# THE COURT OF APPEAL

**Record Number: 2021/185**
**High Court Record Number: 2013/12442P**

**Neutral Citation Number [2022] IECA 208**

**Noonan J.**
**Faherty J.**
**Binchy J.**

**BETWEEN/**

**KEVIN MEEHAN**

**PLAINTIFF/RESPONDENT**

**-AND-**

**SHAWCOVE LIMITED, ELLICKSON ENGINEERING LIMITED, KILELL LIMITED, OTIS LIMITED, OTIS ELEVATOR IRELAND LIMITED, AND DALDOSS ELEVETRONIC SPA**

**DEFENDANTS/APPELLANTS**

**JUDGMENT of Mr. Justice Noonan delivered on the 8th day of September, 2022**

**Introduction**

**1.** One of the principal issues arising in this appeal is the correct approach to the assessment of damages for personal injuries where multiple injuries are concerned. More specifically, there is a dispute between the parties as to how the court should approach the issue of proportionality in that assessment.

**2.** Liability was not in issue in the High Court and the defendants' appeal to this court is confined solely to the High Court's award of general damages for pain and suffering and for loss of employment opportunity. The trial judge assessed the plaintiff's general damages at €125,000 for pain and suffering to date, €175,000 for pain and suffering into the future and €75,000 for loss of opportunity, total €375,000.

**Facts**

**3.** The background to the accident and the plaintiff's course thereafter, as set out in the judgment of the High Court, is lengthy and detailed, not least by virtue of the fact that 10 years elapsed between the date of the accident and the hearing in the High Court.

**4.** It is unnecessary to set out that history at length. I propose instead to summarise the main features of the factual background in an effort to make it more readily comprehensible for the purposes of this judgment. In doing so, I do not seek to minimise the great suffering that the plaintiff has to date endured, nor do I overlook in any way the details of his history as it is to be found in the transcript of the evidence, the agreed expert reports and the judgment of the High Court.

**5.** The plaintiff, who is from County Kildare and was born on the 2nd May, 1978, was involved in an accident on the 9th July, 2011, when he was aged 33. The trial judge described the accident as being "the stuff of nightmares". The plaintiff and his wife were attending a family wedding in Killarney. After the ceremony, they and other members of the wedding party went to the Killarney Plaza Hotel where they were staying. They drove into the underground car park and the plaintiff, his wife, two brothers and a sister in law got into the lift to go to reception three floors above.

**6.** When they reached the reception level, the lift failed to dock. A loud bang followed and the lift suddenly dropped about a foot where it remained, literally hanging by a thread, for a few seconds before crashing to the ground three floors below. Scenes of devastation and panic ensued. All occupants of the lift had suffered serious injuries, including the plaintiff's wife, for whom he was very concerned. The terror he had to endure was greatly exacerbated by the long delay that followed before he and the other victims were rescued. The plaintiff was brought to Tralee hospital and detained there for some five days. The headline injuries suffered by the plaintiff were to his back and legs. He suffered undisplaced compression fractures of the L3 and L4 and a later discovered hairline fracture of T9.

**7.** Fortunately, these injuries did not require surgical intervention and he was put in a back brace to allow natural healing to occur. He also suffered a fracture to his left ankle which required open manipulation under general anaesthetic but no internal fixation. His left ankle was immobilised in a plaster cast which remained in situ for some five to six weeks. He also suffered a fracture of his right heel which appears to have been treated conservatively. At that stage he also had complaints of pain in his right knee in particular but no specific injury was identified requiring treatment.

**8.** On his discharge home from hospital, the plaintiff endured a very difficult course for a lengthy period. The combination of his injuries meant that he was able to do nothing for himself and was largely immobile in bed. The plaintiff's wife was clearly limited in terms of caring for the plaintiff by reason of her own injuries and in consequence, her parents moved in to care for the plaintiff over a period of months. This proved extremely difficult for the plaintiff who was unable to attend to his personal hygiene and toileting. He had to be lifted onto a commode and lifted off again which he found understandably demeaning and difficult to accept.

**9.** On top of all of this, the plaintiff was deeply traumatised by the circumstances of the accident and what had happened to him, his wife and family members. He was at that time suffering significantly from post traumatic stress disorder and a depressive reaction. These were, at that stage, the plaintiff's main injuries but I do not overlook the fact that he suffered many other injuries, for example, that were soft tissue in nature and also dental injuries. Throughout all of this initial phase of his recovery, the plaintiff suffered extreme pain and discomfort from the injuries described.

**10.** With regard to the plaintiff's employment background, he has for many years worked in the pharmaceutical industry and in particular in the quality control and compliance fields. The plaintiff is very highly qualified in these areas both by virtue of his educational attainments and experience. At the time of the accident he was employed in these areas by Bristol Myers Squibb ("BMS"). It is clear from all the evidence in this case that the plaintiff is professionally both highly motivated and highly ambitious to succeed in his chosen career. He has pursued, and gained, many promotions in recognition of his exceptional abilities and is constantly the subject of approaches by recruitment agencies seeking to headhunt those proven abilities and talents.

**11.** The severity of the plaintiff's injuries was such that he was unable to return to work for some 8 months and when he did so in March 2012, he was only able to manage about 12 hours per week, which it appears BMS were very willing to accommodate given that he was such a valued employee. In fact, it was fully two years post accident, in or about August 2013, that the plaintiff got back to full time work. At that time, the plaintiff applied for promotion in a competitive process and was successful. He again succeeded in obtaining a further promotion two years later in August 2015, again the result of competition. A further

two years later, in July, 2019, the plaintiff secured in effect a further promotion, a position with a newly formed subsidiary of BMS called SK Biotech.

**12.** One of the main bases of this subsidiary's operations was located in Korea and the new position that the plaintiff had obtained required him to travel to Korea every few weeks for a week or two at a time and engage very intensively with colleagues at the relevant plants in Korea. While this was clearly very demanding, the plaintiff managed it for a couple of years when he decided that he had progressed as far as he could in BMS and successfully applied for a new position in another pharma company called Takeda. Although his remuneration package overall was slightly less valuable than that he enjoyed with BMS, the new position avoided the long haul travel and was more attractive for that reason and for the potential for career progression that Takeda offered.

**13.** In terms of his personal life, the plaintiff's evidence was that at the time of the accident, he and his wife had been trying for a family and had sought and obtained some medical assistance in that regard. Very happily, in the years that followed the accident, the plaintiff and his wife went on to have three children.

**14.** Unfortunately, also in those years, the plaintiff began to develop more severe pain and symptoms in his right knee and to a lesser extent his left knee and these complaints, I think it is fair to say, became the dominant features of his presentation and treatment in the years leading up to the trial in the High Court.

**Evidence in the High Court**

**15.** The medical evidence in this case was tendered by a mixture of agreed medical reports and *viva voce* evidence of medical experts. The witnesses who gave *viva voce* evidence on behalf of the plaintiff were the plaintiff himself, Mr. Denis Collins, Consultant Orthopaedic

Surgeon, Nigel Tennant, Consulting Actuary and Richard Tolan, Occupational Therapist and Vocational Consultant. Evidence was additionally admitted by way of agreed medical reports from the plaintiff's General Practitioner, Dr. Fiona Grant, Mr. Patrick Kiely, Consultant Orthopaedic, Paediatric Orthopaedic and Spinal Surgeon, Ms. Louise Ward, Psychotherapist and Counsellor and Dr. Elizabeth Cryan, Consultant Psychiatrist.

**16.** It is of some relevance to note here that although the defendants' SI 391 Schedule listed a consultant orthopaedic surgeon, a consultant in emergency medicine, a consultant radiologist and a consultant psychiatrist, none of these witnesses were called to give evidence nor were their reports put before the court. In fact, the defendants, as was their right, elected to call no evidence at all.

**17.** Mr. Kiely reviewed the plaintiff on the 10th December, 2011, some five months post accident. He reviewed the plaintiff's imaging, including X-Rays and CT Scans. He noted that the lumbar fractures were relatively stable. He noted that a MRI of the plaintiff's right knee showed a previous (pre-accident) ACL reconstruction which was intact. There was no evidence of major meniscal or articular injury. On clinical examination, lumbar spinal alignment was satisfactory. There was a full range of movement in the right foot and ankle. There was some swelling and effusion in the left foot and ankle. Range of motion was good but there were signs of tendinopathy. CT of the thoracic spine showed a possible hairline crack at T9 with no displacement.

**18.** Mr. Kiely noted some degenerative changes in the lumbar area which appeared to be related to the impact. Overall, Mr. Kiely felt that the plaintiff had made significant improvements since his first review in the summer. He felt spinal function to be a little bit limited with movement being 80% to 85% normal at best. The plaintiff's foot and ankle

function seemed to be very good. He had mild residual tenderness on the right side and some postural change in the foot with evidence of tendonitis or tendinopathy on the left side.

**19.** Mr. Kiely saw the plaintiff again in July 2012 at one year post accident. His symptoms had continued to improve. He was getting occasional niggling pain around the left ankle which it was felt would get better. He had occasional mechanical back pain after sitting at a desk and at the end of a long day his back would be stiff and sore. He noted that the plaintiff was swimming and exercising on a bike and this was important for him to maintain core flexibility and strength. It is relevant to note here that prior to the accident, the plaintiff was extremely fit and involved in a wide range of sports.

**20.** On examination, the plaintiff's lumbar flexion was 70 degrees and straight leg raising 80 degrees bilaterally without neurological deficit. He had some tenderness over the L3, 4 and 5 area. He had good ankle and foot function. At that stage, Mr. Kiely's prognosis was that over the long term the plaintiff's spinal function would have approached 90% of normal but he would tend to have back pain a little more than the general population, particularly following long periods sitting. Notwithstanding that, Mr. Kiely thought that he had made a good recovery from his multiple injuries.

**21.** Mr. Kiely reviewed the plaintiff again on the 8th July, 2015, now four years post accident. The plaintiff continued to complain of back pain, intermittently requiring pain relieving medication. He was staying fit but was becoming more apprehensive about his knees. This is the first occasion upon which Mr. Kiely makes explicit reference to the plaintiff's knee complaints. The plaintiff was unable to run and his right knee was worse than the left with deep seated knee pain. There was not a great deal to find on clinical examination of his knees beyond some tenderness on palpation on the right. However, MRI showed an abnormal meniscus with a possible horizontal tear. The plaintiff's bilateral knee

symptoms were of sufficient concern that Mr. Kiely carried out a right knee arthroscopy in August 2015 and a similar procedure on the left knee in November 2015.

**22.** He subsequently saw the plaintiff again for a review on the 26th January, 2016, now about four and a half years post accident. He noted that the meniscal tear was repaired at arthroscopy and there was also a meniscal debridement with removal of loose material in the right knee. He carried out a microfracture procedure of the osteochondral defect. On examination, the plaintiff was walking well without a limp and he had no effusion and reasonable muscle condition. Movement of both knees was full. Having reviewed his X-Rays, Mr. Kiely said that the plaintiff's knees looked really good and he was very happy with them overall. The plaintiff was maintaining his level of physical fitness which Mr. Kiely recommended he continue. Mr. Kiely at that stage appeared to be effectively signing off on the plaintiff because he said he would see him again in the future if there were any problems but for now he was doing fine and Mr. Kiely did not have any worries.

**23.** Mr. Kiely saw the plaintiff again a year later on the 6th February, 2017, now some five and a half years post accident and unfortunately, he had not done as well as Mr. Kiely had previously anticipated. At this stage, the plaintiff's major complaints related to both knees and his low back. He complained of significant pain in the knees with the pain score on average of four to five out of ten. He also had mechanical low back pain. While he could go up and down stairs without difficulty, he had problems getting in and out of cars because of a combination of back and knee pain. He noted that the plaintiff had had to give up all sports whereas prior to that, he had been active playing five a side soccer, cycling and running regularly. On examination, Mr. Kiely found significant crepitus in both knees.

**24.** With regard to his foot and ankle fractures, Mr. Kiely noted that these appear to have healed without any major residual symptoms. Given the position regarding the plaintiff's

knees, Mr. Kiely referred the plaintiff to Mr. Collins who is a specialist in knee reconstruction. At that stage Mr. Kiely felt that the prognosis for a return to full function of the plaintiff's knees was very poor and that he would have a significant functional restriction for the future. With regard to his spine, degenerative changes were now evident at the L2/3, L3/4, and L4/5 discs and it was considered that this may give rise to further trouble in the future as the degenerative changes increased with time. However, Mr. Kiely says that no surgical intervention was being considered for the spine at that point in time.

**25.** Mr. Collins saw the plaintiff for the first time on the 16th July, 2017, now six years post accident. His main complaint of symptoms related to his right knee. Mr. Collins reviewed the imaging of the plaintiff's right knee and was of the view that the joint surface had clearly deteriorated since the original (pre-accident) surgery in 2010 when the plaintiff had undergone ACL reconstruction. He felt that, ultimately, the plaintiff will develop degenerative arthritis in the knee and need a knee replacement. Because the plaintiff was not yet frankly arthritic, Mr. Collins considered the plaintiff was too young yet for knee replacement surgery. He considered, however, that injections of hyaluronic acid may be of benefit. Some weeks later in September 2017, Mr. Collins carried out a left knee arthroscopy on the plaintiff. He reviewed him on the 2nd October, 2017, noting that the arthroscopic findings were that he had a tear of the posterior horn of the medial meniscus, which was very friable and not suitable for repair. A partial meniscectomy was carried out. He had previously injected the right knee in August 2017 which had given some improvement. He arranged further injections for the right knee. The plaintiff remained at increased risk of degenerative changes in the left knee.

**26.** It was a further three years before Mr. Collins saw the plaintiff again on the 9th December, 2020, ostensibly as a result of increasing symptoms in the right knee during the

previous three to six months. He planned to carry out further imaging before deciding on a course of action. Having done so, he remained of the view that the plaintiff would ultimately require a knee replacement but a further acid injection may be beneficial. In fact, it seems in or about mid-January 2021, Mr. Collins carried out a further arthroscopy on the plaintiff's right knee which had improved his symptoms. On examination he had a full range of movement and a stable knee with no effusions.

**27.** Mr. Collins provided a final report on the 1st June, 2021 in response to questions from the plaintiff's solicitors. He offered the view that the plaintiff should be able to work until normal retirement age but he would require a knee replacement and be absent from work for some three months in consequence. There was a lesser risk of a knee replacement being required on the left side but nevertheless, Mr. Collins considered that it may be necessitated by the realisation of the increased risk of developing degenerative arthritis. The cost of a knee replacement would be approximately €25,000 and its life expectancy would be 15 to 20 years before revision surgery would be required. In the meantime, the plaintiff would require repeated knee injections.

**28.** In his oral evidence, Mr. Collins said that the plaintiff would require a knee replacement within the next five years and definitely before the age of 50. He put the lifespan of a full knee replacement as in the region of 20 years on average. With regard to the plaintiff's left knee, it was put to Mr. Collins in cross examination that while it was probable that the plaintiff will have a right knee replacement, there is no such probability about his left knee and he agreed with that proposition. However, he said in re-examination that the plaintiff would have some operative procedure with his left knee at some stage in his life, implying that this may not necessarily involve a total knee replacement.

**29.** With regard to the plaintiff's back, his final review by Mr. Kiely was on the 30th May, 2021, a decade or so after the accident. The plaintiff felt the level of pain from his back was at two to three out of ten on a daily basis. Certain activities, such as lifting his children, exacerbated the pain. He had given up sports and was unable to run although he was cycling. He had complaints of ankle and heel pain if walking for more than 30 minutes. Back movements and straight leg raising were relatively good. Mr. Kiely did not expect that the plaintiff's back complaints would prevent him working to normal retirement age. Mr. Kiely put the possibility that he might require spinal surgery in the future at in the region of 10% to 20%.

**30.** Turning now to the plaintiff's psychological/psychiatric injuries, a report from Ms. Ward dated 18th June, 2017 was put in evidence. This showed that in the 9 months between August 2011 and May 2012, the plaintiff and his wife attended counselling sessions with Ms. Ward on 17 occasions. Thereafter, there were two further attendances in 2016 and 2017. In addition, the plaintiff was reviewed by Dr. Cryan on the 11th November, 2019 and a detailed history of the plaintiff was given in her report. I do not propose to set out in any detail the very extensive history to be found in these reports save to say that it is clear that the plaintiff was deeply traumatised and shocked by the circumstances of the accident, its immediate aftermath and the effect not just on him but on his loved ones as well.

**31.** As previously explained, after the plaintiff was discharged from hospital he found it extremely difficult to cope with the circumstances in which he found himself and his near total inability to care for himself which was a significant affront to his dignity. Dr. Cryan considered that the plaintiff had suffered from an episode of depressive disorder which had fully resolved by the time of assessment. He also suffered from post traumatic stress disorder which she felt was in the milder range of severity. There was a significant improvement in

his symptoms of PTSD although he had some residual symptoms at a relatively mild level, usually triggered by a reminder of the accident.

**32.** With regard to any vocational implications of the accident, evidence was given by Mr. Tolan by way of two reports and oral evidence. Mr. Tolan's evidence was relevant to the issue of loss of employment opportunity in circumstances where no future loss of earnings claim was being advanced by the plaintiff on a calculated basis. Mr. Tolan's opinion was that the plaintiff had suffered a loss of opportunity for the period of 26 months following the accident where he was unable to return to full time work and was thus prevented from actively pursuing promotions, which he did successfully subsequently.

**33.** He also felt that there was some element of risk that the plaintiff in seeking alternative employment in the future might find his choice of roles more limited as a result of his physical limitations. His earnings in 2019 were in the €155,000 to €160,000 per annum range. At the time of his second assessment by Mr. Tolan, the plaintiff was working for SK Biotech, the BMS subsidiary, which involved a significant level of travel to Korea six or seven times per year for a week or two at a time. The plaintiff clearly found this very demanding and in fact elected in May 2021 to leave this employment in favour of a new job with Takeda where the value of his remuneration package was somewhat less than with SK Biotech.

**34.** However, this change of employment enabled him to avoid the extensive travel obligations of his previous job which he found difficult to cope with and this, to some extent at least, appears to bear out Mr. Tolan's concern that the plaintiff's employment opportunities had in fact been somewhat restricted, albeit not to a great degree, by virtue of his injuries. As previously noted, the defendants elected not to call any countervailing evidence from an expert with equivalent expertise to Mr. Tolan.

**Damages in multiple injury cases**

**35.** The principles that overarch the court's approach to the assessment of damages in all personal injuries cases have been discussed and analysed in many recent judgments of this Court and there is little to be gained by restating them yet again. All the authorities are at one in considering that a key aspect of the court's approach is proportionality. Proportionality in this context means that the award of damages must be proportionate to the maximum that may be awarded in the most serious cases, €500,000, and must also be proportionate in the context of other awards of damages for greater, lesser or similar injuries. If an injury that is directly comparable to the one in issue has been the subject of a previous award, then it is legitimate and appropriate for the court to have regard to such award. For a very recent example of where the court undertook this exercise, see *Ronan v Walsh* [2022] IECA 164. The role of the Book of Quantum in such cases has also been much considered, and again a very recent instance is to be found in *O'Sullivan v Brozda* [2022] IECA 163.

**36.** In the course of this appeal, a number of issues came into focus. The first was how the court should view the issue of proportionality in a multiple injury case such as the present with particular regard to the "cap" on general damages and the function of the Book of Quantum. Another issue was whether the court's approach to any award of general damages should be influenced by the fact that the ultimate award may also comprise very substantial sums in respect of special damage.

**37.** Taking the latter issue first, from time to time it has been suggested that the so-called "cap" should really only apply in cases where the general damages end up as a relatively minor component of the overall award. Thus, in catastrophic injury cases where awards run into many millions of Euro by virtue of the cost of future medical care, aids and appliances and a host of other anticipated future special damages, it is normally more or less a "given"

that the maximum general damages will follow as a matter of course. In the absence, however, of significant future losses of that kind, it has on occasion been suggested that the courts should be free to award a sum higher than the maximum to take account of the fact that in the absence of significant special damages, the general damages will be the major component of the award and the plaintiff will not receive the benefit of all these other typically large figures. As a matter of logic and common sense, it seems to me that this argument does not withstand any realistic scrutiny.

**38.** The "cap" was originally introduced by the Supreme Court in *Sinnott v Quinnsworth* [1984] ILRM 523 where O'Higgins C.J. explained the rationale for a cap: -

> "In my view a limit must exist, and should be sought and recognised, having regard to the facts of each case and the social conditions which obtain in our society. In a case such as this, regard must be had to the fact that every single penny of monetary loss or expense which the plaintiff has been put to in her past or will be put to in the future has been provided for and will be paid to him in capital sums calculated on an actuarial basis. These sums will cover all his loss of earnings, past and future, all hospital and other expenses in relation to the past and the future and the cost of special care which his dependence requires, and will require, for the rest of his life. What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation. In assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me, that some regard should be had to the ordinary living standards in the country, to the general level of incomes and to the things upon which the plaintiff might reasonably be expected to spend money."

**39.** A similar argument to that advanced by the plaintiff in this appeal concerning the "cap" was also raised in *Nolan v Wirenski* [2016] 1 IR 461 where Irvine J. (as she then was) speaking for the court said (at para. 34 *et seq*):

> "Another suggestion is that the notional maximum award of €450,000 in cases of extreme or catastrophic injury is less than would otherwise be the case because the plaintiff in those cases will recover in full a very large sum in respect of all areas of special damage such as loss of earnings, future care, aids and appliances etc. That cannot be correct in principle; an injured person is entitled to be compensated in full for all losses flowing from the injury he sustains. Special damages represent the calculation of actual losses past and future, which leaves the matter of general damages to be assessed entirely separately. Although there are undoubtedly some dicta in the cases supporting this approach, which I would reject as being unjust and even perhaps irrational, the leading authority would not appear to justify that approach.
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> 35. The plaintiff in *Sinnott v Quinnsworth…,* had to be compensated for injuries that rendered him a quadriplegic and which O'Higgins C.J. described as:-
>
> > '…probably the most serious condition that a person can suffer as a result of personal injuries.'
>
> 36. The Chief Justice said that in assessing a sum to compensate the plaintiff for his injuries 'the objective must be to determine a figure which is fair and reasonable'. He also cited a relevant consideration, namely, that the court should have regard to the fact that all of the plaintiff's losses and expenses would be provided for in the capital sum in his damages. Therefore:-

> ‘What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation.’
>
> 37. The Chief Justice was careful in expressing this principle to ensure that there should be a proper distinction drawn between the sum to be provided for losses, cost and expenses, past and future, which it was the purpose of special damages to cover in full, and the award for compensation over and above those elements. That decision does not appear to be authority for the proposition that an injured plaintiff is to have his general damages reduced because he has received due recompense for his out of pocket expenses and future needs.”

**40.** The point was reiterated a few weeks later in another judgment of this court delivered by Irvine J. in *Shannon v O’Sullivan* [2016] IECA 93 where she referenced the same authority saying (at para. 37):

> “It cannot, in my view, be correct that a plaintiff can have their general damages reduced on the basis that they are to be awarded a very large sum in respect of their claim for special damage to cover matters such as loss of earnings, future care, aids and appliances, assistive technology etc. That cannot be correct in principle; an injured person is entitled to be compensated in full for all losses flowing from the injuries he sustains. Special damages represent the calculation of actual losses, past and future, which leaves the matter of general damages to be assessed entirely separately.”

**41.** I agree entirely with these observations. As a matter of basic fairness and justice, it simply cannot be correct in my view to suggest that a plaintiff who is compensated for actual

ascertained past and future monetary losses is somehow entitled to less compensation for his or her injuries. I reject any suggestion to the contrary.

**42.** The highest figure that may be awarded for general damages has at various times been described as a "cap" and as a "maximum" and to some extent, those expressions have been used interchangeably. I think however there is a difference, and it is of some importance in this case because counsel for the plaintiff argues that the doctrine of proportionality, insofar as the highest figure is concerned, should not involve the operation of a sliding scale, because if it did, the value of more minor injuries would be so low as to reach vanishing point. A "cap" represents a form of artificial limit and it might be taken to suggest that in a particular case, the actual value of the injury may well be higher than the cap, but cannot exceed it.

**43.** If one were therefore to notionally assume that the value of a particular injury is €750,000, an award of damages for that injury would in fact be the same as for an injury regarded as two thirds as serious. On the other hand, if €500,000 is the maximum award for the most serious injury, then one that is notionally two thirds as serious has a value of approximately €333,000. If one were to adopt the "cap" approach, then the application of the doctrine of proportionality becomes difficult, if not impossible, and counsel for the plaintiff understandably had difficulty in explaining how proportionality could operate in such circumstances.

**44.** This very issue was considered by the Supreme Court in *Morrissey v HSE* [202] IESC 6, where the sole judgment was delivered by Clarke C.J. The plaintiff had suffered a reduction in her life expectancy as a result of the defendant's negligence and the Chief Justice in a passage entitled "Damages" considered the issue under discussion here. He said (at p. 107 – 108):

> "14.5 However, it is appropriate to turn first to the award of general damages.

> 14.6 The starting point has to be to set out a very brief account of the history of the adoption by this Court of a limit on the amount of damages which can be awarded for pain and suffering. However, before so doing, it is of some importance to be clear as to the terminology used. On one view, it is said that whatever the limit may be, it can properly be described as a 'cap' on general damages so that it would, on that basis, operate as an artificial limitation reducing the damages which might otherwise properly be awarded to fully compensate an injured party. An alternative view is that the limit, which might in this context not be properly described as a 'cap' at all, amounts to the current view of the appellate courts as to the damages which should be awarded in cases of the most serious injuries. On that view, it might be said that all other damages, ranging from the very minor to those which are relatively serious but not of the most serious category, would require to be broadly proportionate to the damages awarded in the most serious cases, having regard to the level of injury suffered. It will be necessary to return to this question when the brief history of the case law in this area has been reviewed."

**45.** The Chief Justice commenced that review with *Sinnott* and a number of subsequent judgments where the damages limit was revised upwards from the starting point of £150,000.

**46.** It is interesting to note that the Chief Justice found it instructive to look at the position in other jurisdictions such as Northern Ireland, England and Wales and Germany in considering whether the upper limit in Ireland, be it €450,000 or €500,000, was in line with those jurisdictions, as indeed it broadly appeared to be. Having reviewed the evolution of the general damages limit, the Chief Justice considered that there may be categories of case at that limit which, while quite different in terms of the actual injuries, such as the injuries suffered by Mrs. Morrissey as against those suffered by a brain damaged child, ought

properly be regarded as of the most serious kind attracting the maximum amount. He then returned to the question he had raised above (at p. 117):

> "14.28 I should say that I have come to that view while considering that the proper approach to the limit for damages for pain and suffering is the one which sees that limit as the appropriate sum to award for the most serious damages. This is therefore the sum by reference to which all less serious damages should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. The point which I have sought to make, however, is that the type of injuries which do properly qualify for the maximum amount may nonetheless come into different categories. While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award. But those very same considerations also recognise that it may be possible to regard injuries of very different types as being broadly comparable. That consideration applies equally to injuries of the most serious type and, thus, it is appropriate to consider the injuries suffered by Ms. Morrissey to be of that most serious type, even though they differ in character from other types of injuries which can also properly be characterised as being of the most serious type."

**47.** It is clear from the foregoing that the Supreme Court has taken the view that the sum of €500,000, set in *Morrissey*, does not represent a "cap" on the damages that may be awarded for any particular injury but is rather the maximum amount that may be awarded

for the most serious injuries, even where those injuries differ in character and type. Contrary therefore to the submissions of counsel for the plaintiff, I am satisfied that an important aspect of the proportionality test now long recognised by our courts is the application in effect of a "sliding scale" which ranges from the least to the most serious injuries. This approach is also reflected in the judgment of this Court in *Nolan v Wirenski* where Irvine J. said (at para. 31):

> "31. Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries."

**48.** Irvine J. continued (at para. 42):

> "42. As Denham J. advised in *M.N v. S.M.* damages can only be fair and just if they are proportionate not only to the injuries sustained by that plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. As she stated at para. 44 of her judgement 'there must be a rational relationship between awards of damages in personal injuries cases.' Thus, it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories. In this regard, just because a judge describes an injury as significant this does not mean that the damages must be substantial. Any injury to an otherwise

healthy individual is significant. However, when it comes to assessing damages, what is important is how significant the injury concerned is when viewed within the whole spectrum of potential injuries to which I have earlier referred."

**49.** She returned to this theme in *Shannon v O'Sullivan* (at para. 34):

> "34. As to how a court should decide what is proportionate in terms of damages, I believe it is useful to seek to establish where the plaintiff's cluster of injuries and *sequelae* are to be found within the entire spectrum of personal injury claims which includes everything from very modest injuries to those which can only be described as catastrophic. While this is not a mandatory approach, it is a useful yardstick for the purposes of seeking to ensure that a proposed award is proportionate. This type of assessment is valuable because minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages which are likely to fall somewhere in the region of €450,000. The exercise is also valuable because awards of damages must be proportionate *inter se* and every injured party who receives an award of damages should be in a position to look to other awards made in respect of different injuries and conclude that their award was fair and just having regard to the relative severity of each."

**50.** I respectfully agree with these views. I think any party who receives an award of damages for personal injuries should be able to look at other awards and readily understand why they were higher or lower or the same as the award that that particular plaintiff receives. This is part and parcel of the essential consistency and predictability in the awarding of damages for personal injuries upon which I sought to lay emphasis in *McKeown v Crosby* [2020] IECA 242.

**51.** The potential difficulties posed by an upward creep in the level of damages for modest or moderate injuries in terms of the application of the doctrine of proportionality was commented upon by this court in *Payne v Nugent* [2015] IECA 268 where Irvine J., giving a judgment *ex tempore* with which the other members of the court agreed, said (at para. 18):

> "18. For my part I fear there is a real danger of injustice and unfairness being visited upon many of those who come to litigation seeking compensation if those who suffer modest injuries of the nature described in these proceedings are to receive damages of the nature awarded by the trial judge in this case. If modest injuries of this type are to attract damages of €65,000 the effect of such an approach must be to drive up the awards of those in receipt of the more significant middle ranking personal injuries claims such that a concertina type effect is created at the upper end of the compensation scale. So for example the award of general damages to the person who loses a limb becomes only modestly different to the award made to the quadriplegic or the individual who suffers significant brain damage and in my view that simply cannot be just or fair."

**52.** The role of the Book of Quantum and now the Personal Injuries Guidelines in achieving consistency, predictability and proportionality has been commented upon in other judgments. The Book of Quantum and the Guidelines can be of considerable assistance where the injury in issue lends itself clearly to a well defined category in the Book. The quest for consistency however becomes inevitably more difficult in multiple injury cases but that is far from suggesting that the Book of Quantum becomes redundant simply because there is more than one injury involved. As I commented in *Griffin v Hoare* [2021] IECA 329 (at para. 64):

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

**53.** Having said that, it has I think to be recognised that in complex multiple injury cases, such as the present, the application of the Book of Quantum or indeed the Guidelines may prove considerably more problematic. A variety of potential approaches might be adopted. One such is advocated by the Book of Quantum itself (at p. 10):

> "4. Consider the effect of multiple injuries.
>
> If in addition to the most significant injury as outlined above there are other injuries, it is not appropriate to simply add up values for all the different injuries to determine the amount of compensation. Where additional injuries arise there is likely to be an adjustment within the value range."

**54.** What this appears to suggest is that the court should attempt to identify "the most significant injury" which of course in many cases may not be possible. If it is however, the Book of Quantum suggests an adjustment "within the value range" and presumably, the value range being referred to here is the range for the most significant injury. That was the view taken in the judgment of Faherty J., speaking for this Court, in *O'Sullivan v Brozda* where she said (at para. 173):

> "173. While this court is cognisant that both the jurisprudence already referred to (and the Book of Quantum to some limited extent) emphasise that the appropriate way to compensate a litigant for multiple sites of injury is to make an adjustment in the overall award (<u>in other words to adjust upwards the relevant band of damages in the Book of Quantum for the principal injury</u>), this approach cannot be viewed as set in stone." (My emphasis)

**55.** Indeed, I would go further and suggest that in principle, this approach cannot be correct. To take an example, if one were to say that the clearly identified principle or most significant injury was in the €10,000 to €20,000 value range set out in the Book of Quantum, assume then that the injury is at the top of that range such as would merit an award of the full amount of €20,000, it cannot be correct to suggest that the plaintiff can be entitled to no additional compensation for all his or her other injuries because the limit has been reached in the most significant category.

**56.** The Personal Injuries Guidelines advocate a somewhat different approach under the heading "Multiple Injuries" (at p. 6)

> "The assessment of general damages in cases involving multiple injuries gives rise to special difficulty given that in these guidelines each injury is valued separately. The principle difficulty stems from the fact that there will usually be a temporal overlap in the injuries sustained such that if each injury was to be valued separately the claimant would be overcompensated to the point that the award would be unjust to the defendant and disproportionate when compared with other awards commonly made for other greater or lesser injuries. Each injury will, of course, cause additional pain and suffering which must be reflected in the award, but the question is how to ensure that the award will be just in the light of the overlap of the injuries.

In a case of multiple injuries, the appropriate approach for the trial judge is, where possible, to identify the injury and the bracket of damages within the Guidelines that best resembles the most significant of the claimant's injuries. The trial judge should then value that injury and thereafter uplift the value to ensure that the claimant is fairly and justly compensated for all the additional pain, discomfort and limitations arising from their lesser injury/injuries. It is of the utmost importance that the overall award of damages made in a case involving multiple injuries should be proportionate and just when considered in the light of the severity of other injuries which attract an equivalent award under the Guidelines."

**57.** This approach is, like that in the Book of Quantum, premised to a degree on the trial judge being able to identify one particular injury of the plaintiff's multiple injuries which ought properly be regarded as the most significant. Where that exercise is possible, the Guidelines suggest that this should form the starting point upon which to build in order to properly compensate the plaintiff for all the other lesser injuries suffered. The concern identified by the Guidelines is that if one were to separately take each injury and value it individually, there would be a risk of overcompensation and indeed this case provides a good example of how that might arise. In the course of his submissions, counsel for the plaintiff advised this court that if the plaintiff's injuries were all taken separately and analysed by reference to the Book of Quantum, he would come out with a figure for general damages in somewhere of the order of €420,000. Indeed, one can readily imagine cases where the effect of the addition of categories, if there were a sufficient number, would be to actually exceed the limit. Of course, that would entirely offend the doctrine of proportionality.

**58.** The approach of the courts in England and Wales is different again as exemplified in the leading case of *Sadler v Filipiak* [2011] EWCA Civ. 1728. This was a case in which the

plaintiff had suffered eight discrete injuries all of which were the subject of categories in the Judicial Studies Board Guidelines then current in England and Wales, since replaced by the Judicial College Guidelines. In the County Court, the judge had taken all the separate categories of injury, applied figures to them and added them together to come up with a sum of £32,000. The plaintiff appealed to the Court of Appeal on the basis that the sum assessed was too low, but not necessarily that the approach was wrong. The County Court judge had however accepted that he had to discount the figures in each category to allow for the fact that there was overlap between certain of the categories.

**59.** In the event, the Court of Appeal was of the view that the trial judge's valuations were too low and Pitchford L.J., delivering the leading judgment, considered that an addition of the categories ought to lead to a total of £47,500 which in turn was discounted back by approximately 15% to take account of overlap and leave the plaintiff with an award of £40,000. Pitchford L.J. noted that one of the issues that arose in the case was the correct approach towards damages for pain and suffering and loss of amenity when multiple categories of injuries are suffered by the claimant. He cited with approval the dicta of Kennedy L.J. in the unreported case of *Dureau v Evans* 13th October, 1995 where it was said:

> "Help is to be obtained from any source where it happens to be available. To a limited extent, in a case where there are multiple injuries, the figures in the Judicial Board Table can help but I accept Mr. Murphy's criticism of them that, where one has a multiplicity of injuries, it is necessary to take an overall view. The offsetting process may mean it is not possible to derive a great deal of benefit from that particular source. One then looks to see if anything can be gained from looking at a comparable award, if one is to be found, in another case. Even that may not prove to be a

> particularly fruitful source of enquiry. It may be necessary, if it be possible, to select what may be the most serious head of injury to see if a comparable award can be found in relation to that and, if so, build on it to allow for the other heads of injury which had been sustained by the plaintiff in the instant case."

**60.** In this latter regard, Kennedy L.J. appears to have adopted an approach somewhat analogous to that advocated by our Personal Injuries Guidelines. Pitchford L.J. also referred with approval to the observation of Maurice Kay L.J. in *Santos v Eaton Square Garage Limited* [2007] EWCA Civ 225 where it was said:

> "22. … However, in this as in any other similar case, the correct approach is not one of simple aggregation. Compensation for pain, suffering and loss of amenity has to take into account that where there is a plurality or duality of the conditions simple aggregation would produce overcompensation for pain, suffering and loss of amenity. That is particularly so where, as here, the psychological sequelae are related to the pain or perception of pain which was in issue caused by the orthopaedic injury."

**61.** Pitchford L.J. considered this to be the correct approach, saying (at para. 34):

> "It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain,

suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary."

**62.** It seems to me that absent from this analysis, in the Irish context, is of course any reference to proportionality in the context of the maximum amount of general damages which, as I have already noted, features very prominently in the Irish jurisprudence. However, the Court of Appeal of England and Wales nonetheless recognises the importance of not losing sight of the case as a whole or, as it were, not seeing the wood for the trees. This is a point also emphasised by Etherton L.J. in the same case who at para. 41, cited with approval the observations of Sir John May in the Court of Appeal in *Brown v Woodall* (unreported, 12th December, 1994), who said:

"As far as the first ground of appeal is concerned, I respectfully agree that the learned judge's approach adding up the various figures for the awards that she thought appropriate for the various different injuries could well lead one to an award, which, compared with other awards, is in the aggregate larger than reasonable.

In this type of case, in which there are a number of separate injuries, all adding up to one composite effect upon the plaintiff, it is necessary for the learned judge, no doubt having considered the various injuries and fixed a particular figure as reasonable compensation for each, to stand back and have a look at what would be the global aggregate figure and ask if it is reasonable compensation for the totality of the injury to the plaintiff or whether it would in aggregate be larger than was reasonable?"

**63.** Etherton L.J. then said:

"42. In other words, the judge should have, firstly, considered the various injuries and fixed a particular figure as reasonable for each and then, secondly, stood back

> and had a look at what would be the global aggregate figure and ask whether it was reasonable compensation for the totality of the injury."

**Comparators**

**64.** Placed within an Irish context, I think the important point to be taken from these authorities is that whatever individual categories of injury a plaintiff may have suffered, and whatever the values attributable to those categories may be, the court must strive to take an holistic view of the plaintiff and endeavour to place the plaintiff's particular constellation of injuries and their cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum and awards made to other plaintiffs.

**65.** I think this is what the trial judge attempted to do in arriving at a global figure for damages rather than seeking to break it down into individual categories. I do not think there is anything wrong in principle with that approach, particularly where the Book of Quantum does not appear to me to give a great deal of assistance, not least because it has the potential to vastly overvalue the plaintiff's injuries.

**66.** The defendants argue that the figure thus arrived at by the trial judge for general damages, €300,000, was far too high in terms of proportionality representing as it does 60% of the available maximum and is a figure which would be appropriate for a level of far more serious injury than that suffered by this plaintiff.

**67.** No comparable cases were cited to us which is of course unsurprising given the probably fairly unique combination of injuries suffered by the plaintiff.

**68.** Two recent decisions of this court may at least give some degree of assistance in placing the plaintiff's injuries here appropriately on the sliding scale. In *Zhang v Farrell* [2021] IECA 62, the plaintiff was a 29 year old accountancy student who was knocked down

crossing the road. She suffered a left knee injury consisting of a total rupture of the ACL and partial rupture of the MCL. These were surgically reconstructed. She made a good recovery although the knee continued to be mildly unstable and she was at risk of developing degenerative changes but not of requiring a knee replacement. She suffered a disruption of the sacro-iliac joint which was settling. She suffered a very severe psychiatric injury which led her to develop a number of symptoms, including irritable bowel syndrome with incontinence which required her to be near a bathroom at all times. She also developed fibromyalgia involving general muscle and joint pain and headaches. She suffered from panic attacks, insomnia, forgetfulness, confusion, depression and anxiety. She had ongoing back and neck pain.

**69.** The evidence of her psychiatrist was that she would never work again but the trial judge held that it was probable that she would be able to return to full time work after about seven years. She suffered extreme mental health issues brought on by the accident and very significant PTSD which led to her spending most of her time alone in public parks as she had difficulty tolerating being near any other person. The trial judge assessed her general damages to date at €95,000 and into the future at €75,000 making in total €170,000. She recovered a further almost €300,000 in respect of additional items and special damage. The plaintiff appealed the award to this court on the basis that the general damages were too low, but this court declined to interfere.

**70.** In *Quinn v Masivlaniec* [2021] IECA 247, the plaintiff was a 37 year old woman who suffered injuries in a road traffic accident. Her physical injuries were to her bowel and right wrist. The injury to her bowel was life threatening requiring over a week in intensive care. She underwent an exploratory laparotomy involving an extensive midline incision. This showed three perforations of the small bowel and a tear in the small intestine. The bowel

was resected and anastomised. She was left with a 14 centimetre midline scar. She was at risk of getting bowel obstructions which may require further surgery in the future. She had symptoms which included significant constipation and abdominal pain. This was likely to recur and get worse in the future.

**71.** The plaintiff's wrist injury comprised both radial and ulnar styloid fractures with dislocation. Although initially she was treated with a plaster slab only, she subsequently required readmission to hospital for open reduction and internal fixation with K wires. Some years after the accident she continued to complain of pain and reduced lifting and carrying capacity in her wrist. The injury to her wrist was described as very significant and she was likely to deteriorate into the future, develop osteoarthritis and require a wrist fusion necessitating prolonged rehabilitation. This would limit the movements of her wrist in the future. The plaintiff also had psychiatric injuries and developed a panic disorder. As a result of extensive treatment, this improved but did not disappear. The trial judge assessed each of her injuries individually and assigned a figure for damages to them. The trial judge awarded the plaintiff €210,000 for general damages. The special damages were relatively modest.

**72.** Giving a judgment with which the other members of the court agreed, Faherty J. reduced the plaintiff's general damages to €175,000 being made up of €135,000 for pain and suffering do date and €40,000 into the future. As can be seen from the foregoing, both the plaintiff in *Zhang* and *Quinn* suffered serious injuries with lifelong consequences, injuries which were going to impinge to a significant degree on each plaintiff's ability to live a normal life.

**Conclusions**

**73.** In the present case, very fortunately, the plaintiff has made an extraordinary recovery from what were, by any standards, very serious injuries. Much of the credit for this recovery is due to his own motivation and drive which are clearly exceptional. He has fastidiously followed all medical advice given to him to rehabilitate himself and has done so with great success. By the time his case came to trial, he had for some years resumed what was to all intents and purposes a normal, healthy and happy life. He is not subject to any physical limitations in terms of carrying out the normal activities of daily life save to a relatively minimal degree. His career has gone from strength to strength, albeit I accept of course that his upward trajectory was stalled somewhat by the accident and he may yet encounter some relatively minimal disadvantages in terms of any future changes of employment he may pursue. Thankfully, to date however, this has not materialised and he appears to have been successful in pursuing every promotion or alternative employment that he sought by competitive process.

**74.** I do not for a moment seek in any way to minimise the seriousness of the plaintiff's injuries and I acknowledge the enormous trauma, pain and disruption of his life he had to endure, particularly in the early years after the accident. It is indeed gratifying to note that the plaintiff and his wife have since the accident gone on to have three children who no doubt are a source of great joy to them. Again, I accept entirely that the plaintiff has been left with a degree of unpleasant and discommoding discomfort and pain both in his back and both his knees, more particularly the right. I also recognise that these injuries have meant that the plaintiff has lost much of the pleasure he had previously derived from the many sporting activities he enjoyed. He is entitled to be compensated for all those things.

**75.** He is also entitled to be compensated for the fact that he will have to undergo difficult, demanding and painful surgery on multiple occasions in the future in relation to his knees.

It is virtually certain that he will require a total knee replacement on the right side within the next five years and before he reaches the age of 50. He is likely to require a revision of that surgery about 20 years thereafter when he is likely to have retired. The evidence of Mr. Collins is that the plaintiff is likely to have some operative procedure on his left knee, likely later in life during retirement, but it is not probable that he will require a total knee replacement on the left side.

**76.** The trial judge awarded a sum of €300,000 general damages in respect of these injuries. Counsel for the plaintiff was asked by the court during the course of the appeal where in the scale of general damages a young person suffering from paralysis, short of quadriplegia, or the loss of one or more limbs, would fit in to the pantheon of general damages when compared with this plaintiff. No clear answer emerged.

**77.** It seems to me that an award of damages at the level of €300,000 would normally be reserved for cases where the plaintiff is left with a serious and permanent disability of such severity as to compromise his or her ability to carry out the normal activities of daily living to a significant degree. It may also involve the plaintiff being unable to work as prior to the accident, at least where the employment concerned requires physical abilities no longer possessed by the plaintiff. Damages at this level have in the past been awarded also in cases where there may be no major physical disability, but the plaintiff has for example been the victim of serious and sustained sexual abuse, or have had their life expectancy adversely affected. Essentially, such plaintiffs will have had their lives destroyed to a significant extent by what has befallen them, even if it has not necessarily resulted in physical disability or incapacity at the level of the most serious injuries.

**78.** Looked at in that context, the plaintiff herein could be viewed as a person who despite suffering significant injuries, has recovered to the extent of leading a normal and rewarding

life, albeit one that is subject to some limitations which, in the overall scheme of things, could not be viewed as severe. Taking all of these matters into account, in my view it cannot be said that an award of €300,000 for general damages for pain and suffering in this case can be viewed as proportionate, either when viewed in the context of the maximum or in the context of awards for other injuries of the kind to which I have referred.

**79.** In my view, the appropriate award for general damages in this case is €200,000. That sum is, in my judgment, proportionate, in the sense already explained, to the maximum and to other awards. Given the level of trauma suffered by the plaintiff in the early years at least and the fact that a period of 10 years elapsed between the accident and the trial, I do not think that the sum of €125,000 for pain and suffering to date is unreasonable. I would however assess the figure for pain and suffering into the future in the sum of €75,000. I am therefore satisfied that the differential in the assessment of general damages being made by this Court and the sum awarded by the trial judge is well above the margin within which the court might not be inclined to interfere.

**80.** In that latter regard, there was some discussion during the course of this appeal as to the threshold for interference and reliance was placed on the oft cited margin of 25% first mooted in the judgment of McCarthy J. in *Reddy v Bates* [1983] IR 141. As Fennelly J. pointed out in *Rossiter v Dun Laoghaire County Council* [2001] 3 IR 578, the more or less unvarying rule has been that interference is warranted where there is no reasonable proportion between the amount awarded and what the appeal court might be inclined to give. McCarthy J.'s approach to that test was:

> "In order to warrant interference with an award of general damages, the disparity between the views of the individual members of this Court and each item of the award, however large it may be expressed in isolation, must be a significant

> percentage of that item of the award and, as a general rule, should not be less than 25 per cent. … this Court should be reluctant so to interfere and, in particular, … it should avoid relatively petty paring from, or adding to, awards."

**81.** These dicta do not constitute a rule of law or indeed a rule of thumb to be invariably applied as many of the cases demonstrate, indeed not least *Quinn*, where the threshold was considerably less than 25%, and that is recognised by Fennelly J. where he said:

> "The test is one for application as a general principle, even if McCarthy J., in *Reddy v Bates* suggested a possible rule of thumb, the need for at least a 25 per cent discrepancy. That is no more than a highly pragmatic embodiment of his very proper counsel against '… relatively petty paring from or adding to awards.' "

**82.** In fact, one issue that did arise from the debate with counsel in the present appeal was how the 25% should be applied, if indeed it was to be applied. Counsel suggested that 25% should be subtracted from the trial judge's award of €300,000 to arrive at a figure of €225,000. Accordingly, his argument suggested that if this court felt that the value of the case was €225,000 or more, it should not interfere. In fact, I think this is to apply the percentage in the wrong direction. The starting point should be the sum the appellate court would be "inclined to give" and the 25% figure mentioned by McCarthy J. should be added to, or subtracted from, as appropriate, that figure. Accordingly, if one were to apply that rubric to the present case, the minimum figure for non-interference is €240,000 rather than €225,000.

**83.** I stress however that these percentages are really by way of rough guide only and I would personally incline to the view, suggested by counsel for the defendant, that this sort of formulation is perhaps more relevant in lower value cases. Indeed, it is notable that in *Rossiter*, the figure awarded by the High Court was less than 25% below that considered by

the Supreme Court to be appropriate. So again, to take the example of an award of general damages of €500,000, if the appellate court felt that €400,000 was in fact the correct figure, I would find it difficult to accept the proposition that this court should not interfere because it was within the 25% threshold.

**84.** Turning finally to the issue of loss of opportunity, I have already referred to the evidence of Mr. Tolan in that regard which was uncontradicted as I have said by any equivalent expert for the defence. It was at one stage suggested by counsel for the plaintiff that the sum awarded by the trial judge should also be regarded as compensation for the fact that the plaintiff would be some three months off work while he underwent a knee replacement. I do not accept that submission because it seems to me that damages for loss of employment opportunity are for just that, namely compensation to the plaintiff for the loss of a chance to pursue his desired career in the way he wished to pursue it. It is damages for not just the disappointment thus arising for the plaintiff, but also the fact that he is likely to lose some earnings as a result, albeit that it is impossible to quantify that loss in precise figures. The same cannot be said of loss of earnings while the plaintiff is out sick, of which there was absolutely no evidence in this case. Indeed, there was nothing to suggest that the plaintiff would in fact lose any earnings as a result of having to undergo a knee replacement, noting that the plaintiff received his full pay throughout the period following the accident herein when he was out of work.

**85.** Mr. Tolan was of opinion that the plaintiff had suffered some loss of opportunity in two particular respects. The first was due to the fact that he was unable to compete for promotion during the 26 months before he returned to full time employment. That appears to me to be a valid and legitimate view supported by the fact that the plaintiff almost immediately secured promotion when he did in fact return full time. The second aspect of

the loss of opportunity was in terms of his future prospects should he decide to move jobs for whatever reason. In a way, this was already shown to be a realised risk in the sense that the plaintiff was unable to keep to his job with SK Biotech which involved frequent travel to Korea and elected instead to take a less demanding, but slightly lower paid, job with Takeda.

**86.** However, the losses arising from these relatively minor limitations should I think be viewed as modest. In two recent judgments of this court, *Leidig v O'Neill* [2020] IECA 296 and *Griffin v Hoare* [2021] IECA 329, this court awarded in each case the sum of €25,000 for loss of employment opportunity to two young men just qualified in their chosen fields who would be unable to pursue a particular desired occupation because of their injuries in the future. I am prepared to accept, as had been submitted by counsel for the plaintiff, that in view of the plaintiff's high level of earning capacity in the present case, it is appropriate that he should obtain a somewhat higher award, although I do not believe that an award at the level given by the trial judge was justified by the evidence. I would therefore propose to assess the plaintiff's damages under this heading in the sum of €50,000. Accordingly, the total general damages come to €250,000.

**87.** I would therefore substitute for the order of the High Court judgment in the sum of €383,649 (inclusive of the special damages awarded by the High Court) and allow the defendants' appeal to that extent.

**88.** Having regard to that outcome, I would direct the parties to deliver written submissions not exceeding 1,000 words on the issue of costs within a period of 6 weeks from the date of this judgment.

**89.** As this judgment is delivered electronically, Faherty and Binchy JJ. have authorised me to record their agreement with it.