[2020] IEHC 11

THE HIGH COURT
CIRCUIT APPEALS

2019 No. 130 CA

BETWEEN

MICHAEL DOYLE

PLAINTIFF

AND
MARIE DONOVAN

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 January 2020

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The proceedings are personal injuries proceedings in which the Plaintiff seeks damages in respect of injuries said to have been received in a road traffic accident on 1 August 2017. The case is unusual in that the Plaintiff seeks aggravated damages. It is said that aggravated damages should be awarded to mark the court's disapproval of the manner in which the defence of the proceedings has been conducted. The Personal Injuries Defence delivered in the proceedings contains a plea to the effect that the Plaintiff had deliberately caused the collision. This plea is said to involve an imputation of dishonesty and criminality.

2. In the event, the Defendant did not attempt to stand over this plea. Whereas liability had been in issue before the Circuit Court, there was no suggestion in the Defendant's evidence-in-chief to the Circuit Court that the collision had been other than an accident. On cross-examination, the Defendant declined to stand over the plea that the collision had been deliberately caused. The most that was suggested in evidence is that the Plaintiff had braked suddenly and that this may have been negligent.

3. The position since adopted by the Defendant before the High Court on appeal has been to concede liability. The hearing before this court proceeded as an assessment only.

4. One of the issues to be addressed in this judgment is whether these events justify the making of an award of aggravated damages against the Defendant.

ACCIDENT ON 1 AUGUST 2017

5. The only witness who gave evidence before the High Court was the Plaintiff, Mr Michael Doyle. In circumstances where the Defendant had conceded liability for the purposes of the appeal, the precise details of the accident on 1 August 2017 were dealt with briefly. Insofar as relevant to the nature and extent of the injuries suffered by the Plaintiff, the uncontroverted evidence is as follows. The Plaintiff is employed as a general operative involved in maintaining bus shelters, and uses a transit type van for the purposes of his work. The Plaintiff had been exiting the national road known as the "N3" via a slip road near the Blanchardstown shopping centre. The Plaintiff noticed a car parked on the righthand side of the slip road. A woman flagged him down. The Plaintiff explained that he thought that the woman may have mistaken his van for a recovery vehicle. He further

explained that he decided to stop, and intended to pull in to his right. He says that he moved down a gear, put on his indicators, and looked in his mirrors.

6. The Plaintiff says that his vehicle was then hit by the vehicle (Volkswagen Tiguan) driven by the Defendant. He says his vehicle was hit very hard, and that his whole head and body were thrown forward. He describes himself as being in shock, and states that he needed to take time to compose himself.

7. The court has also been provided with photographs which illustrate the damage caused to the Plaintiff's vehicle. The bumper on the driver's side was damaged, the back door was off line, the indicator was cracked, and the chassis was bent. The quarter panel was also bent.

PERSONAL INJURIES DEFENCE

8. Given that the Plaintiff seeks an award of aggravated damages based on the manner in which the defence to the proceedings has been pleaded, it is necessary to set out the relevant part of the Personal Injuries Defence as follows.

> "4. PARTICULARS OF NEGLIGENCE/CONTRIBUTORY NEGLIGENCE
>
> If the Plaintiff sustained the alleged or any personal injuries, loss and damage, which is denied by the Defendant, the same was solely caused by the Plaintiff's own negligence; alternatively, the Plaintiff was guilty of contributory negligence as follows:–
>
> (a) Violently braking his vehicle on the public highway and thereby causing an emergency situation resulting in the Defendant colliding into the rear of the Plaintiff's vehicle.
> (b) Failing to indicate his intention.
> (c) Deliberately causing the collision complained of."

PERSONAL INJURIES

9. The Plaintiff says that he did not have any pain in the days immediately after the accident on 1 August 2017. The first time the Plaintiff sought medical attention was when he attended at the Mater Smithfield Rapid Injury Clinic on 14 August 2017, i.e. some two weeks after the accident had occurred. He says that he had a pain down his neck and his right shoulder.

10. The Plaintiff also gave evidence of having subsequently noticed a swelling on his neck and shoulder: he describes this as being similar in size to a golf ball. The Plaintiff says that he attended a physiotherapist in relation to this swelling. He states that the physiotherapist explained that the swelling would reduce after a period of approximately twelve weeks. The Plaintiff also states that he was instructed to perform certain exercises using an elasticated band, and that the swelling did indeed reduce after a twelve week period.

11. The Plaintiff says that his current state of health is such that it is uncomfortable to perform certain aspects of his work as a general operative. In particular, he has difficulty

with reaching movements, such as those involved in cleaning bus shelters as part of his work.

THE AGREED MEDICAL REPORTS

12. The parties had exchanged and agreed three medical reports in advance of the hearing of the appeal. Two of these have been provided by the Plaintiff, the third by the Defendant.

(i). Report of 6 December 2017

13. The Plaintiff had attended at the Accident and Emergency Department of the Mater Misericordiae University Hospital, Eccles Street, Dublin 7, on 13 November 2017. He was examined on that occasion by Dr Vinny Ramiah. Doctor Ramiah is a consultant in emergency medicine. Doctor Ramiah has since prepared a report dated 6 December 2017. The Plaintiff's complaints and clinical findings on examination are set out as follows (at page 3 of the report).

> "Present Complaints
>
> Mr Doyle complains of intermittent right-sided neck and shoulder pain. This is worse with certain movements, especially rotation movements of his head. He finds that he has difficulty sleeping and lying on his right-hand side which causes neck and shoulder pain. He has also found that performing his work duties which involves washing bus shelters causes him discomfort to the right neck and shoulder. Reaching, lifting and carrying heavy objects make his symptoms worse. He takes painkillers on an as-required basis in the form of NSAIDs and applies topical NSAID gel which improves his symptoms. Overall his neck and shoulder pain is improving with physiotherapy and over time.
>
> Clinical Findings on Examination 13/11/2017
>
> On examination there was tenderness over the right trapezius, mainly involving the right suprascapular region. He had full range of motion in all directions of the cervical spine but his pain was provoked by lateral flexion to the left. The AC joint on the right was non-tender.
>
> Shoulder examination was normal with no evidence of rotator cuff tear or impingement."

14. The report then sets out, at page 4, the treatment which Doctor Ramiah anticipates will be required in the future.

> "Anticipated treatment required into the future
>
> I've advised Mr Doyle to continue with his current regime of physiotherapy, in the form of his homecare exercise programme. He should still continue to use his NSAIDs as required and topical therapy until his symptoms subside. He may also benefit from non-conventional therapies such as massage and acupuncture."

15. The report concludes with the following general comments and observations (page 5).

> "General Comments and Observations
>
> Mr. Doyle has suffered a WAD grade 1 following a rear-end road traffic collision on 01/18/2017. His symptoms have improved with conservative measures. I expect that with continued rehabilitation his symptoms should resolve without complication within three- to six-months' time."

16. The acronym "WAD" (above) stands for "whiplash associated disorder".

(ii). Report of 4 January 2018

17. A report has been prepared by Doctor Barry Teeling on behalf of the Defendant. This report is dated 4 January 2018 and is based on an examination of the Plaintiff on the same date. The report concludes as follows.

> "Opinion \ Prognosis:
>
> Michael Doyle a man prone to injuries was rear-ended in his van when two women stepped out in front of his van. He had right shoulder and neck injury. Two visits to the Rapid Access C, Smithfield and three physiotherapy sessions later he is back to normal. He missed no work. Examination of neck and shoulder was normal. This was a minor soft tissue injury that has resolved."

(iii). Report of 11 March 2019

18. Doctor Ramiah prepared a subsequent report dated 11 March 2019. This report was based on an examination of the Plaintiff which had been carried out on 4 March 2019. It should be noted that this report had been prepared after a *subsequent* accident which the Plaintiff had been involved in on 20 September 2018.

19. The anticipated treatment is set out as follows (at page 4 and 5 of the report).

> "Anticipated treatment required into the future
>
> I've advised that Mr Doyle undergo a period of intensive physiotherapy for rehabilitation of his acute left sided injuries, following his accident on 24/09/2018. He should continue taking NSAIDs on an as-required basis, but I've counselled him regarding long-term use and adverse effects of these medications. He should consider topical NSAIDs and Paracetamol for painful symptoms.
>
> At this stage I would advise that he has a MRI of the right shoulder and subsequently attend a shoulder specialist for assessment. I would recommend referral to Mr. Darragh Hynes, Upper Limb Orthopaedic Specialist, Mater Private Hospital.

He has underlying degenerative arthritis of his right AC joint. I suspect he has a degree of rotator cuff tendonitis/bursitis of the shoulder. He would benefit from a steroid injection of the right shoulder/AC joint under ultrasound guidance. I would advise that he is referred to Mr. Eoin Kavanagh, Consultant Radiologist, Mater Private Hospital, Dublin 7 for this injection as a matter of urgency. I am happy for my reports to be used as a means of referral."

20. The report then concludes with the following general comments and observations (at pages 5 and 6).

"General Comments and Observations

Mr. Doyle suffered what appeared to be a WAD grade 2 following a rear-end RTA on the 01/08/2017. He developed delayed onset right neck/shoulder symptoms.

His symptoms never really settled despite time and physiotherapy. X-ray of the right AC joint showed evidence of underlying degenerative arthritis of the joint. It is likely that the acute soft tissue injury as a result of his initial injury precipitated a flare of underlying chronic osteoarthritis of the right shoulder and the AC joint (shoulder girdle).

Mr. Doyle's symptoms are made worse with his physical work as a bus shelter maintenance worker. He takes painkillers when symptoms deteriorate.

Symptoms and examination suggest underlying degenerative disease of the right shoulder and AC joint.

At this stage he would likely benefit from an ultrasound guided right shoulder and AC joint steroid injection. MRI assessment of the shoulder is advised for confirmation of the suspected underlying diagnosis (Rotator cuff tendonitis/Sub acromial bursitis).

I've advised a specialist upper limb orthopaedic opinion is sought as described above and am happy for my reports to be used as a means of referral."

PREVIOUS ACCIDENTS

21. The Plaintiff has had a series of previous accidents. In some instances, the personal injuries complained of are similar to those the subject-matter of the present proceedings. In particular, the Plaintiff had instituted personal injuries proceedings arising out of an accident on 14 December 2012. The particulars of personal injury are described as follows in the Personal Injuries Summons.

"The Plaintiff attended with his doctor suffering from pain in the right side of the neck and in his right shoulder. The pain interfered with his ability to sleep. On examination it was noted that the Plaintiff had tenderness in his cervical muscles and along the upper border of the trapezius muscles on the right hand side. He was diagnosed with a soft tissue injury of the neck and shoulder with muscular

strain. Analgesics were prescribed, both oral and topical. The Plaintiff was unable to take the prescribed analgesic medication and therefore suffered significant discomfort.

Despite treatment the Plaintiff continued to suffer from ongoing symptoms. he had pain and clicking in his left shoulder. On examination the Plaintiff's Doctor found crepitus in the shoulder around the joint. This was consistent with a soft tissue injury sustained by the Plaintiff in the accident the subject matter of proceedings.

On subsequent examination it was noted that the Plaintiff had an audible and palpable click on movement of his shoulders. He was diagnosed with mild supraspinatus tendonitis. The Plaintiff had suffered from depression prior to the accident and this condition was not assisted by the pain, discomfort, level of disability and longevity of the symptoms suffered as a result of the accident the subject matter of proceedings. The Plaintiff was limited in the analgesia that he could use owing to his rehabilitation programme.

Although the Plaintiff's condition has improved he continues to suffer from debilitating pain and discomfort as a result of the accident.

His normal enjoyment of life has been affected by the injury. The prognosis remains guarded and the Plaintiff therefore reserves the right to adduce further particulars of personal injury as an when the same become apparent prior to the hearing of this matter."

SUBSEQUENT ACCIDENT ON 20 SEPTEMBER 2018

22. The Plaintiff had been involved in a subsequent road traffic accident on 20 September 2018, i.e. some thirteen months after the accident the subject-matter of these proceedings. On this occasion, he had been a passenger in a car. He reports that the car in which he was travelling had been "rear ended" by another car. The Plaintiff attended at a VHI Swiftcare Clinic some four days after that accident, and reported injuries to his left shoulder and lower back. The Plaintiff has since made a claim in respect of this subsequent accident. This claim was settled, and the Plaintiff received a payment in the order of €9,135.

CROSS EXAMINATION OF PLAINTIFF

23. The Plaintiff was cross-examined by counsel on behalf of the Defendant in respect of his previous medical history. Much of this cross-examination was conducted by reference to documentation which had been made available to the Defendant by way of discovery. The purpose of this exercise seems to have been to suggest, first, that the Plaintiff had failed to disclose the fact that he had suffered injuries in *earlier* accidents to the medical professionals; and, secondly, that the Plaintiff had been suffering from intermittent right shoulder pain *prior* to the accident on 1 August 2017. In this latter connection, particular emphasis was laid on a report dated 20 July 2016 from the Department of Orthopaedic Surgery and National Spinal Injuries Unit, Mater Misericordiae University Hospital. This report contains the following description of the Plaintiff's medical complaints as of 5 May 2016.

> "He complains of intermittent right shoulder pain that is activity -dependent. It is aggravated by lifting his arm above shoulder level, especially if weighted, lying on his right side and activities such as brushing his hair. It clears quickly when he stops the aggravating activity. He wakes at night if he lies on his right side. A couple of times per week he develops paraesthesia at the fingertips of the left hand; this generally occurs when sitting, for example reading the paper. Occasionally his whole arm feels dead in this position. His shoulder pain commenced 5 years ago following a road traffic accident in which a car reversed into the front of his stationary vehicle. His symptoms have worsened in the interim. He currently takes Nexium and Brufen."

24. The effectiveness of this cross-examination was, however, undermined by two things as follows. First, the affidavit of discovery sworn by the Plaintiff is not in proper form. In particular, it fails to identify the *individual* documents. Instead, general headings are used which are of no assistance in identifying the individual documents, e.g. a large swathe of documents is baldly described as "Medical Records from St James's Hospital". This failure to properly identify the documents had the consequence that neither counsel nor the court were in a position to verify the date or author of any particular document with certainty. An example of the difficulties which this caused is discussed at paragraph 27 *et seq*. below.

25. Secondly, the precise status of the documentation was not explained to the court. The Supreme Court in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 2 I.L.R.M. 273 has held that it is inappropriate for parties to proceedings to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented. See, in particular, paragraphs [6.14] and [6.15] of the judgment as follows.

> "The purpose for making all of these general observations is to emphasise the need for there to be considerable clarity achieved as to the basis on which any agreement to depart from the rules of evidence has been made. Again, any lack of clarity in this regard is only likely to lead to confusion and potential injustice. It is, quite frankly, inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented. It may, at one end of the spectrum, be the case that the documents are merely being presented on the basis that they will be properly proved in evidence but will have to be disregarded entirely if not so proved. If the agreement between the parties goes beyond that, then there should be absolute clarity as to the precise basis on which the documents are being presented to the judge.
>
> Indeed, the starting point for clarity in any case in which documents are presented to the judge is that the judge is informed as to the basis on which the documents are being made available."

26. It was not made clear to me at the hearing on 12 December 2019 as to whether both parties agreed that the *content* of the discovered documents should be treated as being true.

27. The practical difficulties which the court faced in this regard can be illustrated by the following three examples. The first example is provided by the report of 20 July 2016 from the Mater referenced above. This report appears to indicate that the Plaintiff had been suffering from intermittent pain in his right shoulder for a number of years in advance of the accident of 1 August 2017. Had a proper evidential basis been laid, it might have been open to the Defendant to argue that the symptoms currently complained of by the Plaintiff are not referable to that accident, but rather relate to an underlying condition caused by the earlier accident in 2012.

28. The difficulty, however, is that no medical evidence has been called to support this proposition. The only witness who gave oral evidence before the High Court was Mr Doyle himself. No medical expert was called; instead, the parties were content to rely on the three agreed medical reports identified at paragraph 12 above. None of these reports canvassed the possibility that the symptoms complained of relate to an earlier accident. In the absence of an express agreement between the parties to the effect that the report of 20 July 2016—which is not one of the three agreed medical reports—can be relied upon as proof of the contents thereof, it is not open to this court to draw any inference from same. Even if such an agreement had been reached, it would still be necessary to establish that the symptoms complained of in May 2016 had not resolved prior to the accident of 1 August 2017.

29. The second example relates to the swelling said to have been suffered by the Plaintiff a number of weeks after the accident on 1 August 2017. More specifically, it will be recalled that the Plaintiff had given direct evidence of swelling on his neck and shoulder, which he describes as being similar in size to a golf ball. Counsel for the Defendant had put it to the Plaintiff in cross-examination that there was no documentation recording this alleged swelling. This question was objected to by counsel on behalf of the Plaintiff, who referred the court to an undated document headed up “Clinical Examination”. This document contains a sketch of a torso, and a manuscript note which appears to read as follows: “Right ACT pronounced and tender”. It was suggested that this document might be referring to the swelling alleged by the Plaintiff.

30. It is impossible to identify with certainty the provenance of this document in circumstances where the affidavit of discovery sworn by the Plaintiff does not list the individual documents. This document *might* be part of the medical notes of a visit to the Emergency Department of the Mater Misercordiae University Hospital on 14 September 2017. The document is signed by a doctor, but their Medical Council registration number has been cut off in photocopying. It is simply not possible for the court to know from this documentation whether it does, in fact, confirm that the swelling was indeed reported to a medical professional. The court can only proceed on the oral evidence of the Plaintiff which has not been contradicted.

31. A third example of the practical difficulties arising in respect of the discovery documentation relates to a medical report dated 30 December 2018 which had been prepared by Dr Aidan O'Hora of Willow Park Medical Centre. This report provides details of an examination of the Plaintiff which, apparently, took place on 10 October 2018. Counsel for the Defendant relied on this document for the purposes of his cross-examination of the Plaintiff. Particular emphasis was placed on the following extract from the medical report.

> "Relevant Medical History (including previous and subsequent accidents)
>
> There is no history of prior injury or accident that the practice is aware of."

32. Counsel suggested that this extract was evidence of the Plaintiff having been asked about previous injuries and accidents, and having failed to disclose his previous accidents (including, most relevantly, the accident on 1 August 2017) to Dr O'Hora. With respect, the extract is ambiguous, and it is open to the *alternative* interpretation that the statement of "no history of prior injury" has been prepared by reference to the medical practice's own records rather than by reference to a specific question put to the Plaintiff.

33. Counsel asked the Plaintiff to explain why there was no reference in the medical report to any complaint in respect of pain in the right shoulder. In reply, the Plaintiff stated that he had not, in fact, been examined by Dr Aidan O'Hora, but had seen a different doctor in the practice, Dr Celine Shaw. The Plaintiff also gave evidence of having visited the medical practice more recently to seek attention in respect of his right shoulder, and stated that he was prescribed with difene on that occasion.

34. In the absence of any clear explanation to the court as to the status of this medical report, it would not be safe for me to draw any inference from same. There is no admissible evidence to contradict the direct evidence of the Plaintiff that he had not, in fact, been examined by Dr Aidan O'Hora.

35. If the parties to proceedings wish the court to treat discovery documentation as having evidential value, then this must be explained clearly to the judge at the outset of the hearing. In particular, it must be explained whether the documents are simply being admitted without formal proof, or whether the agreement between the parties goes further, and the documents are to be treated as *prima facie* evidence of the content of same. It should also be explained to the judge as to how conflicts between the content of the documents and oral evidence are to be resolved. For example, if as happened in this case, a medical report contains an entry to the effect that there have been no prior accidents to the knowledge of the author, is the court entitled to assume that this reflects a (dishonest) answer on the part of the patient being examined.

ASSESSMENT OF DAMAGES

36. It seems to me that damages in this case should be assessed on the basis of the three agreed medical reports described at paragraph 12 above. The fact that these reports

have been agreed between the parties means that weight should be attached to same, rather than to the muddled discovery documentation.

37. As appears from the most recent report, i.e. Dr Ramiah's report dated 11 March 2019, the Plaintiff's symptoms from the road traffic accident of 1 August 2017 never really settled despite time and physiotherapy.

38. Dr Ramiah has had the benefit of examining the Plaintiff more recently than Dr Teeling did. Dr Teeling has not, apparently, seen the Plaintiff since 4 January 2018, i.e. almost two years prior to the hearing of the appeal before the High Court. If the Defendant had wished to contradict the more recent findings of Dr Ramiah, then she should, at the very least, have sought an up-to-date report from Dr Teeling. Instead, the Defendant has expressly agreed the later medical report, and, accordingly, I rely on same for the purposes of assessing damages.

39. The evidence indicates that the whiplash injury is at the higher end of the "moderate" scale as *per* the Book of Quantum (2016), prepared by the Personal Injuries Assessment Board. Having regard to (i) the direct evidence of the Plaintiff, which has not been impeached on cross-examination; (ii) the agreed medical reports; and (iii) the Book of Quantum, I assess general damages for pain and suffering in the sum of €25,000.

CLAIM FOR AGGRAVATED DAMAGES

40. The Plaintiff seeks an award of aggravated damages on the basis that the court should mark its disapproval of the manner in which the defence of the case was pleaded. More specifically, it is submitted that the plea that the Plaintiff was guilty of contributory negligence in "deliberately causing" the road traffic accident has blackened the Plaintiff's name. It is further submitted that the plea involved an imputation that the Plaintiff had engaged in a criminal offence in setting up an accident notwithstanding the risk to life and limb, and that this was done for the purposes of defrauding the Defendant and her insurer.

41. Counsel for the Plaintiff relies upon the judgment of the Supreme Court in *Swaine v. Commissioners of Public Works* [2003] IESC 30; [2003] 1 I.R. 521 (at 525) which, in turn, had cited with approval a passage from the judgment in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 (at 317) which describes the jurisdiction to award aggravated damages as follows.

> "2. Aggravated damages, being compensatory damages increased by reason of
>
> (a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or
> (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or
> (c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.

> Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant."

42. I have concluded that this is not an appropriate case to make an award of aggravated damages for the following reasons.

43. First, in seeking to identify the type of circumstances in which it might be appropriate to make an award of aggravated damages in personal injuries proceedings it is necessary to have regard to the legislative framework. In particular, it is necessary to have regard to the safeguards which have been provided for under the Civil Liability and Courts Act 2004 ("*the 2004 Act").* The 2004 Act introduced a requirement for the swearing of affidavits of verification. Relevantly, where the defendant in a personal injuries action serves on another party to the action any pleading containing assertions or allegations, the defendant shall swear an affidavit verifying those assertions or allegations. Such an affidavit shall include a statement by the deponent that he or she is aware that the making of a statement by him or her in the affidavit that is false or misleading in any material respect, and that he or she knows to be false or misleading, is an offence. The 2004 Act also makes it a criminal offence for a person to give, or dishonestly cause to be given, evidence in a personal injuries action that (a) is false or misleading in any material respect, and (b) he or she knows to be false or misleading.

44. The creation of these criminal offences is indicative of a legislative policy as to how the conduct of personal injuries proceedings is to be policed. These statutory provisions apply equally to a defendant as to a plaintiff. If it can be established that a defendant has made an assertion or allegation which is "false" or "misleading", then the appropriate remedy is a criminal prosecution against that individual. It will not normally be necessary or appropriate for the court to impose an additional sanction by way of making an award of aggravated damages.

45. Secondly, even allowing that a court may have jurisdiction to make an award of aggravated damages in personal injuries proceedings solely by reference to the conduct of the proceedings, the court would be required to consider the conduct of the defence in the round. The complaint made by the Plaintiff in the present case, at its height, is confined to the manner in which the case had been pleaded in the Personal Injuries Defence. In deciding whether or not to make an award of aggravated damages, however, weight has to be attached to the *overall* conduct of the proceedings. In the present case, the allegation that the accident had been deliberately caused was not pursued at the hearing before the Circuit Court. It was not put to the Plaintiff in cross-examination. The Defendant declined to stand over the allegation when she herself was under cross-

examination. Moreover, by the time the case came on for hearing on appeal before the High Court, the Defendant had conceded liability.

46. Counsel on behalf of the Plaintiff has made the point that the Defendant has not sought to amend her pleadings so as to remove the allegation. It is further submitted that the continued existence of this plea blackens the Plaintiff's good name, and that, in a sense, the Defendant and her insurer are benefiting from the privilege attaching to legal proceedings under the Defamation Act 2009.

47. With respect, this argument may prove too much. The privilege provided for under the Defamation Act 2009 is intended to protect the public interest in the conduct of litigation by ensuring that parties are not inhibited in either prosecuting or defending claims. This is counterbalanced by other legislative provisions—such as, relevantly, those under the Civil Liability and Courts Act 2004—which make it a criminal offence to give false or misleading evidence. There would need to be very compelling reasons before a court would intervene to supplement this careful statutory regime by relying on its jurisdiction to award aggravated damages in an attempt to defend the good name of parties, thus sidestepping the relevant provisions of the Defamation Act 2009.

48. Thirdly, reliance on the jurisdiction to award aggravated damages to sanction litigation misconduct would give rise to an asymmetry as between plaintiffs and defendants. More specifically, the measure could only be used as against a defendant. This is because the making of an award of aggravated damages is parasitic on a substantive award of damages. Save in the case of a counterclaim, there will not normally be any basis upon which to make *any* award of damages against a *plaintiff* in personal injuries proceedings, still less an award of aggravated damages. Such a one-way measure is of little practical benefit.

49. Finally, the more usual measure taken by a court which disapproves of the manner in which litigation has been conducted is to address same by an appropriate costs order. For example, a party who has succeeded in the substance of its case may nevertheless be refused an order for costs in its favour by reference to the conduct of the litigation. It is also open to a court, in principle, to adjust the basis on which costs are to be measured.

50. The default position is that costs are measured on what is known as a "party and party" basis. On this basis, the costs are measured objectively, and the costs allowed may be less than those actually incurred. For example, a party may have chosen to retain both senior and junior counsel for a case, but would only be allowed to recover the costs of one of the barristers from the other side if the Legal Costs Adjudicator were to decide that it had not been necessary or proper to retain more than one counsel. That party would have to pay the costs of the second barrister itself.

51. The courts have, however, traditionally had a discretion to award costs on a different basis, namely, a "solicitor and client" basis. On this basis, the party whose costs are being measured will be allowed to recover all costs except in so far as they are of an "unreasonable amount" or have been "unreasonably incurred". An order on a "solicitor

and client" basis comes closer to providing a full indemnity in respect of the costs actually incurred than does an order on a "party and party" basis.

52. As explained in the judgment of the High Court (Barrett J.) in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697, which, in turn, relies on the judgment of the High Court (Kelly J.) in *Geaney v. Elan Corporation plc* [2005] IEHC 111, costs can be awarded on a "solicitor and client" basis where the court wishes to mark its disapproval of the conduct of the litigation by a party.

53. The regime governing the assessment of costs has since been modified under the Legal Services Regulation Act 2015 and under an amended version of Order 99. Order 99, rule 10(3) (as amended by the Rules of the Superior Courts (Costs) 2019 Order) now provides that a court may, in any case in which it thinks fit to do so, order or direct that costs shall be adjudicated on a "legal practitioner and client" basis. This appears to mirror, to some extent, the previous concept of "solicitor and client" costs.

54. It seems to me that, in most instances, an award of costs on the "legal practitioner and client" basis would be sufficient sanction for any litigation misconduct. Reliance on the jurisdiction to award aggravated damages on the basis of litigation misconduct alone should be reserved to exceptional cases.

CONCLUSION ON CLAIM FOR AGGRAVATED DAMAGES

55. In conclusion, therefore, this is not an appropriate case in which to make an award of aggravated damages. Whereas it is most regrettable that the Defendant and her insurer chose to make the entirely unsubstantiated allegation that the Plaintiff had deliberately caused the accident, much of the sting of same has been removed by the fact that the plea was not pursued at the hearing before the Circuit Court and, ultimately, liability was conceded in its entirety before the High Court. I will hear further from the parties on the separate question as to whether an award of costs should be made against the Defendant on a "legal practitioner and client" basis pursuant to Order 99, rule 10(3) (as amended).

PROPOSED ORDER

56. The appeal against the decision of the Circuit Court dismissing the Plaintiff's claim for damages is allowed. I will make an order in lieu directing that the Defendant do pay the Plaintiff a sum of €25,000 by way of general damages for pain and suffering. Subject to confirmation from counsel that the figure is correct, there will be an additional sum by way of special damages of €397.

57. I will hear further from the parties on the question of whether an award of costs should be made against the Defendant on a "legal practitioner and client" basis pursuant to Order 99, rule 10(3) (as amended).

58. The Plaintiff will not be entitled to recover any costs in respect of the making of discovery of documents in circumstances where, as discussed at paragraph 24 *et seq*., the affidavit of discovery failed to identify the individual documents.

Appearances

Barney Quirke, SC and Ivan Daly for the Plaintiff instructed by Ferrys Solicitors

Murray Johnson, SC and Noel Cosgrove for the Defendant instructed by BLM Solicitors