THE COURT OF APPEAL

COURT OF APPEAL RECORD NO. 2020/49

HIGH COURT RECORD NO. 2017/4797P

Neutral Citation Number [2021] IECA 329

Woulfe J.

Noonan J.

Ní Raifeartaigh J.

Between

CAOIMHÍN GRIFFIN

Plaintiff/Respondent

-and-

DAN HOARE

Defendant/Appellant

JUDGMENT of Mr. Justice Woulfe delivered on the 9th day of December, 2021

1. I have had the benefit of reading a draft of the judgment which Noonan J. proposes to deliver herein, and I am happy to gratefully adopt the comprehensive account of the facts, the evidence and the trial judge's findings contained in his judgment. Noonan J. has come to a conclusion that the appeal brought against both the determinations of liability and quantum by

the High Court should be allowed. I regret that I can only agree in part as to his conclusions on liability, and cannot agree as to his conclusions on quantum, and I would set out as briefly as possible the reasons which have led me to these different conclusions.

A. Liability

2. I agree with Noonan J. that there was no evidence that the plaintiff mitigated his speed in any way, when he and the defendant first had sight of each other, by braking or even taking his foot off the accelerator. I also agree that there should be some finding of contributory negligence against the plaintiff arising from this failure to mitigate his speed in any way.

3. However, I cannot agree with Noonan J.'s comment, at para. 28 of his judgment, that "*it is simply not credible to suggest that the explanation for this was being dazzled by lights, particularly when one's normal reaction to being blinded or dazzled is, at the very least, to slow down*". It is the case, as pointed out by Noonan J., that the plaintiff himself did not suggest that he was disorientated to the extent that he was unable to brake, because his own evidence was that he did in fact brake. However, the trial judge by implication rejected that part of the plaintiff's evidence that he had braked, and it seems to me the preponderance of the evidence, together with human experience and common sense, lead inexorably to the inference that his ability to brake quickly must have been affected by the "*wall of light*" as found by the trial judge to have met him when he rounded the bend.

4. I note the evidence of the plaintiff's engineer, Mr. Vincent Kelly, when asked, if somebody is blinded by lights what affect does that have on a person? He replied (see Day 3, p. 32) that "*The first effect it has is, I was going to say disorientated but their decision-making is taken out of sync*". He then continued that "*if as he said, he was blinded by a wall of lights, it immediately introduced an uncertainty because you don't know what's happening behind the*

wall of lights and that obviously slows down your decision-making. It is also known to cause people to commit errors. You are not as good as you are when you are relaxed".

5. While the status of this evidence *qua* engineering evidence was queried at the time when he was giving it by counsel for the defendant, there was no formal objection taken to it and the substance of this evidence was not challenged by the defendant during cross-examination. Furthermore, during his own evidence (see Day 3, p. 74) the defendant accepted that if his full beams were on, they could disorientate an oncoming driver coming around the bend, and he also accepted that if the plaintiff was met by a truck, partially on his side of the road with all those beams on, that could create an emergency for him.

6. Whatever about the issue of the status of Mr. Kelly's evidence *qua* proper engineering evidence, as discussed in more detail in the judgment of Noonan J., the above evidence in any event accords with human experience and common sense, in my opinion. In the light of same, I think that any failure on the plaintiff's part has to be seen as mitigated or reduced by the fact that he was blinded by the oncoming wall of lights, as accepted by the trial judge, and this must on the balance of probabilities have disorientated him and slowed down his decision-making when it came to braking as quickly as he needed to. It is also relevant that everything would have happened very quickly when the plaintiff came around the bend, and I note the rough calculation done by the trial judge (albeit there was no specific evidence on this) at para. 43 of his judgment, that the two vehicles would have met one another in a time of in or about 4 seconds.

7. In the light of all of the above, I am of the opinion that the suggested contribution of one third in the judgment of Noonan J. is too high and that any finding of contributory negligence should be at the level of 20% and not one third.

B. Quantum

8. My starting point as regards quantum would be to consider the correct approach to be applied by an appellate Court in deciding whether it should interfere with an award of general damages made in the High Court for personal injuries. In *Foley v. Thermocement Products Ltd Products Limited* (1954) 90 ILTR 92, Lavery J. stated (at 94) that the task of a judge in an appellate Court was:

> "to make his own estimate of the damages he would award and then compare this estimate with the verdict and say whether there is any reasonable proportion between the sums or whether the verdict is an entirely erroneous estimate of the damage or is plainly unreasonable. In making his estimate the judge must adopt all points most favourable to the plaintiff and must keep in mind that the jury had the advantage, which he has not had, of hearing the evidence and of seeing the witnesses and in particular hearing and seeing the plaintiff.
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> No one will deny that this is a most difficult task. It is especially difficult in a case where personal injuries are the subject of the claim. There is no standard by which pain and suffering, facial disfigurement or indeed any continuing disability can be measured in terms of money. All that can be said is that the estimate must be reasonable and different minds will inevitably arrive at widely different conclusions as to what is reasonable. The task must, however, be undertaken."

9. With the abolition of juries in personal injuries litigation, the trial judge's award of damages was scrutinised by the Supreme Court in the same way, and on the same principles, as formerly applied to the jury award, but with one slight qualification. In *Dunne v. Honeywell Controls Limited* (Unreported, Supreme Court, 1st July 1993), Blayney J. stated as follows:-

> "Since the findings of the High Court judge in regard to the injuries and the medical evidence are set out in detail in the judgment delivered in the case, the [Supreme] Court no longer has the task of adopting the view of the facts most favourable to the plaintiff. The decision is based on the findings of the High Court judge."

10. The Supreme Court has repeatedly emphasised the fact that the trial judge had the opportunity of seeing and hearing the witnesses and has professed itself cautious about second guessing the trial judge's determination of the damages issue. Thus, in *Murphy v. Cork County Council* (Unreported, Supreme Court, 18th November 1996), the Court upheld an award for general damages where the plaintiff suffered soft tissues injuries to her neck, leg, arm and lower back. In his judgment with which Barrington and Keane J.J. concurred, O'Flaherty J. observed as follows:-

> "The impression that a plaintiff and his or her witnesses make on the trial judge is critical. In those cases where there is not something palpable such as a loss of limb or loss of the sight of an eye and so forth, when one is dealing with subjective matters, then one must rely on the trial judge and the cold pages of the transcript, not to speak of the medical reports, are often a very poor substitute for what the trial judge has before him in the way of oral testimony."

11. The issue of degree of variation between the respective assessments of a trial judge and an appellate Court was considered in some detail by the Supreme Court in *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 I.R. 578. In that case, the plaintiff suffered severe personal injuries to his right eye. The High Court awarded IR£120,000 to the plaintiff, broken down into IR£30,000 for loss of job opportunity and IR£90,000 for general damages. The plaintiff appealed to the Supreme Court, which held unanimously that the general damages awarded by the High Court were inadequate in that they did not bear a reasonable proportion

to the compensation to which the plaintiff was entitled and should be increased to IR£150,000. In his judgment for the Court Fennelly J. stated as follows (at 583):-

> "As it happens, *Reddy v. Bates* [1983] I.R. 141 also contains a restatement of the test to be applied by this Court in deciding whether it should interfere with an award of general damages made in the High Court for personal injury. Griffin J., at p. 145, expressed himself thus:-
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> > 'It is well settled that this Court cannot set aside the verdict of a jury on the grounds that the damages are excessive unless, adopting a view of the facts which are most favourable to the plaintiff, no reasonable proportion exists between the amount awarded and the circumstances of the case…'
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> He cited *McGrath v. Bourne* [1876] I.R. 10 C.L. 160 and *Foley v. Thermocement Limited* (1954) 90 ILTR 92. McCarthy J. said at p. 151:-
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> > 'In order to warrant interference with an award of general damages the disparity between the views of the individual members of this Court and each item of the award, however large it may be expressed in isolation, must be a significant percentage of that item of the award and, as a general rule, should not be less than 25%...This Court should be reluctant so to interfere and, in particular…it should avoid relatively petty paring from, or adding to, awards.'
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> It might be thought that the fact that damages of the kind at issue are no longer assessed by juries will undermine the rationale underlying these *dicta*. However, Blayney J., speaking for a unanimous Supreme Court, in *Dunne v. Honeywell Controls Limited* (Unreported, Supreme Court, 1st July 1993) stated at p. 8 that 'the approach of the Courts to an appeal against the *quantum* of the damages awarded remains the same as before (Courts Act, 1988) with one slight qualification.' That is:

> 'Since the findings of the High Court judge in regard to the injuries and the medical evidence are set out in detail in the judgment delivered in the case, the Court no longer have the task of adopting the view of the facts most favourable to the plaintiff. Its decision is based on the findings of the High Court judge.'

The more or less unvarying test has been, therefore, whether there is any "reasonable proportion" between the actual award of damages and what the Court, sitting on appeal, "would be inclined to give" (per Palles C.B. in *McGrath v. Bourne* [1876] I.R. 10 CL 160). In *Foley v. Thermocement Limited* (1954) 90 ILTR 92 at p. 94, Lavery J. slightly inverted the language by posing the question, "whether there is a reasonable proportion between the sum [awarded and the appeal Court's assessment] or whether the verdict is an entirely erroneous estimate of the damage or is plainly unreasonable". The test is one for application as a general principle, even if McCarthy J., in *Reddy v. Bates* [1983] I.R. 141 at p. 151, suggested as a possible rule of thumb, the need for at least a 25% discrepancy. That is no more than a highly pragmatic embodiment of his very proper counsel against "…relatively petty paring from or adding to awards". In this respect, it seems to me that this Court is no longer bound by the special respect due to a jury verdict. On the other hand, it is not a Court of first instance. It should only interfere 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. The test of proportionality seems to me to be an appropriate one, regardless – it needs scarcely be said – whether the complaint is one of excessive generosity or undue parsimony. It should, of course, be recalled that this test relates only to the award of general damages, as explained by McCarthy J. in a further passage from the same judgment."

12. In *M.N v. S.M.* [2005] 4 I.R. 461, following an assessment in the High Court by a judge and jury, the plaintiff was awarded the sum of €600,000 against the defendant in respect of injuries inflicted by the defendant in the context of a *continuum* of sexual abuse over a period of five years which culminated in rape. The defendant appealed against the award of damages on the basis that it was excessive. The Supreme Court allowed the appeal and reduced the award of general damages to €350,000, holding that the sum of €600,000 was so far in excess of a reasonable award of compensation that it was disproportionate and needed to be set aside. In the course of her judgment for the Court, Denham J. stated as follows (at 473):-

> "The plaintiff has brought this action seeking an award of general damages for her injuries caused as a result of the sexual abuse by the defendant. The remedy available in the courts is monetary, a sum of money, as compensation. It must be recognised, first and foremost, that no award of money will put the plaintiff back in the position she was before the sexual abuse. No award of damages will retrieve her childhood or repair the damage done to her, emotionally, in her formative years. Further, no amount of money will cure her or render her future clear of the effects of these assaults. An award of general damages is an imperfect mode of compensating a plaintiff. However, it is the only method available. It is a recognition of the injuries and damages must reflect the change of circumstances of the plaintiff.
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> At issue on this appeal is the award of general damages by a jury. In assessing the level of general damages, there are a number of relevant factors to consider. Thus an award of damages must be proportionate. An award of damages must be fair to the plaintiff and must also be fair to the defendant. An award should be proportionate to social conditions, bearing in mind the common good. It should also be proportionate within

> the legal scheme of awards made for other personal injuries. Thus the three elements, fairness to the plaintiff, fairness to the defendant and proportionality to the general scheme of damages awarded by a Court, fall to be balanced, weighed and determined."

13. As referred to by Noonan J. in his judgment, this Court has in recent times considered the appropriate manner of assessing general damages in a number of cases. One such example is *Leidig v. O'Neill* [2020] IECA 296, where Noonan J. in delivering judgment for the Court summarised the matter as follows:-

> "33. The proper approach to the assessment of general damages for personal injuries was most recently discussed by this Court in *McKeown v. Crosby* [2020] IECA 242. In brief summary, the award of damages must be proportionate in the context of the cap for general damages for the most serious injuries, set at €500,000 by the Supreme Court in *Morrissey & Anor v. HSE & Ors* [2020] IESC 6. It must also be proportionate in the context of awards given by the Courts for comparable injuries. It must be fair to the plaintiff and to the defendant. If the Book of Quantum is relevant to the particular injury or injuries that are in issue, the Court is obliged to have regard to it as a guide to the ultimate award."

14. It appears to me from the above authorities that the relevant factors to be considered can be summarised as fairness to the parties and proportionality, in a number of different guises. As per Denham J. in *M.N*, these factors fall to be balanced, weighed and determined in making an award of damages. However, important additional factors arise in the context of an appellate Court considering an award of general damages already made by a trial judge. The appellate Court must respect the fact that the trial judge has had the advantage, which the appellate Court has not had, of hearing the evidence and seeing the witnesses, and in particular hearing and seeing the plaintiff. Another crucial test for proportionality comes into play at the appellate

stage, whereby it is necessary that there is no reasonable proportion between the actual award of damages made by the trial judge and what the appellate Court would be inclined to give, with a rule of thumb being "the need for at least a 25% discrepancy".

15. In applying the latter test, I would be happy that this test of proportionality has been met in this case, and I do not think that overall there is any serious error in the High Court award which would justify this Court interfering with same, even if I might structure the award slightly differently, and even if the award as structured by Barr J. could be seen as somewhat generous.

16. It is very significant for me that the plaintiff was only aged 21 at the date of the incident in November 2014, and the consequences of the accident and the effects on him may naturally have been greater than if the plaintiff was a middle aged or older person. He was involved in what must have been a very frightening experience, having regard to the defendant's evidence that the force of the collision was so severe that he actually thought that the person that was driving the car was dead. The plaintiff had pain in his left knee straightaway. He was told in hospital that the knee cap was "very badly broken", and he had surgery under general anaesthetic on the 26th November, 2014, which involved wiring being put into his knee. After this operation he was in "constant, constant, constant pure pain and none of the medication or anything was really working".

17. After the plaintiff was discharged home from hospital the pain was still very severe, and in the weeks following, the furthest he could leave from his bed was to go to the bathroom and only when using two crutches. He had many sessions of physiotherapy to try and get his leg bending again, as it was locked in a straight position. He went back into hospital again on the 2nd February, 2015, for manipulation of the knee under general anaesthetic, with the purpose of trying to get the bend back in the knee.

18. The plaintiff had a third surgical procedure in April, 2015, to remove the wiring in his knee, presumably again under general anaesthetic. He then had a fourth procedure, an astroscopic procedure by way of keyhole surgery on the 6th May, 2015, to help achieve more of a bend in his knee and to try to relieve some of the pain. His evidence was that moving into the summer of 2015 his knee was still "desperate painful the whole time". He was awake every night and did not sleep for months. It was only after the keyhole surgery that he began to be able to walk without too much difficulty.

19. Going into 2016, the range of motion in the plaintiff's leg gradually improved, but he still had restriction. In his report, Mr. Kieran Barry, Consultant Orthopaedic Surgeon, refers to a further procedure, a further manipulation under anaesthetic in November, 2016, and also to the knee being injected on one occasion. Going into 2017 the plaintiff was still doing exercises to try to get his knee back stronger, but he still had pain there "the whole time".

20. As of the time of the trial in the High Court, *i.e.* January, 2020, the plaintiff's evidence was that his knee was "still very bad". Sitting too long, or standing too long or doing anything for too long would upset the knee. If he was sitting down too much or lying down too much the knee would start stiffening up. There was not really any way he could relieve the stiffness, and he said in evidence that you have to try and accept the pain and try and walk it off.

21. As regards the importance and impact of the plaintiff's oral testimony, as per the authorities cited earlier, I must keep in mind that the trial judge had the advantage, which this Court has not had, of hearing the evidence and of seeing the witnesses and in particular hearing and seeing the plaintiff. Having heard and seen this plaintiff the trial judge concluded, at para. 59 of the judgment as follows:-

> "The Court was impressed with the plaintiff in his account of his injuries. He did not attempt to exaggerate either the level of his symptoms nor the extent of his ongoing

disablement. The Court is satisfied that he has given a truthful account both of his injuries to date and as to his present condition. This young man suffered a serious injury to his left knee together with a less serious fracture to his right clavicle."

22. In his report, Mr. Tony Higgins, Consultant Orthopaedic Surgeon, stated that the plaintiff had sustained a "very comminuted (multiple fragments)" fracture of the patella. He had a loss of 10 degrees of knee flexion compared with his right knee. While his patellar fracture had united, Mr. Higgins felt that he had already developed post-traumatic arthritis of the patellofemoral joint resulting in anterior knee pain. Further injections might be indicated, but Mr. Higgins believed that the plaintiff's symptoms had reached a plateau and were unlikely to improve further. The report of Mr. Kieran Barry, Consultant Orthopaedic Surgeon, was substantially in agreement. He felt it was reasonable to accept that a knee injury of this nature, which had caused disruption of the articulating surface of his patella, placed the plaintiff at risk of developing post-traumatic patellofemoral arthritis in the longer term. He expected that the plaintiff would continue to complain of local symptoms for the foreseeable future.

23. There are a number of additional matters which, in my opinion, are of importance when it comes to consideration of the appropriate award of general damages in the present case. Firstly, the plaintiff also sustained a fracture of the right clavicle, which although a good deal less serious than the knee injury, was also a cause of pain or discomfort for some time. He had to wear a sling for a period of a few weeks, and the effect of using crutches on his shoulder was very severe. As of the trial date in the High Court the plaintiff could still get pain in his shoulder from time to time, as when doing activity above his head, but overall he was reasonably happy with the progress of his shoulder.

24. Secondly, at the time of the accident the plaintiff was nearing the end of his apprenticeship as an electrician. Notwithstanding the injuries sustained in the accident, he

managed to complete his apprenticeship and qualify as an electrician in September, 2015. It was tough for the plaintiff to complete his apprenticeship because of difficulties in going up ladders and very severe pain when kneeling down on most surfaces and even squatting down. After qualification the plaintiff tried to do some work as an electrician with his uncle, but the work was causing too much pain in his knee, and he has had to accept that he will be unable to work as an electrician.

25. Thirdly, the plaintiff suffered a serious loss of amenity as a result of the injuries sustained. His evidence was that he was always very fit from playing Gaelic football since he was young with his club, St. Michael's Foilmore. During the GAA season he would have a game for his club probably every week, and would be training maybe twice or three times a week. Since the accident he has been deprived of his ability to play Gaelic football, and as the trial judge correctly pointed out, this is a serious loss to a young man in a rural community. One might add that this is all the more so in a rural community in a County like County Kerry, where the local GAA club plays the central role in the sporting and social life of the community.

26. Overall in my view, the appropriate figure for general damages for pain and suffering to date in this case would be €70,000, less than the somewhat generous sum of €85,000 awarded by the trial judge, but more than the €60,000 suggested in the judgment of Noonan J. which, with respect, I do not consider adequate.

27. As regards general damages for pain and suffering into the future, the plaintiff is now only 28, and is likely to have ongoing and future symptoms for many years to come. He still has pain and stiffness in the left knee area, which limits his daily activities. Mr. Higgins believed that the plaintiff has developed arthritis of the knee joint, and that his symptoms have reached a plateau and are unlikely to improve further. He is unable to kneel on his left side, and is unable to pursue his chosen career as an electrician. Mr. Barry expects that he will

continue to complain of symptoms for the foreseeable future, and feels that he is at risk of developing arthritis in the future. He will be unable to play Gaelic football again. In my opinion, the appropriate figure for general damages for pain and suffering into the future would be €40,000, less than the sum of €70,000 awarded by the trial judge, but more than the €35,000 suggested in the judgment of Noonan J., which figure I would again consider inadequate.

28. However, in addition to the above figures, I am in agreement that an award of damages for loss of opportunity is appropriate in the present case. The plaintiff spent about four years completing his apprenticeship as an electrician. However, he has been and will be unable to pursue his chosen career as an electrician as a result of the injuries sustained in the accident. The case was opened by his counsel on the basis that the plaintiff was making a general claim for loss of job opportunity, but the trial judge did not make a specific award under that heading. It may well be that the award of damages for pain and suffering into the future was intended to incorporate an amount for loss of opportunity, given that the trial judge highlighted the fact that the plaintiff has been deprived of his ability to pursue his chosen career, and stated that "the Court appreciates that it must be a source of some sadness or disappointment to him".

29. In the *Rossiter* case, cited at para. 11 above, the plaintiff suffered severe personal injuries to his right eye which the trial judge held would undoubtedly interfere with his job opportunities in the future. The trial judge awarded a separate sum of IR£30,000 for possible loss of job opportunity, separate from his award of general damages. Fennelly J., delivering the judgment of the Supreme Court, held that undoubtedly the effects on future employment prospects were an element that must be taken into account in assessing the plaintiff's damages, but in his view that element should be considered as an element of the overall general damages.

30. Having regard to the amount of IR£30,000 awarded for loss of job opportunity in the *Rossiter* case, I think the appropriate figure under that heading of general damages in the present case would be €30,000.

31. As regards the Book of Quantum, I have had regard to the guideline figures set out in the Book, as required by s.22 of the Civil Liability and Courts Act 2004. However, there are a number of limitations arising in terms of how much the Book can assist me in assessing damages in this case. Firstly, it does not cater for the facts of this individual case, *i.e.* a very young man, required to undergo four or five surgical procedures, unable to pursue his career as an electrician, and unable to play Gaelic football for his club in County Kerry. While a guideline may be a useful guide, it is only just that and it remains a valid truism in my opinion that each personal injury case depends to some extent on the facts of the individual case, and on the effect of the particular injury or injuries on the particular plaintiff, having regard to that plaintiff's particular circumstances and character. Secondly, it does not break down the suggested figures into damages to date and future damages, as the Supreme Court has stated should be done by trial Courts, and this makes it more difficult for a judge when it comes to having regard to the suggested figures. Thirdly, it does not cater for damages for loss of job opportunity as an element of the overall general damages. Fourthly, it does not deal with a combination of injuries, beyond stating that if there are other injuries it is not appropriate to add up values to determine the amount of compensation and where additional injuries arise "there is likely to be an adjustment within the value range". In the present case, the plaintiff also sustained a fracture of the right clavicle, in addition to the much more serious knee injury, and this additional injury has to be factored into the potential award which I would be inclined to give, and I have done so.

32. Overall, I would be inclined to assess the plaintiff's general damages in the sum of €140,000 (70+40+30). In making that assessment, I have balanced and weighed the factors of fairness and proportionality, as set out by Denham J. in the *M.N.* case, as cited at para. 12 above. In the first instance, I am satisfied that such an award would be fair to the plaintiff and also to the defendant, having regard to all the relevant matters, including the pain and suffering to date, the number of surgical procedures undergone by the plaintiff, the residual symptoms which are unlikely to improve further, the loss of amenity and the loss of the plaintiff's chosen career.

33. I am also satisfied that the above potential award would be proportionate within the legal scheme of awards made for other injuries. Firstly, I believe that such a potential award would be proportionate in the context of the current cap set at €500,000 for general damages for the most serious injuries. In my opinion one must be somewhat careful about how strictly one applies this aspect of proportionality, as in one sense it is difficult to compare any less serious injury with the most serious injuries such as a brain damage case. However, in the *M.N.* case itself the cap was regarded by the Supreme Court as being a figure at that time in excess of €300,000, but nonetheless the Court substituted an award of €350,000 for serious injuries sustained by the plaintiff in the context of repeated sexual abuse over a five-year period.

34. Secondly, I am satisfied that such a potential award would be proportionate in the context of awards given by the Courts for comparable injuries. Again, in my opinion, one must be careful about how strictly one applies this aspect of proportionality, as it is not possible to achieve complete equivalence, and one must look carefully at the context of exactly how comparable the injuries in the comparator case really are.

35. By way of example, the injuries in *Leidig v. O'Neill*, cited at para. 13 above, might at first glance appear to be comparable injuries. In *Leidig* the plaintiff, when aged 22, suffered a

serious fracture of the scaphoid when his motorcycle collided with the defendant's car on the 20th August, 2015. The fracture did not heal naturally with conservative treatment and ultimately he required surgery in September, 2016, comprising of an open reduction with an internal fixation using a screw and also a bone graft harvested from the plaintiff's iliac crest. The surgery was successful in uniting the fracture but as of the trial date in June, 2019 the plaintiff had a number of residual complaints arising from his injuries which he outlined to the trial judge.

36. At the time of the accident, the plaintiff had just graduated with a degree in mechanical engineering. He had for many years been interested in motorsport and his ambition was to work in that area. However, because of the accident he was unable to pursue that career, at least to date. The plaintiff complained of ongoing pain and discomfort in his wrist, particularly in cold weather, which affected a number of his previous hobbies including fishing, hunting and playing the violin.

37. The trial judge accepted that the wrist injury fell within the "severe and permanent conditions" category of wrist injuries in the Book of Quantum, and he had regard to same. He went on to award a sum of €70,000 for pain and suffering to date, €30,000 for pain and suffering into the future, €40,000 for loss of career, and a further €15,000 for loss of his hobbies, making a total award of €155,000 for general damages. The Court of Appeal disagreed with the trial judge that the injury fell into the severe and permanent conditions category, and held that the "moderately severe" category was more appropriate. The Court substituted a total award for general damages of €90,000, made up of €50,000 for pain and suffering to date, €15,000 for pain and suffering into the future, and a further amount of €25,000 for loss of job opportunity.

38. While the wrist fracture injury in *Leidig* was a relatively serious injury, in my opinion the plaintiff's injuries in the present case were considerably more serious. This plaintiff appears

to have required five surgical procedures, and it appears that four of same were probably carried out under general anaesthetic. His residual symptoms appear to me to be a good deal more serious than in the *Leidig* case, with his doctor stating that he has already developed arthritis of the joint resulting in anterior knee pain, and that his symptoms have reached a plateau and are unlikely to improve further. In all of the circumstances, I believe that the potential award of general damages which I would be inclined to make is broadly proportionate to the award in *Leidig,* having regard to the differences in the severity of the injuries in the two cases.

39. Overall, therefore, I would have assessed the plaintiff's total general damages in the sum of €140,000 (70+40+30). In the circumstances, I am of the view that there is a reasonable proportion between this sum for general damages which I would be inclined to give, and the sum of €155,000 awarded by the trial judge. Applying the rule of thumb suggested by McCarthy J. in *Reddy v. Bates* and endorsed more recently by the Supreme Court in the *Rossiter* case, there is a good deal less than a 25% discrepancy between the two figures, as a result I would not interfere with the award of general damages made by the trial judge. As a result of my finding of contributory negligence, however, it would be necessary to apply a 20% deduction to the total award of €160,968 made by the trial judge, leading to a deduction of €32,194, which would result in a net decree in favour of the plaintiff in the sum of €128,774.