

THE HIGH COURT

**[2023] IEHC 106
Record No. 2020/1440P**

BETWEEN

CHARLENA MCLAUGHLIN

PLAINTIFF

AND

DAVID DEALEY AND HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Mr Justice Cian Ferriter delivered this 7th day of March 2023

Introduction

1. This is my decision on the plaintiff's claims for damages against the second defendant ("the HSE") arising out of an accident in her workplace on 6 September 2018. The accident happened while the plaintiff was attempting to lift a patient on a trolley bed, with the help of another staff member. Liability was ultimately admitted by the HSE on the second day of the hearing and the case thereafter proceeded as an assessment of damages only.
2. I would ordinarily have given my decision on an *ex tempore* basis in respect of what was, ultimately, a routine personal injuries case. However, a legal issue was raised at the close of the evidence to the effect that I should attach less weight to the evidence of the consultant orthopaedic surgeon who was called to give evidence on behalf of the plaintiff on the basis that the plaintiff had been referred to that expert directly by her solicitor and not by her GP. In deference to the argument which I heard on that issue, I reserved my decision so that I could set out my views on that issue with the benefit of proper consideration of the authorities opened and arguments made.
3. The plaintiff had also sued a separate defendant (the first defendant) in respect of injuries to her neck sustained as a result of a road traffic accident on 8 July 2018. That claim as against the first defendant was settled after the opening of the case and the hearing thereafter, including the plaintiff's evidence, was confined to her claims in respect of the

accident against the HSE. It was not suggested that the neck injuries sustained in the road traffic accident caused or contributed to the lower back problems the subject of the plaintiff's claim against the HSE.

The plaintiff and her evidence

4. The plaintiff is a 27-year-old woman who at the time of the accident in question worked as a full-time healthcare assistant in Limerick Regional Hospital. As a result of the accident, she says that she had to give up her job as a healthcare assistant and also to give up on her dream of becoming a nurse. She switched career paths instead and is now in her final year of a degree course in law and human rights in NUIG. Her hope now is to become a human rights advocate.
5. Following the accident, the plaintiff was off work with a back injury for a number of months. She made a decision in late 2018 or early 2019 that she couldn't go on with healthcare or nursing work given its physically demanding nature. She put down law and human rights in NUIG in her CAO application which she believes she put together in late 2018, a few months after the accident. She finished up her job as a healthcare assistant with the HSE in August 2019, commencing her law and human rights degree course in Galway that September.
6. The plaintiff has been working part-time in a wine bar to earn money as she is going through college. This does not involve any heavy lifting although it does involve her being on her feet and delivering drinks and plates of food.
7. The plaintiff has had lower back pain on and off for the past four and a half years since the accident. In the earlier part of this period, she experienced stiffness and soreness in her lower back radiating down to her buttocks and into her legs. Those symptoms abated with time however she continues to experience lower back pain. She says that while she is much improved some four and a half years on from the accident she still has bad days where she needs to manage the back pain which she does using heat packs, over the counter anti-inflammatory and painkiller medication, and special wraps.
8. The plaintiff received physiotherapy from September 2018 to March 2019 which gave her some relief from her symptoms. The plaintiff said she had to give up physio as she could not afford it, needing to save money to put herself through college as she did not have the benefit of a grant for college fees. She said that she would like to go back to physio if

possible. She has focused instead on a programme of home exercises to help with her back pain.

9. The plaintiff gave evidence that she had a minor back problem between March and May 2016 when she experienced a twinge in her back when picking up something from the floor but that that settled after a few months. None of the medical witnesses regarded this previous back episode as material to the present claim.
10. The plaintiff fell down a number of steps in work on 23 September 2022 and went to the A&E. She experienced some muscle damage to the centre back, different from the place in her back to where she suffered the HSE workplace injury and that pain sorted itself out. On the basis of the evidence heard, I don't believe that this previous back episode is material to the present claim.
11. The plaintiff's GP's medical notes were produced in evidence and the court heard from her GP, Dr Peter Flynn. While his notes recorded him as advising the plaintiff to get physio and certifying her for sick leave following her attendance at his practice after her workplace accident, his notes did not record any ongoing complaint of back pain by the plaintiff in her visits to him in the two and a half years following the accident. The plaintiff herself said that she was managing the pain and did not feel the need to bring it to her GP's attention. (Dr Flynn in his evidence accepted the *bona fides* of that position.) This suggests that the plaintiff's pain was objectively on the lower end of the scale and the plaintiff was managing the pain reasonably successfully with physiotherapy, occasional over the counter anti-inflammatories and painkillers, and her home exercise programme. The pain was certainly not at level to cause her to seek ongoing help from her GP or to ask her GP to refer her to a consultant.

The medical evidence

12. The plaintiff's solicitor referred her to Mr John Rice, a consultant orthopaedic surgeon based in Tralee. He prepared three reports relevant to this matter following examinations of and consultations with the plaintiff, being reports of 5 November 2019, 15 September 2021 and 16 March 2022. In the latter report, Mr Rice expressed the opinion that "*at this stage given the long duration of symptoms and lack of progress with rehabilitation I believe it is reasonable to infer that she will continue to experience recurring symptoms... As a result of the injury sustained in 2018*". Mr Rice accepted under cross examination that his diagnosis was largely based on the plaintiff's account of her subjective symptoms although he did on examination detect tenderness in the lower back muscles during his

most recent examination on 16 March 2022. He believes the plaintiff has been consistent and honest with him in her accounts of her symptoms, a view shared by all the medical witnesses and a view with which I agree.

13. Mr Rice arranged for MRI scans of the plaintiff's lower back which showed nothing abnormal. He accepted that this was not a case of any structural or nerve damage. The plaintiff will not need surgery. He did not refer her to a pain specialist. He nonetheless expressed the view that pain had become imprinted into her being in such a way that she was likely to have some back pain on a long-term basis. He believed it will be manageable with minor painkillers such as paracetamol and her home exercise regime. He gave evidence that this was one of those cases where a soft tissue injury had not healed up some 5 years on and, in his view, it was therefore more likely than not that she would continue to experience symptoms potentially for many years into the future.

14. Mr Thomas Burke, a consultant orthopaedic surgeon, was called on behalf of the HSE to give evidence. Mr Burke prepared two medical reports following examination of the plaintiff. The first report was dated 4 December 2020 and the second was dated 14 January 2022. In his second report he expressed the opinion that the soft tissue injuries to the plaintiff's lower back were "gradually resolving spontaneously" and he believed that they would continue to do so with very little likelihood of further complication or the necessity for any surgical or even manipulative intervention. Under cross examination, Mr Burke rowed back from that view. He fairly accepted that he believed that the plaintiff was genuine in reporting her symptoms some four and a half years on. He accepted that the plaintiff may well be one of those exceptional cases where soft tissue injuries do not fully resolve and that the plaintiff may well experience symptoms for many years into the future albeit he believed that she will be able to manage the symptoms effectively as she has been doing to date.

15. Mr Aidan Gleeson was also called to give evidence on behalf of the HSE. He prepared a report dated 9 November 2022 based on an examination of the plaintiff on the day before that date. His report noted the plaintiff as giving a history "of making a substantial recovery from the index accident in around 2019" i.e. some 9 months after the accident. Mr Gleeson accepted, as had Mr Rice and Mr Burke, that he regarded the plaintiff as truthful in her account of her symptoms. However, he expressed the view that the plaintiff's soft tissue issues would completely resolve and did not accept that her ongoing symptoms could be linked to the original accident and injury.

16. It was suggested to Mr Gleeson in cross examination that as a specialist in emergency medicine he was not as qualified as a consultant orthopaedic surgeon to opine on the question of the likely impact (past, present and future) of the plaintiff's soft tissue back injury. Mr Gleeson answered that contention by saying that he had treated a very large number of soft tissue injuries in his 34 years in practice and I approached my evaluation of Mr Gleeson's evidence on the basis that he was appropriately qualified to give it.
17. It was also suggested to Mr Gleeson that he was in effect a "hired gun" for defendants who downplayed the significance of soft tissue injury impacts on plaintiffs and who was not prepared to accept that soft tissue injuries can in some cases have longer-term impact. I accept Mr Gleeson's evidence, in answer to this charge, that he strove to give his evidence to the court in accordance with his duties to the court and I do not believe that he was giving other than his genuinely held views in this case, albeit views robustly held and expressed by him.
18. Mr Gleeson said, as had Mr Rice and Mr Burke, that he regarded the plaintiff as truthful in her account of her symptoms. However, Mr Gleeson expressed the view that, in his experience, where people have suffered soft tissue injuries to their backs, absent structural damage such as degeneration to discs, the soft tissue injuries (which are ultimately in his view simply muscle injuries) invariably resolve and that insofar as people complain thereafter of intermittent back pain, this is usually back pain stemming from normal day-to-day mechanical back issues that cannot be related to the original injury.

Weight to be attached to plaintiff's expert evidence

19. Having summarised the expert medical evidence, it is necessary to turn now to an issue of principle sought to be raised by counsel for the HSE at the close of the evidence.

HSE's case re weight to be attached to the plaintiff expert's evidence

20. Counsel for the HSE made a submission at the close of the evidence to the effect that the court should place less weight on the evidence of Mr Rice because Mr Rice had been engaged as a medico-legal expert directly by the plaintiff's solicitor and had not been the subject of a referral from the plaintiff's treating GP. A number of recent authorities were opened to the court in support of this argument. The submission was robustly opposed by counsel for the plaintiff who contended that no allegation of lack of independence or objectivity had even been put to Mr Rice, let alone substantiated. It was submitted that

Mr Rice's evidence was entitled to no less weight simply because he had been engaged directly by the plaintiff's solicitor.

21. I think it is useful to consider the arguments advanced in the context of the established framework of legal principles that apply to expert witnesses and the evaluation of their evidence.

Over-riding duty of expert: Independence/Objectivity

22. The authorities repeatedly emphasise the requirement of objectivity on the part of experts. This is reflected in the terms of Order 39, rule 57(1), which provides that: "*It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.*"
23. The requirement of objectivity in an expert witness has been commented on in many decisions and is the subject of detailed discussion by both Noonan J. and Collins J. in their judgments in the recent Court of Appeal case of *Duffy v McGee* [2022] IECA 254 ("*Duffy*"). There, Noonan J. quoted with approval from the "classic statement of the duties of experts" found in the judgment of Cresswell J. in *National Justice Compania Naviera S.A v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyds Rep 68 at 81. The first part of that statement is as follows:

"The duties and responsibilities of expert witnesses in civil cases includes the following:

1. *Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation...*
2. *An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. ... An expert witness should never assume the role of advocate."*

24. Noonan J. in *Duffy* observed that “*it is unfortunately commonplace for experts to succumb to the natural tendency to put the interests of their own clients first, unconsciously or otherwise*” (at para. 81). He further deprecated the “hired gun syndrome” whereby litigants shop around for an expert opinion until they find one favourable to their case and explained how the courts have striven to tackle this by the development of principles to be applied when considering the duties of experts (para. 85).

25. The importance of objectivity also animates the observation of Irvine J. (as she then was) in a passage from her judgment in *Fogarty v Cox* [2017] IECA 309 which was relied upon by counsel for the HSE in support of his argument. There, Irvine J. noted (at para. 43):

“Neither was it for the High Court judge to justify his acceptance of the evidence of Dr. Sean McCarthy, even if it was [the plaintiff’s] solicitor who had made the referral. Dr. McCarthy was subjected to intense cross-examination in the course of the trial. It is to be inferred from the fact that the trial judge accepted his evidence on causation, that he considered the circumstances in which Dr. McCarthy became [the plaintiff’s] treating doctor immaterial to his conclusion. Nonetheless, I would caution against a practice whereby any solicitor would repeatedly refer clients who have personal injury claims to the same doctor who would then take over the management of their care with a view to later coming to court to give evidence on their behalf. Those are circumstances likely to place the doctor in a conflict of interest situation and are likely to expose them to a risk of being considered less than fully independent when giving their evidence.”

26. It will be noted that the fact that the medical witness there had been the subject of a direct referral by the plaintiff’s solicitor was not ultimately regarded as material by the trial judge in his assessment of that witness’s evidence.

27. I should make clear that no evidence was presented to me that the practice referred to by Irvine J. applied in relation to Mr Rice in general, to this case in particular or, indeed, to the plaintiff’s solicitor. If a challenge is to be mounted to the independence of an expert, the necessary ground-work for such a challenge needs to be laid in cross-examination (as was done by counsel for the plaintiff in cross-examination of Mr Gleeson, as noted earlier). No challenge was made to Mr Rice’s objectivity or independence in cross-examination in this case and I had no reason to doubt his independence or objectivity. I believe that he gave his evidence fairly, objectively and in accordance with his duties to the court.

Expert Opinion properly grounded in fact

28. The next important requirement of an expert witness is that his or her opinion should be based on relevant, accurate and complete information. As Cresswell J. put it in the next section of his statement in *The Ikarian Reefer*:
- "3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court."
29. As noted by Noonan J. in *Duffy* (at para. 91) "the overriding duty of the expert is owed to the court and includes the duty to provide an objective opinion. Objectivity by definition requires that one has regard to both sides of the case. A central component of the duty of the expert is to ascertain all relevant facts whether they support the client's case or not."

Weight

30. Having considered the critical requirements of objectivity and the need to have regard to all relevant information, it is worth briefly considering the question of the proper approach to the weight to be attached by the court to the evidence of an expert witness.
31. The question of the weight to be attached to an expert's evidence has been the subject of discussion in numerous cases, including most recently in *Duffy*. The principles applicable to the question of the weight to be attached to an expert's evidence are helpfully summarised by McGrath *Evidence* (third edn, 2020) at para. 6-134 as follows:

"The weight to be attached to the evidence of a particular expert witness will depend on a number of factors including the qualifications and experience of the expert, his or her degree of expertise, the extent to which the particular area of expertise is recognised by the courts, whether the views or methodology of the expert accord with those generally accepted in that field of expertise, the extent to which the facts upon which the opinion of the expert is based have been proved in evidence, the extent of the expert's first hand knowledge of the facts upon which he or she has based his or her expert opinion, the nature and extent of the investigations carried out by the expert, the extent to which the expert has relied on information provided by the party who has engaged him or her or has sought to verify that information from other sources, and the extent to which the expert has applied his or her expertise in a critical manner to the information provided by the engaging party."

Conclusion as to general principles

32. Ultimately, as appears from the principles summarised above, it is a matter for the court to evaluate the cogency of the evidence given by any medical expert witness and any question-marks over the weight of that evidence which may arise from the quality of the information on which the expert's opinion is based, the objectivity of the witness and the quality of the analysis contained in the opinion itself. All of these matters are the routine stuff of cross examination of medical witnesses called on either side of personal injuries litigation, as they were in this case.

The HSE's arguments

33. The real focus of the HSE's arguments appeared directed not at Mr Rice's objectivity but at the adequacy of the information he was operating from, in particular, the fact that Mr Rice had not seen the plaintiff's GP records before examining the plaintiff.
34. Counsel for the HSE drew my attention to a number of authorities in support of his argument, including the decision of Barr J. in *Harty v Nestor* [2022] IEHC 108. In that case, Barr J. expressed a concern that the only medical witness who was called to give evidence on behalf of the plaintiff at the trial was a doctor who had been retained directly by the plaintiff's solicitor. He noted (at para. 25) that "*the practice of solicitors referring their clients directly to a consultant for the purpose of drawing up medicolegal reports has been disapproved of a number of decisions, see Fogarty v Cox* [2017] IECA 309 (para. 43) [already referred to above]; *Dardis v Poplovka (No 1)* [2017] IEHC 149 (paras. 156 & 157) and *O'Connell v Martin* [2019] IEHC 571 (paras. 41 et seq)."
35. Barr J. noted how the disadvantage of proceeding with the evidence of a reporting doctor, rather than a treating doctor, was evident in that case as the medical witness called to give evidence on behalf of the plaintiff had been told, incorrectly, by the plaintiff that the plaintiff had suffered no previous neck injury when in fact he had suffered such an injury. The medical witness had neither a referral letter from the plaintiff's GP nor sight of the plaintiff GP medical records. Barr J. concluded, in the circumstances, that the medical witness's evidence, "*while given bona fide, was based on incorrect information as to the plaintiff's premonitory condition*" (para. 26).
36. *Harty v Nestor* is a good example of an expert witness not being in a position to properly assist the court because she was not armed with all the relevant information necessary to give an informed opinion, one of the key requirements of reliable expert evidence.
37. In the earlier case of *Dardis v Poplovka (No. 1)* [2017] IEHC 149 ("*Dardis*"), Barr J. expressed the view that it was inappropriate for solicitors to refer clients directly for specialist examination on the basis that the GP is better placed to refer clients to a specialist as, in that scenario, the consultant will become a treating doctor and "*as a treating doctor, he will also liaise with the plaintiff's GP and keep them updated as to the progress of treatment. In this way, there is continuity and communication between the various medical professionals, who are treating the plaintiff at any given time*" (para. 157). On the facts of that case, as the plaintiff had been referred to a number of

specialists directly by his solicitor, the plaintiff's GP had been unaware as to what treatment was recommended by them (para. 158). *Dardis* is accordingly another case that highlights the importance of proper exchange of information between treating doctors and medical experts retained by solicitors.

38. I do not think that these cases establish (or seek to establish) a legal principle that it is not open to the plaintiff to engage a medical expert, separate from the plaintiff's treating medics, to provide an opinion for use in litigation or that such a course of action is legally impermissible.

39. Counsel for the HSE also made a brief reference to *dicta* of Twomey J. in *Cahill v Forristal and O'Riordan v Forristal* [2022] IEHC 705. In that case, Twomey J., drawing from the comments of Barr J. in *Dardis* as to the inappropriateness of a solicitor directly engaging a medical specialist, stated that "*a solicitor should not suggest to a plaintiff that he can refer her to a consultant, or range of consultants, chosen for legal reasons, to support the claim for damages. This is because there is no medical basis for such referrals*" (at para. 43). In my view, this goes too far. In order to explain why, it is necessary to have regard to the broader context.

40. Plaintiffs who have suffered personal injuries (often in life-transforming ways) through no fault of their own and as result of the actionable wrongdoing of another party are perfectly entitled to bring a claim for damages for such injuries before the courts. A plaintiff is entitled, subject to the rules of court and the legal principles applicable to expert witnesses, to engage and call an independent medical expert in personal injuries litigation just as a plaintiff is entitled to call an independent expert witness in other forms of civil litigation. A solicitor is entitled in accordance with their duties to their client to advise a plaintiff to engage the services of a medical expert. A solicitor with experience in personal injuries litigation will typically be in a position to recommend suitably qualified and experienced medical experts who may be able to assist in the litigation. A solicitor acting for a plaintiff in a personal injuries case does not have to be a medical expert in order to responsibly advise the plaintiff to engage an appropriate specialist medical expert to assist in advancing his or her claims in litigation, just as a solicitor does not have to be an engineer in order to responsibly advise the retention of an engineering expert.

41. In advancing a personal injuries claim, a plaintiff is entitled to call evidence, subject to the rules of court and the legal principles applicable to expert witnesses, from independent medical expert witnesses. Those witnesses may be the subject of a referral from the GP particularly if they are treating specialists. There is no provision in Irish law

or court rules which says that the plaintiff in a personal injuries action may only call a treating doctor with whom they have an ongoing relationship. There is nothing in principle prohibiting an independent medical expert being called on behalf of a plaintiff (subject to the requirement in Order 39 rule 58(1) that such expert evidence is reasonably required to enable the court determine the issues). What is important is that any independently retained expert is properly informed as to the plaintiff's relevant medical history, has had appropriate opportunity to examine the plaintiff and provides his or her expert opinion to the court objectively and in accordance with their overriding duty to the court. A medical expert who is ignorant of material aspects of a plaintiff's medical and treatment history is not going to be in a position to give meaningful assistance to the court (and through such assistance, to the plaintiff's case). A solicitor who does not strive to ensure that any expert engaged by them complies with the requirements the law imposes on expert witnesses (medical or otherwise) will not be doing their best by their client. That applies to solicitors on both sides of personal injuries litigation.

42. My attention was drawn to a Law Society document dated November 2008 entitled "Medico Legal recommendations" which contains a "protocol for direct referral to consultants by solicitors".
43. This protocol - properly - notes that *"a solicitor has a professional duty to his client and to the court hearing the client's case, to fully present every aspect of the plaintiff's case. This is to ensure that the court is fully aware of all of the relevant details of all personal injuries suffered by the client which are the subject matter of a claim and what effect these injuries have had on him to date and into the future. This information is crucial in order for the court to do justice between the parties."*
44. The protocol, having set out (correctly) that *"a medical witness is an expert witness who gives evidence to assist the court in determining the issues in dispute between the parties"* then notes that *"there will be occasions when the client's treating doctor (who is often a general practitioner) will not have the expertise of a specialist and will not, by reason of that, be in a position to provide expert specialist evidence to the court."* This latter statement reflects an obvious but important reality of personal injuries litigation. As a broad rule, in more serious cases, and subject to the nature of the injuries involved, and the rules governing the tendering of expert evidence, a court is more likely to get expert assistance from a specialist rather than a general medical practitioner.
45. The protocol then recommends that where an expert medical specialist is being retained by the solicitor on the client's instructions that *"where the client who has not already been*

referred to a specialist with the relevant expertise continues to complain of symptoms and sequelae from his injuries, it is in order for a solicitor, having regard to the professional duties already referred to, to advise his client to request his GP to refer to a consultant who specialises in the relevant area or areas". The protocol further notes that if the GP is unwilling to make such a referral, the solicitor should write to the GP requesting the GP to refer the client to an appropriate specialist and requesting a response from the GP confirming patient referral within 21 days and advising the GP that if such cooperation is not received within 21 days that the solicitor intends writing directly to the appropriate consultant. The protocol concludes by noting that *"in the event that the GP refuses to confirm referral to a specialist within 21 days, that the solicitor may write directly to an appropriate consultant requesting an appointment."*

46. These recommendations do not, of course, have legal status. However, they correctly proceed on the basis that there is nothing inappropriate *per se* in a solicitor acting for a plaintiff advising his or her client to obtain the opinion of a medical expert in order to allow the plaintiff's case be best advanced at trial. This is all the more so where it is almost inevitable that a defendant (very often a better resourced party) will seek to retain expert medical opinion on its side in the event of there being any dispute as to the injury type or severity.
47. The recommendations also understandably envisage that a referral to a specialist be done through the client's GP in the first instance, while accepting that this is not a hard rule. One can envisage various situations where it may not be practicable for the plaintiff's solicitor to go through the plaintiff's GP before seeking a specialist medical legal opinion: the GP may not have been involved in treating the relevant injuries; the plaintiff may not be happy with their GP's handling of the relevant injuries; the GP may not be in a position to assist in a timely fashion due to pressure of work; the plaintiff and his or her solicitor may have to meet pressing deadlines (e.g. in respect of a PIAB application) which may render it impractical to go to the plaintiff's GP before retaining a medical specialist to give an opinion.
48. In conclusion, in light of the duties a plaintiff's solicitor owes to his or her client, such a solicitor cannot be faulted for engaging a medical expert witness directly in an appropriate case. The critical obligation is to ensure that such a medical expert witness is properly briefed with all relevant information and past medical history and that the medical expert witness prepares his or her opinion thereafter in accordance with his or her overriding duties to the court. A failure to comply with such obligations will inevitably be exposed in cross-examination and will most likely result in reduced – and, depending on the level of non-compliance, potentially very reduced – weight being attached to that expert's evidence.

49. It should also be pointed out that the defendant in the normal course is equally entitled to have the plaintiff examined by medical experts of their choice, to have access to relevant plaintiff medical records (including GP records) and (subject to compliance with court rules on same) to call expert evidence at trial in support of their defence, with such experts being subject to the same overriding duties to the court and to the same principles as to the evaluation of their evidence as those which apply to any expert witness called on behalf of the plaintiff.

Application of the applicable principles to the case here

50. In cross-examination of Mr Rice, counsel for the HSE put to him that he did not have access to the plaintiff's GP records which would have shown that the plaintiff had not gone to her GP complaining of back pain other than on one occasion a number of days after the workplace accident. Mr Rice addressed these matters by saying that he had elicited the necessary information directly from the plaintiff and that he found her credible. He had also conducted his own examinations of the plaintiff and sent her for appropriate MRI scans. It was not suggested to Mr Rice that he had overlooked any material prior medical history or that the plaintiff had misled him in any way about her relevant prior medical history.
51. As already noted, it was not suggested to Mr Rice in cross-examination that his independence was compromised as a result of him being retained directly by the plaintiff's solicitor or that he was effectively a "hired gun" engaged to bolster the plaintiff's case in breach of his duties to the court.
52. Having carefully assessed Mr Rice's direct evidence and his evidence in cross-examination, I accept Mr Rice to have been fair and independent in his evidence and to have given his evidence consistent with his duties to the court. It is evidence to which I attach all appropriate weight.
53. Notably, Mr Burke, who was called on behalf of the defendant, ultimately in substance adopted the same view as Mr Rice in relation to the likelihood of the plaintiff having some ongoing back pain into the future resulting from the original injury. He equally, it appears, did not have access to the plaintiff's GP records although they had been discovered by the

plaintiff. He equally accepted the plaintiff as being genuine in respect of her injuries and was able to elicit all relevant prior medical history from her.

54. While it might have been preferable for Mr Rice to have been furnished with the plaintiff's GP records, as it happened, the plaintiff accurately conveyed any relevant past medical history to Mr Rice and Mr Rice was not accordingly hindered in arriving at an objective view of her injuries in the absence of such records. I would also note that neither of the defendants' expert medical witnesses were furnished with the plaintiff's GP records either, notwithstanding that they had been discovered by the plaintiff. Again, on the facts here, this did not have a material impact on their ability to provide their expert opinion given that the plaintiff also furnished them with an accurate account of her relevant past medical history. All three expert witnesses were agreed as to the credibility and reliability of the plaintiff's account of her injuries and symptoms arising from them.

Conclusion on expert medical evidence

55. I am left with the situation that all of the independent medical witnesses who met with and examined the plaintiff regarded her as being credible in respect of her account of her symptoms and the fact that she continues to intermittently suffer back pain a number of years on from the accident. Mr Gleeson was alone amongst the three experts in his view that any ongoing symptoms could not be linked to the original accident and injury. Neither Mr Rice nor Mr Burke shared that view and both, as experienced consultant orthopaedic specialists, accepted that the plaintiff appeared to be in the exceptional category of case where a soft tissue injury continued to be problematic many years after the original accident and both were of the view that it was likely that back pain resulting from that injury would continue to recur.
56. I am ultimately more persuaded, on balance, by the views of Mr Rice and Mr Burke than those of Mr Gleeson, particularly in circumstances where Mr Burke and Mr Rice each examined the plaintiff on more than one occasion, and where each identified symptoms of tenderness in the lower back pain area on examination in recent times consistent with a continuation of the pain symptoms resulting from the original injury. On the facts of this case, I am not persuaded by Mr Gleeson's view that any ongoing back pain is not linked to the plaintiff's original back injury sustained during the course of her workplace accident. The evidence points firmly to the contrary.

“Loss of opportunity” claim

57. In the presentation of the plaintiff’s case, particular emphasis was placed on the fact that the plaintiff had been deprived of the loss of opportunity of pursuing her lifelong goal of becoming a career nurse. It was said that this should be reflected appropriately in any award of damages.
58. While I accept that, even in the absence of actuarial evidence that the loss of opportunity of pursuing a particular career has resulted in a likely financial loss to the plaintiff, such a factor might be relevant to the overall assessment of general damages as effectively being an aspect of the loss of amenity or impact on overall enjoyment of life on the part of the plaintiff, I do not believe it is a particularly strong factor on the facts of this case. I say this for a number of reasons.
59. Firstly, the evidence demonstrates that the plaintiff chose to opt for law and human rights over nursing only a few months after the accident at a time when she was not possessed of any medical opinion that she would never in the future be capable of working as a nurse. While I accept that her accident was a factor in her decision to pursue law and human rights over nursing, this was not a situation where that decision was based on or guided by medical evidence that she would be unlikely to be able to work as a nurse in the future owing to long-term injuries from this accident.
60. Secondly, the plaintiff commendably explained that the reason she wanted to pursue nursing was that she had a passion for helping others. This is a passion which, in my view, she has every opportunity of giving effect to in her newly chosen career path of law and human rights and, in particular, her desire to become a human rights advocate.
61. Thirdly, I cannot overlook the fact that there was no evidence before me that the plaintiff was likely to earn any less in the long term as a lawyer or human rights advocate than as a nurse. Accordingly, this is not a situation where, even if a compelling link had been established between the injury sustained by her and the need to shift career, that she is likely to have lost out financially as a result.
62. Accordingly, while I take into account the fact that the plaintiff subsequent to the accident decided not to go down the nursing career path, I do not believe that it is a factor that weighs particularly strongly in assessing damages. The plaintiff has commendably got on

with her life and has shown herself more than capable of dealing with the upset caused by not being able to pursue her preferred career path.

Damages for past pain and suffering

63. I accept the plaintiff's evidence as to the nature of the injuries sustained to her lower back and the symptoms she has experienced in the past four and a half years. She has commendably sought to manage those symptoms at home with appropriate exercises and recourse to over-the-counter anti-inflammatories and painkiller medication. She has been able to do part-time work and continue her course of studies. There has been no structural or nerve damage and her symptoms have been confined to those resulting from soft tissue injury to her lower back. There has been no need for recourse to specialist pain management.

64. The plaintiff has made good progress in the management of her symptoms, particularly following physiotherapy, and as a result the symptoms have lessened over time. She nonetheless still has intermittent lower back pain some four and a half years after the accident which is moderately debilitating.

65. In my view, in light of all the circumstances, having regard to the fact that the plaintiff has suffered a minor to moderate back injury which has improved over the course of the last 4 and a half years, but which has nonetheless persisted for that length of time, an appropriate award of damages for general pain and suffering to date is a sum of €35,000.

Damages for future pain and suffering

66. In my view, the plaintiff is genuine in her evidence to the effect that, while substantially improved, she continues to intermittently have some backpain symptoms which she manages with over-the-counter medication and home exercises. Objectively, the present symptoms are in the mild category. It is common case that she will not require any surgical intervention or other specialist treatment in the future. Nonetheless, having regard to the evidence of Mr Rice and Mr Burke, in my view there is a likelihood that the plaintiff will have to deal with ongoing back pain (albeit at an intermittent and manageable level) for a number of years, and potentially a good number of years, into the future. This is not an attractive situation for 27-year-old woman to have to face. It results directly from the accident the subject of the claim.

67. In all the circumstances, doing the best I can in light of the medical evidence which I have heard, and bearing in mind the inherent uncertainties as to the likely future course of the plaintiff's injury, I believe that an appropriate figure of damages to compensate for pain and suffering into the future is €22,500.

Special Damages

68. Special damages are agreed at €2,772.

Total Award

69. I will accordingly make a total award of damages in favour of the plaintiff against the HSE in the sum of €60,272.