UNAPPROVED

THE COURT OF APPEAL

Appeal Number: 2014/100
High Court Record No: 1987/1461P
Neutral Citation Number [2024] IECA 52

Noonan J.
Faherty J.
Haughton J.

BETWEEN/

GERARD BUTLER

PLAINTIFF/
APPELLANT

- AND -

RODNEY REGAN AND LEONARD REGAN (IN THEIR CAPACITY AS PERSONAL REPRESENTATIVES OF THE LATE BRIAN REGAN, DECEASED)

DEFENDANTS/
RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 8th day of March 2024

Introduction

1. This is Mr. Butler's (hereinafter "the Appellant") appeal of the Order of the High Court (Abbott J.) of 29 July 2004, as perfected on 8 August 2004. That the appeal is only now being concluded is (hopefully) explained later in this judgment.

Background

2. The within proceedings arise out of the alleged medical mismanagement by the late Brian S. Regan (hereinafter referred to as "the Deceased") of injuries sustained by the Appellant in a road traffic accident (a head-on collision) which occurred on 29 February 1980 ("the Accident").

3. The Appellant sustained serious injuries for which he was admitted to Jervis Street Hospital. His injuries included lacerations over his left eye and a chest injury which caused a right pneumothorax and a collapse of the lung. His right femur was fractured in two places with a displacement and comminution, and he suffered a fracture and dislocation of the right ankle and a transverse fracture of the right patella. On the day of the accident, he underwent open reduction surgery for the fracture of right talus, and the right patella was excised. Some nine days later, open reduction of both the lower third and the upper third of the right femur was carried out during which a plate and screws were inserted in respect of both. Both fractures were bone grafted, bone being removed from his pelvis for this purpose. The Appellant was hospitalised from 29 February 1980 until 24 April 1980, which included three days in intensive care.

4. At the time of the Accident the Deceased was a consultant orthopaedic surgeon attached to Jervis Street Hospital in Dublin and he treated the Appellant's orthopaedic injuries arising out of the Accident.

5. In September 1980, the Appellant issued legal proceedings in the High Court against the driver of the other vehicle involved in the collision seeking compensation for the personal injuries, loss and damage which were caused to him in the Accident ("the Original Proceedings"). For this purpose, the Appellant relied on three medical reports, dated 14 May 1980, 24 November 1980 and 11 February 1982 provided by the Deceased. The reports detailed the injuries sustained by the Appellant in the Accident and the progression of those injuries.

6. The first of the reports detailed that the Appellant was seen by the Deceased on 15 May 1980 as an outpatient. It noted that the Appellant had *"considerable stiffness of his right lower limb"* and was walking on crutches. The second medical report (dated 24 November 1980) noted, *inter alia*, that when seen on 18 September 1980 the Appellant had *"some clicking in the hip and knee on movement"* with no complaint of pain. It noted that *"X-rays of 11/9/80 showed all fractures uniting well, but union was not complete in the fractures of the femur".* The report documented that the Appellant was again seen as an outpatient on 19 November 1980 when he had advised of further injuries including pain in his right thumb, abrasions of his left leg and left hand. The Appellant's complaints were of pain in his chest on and off, some stiffness in the knee and *"some clicking on movement"*, stiffness in the right ankle, with difficulty in walking without a stick. The Appellant advised that he had not yet returned to work and that he had put on three stone in weight.

7. As recorded in the report, examination of the right knee revealed, *inter alia, "some clicking"* on extension and flexion limited to about 30 degrees and that the subtaloid joint was *"almost fully stiff".* The right hip was *"slightly stiff with a click on movement".* As noted in the report, a review of all x-rays was carried out. The original x-rays showed a fracture of the sixth rib (not reported on by the radiologist), a fracture of the right lateral malleolus of the right ankle (also not reported in the original films) which was fixed at the original operation, and a crack fracture of the right wrist trapezium. The report goes on to state that x-rays of 19 November 1980 showed union of the fracture of the right rib and that fractures of the femur were *"both united, but not fully consolidated"*. Regarding the fracture of the right ankle, there was *"some narrowing of the ankle joint and narrowing of the subtaloid joint"*.

8. In the opinion of the Deceased, the Appellant was *"making a good recovery from his multiple injuries".* He noted that the *"present disabilities are mainly due to weakness*

of the right lower limb and stiffness of the ankle". There was some bony material at the site of the fracture of the right patella. With regard to the right ankle and the subtaloid joint, the Deceased opined that *"there is a traumatic arthritis in these joints and this may develop into osteoarthritis, resulting in pain as well as further stiffness in these joints".* The Deceased considered that *"it is most unlikely that [the Appellant] will be able to resume playing table tennis at a high level of competition, owing to the weakness in his right lower limb and the stiffness of the ankle and foot joints, and of course should a further arthritis develop this would hinder his progress, even further".*

9. The Deceased saw the Appellant on four occasions in 1981. His third report (dated 11 February 1982) noted that the Appellant had complained in January 1981 of some limp, and stiffness on and off in right ankle and some stiffness in the right knee after exercise with occasional clicking. He noted that the Appellant had returned to work at the beginning of January 1981 (with some help at first) but was now *"doing very well"*. When seen on 29 April 1981, the Appellant was noted as having no major complaint and was walking without a stick. He had some ache in the right knee when driving and slight stiffness in the right ankle in the morning. When seen on 29 July 1981, his only problem was his right ankle which became stiffer after walking a half a mile. The Deceased next saw the Appellant on 16 December 1981 when the Appellant had *"minor complaints".* He complained of stiffness and soreness in the right ankle in bad weather. He had *"a clicking in the right hip which is not painful"*, a *"slight clicking in the right ankle which is not painful*" and *"a slight clicking in the right knee which has a slight wobble occasionally"*. It was noted that the Appellant had continued working since January 1981 and that he had taken on two other counties in connection with his work, which involved more driving.

10. Examination of the Appellant in January 1982 noted that his right ankle had *"dorsiflexion to '80 degrees, planter flexion to 25 degrees".* The subtaloid joint was *"25%*

mobile". The appellant's legs were *"equal in length"*. His scars were as previously noted. His right hip showed *"slight stiffness with no clicking on movement"*. There was *"[s]light wasting of the right thigh and calf"*. In the Deceased's opinion, the Appellant had made further progress, had returned to work and *"any present symptoms are of a minor nature"*. He noted, *inter alia*,:

> *"He has some disability and the tendency to arthritis is still present"*.

11. The Deceased's medical reports did not advert to the possibility of the Appellant developing osteoarthritis in his hips or the possibility that he might require a hip replacement in the future. The reports also did not advise of the possibility that the Appellant's lumbar spine could be affected, nor did the Deceased report that the Appellant sustained a fracture to his sternum.

The settlement of the Original Proceedings

12. On 15 February 1984, the Appellant compromised the Original Proceedings for the sum of IR£85,000, comprising IR£71,843.10 in general damages and IR£13,156.90 in special damages, together with the costs of the proceedings. In the context of the settlement the Appellant also received a job security letter from the insurer of the driver of the other vehicle, Royal Sun Alliance ("Sun Alliance") who, coincidentally, happened to be the Appellant's employer, the Appellant at the time being employed as an insurance claims inspector.

13. The letter of comfort provided that the Appellant's employer would facilitate him with a desk job in the event that he suffered a future arthrodesis which rendered him unfit for work as a claims inspector. It did not cover the eventuality of the Appellant becoming unfit for work for reasons relating to hip, knee, or lumbar injuries.

14. Notably, albeit having solicitors on record, it was the Appellant himself who negotiated the settlement of the Original Proceedings. By the time of these negotiations, he

was in possession of two legal opinions from the two senior counsel who were instructed in his case. One of the legal opinions is dated 26 July 1982. I note that at the time counsel gave his opinion, he had not only the Deceased's medical reports but also a report (dated 26 February 1982) and a letter dated 7 April 1982 from Mr. Derek Robinson, Consultant Surgeon in the Meath Hospital from whom the Appellant had sought a second opinion. As a result of the *"severe ankle injury",* Mr. Robinson considered that arthritis was likely in the Appellant's right ankle and that it would require surgical treatment (*"probably a combined Arthrodesis"*) in less than ten years' time if the ankle became sufficiently painful. This treatment would result in the Appellant having *"an immobile but painless joint"* which would undoubtedly affect the Appellant. With this contingency in mind, together with the possibility of the Appellant having to resign his employment as a claims manager and take a desk job, counsel considered that the full value of the case was IR£65,000-70,000 approximately, plus special damages.

Events post the settlement

15. In 1986, the Appellant visited his General Practitioner, Dr. Ismail, complaining of pain in his right knee and was referred by Dr. Ismail to Mr. James Sheehan, consultant orthopaedic surgeon. Mr. Sheehan advised the Appellant that the pain in his knee was caused by arthritis in the hips.

The present proceedings are commenced.

16. By plenary summons issued on 16 February 1987, the Appellant instituted the within proceedings against the Deceased for negligence and breach of duty. Following an Order for the renewal of the plenary summons on 12 February 1988, it was served on the Deceased on 17 June 1988 and an appearance was entered on 28 June 1988.

17. Between June 1988 and the delivery of the statement of claim, the Appellant served three Notices of Intention to Proceed (9 September 1991, 8 October 1992 and 25 January 1996).

18. The statement of claim was delivered on 21 November 1996, some nine years and eleven months after the commencement of the proceedings. The claim made therein was that the Deceased failed to adequately report to the Appellant's legal representatives (in the Original Proceedings) on the entirety of the Appellant's injuries sustained in the Accident, or their likely *sequalae*, as a result of which the Original Proceedings were settled at an undervalue. While acknowledging that the Deceased had prepared and furnished medical reports on the laceration to the Appellant's left eye, his chest injury/collapse of the lung, the right femur injury (comminuted fracture with displacement and fracture of the upper third of the shaft with comminution and gross displacement), right ankle fracture and traverse fracture of the right patella, the Appellant pleaded that the Deceased had failed to examine, diagnose, treat or report to the Appellant's legal advisors the following injuries: severe trauma to the right hip which accounted for degenerative changes and symptoms in the right hip including osteoarthritis; soft tissue injuries of the left leg with resultant osteoarthritis said to be consistent with *"a high degree of energy passing up the Plaintiff's left limb causing compression damage to the articular cartilage of the left hip*"; a fracture of the sternum; osteoarthritic change in the right knee. It was pleaded, *inter alia*, that the Appellant suffered from pain in his hips and pain, stiffness and limitation of movement in his right knee. It was further pleaded that the Appellant was severely discommoded in his private, social working, family and recreational life.

19. By the time the statement of claim was delivered, the Deceased had retired from public service (8 October 1992) and had suffered a stroke in September 1996.

20. On 28 July 1997, the Appellant delivered an amended statement of claim (amending an erroneous date at para. 14 of the Statement of Claim) following which the Deceased's Defence was filed on 12 November 1997. The Deceased denied responsibility for the Appellant's injuries. He pleaded that at the hearing of the action he would rely on the Appellant's delay and claimed resultant prejudice to him by reason of that delay. The Appellant's reply was filed on 2 April 1998.

21. On 31 July 1999, the Appellant availed of an occupational ill health pension from his employer, Sun Alliance, and retired from his employment at age 49.

22. On 11 November 1999, the Deceased issued a Notice of Intention to Proceed. This was followed on 4 November 2000 by the Appellant's fourth Notice of Intention to Proceed.

23. The Notice of Trial issued on 3 March 2000. There followed the service of an (undated) additional particulars of personal injuries and special damages by the Appellant in which, *inter alia,* he updated the particulars regarding his physical injuries and outlined details of psychiatric/psychological injuries arising from the Deceased's negligence and breach of duty and gave details of his claimed financial loss.

24. On 14 June 2001, the Deceased filed a first amended defence alleging, in addition to the prior pleas, contributory negligence on the part of the Appellant. This was followed on 16 November 2001 by a second amended defence in which was added the plea that *"[the Deceased] has been so prejudiced by the said delay as to make it inequitable that he should have to defend these proceedings"*.

25. On 10 December 2001, the Deceased issued a notice of motion for an order directing the trial of a preliminary issue as to whether the Appellant had been guilty of such inordinate and inexcusable delay in the prosecution of his claim so as to cause prejudice to

the Deceased. By Order of the High Court (Johnson J.) of 25 February 2022, the Deceased's motion was refused.

26. The trial of the action came on for hearing before Abbott J. (hereinafter "the Judge") on 16 April 2002 and ran for 20 days, closing on 17 May 2002. The Appellant was fully legally represented at all stages of the trial.

27. In the course of the trial the Judge heard evidence from the Appellant and some 13 witnesses called on his behalf, together with 6 witnesses for the Deceased. The Deceased did not give evidence. It appears to be the case that the Appellant (and the Judge) were only apprised on 16 April 2002 of the Deceased's inability to give evidence. This is a matter which the Appellant has raised in his appeal grounds and submissions, and I will return to this in due course.

28. On 1 July 2004, the Judge delivered his judgment in the matter.

The High Court judgment

29. As appears from the judgment, at the outset of the commencement of the trial on 16 April 2002 the Judge addressed the Deceased's plea of delay. After noting that there was a difference of opinion as to whether the Deceased's motion had been adjourned on the basis that it was to be heard as a preliminary issue prior to the hearing of the action or had been adjourned to the hearing of the action *simpliciter*, the Judge decided to hear a preliminary application by counsel for the Deceased to have the motion dealt with since at that stage the defence *"were alleging that the defendant was unable to give evidence, although the correspondence and affidavits leading up to that date had not been so explicit about this fact"*. (p. 3)

30. After hearing from both sides, the Judge ruled that he would not deal with the issue of delay and alleged prejudice as a preliminary issue but rather would deal with those

matters in the hearing as a matter of defence. His judgment recites the reasons he gave for so ruling (pp.3-7).

31. At pp. 7-23 of the judgment, the Judge sets out his decision on the Deceased's delay argument. He noted that the case had proceeded before him over a number of days and that evidence was heard. A number of authorities were opened to him on the issue of delay. After quoting from some of those authorities (including *Primor Plc v. Stokes Kennedy Crowley & Oliver Free & Co* [1996] 2 I.R. 459) and adverting to the parties' arguments, the Judge's conclusions on delay were as follows: albeit that the delay between the issue of the plenary summons and delivery of the statement of claim might be explained by the Appellant's difficulty in finding a medical report given the reluctance of Mr. Sheehan to become involved in any litigation, the Judge nevertheless found the delay to be inordinate. He found further inordinate delay from the date of the delivery of the statement of claim until the case was ready for hearing in 2000. Any delay from the time the case was ready for hearing, however, *"may be as much due to listing difficulties arising from various factors including foot and mouth and acquiescence 'akin to estoppel' on the part of the defendant."* (p. 21) In any event, the total delay was *"unquestionably inordinate to a very great degree".*

32. As to whether the delay was excusable, the Judge opined that albeit that there had been difficulties in obtaining medical reports, and that the normal delays in litigation may have accounted for a significant part of the delay and rendered it excusable, *"a more controversial question arose in relation to a significant part of this delay arising from sheer inertia on the part of the plaintiff to further process the claim and to engage with his claim as one would expect of a reasonable litigant, by reason of a type of mental block akin to depression in respect of which other factors such as gastro-intestinal trouble, work*

pressures, neighbour troubles and, (to a lesser extent) the pressure of a young family…".(p. 21)

33. He considered that while these extraneous factors had an impact on the Appellant and may have slowed down his processing of his claim, he also considered that *"having regard to the obsessive and perfectionist approach of the plaintiff to his affairs, that the claim itself became an oppressive presence for the plaintiff in the psychological sense and that the delay, even though at times exacerbated by external factors, still related to causes which to a substantial extent were arising from the action itself".* (p. 21) Consequently, notwithstanding the exceptionally inordinate delay, *"such delay is excusable from the point of view of determining whether the action should proceed if other conditions for a proper and fair forensic investigation of the allegations of the plaintiff are present".* What added weight to the decision of the Judge was his consideration that the defendant was *"guilty of a significant degree of acquiescence 'akin to estoppel' from the time the case was ready for hearing".* He went on to state:

> *"However, in view of the fact that the case was heard in its entirety the court must have regard to the manner in which courts have processed claims against deceased persons, having regard to the inability of the defendant in this case to give evidence and hence effective instructions".* (p. 22)

34. The Judge considered it appropriate to set out a template or guide for his consideration of the issues arising in the case and did so at pp. 22-23 of his judgment. The template is more particularly referred to later in this judgment.

35. The Judge next proceeded to consider the liability of the Deceased for the Appellant's personal injuries, firstly the depression the Appellant claimed he suffered from the disappointment of being told in 1986 by Mr. Sheehan that he arthritis in his hips. Preferring the approach advocated by the Deceased's legal representatives for the task in

hand over the submissions of the Appellant's counsel, the Judge held that the *"personal injuries are too remote to be compensatable in a claim of this kind."* (p. 24) He went on to add:

> *"In any event I consider that by reason of the fact that the plaintiff had been exposed to a seriously threatening injury to his ankle and awareness of its consequences even without arthrodesis he had plenty of cause to get depressed after his return to work. Instead he was reasonably successful on his return to employment, and highly successful in competitive table tennis. This initial good mental and emotional recovery after a serious injury renders it improbable that he suffered depression on being told of further injuries. It is much more probable that his acknowledged depression arose from other unfortunate experiences".* (p. 24)

36. He continued his assessment of the Deceased's liability under the heading *"ECONOMIC LOSS".* It seemed to the Judge appropriate to apply the test set by Henchy J. in *McGrath v. Kiely & Anor* [1965] I.R. 497. There, a surgeon who failed to report aspects of injury which resulted in the sum recovered by a litigant in subsequent litigation being reduced was held liable for the loss arising from the reduction of the award by reason of such omission. The Judge noted that this authority was not challenged by the Deceased. He considered that it ruled the facts of the case before him *"if it is found that the defendant was negligent in complying with his contract to report the plaintiff's injuries to the plaintiff's solicitors for the purpose of the case arising from his car accident"*. (p. 24)

37. The Judge went on to state:

> *"On the basis of the template described by me above for the testing of evidence in this case, I find that the only basis upon which the defendant is liable is in respect of the non-reporting to the plaintiff's solicitors of the probability or at least the*

serious possibility of severe arthritis in the right hip leading to a possible or probable necessity for hip replacement at some future date".

38. The Judge so concluded for the reasons he set out at pp. 25-27 of his judgment, which I summarise as follows:

- The Deceased's medical reports had referred to complaints made by the plaintiff relating to clicking and stiffness in his right hip.
- Hospital and X-ray notes from 10 September 1980 and 19 November 1980, respectively, showed that that the Appellant's right hip "*was a matter to be considered and being considered by the defendant, and that the X-ray report did not specifically address concerns about the hip joint".*
- The evidence of Messrs. Strachan and Norris, orthopaedic specialists for the Appellant (albeit the Judge erroneously refers to 'the defendant'), that the Deceased should have had regard to the force of the impact on the right knee causing disruption of the cartilage of the right hip, indicated that the Deceased *"should have had regard to ordinary standards of care with regard to this aspect of bio-mechanics giving rise to a risk of the right hip being affected by the tremendous linear force applied from the knee along the hip giving rise to severe femoral fractures, if he had made any enquiries as to how the fractures occurred".*
- The evidence of Dr. Denis Wood (Chartered Engineer) in relation to the transmission of force upwards from the knee to the hip by reason of the linear force created by the partially overlapping head-on nature of the collision in which the Appellant suffered his injuries.
- The Judge, however, did not find the Deceased liable regarding a failure to report in respect of the Appellant's left hip. He rejected the Appellant's

evidence that he had complained to the Deceased about pain in both his right and left hips and the Judge was *"unable to find within any documentation emerging from him in either his own notes, his letters or Mr. Robinson's report indicating that he made any complaint about the left hip before or around the time when the defendant's medical legal reports were being prepared".* Moreover, the Judge considered that the complaint about arthritis in the Appellant's right knee was not something in respect of which the Deceased should be blamed *"as the injury to the knee was patent, severe, and clear to the plaintiff and his legal advisors that complications could arise in the future".* He found that, in any event, the medical evidence in relation to the present condition of the right knee was far from indicating that the injury was any more serious than it might have been anticipated at the time of reporting of the Deceased.

- Similarly, insofar as the Appellant had further complaints in relation to his right ankle injury, those were not to be attributable to the Deceased *"as the ankle injury was severe and patent which prompted the plaintiff to seek and receive a second opinion specifically upon the subject and the defendant cannot be blamed if such second opinion did not elucidate all the possibilities".*
- The additional injuries and fracture to the sternum were not matters for which the Deceased was responsible as orthopaedic surgeon: while the Deceased did report on broken ribs in his reports, this fact should not fix the Deceased with liability in respect of the non-reporting of the fractured sternum.
- The degenerative changes in the Appellant's back were not matters which should be considered separately from the right hip issue *"as both the*

degeneration of the back and degeneration of the left hip may be regarded as consequences of compensatory posture arising from the initial right hip injury".

- Whilst the evidence was inconclusive as to whether the joint space of the left hip was narrower than the joint space of the right hip, the Judge considered that since those measurements arose many years after the Appellant sustained the initial injury, comparisons and possible apparent contradiction involving joint spaces were not helpful. He found the evidence of Messrs. Norris and Strachan relating to the crucial nature of a clinical diagnosis based on symptoms was the best indicator of hip injury arising from accidental trauma rather than the ageing process.
- In relation to the balance of the injuries which were alleged by the Appellant to have been overlooked by the Deceased, the Judge considered that they were *"of such minor consequence that they would not have had the consequence of moving a settlement away from the threshold it reached in 1984 and thus should not be taken into consideration in this case".*
- The views of Messrs. Norris and Strachan were consistent with at least one orthopaedic textbook of the early 1980s.

39. The Judge found that no issue arose under the Statute of Limitations. As the Appellant's claim was sustained only in relation to economic loss and not personal injuries, the six-year period of limitation applied from the date of accrual of the action. "*As the right of return accrued (at the earliest) on the date of last medical report in 1982, the proceedings were commenced within the six-year period thereafter and hence the claim as accepted by this Court is not statute barred".*

40. The Judge next turned to the assessment of damages. As dictated by the approach of Henchy J. in *McGrath v. Kiely & Anor* [1965] IR 497, he held that the Appellant was entitled *"to the difference between the settlement he might have obtained had the defendant reported fully and properly on his right hip to his legal advisors and the settlement sum actually obtained by him".* (p. 28) The Judge found that the settlement of over £70,000 the Appellant had obtained in general damages *"was a significant and generous settlement for the injuries disclosed by the medical reports".* He noted, however, that that was given on the basis that the Appellant had received a letter of comfort from his employer in relation to the security of his employment notwithstanding his manifestly severe ankle injuries. He went on to state:

> *"There is no doubt that had the severity of the plaintiff's hip injuries [been] notified by the defendant in his reports prior to the settlement that either the amount of the settlement would have been increased or a more extensive and elaborate letter of comfort would have been given by the defendants or a combination of such altered reaction could have been obtained by way of overall settlement by the plaintiff."* (p. 28)

41. The Judge considered, however, that it mattered little whether the impugned settlement would have included an extended letter of comfort *"as such an extended letter of comfort would in itself have an economic value".* He continued:

> *"The addition of the hip injuries would have been a significantly new element in the settlement, on the basis of no letter of comfort, I would consider, having regard that in 1984 the standard of Sinnott v. Quinnsworth Ltd and Others [1984] 1 I.L.R.M. 1 indicating that the maximum compensation which a plaintiff might hope for in respect of general damages for the most catastrophic injuries would have been £150,000 and having regard to the fact that additional (even severe) injuries do*

not add to settlement values in strictly arithmetical terms the most likely increase of the value of the settlement from the point of view of general damages would have been £15,000". (pp. 28-29)

42. The Judge further considered that at the time of the settlement there would have been an attempt *"to negotiate either an actuarial figure for loss of earnings sometime in the future by reason of disability or loss of employment prospects, or to negotiate an overall loss of job prospects figure".* Additionally, *"there may well have been some estimate of prospective costs of hip replacements".* (p. 29)

43. Having regard to the actuarial evidence adduced by the Appellant, the Judge considered the appropriate manner of calculating the present value of damages attributable to those items of loss *"should be to apply whatever actuarial multiplier might foreseeably have been used in 1984 to deal with any feared loss arising from the deterioration of the hips"*. The Judge rejected the Appellant's Actuary's suggestion that the Appellant's historical losses and the actuarial value of his present losses should be calculated and discounted back for the purposes of ascertaining the value of such losses. He considered firstly that damages would have been assessed in 1984 in the light of expectations in 1984 and in light of the mortality tables facing the Appellant in 1984. Secondly, he considered that the consistency tests put to the Appellant's Actuary in cross-examination were not met. He also rejected the use of historical losses as a means for deciding the quantum in relation to those factors. He considered that an award of interest under the Courts Act 1981 was the most appropriate method of dealing with the matter. He noted that the only guide of expectations at the time of negotiation of the 1984 settlement in relation to loss of wages was a note made by the Appellant in relation to the loss of IR£65 per month in relation to the worst possible consequences arising from his ankle injury. In light of the evidence, and the experience of the Appellant, he considered that *"hip replacement and adverse*

consequences to the plaintiff's employment might not have been probable until the plaintiff was 48 to 52 and similarly expenditure on hip operations might not occur until that time". (p. 30)

44. In evidence, the Appellant's Actuary had clarified that the multiplier would be in the region of IR£200 per week lost. On that basis, the Judge considered that the figure in respect of prospective losses would have been in the region of IR£13,000. Alternatively, it would have been reasonable for such sum to be added on, on a non-actuarial/mathematical basis on the basis of general loss of job prospects.

45. Considering that there could be a probability of at least two hip operations, the Judge found that the value of same as of the date of trial (of the within proceedings) would have been in the region of IR£9,200, which *"would probably be represented by a sum in the region of [IR]£3,000 in 1984"* and which would be *"strongly discounted by reason of the fact that a hip operation would not be imminent"*. Hence, the Judge considered *"the sum of [IR]£2,000 at most, to have been a likely contingency figure for hip operations in any settlement that would have incorporated an arthritic injury to the plaintiff's hips."* He was of the view that *"back operations and knee operations would not have been foreseeable in 1984 as the reporting literature from the defendant and Mr. Robinson do not allude to any secondary problems arising there, notwithstanding that the ankle injury would manifestly have given rise to some posture difficulties similar to those presented by a degenerating hip."* (p. 30)

46. Overall, he considered that damages in the case could be *"summarised and totalled as follows in 1984 monetary damages:*

Loss to settlement in respect of general damages	*IR£15,000*
Probable actuarial loss – loss of job prospects	*IR£13,000*
Contingency sum in relation to hip operations in the future	*IR£2,000*

Total *IR£30,000"*

47. The Judge then turned to the plea of contributory negligence finding no merit in same and that it was "*not sustainable by reason of the fact that the defendant did not bring the hip injury into sufficient focus to place an onus on the plaintiff or his advisors to receive clarification"*. He further noted:

> *"Also the action was settled on the basis of a settlement at full value on the advice of two eminent and experienced senior counsel who were in 1984 best positioned to judge whether the case should be moved forward by setting it down for trial and advising on proofs for same rather than settle on the basis of full value when the opportunity arose."*

48. The Judge rejected the Deceased's submission that Courts Act interest, if it was to be awarded, should not be awarded in respect of periods when the Appellant was guilty of delay. He was satisfied that that was not an appropriate approach for a number of reasons, including that no authority was advanced by the Deceased for the argument made, and the Judge noting that there was no provision in the Courts Act 1981 specifically directing that that was how the discretion was to be exercised in every case. He further considered that the Oireachtas intended Courts Act interest *"to be a neutral measure insofar as it was practicable to protect successful plaintiffs against the ravages of inflation and change in economic conditions"*. Thus, to apply the jurisprudence of delay *"would be to penalise the plaintiff using a system of jurisprudence which many of the authorities clearly say was not developed for the purpose of punishing plaintiffs".* (p. 32)

49. Accordingly, the Judge was prepared to give judgment for the Appellant against the Deceased for the sum of €38,092.15 in damages (being the euro equivalent of IR£30,000) together with interest pursuant to the Courts Act, 1981 from 16 February 1987 to the date of judgment.

50. By Order dated 29 July 2004, the Appellant was to recover the sum of €38,092.15 together with interest from 16 February 1987 to the date of judgment together with €23,949.58 by way of special damages (same having been agreed by the parties) and the costs of the action at the rate of 17/19 (seventeen nineteenth's thereof) when taxed and ascertained.

51. The Judge duly granted a stay of execution in the event of an appeal conditional on the payment out of 40% of the said award by the Deceased to the Appellant.

Events post the High Court Order

52. On 6 August 2002, the Deceased filed an appeal in the Supreme Court (No. 378/2004) against the Order of the High Court. By notice of motion of the same date, he appealed to the Supreme Court against the Judge's refusal to grant an unconditional stay on his Order pending the determination of the appeal. On 16 August 2002, the Appellant filed his appeal in the Supreme Court (No. 395/2004).

53. The Deceased's application for an unconditional stay came on for hearing in the Supreme Court on 8 October 2004. On the day, counsel for the Deceased advised the Court that liability was fully in issue on the appeal. The Appellant, by now a lay litigant representing himself, objected to the application. However, on the basis that liability was being appealed, the Court granted an unconditional stay, with the proviso that the High Court Order with regard to interest would continue to apply to the entire amount of the award, *"should the Plaintiff succeed in his defence to the appeal".*

54. In 2014, the appeals of both parties were remitted to this Court following the establishment of the Court in 2014 (Article 64 transfer). It should be noted at this stage that the Deceased passed away on 18 December 2013. If I might now fast forward to 2019: it is common case that on 18 July 2019, by Order of this Court (Irvine J.), the Deceased's appeal (2014/97) was struck out with liberty to apply to re-enter within 6 months on four

days' notice to the Registrar and the Appellant. On the same date, Irvine J. made an order in similar terms in respect of the Appellant's appeal (2014/100). As is clear from the transcript of the hearing before the Court on 18 July 2019, Irvine J. had been minded to list the appeals for hearing on a date later that year but, recognising that the Deceased by then had passed away (with the proceedings yet to be reconstituted), she considered that the way to proceed was to strike out the appeals with liberty to the parties to apply to re-enter, as just indicated.

55. No application was made by or on behalf of the Deceased's personal representatives to re-enter the Deceased's appeal.

56. It would seem to be the case, however, that for a period of time at least, the Deceased was intent on appealing against the finding of liability against him (as was made clear to the Supreme Court in October 2004). It is difficult however to put an exact date on when the decision was taken not to pursue the appeal. Certainly, from exchanges that occurred between the solicitor then on record for the Deceased (albeit the Deceased was deceased by this time) in July 2019 when the matter was before Irvine J., the Deceased's appeal was still, it appears, going to be pursued at that time albeit, as Irvine J. pointed out, and which was accepted by the solicitor acting for the Deceased, the proceedings would have to be reconstituted.

57. However, as counsel for the respondents explained in answer to questions posed by this Court, at some point thereafter a decision was taken by the respondents not to apply to have the appeal re-entered. As counsel explained to this Court, *"there's been a change of personnel to a certain extent in the defence of the case, and a decision was made that we weren't going to pursue it in relation to a variety of matters"* (Court of Appeal Transcript p. 30).

58. While the Deceased was alive, one can well imagine (in cases of alleged clinical negligence such as this) why he would wish to pursue the issue of liability on appeal. Following his death, however, the considerations that may have particularly informed the decision to pursue an appeal may indeed have abated, leading to the Deceased's personal representatives and/or his indemnifiers taking a different view. That would appear to be the case here (albeit that the Deceased was dead at least six years before that view was arrived at).

59. The Appellant, on the other hand, took action against the strike-out Order of 18 July 2019. By notice of motion dated 17 January 2020, grounded on his affidavit sworn 30 January 2020, he applied to re-enter his appeal. By Order of this Court (Costello J.) dated 21 March 2022, the Appellant's appeal was duly re-entered. On 21 March 2022, upon the Appellant's motion (grounded on his affidavit sworn 26 January 2022), the Court (Costello J.) ordered the reconstitution of the proceedings and the appeal, and that the title of the proceedings be amended to substitute the respondents for the Deceased as the defendants in the proceedings and the respondents in the appeal.

60. Undoubtedly, any reader of this judgment may well ask what was happening to the Appellant's appeal between 2004 and 2014 (when it was still in the Supreme Court), and between 2014 (when it came to this Court) and when it was struck out by Irvine J. on 18 July 2019. There is no easy answer to that, it seems. In respect of the years in which the appeal was in the Supreme Court, counsel for the respondents suggested that books of appeal had not been lodged as they ought to have been, hence the appeal did not come into the type of list in the Supreme Court where the matter might have then been listed.

61. Looking elsewhere for the reason as to why the appeal took so long to be heard, I consider that the Appellant's 200-page affidavit which grounded his reconstitution application, his written submissions in the appeal, the findings made by the Judge on issues

of delay, together with the respondents' counsel's oral submissions in response to questions from this Court go some way towards explaining the extraordinary length of time this appeal has taken to be heard. It is clear from the Appellant's affidavit evidence grounding his various motions and his submissions to the Court that he did not perhaps push his appeal forwards with the alacrity that might otherwise have been expected, but as is also clear from his affidavit evidence and submissions, there were factors in his life (not least his ill-health) that militated against a more expeditious progression of his appeal. I also note that counsel for the respondents candidly acknowledged that there was *"some criticism"* to be attached to the Deceased/respondents for not pushing the Appellant's appeal forward (and presumably the Deceased's own appeal while it was still extant). Counsel also apprised the Court there had been *"interaction"* (which included mediation) between the parties that over the years (presumably in an attempt to resolve matters). Indeed, the Appellant also refers to this in his submissions.

62. Whatever way one looks at it, it is a very unfortunate state of affairs indeed that some 37 years on from the institution of the proceedings, and almost 20 years on from the High Court judgment, the issues that arise as between the Appellant and his one-time medical advisor, the Deceased, have not been resolved. However, as the saying goes, "we are where we are", and so, perhaps, at this juncture, it is time to address the issues that arise in the appeal.

The appeal

63. In his notice of appeal, the Appellant advances some 34 grounds. However, at the outset of the appeal hearing, he withdrew grounds 22, 26, 27, 28, 31 and 34.

64. Having reviewed the remaining grounds, and further to the Appellant's written submissions and those of the respondents, I consider that the issues which arise for determination reduce, in essence, to the following, namely, whether the Judge erred:

1. In concluding that the Deceased was liable in respect of his non-reporting of probable/possible arthritis in the Appellant's right hip but that he was not so liable as regards the left hip.
2. In failing to find the Deceased liable and/or award the Appellant damages in respect of the Deceased's failure to diagnose osteoarthritis in the Appellant's right knee or to diagnose or report on the Appellant's lower back and fractured sternum.
3. In failing to award damages for psychiatric injury which the Appellant claims arose out of his being told in 1986 that he had arthritis in the hips.
4. In the overall manner in which he approached the calculation of damages.
5. In the manner in which he assessed the financial loss accruing to the Appellant arising out of the Deceased's failure to advert to probable/possible arthritis in the right hip.
6. In failing to award the Appellant aggravated damages arising from alleged reprehensible, unlawful and unprofessional conduct on behalf of the Deceased and/or his legal representatives.
7. In imposing an evidential burden on the Appellant by dint of the template employed by the Judge to meet the exigencies of the Deceased not being in a position to give evidence, resulting in an unfair trial.

65. Before addressing the foregoing issues, it is apposite to say a few words about the function of this Court in an appeal such as the present. As can be seen from the judgment, the Judge made a number of findings of fact. In so doing he had the advantage of seeing and hearing the witnesses in the case, an opportunity this Court did not have. As set out in *Hay v. O'Grady* [1992] 1 I.R. 210, at p. 217, this Court's role in reviewing findings of fact made by a trial judge is a limited one. An appellate court is bound by such findings made

by a trial judge when they are supported by credible evidence. As said by Collins J., writing for this Court in *McCormack v. Timlin* [2021] IECA 96, *"[t]he 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".* (para. 57)

66. It will also be recalled that in *Doyle v. Banville* [2012] IESC 25 Clarke J. (as he then was) emphasised the necessity of a trial judge to engage with *"the key elements of the case made by both sides".* However, as Collins J. cautions in *McCormack v. Timlin,* 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",* citing in this regard *Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50; [2017] 3 IR 707, where McMenamin J stated that only complaints that go *"to the very core, or essential validity, of [the trial judge's] findings will suffice in order to warrant the intervention of an appellate court"* (at para.110). Thus, what the case law makes clear is that very significant weight is to be given to the Judge's findings and conclusions, and, as McMenamin J. emphasised in *Leopardstown Club Limited v Templeville Developments Ltd*, there is a *"high threshold"* for intervention on appeal. Bearing all this in mind, I turn now to the arguments made by the Appellant.

Issues 1 and 2: Whether the Judge erred in determining that the Deceased's failure to examine and report related only to the Appellant's right hip, and not his left hip, right knee, lower back or sternum (grounds 2, 3, 4, 5, 6, 7, 11 and 12).

<u>The right hip</u>

67. As is evident from the judgment, the Judge found that the only basis upon which the Deceased was liable was in respect of the non-reporting to the Appellants' solicitors of the probability, or at least the serious possibility, of severe arthritis in the Appellant's right hip leading to a possible or probable hip replacement in the future. Essentially, the Judge arrived at his finding by reference to the evidence given by the Appellant's medical experts Mr. Strahan and Mr. Norris, the evidence given by Dr. Denis Wood (Chartered Engineer) also on the Appellant's behalf, and indeed by reference to two of the Deceased's medical reports which had referred to the Appellant's complaints of clicking and stiffness in his right hip. In making this finding, the Judge rejected the evidence of the Deceased's expert, Mr. McElwain, who was of the opinion that the Appellant's osteoarthritis in both his hips was primary osteoarthritis and not secondary or traumatic arthritis. Mr. McElwain testified that for the Appellant's osteoarthritis to have been secondary or traumatic arthritis, there would have to have been either a fracture of the acetabulum with displacement, a fracture of the neck or femur, a dislocation of the hip or a fracture of the head of the femur (High Court Transcript Day 15, Q. 233).

68. As I have said, the judge preferred the evidence of the Appellant's medical experts (over that of the Deceased's expert) that the damage to the Appellant's right hip did in fact arise in the collision. As Mr. Strachan testified, the damage arose *"with the force that is driving your femur upwards and to break it in two places the head of the femur must be damaged where it hits the acetabulum into the socket. And it is damaged to a greater and lesser degree depending on the force applied"* (High Court Transcript Day 8, Q. 55). As I have indicated already, the Judge was obviously also fortified in his conclusion by reference to the evidence (insofar as it related to the right hip) of Dr. Wood who testified, *inter alia,* that *"…the force applied to the front of each femur would be directly transmitted*

through the femur, through the head of the femur into the hip joints" (High Court Transcript Day 11, Q. 184).

The left hip

69. As already stated, however, the Judge did not accept that the Deceased should be fixed with liability for the non-reporting in relation to the Appellant's left hip. He rejected the Appellant's evidence that he had complained to the Deceased of pain in both hips. The Judge found nothing in either the Appellant's own notes and letters or Mr. Robinson's (from whom the Appellant had sought a medical opinion in 1982) report indicating that the Appellant had made any complaint about the left hip before or around the time the Deceased's medical legal reports were being prepared. The Judge made further reference to the left hip later in the judgment when he opined that neither the degeneration in the Appellant's back nor the degeneration of the left hip required to be considered separately from the right hip as the degeneration *"may be regarded as consequences of compensatory posture arising from the initial right hip injury".*

70. In grounds 4 and 5 of his appeal, and in his written submissions, the Appellant takes issue with the Judge's finding regarding the left hip. He asserts that his sworn testimony to the High Court was that he had reported to the Deceased on 25 November 1981 and 16 December 1981 that he had a slight stiffness of the hips and a tightness of his groin but that the Deceased had failed to note or record those complaints. In aid of his submission, the Appellant quotes the evidence of his expert, Mr. Strachan, who testified that the Deceased *"should have referred to the hips and made a comment that there was a serious risk of damage to the hips in this accident and that there would be a risk of develop [sic] degenerative arthritis".* Mr. Strachan testified that this was:

> *"(A) because there was this risk from the type of the injury and,*

(b) because [the Appellant] was already having some symptoms around the hip, albeit clicking, but that should have alerted somebody to X-ray the hips."

(High Court Transcript Day 8 Q. 93– Q.94)

Mr. Strachan further stated:

"The failure to anticipate that there was going to be an onset of degenerative arthritis and this would inevitably lead at some stage to an operation on his hip, particularly on the right hip, and inevitably because of the wear then on the left hip. So that he was not prepared for this, both from a point of view of himself or from a financial point of view" (High Court Transcript Day 8 Q.98-Q.99).

71. The Appellant also points to Mr. Strachan's testimony (when asked to explain the left hip osteoarthritis) that the left hip *"may well have been damaged in the accident"* and *"if you get arthritis in one hip, you are automatically putting extra weight on the other side and then you get degenerative arthritis in the other hip"* (High Court Transcript Day 8 26 April 2002 Q. 354). Moreover, the Appellant points to the fact that Mr. Strachan had confirmed that he, the Appellant, had severe osteoarthritis in the right hip and *"slightly less but severe"* osteoarthritis in the left hip (High Court Transcript Day 8 Q. 45).

72. The Appellant also relies on the evidence of Mr. Norris who when commenting on the Deceased's examination of the Appellant's right hip in November 1980, and on Appellant's testimony that he had made complaint to the Deceased in November 1981 and December 1981 about his left hip being slightly stiff, stated: *"I would have been worried about the possibility of something being wrong with the left hip also" "I would have taken an x-ray"* (High Court Transcript Day 9, Q. 76 – Q. 77).

73. In his supplemental/replying submissions, the Appellant asserts that *"in the absence of clear and acceptable evidence from the Defendant refuting my evidence that I'd complained to [the Deceased] of symptoms of slight stiffness in my hips and a tightness in*

my groins on 25-11-01…at which, on my evidence, he didn't in my presence make any notes, and 16-12-01 when he carried out his final medico-legal examination, Abbot J shouldn't have denied me damages for the OA in my left hip as it's unfair and unjust."

74. On the other hand, the respondents, refuting the argument that the Judge erred in his findings relating to the left hip, point out that Mr. Strachan, the Appellant's expert, under cross-examination, when asked by counsel for the Deceased whether the Deceased should have warned the Appellant about the possibility or probability of arthritis in the left hip, replied *"no, I am particularly concerned with the right side."* (High Court Transcript Day 8, Q. 267).

75. Counsel also points to the evidence of the Deceased's expert, Mr. McElwain, who was of the opinion that the osteoarthritis evident in both hips was primary osteoarthritis and not secondary or traumatic osteoarthritis which must be caused by either a fracture of the acetabulum with displacement, a fracture of the neck of the femur, a dislocation of the hip or a fracture of the head of the femur. Mr. McElwain also testified that 90% of arthritic conditions in the hip were primary in nature and that the Appellant's osteoarthritis was idiopathic and a consequence of advancing years rather than as a result of injury (High Court Transcript Day 15 Q. 255).

76. Counsel points out that Mr McElwain also gave evidence that between his initial examination of the Appellant in 1997, and his later examination in 2000, there was very slow progress in the arthritis and *"in fact, there was no significant change at all between the x-rays".* This led to Mr. McElwain's conclusion that it was a very minor form of osteoarthritis and not a progressive type (High Court Transcript Day 15 Q. 277). He was of the view that there was no evidence to suggest that the degenerative change in the hip joints had anything to do with the accident (High Court Transcript Day 15 Q. 189).

77. The respondents also point to the evidence of Mr. Norris, the Appellant's expert, who stated, in cross-examination, that there had not been very much deterioration in the x-ray appearance of the Appellant's hips since the first x-rays in 1986 or 1987 to 2002. He clarified that with careful examination, he had not been able to detect any deterioration (High Court Transcript Day 9 Q. 232-Q. 236).

78. Having considered the evidence to which the Judge clearly had regard in making the finding he did regarding both the Appellant's right hip (in respect of which he favoured the evidence of the Appellant's experts), and the evidence that was before him relating to the left hip, I find no basis upon which this Court could disturb the findings the Judge made as regards the Appellant's left hip. In the first instance, I am satisfied the Judge was entirely within his remit in relying on the fact that there was no note or documentary evidence of the complaint about the left hip the Appellant alleges he made in November/December 1981. Furthermore, and in any event, the evidence from one of the Appellant's own experts, Mr. Strachan, was that he would not have expected the Deceased to report on the left hip. To my mind, therefore, there was cogent evidence before the Judge (including the evidence of Mr. McElwain relating to the left hip when viewed in the context of what Mr. Strachan said regarding the Deceased's obligations *vis a vis* the left hip) upon which he was entitled to conclude that the osteoarthritis in the left hip was not caused by the Accident and was not a risk that should have been adverted to in the Deceased's reports. While certain of Mr. McElwain's evidence was objected to by counsel for the Appellant during the trial on the basis that it had not been put to the appellant's medical experts, I do not find that that impairs the Judge's findings in circumstances where Mr. Strachan, the Appellant's own expert, agreed that there was no obligation on the Deceased to report on the Appellant's left hip. Additionally, the Judge was, in my view, also entitled to conclude, in as much as he did, that any degenerative change in the left hip may be regarded as the

consequence of compensatory posture arising from the right hip injury. There was evidence from Mr. Strachan, the Appellant's own expert, to support this view.

The right knee

79. It will be recalled that with regard to the Appellant's right knee complaint, the Judge opined:

> *"The complaint about arthritis in the knee is not something in respect of which the defendant should be blamed as the injury to the knee was patent, severe, and clear to the plaintiff and his legal advisors that complications could arise in the future".*

He further stated:

> *"In any event the medical evidence in relation to the present condition of the right knee is far from indicating that the injury is any more serious than it might have been anticipated at the time of reporting of the defendant".*

80. By grounds 2 and 3, the Appellant contends that the Judge erred in failing to find the Deceased negligent for his failure to diagnose osteoarthritis or report on the risk of osteoarthritis developing in the Appellant's right knee and, consequently, he says that the Judge erred in failing to award him damages in respect of the right knee. In his written submissions, he describes the Judge's decision as *"irrational".* He points to the medical report compiled by the Deceased on 24 November 1980, wherein he makes reference to *"some clicking in the hip and knee on movement", "there is still some stiffness in the knee. There is some clicking on movement".* There was also a reference to *"on examination: right knee…extension movement is full with some clicking".* In the report dated 11 February 1982, the Deceased records the Appellant's complaint of *"stiffness of the right knee after exercise, there was occasional clicking"* and *"there is some ache in the right knee on driving"* and *"there is slight clicking in the right knee which has a slight wobble occasionally".*

81. The Appellant points to the evidence of Mr. Strachan as to the consequences of the injury to his right knee. Mr. Strachan testified that as a result of the considerable damage to the knee, the Appellant *"would have developed, or has in fact developed osteoarthritis".* He, Mr. Strachan, as an orthopaedic surgeon, would have anticipated that. He stated that he *"would have come to the conclusion that [the Appellant] would have got arthritis after the operation by removing the bits from the patella and looking at the damage to the joint"* (High Court Transcript Day 8, Q.22-Q.24).

82. The Appellant also relies on the evidence of Mr. Norris, who testified that the injuries sustained by the Appellant in the collision resulted in *"damage to the knee joint itself raising the possibility of long-term osteoarthritic change*" (High Court Transcript Day 9, Q. 83). Mr. Norris also testified that the Deceased should have reported *"the possibility of long- term problems with that knee joint i.e. degenerative arthritis of the knee joint"* (Q.85) and that if he, Mr. Norris, had been reporting in 1981/1982 on the Appellant's right knee, he would have mentioned *"the possibility of long-term post traumatic degenerative change, both in the knee and in the hip…".* The Appellant points out that Mr. Norris felt *"very strongly"* (Q. 89) that the Appellant and his legal advisors should have been given this information and *"should've been appraised [sic] as to the prognosis"* (High Court Transcript Day 9, Q. 81- Q. 89 and Q. 90).

83. The Appellant also points out that Mr. McElwain conceded in cross-examination that the Appellant had sustained *"a very severe blow"* to his knee and there that there would have been *"a certain amount of damage onto the articular surface of the femoral groove where the patella articulates"* (High Court Transcript Day 15, Q.50- Q.52). He says that Mr. McElwain referred to *"spiking of the tibial spines"* (High Court Transcript Day 15, Q. 59 – Q. 60). I note that this reference was in response to it being put to him by counsel for the Appellant that Mr. Norris had said that spiking of the tibial spines had

occurred. Mr. McElwain did not disagree but added *"[b]ut I'm saying that in the context of diagnosing osteoarthritis it didn't fit into the picture"* (High Court Transcript Day 15, Q. 59 – Q. 60).

84. The Appellant had testified that his right knee became tense and ached while driving, that it was stiff and sore when walking, that he suffered stiffness when sitting and after walking or standing – indeed he said that the more he walked the stiffer his knee became. Moreover, he testified that the right knee was tender and sore in bad weather. He stated that he had pain in the medial aspect of the knee. However, compared to his other osteoarthritic joints, his knee was at *"a lower league"* or *"a lower level"* (High Court Transcript Day 3, Q.355- Q. 357).

85. The Appellant submits that while his knee symptoms may have been at *"a lower level"*, that was not a sufficient reason for the Judge to disregard the Deceased's recorded clinical symptoms/signs regarding the knee, the Appellant's evidence, and the expert diagnoses of Mr. Strachan and Mr. Norris regarding his knee. He submits that if the Judge was satisfied, as he was, to find that the Appellant's right hip was a matter on which the Deceased should have reported, then, by the same token, the Judge should have concluded likewise with regard to the Appellant's right knee, particularly in circumstances where the Deceased's report of 11 February 1982 opined that *"[t]he tendency to arthritis is still present"*. This, the Appellant says, must be taken as the Deceased referring to the Appellant's ankle, subtabloid, knee and hip joints.

86. The respondents contend that the Judge had ample evidence to conclude as he did in regard to the Appellant's right knee. Counsel points to the Appellant's own testimony that his knee *"didn't cause a huge problem"*. Moreover, examination of the right knee in 1997 by the Deceased's expert, Mr. McElwain, found no limitation of movement in the right knee (High Court Transcript Day 15 Q.79). In the opinion of Mr. McElwain, the right

knee was perfectly stable with no degeneration in the right knee joint. He found that the knee was well-preserved with no arthritic changes. In sum, Mr. McElwain did not find a lot wrong with the Appellant's right knee (High Court Transcript Day 15 Q.283). He considered the Appellant's symptoms and complaints regarding his knee to be *"out of proportion considering that he did not have arthritic changes in his knee"* and opined that the Appellant "*had a lot of symptoms that really did not fit with the condition of his knee at that time"* (High Court Transcript Day 15 Q.282 – Q. 283). Moreover, Mr. McElwain had examined the Appellant in 2000. He testified that the Appellant did not have any osteoarthritis in the right knee at that time.

87. Overall, the Appellant has not persuaded me that the Judge was not entitled to conclude as he did with regard to the Appellant's right knee. I consider firstly that given the nature of the Appellant's right knee injury, there was ample evidence from which the Judge could conclude that that knee injury was *"patent, severe and clear"* in 1980-1982 such as to put the Appellant's legal advisors on alert as to possible complications in the future. In my view, the position was not like that in relation to the right hip where there was no such patent or severe injury and where, accordingly, the Appellant's legal advisors would have been relying on the Deceased to advise as to possible risks pertaining to the right hip.

88. Furthermore, and in any event, there was also clearly evidence from which the Judge could conclude, as he did, that the medical condition in relation to the Appellant's right knee was *"far from indicating that the injury is any more serious than it might have been anticipated at the time of reporting of the Defendant".* The Judge was entitled to prefer the evidence of Mr. McElwain, who examined the knee in 1997 and found it stable and no degeneration despite the lapse of 17 years since the accident occurred. Having regard to all of the foregoing, it is not for this Court to substitute any contrary view to that formed by

the Judge, absent any persuasive argument (of which there is none) that the Judge did not engage with the evidence before him.

The back

89. It will also be recalled that the Judge also disregarded the Appellant's complaint that the Deceased should have adverted in his report to possible degenerative changes to the Appellant's back. At ground 6, the Appellant asserts the Judge erred in fact and in law in not finding that the Deceased's failure to diagnose osteoarthritis in his right hip had deprived him of an automatic entitlement to compensation from the motorist's insurer for his back injuries which, it is contended, were consequent upon the osteoarthritis developing in the Appellant's right hip. At ground 7, the Appellant asserts the Judge erred in not awarding damages in respect of his lower back.

90. In essence, the Appellant asserts that he should have been compensated separately for the degenerative changes in his lower back. In aid of his submissions, he points to the evidence of Mr. Strachan who testified that the Appellant was *"getting wear, degenerative arthritis in his back"* as *"a consequence of the injuries to his lower leg and into his hips, in particular, because they are doing greater strain on his back. So he got degenerative arthritis [in the back] at an earlier stage than one would expect. So this is secondary to his accident"* (High Court Transcript Day 8, Q.79 – Q. 85).

91. The Appellant also points to the evidence given by Mr. Norris to whom the Appellant complained about his back in 2000. Mr. Norris testified that *"X-rays demonstrate signs consistent with spondylosis"* (High Court Transcript Day 9, Q. 114 – Q. 119). The Appellant asserts that when Mr. Norris examined him in 1988 he found a fixed flexion deformity of the right hip to circa 20 degrees. This was again evident when Mr. Norris again examined him in March 2002. At that time, the Appellant apprised Mr. Norris of pain and discomfort when standing and walking. Mr. Norris testified to a

"correlation between the hips and the back" due to *"the fixed deformity"* as it *"poses additional stresses and strains on the spine and will tend to aggravate the effect of the spondylotic change*" (High Court Transcript Day 9, Q.120- Q. 125).

92. The Appellant thus contends that the Deceased should have diagnosed all of this in 1981/82 since, as Mr. Norris testified, *"hip pain and back pain often go hand in hand, if there is pathology in the hip joint".* Thus, *"[the Deceased] should have highlighted or alluded to the possibility that [the Appellant] develop hip pathology and if he had developed hip pathology, there was a likelihood that he would also develop symptoms in his low back"* (High Court Transcript Day 9, Q. 120- Q.125). Mr. Norris went on to state:

> *"Once there is pathology in the hip, that can have an adverse effect on the spondylosis, it can exacerbate symptoms"* and *"... it has had a material effect on the severity of [the Appellant's] back symptoms ...because he has had a problem with his hip, that has had an influence on his back problem"* (High Court Transcript Day 10, Q.55).

93. The Appellant also calls in aid Mr. Norris' opinion that *"[the Deceased] should have, perhaps, in mentioning the probability of arthritis, mentioned that that might have an influence on his back at the same time, yes".* He, Mr. Norris, would always do that since *"[i]n discharging one's duty to one's medical-legal client one has a duty to mention as many of the possibilities as one can do, because these things can have a bearing on peoples' long-term employment prospects and the prognosis and all the rest of it"* (High Court Transcript Day 10, Q. 55).

94. The respondents refute the claim that the Judge erred in his conclusions on the plaintiff's back complaints. They point to the evidence of Mr. McElwain who testified that the Appellant's back pain had nothing to do with the accident in February 1980 because of the length of time it took to develop, namely in 1986. They also contend that the Judge

had ample evidence to conclude that *"degenerative changes in the plaintiff's back are not matters that should be considered separately from the right hip".* In this regard, they pointed to the evidence of Mr. Strachan, the Appellant's expert. Under cross- examination, Mr. Strachan, when testifying about the Deceased's duty to warn against the risk of osteoarthritis in the Appellant's right hip, stated there was no similar duty on the Deceased to warn of arthritis of the back. He stated that that *"would have come later"* (High Court Transcript Day 8, Q. 268).

95. It is clear to me that in opining as he did in relation to the Appellant's back, the Judge was entitled to accept the view expressed by the Appellant's own expert (Mr. Strachan) that the Deceased had no duty to report on possible osteoarthritis in the back. Moreover, I note the Judge's intervention during the cross-examination of Mr. Norris from which he gleaned from Mr. Norris' replies that the latter's opinion as to what the Deceased ought to have reported on in relation to the Appellant's back was *"a counsel of perfection"* and, moreover, was expressed in far more conditional terms than Mr. Norris' opinion on the Deceased's duties *vis a vis* the Appellant's right hip (High Court Transcript Day 8, Q. 268).

96. Furthermore, it is implicit in the Judge's finding (at p.26, sub para. 8) that the degeneration of the Appellant's back (and the left hip) may be regarded as a consequence of compensatory posture the Appellant adopted arising from the initial injury to the right hip. As I have previously said, this must necessarily have been factored in by the Judge when dealing with the right hip. The Appellant, in those circumstances, cannot have any valid ground for complaint that the Judge did not engage with the evidence relating to his back.

The fractured sternum

97. By ground 11, the Appellant asserts that the Judge erred in failing to find that the Deceased was negligent in not reporting on his fractured sternum. By ground 12, he asserts that the Judge erred in not awarding damages based on that failure.

98. In his report of 24 November 1980, the Deceased records that the Appellant *"has pain in the chest on and off, in the centre of the chest. He feels the pain occasionally if he stoops".* Separate to that report, there is an x-ray report dated 19 November 1980 which records *"Sternum. There is a well united fractured of the mid sternum. Displacement is slight".* That report is marked *"Ref. Doctor: Mr. Regan"* and *"Ward. OPD".*

99. The High Court heard evidence from Mr. Brian Lane, Consultant General Surgeon of Beaumont Hospital, who at the time of the Appellant's accident was a Consultant General Surgeon in Jervis Street Hospital, to which the Appellant was admitted on 29 February 1980 following the collision. Mr. Lane testified that the fracture of the Appellant's rib had been referred to *"right from the time of admission"* to hospital. He also testified that the x-ray of 19 November 1980 would appear to have been procured at the behest of the Deceased, albeit there was no note of who requested it (High Court Transcript Day 17, Q.51, Q.54 and Q.62). Mr. Lane further testified that it would have been he who requested the Deceased (who was the orthopaedic surgeon on duty) to look after the Appellant's orthopaedic injuries.

100. It is common case that the medical reports compiled by the Deceased did not record a sternal fracture. Mr. Norris, on behalf of the Appellant, testified that *"the sternal fracture should have been recorded"* by the Deceased, but in the same breath he thought that *"it perhaps might have been better to have been in the province of a thoracic surgeon rather*

than an orthopaedic surgeon". Questioned as to whether a fracture of the bone was something an orthopaedic surgeon should have reported on, Mr. Norris replied as follows:

> *"A fracture of the sternum is treated in orthopaedic wards usually, unless they are very complicated, so I think it certainly should be mentioned. But the pneumo thorax is out with [sic] the treatment realm of an orthopaedic surgeon"* (High Court Transcript Day 9, Q. 158).

101. The Appellant also relies on exchanges by the Judge with counsel for the Deceased while Mr Norris was giving his testimony. The Judge opined that it *"flies in the face of reason that an orthopaedic surgeon would be asked to report on the boney aspect of a case and just because he is not a chest surgeon dealing with primarily lungs… he will skirt away from ribs and all that"* (High Court Transcript Day 15, Q. 140).

The Judge commented that the Appellant's counsel *"has made the point well right through the case that whatever is said about the issues in this case, [the Deceased] was a bit haphazard in overlooking serious enough boney injuries"* (High Court Transcript Day 15, Q. 140).

102. It is clear, however, that in his judgment, the Judge did not fix the Deceased with liability for the non-reporting of the fractured sternum. He stated:

> *"The additional injuries and fracture to the sternum were not matters according to Mr. Lane for which the defendant was responsible as orthopaedic surgeon and while he did report on broken ribs in his reports this fact should not fix the defendant with liability in respect of the non-reporting of the fractured sternum".*

103. I am satisfied that in concluding as he did, the Judge had regard to the overall thrust of Mr. Lane's evidence, which was that *"[c]hest injuries, abdominal injuries and head injuries would be looked after by the general surgeon".* Mr. Lane also testified that he would have looked after the Appellant's chest injuries *"for some days"* i.e. as long as he

was in intensive care and that he, Mr. Lane, was *"specifically involved with the management of [the Appellant's] fractured sternum"*. He testified that he had not at any stage asked the Deceased to look after the fracture of the sternum or any bone in the chest.

104. In light of this evidence, and albeit that Mr. Lane may have made certain concessions in cross-examination, it was nevertheless entirely open to the Judge to conclude that responsibility for the management of the sternum fracture did not lie with the Deceased.

Issue 3: The failure to award damages for the Appellant's psychiatric injuries (grounds 8, 9 and 10)

105. As his judgment shows, the Judge rejected the Appellant's claim that his depression had been brought about by the disappointment or shock of being told by Mr. Sheehan in 1986 that he had arthritis in his hips. Furthermore, he considered the Appellant's psychiatric injuries too remote to be compensatable in a claim of this kind. In any event, he considered that by reason of the fact that the Appellant had been exposed to a seriously threatening injury to his ankle and his awareness of its consequences (even without arthrodesis), the Appellant would have had plenty to get depressed about once he returned to work. However, as the Judge found, the Appellant *"was reasonably successful on his return to employment and highly successful in competitive table tennis"*. Accordingly, the Judge considered that this *"initial good mental and emotional recovery after a serious injury"* rendered it improbable that the Appellant had suffered depression on being told of further injuries in 1986. He opined that it was *"much more probable that his acknowledged depression arose from other unfortunate experiences"*.

106. Ground 8 of the Notice of Appeal asserts that the Judge erred in failing to award the Appellant damages for nervous shock and psychiatric injury which, it was said, was caused

by the Deceased's negligence. By ground 9, the Appellant contends that the Judge erred in not finding that the Deceased's failure to diagnose osteoarthritis, or report on risk of same, in the Appellant's right knee and hips had deprived him of an automatic entitlement to compensation for psychiatric injuries which were consequent upon the combined osteoarthritis in the right ankle, right subtaloid joint, right knee, hips and low back. Ground 10 asserts that the Judge erred in not awarding damages for the psychiatric injury consequent upon the combined osteoarthritis in the right ankle, right subtaloid joint, right knee, hips and low back.

107. The Appellant's submissions take issue with the Judge's reasoning on a number of bases. He asserts that the psychological injuries he suffered were foreseeable as he was faced in 1986 with the prospect of having to take on an expensive medical negligence action for injuries that the Deceased had not reported on. He states that he was a *"poor prospect"* for any further long-term injuries. He says that the upsetting news about his osteoarthritis came gradually, in respect of his hips in November 1986, his right knee in August 1988 and his lumbar problems around 1987/88. All of this, he says, led to doubt about his being able to continue his work *"combined with the associated loss of substantial pleaded compensatory damages"*, resulting in an upsetting experience for him as the bread winner for his young family. He asserts that his own vocational experience gave him *"a clear insight into the gravity of the unreported injuries".* According to the Appellant, his knowledge of the grounds of the unreported injuries, their likely adverse effects on his work and social life, together with the ongoing absence of amelioration for the loss of needed compensatory damages, are *"inextricably linked".*

108. He says that the Judge's reasoning was irrational given that he had become *"very depressed"* after receiving the news about his hips and required Valium. He submits that the Judge ought to have taken into consideration the Appellant's own insight into the

"troubling predicament" the Deceased had placed him by his having to take on an expensive medical negligence action, to which the Appellant had testified.

109. He argues that any part of his psychiatric injuries that are a consequence of the unreported osteoarthritic injuries should entitle him to damages because had such injuries been reported on by the Deceased, or a treating psychiatrist before the Original Proceedings had been disposed of, the Appellant would *"automatically"* have been entitled to receive damages for those injuries. He further submits that the law does not require that consequential psychiatric injuries must commence or be diagnosed immediately following a physical injury.

110. The Appellant also points to his testimony that if he had been alerted by the Deceased to the risk of osteoarthritis, he would have deferred settlement of the Original Proceedings for a five- or six-year period and looked for a second opinion from an orthopaedic surgeon. Moreover, he would not have settled his case until his back *"was absolutely clear".* He says that the damages he lost by settling when he did should be calculated on the basis that had he been advised of the risk of arthritis by the Deceased, he would have deferred settlement of his claim by five/six years.

111. He points to his testimony as to the effect on him of the news that he had osteoarthritis in his right hip. On being told by Mr. Sheehan in 1986 of this diagnosis, he *"felt very down that night".* The news had come as a considerable shock. Consequently, he was unable to clear his workload at work, with the result being that some 55 work calls remained outstanding as of the end of 1986, compared with zero outstanding calls at the end of 1985. This, he said, was borne out by his work performance appraisal for year end 1986 which noted *"a preoccupation with a personal health problem".*

112. A number of health professionals testified on the Appellant's behalf in relation to his depressive state, including Dr. Maguire, Consultant Psychiatrist, who first saw the

Appellant in 1995. In evidence, Dr. Maguire was loath to speculate as to when the Appellant's psychological problems began but stated that when he initially saw the Appellant it was for *"an accumulation of events"* and that an issue with a neighbour had precipitated the Appellant's presentation at that time, together with other significant life events, including the Appellant's physical state and the resultant restrictions on his previous lifestyle. Dr. Maguire testified that the Appellant was also undergoing financial strain as a result of having to move house due to the dispute with his neighbour. He had diagnosed the Appellant as having suffered *"a stressed reaction with depressive features"* (High Court Transcript Day 12, Q. 5 – Q.10). He saw the Appellant as being *"exposed to a constellation of events that were changing as time passed"* (High Court Transcript Day 12, Q.14). In relation to the Appellant's retirement from his employment in or about 1999, Dr. Maguire testified that from accounts given to him by the Appellant, the Appellant was someone *"who was deteriorating physically and certainly deteriorating psychologically as one pressure lead (sic)to another pressure and it was a vicious circle"* (High Court Transcript Day 12, Q. 87).

113. In an exchange with the Judge, Dr. Maguire testified that the Appellant's physical problems and the litigation were *"huge problems in his life".* He testified that during the time he saw the Appellant, *"his work performance appeared to be deteriorating"* (High Court Transcript Day 12, Q.35). He considered the Appellant *"fragile in the face of stress"* (High Court Transcript Day 12, Q. 40). Dr. Maguire also testified that while the Appellant was *"not actively, chronically suicidal or anything like that"*, there were times *"when he becomes acutely distressed"* and *"the fear would be that he might act impulsively and so on".* Accordingly, Dr. Maguire had a fear that the Appellant *"might act impulsively in an acute state of stress for one reason or another"* (High Court Transcript Day 12, Q. 137).

114. The Appellant relies on the evidence given by his GP, Dr. Ismail. Dr. Ismail testified that there were multiple *"factors"* and *"stressors"* in the Appellant's life at the time he began attending another medical professional, Dr. Crowe, for ulcerated colitis, including that the Appellant *"was extremely anxious and depressed", "was very concerned about his discomforts"* and *"also had a problem and that he had to take litigation as far as his hip joints were concerned".* (High Court Transcript Day 7, Q.347). Dr. Ismail rejected the suggestion that the neighbour problem was the principal ingredient in the psychological injuries stating that the Appellant had concerns that he would not be able to continue working and was finding it difficult to work and being able to cope (High Court Transcript Day 7, Q.490 – Q.492).

115. Dr. Ismail testified that over 1994 – 1996, he noted that the Appellant was *"depressed"* had *"poor concentration"* and was *"irritable at home".* He prescribed medication for the Appellant's *"depressive and anxiety state".* On further attendances, he noted *"insomnia", "tiredness",* the Appellant being *"gloomy about the future"* and *"not socially outgoing".* On 15 October 1994 he diagnosed *"anxiety and depression".* In April, he noted that the Appellant was *"symptomatic again"* and *"unable to attend work",* for which he prescribed Prozac. On review on 4 September 1995, he noted that the Appellant had *"all the symptoms of depression"* and again prescribed medication. On 11 October 1995, he noted that the Appellant was *"very very depressed",* and he recommended that he see a psychiatrist. (High Court Transcript Day 7, Q. 331 – Q. 508).

116. Dr. John Crowe testified that the Appellant had first attended in July 1989 complaining, *inter alia,* of fatigue (High Court Transcript Day 11, Q. 103). He saw him again in 1992 when he *"complained again of fatigue… he was developing a depressive illness, and I referred him to a psychiatrist".* (High Court Transcript Day 11, Q.120 – Q.121). He testified that the Appellant's symptoms of depression and colitis *"varied up*

and down throughout that year, the following year and through 1994, and through that period he was on specific treatment for colitis and on anti-depressants" (High Court Transcript Day 11, Q. 124). He stated that on each visit *"there was discussion… about his depression, fatigue and various other psychological difficulties"* (High Court Transcript Day 11, Q. 105 – Q. 129).

117. Dr. Crowe considered that the Appellant's depression *"was … partially related to his road accident, and the medical – legal consequences of the road accident, which were not fully resolved…"* (High Court Transcript Day 11, Q. 131).

118. In their submissions, the respondents assert that there was sufficient and credible evidence for the Judge to find that the Appellant's psychiatric injuries were *"too remote"*, and that there was also sufficient and credible evidence which underpinned the Judge's conclusion that the Appellant's good mental and emotional recovery after a serious injury in 1980 rendered it *"improbable"* that he suffered depression on being told in 1986 of further injuries. The respondents also submit that relevant to the view taken by the Judge, is the Appellant's own testimony as to his physical and emotional recovery from the Accident. They point to the evidence he gave on 26 April 2002 in relation to his and his family's fortunate circumstances after the settlement of the Original Proceedings (High Court Transcript Day 3, Q.439).

119. They further point to Appellant's testimony about other stressors in his life, over and above having been told in 1986 that he had arthritis in his hips. He had testified to an ongoing dispute with a neighbour from the 1980s into the 1990s which culminated in the decision by the Appellant and his family to move house after consultation with his GP (High Court Transcript, Day 2 Q.462 – Q. 474). He had also testified that as a result of this dispute and other things, he *"was beginning to suffer from stress and depression"*.

120. The respondents also point out that the Appellant was not in fact diagnosed with depression until he visited Dr. Crowe in 1992 (High Court Transcript, Day 2 Q. 509). They point to Dr. Crowe's description of the Appellant's depression as *"partly indulgenous, that it was arising within himself and not reactive to any external situation, and partially related to his road accident and the medico-legal consequences of the road accident, which were not fully resolved, and the protracted dispute with his aggressive neighbour…"* (High Court Transcript, Day 11 Q. 131). Furthermore, Dr. Maguire's (the Appellant's own expert) had described him in direct evidence as *"a very obsessional individual"* (High Court Transcript, Day 12 Q. 40).

121. Moreover, the evidence of Dr. Draper, who gave evidence for the Deceased was that when he examined the Appellant, he found no psychological or psychiatric *sequalae* to the initial road traffic accident and no features of post-traumatic stress disorder. Dr. Draper diagnosed the Appellant with chronic obsessional neurosis. He also found that the Appellant displayed no evidence of physical disability at their consultation. Furthermore, Dr. Draper did not disagree with the observations and evidence of Dr. Maguire whose observations, Dr. Draper, said, accorded with his own diagnosis of chronic obsessional neurosis. Dr. Draper testified:

> *"The conclusion I made was that he was a 50 year old male who showed no evidence of psychiatric sequalae the road traffic accident 1980 and indeed returned to full and normal function thereafter, but subsequently developed a chronic obsessional neurosis which was fuelled by his rigid and obsessional personality and sustained by his determination to find evidence that his treatment had been negligent"* (High Court Transcript, Day 16 Q.294 – Q.306).

122. Clearly, the Judge accepted that the Appellant did suffer from depression or other psychological difficulties. He concluded, however, that these psychological injuries had

not arisen as a result of his having learnt in 1986 that he had osteoarthritis in his hips, the diagnosed psychological injuries being *"too remote"* from that event. Rather, for the reasons he stated, he opined that the Appellant's acknowledged depression stemmed from other unfortunate experiences, of which evidence was given during the trial.

123. The issue for this Court is whether it can be said that the Judge erred in arriving at the conclusion he did. I am satisfied that he did not. I find that there was evidence from which the Judge was entitled to conclude, on the balance of probability, that the Appellant's depression stemmed from factors other than the news he received from Mr. Sheehan in late 1986.

124. This was a conclusion the Judge could reasonably arrive at having regard to the evidence before him, including the evidence given by witnesses called on the Appellant's behalf. From this evidence, there were any number of factors, unconnected to the events of 1986, which could reasonably be regarded as causative of the Appellant's depressive illness, thus leading to the Judge's finding that it was much more probable that the cause of the psychological injuries had its origins in some other *"unfortunate experiences"*, as referred to in the course of the trial.

125. The improbability of the events of 1986 having led to the Appellant's psychological condition was compounded for the Judge by reason of the Appellant's good mental and emotional recovery from his very serious physical injuries sustained in the Accident (especially the injury to his ankle and the poor prognosis he had received in respect of that injury). I agree with the Judge that if the Appellant was able to surmount those injuries without psychological impairment (which, evidently, he was by his ability to get back to work, resume his competitive table tennis and indeed enjoy (as he was entitled to) the fruits of his settlement by treating his family), then it is unlikely that the news he received in late

1986 about his hips (which was nowhere as serious as his ankle injury and its prognosis) would have led to the psychological injury of which he complains.

Issues 4 and 5: The approach of the Judge to the damages to be awarded to the Appellant for the Deceased's failure to advert to the risk of osteoarthritis in the right hip, and the manner of that assessment (grounds 1, 13, 14 and 15).

126. Having ruled out that the Appellant's depression arose from the Deceased's failure in 1982 to advert to a risk of osteoarthritis in the Appellant's hips, and in light of his finding that the Deceased was indeed liable to the Appellant for failing to advert to the probability or possibility of the Appellant developing osteoarthritis in his right hip, the Judge turned to the question of what damages fell to be awarded to the Appellant as a result of this failure. The approach of the Judge to the assessment of damages in this regard is an issue in this appeal, to which I now turn. Before doing so, it is apposite to set out the function of this Court when reviewing awards of general damages.

127. In *Reddy v. Bates* [1983] I.R. 141, McCarthy J. stated that as a general rule, the justification to interfere with an award of general damages by a lower court must be on the basis that there is a significant disparity in the appropriate award in the view of the court which should not be less than 25%. This estimate is indicative of the seriousness of the margin of error which must exist before an appellate court should consider interfering in an award of damages. In *Rossiter v. Dun Laoghaire - Rathdown County Council* [2001] 3 I.R. 578, Fennelly J. agreed that a marker of 25% should be a rule of thumb for the justification to interfere with an award of general damages and stated that the appellate court should only embark upon such an exercise *"when it considers that there is an error in the award of damages which is so serious as to amount to an error of law".* (p. 584)

128. With that guidance in mind, I turn now to the present case.

129. In the knowledge that the Appellant had in 1984 compromised the Original Proceedings, the Judge opined that having regard to the approach adopted in *McGrath v. Kiely*, the Appellant was entitled to the difference between the settlement he might have obtained had the Deceased reported fully and properly on the Appellant's right hip to his legal advisers, and the settlement sum actually obtained by him in 1984. For the reasons to which he adverted in the judgment (already set out earlier in this judgment), the Judge settled on a sum of IR£15,000 general damages as compensation for the loss to the settlement the Appellant had obtained, a sum of IR£13,000 for probable actuarial loss/loss of job prospects, and IR£2,000 by way of a contingency sum for hip operations in the future. As previously stated, all of this translated into an award of general damages of IR£30,000 (€ 38,092.15) with Court Acts interest from 16 February 1987 to the date of judgment (together with the agreed special damages of IR£23,949.58) and costs.

130. By ground 1, the Appellant asserts that the Judge's assessment of damages was not in accordance with the evidence and was insufficient to meet his claim. By ground 13, he asserts that the Judge erred in assessing general damages by reference to 1984 values. By ground 14, he says that the Judge erred in not assessing general damages by reference to present values. Ground 15 asserts that the Judge erred in discounting actuarial and accounting evidence adduced by the Appellant which said that the future and historical losses the Appellant sustained should be assessed by present values.

131. Notably, neither the Appellant's written submissions nor his supplemental/replying submissions engage in any real sense with the Judge's rationale for the approach he adopted. Given, however, the grounds of appeal just recited, it falls to the Court to consider the Judge's overall approach to the assessment of general damages in this case.

132. As already referred to, the Judge took as his template the decision of the Supreme Court in *McGrath v. Kiely*. There, the issue that arose was not unlike the present case. An

injury to the plaintiff's left clavicle had been left out of medical reports provided by the first defendant surgeon. The trial proceeded without this injury being opened to the jury. Subsequently the plaintiff brought proceedings against the first named surgeon. On appeal, Henchy J. held that there was a contractual duty on the first defendant to furnish full and accurate reports of the plaintiff's injuries and condition and that in failing to do so, the first defendant was in breach of contract. The test to determine whether a remedy in damages flowed from such a breach was articulated by Henchy J. as follows:

> *"If, when giving the report, he [the first named defendant surgeon] had considered the consequences of the omission of any reference to a substantial item of personal injuries, must he have realised as a reasonable man that the plaintiff was liable in consequence to suffer damage such as she has suffered? I think the answer must be "yes"".* (p. 574)

133. Henchy J. considered the measure of damages was the sum of money that would put the plaintiff in the same position, to the greatest extent possible, as she would have been in had the defendant properly performed his contractual duties. Having regard to that *dictum,* it seems to me that it was appropriate for the Judge to approach the question of general damages in the manner he did.

134. As to the actual general damages to be awarded to the Appellant, the starting point for the Judge was the IR£70,000 odd general damages the Appellant had obtained by way of settlement in the Original Proceedings, which was considered by the Judge as a *"significant and generous settlement".*

135. The settlement figure received by the Appellant included the injury to his right ankle which, as he testified to in the within proceedings, was the most severe and disabling of all of the injuries he sustained, and which would have long term consequences (High Court Transcript, Day 4 Q. 204). In evidence, he acknowledged that the Deceased had warned

him that his ankle was going to get worse and at some stage he might need an arthrodesis. He also stated:

> *"Yes, the arthrodesis was discussed in detail through correspondence with Mr. Robinson from whom we obtained a second opinion and Mr. Robinson indicated that the ankle was likely to deteriorate"* (High Court Transcript, Day 3 Question 358).

136. On 7 April 1982, Mr. Robinson, Consultant Surgeon in the Meath Hospital, when writing (some two months after the Deceased's final medical report) to the Appellant's then solicitors, had stated as follows:

> *"With regard to the injury to the patient's right ankle, x-rays taken in November 1980 were said to have shown narrowing of the ankle and subtaloid joints indicating the likelihood of the development of degenerative or arthritic changes in both joints in the future. I think it unlikely that in view of reasonable mobility and the patient's ability to carry out his work no doubt with increased difficulty since January 1981, that surgical treatment (probably a combined Arthrodesis) would be required in less than ten years time and only then if painful symptoms justified such a procedure. The result of it would be to produce immobility of the affected joints which would render the ankle and foot rigid but relatively painless thus enhancing his capacity to pursue his employment."*

137. It is thus clear, at the time the settlement was entered into in 1984, that the Appellant was being compensated for a severe and possibly disabling injury to his right ankle which could significantly deteriorate into the future and for which he may need to undergo a major procedure within an estimated 10 years of the settlement. As earlier referred to, Mr. Robinson's prognosis was available to counsel acting for the Appellant in the Original Proceedings. It will be recalled that in July 1982, the Appellant's counsel's view was that

the full value of the case (to encompass general damages and a sum of future loss of earnings) was in the region of IR£65,000/IR£70,000 plus special damages. As we know, the Appellant received some IR£70,000 odd general damages in the settlement.

138. It also bears repeating that by the date of the settlement of the Original Proceedings in 1984, the Appellant had made a substantial recovery from his injuries, including having been able to return to work and resume playing table tennis competitively. Indeed, as testified to by the Appellant, his table tennis results had improved following the Accident and he had won second place in 1982/1983 in division one, and his team had finished eighth in the Leinster League (High Court Transcript Day 2, Q.269-278). This was in the context where the Deceased, in his second medical report of 24 November 1980, had considered that "*it is most unlikely that [the Appellant] will be able to resume playing table tennis at a high level of competition, owing to the weakness of his lower limb and stiffness of the ankle and foot joints, and of course, should a further arthritis develop, this would hinder his progress, even further"*. By the Deceased's third report, however, the Appellant's complaints were being classified as of *"a minor nature"* albeit he was noted to still have *"some disability and the tendency to arthritis is still present".*

139. Nevertheless and notwithstanding that the Appellant had recovered sufficiently post the Accident to be able to return to work and resume competitive table tennis, as far as the within proceedings are concerned, it is clear that the Judge, when weighing what sum of damages remained to be awarded to the Appellant on foot of the Deceased's failure to report on the risk of osteoarthritis in the right hip, had regard to the Appellant's *"manifestly severe ankle injuries"* (and the prognosis for same), which were the injuries that represented the bulk of the appellant's complaints in the Original Proceedings (as is clear from the legal opinions provided by his then counsel). The Judge also took note, as he was entitled to do, of the *"generous"* settlement the Appellant had obtained in 1984.

140. It is, I think, of some relevance also that the Appellant, as he confirmed in his submissions to the Court, has not of yet had to have the anticipated arthrodesis, or indeed any hip replacements, albeit in his oral submissions he says that the hip replacements are long overdue.

141. When reviewing the IR£70,000 odd general damages previously given to the Appellant, the Judge duly noted that this sum was paid over on the basis that the Appellant had also received (from his employer, Sun Alliance), a letter of comfort in respect of his ankle injuries. He had no doubt but that had the severity of the Appellant's right hip injuries been reported by the Deceased to the Appellant's legal advisors prior to the settlement, that the amount of the settlement would have increased, or else the Appellant would have received a more elaborate letter of comfort. Either way, the Judge considered that the addition of the right hip injuries would have been a significant new element in the settlement.

142. Presumably on the basis that a letter of comfort was no longer a feasible option in 2004 (the Appellant having left his employment in July 1999), the Judge considered that the requisite compensation had to now be in monetary terms. He concluded that the monetary value of the likely increase of the value of the settlement by way of general damages would have been IR£15,000. As we see, he formed this view by reference to *Sinnott v Quinnsworth Ltd. & Others* [1984] ILRM 523, which had set the cap of the maximum compensation a plaintiff might hope for in respect of general damages for the most catastrophic injuries at IR£150,000. Viewed against *Sinnott*, and against the backdrop where the Appellant had in 1984 obtained IR£70,000 odd in general damages for his injuries, and noting the Judge's correct observation that additional (even serious) injury did not necessarily add to settlement values in strict mathematical terms, I consider that the IR£15,000 award (which was duly brought up by the Judge to present values by the

addition of Courts Act interest) as entirely proportionate in all the circumstances of this case.

143. The Judge also recognised that, had the Deceased reported on the right hip as he ought to have in 1984, an attempt would have been made on behalf of the Appellant to negotiate an actuarial figure for loss of earnings sometime in the future by reason of disability/loss of employment prospects pertaining to his right hip. He also considered that some element of the prospective costs of hip replacements might have been factored into the settlement negotiations. In 1984, the risk to the Appellant of future disability/loss of employment prospects by reason of his ankle injury had evidently been met by the letter of comfort he had received from his employer. As I have said, the Judge, however, had to put a monetary figure on any claim the Appellant may have had in 1984 for future disability/loss of employment prospects based on his right hip injury.

144. The Judge had before him the report (1 May 2002) and evidence of Mr. James Kehoe, Consulting Actuary, for the Appellant, and the report and evidence of Mr. James Hyland, Forensic Accountant, also called on behalf of the Appellant.

145. Mr. Hyland's report detailed the Appellant's claim to financial loss from 1997 to the end of October 2001. It appears that the Judge, albeit he does not specifically reference Mr. Hyland's report in the judgment, was not prepared to accept that report, which the Judge described in the course of the hearing as *"a complete belt and braces presentation of the losses in 1999 or 2002, with (sic) any discounting back to what people would have foreseen back in 1983 and 1984".* Thus, the Judge rejected the use of historical losses as a means for deciding the quantum of damages to be decided in the case.

146. The values set out in Mr. Kehoe's report were based on the Appellant's future loss of income on two alternative bases:

(1) Assuming the Appellant would have continued to work as a Claims Inspector up to his normal retirement age (65 years).

(2) Assuming the Appellant would have obtained a promotion to Chief Claims Inspector up to his normal retirement age (65 years).

147. Mr. Kehoe confirmed under cross-examination that the approach he utilised in his report was to look at present values and to arrive at a computation which valued the Appellant's loss in 2002 terms on the basis that there were many uncertainties regarding the past time period. However, the Judge rejected Mr. Kehoe's suggestion that the Appellant's historical losses and the actuarial value of his present losses should be calculated and discounted back for the purposes of ascertaining the value of such losses as of the date of settlement in 1984. The suggestion was rejected firstly on the basis that damages would have been assessed in 1984 in the light of expectations in 1984, and in the light of mortality tables facing the Appellant in 1984. Secondly, the Judge found that the consistency tests which had been put to Mr. Kehoe in cross-examination by counsel for the Deceased were not met. From a review of the transcripts, I am satisfied that the view taken by the Judge is underpinned by exchanges between the Judge and Mr. Kehoe in the course of the trial. (High Court Transcript Day 14, Q.182-Q.197)

148. I am satisfied the Judge had sufficient reason to conclude that the most appropriate manner of calculating the present value of damages for disability/loss of employment prospects in the future pertaining to the Appellant's right hip (from the standpoint of 1984) was to apply whatever actuarial multiplier might foreseeably have been used in 1984 and then to factor into his assessment that that any award he made having regard to 1984 values could (and would) be augmented by an award of interest under the Courts Act 1981.

149. Using a note made by the Appellant at the time of his negotiations in 1984 relating to the loss of IR£65.00 per month in relation to the worse possible consequences of his ankle

injury, the Judge concluded that having regard to the evidence, and the experience of the Appellant, adverse consequences to the Appellant's employment might not have been probable until the Appellant was 48 to 52 years of age and, similarly, expenditure on hip operations might not have occurred until that time. The Judge noted that Mr. Kehoe clarified in evidence, when requested, that the appropriate multiplier would be in the region of IR£200 per week lost. On that basis, the Judge arrived at his figure of IR£13,000 for prospective loss of wages. Alternatively, he found that it would have been reasonable for such sum to be added on a non-actuarial mathematical basis, by reason of general loss of job prospects.

150. Part 16 of the Appellant's submissions, under the heading "**HISTORIC FFINANCIAL LOSSES**" (emphasis in original) advert to the testimony given by Mr. Hyland on 8 May 2002, upon which the Appellant relies for the purposes of the appeal. Part 17 of his submissions, under the heading "**FUTURE FINANCIAL LOSSES**" (emphasis in original)**,** advert to Mr. Kehoe's testimony upon which, again, the Appellant relies in this appeal. The Appellant makes the case that but for his health issues, he would have remained in his employment and likely secured promotion to the position of Chief Claims Inspector. This likelihood, he said, was bolstered by the evidence tendered by the Deceased's expert psychiatrist, Dr. Draper who testified, *inter alia*, that the Appellant *"was probably a very successful Claims Inspector"* (High Court Transcript Day 16, Q. 310, Q. 397 – Q.398).

151. Admittedly, Ms. Keenan, Vocational Consultant, (called on behalf of the Appellant) records in her report that the Appellant told her that the position of Chief Claims Inspector was advertised in Sun Alliance in 1997 and that he could have applied for it but for his injuries. There is no evidence that the Appellant attempted to do so, however. Nor was there evidence adduced by him of his chances of securing the position of Chief Claims

Inspector had he applied for it. Furthermore, albeit that the Appellant makes the case that he lost out on promotion opportunities because of his physical and psychological difficulties, it is common case that he retired voluntarily from his employment on health grounds in July 1999 (having been off work from February 1998). There was no suggestion that the Appellant ever sought to rely on his letter of comfort in order to secure less arduous work within his employment prior to making the decision to retire on ill-health grounds. There was also evidence before the High Court that there were several factors which led to the Appellant's retirement: hence it cannot be said that his retirement stemmed from the injury in his right hip. As he testified to, he retired because he could not cope at work. (High Court Transcript, Day 2 Q. 511) Furthermore, the decision to retire was one made by himself, as he testified to on Day 3 (Q. 501). It is also notable that Dr. Ismail (the Appellant's GP) conceded in cross-examination that as of the date of the trial the Appellant was physically probably able to resume work in *"a sedentary occupation".* Similarly, Ms. Keenan testified that *"clerical related office based routine type of work"* would suit the Appellant (High Court Transcript, Day 11 Q.38).

152. The foregoing constituted some of the myriad factors (against the backdrop where the Appellant's most serious injury from the Accident was the injury to his right ankle) with which the Judge had to grapple when assessing the Appellant's likely loss of earning arising from the Deceased's failure to report on the injury to his right hip. Nowhere, however, does the Appellant say how the Judge went wrong in the methodology he chose in order to put a monetary value on the future loss of employment prospects the Appellant faced in 1984, had the Deceased adverted to his right hip injury.

153. To my mind, the approach and methodology of the Judge was considered and rational, in the context of the issues before him. He was tasked with factoring in a sum for prospective loss of employment prospects for the Appellant from the standpoint of 1984. I

am satisfied that the methodology employed by the Judge accords with the rationale set out in *McGrath v. Kiely,* and with the guidance set out by Clarke J. (as he then was) in *Mount Kennett Investment Company v. O'Meara* [2011] IEHC 210.

154. Overall, I am satisfied that the sum awarded by the Judge (largely in substitution for the more extensive letter of comfort the Appellant might have received in 1984, had the Deceased reported on the Appellant's right hip injury in 1980-82,) was an entirely appropriate actuarial figure and which took sufficient account of work restrictions the Appellant might have encountered because of his right hip injury.

155. I note that in his submissions, the Appellant describes the letter of comfort he received in 1984 as *"worthless"* because of the Deceased's failure to report on all his injuries, and of what the Appellant's views as his resultant psychiatric difficulties as a consequence of this failure. I have already upheld the Judge's findings as regards the psychological injuries.

156. There is no evidence that the Appellant ever sought to rely on the letter of comfort he received, or that it was considered wanting by him or indeed his employer. The Appellant testified that in 1999 he left his employment because of his inability to cope at work due to mental health difficulties (High Court Transcript Day 2 Q.440). There was no suggestion in the evidence he gave that he sought to rely on the letter of comfort in order to secure a desk job with Sun Alliance, i.e. a different job to that of Claims Inspector. Moreover, Ms. Linda Murphy, Human Resources Manager, with Sun Alliance, who was called by the Appellant, testified that the Appellant had never, to her knowledge, sought to rely on or enforce the letter of comfort (High Court Transcript Day 10, Q.363) She testified that she herself had only recently become aware of the letter. For these reasons, the Appellant's claim that the letter of comfort was *"worthless"* rings somewhat hollow.

157. In summary, therefore, I agree with the respondents' contention that the Judge was entitled to consider the realistic impact which the addition of further injuries may have had on the overall settlement the Appellant had received in light of the evidence that the Appellant's ankle injuries were the most severe injuries. As the Judge properly noted, *"additional (even severe) injuries do not add to settlement values in strict arithmetical terms".* Overall, I consider that the IR£30,000 (IR£15,000 for the right hip injury and IR£15,000 for loss of job prospects and possible hip replacement) award made by the Judge was a considerable uplift on the IR£70,000 odd general damages settlement figure the Appellant received in 1984, the result being that had the IR£30,000 uplift been done in 1984, the Appellant would have been compensated by way of general damages at more than two thirds of the IR£150,000 cap on general damages which pertained in 1984. It also bears repeating that, as per the Order of 29 July 2004, the sum awarded was always going to be sufficiently representative of present value by the provision the Judge made for Courts Act interest to be added on.

Issue 6: The Appellant's claim for aggravated, exemplary, and punitive damages (grounds 17, 18, 19, 20, 21, 23, 24, 25, 29, 30, 32, and 33)

158. The Appellant contends that the need for aggravated, exemplary and punitive damages arises for myriad reasons. In Part 20 of his written submissions, he says that although he referred only to aggravated damages in his Notice of Appeal, the Deceased was in fact put on notice of the Appellant's intention to claim exemplary and punitive damages *via* correspondence sent by the Appellant on 27 May 2008 to the Supreme Court which was copied to the Deceased's solicitors.

159. By ground 33, the Appellant asserts that the Judge erred in law and in fact in failing to award him aggravated damages on foot of what he describes (at grounds 29, 30 and 32)

as the *"reprehensible, unlawful and unprofessional conduct"* on the part of the Deceased's legal advisors, and indeed others. He asserts that his legal team were only apprised on Day 1 of the trial that the Deceased would not attend to give evidence. He says that the Deceased's unfitness to give evidence was in fact concealed over a period of 18 months pre-trial. All of this, the Appellant says, ruined his chances of getting a fair trial, and caused the Judge to deprive him of substantial damages in respect of the osteoarthritis in his left hip.

160. The Appellant thus contends, *inter alia,* that the Judge erred in failing to take the Deceased's legal advisors to task for making representations (upon which the Appellant says he relied) that the Deceased would attend court and give evidence but which in fact did not come to pass, the result of which, the Appellant asserts, led to his suffering serious detriment, evidential prejudice, injury and loss.

161. He complains that the fact that the Deceased's unfitness to give evidence was not disclosed to him or his legal advisors in the 18 months prior to the trial means that he was deprived of an opportunity to have the Deceased examined by someone outside of the jurisdiction, and that the Judge did not deal properly with the issue of the 18 month delay or what the Appellant describes as the resultant evidential disadvantage to him as a result of the Deceased's found unfitness to give evidence.

162. The Appellant also contends that he was repeatedly threatened that he would be fixed with the Deceased's *"financially and psychologically ruinous costs"*.

163. In aid of his claim for aggravated, exemplary and/or punitive damages, the Appellant cites a number of legal authorities.

164. In essence, much of the Appellant's argument as regards his claimed entitlement to aggravated or exemplary or punitive damages as a result of the Deceased's alleged conduct in the court below focuses on what he considers to be the Judge's failure to mark by way of

such damages conduct on the part of the Deceased/his legal representatives with regard to various applications to the court made pre-trial and which pertained to the health of the Deceased. The Appellant focuses especially on the delay on the part of those legal representatives in advising either him or the court on the Deceased's state of health.

165. In his supplemental submissions, the Appellant elaborates on his claim of litigation disadvantage as a result of the Deceased's unfitness to give evidence and again asks this Court to take account of the failure of the other side to apprise him in good time of the Deceased's difficulties (and thus allow for the Deceased's evidence to be taken on commission).

166. The respondents contend that an award of aggravated, exemplary or punitive damages based on the Deceased's conduct in the court below is not merited on any of the bases outlined by the Appellant. While counsel for the respondents candidly acknowledged that such an application could have been made to the Judge, he says that the fact of the matter is that the issue of aggravated and/or exemplary and/or punitive damages was not pursued by the Appellant or his legal advisors during the trial. Nor does the High Court judgment suggest that the issue was raised. In those circumstances, the respondents say that the issue of such damages is not for this Court, particularly in circumstances where the Appellant's submissions advert to issues of fact which were never resolved in the court below given that there was no application by the Appellant in the court below for such damages.

167. In his oral submissions, the Appellant agreed that no application had been made to the trial judge for aggravated damages based on the 18-month period of which the Appellant complains.

168. By reason of the fact that no application for such damages on any basis was pursued in the court below, I am constrained to agree with the argument put forward by the

respondents on this issue. In the absence of any application to the trial judge for an award of aggravated, exemplary or punitive damages and, consequently, in the absence of opportunity for the Judge to have made findings on foot of which an award of such damages might have been found to be merited, it is not for this Court *de novo*, at this remove, to award damages in respect of the alleged conduct of the Deceased and/or his legal representatives, prior to or during the hearing of the action.

169. I would in any event observe that there was substantial evidence before the High Court from the Deceased's treating physicians that as of April 2002 (when the trial commenced), the Deceased (then aged 82) was not in a position to give evidence. Dr. Loman Cusack, who was the Deceased's GP from 1982 to 1992, testified that up to 1992 the Deceased was psychologically and physically robust (High Court Transcript Day 15, p.34). Dr. Tiernan Murphy became the Deceased's GP in 1993. He testified that the Deceased had a stroke in 1996 and that a brain scan at that time also diagnosed two previous strokes (High Court Transcript Day 15, p.36). Dr. Murphy also testified that following the series of strokes, the Deceased had suffered from labyrinthitis, had deteriorated very quickly in the years thereafter such that by the year 2000 he was physically very frail due to mental deterioration and anxiety (High Court Transcript Day 15, p.37). It was the opinion of Dr. Murphy that whilst the Deceased could have given evidence prior to 2000, sometime between 2000 and 2001 his memory began to fail so considerably that by 2001 he was not fit to give detailed evidence, especially regarding events in the past (High Court Transcript Day 15, p.38).

170. Based on the evidence that was before the High Court (which also included the evidence of Dr. Draper who examined the Deceased), I agree with the respondents' counsel's submission that any engagement on the part of the Deceased in the proceedings

certainly after early 2001 would have been to his detriment, and that, accordingly, the Judge was entitled to proceed on the basis that that would be the case.

171. The Appellant's submissions also suggest that the conduct of the Deceased as regards the Deceased's own appeal of the High Court judgment is something that should attract aggravated or exemplary damages. The Appellant relies on the fact that after it was struck out, the Deceased's legal representatives chose not to seek to re-enter the Deceased's appeal which, the Appellant says, indicates that the appeal was never a genuine appeal. Thus, it is suggested that the Deceased's conduct in this regard warrants exemplary damages.

172. There is, however, no merit in this argument. It is well settled that a defendant medical practitioner found to be negligent albeit initially putting a plaintiff on proof of liability cannot be the subject of exemplary damages for having done so. As stated by Keane J. in *Cooper v. O'Connell* (Unreported, Supreme Court, 5 June 1997 at p.21):

> *"the fact that a medical practitioner has been admittedly guilty of negligence and that his defence or insurers have initially put the plaintiff on proof of liability could not conceivably be regarded as circumstances justifying the invocation of this drastic, although essential rule grounded in public policy".*

173. As part of his claim for aggravated and or exemplary damages the Appellant also adverts to one of the grounds raised in the Deceased's now abandoned appeal. He asserts that the Deceased had pleaded *"a false allegation of dishonesty"*. In his supplemental submissions, the Appellant complains that the respondents' submissions raise or repeat this false allegation of dishonesty which was raised in ground 18 of the Deceased's now abandoned grounds of appeal.

174. In their submissions, the respondents refute this and say that this ground arose in circumstances where the IR£13,000 sum the Appellant obtained in special damages in the

settlement of the Original Proceedings included a sum of IR£2,000 odd for an operation to remove two steel plates from the Appellant's leg.

175. It is common case that the operation for which the Appellant sought compensation in in the 1984 settlement negotiations never came to pass. In fact, such an operation was never required or anticipated. In the course of his cross-examination in the court below, the Appellant admitted to having apprised the defendant motorist's solicitor (in the Original Proceedings) that it would be *"a substantial operation"* to remove the plates. When asked who had told him that, the Appellant replied that he had made it up and that he had made *"a tactical argument"*. Later in his cross-examination, he admitted *"Okay, it was a lie"* (High Court Transcript Day 5, Q. 352). This, the respondents say, led to the inclusion of ground 18 in the Deceased's appeal of the High Court Order, the argument presumably being that the Deceased was entitled to take a dim view of the Appellant's conduct and, hence, seek to persuade an appellate court that any damages obtained by the Appellant in the within proceedings ought to have been discounted by an amount equal to the "operation" figure claimed by the Appellant in the Original Proceedings.

176. The first observation I would make is that there is no basis upon which this Court could contemplate an award of exemplary or aggravated or punitive damages simply because the Deceased had chosen to raise the issue of the IR£2,000 operation sum in his cross-appeal. Secondly, and perhaps more importantly, the complaint the Appellant seeks to now make is essentially a non-starter, in as much as he relies on it as a basis for exemplary or aggravated damages. The fact of the matter is that the Deceased's appeal is no more and, hence, the issue of this Court (had the matter been pursued) somehow reducing the award the Appellant obtained in the court below by subtracting the sum the Appellant obtained for his *"operation"* is also a non-starter. Moreover, there is absolutely no suggestion that the Judge sought to discount the damages he awarded the Appellant by

reason of the Appellant having previously received IR£2,000 for an operation that never happened and which was never contemplated. In fact, from a reading of the High Court Transcript, it is clear that the Judge accepted that the Appellant, during his negotiation of the settlement of the Original Proceedings, was entitled *"to put the case at its highest point for negotiations"* and therefore, the Judge was "*inclined to give him the benefit of the doubt at all tiles (sic)"* in relation to this issue (High Court Transcript 17 May 2002 p. 56).

177. The Appellant further suggests in his submissions that the respondents have been tardy in paying him the damages awarded by the High Court. He says that albeit that the Deceased's appeal was struck out by this Court on 18 July 2019 (with no application by the Deceased's personal representatives to reinstate same), payment of €117,200.72 (comprising the damages awarded by the Judge and Courts Act interest) was withheld by the respondents until 25 June 2020. The fact of the matter is that the money has now been paid. Even if it ought to have been paid earlier than it was, the Appellant has now received his money (and with the benefit of Courts Act interest).

Issue 7: Alleged unfairness in the trial

178. It will be recalled that in refusing the Deceased's application for a trial of the delay as a preliminary issue and allowing the proceedings to be tried on their merits, the Judge stated in his ruling on the matter that given that the Deceased was not in a position to give evidence, there would have to be some accommodation for this, and that the court recognised that *"any person under a disability would have to have his or her interests jealously guarded by the court in relation to the hearing".* As the Deceased was found by the Judge to be *"presumptively and almost axiomatically prejudiced by reason of his inability to give evidence and hence proper instructions",* the Judge set out a template for his assessment of the evidence in the case, as earlier referred to in this judgment.

179. The Judge outlined his template and guide in the following terms:

"Evidence of claims by the plaintiff should not be accepted unless:-

(1) It is backed by clear hospital records, doctors' reports, records of the case including counsel's opinion, doctors' reports, hospital records, X-rays and X-ray reports and like documentation.

(2) It is consistent with the numerous letters, memoranda and notes made by the plaintiff not for the purpose of self-corroboration but more from the point of view of discounting the plaintiff's claim if it is not mirrored in detail in the copious documentation created by himself at material times.

(3) There is a clear clinical/mechanical indication of a serious injury from the indicators and symptoms available to the defendant and which were not obvious from a lay person's examination of the report in respect of the more dramatic injury such as the knee and the ankle.

(4) The plaintiff had no opportunity from the documentation presented to him for obtaining a second view in relation to injuries in respect of which the prognosis was manifestly uncertain.

(5) It is consistent with the other evidence in the case.

(6) It is consistent with medical texts of the early 1980s". (p. 22)

180. In his replying submissions, the Appellant likens the template to the Judge *"licencing himself"* to deprive the Appellant of natural justice and he asserts that he was put at a litigation disadvantage by the adoption of the template. He says that his evidence was rejected on the basis of the template when his evidence should have been considered as it would normally be considered.

181. I find no merit in the Appellant's complaint that he was put at a litigation disadvantage by the template, or that he was otherwise subject to unfairness. I find nothing

in the actual approach of the Judge, either as regards the assessment of liability, or the assessment of damages, that is suggestive of unfairness to the Appellant. After a full trial (the Appellant being fully legally represented), where witnesses on both sides gave evidence and were tested on cross-examination, the Judge arrived at his decision on liability and then on quantum. In assessing both aspects of the claim, he arrived at his decisions, essentially by preferring the evidence of one particular witness over another, as is common in actions such as this. On occasions, his assessment was bolstered by the documentary evidence, or indeed the lack thereof, again as is commonplace in actions such as the present.

182. One of the Appellant's particular grievances is that the Judge refused to accept his evidence of having complained to the Deceased in November and December 1981 of stiffness in both his hips and a tightness in his groin. He says that when he made his complaints, he did not see the Deceased making any note of them. He submits that in the absence of acceptable evidence from the defence refuting his evidence that he complained of such symptoms, the Judge should have accepted the evidence he gave regarding his left hip.

183. Again, I am not persuaded that there is any merit in this complaint. The Judge's function was to assess the evidence. He duly assessed the Appellant's evidence regarding the left hip but was not convinced that the osteoarthritis in the left hip should be laid at the Deceased's door, in the absence of any note or record of any complaint made by the Appellant to the Deceased in respect of the left hip. The Judge was, in any event, also of the view that the degeneration of the Appellant's left hip was a consequence of the compensatory posture adopted by the Appellant arising from the initial right hip injury. That was a finding he was entitled to make on the evidence, as I have earlier indicated. I

have already stated that the Judge had the evidence of Mr. Strachan, who did not see the Deceased as having an obligation to report in relation to the appellant's left hip.

184. I note that in his submissions, the Appellant asks the Court on more than one occasion to treat the evidence of some of the witnesses called on behalf of the Deceased (e.g. Mr. McElwain and Dr. Draper) as *"biased"* and/or *"unreliable"* save where their evidence supports the Appellant's position. I am satisfied that there is no basis for the Appellant's claims in this regard. It follows, therefore, that where such evidence has been relied on by the Judge, there can be no question of the Judge being unfair to the Appellant. At the risk of repetition, the Judge was entitled to prefer the testimony of one witness over another once a rational basis has been set out for that preference by the Judge, which was done in this case, in my view. I am satisfied that there was no unfairness in the trial process.

Summary

185. For the reasons set out above, the Appellant has not succeeded on any of the grounds in his Notice of Appeal that he pursued, which were grounds 1-21, 23-25, 29-30 and 32-33. Accordingly, I would thus dismiss the appeal on these grounds.

Costs

186. In his written submissions the Appellant also argued that the Judge erred in not awarding him his full costs in the High Court, or, alternatively erred in awarding him only seventeen nineteenths of a twenty-day trial when the award ought properly to have been eighteen twentieths of a twenty-day trial. I should clarify at this juncture that the costs issue was not adverted to in the Appellant's notice of appeal.

187. Noting the Appellant's submissions in relation to the High Court costs Order, the Court has determined that this issue is best addressed at the hearing which the Court proposes to schedule to deal with the costs of the within appeal. Accordingly, the Court

will list the matter for one hour at 9.30am on Tuesday 19 March 2024 for the purposes of hearing the parties on the issue of the High Court costs Order and in relation to the costs of the appeal.

188. As this judgment is being delivered electronically, Noonan J. and Haughton J. have indicated their agreement therewith.