



**THE COURT OF APPEAL**  
**UNAPPROVED**  
**NO REDACTION NEEDED**

**Record Number: 2020/49**  
**High Court Record Number: 2017/4797P**  
**Neutral Citation Number [2021] IECA 329**

**Woulfe J.**

**Noonan J.**

**Ní Raifeartaigh J.**

**BETWEEN/**

**CAOIMHÍN GRIFFIN**

**PLAINTIFF/RESPONDENT**

**-AND-**

**DAN HOARE**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Noonan delivered on the 9th day of December, 2021**

1. This appeal arises from a road traffic accident in which the respondent (“the plaintiff”) suffered personal injuries. The appellant (“the defendant”) appeals the order and judgment of the High Court dated 24<sup>th</sup> January, 2020 which found the defendant 100% responsible and awarded damages. The appeal is brought against both the determinations of liability and quantum by the High Court. In reaching my conclusions, I have had the advantage of reading in draft the judgment of Woulfe J. delivered herein.

## **Background Facts**

2. The accident occurred at about 6.50am on the 25<sup>th</sup> November, 2014 on the road from Cahirciveen to Killorglin on the Ring of Kerry. The plaintiff was born on the 17<sup>th</sup> December, 1992 and was 21 years of age on the date of the accident. It was a dark morning and although the road was damp, it was not raining. The road was not particularly wide with about 20 feet of useable carriageway. The plaintiff was driving his motor car towards the Killorglin direction at, he claimed, about 75km/h.

3. As he rounded what was for him a right hand curve in the road, he met the defendant's articulated lorry coming in the opposite direction. The plaintiff claimed that he was blinded by a "wall of lights" on the oncoming lorry which resulted in him becoming disorientated and colliding head on with the lorry. The plaintiff's version of the accident was strongly disputed by the defendant who said that at all material times his headlights were dipped, he was on his own side of the road and the plaintiff was travelling at "a ferocious speed".

## **The Evidence and the Trial Judge's Findings**

### ***(a) Liability***

4. The plaintiff's evidence was that he was driving to work on this road, with which he was well familiar, at a speed of about 75km/h. He came around a right hand bend on to a short straight where he met a "huge wall of light". He said he was completely blinded and disorientated by the light. He said he pressed the brakes to try and stop but collided head on with the lorry. His vehicle ended somewhat rotated to his left so that the driver's door was against the front of the lorry.

5. In cross-examination, it was suggested to the plaintiff that if the defendant's lorry was illuminated in the manner suggested by the plaintiff, he ought to have seen the approaching lights some distance before he actually saw the vehicle. He denied that. He was asked if he braked and said that he did. He did not agree that the accident occurred completely on his wrong side of the road. He said that after he had seen the wall of light, he held the steering wheel as straight as he could and tried to stop the car. He denied that he changed his direction of travel.

6. The court also heard evidence from Donal O'Sullivan, who was driving in the same direction as the plaintiff and came upon the accident shortly after it happened. He also described the lights on the defendant's lorry when he arrived as being a "wall of light". He was strongly challenged on this evidence in cross-examination by reference to previous allegedly inconsistent statements made by him concerning the lighting on the defendant's lorry.

7. The plaintiff also called in evidence a forensic collision investigator, Jim O'Brien, formerly a member of An Garda Síochána. He commented on various photographs taken by different parties, including the Gardaí. He said that the defendant's articulated lorry was upwards of 40 feet long. It had the standard four headlamps on the body of the cab below the windscreen but four auxiliary lights had been added to the roof of the cab and he described these and their operation in detail.

8. He noted that the plaintiff's evidence was that he was driving at 75km/h and he believed the truck to have been travelling at about 40km/h as the plaintiff came into view but Mr. O'Brien believed the truck would have braked from that speed to a slower speed. He thus estimated the closing impact of the two vehicles combined at about 100km/h and

his view was that the damage evident to the plaintiff's vehicle was consistent with an impact at that speed but not higher for reasons which he gave.

9. Mr. O'Brien's evidence therefore appears to suggest that the impact damage on both vehicles, and the plaintiff's in particular, was consistent with the plaintiff still travelling at 75km/h on impact, thus suggesting that he did not slow down.

10. With regard to the position of the vehicles, he accepted that the photographs clearly showed that the plaintiff ended up completely on his wrong side of the road. His view was that the truck was "marginally" into the plaintiff's lane by he thought some 12 to 14 inches. The truck was angled slightly to its left indicating that the driver had started to move to his left at the time of impact. He was of the opinion that if the lights were as described by the plaintiff, this would be dazzling and disorientating for the plaintiff.

11. Although this latter opinion evidence might have been open to objection on the basis that it was not within Mr. O'Brien's area of expertise, there was in fact no dispute about this proposition, representing as it did no more than a statement of the obvious that common sense would in any event suggest. As was noted in *Byrne v Ardenheath* [2017] IECA 293 and subsequent judgments of this court, in cases not involving complex fields of specialist activity, the court is entitled to bring its own common sense to bear in analysing expert evidence in the context of the relevant duty of care – see *Cekanova v Dunnes Stores* [2021] IECA 12, *Naghten (A Minor) v Cool Running Events Ltd.* [2021] IECA 17, *Dunphy v O'Sullivan* [2021] IECA 171 and *Nemeth v Topaz Energy Group Ltd.* [2021] IECA 252.

12. As regards the post-impact position of the plaintiff's vehicle, Mr. O'Brien agreed several times that it was entirely on the incorrect side of the road and in fact, the right hand headlight of the truck was still illuminated after the accident. He also confirmed on cross-examination that there was no evidence of the plaintiff having braked prior to the accident.

When asked about what distance the vehicles would have been apart when they first had sight of each other, Mr. O'Brien thought this was around 100 metres. He agreed that the aura, as it was described, of the defendant's lights should have been visible to the plaintiff at about 200 metres from the lorry.

**13.** The following exchange took place during Mr. O'Brien's cross-examination (Transcript Day 3, p. 12): -

"67 Q. Yes. Now, at 100 metres of sight distance, even leaving 100 metres as the basic level, at 75 kms an hour Mr. Griffin can stop, can stop completely if the other lorry is not moving, isn't that right?

A. Yes.

68 Q. Right. So if he is doing 75 kms and he brakes and the evidence from Mr. Hoare is that he wasn't travelling quickly, suggests to you Mr. Griffin could have stopped before the accident if he had any issue with the lighting on Mr. Hoare's lorry?

A. He would have been in a position to stop his vehicle if he made a decision at that initial moment to apply his brakes to their maximum and bring his vehicle to a halt. He would have had to make that decision at that 100 metre distance you were talking about.

69 Q. But according to your calculations and his evidence, he is only doing 75kms an hour?

A. Yes.

70 Q. He would have been stopped I suggest to you if he made that decision?

A. It would have been possible for him to stop had he made that decision to stop at the initial metre of that 100 metres.”

**14.** Mr. O’Brien’s evidence was followed by that of Vincent Kelly, a consultant engineer, who gave various relevant measurements of the scene of the accident. He noted that the plaintiff’s carriageway was 9 feet 4 inches in width and that of the defendant’s was 10 feet 8 inches. The exact sight distance as between the two vehicles was measured by him at 409 feet. His evidence concerning the position of the defendant’s lorry from the photographs was that the back wheel of the lorry was on its wrong side of the white line whereas the front wheel was inside it. As regard to stopping distances, Mr. Kelly’s evidence was that a vehicle travelling at 75 km/h in normal circumstances would be able to stop on a dry road in a distance of 99 feet but it would be longer on a wet road.

**15.** The photographic and other evidence also established that after the accident, traffic was able to pass by the defendant’s lorry in its post-impact position. Accordingly, there was sufficient room for the plaintiff’s car to pass the defendant’s lorry too. The defendant in evidence disputed the plaintiff’s version of events as previously indicated. He said that he was travelling at 20 to 30 km/h when the impact occurred.

**16.** Mr. Kelly also purported to give evidence on the effect that being blinded by lights would have on the decision making capacity of a driver, as referred to in more detail in the judgment of Woulfe J. This evidence is not directly referenced in the judgment of the High Court but to the extent, if any, that it had a bearing on that court’s decision, I propose to comment on it briefly.

**17.** Expert evidence is subject to an exception to the evidentiary rule that a witness may generally only give evidence of fact, not opinion. Evidence of opinion may be given by an expert, provided that such opinion is within the area of expertise proven by the witness.

Consulting forensic engineers are perhaps the most common type of expert called in personal injuries claims and they are often known to the court, so that the necessity for qualifying the witness is frequently dispensed with.

**18.** The only evidence given by Mr. Kelly of his qualifications was that he said he was a consulting engineer, which again would be quite normal. That did not however, qualify Mr. Kelly to give evidence of opinion on something that was within the realm of behavioural psychology. An objection was mooted by counsel for the defendant during Mr. Kelly's direct evidence on this topic on the basis that it was not engineering evidence, which it clearly was not. Mr. Kelly sought to stand over it on the basis that he had a qualification in ergonomics, which the judge evidently found to be a surprising justification.

**19.** Moreover, it is evident from the commencement of Mr. Kelly's cross-examination that none of this purported opinion evidence was contained in his report exchanged pursuant to S.I. 391 of 1998. Mr. Kelly confirmed that his report was confined to factual matters. Lawyers and forensic experts alike are well aware that the statutory instrument requires that the substance of their evidence must be contained in their report so that the other side has notice of it. The object of the S.I. is to avoid trial by ambush and manifestly, that would be defeated if experts were free to offer opinions to the court of which the opposing party was unaware before the commencement of the trial.

**20.** Accordingly, the trial judge was not entitled to place any reliance on Mr. Kelly's opinion about the effect of bright lights on the decision making capacity of oncoming drivers and ought properly to have disregarded it. At para. 42 of his judgment, the judge said that he accepted the evidence of Mr. O'Brien and Mr. Kelly that an oncoming driver would be dazzled and become disorientated and could possibly lose control of his vehicle, thereby explaining the veer across the road and consequent collision. While it is true to say that there

was no real dispute about the fact that, if the lights on the defendant's lorry were as the plaintiff claimed, he would be dazzled and disorientated by them, neither Mr. O'Brien nor Mr. Kelly purported to suggest that this could cause the plaintiff to lose control of his vehicle. This was clearly an erroneous finding by the judge. Further, the suggestion by Mr. Kelly that one's decision making capacity would be slowed down by bright lights was not one that could be relied upon by the judge to explain why the plaintiff did not brake, as I note below, being outside his competence as an expert.

### **The Judge's Findings**

21. On the critical issue of the lights on the defendant's lorry, the judge accepted the evidence of the plaintiff and Mr. O'Sullivan that all the lights on the defendant's lorry were switched on at the material time. That key finding of fact is one that was clearly open on the evidence and cannot be disturbed by this court on well settled *Hay v O'Grady* principles. There was a straight conflict of evidence which was resolved by the judge for reasons he gave.

22. The court also rejected the defendant's evidence that the cab of his lorry at all times was on the correct side of the road. The judge expressed himself satisfied that the defendant's lorry was partially on the incorrect side of the road and was moving from there onto its correct side when the collision occurred.

23. Significantly however, some aspects of the plaintiff's evidence were rejected by the court. His evidence that the collision did not occur on the defendant's side of the road was rejected, and indeed could not conceivably have been accepted in the light of the incontrovertible photographic evidence of the position of the vehicles at the accident.



24. The judge also considered that neither vehicle was going excessively fast. At the time of the impact, his conclusion was that the defendant's lorry was travelling at about 20 km/h and the plaintiff's car at 75 km/h. However, it must follow from that finding of fact by the trial judge that the plaintiff cannot have braked or slowed down in any way in the interval between first seeing the defendant's lorry and colliding with it. By implication therefore, the trial judge rejected the plaintiff's evidence that he had braked and accepted that of Mr. O'Brien that there was no evidence of braking by the plaintiff.

25. In finding that the accident happened on the plaintiff's incorrect side, the trial judge also implicitly rejected the plaintiff's evidence that he had kept travelling straight when he saw the lorry. His conclusion was that the only rational explanation for the accident was that the plaintiff had been blinded by a wall of light from the defendant's lorry. He said (at para. 42): -

“I accept the evidence of Mr. O'Brien and Mr. Kelly, which indeed was accepted as a proposition by the defendant, that if his full headlights and cab lights were on, an oncoming driver would be dazzled and would become disorientated and could possibly lose control of his vehicle. I am satisfied that this was the most likely explanation for why a car that was not travelling at excessive speed should veer across the road and collide head-on with an oncoming lorry.”

26. In absolving the plaintiff from any liability for the accident, the judge said: -

“46. Taking all of these matters into account, I am satisfied that this accident was caused by the negligence of the defendant in driving partially on the incorrect side of the road and more importantly, in driving with his full headlights and roof lights on at a time when it was unsafe and dangerous to do so, having regard to the presence

of oncoming traffic on the road at that time. Accordingly, liability for this accident must rest with the defendant.

47. As I have already found that the plaintiff was not travelling at an excessive speed at the time of the accident and as I am satisfied from the evidence given by Mr. O'Brien and Mr. Kelly that once the plaintiff was dazzled by the lights coming from the defendant's vehicle, the ensuing consequences, whereby he veered across the road and collided into the defendant's vehicle, was not due to any negligence on the part of the plaintiff. Accordingly, I do not find any contributory negligence against him."

**27.** There is more than ample authority for the proposition that in reaching conclusions on the evidence, a trial judge must engage fully with that evidence in explaining why he or she comes to a particular conclusion.

**28.** In my judgment, there were certain important aspects of the evidence, to which I have referred, with which the trial judge failed to engage before coming to his final view. The evidence here established that the plaintiff could have entirely avoided this accident by simply stopping his vehicle. Mr. Kelly's evidence, which was not in dispute, was that there was a distance of 409 feet between the two vehicles when the plaintiff and defendant first had sight of each other. His evidence was that if the plaintiff had applied his brakes when he first saw the wall of light, his stopping distance on a dry road would have been 99 feet. Mr. Kelly did of course accept that the stopping distance would be longer on a wet road.

**29.** Nonetheless, both Mr. Kelly and Mr. O'Brien agreed that the plaintiff could have stopped in time. Yet there was absolutely no evidence that the plaintiff mitigated his speed in any way by braking or even taking his foot off the accelerator. It is simply not credible to suggest that the explanation for this was being dazzled by lights, particularly when one's

normal reaction to being blinded or dazzled is, at the very least, to slow down. Of course, even the plaintiff himself did not suggest that he was disorientated to the extent that he was unable to brake because his own evidence was that he did in fact brake.

**30.** In my view, unfortunately it seems that the judge did not engage in any way with this evidence in coming to his conclusion that the plaintiff was blameless in respect of the accident. The same considerations apply to the judge's conclusion that the plaintiff was not to be faulted for the fact that he veered completely onto his incorrect side before the impact. One could certainly envisage a situation where a driver blinded by lights wrongly believes that the oncoming vehicle is on his side of the road and makes a split second decision that it can only be avoided by swerving to the right.

**31.** However, according to the plaintiff himself, that is not in fact what happened in this case. The plaintiff explicitly denied that he swerved but rather insisted, in the face of incontrovertible photographic evidence, that he continued on a straight course, which if true would have allowed him to safely pass the defendant's lorry, there being sufficient room to do so. Again, the trial judge failed to engage with or analyse this evidence in any meaningful way and therefore, in my view, his conclusion that the plaintiff was blameless for this accident cannot stand.

**32.** At para. 47, the judge said he was satisfied from the evidence of Mr. O'Brien and Mr. Kelly that once the plaintiff was dazzled by the defendant's lights, the ensuing consequences whereby he veered across the road and collided with the defendant's vehicle were not due to any negligence on his part. Insofar as this can be construed as a reference to the evidence of Mr. Kelly which I have already criticised, if the judge relied on it to found this conclusion, then in my view he was wrong to do so.

**33.** The evidence accepted by the judge meant, as I have explained, that the plaintiff did not apply his brakes at all before the impact. There was no, or no admissible, evidence as to the reasons for this failure on his part. Failing to apply the brakes when confronted with a perceived obstacle on the road cannot be viewed as other than amounting to significant negligence, in my view. This failure was compounded by an unexplained veer onto the incorrect side of the road.

**34.** Each of these failures, and in particular that regarding braking, made a significant contribution to the occurrence of the accident. While I believe the judge was correct to conclude that the primary cause of the accident was the defendant's failure to dip the powerful lights on his lorry, I am of the view that he was in error in failing to make a finding of contributory negligence against the plaintiff. In all the circumstances, I am satisfied that the appropriate level of contribution should be one third.

**(2) *Quantum***

**35.** There is no dispute about the injuries suffered by the plaintiff. The medical reports were agreed and in fact there were only two, one from Mr. Tony Higgins, Consultant Orthopaedic Surgeon, on behalf of the plaintiff and Mr. Kieran Barry, Consultant Orthopaedic Surgeon, on behalf of the defendant. Both consultants examined the plaintiff in 2018, some four years or so after the accident. The plaintiff's most serious injury was a comminuted fracture of his left patella, described by Mr. Higgins as "very comminuted". His other principal injury was an uncomplicated fracture of the right clavicle.

**36.** As noted by the trial judge, on the date of the accident the plaintiff was nearing the end of his apprenticeship as an electrician. He was due to sit an exam the following day but

instead, ended up in Kerry General Hospital for four days where he underwent surgery for his knee fracture which was stabilised with open reduction and internal fixation. The clavicle fracture was treated conservatively by immobilisation in a collar and cuff. Because of ongoing problems with the knee, the plaintiff had further intervention by way of manipulation under anaesthesia on the 2<sup>nd</sup> February, 2015.

**37.** He again underwent surgery for removal of the tension band wiring on the 24<sup>th</sup> April, 2015 and had yet another surgical intervention some two weeks later on the 6<sup>th</sup> May, 2015 comprising an arthroscopy of his left knee. Fortunately, his patellar fracture went on to full union. At four years post-accident, the plaintiff had intermittent right knee pain made worse by walking long distances or any kind of sporting activity. His ability to squat was affected and he had discomfort kneeling on the left knee. He had made a full recovery in respect of the injury to his collarbone with the exception of the occasional ache.

**38.** Mr. Higgins noted that the plaintiff returned to light duties after nine months. He was able to complete his training as an electrician because, as noted by the trial judge, he was apprenticed to his uncle who was able to facilitate his disability.

**39.** Mr. Higgins' clinical findings on examination of the left knee were that it was stable but with the loss of ten degrees of flexion. Mr. Barry on the other hand appears to have found him to have full movement of the knee. Both surgeons however accepted that he was at risk of developing arthritis in his patella in the future. Mr. Higgins believed that the plaintiff would not be able to work as an electrician as this employment would require squatting and kneeling on a regular basis.

**40.** The trial judge accepted the plaintiff's evidence that he had great difficulty in trying to work as an electrician and this was almost impossible for him. He noted that he did two periods working as a barman for some months which he was able to manage with the

exception of prolonged periods of standing. By the time of the trial, the plaintiff's employment position had changed significantly in that he took up farming in earnest in 2016, renting a neighbour's farm. In 2017, he took over the working of his mother's 70 acre farm which he was able to do because the nature of the farming, consisting of dry cattle and sheep, did not involve excessively strenuous work. The judge noted that he brought in a contractor to do the sheep shearing.

41. In relation to the plaintiff's knee, the judge noted that although he had initially 20 sessions of physiotherapy, he was currently on no treatment and taking no medication. The judge had regard to the fact that the plaintiff was a keen footballer, playing with his local GAA club prior to the accident, and had to give up football which was a source of disappointment to him. The plaintiff had also suffered the disappointment of losing his chosen career as an electrician.

### **The Judge's Assessment**

42. The judge's conclusion on quantum was (at para. 61): -

“Taking all of these matters into account, the Court awards the plaintiff the sum of €85,000 for pain and suffering to date and the sum of €70,000 for pain and suffering into the future...”

43. The plaintiff's special damages were agreed in the sum of €5,968 and although this court was not given a breakdown of that figure, having regard to the fact that the plaintiff's car was totally written-off in the accident and he appears to have had fairly substantial medical bills, one assumes that there was little or no component in this sum for any past or future loss of earnings. Counsel for the plaintiff, in opening the case in the High Court, indicated to the trial judge that no claim was being advanced in respect of the differential in

the plaintiff's earning capacity because he could no longer work as an electrician but asked the court to assess damages for loss of opportunity under this heading. However, as stated by the trial judge, the award of €155,000 was for damages for pain and suffering only and no allowance was made for loss of opportunity.

44. In his judgment, Woulfe J. has helpfully set out some of the leading authorities on the proper approach of an appellate court to personal injuries appeals. This court has in recent times considered the appropriate manner of assessing general damages in a number of cases. One such was *Leidig v O'Neill* [2020] IECA 296 where I summarised the matter thus: -

“33. The proper approach to the assessment of general damages for personal injuries was most recently discussed by this court in *McKeown v Crosby* [2020] IECA 242. In brief summary, the award of damages must be proportionate in the context of the cap for general damages for the most serious injuries, set at €500,000 by the Supreme Court in *Morrissey & Anor. v. HSE & Ors.* [2020] IESC 6. It must also be proportionate in the context of awards given by the courts for comparable injuries. It must be fair to the plaintiff and to the defendant. If the Book of Quantum is relevant to the particular injury or injuries that are in issue, the court is obliged to have regard to it as a guide to the ultimate award.

34. Before an appellate court can interfere with an award of damages, it must be satisfied that no reasonable proportion exists between the award and what the appellate court would be inclined to give – see *Rossiter v Dun Laoghaire Rathdown County Council* [2001] 3 IR 578. A court of appeal should only interfere with an award of general damages where it considers that there is an error in the award which is so serious as to amount to an error in law. Where the expert evidence is given by way of agreed reports, as here, the appellate court is generally in as good a position

as the trial judge to assess that evidence, while recognising that the trial judge is undoubtedly in a better position to assess that evidence in the context of its impact on the particular plaintiff concerned.”

45. The concept of proportionality has been repeatedly emphasised by appellate courts as central to the assessment of damages for pain and suffering. Thus in *Nolan v Wirenski* [2016] 1 IR 461, Irvine J., speaking for this court, said: -

“[44] As Denham J. advised in *M.N. v S.M. (Damages)* [2005] IESC 17, [2005] 4 IR 461, damages can only be fair and just if they are proportionate not only to the injuries sustained by that plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. As she stated at para. 44, p. 474, ‘there should be a rational relationship between awards of damages in personal injuries cases’. Thus it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages, and more severe injuries of a level which are clearly distinguishable in terms of *quantum* from those that fall into the other, lesser categories. In this regard, just because a judge describes an injury as significant this does not mean that the damages must be substantial. Any injury to an otherwise healthy individual is significant. However, when it comes to assessing damages, what is important is how significant the injury concerned is when viewed within the whole spectrum of potential injuries to which I have earlier referred.”

46. In the same case, Irvine J. posited a number of matters that the court might appropriately consider in determining where in the spectrum of compensation a particular



injury must fall. She reiterated these subsequently in *Shannon v Sullivan* [2016] IECA 93:

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“43. 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?"

47. These are all proper matters for the court to direct its mind toward in coming to a conclusion as to the proportionality of a given award. At the time of the High Court judgment, the maximum level of damages awarded for pain and suffering was €450,000, being the relevant maximum for the purposes of this appeal rather than the current maximum of €500,000. Thus the trial judge's award here was in excess of one third of the amount that could be awarded for the most serious type of injury such as quadriplegia or severe brain damage. In my view, the award here cannot be viewed as proportionate under that heading.

48. Looking at comparable cases, as was done in *McKeown v Crosby* [2020] IECA 242, can be of assistance in gauging the proportionality of an award while acknowledging that no two cases are exactly alike. But, as Denham J. in *M.N. v S.M. (Damages)* [2005] IESC 17 put it, there should be a "rational relationship" between awards. The importance of consistency and predictability of awards was something this court drew attention to in *McKeown* as being fundamental to fairness in the operation of any system of monetary compensation for personal injuries.

49. That is not to suggest that it is the function of an appellate court to somehow benchmark appropriate awards. As was said in *McKeown* (at para. 34): -

"...Of course it cannot be the function or objective of an appellate court to ensure precise streamlining of awards by tinkering at the margins. This has been expressed in different ways over the years. In *Nolan v Wirenski*, Irvine J. summarised all the relevant authorities on the jurisdiction of the appellate court in relation to awards of damages and it would be idle to repeat that. Suffice it to say that the court must be

satisfied that no reasonable proportion exists between the sum awarded by the trial judge and what the appellate court itself considers appropriate, bearing in mind the factors to which I have already referred. The appellate court is obliged to pay particular respect and deference to the views of the trial judge in his or her assessment of the plaintiff and how the particular injuries have affected him or her. That is of course not to suggest that the appellate court should ignore glaring inconsistencies between the plaintiff's own evidence and that of the medical experts or indeed of other objective factual evidence. While the appellate court of course pays particular regard to the trial judge's view of the plaintiff, the authorities make clear that where the expert evidence is, as here, given by way of agreed reports, this court is in as good a position as the trial court to assess that evidence."

**50.** In the context of comparable cases, *Leidig* was a recent case with some features comparable to the index case. Mr. Leidig was 22 years of age when he suffered a significant fracture of the scaphoid which required reduction and internal fixation and bone grafting from his hip. Surgery was undertaken after a year of unsuccessful conservative measures. He had just completed a degree in engineering and his ambition was to work in the field of motorsport, in which he was keenly interested. Because of the injury, he had to abandon this for a desk job at a local factory. He complained of ongoing pain which was likely to continue to a degree for the future and he had to give up his hobbies of fly fishing and playing the violin which he enjoyed very much. He was at risk of developing arthritis in the wrist.

**51.** The High Court awarded him damages of €115,000 for pain and suffering and €40,000 for loss of opportunity which was held by this court to be so disproportionate as to amount to an error of law. Damages were assessed on appeal at €50,000 for pain and suffering to

date and €15,000 into the future, totalling €65,000. An additional sum of €25,000 was allowed for loss of opportunity.

**52.** I accept that the main injury in this case is somewhat more serious than that in *Leidig*, as Woulfe J. points out, noting that there was a discrete lesser injury, but I cannot accept that an award of damages for pain and suffering alone in the amount of €155,000 can on any view of the matter be regarded as proportionate to *Leidig*. It is important to remember that the relevant comparison here for proportionality purposes lies between the award of €155,000 damages in this case for pain and suffering and the equivalent award in *Leidig* of €65,000 damages for pain and suffering, rather than the total award of €90,000 in the latter case which included an additional and separate sum for loss of opportunity.

**53.** Accordingly, I am satisfied that when viewed in the light both of the maximum award for general damages and of comparable awards, the award made here is so disproportionate as to amount to an error of law. An award at the level determined by the High Court bears no “rational relationship” not only to *Leidig* but other recent awards of this court – see for example *Nolan v Wirenski* (op. cit.), *Payne v Nugent* [2015] IECA 268, *Shannon v Sullivan* (op. cit.), *Martin v Dunnes Stores (Dundalk) Limited* [2016] IECA 85, *McKeown v Crosby* (op. cit.), *Zhang v Farrell* [2021] IECA 62 and *Dunphy v O’Sullivan* [2021] IECA 296.

**54.** The trial judge made no reference to the Book of Quantum but in my view, this is clearly a case in which the injuries come within the scope of defined categories in the Book. Part 5D deals, *inter alia*, with fractures of the patella which are subdivided into minor, moderate and severe and permanent conditions. The “moderate” category is defined as: -

“Fractures to the patella that may have required surgery with either a full recovery expected or minimal low level ongoing pain but not lack of movement to the knee – €37,000 to €77,200”.

**55.** “Severe and permanent conditions” are defined as follows: -

“Complex and multiple fractures to the patella which requires 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 knee or ankle joint and may affect the ability to walk unaided. – €52,800 to €89,100”.

**56.** I think the plaintiff’s injury probably fits into the severe and permanent category given that the fracture was very comminuted and he may develop arthritis in the future. It is clearly however not at the most severe end of this category to the extent that there is no incomplete union nor is the plaintiff’s ability to walk unaided affected. I would however place it at the upper end of this category.

**57.** With regard to the fracture of the plaintiff’s collarbone, this is provided for in Part 4B of the Book of Quantum as follows: -

“The clavicle is known for not healing quickly or accurately. Therefore the level of assessment will depend upon several factors which may include complicated or simple fracture, duration of treatment, complications, and whether there is any ongoing permanent disability. – €22,100 to €44,000.”

**58.** Two categories of the Book of Quantum are relevant here, one, the patellar fracture, at the upper end of the relevant range and the other, the clavicle fracture at the lower. Of course, it is not a matter of simply adding up totals but rather adjusting the overall award to fairly reflect the effect of all the injuries on the plaintiff. Having regard to these factors, in my view the appropriate figures for general damages in this case are €60,000 for pain and suffering to date and €35,000 for pain and suffering into the future, totalling €95,000. This

figure is in my judgment proportionate to both the maximum award and comparable cases. It represents, for example, an uplift of some 45% over the damages awarded in *Leidig*.

**59.** As I noted in *McKeown*, it must be acknowledged that the Book of Quantum has certain limitations, but the court nonetheless has a statutory obligation to have regard to it pursuant to s. 22 of the Civil Liability and Courts Act, 2004. Some of those limitations are highlighted in the judgment of Woulfe J. It is certainly true to say that the Book of Quantum does not cater to the facts of individual cases, and clearly it could never do so.

**60.** There are, for example, certain types of injuries not covered at all such as psychological injuries and scarring. But there are many others that readily fall into defined categories and this is one such case. There will naturally be variations within categories depending not just on the severity of the injury but on factors such as the age and circumstances of the particular plaintiff.

**61.** This is what the range expressed for a particular injury is designed to cater for. As I noted in *McKeown* in relation to the Book of Quantum (at para. 23): -

“Some courts have observed its limitations in that it cannot take account of how a particular injury affects a particular plaintiff – see *McFadden v Weir* [2005] IEHC 47. That is true up to a point but such an approach runs the risk that similar plaintiffs with similar injuries may end up with substantially dissimilar compensation.”

**62.** The objective of achieving consistency and predictability in awards of general damages, now given statutory recognition in s. 90(3)(d) of the Judicial Council Act 2019, would in large measure be frustrated if courts dealing with injuries in defined categories appearing in the Book of Quantum, and now the Guidelines, were free to disregard the

stipulated bands on the basis that the defined injury had affected the particular plaintiff to a greater extent than might be so in other cases.

**63.** As was said in *McKeown*, “Should the person who bears the consequences of an injury with fortitude receive less compensation than one who does not? Such an approach can hardly be viewed as just or fair.” (at para. 23). And further in the same case (at para. 25), “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.”

**64.** It has also been suggested from time to time that the Book of Quantum may not be of assistance in cases involving multiple injuries. It does at least, as Woulfe J. observes, state that it is not appropriate to simply add up values for individual injuries but to make an adjustment within the value range. Many, if not most, personal injury claims involve more than a single injury in the sense of a particular insult to an identified part of the body. The Book of Quantum, and indeed the Personal Injuries Guidelines that have recently replaced it, would be of little value if they were to be viewed as applying only to a single injury.

**65.** The approach to multiple injuries advocated in the introduction to the Guidelines is instructive (at p. 6-7): -

“The assessment of general damages in cases involving multiple injuries gives rise to special difficulty given that in these Guidelines each injury is valued separately. The principal difficulty stems from the fact that there will usually be a temporal overlap in the injuries sustained such that if each injury was to be valued separately the claimant would be overcompensated to the point that the award would be unjust to the defendant and disproportionate when compared with other awards commonly

made for other greater or lesser injuries. Each injury will, of course, cause additional pain and suffering which must be reflected in the award, but the question is how to ensure that the award will be just in light of the overlap of the injuries.

In a case of multiple injuries, the appropriate approach for the trial judge is, where possible, to identify the injury and the bracket of damages within the Guidelines that best resembles the most significant of the claimant's injuries. The trial judge should then value that injury and thereafter uplift the value to ensure that the claimant is fairly and justly compensated for all of the additional pain, discomfort and limitations arising from their lesser injury/injuries. 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.”

**66.** There is however a further issue that requires consideration. Although as I have said, the plaintiff advanced a claim for loss of opportunity in these proceedings, which the judge appears to have considered was well-founded, the judge made no award for such damages. While I appreciate that there is no cross-appeal in this respect by the plaintiff, in fairness to him I consider that this court should assess an appropriate figure under this separate heading.

**67.** The parallels with *Leidig* have already been noted in the context of the injuries in that case and consequent award. There is an even closer similarity with regard to the claim for loss of opportunity in my view and it is therefore appropriate to assess damages under this heading on the same basis, i.e. in the sum of €25,000.



## **Conclusion**

**68.** Accordingly, I assess the plaintiff's total general damages in the sum of €120,000 to which must be added the agreed special damages of €5,968. Applying a one third deduction, this results in a net decree in favour of the plaintiff in the sum of €83,979. Accordingly, I would allow this appeal, set aside the order of the High Court and substitute a decree for that amount.

**69.** Having regard to the outcome of this appeal, the court invites the parties to deliver written submissions on the issue of costs. The defendant will have a period of three weeks to deliver written submissions not exceeding 2,000 words and the plaintiff will have a similar period in which to respond.

**70.** As this judgment is being delivered electronically, Ní Raifeartaigh J. has indicated her agreement with it.