THE HIGH COURT

[2022] IEHC 705

Record No. 2019/00426

BETWEEN

SARAH CAHILL

PLAINTIFF

AND

BRIAN FORRISTAL

DEFENDANT

AND

Record No. 2019/00407

BETWEEN

RACHEL O'RIORDAN

PLAINTIFF

AND

BRIAN FORRISTAL

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 15th day of December, 2022

INTRODUCTION

1. This case concerns a tip in stationary traffic to the first plaintiff's ("Ms. Cahill's") car, which was so inconsequential that it caused no damage to her car. Nonetheless her solicitor decided that Ms. Cahill should be referred to two consultants, including a consultant psychiatrist. This was for the purpose of her being assessed/treated for the psychiatric injuries which she allegedly suffered as a result of this tip in stationary traffic. There were clearly no medical grounds for this referral since Ms. Cahill's solicitor is not as GP.

2. In addition, this referral was made despite the High Court finding that such referrals should not be made, as they are '*inappropriate'* (*Dardis v. Poplovka* (No. 1) [2017] IEHC 149 at para. 156 per Barr J.). Such referrals are '*inappropriate'* since it is not the role of a legal practitioner to decide which medical issues a client has, which speciality is appropriate for that client, and which specialist, within that speciality, is appropriate for him to see. These are matters for the client's GP. It follows that such solicitor-referrals amount to *medical evidence being procured by legal practitioners even though there is no medical basis for this evidence*. As a legal practitioner has legal expertise, there can *only* be a legal basis for a referral by a legal practitioner in these circumstances, i.e. to support a claim for damages. For this reason, while the legal practitioner might see the referral as being in his client's best legal (and financial) interests, these referrals are still *'inappropriate'* and should not be made. The means do not justify the ends and so, just because a client might be in a better position to seek a greater settlement/court award with a consultant's report, this does not make those solicitor-referrals appropriate.

3. Although Barr J. sought in 2017 to bring the '*inappropriate'* practice of referrals of clients by solicitors to medical specialists to an end, by highlighting that issue in *Dardis*, this did not have the desired effect amongst legal practitioners. This is because Barr J. had to highlight the issue once again five years later in *Harty v. Nestor* [2022] IEHC 108 at para. 24.

4. Unfortunately, Ms. Cahill's case illustrates that this practice has still not ended, and so the High Court is required to highlight once again why this practice is '*inappropriate*', in the hope that legal practitioners will stop referring their clients to medical specialists (and in the hope that medical specialists will stop accepting those referrals).

5. It is important that this issue is highlighted. This is because the courts play an important role in highlighting concerning practices in order to seek to bring those practices to an end. A recent example of this approach by the courts is provided by the judgment in *Duffy v. McGee* [2022] IECA 254, where the Court of Appeal highlighted the overuse of expert evidence, in order to bring about a change in the approach of legal practitioners in this area. Ms. Cahill's case is noteworthy for the fact that it also provides an example of the over-use of expert evidence, which was criticised in *Duffy v. McGee*. This is because, even though there was no accident scene to inspect, or damaged car to inspect, Ms. Cahill's solicitor engaged the services of an engineer to give expert evidence to the Court regarding the 'accident' in which Ms. Cahill was involved. In fact, there were 18 different professionals (lawyers, doctors, engineers *etc*.) engaged, at no doubt considerable cost, in supporting, and defending, two personal injury claims for up to €60,000 – all arising from a tip in stationary traffic which led to no damage to Ms. Cahill's car.

6. Since Ms. Cahill's case is one of the tiny percentage of personal injury claims that are ever heard in court (3% *per* the Statement of the President of the High Court, 10th July, 2020), it is impossible to know how common these solicitor-referrals are in the 97% of personal injury claims that settle on the basis of consultant's reports. Indeed, if Ms. Cahill's claim had not been the exceptional case to be heard in open court, the issue of solicitor-referrals, and the other issues of concern in this case, would not have come to light. These issues are of public interest since they concern the waste of Gardaí resources, medical resources and court resources, since:

- The Gardaí had to waste scarce resources investigating a false claim by Ms. Cahill that the defendant ("Mr. Forristal") had left the scene of an 'accident'.
- The State's medical care system, which is under well-publicised strain, was subject to unnecessary referrals to consultants by Ms. Cahill's solicitor on three occasions, contrary to the High Court judgment by Barr J. that these referrals are '*inappropriate'*.
- There was an unjustified use of expert evidence (medical evidence and engineering evidence), which is an issue that has been highlighted by the Court of Appeal in *Duffy v. McGee* and which uses up scarce court resources.

In addition, this case also considers a series of false and inconsistent claims that were made in this action for damages. It is also important to highlight these issues, so that litigants in other cases are aware of the attitude of the courts regarding these matters, which may facilitate settlement in those other cases.

SUMMARY

7. The most concerning of the issues which arose in this case are contained in the following summary of the key facts:

- Ms. Cahill was sitting in the driver's seat of her car with the second plaintiff ("Ms. O'Riordan") in the passenger seat. They were stationary in heavy traffic on Emmet Street, Clonmel, just opposite the Garda station, when the front of Mr. Forristal's car inadvertently came into contact with Ms. Cahill's car. Ms. Cahill's engineer described this type of case as a 'minimal impact' case.
- Mr. Forristal was a credible witness and he gave evidence that he had just taken off from a stationary position about a foot and a half behind Ms. Cahill's car and that he was travelling at *circa* 5-8 km per hour. He also confirmed under oath that he does not drink.

- The parties get out of their cars and Mr. Forristal immediately acknowledged to the plaintiffs that he had made contact with Ms. Cahill's car. He also apologised to them. Mr. Forristal says that Ms. Cahill bent down and rubbed her bumper and she said there was no damage to the car. He also gave evidence that both sisters said that they were fine. When this was put to Ms. Cahill, she said that she did not remember this exchange. In her statement to Gardaí, Ms. Cahill stated that there was no damage to her car. Yet in her evidence to this Court, she stated that there was damage to her car.
- Neither Ms. Cahill nor Ms. O'Riordan looked for any insurance details from Mr. Forristal and all parties got back into their cars and continued on their way, with Ms. Cahill driving off first and Mr. Forristal driving off behind her.
- Within minutes, Ms. Cahill decided to pull her car in. As Mr. Forristal overtook them, he stated that he saw them appearing to take the details of his car registration. After Mr. Forristal had moved off, Ms. Cahill and Ms. O'Riordan called into the Garda station. Ms. Cahill reported the incident and claimed to Garda Con O'Leary that there was a smell of alcohol off Mr. Forristal's breath (thus clearly implying that he might be guilty of the criminal offence of driving under the influence).
- Most seriously of all, Ms. Cahill claimed that Mr. Forristal left the scene of an accident, when it is clear from her own evidence that they talked and they then got into their respective cars and that she had to drive off first, as he was in traffic behind her. This allegation against Mr. Forristal was therefore clearly false.
- Garda O'Leary examined Ms. Cahill's car and he could see no damage to the back of the car and as an independent witness, his evidence is compelling.
- To support her claim for psychiatric injuries resulting from this tip to her car in stationary traffic, Ms. Cahill's solicitor, who has no medical training, referred her to a consultant psychiatrist, Dr. Aisling Campbell. This action by her solicitor is in clear breach of the

finding of Barr J. in *Dardis v. Poplovka* (No. 1) [2017] IEHC 149 and in *Harty v. Nestor* [2022] IEHC 108 that such referrals are *'inappropriate'*.

- Ms. Cahill must have known that she was only referred to a psychiatrist for legal reasons (i.e. to support her claim for damages), because her solicitor could not have had any medical basis for making the referral. In these circumstances, it is relevant to note that this consultant's report notes that Ms. Cahill claimed to her that the '*driver smelled of alcohol'*, even though Mr. Forristal does not drink. This report also notes Ms. Cahill's claim that Mr. Forristal *'left the scene of the accident'*. In addition, the report notes Ms. Cahill's claim regarding the effect of the *'minimal impact'* in the following terms: *'she thought that she had heard "**an explosion**"'*. (Emphasis added)
- It is important to remember that Ms. Cahill, on the basis of a referral by her solicitor (and not on the basis of any medical advice by her GP) is claiming that this tip in stationary traffic caused her psychiatric injuries. This is why she saw the consultant psychiatrist that her solicitor, for legal reasons, recommended she see. This meant that it was necessary for the Personal Injuries Assessment Board ("PIAB") to engage a consultant psychiatrist to assess Ms. Cahill. At the consultation with PIAB's consultant psychiatrist, Ms. Cahill would have known that the evidence being provided to this consultant had one purpose and one purpose only, namely to support her claim for psychiatric injuries arising from the tip in stationary traffic to her car. The report of this consultant psychiatrist states that Mr. Cahill informed her that *'the **airbags deployed** and she thought there was **going to be a fire**'* (Emphasis added). This is completely untrue (as Ms. Cahill accepted in the witness box) as the airbags were not deployed.

8. The foregoing false and inconsistent claims and the clear breach of the High Court finding in *Dardis* (that it is *'inappropriate'* for solicitors to refer their clients to medical specialists) cast a considerable shadow over:

- the reliability of all of Ms. Cahill's evidence, including the alleged injuries suffered as a result of the 'tip',
- the claim of Ms. O'Riordan for personal injuries from the same accident (since Ms. O'Riordan's claim relies to a great extent on the evidence of Ms. Cahill as to what occurred and Ms. O'Riordan did not seek to contradict or resile from that evidence).

Both claims were heard together by the Circuit Court and by this Court on appeal. The two claims were rejected by Judge O'Donohoe in the Circuit Court and by this Court on appeal.

THE EVIDENCE

9. On the 12th February, 2018 at 12.45pm approximately, Ms. Cahill was sitting in her car in a line of traffic on Emmet Street in Clonmel. Ms. Cahill was in the driver seat and Ms. O'Riordan was in the passenger seat. The car was stationary as the traffic ahead was not moving. Mr. Forristal gave evidence that his car was approximately 1.5 feet behind Ms. Cahill's car in the traffic. While checking for traffic coming from his right, he moved from a stationary position, on the mistaken assumption that Ms. Cahill was also going to be moving. When he realised his mistake, he braked, but could not avoid coming into contact with Ms. Cahill's car.

10. Ms. Cahill and Ms. O'Riordan got out of Ms. Cahill's car and they had a brief exchange in which Mr. Forristal accepted that he had made contact with Ms. Cahill's car. He says he asked if everything was ok with Ms. Cahill and Ms. O'Riordan. He says that both Ms. Cahill and Ms. O'Riordan said everything was fine. He also stated in evidence that he could see there was no damage to Ms. Cahill's car. In those circumstances, he was not surprised that there was no suggestion of any exchange of insurance details or of notifying the Gardaí. In this regard, notifying the Gardaí would have been a very easy matter, as the incident took place outside the Garda station. The parties then got back into their respective cars and resumed their journeys.

11. In all these circumstances, Mr. Forristal was surprised to learn some time later that both plaintiffs were claiming that they had suffered significant personal injuries (since they were both seeking damages in excess of €15,000 (the jurisdiction of the District Court). When Garda Con O'Leary met Mr. Forristal to interview him, shortly after the incident, he accepted that he had tipped Ms. Cahill's car. Rather than 'leaving the scene of an accident' as alleged by Ms. Cahill, Mr. Forristal explained to Garda O'Leary that he drove off after Ms. Cahill drove away and that the parties did not exchange insurance details as both Ms. Cahill and Ms. O'Riordan indicated to him they were fine, and as he could see that there was no damage to Ms. Cahill's car.

12. One of the many concerning aspects of this case is that the incident took place outside the Garda station. Therefore, it would have been easy for Ms. Cahill to have got a Garda to attend the scene if she had any concerns about the incident. However, instead she drove off with Mr. Forristal following behind, not having sought any insurance details, and she immediately pulled in further up the road and then drove into the Garda station, after Mr. Forristal has departed. She then made an allegation to Garda O'Leary, in Mr. Forristal's absence, that there was smell of alcohol off Mr. Forristal, who does not drink, and that he had left the scene of an accident, which is untrue - all of this in advance of making a personal injury claim.

Waste of Garda resources to support the claims

13. These allegations caused a waste of Garda resources since Garda O'Leary had to track down and interview Mr. Forristal. In addition, of course, these allegations would have painted Mr. Forristal in a very negative light in the context of the plaintiffs' claim for damages from him. In this regard, this allegation of a criminal offence (of leaving the scene of an accident) on the part of Mr. Forristal (as well as the implied allegation that he might have been driving under the influence) might have increased the chances of the defendant insurance company not

fighting the claim and might have increased the amount of any settlement received by the plaintiffs.

Mr. Forristal

14. Mr. Forristal accepts that the 'accident' was caused by his negligence in allowing his car make contact with Ms Cahill's car. He immediately apologised for the accident.

15. It is relevant to note that Mr. Forristal gave evidence which was not completely one-sided, as it did not always try to support his defence to these proceedings. For example, a motor assessor who gave evidence relating to Mr. Forristal's car stated that the faint spider like cracking around the screws in the front number plate on Mr. Forristal's car were likely to have been caused by the screws being tightened too hard and not by the accident.

16. Yet, when given the opportunity to support his own motor assessor's evidence and say that this damage was pre-existing at the time of the accident (and so was likely to have been caused by screw tightening, rather than the tip off Ms. Cahill's car), Mr. Forristal did not do so. Instead, he said that he did not know whether this happened on the day of the incident. This was because he very fairly said that he was not in the habit of looking at his number plate.

17. For this reason and the manner in which he gave his evidence and the consistent nature of that evidence, this Court found Mr. Forristal to be a credible witness and it had little hesitation therefore in believing Mr. Forristal's sworn evidence and in particular his convincing evidence that he does not drink. Indeed, because of his credibility as a witness and the consistent nature of his evidence, in contrast to the contradictory evidence provided on behalf of the plaintiffs, this Court concludes that his description of the events is, on the balance of probabilities, the correct one.

Garda O'Leary

18. Independent evidence was provided by Garda O'Leary regarding his involvement in the aftermath of the incident. He came across as a conscientious and diligent Garda. He gave evidence that Ms. Cahill and Ms. O'Riordan both came into the Garda Station on the day of the incident and that he was told that Mr. Forristal had a smell of drink off him, and also that he was told that Mr. Forristal had left the scene of the accident.

19. It is also relevant to note that a photograph was provided to the Court of a relatively wide gash in the underside of the back bumper of Ms. Cahill's car, a few inches in length, which Ms. Cahill claimed in Court was caused by Mr. Forristal. Evidence was provided by Ms. Cahill's former husband that this photograph was taken the day after the incident. However, Garda O'Leary examined the back of Ms. Cahill's car on the day of the incident and confirmed that he saw no damage to the car. Garda O'Leary also confirmed that if there had been a gash of the type in the photograph, he would have seen it and this Court has no reason to doubt his independent evidence in this regard.

Inconsistent claims by both plaintiffs as to whether there was damage to the car

20. The inconsistencies in the evidence provided on behalf of both plaintiffs cast further doubt over their recollection of the incident generally and in particular their claim of damage to Ms. Cahill's car.

21. In his report of 2nd May, 2018, Ms. Cahill's GP (Dr. Patrick Lynch) states that at their consultation on 13th February, 2018, Ms. Cahill informed him that Mr. Forristal had '***walloped*** *into the back of her car'* and that '***her bumper was damaged***' (Emphasis added).

22. This statement by Ms. Cahill to her GP is inconsistent with Mr. Forristal's evidence that immediately after the incident Ms. Cahill bent down and rubbed the bumper and said everything was fine. However, in her evidence to this Court, Ms. Cahill also claimed that Mr.

Forristal had damaged her car, since she claimed the gash to her bumper (to which reference has already been made) was caused by Mr. Forristal.

23. Significantly however, some weeks after the incident, on 6th March, 2018, Ms. Cahill made a Garda statement concerning the accident and she expressly stated that she did not notice any damage to the car after the car accident. It is relevant to note that this statement was made after her former husband had allegedly photographed the bumper with the gash after receiving a phone call from a 'distressed' Ms. Cahill the day after the tip in stationary traffic. Yet in this statement to the Gardaí, Ms. Cahill makes no reference to any such damage to the car, but instead specifically states that she noticed no such damage to her car.

24. It is also to be noted that Ms. O'Riordan provided a statement to the Gardaí on the 4th March, 2018, conflicting with Ms. Cahill's statement to the Gardaí, since she claims that she saw a crack on the back bumper of Ms. Cahill's car while at the Garda Station immediately after the accident. This evidence by Mr. O'Riordan is also inconsistent with the independent evidence of Garda O'Leary, who examined the car at the Garda station, at the same time as Ms. O'Riordan claims to have seen the crack in the bumper.

25. In the face of this inconsistent evidence, this Court prefers the evidence of the *independent* Garda in this regard and so concludes that Ms. O'Riordan's and Ms. Cahill's recollection, in court, of the incident is mistaken.

Ms. O'Riordan's claim

26. In relation to Ms. O'Riordan's claim, this Court has reason to doubt her recollection of events as it conflicts with the evidence of the independent witness (Garda O'Leary). In addition, it is to be noted that while much of the evidence in this case was provided by Ms. Cahill, Ms. O'Riordan did not row back from any of this evidence (even though some of it was false and inconsistent) in her claim for damages. In addition, she attended with Ms. Cahill at the Garda Station where the false allegation against Mr. Forristal were made. This has impacted

on the credibility of her claims regarding the nature of the accident and the injuries she suffered (*albeit* that she did not allow herself to be referred, without any medical basis, by her solicitor to a consultant psychiatrist to support a claim for damages for psychiatric injury resulting from a tip in stationary traffic).

Inconsistency of fact that there is no claim for repair to the 'damaged' car

27. A further inconsistency in the evidence of Ms. Cahill regarding the alleged damage to the car, is the fact that, while she now claims that Mr. Forristal did damage her car, there is no claim for special damages (i.e. out of pocket expenses) in this case. This is despite the fact that Ms. Cahill showed herself to be very careful to list any expenses which she might be able to recover from Mr. Forristal, since she claims even minor sums from Mr. Forristal, e.g. a sum of €8 in respect of a GMS charge.

28. Her failure to claim any expenses for the gash to her bumper, that she now claims was caused by Mr. Forristal, provides further support for this Court's conclusion, on the balance of probabilities, that there was no damage to her car caused by the 'tip' with Mr. Forristal's car.

Inconsistent claims by both plaintiffs regarding the nature of the contact between the cars

29. Another reason for this Court's doubts about the reliability of the recollection of Ms. Cahill and Ms. O'Riordan regarding the incident and its effects on them is the wildly inconsistent descriptions of the nature of the impact.

30. As already noted, a consultant's report notes Ms. Cahill claiming that the tip was like an '*explosion'*, the '*airbags deployed'* (which did not occur) and caused her to fear that a *'fire'* might break out. In order to seek to explain the false statement regarding the airbags, Ms. Cahill, not for the first time, sought to blame someone else for this error. This is because she blamed the consultant psychiatrist for incorrectly recording in her report that Ms. Cahill said the airbags were deployed.

31. In contrast, the notes of her sister's GP (Dr. Bernie Rouse) from two days after the accident (and thus while matters were fresh in her memory) describes the incident in much more prosaic term, i.e. that Ms. O'Riordan *'became aware of a **jolt**'*. (Emphasis added)

32. In light of these wild inconsistencies and Mr. Forristal's credibility as a witness, this Court has little hesitation in concluding that his description of the incident, as one where he had a 'tip' with Ms. Cahill's car is the most accurate one, on the balance of probabilities.

False claim that Ms. Cahill never had any similar injuries

33. The next inconsistency/falsehood in Ms. Cahill's claim for damages is in her Reply to Particulars. This is because in these proceedings, which she has taken against Mr. Forristal, she is seeking damages from him for back, neck and left breast pain as well as psychiatric injuries. Accordingly, she would have known that it is of considerable importance that she disclose to the defendant any previous history of such complaints.

34. However, in her Replies to Particulars, it is stated that she had not suffered from any relevant injuries in the previous five years. Yet, this is false, which she accepted in the witness box. This time, she sought to blame her solicitor for this error, by claiming that she had told her solicitor the correct details, yet he had failed to insert those details in the Replies to Particulars.

False statement in psychiatrist's report

35. To support a claim for damages for psychiatric injuries resulting from the tip to her car in stationary traffic, Ms. Cahill was referred by her solicitor to a consultant psychiatrist, Dr. Aisling Campbell. Clearly, to establish whether there was in fact a link between the incident and the alleged psychiatric injuries, it is important that Ms. Cahill disclose to this psychiatrist details of Ms. Cahill's previous psychiatric history. In particular, Ms. Cahill would have known that if she had no history of mental health issues before the accident, the resulting

settlement/court award is likely to be greater, since this would support a claim that her alleged psychiatric injuries were caused *solely* by the tip in stationary traffic.

36. It is important to note therefore that in Dr. Campbell's first report of 19th November, 2018, it is stated that Ms. Cahill said to her that she had never seen a psychiatrist or counsellor before the incident. However, in her evidence to this Court, Ms. Cahill accepted that this statement to Dr. Campbell was also false.

Ms. Cahill's own medical team appear to question her injuries

37. Finally, in relation to Ms. Cahill's evidence, it is to be noted that the credibility of Ms. Cahill's claims about her physical injuries, to support her claim for damages, is cast into doubt by the assessment of her own physiotherapist. This is because in her GP's report dated 19th November, 2019, it is noted that the physiotherapist assessing Ms. Cahill seemed to doubt whether there was any physical basis for the alleged injuries. This is because it is stated therein that the physiotherapist felt that Ms. Cahill's:

> "[N]on-specific low back pain, thoracic and neck pain […] were **influenced by psychological factors**." (Emphasis added)

Solicitor refers Ms. Cahill to two consultants, contrary to terms of High Court judgment

38. One of the main issues of concern in this case is the fact that the solicitor for Ms. Cahill referred a client to a medical specialist, chosen by that solicitor for legal reasons (i.e. to support a claim for damages), in order to obtain a medical report. This is contrary to the holding by Barr J. in *Dardis* that such solicitor-referrals are 'inappropriate'. In this regard, no evidence was provided to this Court regarding the existence of any practice direction from the Law Society to solicitors, regarding the making of such referrals, since the delivery of that judgment.

39. However, it is clear from *Dardis* and other cases that these referrals are inappropriate because *there is no medical basis for these referrals* for the simple reason that *solicitors have*

no medical expertise. For this reason, the referrals can only have a legal basis, namely to procure evidence (in the form of a medical report) which will support a claim for damages.

40. Barr J. first raised the inappropriateness of solicitor-referred medical reports for personal injury cases in 2017. In the *Dardis* case, at para. 156, he stated:

> "The court is of the view that **it is inappropriate for solicitors to refer clients for specialist examination.** There are two reasons for this. Firstly, normally, a plaintiff's G.P. plays a central role in relation to his rehabilitation. Often, the G.P. is the person who is first consulted by the plaintiff in relation to his injuries. He or she deals with the plaintiff on an ongoing basis. His primary aim is to make the plaintiff better. Accordingly, **it is the G.P., who should decide when and to what specialist a patient should be referred.** A plaintiff's case is **much stronger if the decision to refer him to a specialist is made by the G.P., rather than by the plaintiff's solicitor**.
>
> The second reason why this is preferable, is that if the plaintiff is referred by his G.P. to a specialist, that consultant becomes a treating doctor. This means that he assumes the responsibility of advising the plaintiff as to what treatment is best suited to make him better. He will decide what treatment is appropriate for the plaintiff and will oversee its implementation. If a given course of treatment is not successful in relieving the plaintiff's symptoms, he will advise what further treatment should be undertaken, or he will refer the plaintiff on to another specialist in a different field. **As a treating doctor, he will also liaise with the plaintiff's G.P. and keep him updated as to the progress of treatment. In this way, there is continuity and communication between the various medical professionals, who are treating the plaintiff at any given time**."
>
> (Emphasis added)

It is relevant to note that this finding in *Dardis* that solicitor-referrals are 'inappropriate' was not appealed and so it represents the current state of the law in Ireland on solicitor-referrals.

Solicitor-referrals to consultants continue despite High Court's condemnation of practice

41. It is clear that the condemnation in 2017 by the High Court in *Dardis* of the practice of solicitor-referrals was insufficient to bring it to an end. This is because some five later, in 2022, Barr J. had to repeat his condemnation of this practice by stating in *Harty v. Nestor* [2022] IEHC 108 at para. 24 that:

> "The court is also concerned by virtue of the fact that the only medical witness who was called to give evidence on behalf of the plaintiff at the trial of the action, was Dr. Aideen Henry, **who was retained directly by the plaintiff's solicitor**. **The practice of solicitors referring their clients directly to consultants for the purpose of drawing up medicolegal reports has been disapproved** of in a number of decisions: see *Fogarty v. Cox* [2017] IECA 309 (para. 43); *Dardis v Poplovka* (No 1) [2017] IEHC 149 (paras. 156 & 157) and *O'Connell v Martin* [2019] IEHC 571 (paras. 41 et *seq*).
>
> The disadvantages of proceeding with the evidence of a reporting doctor, rather than a treating doctor, is evident from the present case. **Dr. Henry operated on the basis of what she had been told by the plaintiff in relation to no previous neck injury, or complaints. Had she been treating the plaintiff as a patient on a referral from his GP, she would have received the normal referral letter from the GP, which would have set out the salient medical history of the patient being referred**. **This would have prevented Dr. Henry operating on the mistaken understanding that the plaintiff's neck had been asymptomatic** prior to the 2017 accident. Furthermore, Dr. Henry did not have sight of the plaintiff's GP medical records. In this regard she was operating at a considerable

disadvantage. Her evidence, while given *bona fide*, was based on incorrect information as to the plaintiff's premorbid condition." (Emphasis added)

42. If legal practitioners continue to recommend or make these *'inappropriate'* referrals, despite their condemnation by Barr J., it is important that they should be aware of the negative potential consequences for their clients.

Why legal practitioners should comply with High Court's statement on solicitor-referrals

43. If a plaintiff (in conjunction with her solicitor) feels she has a medical need to see a consultant, her solicitor should refer her to her GP. A solicitor should not suggest to a plaintiff that he can refer her to a consultant, or a range of consultants, chosen for legal reasons, to support her claim for damages. This is because there is no medical basis for such referrals. As noted by Barr J. in *Dardis,* a plaintiff's case would be '*much stronger'* if the referral is made by a GP, rather than by a solicitor. A legal practitioner might regard it as being in his client's best legal (and financial) interests to refer that client to different specialties, and certain specialists, within those specialties, so that he has consultants' reports to support the claim for damages. However, just because a solicitor believes something is in his client's best legal interests does not negate the finding of the High Court that solicitor-referrals are '*inappropriate'*. In fact, instead of increasing the amount of the likely settlement/court award, a solicitor-referral may lead to a lesser award, or the rejection of the claim entirely, as illustrated by Ms. Cahill's case. This is for the following reasons.

(i) Impact on credibility of plaintiff regarding injuries the subject of referral

44. The first reason is because where a plaintiff seeks damages for alleged injuries, which are the subject of a solicitor-referral, the very existence of a solicitor-referral is *prima facie* evidence that there is in fact no medical basis for that referral. This immediately raises question marks about the existence, and severity, of the alleged injuries. In addition, that solicitor-

referral is also *prima facie* evidence that the consultant was chosen, not for medical reasons, but solely for legal reasons, i.e. to support the claim for damages.

45. Against this background it is relevant to note the Supreme Court has directed (in *Rosbeg Partners v. LK Shields Solicitors* [2018] 2 I.R. 811 at p. 823) that courts '*bring an appropriate scepticism*' to all stages of the litigation process. This direction has particular resonance to medical evidence, which has come into existence without any medical basis. Thus, when a court comes to consider the particular injury or pain which the plaintiff claims to a consultant she has, logic dictates that the credibility which this Court attaches to that claim may be reduced, if not eliminated, by the fact that there was no medical basis for that referral.

46. In addition, of course, *'an appropriate scepticism'* means that one must bear in mind that these medical reports are often based on the subjective assessment of pain provided to the consultant by a plaintiff (as is noted hereunder in relation to the medical reports in this case). In these circumstances the medical reports are sometimes of limited value, since all they do is provide the apparent gravitas or authority of a consultant's report (arising from a referral for which there was no medical basis) for what is essentially the subjective views of a plaintiff on her pain.

(ii) Impact on credibility of plaintiff regarding other injuries and claims

47. The second reason why a plaintiff would be better off with no medical report, rather than a solicitor-referred medical report, is because of the possible impact upon, not just her credibility regarding the injuries, the subject matter of the report, but also her other injuries and claims.

48. This is because a plaintiff who is relying on solicitor-referrals is willing to procure medical evidence even though there is no medical basis for procuring that evidence (as well as contravening the terms of the High Court judgment in *Dardis*). This could have a negative effect on the credibility of the plaintiff's other claims, i.e. those injuries which were examined

by a GP (and so had a medical basis), those injuries which were examined by a consultant to whom the plaintiff was referred by a GP (and so had a medical basis) and indeed claims for financial loss (e.g. loss of income) arising from the alleged injuries.

(iii) Solicitor-referred medical reports may not be admissible

49. A third reason why a plaintiff might be better off without a solicitor-referred medical report is because there may be an issue over whether such medical reports are admissible in the first place, since medical evidence has been procured by the solicitor without there being any medical basis for it. This is because Order 39, Rule 58(1) of the Rules of the Superior Courts states that:

> "Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings."

While this Court does not propose to decide this issue (since this is a matter for legal argument in a future case) it seems to be, at the very least arguable, that a *medical* report regarding an alleged injury, which has been procured by a solicitor *without any medical grounds* for same, is not '*reasonably required'* to determine the proceedings regarding that alleged injury.

50. Finally, in this regard, quite apart from the foregoing legal reasons, if a plaintiff has a genuine medical need, there are also good *medical* reasons (as noted by Barr J. at para. 156 of *Dardis* and para. 24 of *Harty*) why a plaintiff should not accept the advice of a solicitor to refer her to a series of consultants, but should seek a referral from her GP.

Three solicitor-referrals to consultants in this case

51. It is against this background that this Court will consider the details of the three solicitor-referrals in this case. The first referral was made by Ms. Cahill's solicitors to Mr. Terence Murphy, Orthopaedic Surgeon.

‘Inappropriate’ solicitor referral to an orthopaedic surgeon

52. Mr. Murphy accepted this referral even though it was not from a GP, and so was without any medical basis. As a solicitor-referral, rather than a GP referral, it suffers from the medical disadvantages set out by Barr J. in the *Harty* judgment and the *Dardis* judgment, i.e.

- missing the salient medical history, which a GP would have provided, and
- absence of continuity of treatment and communication between medical professionals who are seeing a patient.

53. Counsel for Mr. Forristal dealt with the inappropriateness of Ms. Cahill’s solicitors referring her to Mr. Murphy. He did so by asking a rhetorical question (to which there was no objection by Ms. Cahill’s legal practitioners), i.e. *‘Is [your solicitor] a doctor?’*. Similarly, he asked *‘Ms. Cahill [your solicitors’ firm] is not a firm of GPs, is it?*’.

54. As noted earlier, these solicitor-referral medical reports are often of limited value, since they sometimes involve attaching the gravitas of a consultant’s report to what is in essence a subjective assessment by the client/patient of her pain. So, for example in Mr. Murphy’s report of 23rd July, 2019, the three paragraphs dealing with Ms. Cahill’s present condition amount to Ms. Cahill’s subjective assessment of her condition told to a consultant who has been engaged solely for legal reasons to support her claim for damages i.e. ‘*Ms Cahill states she has ongoing neck and low back pain which is present most days’*, ‘*she rates this pain in her neck approximately 4/10 and in her lower back at approximately 3/10’*, ‘*she takes analgesia every day’*, ‘*she states that she is more cautious in day-to-day activities’, ‘she tried attending the gym for a period of time but was unable to continue’*, ‘*she states that things that particularly exacerbate her symptoms are […] etc’.*

55. It is important to bear in mind that if the recipient of this report did not know that there was no medical basis for this referral, he might attach significance to this description of Ms. Cahill’s present condition as it is contained in a consultant’s report. That recipient of the report

would understandably assume that a consultant was engaged because a GP regarded Ms. Cahill's medical condition as justifying such a referral. Yet, in Ms. Cahill's case, this medical report was procured solely for legal reasons, and without any medical basis. For this reason, Mr. Murphy's assessment of Ms. Cahill's present condition (containing as it does the subjective views of the plaintiff regarding her pain) is arguably of no use to this Court. This is because one cannot get away from the fact that *it is medical evidence which was procured by Ms. Cahill's solicitor without any medical basis,* yet it has the apparent gravitas of being from a consultant (to whom a patient is normally only referred where the medical condition is too serious/too specialised for treatment by a GP). In this case, of course, it is not a GP, but a solicitor who felt, for legal, rather than medical reasons, that Ms. Cahill should be referred to a consultant orthopaedic surgeon (and a consultant psychiatrist) arising from a tip to her car in stationary traffic.

'Inappropriate' solicitor referral to a consultant psychiatrist

56. Unfortunately, this was not the only breach by Ms. Cahill's solicitors of the finding in the *Dardis* judgment, that it was *'inappropriate'* for a solicitor to refer a client to medical specialists to support a claim for damages. This is because Ms. Cahill accepted under cross-examination that it was her solicitor who had also referred her to a consultant psychiatrist, Dr. Aisling Campbell. Again, counsel for Mr. Forristal asked the rhetorical question in relation to this referral (again without objection from her legal practitioners) – '*Is [your solicitor] a doctor?'*. Counsel for Mr. Forristal then pointed out that there was no medical reason, but only a legal reason for the referral to a consultant psychiatrist, when he asked:

> "So you weren't referred by your GP and I take it that the purpose of this report was **purely for the purpose of you making a claim for damages for personal injuries** against the defendant, is that right?" (Emphasis added)

57. Dr. Campbell accepted this referral even though it was not from a GP, and so was without any medical basis. As a solicitor-referral, it suffers from the medical disadvantages set out by Barr J. in the *Harty* judgment and the *Dardis* judgment, to which reference has already been made.

Third 'inappropriate' solicitor referral to a consultant

58. It is also worth noting that Ms. Cahill's solicitor referred Ms. Cahill on a third occasion to a consultant, in clear breach of the finding in the *Dardis* judgment that such referrals are inappropriate. This was when she was referred back to Dr. Campbell for a second consultation and a second medical report, a year after the initial consultation, which report was also adduced in evidence in support of the claim for damages.

Consultants not expected to be aware of the *Dardis* case

59. It is important to point that neither Mr. Murphy nor Dr. Campbell would be expected to be aware that the High Court had disapproved of the practice of solicitor-referrals to consultants. In this regard, while counsel for Mr. Forristal challenged Ms. Cahill regarding the inappropriate nature of her solicitor referring her to a consultant, no evidence was provided to this Court of whether the finding of the High Court in *Dardis* has been brought to the attention of consultants who accept referrals or whether it is regarded as good medical practice for consultants to accept referrals of patients from persons other than GPs (whether that be solicitors, accountants, engineers, tax advisers or other non-healthcare professionals).

Effect of the solicitor-referrals on Ms. Cahill's claim in this case

60. In relation to the inferences which arise from the use of solicitor-referrals in this case, this Court has found that Ms. Cahill was not a credible witness regarding the nature of the accident and the cause and extent of the alleged injuries (including those alleged injuries for which she saw her GP). There were several reasons for this Court's doubts over her credibility (including the false and inconsistent claims set out above). However, one factor which

contributed to this Court's doubts about the credibility of her claims of psychiatric injuries and neck, lower back, and left breast injuries, was the fact that she was willing to procure medical evidence/reports, without any medical basis for that evidence, in order to support her claim for damages, in breach of the finding of the High Court in *Dardis*.

61. In addition, Ms. Cahill's referrals took place in 2018 which was *after* the High Court's judgment in 2017 in the *Dardis* case. While Ms. Cahill may not have known that she was engaging in an *'inappropriate'* practice, her solicitor is her agent in this respect and so she is bound by his actions in making the solicitor-referral in the face of the High Court finding that such referrals are inappropriate.

The strain on medical resources resulting from solicitor-referrals

62. Quite apart from solicitor-referrals to consultants being '*inappropriate'* for the legal and medical reasons set out by Barr J. in his two judgments, there is also a public interest element to ending this practice. That is the fact that, in a country where there is a well-publicised strain on the health system, such referrals put an additional strain on those resources. As a result, genuine patients (i.e. referred for medical reasons and not in order to support a claim for damages) might be delayed in seeing specialists because of solicitor-referred clients/patients.

63. As regards the extent of the strain on medical resources in this case, it is to be noted that a 'tip' against Ms. Cahill's car in stationary traffic led to a total of eight separate medical appointments to support Ms. Cahill's claim for damages, i.e.:

- Dr. Patrick Lynch, GP – on the 2nd May, 2018,
- Dr. Patrick Lynch - on 19th November, 2019
- Dr. Patrick Lynch - on the 10th July, 2021
- Mr. Terence Murphy, Consultant Orthopaedic Surgeon – on the 23rd July, 2019
- Dr. Aisling Campbell, Consultant Psychiatrist – on the 19th November, 2018

- Dr. Aisling Campbell - on the 6th December, 2019
- Dr. Peter Kirwan, Consultant Psychiatrist, of PIAB – on the 25th February, 2019
- Dr. Mike Quirke, GP, of PIAB – on the 9th January, 2019

64. It is unclear to this Court how widespread the practice is, of solicitor-referrals. However, it has led to two separate written judgments by Barr J. in an attempt to bring this practice to an end. Furthermore, if even a small percentage of the *circa* 15,000 personal injury cases each year (*per* Courts Service Annual Report 2021 at p. 46) are subject to solicitor-referrals to consultants, this has the capacity to have a significant impact on Ireland's medical resources. For this reason, solicitors who make these *'inappropriate'* solicitor-referrals should bear in mind that for every consultant appointment taken by a solicitor's client in breach of Barr J.'s finding in *Dardis*, this is one less slot available for genuine patients.

65. However, it is important to note that not every solicitor engages in this '*inappropriate'* practice, as evidenced by the fact that Ms. O'Riordan's solicitor (she was represented by a separate solicitor and a separate junior counsel, but the same senior counsel) did not make any such referrals to consultants, even though she had been involved in the same 'tip' as Ms. Cahill.

66. To the extent that this practice is widespread, it is hoped that the highlighting of this practice, not for the first time by the High Court (and, in particular, the highlighting of the negative inferences which may arise for a plaintiff's credibility), may bring it to an end.

67. In highlighting this issue, this Court is taking a similar approach as that taken by the Court of Appeal in the personal injuries case of *Duffy v. McGee* where Collins J. highlighted the '*responsibilities of legal practitioners'* in bringing about *'a significant change of culture'* regarding, in that instance, the *'inexorable'* use of expert witnesses. The same point can be made, more forcefully in this case, regarding the responsibilities of legal practitioners to bring solicitor-referrals to an end, since such referrals directly contravene a finding by the High Court that they are *'inappropriate'.*

Solicitor-referrals which are appropriate

68. It is important, at this juncture, to clarify for legal practitioners and indeed medical specialists that certain types of solicitor-referrals are appropriate. These can be easily distinguished from the type of solicitor-referrals in this case. This is because a litigant might be referred to a consultant *by a GP for medical reasons* and it is then perfectly appropriate for the solicitor for the other side in the litigation to seek a second opinion from a different consultant in *the same speciality* regarding that person. It is clear that these solicitor-referrals are very different from the type of solicitor referral with which Barr J. was concerned. This is because, by virtue of the first GP referral, *there is a medical basis for a consultant to treat the patient*. Hence the referral for a second opinion, *albeit* that is a referral from a solicitor to a consultant, has a medical basis. This contrasts with the position in this case and the cases considered by Barr J., where there never was a GP referral, only a solicitor referral to a consultant orthopaedic surgeon and a consultant psychiatrist.

Unjustified use of expert evidence in this case

69. The next issue of concern which arose in this case is the use of expert evidence, particularly since as noted above, the Court of Appeal in *Duffy v. McGee* has called for a change in the approach of legal practitioners to the *'inexorable'* rise in the use of expert evidence in litigation. In that case, Collins J. noted that when legal practitioners engage experts, *'a sense of proportion should not be lost'* (quoting Lavery J.). He also noted that the increase in the use of experts was '*far from being an unalloyed blessing',* particularly as expert evidence is often adduced on issues '*that are matters of common knowledge or, at least, are within the knowledge or expertise of the trial court'.*

70. This Court must have regard to the comments of the Court of Appeal and in particular the comment that '*there **needs** to be a significant change of culture in this area'* (Emphasis

added). In order to ensure that there is indeed a change in culture, it seems to this Court there is an onus on the High Court (and other first instance courts) to highlight every example of unacceptable practice regarding expert evidence. Otherwise, it seems that some legal practitioners may ignore the Court of Appeal judgment in *Duffy v McGee*, as seems to have occurred in relation to the High Court's judgment in *Dardis*.

71. Before considering the examples of unjustified expert evidence adduced in Ms. Cahill's case by her legal practitioners, this Court will refer to what Collins J. may have had in mind, when he referenced experts being called to give evidence on matters which are common knowledge.

Expert evidence on how to pour a kettle

72. The day before Ms. Cahill's hearing, there was an application in another personal injuries case, which was due to be heard immediately after Ms. Cahill's case. Like Ms. Cahill, the plaintiff in that case was appealing the rejection of his personal injuries' claim by the Circuit Court.

73. The application before this Court was for the appeal to be adjourned, as the plaintiff's firm of engineers was not available to give expert evidence. As the claim concerned injuries suffered by the plaintiff when pouring water from a kettle in a hotel, this Court enquired as the exact nature of the expert evidence and why it was necessary.

74. This Court was advised by counsel for the plaintiff that expert engineering evidence was required as to '*how to pour water from a kettle'*. In this Court's view, this is a perfect example of exactly what the Court of Appeal criticised as the '*inexorable expansion'* of expert evidence into areas of common knowledge.

75. In this regard, it is worth noting that in *Flynn v. Bus Eireann* [2012] IEHC 398 at para. 9, Charleton J. stated that before a court accepts expert evidence as admissible on a particular topic, the expert must outline certain matters for the court:

> "It should be born in mind that experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement is predicated upon also informing the court of the factors which make up their opinion and [….] the elements of knowledge which their **long study and experience** had furnished to them whereby they had formed that opinion" (Emphasis added).

76. In addition, in *Elliot v. Irish Asphalt* [2011] IEHC 269 at para. 10, Charleton J noted that the *'role of the expert is to elaborate on the principles applicable to an* ***esoteric discipline'*** (Emphasis added).

77. In the hotel case therefore, this would have required the expert engineer to provide this Court with the elements of his *'long study and experience'* which enabled him to provide an 'expert' opinion on the *'esoteric discipline'* of pouring water from a kettle. In these circumstances, this Court had little hesitation in refusing the adjournment of the case to facilitate the expert giving that evidence. The following day, on the afternoon of Ms. Cahill's hearing, this Court was informed that the appeal in the hotel case had been withdrawn by the plaintiff.

78. In light of the Court of Appeal's demand that there *'needs to be'* a change in this area, this Court is highlighting this example of the use of inappropriate expert evidence, which although it did not occur in Ms. Cahill's case, was brought to the Court's attention on the eve of that hearing. By highlighting this inappropriate use of expert evidence and the *'responsibilities of legal practitioners'*, this may lead to the '*change in culture'* regarding the giving of expert evidence on matters of common knowledge, which has been demanded by the Court of Appeal.

79. However, it is also the case that Ms. Cahill's claim contained two examples of the use of expert evidence which this Court regards as unjustified, which also requires to be highlighted, in order to seek to achieve the change in culture demanded by the Court of Appeal.

Expert medical evidence sought even though *'inappropriate'*

80. The first relates to the expert medical evidence of consultants. This is because there were three medical reports from consultants (two from Dr. Campbell and one from Mr. Murphy), which were procured without any medical basis for that evidence (as they resulted from a solicitor's referral). Under Order 39, Rule 58(1) of the Rules of the Superior Courts:

> "Expert evidence shall be restricted to that which is **reasonably required** to enable the Court to determine the proceedings". (Emphasis added)

81. If medical evidence (a consultant's report) is brought into existence without any medical basis for the referral to that consultant, it seems arguable that the medical report, is not an expert report which is *'reasonably required'* to determine the proceedings. In this case, although the point was not argued before this Court (and so a decision on this issue, will be left over for another case) it is arguable that the three solicitor-referred medical reports were not reasonably required, and as such may be an example of the '*inexorable'* expansion of expert evidence which is not justified.

The 'appropriate' use of medical experts

82. The proper approach to using medical experts in personal injuries litigation is that, after someone has suffered an injury, and been to their medical experts to diagnose and hopefully resolve their medical issues, they may decide to seek legal advice on recovering damages for those injuries.

83. It was a complete reversal of the proper approach to personal injuries litigation, for Ms. Cahill to have gone to her solicitor after an accident, rather than her GP. It was then completely *'inappropriate'* for that solicitor, with no medical expertise, to decide to *which medical specialties* to refer Ms. Cahill (in this case orthopaedics and psychiatry) and then to *which consultants within those specialities* to refer the client (in this case Mr. Terence Murphy and Dr. Aisling Campbell) for assessment/treatment. Since, Ms. Cahill's solicitor has only legal

expertise, his choice of experts can only have been made from a legal, rather than a medical perspective, i.e. which specialities and which specialist he regarded as being in Ms. Cahill's best interests from a legal perspective (i.e. from the perspective of her obtaining an award of damages).

84. Accordingly, ending this practice of using expert medical reports in personal injury cases which are obtained *without any medical justification* would be consistent with the Court of Appeal's call for a change in culture regarding the over-use of expert evidence. If this practice does not end, as noted above, it is questionable whether such medical evidence/reports are admissible.

Engineering expert engaged where one car tips another in stationary traffic

85. Ms. Cahill's solicitors, in addition to *inappropriately* engaging two medical experts, decided to provide further support for Ms. Cahill's claim for damages by engaging the services of an expert engineer – it must be remembered for a tip in stationary traffic, which resulted in no damage to Ms. Cahill's car. Since this expert evidence was also not justified, in this Court's view, this is being highlighted to seek to ensure that there is a change in culture regarding expert evidence, as demanded by the Court of Appeal.

86. The expert engineering evidence is an example, in this Court's view, of where *'a sense of proportion'* is lost and where the expert evidence is '*far from being an unalloyed blessing'.* The expert engineering evidence was unnecessary, in this Court's view, because all an engineer could achieve in the circumstances of this case, was to provide his view that it was *possible* that a minimal impact damage case could cause injuries to a person seated in the car, such as the injuries complained of by the two plaintiffs. This Court believes that such evidence was unnecessary since counsel for the plaintiffs had provided this Court with a judgment in *Dunphy v. O'Sullivan* [2021] IECA 171 from which it is clear that the Court of Appeal has accepted that such a possibility exists.

87. In any case, the task for this Court is *not* to decide, on the balance of *possibilities*, what happened according to an engineer who was not at the scene of the 'tip' (for very good reasons, since the 'incident' was so inconsequential) and who did not examine the plaintiff's car (since there was no damage to it).

88. Accordingly, Ms. Cahill's engineer provided evidence which was of little or no value to this Court. However, this is not a reflection of the engineer's undoubted expertise regarding minimal impact cases. He was asked to give this expert evidence and he would not be expected to refuse the offer of well-paid work (assuming that he did not do so on the basis of 'no foal no fee').

89. However, the task of this Court is to decide, on the balance of probabilities, whether the two plaintiffs were in fact injured as they claim, and in particular based on the credibility of their evidence. Accordingly, this expert evidence was of no assistance and is a further example, in this Court's view, of the *'inexorable expansion'* of expert evidence, which the Court of Appeal believes should stop.

The number of professionals engaged as a result of a tip in stationary traffic

90. More generally, this case also highlights the number, and variety of professionals, who are engaged in even the most minor of personal injuries' claims – in this case arising from one car tipping another car in stationary traffic, which caused no damage to the car that was 'hit'. This is because the following professionals were engaged to pursue the claim, to defend the claim, to write reports, attend as witnesses, etc:

- Three solicitors, one for each of the two plaintiffs and one for the defendant
- Three junior counsel, one for each of the two plaintiffs and one for the defendant
- Two senior counsel, one for both plaintiffs and one for the defendant
- Dr. Mark Jordan, an expert engineer in impact dynamics
- Mr. Jason Murphy of Edge Anderson & Co. Ltd., a motor assessor

- Mr. Mark Nangle of M.A. Nangle & Co. Ltd., a consultant engineer
- Dr. Patrick Lynch, a GP
- Dr. Beirne Rouse, a GP
- Mr. Terence Murphy, an orthopaedic surgeon
- Dr. Aisling Campbell, a consultant psychiatrist
- Dr. Peter Kirwan, a consultant psychiatrist (on behalf of the defendant/PIAB)
- Dr. Mike Quirke, GP (on behalf of the defendant/PIAB)
- Dr. Joseph Hennessey, GP (on behalf of the defendant/PIAB)

This is a total of 18 people and it is to be noted that there are roughly the same number of non-lawyers, as lawyers, who stand to financially benefit from this most minor of accidents, *albeit* that it is likely that the lawyers usually benefit to a much greater degree due to their greater involvement in the case.

Why a defendant sometimes *cannot afford to win a case*

91. This case also highlights the concept of a defendant *not being able to afford to win a case*, as strange as that may sound. This is because in this case, were it not for the fact that these claims were defended by the insurance company in the Circuit Court and in the High Court, these claims might have led to a settlement, without any of the foregoing issues coming to light.

92. In fact, this case is exceptional in that these matters were aired in open court, since it is one of the very small percentage (*circa* 3%) of personal injury cases that is heard in court. For this reason, it is important that when issues of concern do arise in the very small percentage of cases which are heard, that these are highlighted in a judgment, particularly as it is not the practice for written judgments to be issued in Circuit Court cases (where the claims were rejected).

93. It is also exceptional that this case did not settle for another reason, namely that Mr. Forristal accepted that he had tipped Ms. Cahill's car. For this reason, he had accepted that he was, in this sense, guilty of negligence, and so there was no issue regarding liability to be contested. In addition, there were allegations made against Mr. Forristal that there was a smell of alcohol off him when he was driving and that he had left the scene of an accident, allegations which might have made a settlement more likely.

94. Furthermore, since *circa* 97% of personal injury cases settle (in part, no doubt, because legal costs are so high in Ireland – see *Review of the Administration of Civil Justice*, October 2020 at p. 267), it arguably made no economic sense for the defendant/insurance company to fight an unmeritorious case, such as this one, where the plaintiff is unemployed (as Ms. O'Riordan is). This is because a losing plaintiff, who is unemployed, is unlikely to be in a position to pay a winning defendant's legal costs. This is why it often makes economic sense for a defendant to pay say €10,000 to settle an unmeritorious claim in the High Court, rather than spending tens of thousands of euro in unrecoverable legal costs in winning the case. It is for this reason that the Supreme Court referred, in very stark language, to the fact that legal costs can be used by a person without means '*as a form of unfair tactic little short, at least in some cases of blackmail'* (in *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12).

95. Thus, this is an example of the type of case which a *defendant cannot afford to win,* which only comes to light because it is one of those very small percentage of cases that actually get heard in court.

Settlement of a claim does not mean that the claim had merit

96. This case also illustrates the fact that a settlement of a claim does not automatically mean that the claim had merit. It can mean that a defendant cannot afford to spend the legal

costs on winning the claim, particularly where the legal costs are in the thousands of euro (in the Circuit Court) or in the tens/hundreds of thousands of euro (the High Court).

97. This is because of the '*distorting effect'* that a plaintiff without means has on litigation (per O'Donnell J. in *Quinn Insurance Ltd (Under Administration) v. PricewaterhouseCoopers* [2021] IESC 15 at para. 12). Where the plaintiff is not a person of means, then the greater the legal fees the greater the distorting effect on settlements of personal injury cases. It is this 'distorting effect' which means that some settlements will not reflect the fact that a plaintiff has a meritorious claim, but rather that a defendant cannot afford to win the case.

98. However, it is also relevant to note that the distorting effect of legal costs on the outcome of a case is minimal for personal injury cases heard in the District Court (since successful defendants are only at risk of not recovering legal costs in the hundreds of euro). However, the distorting effect is of more relevance for those personal injury cases that are heard in the Circuit Court (where costs are likely to be in the thousands of euro) and is hugely significant for those cases heard in the High Court (where costs are likely to be in the tens/hundreds of thousands of euro).

CONCLUSION

99. A personal injury claim is determined by whether the version of events provided by the plaintiffs is probable, not that it is possible. The onus of proof in this regard rests on the plaintiffs and they have failed to discharge it in this case.

100. There were a number of false and inconsistent claims and concerns in this case which cast doubt on the version of events presented to support both plaintiffs' claims, the most concerning of which were:

- Ms. Cahill made a claim to An Garda Síochána, in advance of her personal injuries claim, that Mr. Forristal (who does not drink) was under the influence of alcohol and so there was an implication that he was driving under the influence.

- Ms. Cahill falsely claimed that Mr. Forristal left the scene of an accident, which led to a waste of Garda resources in investigating this issue.
- The Report of the consultant psychiatrist for PIAB records that Ms. Cahill stated that the air bags in her car were deployed as a result of a 'tip' in stationary traffic on a busy street in Clonmel, which Ms. Cahill accepted in evidence did not occur. For this false statement, she blamed the consultant. Similarly in her Replies to Particulars, it is falsely stated on behalf of Ms.Cahill that she had not suffered any previous injuries which were relevant to the accident. For this false statement, she blames her solicitor.
- Ms. Cahill's solicitor (and not her GP) referred her to a consultant psychiatrist for the assessment/treatment of psychiatric injuries which were allegedly suffered as a result of a tip her car received in stationary traffic, which resulted in no damage to her car. This referral was made in contravention of the finding of Barr J. in *Dardis* that such referrals are inappropriate. As with the complaint to the Gardaí, this was also a waste of scarce national resources

101. For these and the other reasons set out in this judgment, this Court concludes that the plaintiffs failed to discharge the onus on them to prove that the incident occurred as they claimed and that it caused their alleged injuries. This Court also concludes that Mr. Forristal's version of events and Garda O'Leary's version of events is the correct one and that the plaintiffs' recollection of events and of their resulting injuries is not accurate. While the plaintiffs genuinely believe their version of events and that these alleged injuries resulted from the incident, memories fail over time and the plaintiffs may have unwittingly convinced themselves that certain things happened, when this was not the case. As noted by O'Donnell J. in *Rosbeg Partners v. LK Shields Solicitors* [2018] 2 I.R. 811 at p. 823, litigation is *'a distorting process'* and *'it is human nature'* for:

> "[M]emories and consequently accounts to become subtly and unwittingly adjusted under the focus of a case, and in the light of the consequences of failure".

In this case, one of the *'consequences of failure*' is the loss of a very significant amount of money in damages. This is because the plaintiffs were claiming damages of up to €60,000 and it would take a person on average wage well over a year to earn this amount (based on the average wage of €864.32 per week/€44,945 per annum - CSO statistical publication of 29th November, 2022).

102. Finally, it is of course possible that solicitors will continue to believe that it is in their client's legal interests to refer them to consultants despite:

- the repeated attempts by Barr J. in 2017 and 2022 to stop the practice, and
- the possibility of those medical reports being inadmissible on the grounds that they are not 'reasonably required' (as the referrals have no medical basis).

However, there is another incentive, namely to avoid the negative impact on the credibility of a plaintiff, which could arise from such a referral. This is because the very existence of a solicitor-referral is *prima facie* evidence that there is in fact no medical basis for that referral. This immediately raises question marks about the existence, and severity, of the alleged injuries, the subject of the referral, and for which damages are being claimed (as well as the other claims made by that plaintiff).

103. In conclusion, this Court has no hesitation in agreeing with the decision of Judge Donohoe in the Circuit Court and so will reject both these claims and so it rejects the appeals of both plaintiffs. As the plaintiffs have both lost their appeals, it seems to this Court that the defendant has been entirely successful. Accordingly, this Court is minded to award costs in favour of Mr. Forristal against both plaintiffs. The Court will so order, unless any of the parties

notify the Registrar within one month of this judgment, that they wish to argue that the circumstances of this case justify a different order.