

THE HIGH COURT

[2024] IEHC 703

[Record No. 2018/10980P]

BETWEEN

MARY DALY

PLAINTIFF

AND

RYANS INVESTMENTS LIMITED T/A HERTZ

DEFENDANT

**JUDGMENT of Mr Justice Barr delivered electronically on the 13th day of
December 2024.**

Introduction.

1. This action arises out of a road traffic accident which occurred on 16 April 2016, when the defendant's vehicle collided into the passenger side of the plaintiff's vehicle as both vehicles were leaving a roundabout. The defendant's vehicle was being driven by an American tourist at the time of the accident.
2. The impact between the vehicles was reasonably severe, insofar as there was just over €4,000 worth of damage to the plaintiff's car.
3. The defendant has admitted liability for causation of the accident. There is no plea of contributory negligence pursued against the plaintiff. The central issue in the case concerns causation of an injury to the plaintiff's right shoulder.

4. It is the plaintiff's case that she injured her right shoulder in the accident. She states that she became aware of severe pain in her right shoulder within a few days after the accident. She states that she reported this to her GP.

5. It is common case that the injury to the plaintiff's right shoulder did not respond to injection treatment, a number of injections having been administered thereto by the plaintiff's GP and by a pain specialist, and by an orthopaedic surgeon. It is accepted that due to her ongoing symptoms, she was required to have surgery in the form of an arthroscopic subacromial decompression on 06 October 2022. This has given her significant beneficial results, although she continues to complain of some pain in her right shoulder.

6. The defendant's case is that the findings on the MRI scan of the plaintiff's right shoulder, which was carried out on 17 February 2017, which revealed significant supraspinatus tendinosis with a partial tear, together with a local bursitis, and which ultimately required the operative treatment, was not caused by the road traffic accident the subject matter of these proceedings. This is based on the submission that there was no mention in the plaintiff's medical records of any reference to any right shoulder symptoms until ten months post-accident. Even then, it was not thought to have been caused by the RTA, as there was no mention of that in either the referral letter from the GP for the MRI, or in the radiological report following the MRI.

7. Thus, the central issue in the case is the causation of the plaintiff's injury to her right shoulder.

The Evidence.

8. The plaintiff is a 51 year old homemaker, who has two adult daughters. She also has a foster son. On the day of the accident, she had travelled to Limerick with her

mother and her foster son, for the purpose of bringing her foster son to a medical appointment. Having completed their business in Limerick, they were returning to her home in Bruff County Limerick when the accident occurred. The plaintiff had proceeded through a roundabout and had just commenced travelling down the main Tipperary Road, when she was struck from the left side by the defendant's vehicle.

9. The plaintiff stated that the accident itself was quite shocking, as there was extensive damage to the passenger side of her vehicle. In particular, her mother, who was 80 years of age at the time, was extremely shocked and upset by the accident. She was screaming immediately after the impact. The plaintiff stated that she was very worried for her mother.

10. Some two days after the accident, the plaintiff attended with her GP and brought her mother with her. She stated that the primary purpose of the visit was to have her mother examined by the doctors, as she had been very unwell and upset since the accident. The plaintiff stated that on that occasion she mentioned to her GP that she had pain in her right shoulder, which had been caused by the accident. The plaintiff stated that her GP asked her did she have pain medication at home, to which she replied that she did, and her GP then told her to continue taking that medication and to see how she got on.

11. The reference to having pain medication referred to a serious accident which had occurred to the plaintiff on 07 November 2001, when she had slipped on the floor of the factory in which she was working at the time. As a result of that fall the plaintiff suffered a severe injury to her lower back in the area of her coccyx. She also developed PTSD after that accident. The plaintiff had injection treatment and manipulation of her coccyx in 2003. When that did not produce lasting beneficial results, her tailbone was surgically removed in 2004. Although she had got substantial improvement following

that operation, she continued to experience bouts of severe pain in her lower back on an intermittent basis, for which she was prescribed relatively strong painkilling medication. The plaintiff confirmed that she had brought proceedings in relation to the injury sustained in that accident, for which she had received compensation of €104,000.

12. The plaintiff confirmed that she had also had two other accidents prior to the accident the subject matter of these proceedings. In 2003, she had been involved in an RTA. She had brought proceedings in relation to that accident, but had not been successful. In 2015, she had suffered an injury to her right arm and right wrist, when a shelf in a B&Q shop fell on her. She brought proceedings in relation to those injuries and recovered compensation in the sum of €25,000. The plaintiff accepted that she was suffering pain in her lower back at the time of the accident in this case. She was not making any claim in the proceedings for aggravation of that pain. The sole injury that she alleged had arisen as a result of the accident in April 2016, was the injury to her right shoulder.

13. The plaintiff stated that she had gone to her GP in July 2016 because she had very restricted arm movements. She stated that she could not sleep due to pain in her right shoulder and arm. Her GP directed that she should continue taking her analgesic medication. She also referred the plaintiff for physiotherapy treatment. The plaintiff stated that she had five or six sessions of physiotherapy, but this did not provide any lasting improvement.

14. The plaintiff stated that in March 2017, due to ongoing pain in her shoulder, a cortisone injection was administered by the GP to her shoulder. This gave relief initially, but it only lasted for two to three days. She was continuing to take the oral medication. At the end of 2017, she had a further injection to the shoulder, which gave better relief. This lasted for three to four weeks, but then the pain and stiffness returned

in the shoulder. The plaintiff stated that she had had an MRI of her right shoulder on 17 February 2017, which demonstrated a partial tear of the supraspinatus tendon, with a subacromial bursitis and supraspinatus tendinosis. The plaintiff stated that during 2017, the pain medication which she was taking, took the edge off her pain, but did not resolve it.

15. In 2018, she was referred by her GP to Professor Dermot O'Farrell, Consultant Orthopaedic Surgeon. He administered a total of four injections to her right shoulder. The plaintiff stated that in all, she had had approximately 9/10 injections to the shoulder. While the injections provided good initial relief, they did not provide any lasting relief from pain.

16. On 06 October 2022, Professor O'Farrell carried out an arthroscopic subacromial decompression of her right shoulder. She stated that the surgery provided very good relief for her in terms of pain. She stated that while she had obtained significant relief from pain as a result of the operation, she still gets occasional twinges of pain, particularly after activities, such as hoovering. She stated that she had not had any problems with her right shoulder prior to the accident.

17. In cross-examination, the plaintiff accepted that she had attended with her GP on a relatively frequent basis prior to the time of this accident, due to the injuries that she had suffered in her previous accidents. The plaintiff accepted that there was reference in the GP notes in 2013, to pain in her right arm. That had been investigated in hospital, as being possibly due to cardiac issues, but they had been ruled out. She accepted that she had had surgery for carpal tunnel syndrome in her right wrist in February 2023, but the surgeon had not related that to the RTA in 2016. The plaintiff accepted that her GP records revealed that she had been a relatively frequent attender with the practice.

18. It was put to the plaintiff that while she had stated that she had attended at her GP practice on 18 April 2016, some two days after the accident, there was no mention of that in their records. The plaintiff stated that her primary purpose in going to the GP practice that day, was to obtain medical help for her mother, who had been particularly distressed since the accident. She said that she just mentioned her right shoulder pain to the GP in passing. The GP just asked whether she had pain medication at home, and on learning that she did, she advised her to continue taking the medication and to see how she got on.

19. It was put to the plaintiff that she had gone to a different GP for the purpose of submitting a report as part of her application to the Personal Injuries Assessment Board. The plaintiff accepted that she had gone to a different GP. She stated that she had been instructed to do so by her solicitor. She accepted that that GP had not been furnished with a copy of the plaintiff's own GP notes and records.

20. It was put to the plaintiff that she had changed her story about the circumstances of the accident, insofar as she had stated in evidence that she had hit her head and right shoulder as a result of the impact, but that had not been mentioned to her second GP, Dr Kerin. The plaintiff stated that she had hit her head in the accident. She had had a headache. She had taken Solpadine and it had resolved quickly.

21. It was put to the plaintiff that she had never told Dr Kerin that she had hit her head, or right shoulder in the accident. She stated that she had told him that information. When it was put to her that that was not noted in his medical report prepared for the purpose of the proceedings, the plaintiff stated that she could not comment on that omission.

22. It was put to the plaintiff that when she had seen her GP on 16 June 2016, there was no mention in the notes of any injury to her right shoulder. The plaintiff accepted

that that was correct, but stated that she had been taking the analgesic medication, as had been directed by her GP. Her GP had told her to take that medication, and to see how she got on.

23. It was put to the plaintiff that there was an entry in the GP notes, that on 13 July 2016, there had been reference in the GP notes to a shoulder injury as follows: *“Says hurt her arm. Shoulder. Doesn’t need all time. Ponstan.”* The plaintiff stated that that was the second time that she had mentioned her shoulder injury to her doctor. She said it was definitely referable to her right shoulder.

24. It was put to the plaintiff that when she was referred for an MRI of her shoulder on 26 July 2016, the referral note from Dr Leslie, clearly referred to the left shoulder. It was put to the plaintiff that the referral note from her GP, under the heading Examination Required indicated an MRI of the left shoulder and went on to state: *“Severe pain in L shoulder and tenderness AC joint. Pain all ROM. No Hx trauma.”* The plaintiff stated that she had not seen these GP notes prior to coming to court. It was put to the plaintiff that her visit to the GP and her complaint of pain in the shoulder at that time, had referred to her left shoulder. The plaintiff stated that she had obtained an MRI on her right shoulder and it had been reported on.

25. It was put to the plaintiff that the GP records revealed that she had attended with her GP practice on 02 August 2016 and again on 06 September 2016 in relation to other matters, but there had been no mention of her right shoulder. The plaintiff accepted that there was no reference to her shoulder in those notes.

26. It was put to the plaintiff that on 13 October 2016, she had attended Shannon Doc complaining of pain in her arms *“For a few days. 3/7 ago. Worse in the left arm”*. It was put to the plaintiff that there was no mention of any right shoulder pain. The plaintiff stated that that was correct. She had not been there for any pain in her right

shoulder. She had been there for a different reason. She stated that she did not mention her right shoulder pain on each occasion that she saw her doctors.

27. It was put to the plaintiff that she had attended University Hospital Limerick and had been detained due to left arm pain. In relation to co-morbidities, the records mentioned sciatica, but there was no mention of any problem with her right shoulder. The plaintiff accepted that that was correct. She said that there was no mention of her right shoulder, because she had been there for left arm pain and possible cardiac problems.

28. It was put to the plaintiff that she had seen Dr Leslie in October 2016, but again there was no mention of her right shoulder in the GP records. The plaintiff accepted that that was correct, but stated that she was taking medication for her right shoulder pain. It was put to the plaintiff that on 11 December 2016, she saw her GP, and the notes recorded, *inter alia*, that there was right arm pain between the elbow and the wrist. However there was no mention of the right shoulder. The plaintiff accepted that that was what was in the notes, but she stated that her GP was aware of the shoulder injury. It was put to the plaintiff that the GP notes for her visit on 12 December 2016 again referred to right arm pain, but there was no reference to the right shoulder. The plaintiff stated that she may have mentioned it to the doctor, but for some reason it was not in his notes.

29. It was put to the plaintiff that the first mention in the GP notes of any problem with her right shoulder in the GP notes, was on 30 January 2017, which recorded “*Exercises shown to stretch subscapularis. Muscle tightness*”. The records revealed that on 09 February 2017, the plaintiff was referred by her GP for an MRI of her right shoulder. The referral letter to the hospital stated “*Painful arc R shoulder. Pain radiating down to elbow. Reduced external rotation and internal rotation*”. It was put

to the plaintiff that there was no reference to any accident or trauma in the referral note from the GP. It was further put to the plaintiff that in the radiology report, which had issued on 20 February 2017, under the heading Clinical Information, it had stated “*No history of trauma*”. The plaintiff stated that she could not recall what she had told the medical personnel at the time of that MRI scan.

30. The report of the MRI carried out on 17 February 2017 of the plaintiff’s right shoulder, stated under the heading Summary “*Significant supraspinatus tendinosis with partial tear. There is local bursitis which may respond to injection.*”

31. It was put to the plaintiff that the first treatment which she received to her right shoulder, was the injection which had been administered thereto by her GP on 22 March 2017, but there was no mention of the injury having been caused by any accident or trauma. The plaintiff accepted that the notes did not refer to these things. It was put to the plaintiff that on 10 October 2017, she had been referred by her GP for physiotherapy treatment, but she had not attended with the physiotherapist. The plaintiff accepted that that was correct.

32. It was put to the plaintiff that the hospital records revealed that on 19 December 2017, she had had an ultrasound guided injection to her right shoulder performed by Dr James Crotty, but there was no mention of any accident or trauma in that record. The plaintiff accepted that that was correct.

33. It was put to the plaintiff that on 22 March 2018, she had been referred by her GP to Professor O’Farrell for possible decompression of the subacromial bursitis in her right shoulder. The referral letter did not refer to trauma, but did enclose a copy of the MRI report, which has specifically stated “*No history trauma*”. The plaintiff accepted that that was correct. It was put to the plaintiff that these documents indicated that her GP was leading the specialist to think that the plaintiff’s injury to her right shoulder had

not been caused by trauma. The plaintiff stated that that could not be assumed; however, she accepted that that was the content of the documents.

34. It was put to the plaintiff that the first reference to the right shoulder injury having been caused by the RTA, was in a record from the musculoskeletal and rheumatology triage service at Nenagh General Hospital and Croom Hospital, run by Ms Mairéad O'Connor, Clinical Specialist Physiotherapist, where it had been stated under history of present condition: "*RTA two years ago. 3/52 later right shoulder pain anterior pec area. GP refer and anti-inflammatories. Area of pain spread. Case pending.*" It was put to the plaintiff that that record had been made after she had commenced her legal proceedings. It was put to her that she had told them that the pain began three weeks after the accident, when she had stated in evidence that the pain had started two days after the accident.

35. The plaintiff accepted that she had received a number of injections from Professor O'Farrell, following her referral to him by her GP. She was asked as to whether she had told him that it was not until March 2017 that she had first received any injection from her GP to the right shoulder. She could not recall if she had told that to Professor O'Farrell.

36. It was put to the plaintiff that Professor O'Farrell had not seen her GP records. She stated that if he had asked for them, he would have been given them. She accepted that he had acted on what she had told him in relation to her shoulder pain. She did not accept that in telling Professor O'Farrell that her shoulder pain had come on within days of the accident, she had not given a full picture of her injury. She was asked as to whether she knew that her medical records would not support her account of her injury; she stated that she was not aware of that, as she had not seen her GP records.

37. The plaintiff stated that she had last seen her GP a month prior to the hearing of the action. She had not told him that she had a case coming up. She accepted that she had told the defendant's specialist, Professor Masterson, that she had stiffness in her shoulder approximately two days after the accident. It was put to the witness that when she was seen by Professor Masterson on 03 February 2022, he had found her to have a reasonably good physical examination. It was put to her that there was not much wrong with her at that time. The plaintiff did not agree with that assertion, as she said that she had had surgery on her shoulder in October 2022.

The Plaintiff's Medical Evidence.

38. Professor Dermot O'Farrell, Consultant Orthopaedic Surgeon, gave evidence on behalf of the plaintiff. He stated that she had been referred to him by her GP in October 2018. She had had an MRI in February 2017, which had revealed tendonitis of the supraspinatus tendon and a subacromial bursitis on the rotator cuff. He stated that he was not aware of the plaintiff's pre-accident medical history. She had only been referred to him in relation to her right shoulder problem. He had been informed by the plaintiff that she had been involved in a road traffic accident in 2016 and that she had injured her right shoulder and neck at that time.

39. Professor O'Farrell stated that the plaintiff had had extensive investigation and treatment of her right shoulder prior to being referred to him. She had had the MRI scan in February 2017; a number of injections had been administered by both her GP and Dr Crotty. She had also been seen by Ms Louise Connelly, a specialist physiotherapist. Professor O'Farrell gave her three or four further injections, which were of a cocktail of anti-inflammatory and local anaesthetic medications. However, these only provided temporary benefit for the plaintiff.

40. On 06 October 2022, he carried out an arthroscopic subacromial decompression of the right shoulder. He stated that this was fairly standard surgical treatment when other modalities of treatment had not been successful. He stated that after the operation, the plaintiff made a reasonable post-operative recovery.

41. Professor O'Farrell stated that he also performed a carpal tunnel release operation on the plaintiff's right wrist in February 2023. However, he formed the opinion that this condition was not related to the plaintiff's road traffic accident.

42. He agreed that in relation to her shoulder injury, if it had hit the car door frame, that can often cause the type of injury that occurred to the plaintiff's right shoulder. He also agreed that the tear to the tendons, was very common, even without any accident or trauma. He stated that if he did an MRI of the general population, at least 50% of them would have a tear, but would not necessarily have any symptoms. An accident could render a pre-existing tear symptomatic. In relation to having a full range of movement of the shoulder, he stated that with this condition it was possible for a plaintiff to have a full range of motion, but they can have a painful arc within the full range, such that they would have no pain either side of the arc. The plaintiff exhibited that on examination. He stated that he was satisfied that surgery was necessary in this case.

43. In cross-examination, Professor O'Farrell accepted that where people had a partial tear of the supraspinatus tendon which had occurred without an accident, it was also possible for them to become symptomatic without trauma. He stated that approximately 75% of his patients would become symptomatic without any trauma occurring.

44. When it was put to the witness that the MRI report on the right shoulder had noted "*No history trauma*", Professor O'Farrell stated that he had not been aware of

that, as he had not had sight of the plaintiff's medical records. He stated that he had got a history of trauma from the patient. He stated that it was possible that the GP may not have elicited that there had been a history of trauma giving rise to the injury. It was put to him that if the GP had known of trauma, it would have been likely that that would have been recorded in the GP notes; Professor O'Farrell accepted that that would be the likely scenario.

45. It was put to the witness that there was no reference in the GP notes to any injury or symptoms in the right shoulder, until late January 2017. He was asked whether it was likely where symptoms had come on in the left shoulder in July 2016, that might have been an indicator that symptoms were likely to arise spontaneously in the right shoulder. Professor O'Farrell stated that that was very common. The witness confirmed that the plaintiff had been referred to him in 2018 without any reference to trauma occurring to the right shoulder.

46. It was put to the witness that in one account that had been given by the plaintiff to the specialist physiotherapist, she had stated that the pain had come on in her right shoulder three weeks after the accident; Professor O'Farrell stated that that can happen; the onset of pain need not necessarily be immediate after an accident. He stated that he had gone by what he had been told by the plaintiff in relation to the onset of pain occurring after the accident. He had first seen the plaintiff a long time after the accident in 2018.

47. He stated that in his experience the plaintiff's GP practice was good at recording things in their notes. He agreed that he had not been told by the plaintiff that she had hit her head in the accident.

48. It was put to the witness that the onset of pain some ten months after the injury would be a very long time for those symptoms to have been caused by the accident.

Professor O'Farrell agreed that it would be a long time. It was put to him that this was all the more unlikely given that the left shoulder had become spontaneously symptomatic in the interim; Professor O'Farrell stated that he had not been aware of any symptoms in her left shoulder. He accepted that ten months was a long time for symptoms to appear, if caused by an accident. He stated that the onset of pain could be related to the degree of tear of the tendon. If it was a small tear, the pain may come on some time later. He stated that it was possible that the tear could have been present prior to the accident and that the accident could have caused it to become symptomatic. A tear in the tendon is not necessarily significant in itself. Many people over the age of 40 years have a tear in the tendons in their shoulders.

49. The witness accepted that he had not been informed by the plaintiff that she had experienced any symptoms in her left shoulder in July 2016. Nor was he aware that Dr Kerin had seen the plaintiff and had furnished a medical report.

50. In re-examination it was put to the witness that the plaintiff had stated that she had not mentioned it to her GP on her first visit, because she had been with her mother, about whom she was very concerned following the accident; Professor O'Farrell accepted that it appeared to have been a shocking accident, having regard to the fact that she had her foster child and elderly mother with her, so it was possible that she may not have mentioned any shoulder injury on that visit to her GP.

51. It was put to the witness that the plaintiff had stated that she had mentioned it in passing to her GP and had been told to continue with the medication that she was already taking for her back; Professor O'Farrell stated that that was reasonable.

The Defendant's Medical Evidence.

52. Evidence was given on behalf of the defendant by Professor Eric Masterson, Consultant Orthopaedic Surgeon, who had seen the plaintiff on two occasions on 18 April 2019 and 03 February 2022.

53. He stated that the plaintiff had told him that she had been involved in a significant road traffic accident and that two days later she had become aware of stiffness in her right shoulder, which had got progressively worse. On 18 April 2019, on physical examination, the plaintiff had a full range of movement of the right shoulder, but had complained of pain on movement. He noted that she had been referred for an MRI of the right shoulder in February 2017, the radiological report thereon had recorded "*No history of trauma*". He stated that that information would probably have come from information given to the radiologist by the GP in the referral letter. The radiologist would not normally speak to the patient who had undergone the MRI.

54. It was his opinion that it was unlikely that the symptoms in the plaintiff's right shoulder had been caused by an accident some ten months prior to the onset of symptoms. The fact that symptoms had emerged in the left shoulder spontaneously, may be indicative of some degenerative process in both shoulders.

55. When seen on 03 February 2022, the plaintiff complained that she would awake regularly at night with pain in the right shoulder. She found it difficult to wash her hair, or do household chores. She found driving for long distances difficult. She was taking medication occasionally. Examination revealed a full range of movement in the right shoulder, although the extremes of movement were apparently uncomfortable. Impingement test was negative. Rotator cuff power was reasonable. In his report following that examination he had given the opinion that the plaintiff had subjective complaints in her right shoulder. Objectively, the shoulder was unremarkable. He had stated that sight of the MRI report would be helpful.

56. It was put to the witness that subsequent to that examination, Professor O'Farrell had performed the decompression operation in October 2022, where he had repaired the partial tear of the supraspinatus tendon. Professor Masterson stated that generally by age 40 years, 20% of the population would have rotator cuff tears, by 80 years, some 80% would have such tears; it was a function of aging. The witness accepted that Professor O'Farrell would only perform surgery if it was indicated as being necessary. It was put to the witness that it was some two years after the accident, that it was first noted in the medical records that the injury had been caused by an accident; Professor Masterson stated that that indicated that the accident was probably of no relevance to the onset of symptoms.

57. In cross-examination, Professor Masterson accepted that it was possible to have a spontaneous onset of pain in one shoulder, and due to pain in that shoulder and increased use of the other shoulder, one could develop pain therein due to the same degenerative changes being present in both shoulders.

58. He stated that he had not seen the MRI report at the time of his examinations and reports. He accepted that the MRI had revealed supraspinatus tendinosis with partial tear of the tendon. He accepted that the MRI had been followed by other modalities of treatment, which was the usual course of treating such an injury. He stated that the clinical details would normally be furnished by the referring doctor when requesting the MRI.

59. The witness accepted that the pain medication which the plaintiff was on in relation to her back complaints, being non-steroidal anti-inflammatories, would affect any inflammation in the body wherever it occurred. Thus, it would not only target the back pain.

60. It was put to the witness that it was entirely possible that the symptoms in her right shoulder had been caused by the accident in 2016, he stated that while that was possible, there were several factors detracted from that contention. These included the following: there had been no immediate discomfort in the right shoulder; presumably if the injury was sufficient to tear a tendon, it would have caused immediate bleeding and pain; the findings on the MRI scan were a common finding in the general population and were more commonly degenerative than traumatic in nature; it would be unusual to have an isolated partial thickness tear of the supraspinatus tendon from the accident as described; and the plaintiff's physical examination was effectively normal, apart from some apparent global discomfort in the shoulder with all movements. Specifically, there was no evidence of impingement. On this basis he remained of the view that the plaintiff's right shoulder symptoms were not caused by the accident. He stated that if a person had damaged their rotator cuff in an RTA, they would be aware of that within a reasonably short period after the accident. It was not possible to say that an accident had caused a particular tear of a tendon in a shoulder. It could be tied to the accident if the symptoms had come on proximate to the accident. He repeated that if the tendon had been torn in the accident, the plaintiff would have known about it fairly quickly.

61. It was put to the witness that when he had seen the plaintiff in February 2022, he had felt that she had subjective complaints of pain, but without any objective findings, yet Professor O'Farrell had deemed it necessary to perform decompression surgery, some eight months later in October 2022; Professor Masterson stated that he had not been told that surgery had been contemplated at that time. He stated that he would not contradict Professor O'Farrell's clinical decision to perform the operation.

Conclusions.

62. In reaching a determination on the central issue of causation in this case, it will be helpful to begin by setting out the facts on which there is no dispute between the parties: first, it is accepted that there was an RTA on 16 April 2016 for which the defendant was responsible; second, it is accepted that the plaintiff had the onset of pain in her left shoulder in July 2016, for which she was referred for an MRI, however, the records indicate that she did not attend for that MRI; it is accepted that the plaintiff was referred by her GP for an MRI of her right shoulder in February 2017; that MRI revealed significant supraspinatus tendinosis with a partial tear in the right shoulder; it is accepted that the plaintiff had a number of injections into her right shoulder, but eventually required an arthroscopic decompression of the right shoulder, which was carried out on 06 October 2022.

63. It is accepted by the medical experts that tears can arise spontaneously in the tendons in the shoulder without any trauma thereto.

64. It appears to be accepted by the parties that that happened with the plaintiff's left shoulder in July 2016, as there is no suggestion that she injured her left shoulder in the RTA in April 2016. The medical experts agreed that the onset of pain in one shoulder, can often give rise to the onset of symptoms in the other shoulder, due to extensive use of that shoulder, given the onset of symptoms in the first shoulder.

65. The first contentious issue on which the court must make a finding is in relation to the adequacy of the records kept by the plaintiff's treating GP practice, which was made up of Dr Lynch and Dr Leslie. The court has had the benefit of a printout of the computer records held by that practice in relation to the plaintiff for the period 01 October 2012 to 19 October 2017, together with ancillary correspondence relating thereto. Having regard to the content of the GP records, I find as a fact that the plaintiff was a frequent attendee at the practice over a long number of years. This was due to the

fact that she had suffered serious injuries prior to the time of this accident and she also had other medical complaints for which she attended with her GP.

66. I find as a fact that the GP practice kept good records. This is supported by the evidence of Professor O'Farrell, who accepted in cross-examination that in his experience the plaintiff's GP practice were diligent in their record keeping.

67. Following from that, I find that had the plaintiff mentioned that she had symptoms in her right shoulder, that that would have been recorded in the GP notes. Furthermore, I find that had she told her GP that she thought that her right shoulder symptoms were referable to the RTA in April 2016, that too would have been recorded in their notes.

68. In the absence of any reference to right shoulder symptoms in the GP notes until 30 January 2017, I find that the plaintiff did not complain to her GP of the onset of symptoms in her right shoulder until that time.

69. The court has already quoted the content of the referral note sent by the plaintiff's GP to Barrington's MRI Centre on 02 February 2017, requesting an MRI of the right shoulder. It is noteworthy that that referral note referred to a painful arc in the right shoulder with pain radiating down to the elbow, with a reduced range of external and internal rotation. There was no mention of any RTA, or trauma in that referral note.

70. I find that on the balance of probabilities the reference in the MRI report dated 20 February 2017, where under the heading "*Clinical Information*", there was recorded "*Painful arc. No history of trauma*"; that on the balance of probabilities that was information that was supplied to the radiologist from the plaintiff's GP, although it did not appear to be in the referral note from the GP practice. I am satisfied that the content of the referral note and the radiological report on the MRI, support the contention that as of February 2017, the plaintiff and her GP, were operating on the assumption that

the symptoms that she had in her right shoulder were not related to the RTA in April 2016.

71. This is supported by the fact that when referring the plaintiff to Professor O'Farrell by letter dated 22 March 2018, the GP did not refer to the symptoms as being trauma related. I find that if the GP had formed the opinion, or even the suspicion, that the plaintiff's symptoms were related to an identifiable source, such as a specific accident, the GP would have mentioned this in the referral letter. That is the type of information that a treating GP would furnish to a consultant when making a referral to the consultant.

72. Having regard to the findings of fact in this case, that the plaintiff did not mention any symptoms in her right shoulder for ten months; that the clinical information recorded in the radiological report of the MRI carried out on the right shoulder recorded *inter alia* "No history of trauma"; and having regard to the fact that the plaintiff had had a spontaneous onset of pain in her left shoulder in July 2016; and having regard to the fact that the first documented association of the plaintiff's right shoulder symptoms with the RTA, appears in the note taken by the physiotherapist, Ms Mairéad O'Connor, on 05 September 2018; I must conclude that on the balance of probabilities the symptoms in the plaintiff's right shoulder were not caused by the RTA on 16 April 2016.

73. This finding is supported by the expert evidence given by both experts. Both accepted that while there could be a delay in the onset of symptoms in a shoulder injury following an RTA, a delay of ten months in such onset, would make it difficult to relate the onset of symptoms to the index event.

74. Even if the accident did not cause the tear to the tendon, it being a pre-existing tear, which is very common in an aging population; and while trauma could render the

pre-existing tear symptomatic, the experts were agreed that the tear, although not caused by the accident, would become symptomatic much sooner than ten months post-accident.

75. In reaching its conclusions herein, the court has had to have regard to the fact that the plaintiff elected not to call either her treating GP, or the GP to whom she was referred by her solicitor for the purpose of preparing a report for submission to PIAB, and on which report the injuries were pleaded in the personal injury summons. It is well established that a court can have regard to the fact that a party chooses not to call a witness who is likely to be in a position to give relevant evidence, where that witness is available to give evidence to the court: see *Doran v Cosgrove* [1999] IESC 74, *H. v St Vincent's Hospital* [2006] IEHC 443; *Dunne v The Coombe Hospital* [2013] IESC 58; *Fyffes v DCC* [2009] 2 IR 714.

76. In *Whelan v AIB* [2014] IESC 3, O'Donnell J (as he then was) delivering the judgment of the court, set out at para. 91 the nature of the inferences that can be drawn by a court where there has been failure on the part of a party to call a relevant witness, whom it is in their power to call at the trial of the action:

“At the outset I should say that I deprecate the fashion of referring to the “drawing of an inference” in the abstract as if it was an end in itself, akin to the deduction or addition of points which might or might not alter the result of a game. The drawing of an inference in this context, as indeed in any other, is an exercise in logic: when one party asserts a given set of affairs, which the identified witnesses available to the other party could be expected to rebut if untrue, then, if the second party does not call those witnesses to give evidence, the court may draw the inference in support of the case made by the first party, that those

witnesses were not called to give such evidence because they would not in fact rebut the case made by the first party. Each case therefore, involves a consideration of the specific inference which the court is invited to draw. The position is well put in two authorities relied on by the bank in this regard. In *McQueen v. Great Western Railway Company* (1874 - 75) L.R. 10 Q.B. 569 Cockburn L.J. said:

'If a prima facie case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie has been established, the omission to call witnesses who might have been called on the part of the defendants amounts to nothing.' (para. 574)

In Wisniewski v. Central Manchester Health Authority [1998] P.I.Q.R. P324, Brooke L.J. set out four applicable principles which were adopted in this jurisdiction in Fyffes:

'(1) In certain circumstances a court may be entitled to draw inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reasons for the witness's absence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified' (p. 340)"

77. In the present case, the plaintiff did not elect to call either of her treating GPs, Dr Lynch or Dr Leslie. She had been attending with their GP practice on a frequent basis for many years prior to the accident. She also attended with them on a frequent basis after the accident. Both of these doctors were in an ideal position to give evidence in relation to the onset of the plaintiff's symptoms in her right shoulder and to furnish

an opinion on whether those symptoms were related to the road traffic accident. It is significant that neither of them was called to give evidence at the trial of the action.

78. More surprisingly, the plaintiff elected not to call the GP to whom she had been referred for the purpose of producing a report for submission to PIAB. It was on the basis of this report that the personal injury summons was drafted. Yet, the plaintiff decided not to call this doctor. The court is entitled to draw the inference that in deciding not to call these doctors, who appear to have been available to the plaintiff, she made a conscious decision not to rely on their evidence. Their omission at the trial, strengthens the evidence given by the defendant's expert, Professor Masterson. It also weakens the plaintiff's contention that she had complained to her treating GPs about her right shoulder, but for some reason they had failed to record this in their notes.

79. Having regard to the findings of fact made by the court in this judgment, and having regard to the inferences that the court is entitled to draw from the failure on the part of the plaintiff to call relevant witnesses, I find as a fact that the injury to the plaintiff's shoulder, in the form of a tear of the supraspinatus tendon and associated findings, was not caused by the RTA on 16 April 2016.

80. As the plaintiff's only pleaded injury following this RTA was the injury to her right shoulder, and as I have found that that injury was not related to the accident the subject matter of these proceedings, and as the special damages aspect of this case, being the car repairs, have been discharged by the defendant's insurers, I must dismiss the plaintiff's case against the defendant.

81. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs.

82. The matter will be listed for mention at 10.30 hours on 17 January 2025 for the purpose of making final orders.