURT OF APPEAL
UNAPPROVED

Record Number: 2023/303
High Court Record Number: 2022/2006P
Neutral Citation Number [2024] IECA 150

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

COURTNEY COLLINS

PLAINTIFF/ RESPONDENT

-AND-

STEFFAN PARM, ANNELI PARM AND TOOMAS PARM

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of June, 2024

1. This is a personal injuries quantum appeal brought by the defendants against the judgment and order of the High Court of 25th October, 2023.

Background

2. On 20th March, 2019, the plaintiff, who was born on 31st January, 2004 and was a fifteen year old school girl at the relevant time, was travelling as an unrestrained rear seat passenger in the defendants' car. She was accompanied by three school friends as well as

the driver, the first defendant. The driver attempted to negotiate a bend on the road at excessive speed, causing the car to go out of control, collide with a tree and roll into a field, as a result of which some of the occupants, although not the plaintiff, were ejected from the car. The accident was clearly a very terrifying one for the plaintiff in particular because she immediately thought that she had suffered a serious spinal injury. The plaintiff was not wearing a seatbelt and the case proceeded as an assessment of damages in the High Court subject to a plea of contributory negligence by the defendants. The trial judge found that the plaintiff had been guilty of contributory negligence in that regard to the extent of 15%. That finding is not appealed.

The plaintiff's evidence

3. The plaintiff said that she lost consciousness in the accident but when she came to, two of her school friends were lying out on the field where the car landed, and one was screaming in pain. She described a very chaotic scene which was clearly extremely frightening for her. The plaintiff felt she was unable to move and was immediately concerned that she had suffered a very serious injury. She was the only person left in the car and as all the windows had smashed, she was covered in glass. She had a lot of cuts around her hands which were stitched, eventually leaving scars. It was ultimately determined that the plaintiff fortunately had suffered no serious spinal injury. She remained in hospital for three days.

4. The plaintiff was due to do her Junior Certificate exam that year but did not return to school in the approximately three-month interval between the accident and the exams. She appears to have encountered certain difficulties prior to the accident in the school she was attending and consequently after the State exam, she changed school. After she finished school, the plaintiff took up hairdressing and commenced an apprenticeship.

5. The case proceeded to trial before the High Court sitting in Waterford in October 2023, some four and a half years after the accident.

6. The plaintiff's evidence was that she continued to have pain in her neck and back which had not improved, despite treatment. She wanted to do dog grooming but felt physically unable. She said after the scans, she was informed by the doctors in the hospital that she had Scheuermann's Disease, a congenital condition of the spine.

7. The plaintiff also complained of having developed ringing in her ears, or tinnitus, after the accident. She agreed it was mild and did not affect her sleep or work or anything else. She was asked about injuries to her teeth and said that for the three years prior to the accident, she was wearing braces and was being bullied in school. She was due to get her braces removed on the day following the accident, but her knee hit her mouth in the impact and broke her braces. She attended a dentist and had the braces put back on. She believed that her two front teeth were damaged, and one went black and she had to get root canal treatment. Her other central upper tooth appeared fine. She was told she might have to get a crown on the damaged tooth.

8. From the psychological perspective, the plaintiff agreed that she suffered an acute stress reaction. She described how she was *"really badly bullied"* during her first three years at secondary school. This led to her *"mitching"* from school. When she moved school after the Junior Cert, this stopped. She found that she suffered from mood swings and flash backs and her relationship with her mother became strained post-accident.

9. She had depression and lost motivation to attend school or work. She had had no treatment to date because she could not afford it. She agreed however that she was improving and getting better.

10. Finally, she referred to her head injury where her forehead was swollen up for a week but agreed that it cleared up quickly enough. With regard to the scarring on her arms and hands, she said that she was conscious of these and one customer in the hair salon remarked to her that it looked like she had been suicidal.

11. Under cross-examination, the plaintiff agreed that she had a general practitioner but no report had been provided by the GP. She said she did not find physiotherapy or swimming helpful.

The medical evidence

12. The medical reports in this case were agreed and consequently, no medical witness gave oral evidence. I propose to summarise the contents of these medical reports in chronological order.

- Professor Ruairí MacNiocaill, Consultant Orthopaedic Surgeon Report dated 11th February, 2020, about eleven months post-accident.

  Professor MacNiocaill is attached to University Hospital Waterford. He describes the plaintiff's injuries as including a closed head injury with a subgaleal haematoma, multiple cuts and bruises on the hands and a dental injury. There was a concern as to possible spinal fractures but these were ruled out. The plaintiff had some ongoing neck pain and remained in a collar for two weeks after which she was followed up at the Out Patients Department. She said she had a number of visits to her GP for treatment of her back pain and developed significant anxiety and psychological problems. The plaintiff's presenting complaints were of ongoing ringing in her ears, neck and back pain, and anxiety and nightmares. On examination there was some tenderness of the spine in the midline and a decrease in her thoracolumbar spinal

range of movement of about 30%. An MRI scan showed the presence of Scheuermann's Disease. In his opinion, Professor MacNiocaill said he found no concerning cause for the plaintiff's back pain and suspected it would improve over time.

- Dr. Kathleen Byrne, Dental Surgeon who examined the plaintiff on the 10th March, 2021, two years post-accident.

  Of note in relation to Dr. Byrne's report, this was obtained at the behest of the Personal Injuries Assessment Board. The plaintiff gave Dr. Byrne a history of having had root canal treatment on her two front teeth following the accident although her direct evidence suggested that she had one such root canal carried out. Dr. Byrne confirmed that there was a root canal on the upper right first tooth only. She identified possible sequelae for this tooth including discoloration and fracture and said it *"may need crown replacement in this event."*

  Dr. Byrne noted that the upper left first tooth appeared fine at present but if previously traumatised in the accident, it is possible that the nerve may die leading to the need for root canal and possible crown placement. Dr. Byrne noted that there was a definite need for orthodontic treatment at present but could not definitely say that this arose from the accident. She said that there appeared to be evidence that a course of orthodonture treatment had previously commenced and was not completed but it was not possible to be sure about this. She gave costings for possible future treatment that might be needed including crowns and root canals.

- Dr. Dominic Fannon, Consultant Psychiatrist, who examined the plaintiff on the 15th March, 2021, two years post-accident.

Dr. Fannon reported on behalf of PIAB. The plaintiff led no evidence from a psychiatric/psychological expert. Dr. Fannon noted that the plaintiff's acute stress reaction following the accident had resolved and she appeared to have an adjustment disorder with mixed anxiety and depressed mood which was ongoing. Dr. Fannon noted that since the accident, the plaintiff had seen her GP on two occasions and had no physiotherapy. The plaintiff told Dr. Fannon that she had had two visits to a dental surgeon/orthodontist. Dr. Fannon noted that the plaintiff and her mother reported that the plaintiff had significant emotional difficulty associated with school place bullying and intimidation prior to the accident. Under the heading *"Lifestyle effects"*, Dr. Fannon noted no current impairment to the heading of *"Occupational"* and *"Recreational"* but under *"Domestic/personal"*, the plaintiff and her mother reported impairment of personal functioning.

Her current complaints included frequent headaches and intermittent discomfort of the neck and back. She had complaints of intermittent anxiety and mood swings with occasional intrusive recollections of the incident. There was some mild insomnia associated with physical discomfort. On examination, Dr. Fannon found the plaintiff to be tense in manner and dejected in mood. He described the effects on the plaintiff's mental health as *"mild"*. In the opinion section of the PIAB *pro forma* report, in response to a request to indicate the degree to which he felt the plaintiff's symptoms have been caused by the accident, Dr. Fannon responded *"most (greater or equal to 75%) of the symptoms/disability"*.

Under the box entitled *"Estimated time period to full recovery (from the date of the accident)"*, Dr. Fannon responded *"Three years approximately with treatment."*

In his general comments, Dr. Fannon considered that the plaintiff would benefit from treatment in respect of her mental health complaints and recommended neurological assessment and opinion.

- Mr. Deb Roy, Consultant Spine Surgeon, who reviewed the plaintiff on the 12th July, 2022, three years and four months post-accident.

  Mr. Roy appears to have been asked to see the plaintiff for a medico-legal report and was not involved in her treatment. He gives the plaintiff's history as already outlined. He notes that the plaintiff had multiple GP visits for ongoing pain and six sessions of physiotherapy which included dry needling. She complained of pain from the neck down to her lower back without aggravating or relieving factors. She complained of nightmares, sleep disturbance and headaches. She complained that she had become socially withdrawn and was unable to swim because it causes her pain. She was training to become a dog groomer but felt unable to continue. Mr. Roy carried out a physical examination including the plaintiff's neck and back and a normal range of movement was found. He noted that the plaintiff had mild tenderness on palpation of the neck and that some movements produced low back pain. Mr Roy noted that once he had reviewed the plaintiff's scans he would give an opinion.

  Following that review, Mr. Roy provided an addendum report on the 25th May, 2023. He noted that the plaintiff's MRI scan of the cervical and lumbar spine carried out on the 19th May, 2023 is completely normal. In his opinion, Mr. Roy said the plaintiff's musculoskeletal symptoms had not completely settled. He noted that she had symptoms of post-traumatic stress but had not been seen by any mental health specialist. He said that she does not need any surgical intervention or pain

management but would benefit from a mental health referral as post-traumatic stress can affect recovery.

- Professor Michael A. Walsh, Ear Nose and Throat Surgeon, who examined the plaintiff on the 5th September, 2022, some three and a half years post-accident.

  Professor Walsh examined the plaintiff for the purpose of assessing her complaints of tinnitus. The plaintiff complained that the tinnitus is constantly present but does not disturb her sleep or concentration or her work, then apparently in a nursing home. She had no change to her hearing and no balance disorder. Clinical examination was normal as was audiological testing. He concluded that the nature of the tinnitus is mild and no form of rehabilitation is required.

- Mr. Michael O'Riordan, Consultant Orthopaedic Surgeon who examined the plaintiff on behalf of the defendants on the 21st November, 2022, three years and eight months post-accident.

  Mr. O'Riordan examined the plaintiff about four months after Mr. Roy. The plaintiff complained to Mr. O'Riordan that she had back pain but does not appear to have made any complaint of neck pain. She has difficulty sleeping and takes analgesics before bed. She appeared now to be working part-time in a hotel but complained she could not do any heavy lifting. She can't play football as previously nor can she go to the gym as her pain appeared to be confined to the lumbar spine.

  On examination, no abnormality was detected by Mr. O'Riordan.

  He considered that the plaintiff's prognosis is excellent and that she had a strain of her back following the accident. Her radiological findings are consistent with Scheuermann's Disease which may, of itself, be symptomatic. His view was that the

injury she sustained would have resolved within three years of the accident and any ongoing symptoms are related to her Scheuermann's Disease.

- Dr. Patricia Eadie, Consultant Plastic Surgeon, who examined the plaintiff on the 6th June, 2023, four years and three months post-accident.

  The plaintiff advised Dr. Eadie that she had lacerations to her left leg and left wrist which were treated with steri-strips in hospital. On examination, Dr. Eadie describes two scars on the lateral aspect of the left forearm/hand. One is a 1cm pale flat scar which is barely visible. On the lateral aspect of the wrist is a 7mm pale raised scar which is visible at conversation distance. On her left leg, there is a 1cm x 3mm pale visible scar above the left knee. Dr. Eadie described these as *"three small scars"* and that they had matured very well. She said one of the scars is barely visible and the other two are very pale and are visible. No treatment is recommended. She included photographs of the scars with her report.

Judgment of the High Court

13. At the conclusion of the oral evidence, counsel for both parties made brief oral submissions to the judge. At the outset, the judge indicated that his understanding was that he was required to approach the assessment on the basis of identifying a dominant injury. Counsel for the plaintiff suggested that the psychiatric injury was arguably the dominant one although it was possible to take the same view of the back injury or the dental injury. While an oblique reference was made to the judgment of this Court in *Meehan v Shawcove* [2022] IECA 208, it was not opened to the court. Unfortunately, that was the extent of the assistance given to the judge and it is particularly noteworthy that neither party made any reference to the Personal Injuries Guidelines.

14. In a written *ex tempore* judgment delivered a few days after the conclusion of the hearing, the judge commenced by setting out the factual background. The judge then turned to a description of each of the plaintiff's injuries in turn being respectively, scarring, teeth, back and neck, tinnitus and psychiatric impact. Having described each of the injuries both in terms of the plaintiff's evidence and the medical reports, the judge turned to his decision on quantum which is relatively brief. It is divided into two categories of *"dominant injury"* and *"uplift"*.

15. The judge considered that the dominant injury suffered by the plaintiff was that of an adjustment disorder with mixed anxiety and depression. He accepted the plaintiff's evidence that it had a reasonably severe impact on her mood, concentration and ability to socialise and engage in school in the couple of years after the accident. He noted that the position had improved more recently but accepted the medical evidence that a complete recovery was likely to take up to five years after the accident. It is unclear what the source for this conclusion was because the only psychiatric evidence before the court was from Dr. Fannon and his report indicated an estimated time period to full recovery of *"three years approximately with treatment"* but from the date of the accident, not the date of the report.

16. It seems possible that given that the report was two years post-accident, the judge may have incorrectly read the report as indicating a recovery time of three years from the date of the report rather than the accident, which would account for the five years. The judge went on to conclude in relation to the dominant injury as follows:

> *"16. In the circumstances, in my view damages of €45,000 to date and €10,000 into the future under this heading would be appropriate."*

Under the heading of *"uplift"* the judge went on to say that it is necessary to uplift the award for psychiatric injury to reflect the various other injuries, including the neck and back pain,

tinnitus, impact on teeth and scarring. With regard to the back and neck injury, the judge held that these were not clinically at the serious end of the scale. He said that the tinnitus is clinically mild and with regard to the dental injury, in the absence of expert orthodontic evidence, the judge was not in a position to assess the extent, if any, to which the accident has caused longer term orthodontic problems. With regard to the scarring, he felt that this was *"objectively minor"* but a source of potential embarrassment to the plaintiff in the future. His conclusion was:

> *"19. In my view, the damages of an additional €30,000 for damages to date and a figure of €10,000 into the future would be an appropriate additional sum.*
>
> *20. This leaves a total figure for general damages of €95,000. The special damages are agreed at €4,162.00, giving an overall total of €99,162.00 on a full liability basis."*

The appeal

17. The essential complaint of the defendants in the appeal is that the general damages were excessive and disproportionate. The amount awarded for psychiatric injury placed it within the serious category at 4A(b) of the Personal Injury Guidelines. There is a further complaint that the judge did not provide any reason for the amount of the uplift or how he arrived at the figure therein. The defendants submit that the judge departed from the Guidelines without providing reasons as he was obliged to do. The defendants further complain that the judge failed to have any regard to comparable cases or other awards available under the Guidelines.

The proper approach to assessment

18. The starting point is s. 99 of the Judicial Council Act, 2019 which amends s. 22 of the Civil Liability and Courts Act, 2004:

> *"(1) The court shall, in assessing damages in a personal injuries action –*
>
> *(a) have regard to the personal injuries guidelines (within the meaning of section 2 of the Judicial Council Act, 2019), and*
>
> *(b) where it departs from those guidelines, state the reasons for such departure in giving its decision."*

19. As the section makes clear, the court is obliged to have regard to the Guidelines, as it was in identical terms to the Book of Quantum previously. The important change, however, introduced by the 2019 Act was to require the court to state reasons for departing from the Guidelines if it did so. The Introduction to the Guidelines in the paragraph entitled *"Use of Guidelines"* explains how they are to be applied. It suggests that the judge should ask the parties to identify, by reference to the *"dominant"* injury sustained, the relevant damages brackets (and where within the brackets the dominant injury fits). The court should then proceed to consider how the Guidelines should impact on the award. In the subsequent paragraph of the Introduction dealing with *"Multiple Injuries"* it is suggested that the judge should, where possible, identify the bracket that best resembles the *"most significant"* of the claimant's injuries which should then be valued and thereafter uplifted to reflect all the other injuries.

20. The fact that the judge referred to the concept of a dominant injury and uplift suggests that he had, at least in broad terms, an awareness of the Guidelines and how they should be applied, while noting that nowhere in the judgment does the judge actually refer to the

Guidelines themselves. That is not only contrary to the legislation and the Guidelines themselves, but to all the authorities that deal with them. It is, however, perhaps a little unfair to be overly critical of the judge in this regard because, unfortunately, he received absolutely no assistance from the parties as to how he should approach this matter. As I have already pointed out, the Guidelines were not once mentioned by anyone. It is perhaps somewhat ironic therefore to find the defendants in their appeal complaining about the fact that the judge had no regard to the Guidelines or to cases about which he was told nothing.

21. As the Guidelines themselves acknowledge, the assessment of damages in multiple injuries cases gives rise to special difficulty because each injury is valued separately under the Guidelines. The court's obligation is to have regard to the assigned values for each injury and not just for the dominant, or most significant, one. The Guidelines draw attention to the risk of overcompensation from valuing each injury separately, a risk that would in many cases eventuate if the values were simply to be added together. Such an approach would overlook the temporal and sometimes physical overlap between injuries and produce a disproportionate and unfair result in many cases.

22. On the other hand, cases may arise less frequently where the cumulative effect of all the injuries is greater than the sum of its parts. The overriding consideration remains proportionality as explained in many recent judgments of the High Court and this Court. In *Meehan*, I sought to analyse the different approaches to multiple injury cases under the Book of Quantum, the Guidelines and the jurisprudence of the courts of England and Wales concluding (at para. 64):

> *"Placed within an Irish context, I think the important point to be taken from these authorities is that whatever individual categories of injury a plaintiff may have suffered, and whatever the values attributable to those categories may be, the court*

must strive to take an holistic view of the plaintiff and endeavour to place the plaintiff's particular constellation of injuries and their cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum and awards to other plaintiffs."

23. In *Lipinski (a Minor) v Whelan* [2022] IEHC 452, Coffey J. observed that the Guidelines set out a procedure which the trial judge must have regard to before making an award while at the same time drawing attention to the obligation of the court to adhere to the legal principles applying to the assessment of damages as developed over the years in the judgments of the Superior Courts. *Lipinski*, which is also relevant as a comparator in this case, was referred to with approval in *Zaganczyk v Pettit* [2023] IECA 223.

24. In the latter judgment, I also referred to another decision of the High Court considering multiple injuries, *McHugh v Ferol* [2023] IEHC 132. I cited the following passage from the judgment of Murphy J. (at para. 24 of *McHugh*):

"It appears to me that a fair and transparent means of assessing what the uplift should be in any given case is to categorise each of the additional injuries according to the bracket that it would fall into were that the main injury and then discount the award to allow for the temporal overlap of the injuries. In this way, both parties can see precisely how the court arrived at its decision and the level of discount allowed for overlapping injuries. Any other method leaves the plaintiff and the defendant guessing as to how the court arrived at its decision."

25. Having referred to this passage, I said (in *Zaganczyk*) at para. 25:

"It seems to me that this approach has much to commend it and accords in significant measure with the method of calculation adopted in England and Wales, with the

important caveat that in that jurisdiction, it would appear that all of the injuries are discounted to factor in the overlap whereas here, the plaintiff will obtain full value for the dominant injury with the discount being applied, if it is to be applied, to the lesser injuries."

26. That is the approach adopted by Murphy J. where she accorded full value under the Guidelines to the dominant, or most significant, injury but then identified the categories appropriate to the lesser injuries, totalled these and applied a 50% discount to take into account the *"roll up factor and the overlap of injuries"*.

27. In the section *"Multiple Injuries"* in the Introduction to the Guidelines, it states:

"It is of the utmost importance that the overall award of damages made in a case involving multiple injuries should be proportionate and just when considered in light of the severity of other injuries which attract an equivalent award under the Guidelines."

28. This is again drawing attention to the importance of proportionality, and commenting on that passage in the Introduction, I noted in *Zaganczyk* (at para. 27):

"Whatever mathematical approach is adopted, it is important not to lose sight of the global impact of all the injuries on the particular plaintiff concerned. The plaintiff is entitled to be compensated for all the suffering they have endured, be it from one or ten discrete injuries suffered at the same time. As the Guidelines suggest, some assistance may be derived from a consideration of how the overall award compares with other individual categories in the Guidelines. If an obvious mismatch emerges, this may suggest that the requisite proportionality has not been achieved. That is, in

my view a useful exercise in the present case as appears further below and can provide a helpful 'reality check'".

29. *Keogh v Byrne* [2024] IEHC 19 was another multiple injuries case where the principles in the Guidelines were again considered by Coffey J. Having referred to the Guidelines and some of the authorities I have already mentioned, he went on to say (at para. 12):

"It is evident from the foregoing that in a case where a court is required to assess general damages for multiple injuries having regard to the Guidelines, the trial judge should follow a two-stage process in order to ensure that the overall award is fair to all parties and proportionate. First, the court must ensure that the plaintiff is compensated for all their pain and suffering which results from their injuries. This requires the trial judge to consider the relevant guidelines for each injury and to apply the principles of fairness and proportionality in order to assign a value to each injury that is fair to all parties and proportionate. Secondly, and whether it is possible to do so by reference to the plaintiff's 'most significant injury' or not, the court is obliged to ensure that the overall award is itself fair to all parties and proportionate. This requires the trial judge to step back from the individual injuries and their corresponding assigned values in order to holistically evaluate the cumulative effect of all the injuries on the plaintiff and to adjust the ultimate award in order to avoid over or under compensation. In carrying out this task, the trial judge must have regard to the overlap of injuries and the maximum and equivalent awards available under the Guidelines for suffering of similar gravity to that of the plaintiff's overall injury profile. Where a discount is applicable, the method of adjustment - whether it be by way of deduction from the value assigned to the plaintiff's lesser injuries or from the initial aggregate amount, or whether it is

expressed as a percentage or a specified sum - appears to be of little practical consequence provided that the ultimate award of general damages is so measured as to achieve overall fairness and proportionality."

30. Coffey J. went on to point out that while a discount may frequently arise in the context of injuries other than the most significant injury, there may be cases where the opposite is also true, for example a person losing the sight of both eyes will not be adequately compensated by doubling the value attributable to the loss of one eye, and so on.

31. In *Keogh*, there were three injuries of significance which fell to be assessed under the Guidelines. Coffey J. identified the most significant injury and accorded it full value at €55,000. The other two lesser injuries were valued by him at €42,000 and €3,000 respectively, giving a cumulative total of €100,000 if all were simply added together. He considered however that a discount of €15,000 should be applied to the lesser injuries resulting in an overall award of €85,000. He thus discounted the lesser injuries which had a value of €45,000 by one third, although he did not describe the discount in terms of fraction or percentage, but rather as a fixed amount.

32. All of these cases were instances of multiple injuries where it was possible to identify which of those injuries could be regarded as the *"most significant"*, as the Guidelines require. Although the expression *"dominant injury"* is not actually used in the section on multiple injuries, it seems clear that the concepts of *"dominant injury"* and *"most significant"* injury are the same. It is relevant to note that the Guidelines concerning multiple injuries refer to the identification of the *"most significant"* of the claimant's injuries, and the judge should then value that injury before uplift, making clear that there can only be one such injury, be it described as *"most significant"* or *"dominant"*.

33. Equally important is the fact that the Guidelines recognise that there will be cases where it is not possible to identify one such injury out of a number of equally serious injuries. The judge should identify the *"most significant"* injury *"where possible"*, and there will inevitably be cases where it is not possible to do so. The judge accordingly is not obliged in all cases to identify one injury as being the *"most significant"*, where that is not reasonably possible.

34. The question thus arises as to how a discount for overlap is to be applied, if it is to be applied, where there is no injury that can be ascribed a *"most significant"* status. For example, in the present case, the judge was invited to consider the possibility that any one of three injuries suffered by the plaintiff might have been regarded as the dominant one, suggesting that it might also have been open to the court to conclude that each was equally significant. Assuming that it is appropriate to apply a discount for overlap, it must be applied to all the injures, unlike in cases where there is a *"most significant"* injury, which must be accorded its full undiscounted value.

35. It is immediately apparent that this has the potential for unfairness, if the same discount were to be applied to cases with a *"most significant"* injury as to cases without such a feature. It would mean, for example, that a claimant with a serious injury would receive a lower award for that injury by virtue of the fact that the same claimant had a second equally serious injury. That would clearly offend the overriding principle of proportionality and basic fairness.

36. The "*step back*" approach requires the court to look at the overall award in the round, in order to ensure that it is proportionate by reference to the well settled parameters identified in the cases. This is likely to mean that in most cases where there is no clear single *"most*

significant" injury, a lower level of discount will apply than would be applied to the aggregated *"lesser injuries"* in cases where there is such a *"most significant"* injury.

Assessment in this case

Psychiatric injury

37. The trial judge identified the plaintiff's psychiatric injury as the dominant, or most significant, injury. There was no real dispute about that, either in the High Court or this Court. I have already referred to the fact that the plaintiff did not lead any evidence from a psychiatrist or psychologist and the only medical evidence in that regard before the court was the report of Dr. Fannon who was instructed by PIAB. He described the plaintiff as having an adjustment disorder and there was some mixed anxiety and depressed mood ongoing. These were, according to the plaintiff, intermittent. He found no impairment in relation to occupation or recreation but there was such impairment in the domestic/personal category. He considered the effects of the accident on the plaintiff's mental health as mild and that most of her symptoms, but not all, were related to the accident. She had had no treatment up to the date of trial which she said she could not afford. Dr. Fannon's opinion was that the plaintiff should make a full recovery within three years of the date of the accident with treatment.

38. Part 4 of the Guidelines deals with psychiatric damage and lists a number of factors affecting the level of the award including:

(i) age;

(ii) interference with quality of life and education;

(iii) impact on work;

(iv) impact on interpersonal relationships;

(v) whether medical assistance has been sought;

(vi) nature, extent and duration of treatment undertaken and/or medication prescribed;

(vii) likely success of treatment;

(viii) prognosis, to include any future vulnerability;

(ix) the extent and/or nature of the associated physical injuries.

39. It will be seen therefore that factors (ii) and (iii) do not arise in this case but factor (iv) does. Psychiatric damage is divided into four categories of severe, serious, moderate and minor. The first three of those categories place emphasis on factors (ii) and (iii), which, as I have noted, do not arise here. Category (c) being moderate psychiatric damage is classified as follows:

> *"While there may have been problems of the sort associated with factors 4(ii) and (iii) above, there will have been marked improvement by the date of the trial and the prognosis will be good. - €15,000 to €40,000."*

40. Whilst it might be argued that because of the absence of factors (ii) and (iii), the plaintiff does not quite fit this category, the next category (d), minor, relates to cases where a full recovery has already been achieved and that was not the position here at the time of the trial.

41. I am satisfied therefore that the moderate category is the appropriate one to have regard to in this case. In considering where within that category the plaintiff's damages should lie,

it is appropriate to have regard to comparable cases and the closest analogue is to be found in *Lipinski*. The plaintiff there was a 14-year-old schoolgirl who suffered PTSD in a road traffic accident. This was agreed to be the plaintiff's dominant injury. The plaintiff had obtained a great deal of treatment in the form of counselling which was ongoing at the time of trial. Her symptoms included nightmares, flashbacks, panic attacks, sleeplessness, irritability, low mood, withdrawal from her family, poor concentration, demotivation at school and a decline in academic performance.

42. The plaintiff's PTSD was found by the trial judge to have upended almost every aspect of the plaintiff's life for many months and to have been severely disabling. By the time of the trial in the High Court, the plaintiff continued to suffer from the effects of PTSD but had significantly improved. The judge concluded that the plaintiff's injury fell into the moderate category of PTSD which has a value range of €10,000 to €35,000, but fell at the very top of that range and accordingly he made an award of €35,000 in respect of the psychiatric injury.

43. It seems to me that there is an argument for saying that the plaintiff's injury in this case is significantly less serious than that in *Lipinski*. However, it emerged at the hearing of the appeal that there was very little dispute between the parties as to the value of the psychiatric injury suffered by the plaintiff, with counsel for the defendants conceding that it could be valued at up to €35,000, whereas counsel for the plaintiff suggested a figure of €40,000.

44. Having regard to the concession made by counsel for the defendants, I am prepared to attribute a value of €35,000 to the plaintiff's psychiatric injury.

Spinal injury

45. When Professor MacNiocaill examined the plaintiff at 11 months post-accident, he found her to have some tenderness in the midline of her spine with decreased thoracolumbar spinal movements. He said there was no cause for concern in relation to the plaintiff's back, a claim which he suspected would improve over time. Mr. Roy saw the plaintiff three years and four months post-accident when on examination he found her neck and back to have a normal range of movement, the only finding being some mild tenderness on palpation of the neck and some movements produced low back pain.

46. While all her symptoms had not completely settled, he felt that she did not require any intervention in the form of surgery or pain management. Mr. O'Riordan who saw the plaintiff a few months later, noted she was making some complaints of back pain, but he detected no abnormality on examination and considered her prognosis to be excellent. Importantly, he was of the view that her soft tissue injury would have resolved within three years of the accident and any ongoing symptoms are related to her Scheuermann's disease.

47. Part 7B of the Guidelines deals with back injuries and again identifies a range of factors that are relevant to the assessment. Although I accept that the plaintiff initially had some complaints regarding her neck, these appear to be part of the same soft tissue injury to her spine and were so regarded by the medical witnesses, so that it would not in my view be appropriate to treat them as two discrete injuries separately attracting compensation under different categories. The category that seems most closely to reflect the plaintiff's injury is category B(d), minor back injuries which is stated to include:

> *"(This) includes injuries such as sprains, strains and soft tissue injuries which are less serious. As with minor neck injuries, whilst the duration of the symptoms will*

always be important, the consideration set out at 7(b) above will guide whether the award should be in the higher or lower category.

(i) where a substantial recovery without surgery takes place within two to five years €12,000 to €20,000."

This appears to me to be the relevant category of assessment for the plaintiff's injury which I would place at the lower end and ascribe a figure of €15,000 for this injury.

Teeth

48. As with the psychiatric injuries, no dental expert gave evidence on behalf of the plaintiff, who relied on the report of Dr. Byrne obtained by PIAB. This disclosed that the plaintiff injured one of her front teeth which required a root canal. While Dr. Byrne identified possible *sequelae* for this tooth which might eventuate and require a crown replacement in the future, whether this is a remote possibility or otherwise is not stated by Dr. Byrne. While the trial judge accepted that the plaintiff had to have her braces refitted as a result of the accident, he found that there was nothing to link any future orthodontic treatment with the accident.

49. Part 9F of the Guidelines deals with damage to teeth and category (iii) is *"loss of or serious damage to one front tooth - €3,500 to €8,500*." Whilst it is somewhat unclear that the damage to the plaintiff's front tooth could be classed as serious, I am prepared to accept that the injury does fall within this category, albeit well short of the loss of a tooth, and ascribe a value of €5,000 in that regard.

Tinnitus

50. Part 5B(d) deals with partial hearing loss/tinnitus and the plaintiff's injury appears to me to fall within the lowest category being (iii) *"mild or occasional tinnitus with hearing loss, depending upon the severity of the hearing loss €500 to €18,000."*

51. This category envisages hearing loss which obviously does not arise in this case and it appears to be accepted that her tinnitus is mild and does not intrude on any of her normal activities. I would thus place it at the lower end of this range and ascribe a value of €3,000.

Scarring

52. The plaintiff has two small scars on the lateral aspect of her left forearm and hand, one of which is barely visible. The other is a pale 7mm raised scar which is visible at conversation distance. There is also a small scar above the plaintiff's left knee which is very pale, and no treatment is required for any of these scars. As noted above, photographs of the scars are appended to Dr. Eadie's report.

53. They are clearly of a very minor order in terms of cosmetic disfigurement and fall into Part 10A of the Guidelines dealing with scarring at subparagraph (b):

> *"A single noticeable scar, or several superficial scars of leg(s) or arm(s) or hand(s) with some minor cosmetic deficit - €1,000 to €40,000."*

54. These scars are in my view clearly very much at the lower end of this broad range and I would ascribe a value of €5,000 to them.

Head injury

55. The plaintiff received a blow to the head which resulted in a swelling or haematoma which appears to have subsided within a week or two of the accident. As such, in my view it falls clearly within Part 3(d) being *"minor brain damage or head injury"*, the last category thereof at (iv) being *"substantial recovery within six months €500 to €3,000*. I would assign a value of €2,000 to this injury.

Conclusion

56. I am satisfied that the award of damages in this case by the High Court was so disproportionate as to amount to an error of law. In *Zaganczyk*, I referred to the fact that the award of general damages by the High Court in that case, at €90,000, bore no relationship to the far more serious injuries that attracted an award at that level under the Guidelines, with examples. The same is true in this case also. The award here was further erroneous as it was made without regard to the Guidelines and insofar as it departs from them, which it clearly does, no reasons are given for such departure.

57. The cumulative total of the plaintiff's non-dominant injuries is therefore a sum of €30,000 which I propose to discount by a factor of one third, or 33.3%, to fairly reflect the temporal overlap of all these injuries. In my view therefore, the appropriate total general damages come to €55,000. I think it worth pointing out that if there had been no *"most significant"* injury in this case, the discount of €10,000 from the aggregated totals of the injuries would have amounted to about 15%. To that must be added the agreed special damages in the sum of €4,162, giving an overall award of €59,162, before discount for contributory negligence. Factoring in a reduction of 15% gives a net award of €50,287.70 and I would substitute judgment in that amount for the order of the High Court herein and, to that extent, allow this appeal.

58. With regard to the costs of the appeal, the Court directs the defendants to deliver written submissions not exceeding 1,000 words within a period of 14 days of the date of this judgment and the plaintiff will have a similar period to respond likewise.

59. As this judgment is delivered electronically, Binchy and Meenan JJ. have authorised me to record their agreement with it.