



THE COURT OF APPEAL

Record Number: 2021/21

High Court Record Number: 2017/5579P

**Murray J.
Noonan J.
Haughton J.**

Neutral Citation Number [2022] IECA 177

BETWEEN/

JOANN TWOMEY

PLAINTIFF/RESPONDENT

-AND-

JERAL LIMITED, JEREMY BUCKLEY AND ALICE BUCKLEY

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 16th day of June, 2022

1. This personal injury action proceeded as an assessment of damages in the High Court. The appellants (the defendants) now appeal against part of the award of special damages made by the High Court in respect of loss of earnings. The respondent (the plaintiff) cross-appeals against the deduction in her claim to future loss of earnings made by the trial judge pursuant to *Reddy v Bates* [1983] IR 141.

Relevant facts

2. The facts as they appear from the judgment of the High Court (Meenan J.) delivered on the 29th October, 2020 are largely uncontroversial. The plaintiff was born on the 24th June, 1968 and was 46 when she was involved in an accident on the 27th April, 2015 at the defendants' Centra supermarket in Cork. At the time of the incident she had been employed there for some eight years. Essentially, a heavy steel girder fell from above onto the back of the plaintiff's right leg. This caused a severe laceration some 25 centimetres long to her right calf. When it healed, the plaintiff described it in evidence as looking like a "shark bite".

3. As a result of this injury, the plaintiff claimed to have been suffering from severe and ongoing pain at the site of the laceration, which limit her physical activities and in particular, her ability to work as she had done prior to the accident. This was a matter of controversy between the medical experts on both sides.
4. The plaintiff left school at the age of 18 having completed her Leaving Certificate examination, and since that time, she had been in continuous employment, the sole exception being a one-year period when she attended a secretarial course. She completed many other educational and practical courses to enhance her work skills, the details of which are set out in the High Court judgment. The plaintiff worked in various clerical positions and as a shop assistant continuously up to the time of her accident. Of note, she was employed for some sixteen and a half years at a Quinnsworth (now Tesco Ireland) supermarket as a cashier before moving to the defendant's supermarket. There she attained a position of responsibility and trust, being one of the keyholders of the premises. She was described as a "fantastic absolutely brilliant worker" in evidence by the manager at her then current employment with Boots Ireland.
5. The primary issue in this case is concerned with the plaintiff's post-accident employment history. This was as follows:
 - 31st October, 2015 - The plaintiff resigned from her job with the defendants for various reasons.
 - 22nd November, 2015 to 26th December, 2015 - The plaintiff obtained a short-term contract with Marks and Spencer, essentially over the Christmas period.
 - 25th January, 2016 to 20th June, 2016 - The plaintiff obtained employment with Lidl supermarkets which involved her working 22.5 hours per week. However, she found this work heavy and increasingly difficult to manage, resulting in her leaving after 5 months.
 - 3rd August, 2016 to 25th September, 2016 - The plaintiff obtained a job as a cashier at the Amber Petroleum Service Station but struggled to cope with the physical demands of the job and her contract was not renewed.
 - 11th October, 2016 to 1st October, 2017 - The plaintiff obtained employment with Boots Ireland as a customer assistant, initially working in the Mahon store in Cork for some 22 hours per week. However, from in or about January of 2017, this increased to 37 hours per week for most weeks.
 - 1st October, 2017 to date - The plaintiff transferred to the Boots store in Patrick Street in Cork. This was more convenient for her and from about Christmas 2017, she was working a 37 hour week. However, she found it very difficult to cope with these hours until eventually, in May 2018, she "came to a wall" with pain as she described it and went out sick. From then on, she felt she was no longer able to cope

with full time employment and with her employer's agreement, reduced her hours to 22.5 hours, or 3 days, per week with effect from the 1st July, 2018.

The Evidence before the High Court

6. The plaintiff led medical evidence from three doctors, Dr. Tessa Neville, Consultant Psychiatrist, Dr. Sarah Sheehan, the plaintiff's General Practitioner, and Mr. Sean T. O'Sullivan, Consultant Plastic and Reconstructive Surgeon. The defendants called Mr. Michael O'Shaughnessy, Consultant Plastic and Hand Surgeon and Mr. David Mulcahy, Consultant Orthopaedic Surgeon. Each of those witnesses' reports were made available to the High Court in addition to their oral evidence.
7. The plaintiff's own evidence was that she continued to suffer from severe pain in her leg which left her exhausted and needing to rest her leg after a day's work. She said she had given up working full-time in July 2018 on the advice of Dr. Davitt, another GP practicing with Dr. Sheehan.
8. The evidence of Dr. Sheehan was that the plaintiff consistently complained of pain in her leg and Dr. Sheehan was of the view that the plaintiff pushed herself very hard to work although it was a real struggle to maintain the effort. Dr. Sheehan's direct evidence (Transcript, Day 1 at p. 90) was: -

"... [S]o it's my opinion as a general practitioner and on speaking with Joann and with the physical and psychological impact it's had on her, I do feel that she's just about at her limit with the current hours that she's doing. I think any further increase in her hours will be a big push mentally and physically."
9. Mr. O'Sullivan's evidence was that the plaintiff complained of a shooting type pain in her calf which would be consistent with an injury to one of the underlying cutaneous nerves. He said in his oral evidence that the shooting pain would normally indicate some type of nerve injury or nerve involvement. He felt it was consistent with tethering of the skin graft and the scarring, affecting the underlying tissues.
10. When asked about the plaintiff's progress, if any, since 2016, he said (at Transcript, Day 2 at p. 8): -

"I think from a functional point of view she has made some progress, but it's relatively static. I think she's still have (*sic*) problems – her main issue really is pain aggravated by prolonged standing, aggravated by walking on an uneven surface or walking up or down inclines such as the stairs or a hill. And I think if it hasn't improved at this stage I suspect that that's kind of plateaued at this point in time."
11. The defendants' doctors were of a different view. Mr. O'Shaughnessy did not consider that the plaintiff's pain was caused by nerve damage but was rather more likely to be psychological in origin. He disagreed with Mr. O'Sullivan's evidence in this regard. He said he found no evidence of tethering, as suggested by Mr. O'Sullivan, and disagreed that there was evidence of nerve damage. In cross-examination, it was put to Mr. O'Shaughnessy that, on his suggestion, the defendants had referred the plaintiff for psychiatric assessment

to Professor Dinan, who had provided a report which appears not to have been made available to the court and who did not give evidence. It was put to Mr. O'Shaughnessy that Professor Dinan's report had stated that there was no attempt by the plaintiff to exaggerate her symptoms and his response was (Transcript, Day 3 at p. 11): -

"I agree. I thought her symptoms were genuine because on the basis that when I saw her she was tearful and anxious and clearly distressed. What I would be suggesting is the basis for her complaints lie at a psychological level. I could find no evidence on the basis for them at a physical level."

12. Mr. Mulcahy in his report expressed the view that he would not expect the plaintiff to have any functional limitation from the type of wound she sustained and he could not find any physical reason for her to have ongoing pain. In his oral evidence, he said he could see no reason why the plaintiff could not work as a pharmacy assistant for 37 hours a week.
13. Apart from medical witnesses, the plaintiff called Ms. Patricia Coughlan, Vocational Rehabilitation Consultant, who noted in her report that the plaintiff was struggling with her work demands and would be best advised to seek sedentary employment in the future. Such sedentary employment would be of a lower paid type than her current job. However, the plaintiff was not asked about pursuing such alternative employment in her cross-examination, or what her preferences might be in that regard, nor was it put to her that she should attempt to seek out such employment.
14. Evidence on behalf of the plaintiff was also given by Mr. Nigel Tennant, Consulting Actuary, who provided a report in the usual form dealing with the plaintiff's past and future claimed loss of earnings. Mr. Tennant's report noted that it was predicated on the assumption that, as a result of the plaintiff's injuries, she had to reduce from working 37.5 hours per week to 22.5 hours per week with effect from the 3rd July, 2018. As of the date of his report, the 9th January, 2020, her net past loss of earnings arising in this regard were estimated by him at a little under €12,000.
15. As regards her future loss of earnings, Mr. Tennant calculated this to age 68 as having a capital value of €115,062. Mr. Tennant noted that the future loss had no regard to any contingency deduction along the lines of *Reddy v Bates*. He noted that there were then current government proposals to require employers to make pension contributions on behalf of employees which meant that a future loss of earnings for the plaintiff would have knock on effects in terms of lost pension contributions in the future. However, he agreed in evidence that he could not estimate what this might be in the absence of concrete proposals.

Judgment of the High Court

16. The judge noted the plaintiff's employment history in some detail as he considered it to be of particular relevance to her claim for future loss of earnings. He also identified the various medical witnesses who had given evidence to the Court. In his consideration of the evidence, the first conclusion reached by the judge was (at para. 15): -

“The plaintiff gave evidence of the injury and its effects on her working, social and recreational life. In my view, the plaintiff was an honest and truthful witness who did not seek to exaggerate the effects of her injury. Further, she emphasised, and I accept, that she has made every effort to try and return to her life as it was before the accident.”

17. He was of the view that the questions that he had to consider were first, was the plaintiff’s complaint of pain genuine and second, was the pain attributable to the accident.
18. In answering the first question in the affirmative, the judge said that he did not believe the plaintiff was inventing the pain and he gave reasons for reaching that conclusion. In considering the second question, he referred to the dispute between the medical experts called on both sides. He set out the competing evidence of Mr. O’Sullivan and Dr. Sheehan on the one hand, and Mr. O’Shaughnessy on the other, before concluding that it was more probable that there had been nerve involvement as a result of the accident.
19. He noted that the plaintiff’s job is not sedentary and requires moving about and he accepted her evidence which he believed to be consistent with her work record. She had taken every opportunity over the years to acquire more skills and he concluded on this issue (at para. 22) that: -

“Given her evidence, I do not believe that the plaintiff would be happy with a number of the alternative employment options referred to by Ms. Coughlan. Therefore, I am satisfied that the plaintiff has established a basis for this Court to award a sum to compensate her for future loss of earnings.”

20. The judge went on to consider the principles to be applied in the award of damages, both general and special. In the context of the plaintiff’s claim for damages for loss of future earnings, he referred to Mr. Tennant’s evidence and the appropriate *Reddy v Bates* deduction, which was considered by this Court in *Walsh v Tesco Ireland Limited* [2017] IECA 64, from which the judge quoted.
21. Having done so, the judge went on to say the following (at para. 26): -

“In this case, I consider a figure of 40% [*Reddy v Bates* deduction] to be appropriate. In doing so, I have had regard to the ongoing consequences of the measures taken to halt or prevent the spread of COVID-19, which may persist for a number of years. It is undoubtedly the case that the retail sector is one that has been, and will continue to be, adversely affected. In any event, the number of retail stores has reduced in recent years with the increase in ‘online’ shopping. Were the plaintiff to be made redundant from her current position, I have no doubt, given her history, that she would actively seek alternative employment. However, considering the report of Ms. Coughlan, the remuneration for such employment would be at a lower level than she currently receives.”

22. Turning then to the assessment of damages, the judge awarded general damages of €50,000 to date and €30,000 into the future, total €80,000. With regard to the future loss of earnings, he accepted Mr. Tennant's figure of €115,062 and reduced it by 40% to arrive at €69,037.20. Dealing then with the special damages, he assessed these, insofar as loss of earnings was concerned, at:
- May 2015 – October 2015 – €7,373.71
 - October 2015 – July 2018 – €7,373.71
 - Loss of earnings arising from reduction of hours from 37½ hours per week to 22 hours per week, to date – €12,000.
23. Having made the appropriate Social Welfare deductions and adding back agreed medical expenses, the special damages totalled €40,372.30. This led to an overall award in the sum of €189,409.50.

The Appeal and Cross-Appeal

24. The defendants' appeal is confined to three specific heads of damage identified above as follows:
- (a) Loss of earnings from October 2015 to July 2018 in the sum of €7,373.71;
 - (b) Loss of earnings from July 2018 to the date of trial in the sum of €12,000; and
 - (c) Future loss of earnings of €69,037.20.
25. As became clear during the course of the oral hearing before this Court, the defendants' fundamental complaint is that the judge failed to give any, or any sufficient, reasons for his conclusions. With regard first to the loss of earnings between October 2015 and July 2018, the defendants argue that there is no basis to be found in the judgment for why the judge allowed this sum. The same essential complaint is made with regard to the earnings post-July 2018 both up to, and after, the date of trial. It is said that the judge failed to have any regard to the evidence of Ms. Coughlan that the plaintiff should seek sedentary employment. It was contended that the judge had no regard to this or to the fact that the plaintiff did not give evidence to that effect either, and that the judge's conclusion that the plaintiff would not be satisfied with alternative sedentary employment was unsupported by any evidence.
26. In reaching his conclusions on the medical evidence, the defendants submit that the trial judge failed entirely to have any regard to the evidence of Mr. Mulcahy, which was material. It is said that this evidence was never considered by the judge.
27. With regard to the cross-appeal, the plaintiff contends that the deduction of 40% applied by the trial judge to the future loss of earnings was erroneous, being excessive and finding no basis in the evidence before the Court. In particular, it was said that there was no evidence before the Court which justified the trial judge's comments with regard to the downturn in the retail sector and further, if it was the judge's intention to make such a

substantial deduction, the parties, and in particular the plaintiff, should have been forewarned about this and given an opportunity to make submissions.

The High Court's Assessment of the Evidence

28. The starting point in any consideration by an appellate court of the trial judge's assessment of the evidence is of course the seminal judgment of the Supreme Court in *Hay v O'Grady* [1992] IR 210, the principles of which are by now so well-known that repetition is not required. Findings of fact by a trial judge that are supported by credible evidence bind an appellate court. More recent judgments have tended to emphasise the need for trial judges to explain their train of thought, at least to a sufficient degree to enable the appellate court, and of course the parties, to understand how a particular result is arrived at – see for example *Doyle v Banville* [2012] IR 505 and *Donegal Investment Group plc v Danbywiske & Ors.* [2017] IESC 14.
29. The degree of analysis or explanation required from a trial judge is of course entirely case dependant. Simple cases may require only basic elucidation of reasons by the court of trial, whereas in complex cases the converse may be true. Even in the absence of explicit reasoning, it may be possible in many cases to infer with reasonable confidence why a particular outcome ensued. Appellate courts should not encourage “rummaging in the undergrowth” of the evidence in an effort by appellants to demonstrate some minor point that may have been, apparently at least, overlooked by the trial judge but where the overall rationale is perfectly clear.
30. Courts of trial are now, more than ever, expected to operate in a way that is efficient and cost-effective. This would be entirely defeated by a requirement on the part of a trial judge to parse and analyse every minute piece of evidence before the court, lest he or she be criticised for failing to do so by an appellate court. The requirement to give a reasoned analysis must be proportionate to the issue with which the court is concerned. This is particularly true, for example, in the context of interlocutory motions where this court has repeatedly said that a significant margin of appreciation must be accorded to a High Court judge dealing with such matters.
31. Judges in the High Court are expected to efficiently dispose of often heavy motion lists on a Monday in that court. It would be entirely inimical to the administration of justice if every such motion and application called for an elaborate statement of reasons for particular conclusions. Very often, no more is required than an acceptance by the judge of the submission of one side or the other. The work of our courts would quickly grind to a halt if first instance and appellate courts were concerned with having to analyse in depth the reasons for allowing three weeks for discovery instead of four.
32. Naturally, trials will usually call for more analysis than straightforward motions. However, here again, it cannot be the function of a trial judge to record and analyse every piece of evidence from every witness and every submission made before it is safe to arrive at an overall conclusion. Were that to be the standard, judgments would become little more than transcripts of the evidence. It has become a perhaps inevitable feature of modern litigation and the increasing complexity it brings that judgments have tended to become longer and

longer over the years. The judgments in *Hay v O'Grady* itself, given barely thirty years ago, occupy all of six pages of the Irish Reports.

33. Appellate courts are entitled to, and do in fact, assume that the trial judge has taken account of all the evidence in reaching a decision. That remains the position whether it is expressly so stated or not. It is for an appellant to establish that a particular conclusion reached by a trial judge is one that cannot be sustained on the evidence. That means all the evidence and not exclusively the evidence identified by the judge in his or her decision. Where an issue in controversy is decided in a particular way, it would naturally be preferable in the normal course of events for the trial judge to indicate, even in a general way, the evidence on which the judge relies to found a conclusion.
34. Even in the absence of such express statement, it is often possible to infer the reasons for a particular outcome so that there is, in reality, no doubt about why it ensued. In *McCormack v Timlin & Ors* [2021] IECA 96, Collins J., speaking for this Court, succinctly summarised the state of the authorities regarding the functions of an appellate court. Having referred to the limitations on the functions of review by an appellate court set out in *Hay v O'Grady*, he said (at pp. 42 – 43): -
 - “57. However, as I noted in *McDonald v Conroy* (at para 17), the appellate self-restraint mandated by *Hay v O'Grady* has an important *quid pro quo*, namely the requirement for ‘a clear statement .. by the trial judge of his findings of fact, the inferences to be drawn, and the conclusions to be drawn.’ The decision of the Supreme Court in *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505 has developed this aspect of *Hay v O'Grady* significantly.
 58. Of course, the exception must not be allowed to swallow up the general rule. Accordingly, appellate courts must be astute not to permit *Doyle v Banville*- inspired complaints of ‘non-engagement’ with the evidence to be used as a device to circumvent the principles in *Hay O'Grady: Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50; [2017] 3 IR 707, per McMenamin J at paragraphs 109–111. Only complaints that go ‘to the very core, or essential validity, of [the trial judge’s] findings’ will suffice (para 110).
 59. What is required of a trial judge is that their *judgment* ‘engages with the key elements of the case made by both sides and explains why one or other side is preferred’: *Doyle v Banville*, at paragraph 10. Where a case turns on ‘very minute questions of fact’ as to how an accident or injury occurred – and this case is such a case *par excellence* – ‘then clearly the judgement must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred.’: *ibid*. The obligation here is essentially functional: elaborate analysis is not necessarily required. What is required is that the parties know why the court concluded as it did or (as it was put by Irvine J in *O'Driscoll v Hurley* [2015] IECA 158, at para 19) ‘why they won or lost.’”

35. The judgment of the Supreme Court in *Donegal Investment Group plc v Danbywiske* [2017] IESC 14 was also referred to by Collins J. as an important illustration of the principles he identified. In the latter case, Clarke J. (as he then was) said: -

“8.8 It is, in my view, important to emphasise that the exercise which an appellate court has to carry out when scrutinising the judgment of a trial judge is not one to be conducted in a mechanical way so as to encourage parties to attempt to find some element of the findings of the trial judge which is said to be insufficiently explained. It must be recalled that a judgment is arrived at the end of a very open and transparent trial process. The case will have been fully pleaded, the evidence fully heard and submissions made on both sides. In many cases, and in particular in the Commercial Court, there will be further procedures including the exchange of witness statements and expert reports. Against that backdrop it will often be possible readily to infer why a particular finding was made even if there is no express statement in the judgment. The parties will know how the case ran. An appellate court can read the record of the case. The judgment needs to be read in the light of the case as made and defended before the trial judge.

8.9. But there can be cases where it is just not possible to ascertain, with any reasonable degree of confidence, the reasons why a trial judge adopted a particular approach in relation to an important part of the facts. Where a finding of fact is of significant materiality to the overall conclusion of the case and where the reasons of the trial judge are neither set out in the judgment or can safely be inferred from the run of the case and the structure of the judgment itself, then an appellate court is unable properly to carry out its task of scrutinising the judgment to see whether the findings of fact are sustainable in the light of the principles set out in cases such as *Hay v. O’Grady* and *Doyle v. Banville*. In such circumstances an appellate court will have no option but to allow an appeal to the extent appropriate and take whatever further steps may be required in all the circumstances of the case in question.”

36. Turning now to the facts in the instant appeal, the primary dispute between the parties in the High Court was whether, in consequence of her injury, the plaintiff would only be able to work a three day instead of a five day week into the future. The plaintiff’s own evidence on this was clear. Although post-accident she had for a period worked a full week with Boots, she reached a point in May 2017 where she could no longer sustain that. This resulted in her having to take some two months’ sick leave before agreeing with her employer that she could return on a three day per week basis.

37. It is clear beyond doubt that the judge accepted the plaintiff’s evidence about her ability to work. He said that he found her to be an honest and truthful witness who did not exaggerate the effects of her injury. He further accepted that she had made every effort to try and return to her life as it was before the accident. There was of course a significant difference of opinion between the medical experts on both sides as to the plaintiff’s future working ability and the cause of her complaints.

38. However, no medical witness on behalf of the defendants sought to suggest that the plaintiff's complaints were not genuine or that she was malingering. Indeed Mr. O'Shaughnessy expressly accepted the proposition that her complaints were genuine. The main difference between Mr. O'Sullivan and Mr. O'Shaughnessy was that the former considered that the plaintiff's pain stemmed from nerve injury whereas the latter felt its origins were psychological. The judge was called upon to resolve this conflict of expert evidence and he did so. Having identified that dispute he said (from para. 19 onwards): -

"Having heard [the medical] evidence, it seems to me, as a matter of probability, that the pain as described by the plaintiff indicates nerve involvement. The pain was not there prior to the accident and Mr. O'Sullivan was of the view that the pain as described was consistent with an injury to one of the underlying cutaneous nerves. The findings of the plaintiff's General Practitioner, Dr. Sarah Sheehan, as set out in her report, is (sic) also consistent with nerve involvement.

20. Mr. M. O'Shaughnessy, Consultant Plastic and Hand Surgeon on behalf of the defendant, took a different view, telling the Court that it is difficult to see a basis for the pain, there being no touch hypersensitivity or a neuroma present. Mr. O'Shaughnessy was of the view that the plaintiff's ongoing complaints were more at a psychological than a physical level. Having considered the matter, my conclusion is that it is more probable that there is in fact nerve involvement as a result of the accident."

39. The judge then went on to consider the psychological injuries suffered by the plaintiff, evidence of which was given by Dr. Neville. It will be recalled that the defendants' psychiatrist, Professor Dinan, was not called to give evidence. The judge's assessment of this evidence led him to conclude that the psychological injuries were at the lower end of the scale. That conclusion is also of significance in the context of his acceptance of Mr. O'Sullivan's evidence over that of Mr. O'Shaughnessy. Although not expressly so stated by the trial judge, the finding is consistent only with the conclusion that it was less likely that the plaintiff's complaints had a psychological origin, as Mr. O'Shaughnessy appeared to believe.

40. Another significant component of this divergence of medical opinion is that if Mr. O'Shaughnessy's view were to prevail, then clearly there would be a prospect of recovery in circumstances where the plaintiff's psychological symptoms improved. On the other hand, the consequence of accepting Mr. O'Sullivan's evidence, that the plaintiff had suffered permanent nerve damage which had reached a plateau, was that it would not improve in the future with consequent repercussions for her working ability.

41. The views of Mr. O'Sullivan were further reinforced by Dr. Sheehan whose evidence was clear that, in her view, the plaintiff was at the limit of what she could do in working a three day week. Dr. Sheehan's evidence also was strongly suggestive of the fact that the plaintiff's ability to work a full week was not being held back as a result of her symptoms being essentially psychological in nature. On the contrary, Dr. Sheehan's view was that the plaintiff had pushed herself very hard to work to the maximum extent possible.

42. A significant aspect of the defendants' complaint about the trial judge's assessment of the medical evidence is that he entirely overlooked the evidence of Dr. Mulcahy, to the extent at least that he expressed no view on it. The first observation to be made about Mr. Mulcahy's evidence is that it is not at all obvious why the defendants felt it necessary to refer the plaintiff for the opinion of a consultant orthopaedic surgeon. The plaintiff did not suffer an orthopaedic injury. She was not treated by an orthopaedic surgeon. She was treated by Mr. O'Sullivan, whose specialist field of expertise was clearly appropriate to her injury.
43. It was thus appropriate that the defendants would instruct a medical witness with a similar expertise in Mr. O'Shaughnessy. It is entirely unsurprising therefore that the judge primarily had regard to the evidence of the plastic surgeons concerned in reaching his conclusions. The fact that he does not expressly allude to Mr. Mulcahy's evidence does not mean, as the defendants argue, that he ignored it. He expressly referred to the fact that Mr. Mulcahy had given evidence. Mr. Mulcahy in his report expressed the view that he could find no physical reason for the plaintiff's ongoing pain. However, it must follow from the judge's acceptance of Mr. O'Sullivan's evidence that he implicitly rejected the evidence of Mr. Mulcahy in precisely the same way as he did that of Mr. O'Shaughnessy. This cannot reasonably be characterised as a failure by the trial judge to engage with the evidence where that evidence was, in Mr. Mulcahy's case, essentially repetitive of what had already been said by Mr. O'Shaughnessy.
44. Having regard to the foregoing, I am satisfied that there was more than ample credible evidence available to the trial judge, accepted by him, to support his conclusion that the plaintiff would in the future be confined to working a three day week. I am further satisfied that this was a conclusion which he explained, so that it could not be said that there was any lack of clarity about why he decided the issue the way he did.
45. A further complaint made by the defendants, as already noted, is that the judge failed to have regard to the evidence of Ms. Coughlan who suggested that the plaintiff might consider alternative sedentary, albeit lower paid, employment to accommodate the difficulties with her leg. Ms. Coughlan's evidence was explicitly referred to by the judge at paras. 14 and 22 of his judgment. However, the defendants say that there was no basis for the judge's conclusion that given the plaintiff's evidence, he did not believe that she would be happy with a number of the alternative employment options referred to by Ms. Coughlan.
46. There is some validity in this criticism, but only up to a point. The plaintiff's evidence, to which the judge had regard, included matters such as the following. When the plaintiff was cross-examined, she was asked why she took on a full working week when she transferred to the Boots store in Patrick Street (Transcript, Day 1 at p. 49): -
- "Q. ... So, I'm struggling to understand, Ms. Twomey, when you took on 37.5 hours, and when you started having difficulties. Can you explain that for us?
- A. I always had difficulties. But I just love the job so much that I didn't want to give up the job. I was hoping I could manage my leg and that."

47. In the light of that evidence, it seems to me to be perfectly reasonable to reach the conclusion that the plaintiff was unlikely to have been content with sedentary alternative employment of the kind identified by Ms. Coughlan.
48. Further, it seems to me that if the defendants were serious about pursuing the suggestion that the plaintiff was not justified in reducing her working week in Boots from five days to three in favour of full-time sedentary employment, they should at least have put that proposition to her in cross-examination. Having failed to do so, it does seem somewhat unreasonable to criticise the trial judge for allegedly failing to take this on board.
49. Dealing with the individual heads of loss about which the defendants complain, the first concerns the period between October 2015 and July 2018. It was said that the judge gave no explanation for his acceptance of this claim. While again it might have been preferable for the judge to say so explicitly, I think it is reasonably obvious that the judge simply accepted the plaintiff's evidence as to the reasons why she changed jobs over this period of time. She explained why she felt unable to continue working for the defendants following the accident. Her contract with Marks and Spencer was for the Christmas period. She found the work in Lidl too heavy to manage. She was let go by Amber Petroleum and she explained why she eventually had to reduce her hours in Boots. Each of these matters led to the loss of earnings claimed and it must follow from the judge's acceptance of the plaintiff's evidence as being truthful and that she made every effort to get back to work, that he found this claim reasonable.
50. As regards the position from July 2018 onwards, again it follows from the judge's acceptance of the plaintiff's inability to work more than three days a week from July 2018 that the losses that flowed from this were recoverable.
51. It follows from the foregoing that the defendants' appeal must fail.

The Reddy v Bates Deduction

52. The plaintiff's cross-appeal is solely concerned with the 40% deduction levied by the judge against the plaintiff's future loss of earnings claim. It is said that this is excessive, apparently being based on factors about which there had been no evidence. Further, the plaintiff complains that had this been within the contemplation of the judge, some indication of that ought to have been given to the parties to enable submissions to be made concerning the appropriate level of deduction on the facts of the case.
53. The issue arising here is far from straightforward. Deductions for *Reddy v Bates* contingencies have been an everyday feature of our law for decades where seemingly, courts are left at large to make such deductions as they consider appropriate, almost always without the benefit of any real evidence as to how the relevant percentage should be arrived at. *Reddy v Bates* was decided in an era when personal injury claims were heard by juries. In his leading judgment, Griffin J. noted that the Supreme Court had decided over the previous 20 years that where future losses were concerned such as earnings or medical expenses, an actuary should give evidence.

54. The actuary will in the normal way provide a calculation, capitalising the value of each Euro per week until, in the case of loss of earnings, the plaintiff's likely retirement date. That figure is arrived at on the assumption that the plaintiff will in fact work to retirement. There are of course an infinite number of reasons why a particular plaintiff may not in fact work to retirement and accordingly, the courts have held that an allowance must be made for those contingencies. As Griffin J. explained (at p. 146): -

"However, [the capitalised figure] does not take into account the marriage prospects of the plaintiff; nor does it take into account any risk of unemployment, redundancy, illness, accident or the like. It assumes that the plaintiff, if uninjured, would have continued to work, week in and week out, until retirement. In effect, it is based on the assumption that there would have been guaranteed employment, at a constantly increasing annual rate of wages, until retirement or prior death."

55. Griffin J. went on to consider the state of the employment market in Ireland and elsewhere in the European Economic Community, noting (at p. 147) the prevalence of a high rate of unemployment, a factor which required to be taken into account in assessing future loss of earnings.

56. In considering the *Reddy v Bates* deduction, many of the cases since have understandably focused on the relevant state of the employment market and the nature of the plaintiff's employment in arriving at an appropriate deduction. A widespread recognition appears to have developed over the years of a "spectrum" of appropriate percentages to be applied depending on the facts of the case. Courts hearing claims in times of economic boom or recession have tended to reflect those factors in the approach to the deduction. There are instances of courts declining to make any deduction on the basis that the plaintiff was employed in a job that was to be regarded as extremely secure and likely to remain so.

57. However, if the past few years have reminded us of anything, it is surely the futility of trying to predict what the future holds in economic and employment terms beyond the short-term. Yet this is what judges are asked to do on a daily basis. I think when one is seeking to apply a *Reddy v Bates* deduction to periods of decades into the future, the best one can do is to assume that economic prosperity and the associated labour market will wax and wane on a cyclical basis, as it has always done.

58. An undue focus on prevailing economic conditions has perhaps led in some cases to the other exigencies of life, clearly identified in *Reddy v Bates*, being overlooked. These matters were a central feature of the judgment of this court in *Walsh v Tesco Ireland Limited* [2017] IECA 64 where the sole judgment was given by Irvine J. (as she then was), with which the other members of the court agreed. In noting the submissions of the parties, Irvine J. said (at para. 37): -

"Counsel [for the respondent] accepts that it is customary for trial judges to discount claims for future loss of earnings based upon the exigencies referred to in *Reddy v. Bates*. However, he submits that there were no particular circumstances that would mandate the discount in this case given the type of employment the trial judge

considered Ms. Walsh would likely have pursued and the prevailing economic climate. If he was incorrect in that submission, counsel argues that the discount to be applied on the facts of the present case should be at the lowest end of the relevant spectrum.”

59. In her conclusion on this issue, Irvine J. pointed to the fact that the *Reddy v Bates* deduction was not solely concerned with issues concerning the employment market: -
- “67. As to the submission made that the trial judge erred in law in his failure to make any deduction from his award in respect of future loss of earnings for the exigencies of life as referred to in *Reddy v. Bates*, that I fully accept.
68. While the trial judge was entitled to take a very optimistic view of the work market that would likely have been available to Ms. Walsh had she not been injured and thus to conclude that work would always have been available to her, what he failed to take into account is that for reasons completely unrelated to the work market, she may not have been in a position to avail of that work.
69. The reasons why a well motivated person may find themselves not working continuously or full time into the future are too numerous to mention. However, by way of example, they might be injured in a road traffic accident with the result that they cannot work or they might fall prey to some illness with similar unfortunate consequences. Their husband, partner, one of their children or an elderly relative might, for some period of time, need their care and support such that they would not be able to work or work fulltime as they had hoped. As people advance in life the risk of these occurrences cannot be ignored or ruled out. Nobody is immune from such risks. Nobody can say with certainty that they will be able to work continuously for the following eighteen year period, that being the duration of Ms. Walsh's claim for future loss of earnings in these proceedings.
70. In these circumstances, having regard to the prevailing jurisprudence, I must conclude that the trial judge erred in law when he failed to discount the figure which he considered proved in respect of future loss of earnings to take into account the factors outlined in *Reddy v Bates*. In circumstances where the trial judge clearly took an optimistic view as to the market which would otherwise have been available to the plaintiff, I consider that the reduction to be made should be at the lower end of the parameters often applied by the court and I would propose a reduction of 15% having regard to the overall findings of fact made by the trial judge.”
60. These passages were also referred to by the trial judge in this case. They were more recently approved again in the judgment of this Court in *O'Doherty v Callinan* [2020] IECA 200.
61. These factors are of course present in every case and thus should be regarded as relatively neutral in terms of adjusting the *Reddy v Bates* deduction one way or the other. The same applies, perhaps to a somewhat lesser extent, to any assessment of the long-term economic and employment prospects, again these being factors common to every case.

62. There are other considerations particular to each case which also have a direct bearing on the *Reddy v Bates* deduction. It is impossible to list these exhaustively but commonly they would include matters such as the plaintiff's track record in employment to the date of the accident and the relative security of such employment at the date of trial. Thus it would be appropriate to have regard to the fact that certain types of employment have historically been shown to be very secure as against others which have not. But as *Walsh v Tesco* shows, the employment market is but one, albeit an important, element in the overall assessment of an appropriate deduction.
63. While I do not suggest that it is impermissible as a matter of law to make no *Reddy v Bates* deduction, it is notable as I have pointed out, that in cases where that has occurred, the court appeared to focus solely on the security of the plaintiff's employment without necessarily considering other factors such as those mentioned by Irvine J. It is therefore somewhat difficult to envisage cases where no *Reddy v Bates* deduction is appropriate.
64. Many of the cases refer to a spectrum of deduction without necessarily identifying what the spectrum is. An analysis of the jurisprudence, and discussion with counsel in the course of this appeal, suggests that the spectrum contemplated in the various judgments where it is mentioned is probably in the range of 15% to 25%. This appears to me to be the range that courts and practitioners alike have adopted over the years and one that has become firmly embedded in convention and practice. To the extent that courts have traditionally reduced awards by a percentage within that spectrum to take account of *Reddy v Bates* contingencies, those deductions have, in the normal way, been made by the court performing its own assessment of what might be an appropriate deduction to make on the facts of the case in hand.
65. There is perhaps some analogy here with the assessment of damages for personal injuries, in that the court is at large, albeit within broadly recognised parameters, to award such sum as it considers fair compensation for personal injury. There is undoubtedly an element of discretion engaged by this exercise where the court is required to assess, as best it can, what appears to the judge to be a fair and appropriate deduction to make in all the circumstances of the case.
66. Where, however, a court is being invited by either side to go outside those broad parameters, or that "spectrum", the onus should be on the party advocating such approach to put evidence before the court which would justify it on the particular facts.
67. The deduction of 40% made in the present case by the trial judge is, to my mind, significantly outside the range I have identified and needs to be justified by reference to evidence based reasons. The plaintiff's employment history and the judge's own findings of fact pointed strongly to the plaintiff, at all times during her working life to date, being strongly motivated to seek and maintain employment wherever she could find it. She was undoubtedly an employee who was highly valued, both by the defendants and also her current employer who recognised that she was an excellent and dedicated worker.

68. One would have thought that these factors would tend to drive the court towards the lower end of the *Reddy v Bates* spectrum in assessing the relevant deduction. The trial judge, however went in the opposite direction, essentially on the basis of speculation by him as to the state of the shopping retail market by virtue of the pandemic and a perceived move towards online shopping. As the plaintiff rightly points out, there was absolutely no evidence before the trial court about these factors and even if they could be said to an extent to be matters of common public knowledge, their precise impact on the future employment prospects of a person such as the plaintiff was a matter that required some concrete evidence, rather than mere speculation.
69. Apart from everything else, the assumption that all retail shopping is impacted equally by these factors would have to be substantiated. As a matter of common sense, those involved in the business of retail sale of clothes or books might face difficulties as a result of online shopping or the pandemic, whereas food retailers and pharmacies appear to have prospered. The fact that the plaintiff was employed by a pharmacy company would, if anything, appear to be at odds with the judge's approach.
70. To that extent therefore, I am satisfied that the trial judge fell into error in arriving at a 40% reduction of the future loss of earnings figure. There was, in my view, nothing before the court in this case which would have justified a departure from what I have found to be the normal range of *Reddy v Bates* deductions. As was done in *Walsh v Tesco*, in the light of the findings of fact made by the trial judge concerning the plaintiff's work history and motivation, I would also propose a reduction of 15% from the future loss of earnings figure put forward by Mr. Tennant.
71. That figure at €115,062 minus 15%, results in a net figure of €97,802.70. That in turn increases the overall award to the plaintiff by a sum of €28,765.50.
72. Accordingly, I would substitute for the order of the High Court, judgment in the sum of €218,175 and allow the plaintiff's cross-appeal accordingly.
73. With regard to costs, as the plaintiff has been entirely successful in both the appeal and the cross-appeal, it would seem to follow that she should be entitled to her costs of each. If the defendants wish to contend for an alternative form of order, they will have a period of 14 days from the date of this judgment to notify the Office of the Court of Appeal of their intention to seek a short supplemental hearing on the issue of costs. If such request is made and does not ultimately result in an order different from that proposed above, the defendants may additionally be liable for the costs of such supplemental hearing. In default of such application, an order in the proposed terms will be made.
74. As this judgment is delivered electronically, Murray and Haughton JJ. have indicated their agreement with it.