THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 62
Record Number: 2018/357
High Court Record Number: 2012/8784P

Birmingham P.

Whelan J.

Noonan J.

BETWEEN/

CHENG ZHANG

PLAINTIFF/APPELLANT

-AND-

STEPHEN FARRELL

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 5th day of March, 2021

1. This appeal arises out of a road traffic accident that occurred at about 5pm on Sunday 17th April, 2011 at the junction of Upper Merrion Street and Merrion Row in Dublin. The appellant (the plaintiff) was walking across the street when she was struck by the respondent's (defendant's) motor car. She suffered personal injuries and other losses in respect of which she brings these proceedings. The High Court (Barr J.) in a judgment delivered on the 2nd December, 2016, on the issue of liability, found the defendant 55%

and the plaintiff 45% responsible for the accident. Following a subsequent trial on the issue of quantum, the court gave judgment on the 17th July, 2018 awarding the plaintiff damages in the sum of €265,039.30 on an apportioned basis.

2. The plaintiff has appealed both judgments and the final order made on the 20th July, 2018 both on the issue of liability and the award of damages. In essence the plaintiff contends that liability should have been determined 100% in her favour and the damages awarded were insufficient. The defendant has cross-appealed and confined his appeal to the award of special damages in respect of earnings, both past and future and the sum awarded for loss of opportunity.

Facts

3. The plaintiff was walking on Baggot Street Lower on the right hand side as one faces Merrion Row. She reached the junction of Merrion Street Upper which was to her right and Ely Place to her left. She intended crossing straight over and proceeding along Merrion Row. The junction is controlled by traffic and pedestrian signals. Traffic travelling towards Merrion Street towards Ely Place was stationary in two lanes at a red traffic light as the plaintiff began to cross the road in front of these two stationary lines of traffic.

4. She was walking at a normal pace, had traversed half the width of the road past the stationary traffic and about one third of the opposite lane when she was struck by the defendant's motor car. The defendant had driven down Merrion Row in the direction of Baggot Street and just turned left in to Merrion Street Upper when he collided with the plaintiff. The accident occurred during daylight hours with good visibility. None of these facts were in dispute. There was however some dispute as to what the various traffic signals were showing at the relevant time.

5. CCTV footage was available from two cameras. One was mounted on the wall of Government Buildings on Merrion Street Upper facing towards the junction where the accident occurred. This camera actually captured the accident. The second camera was located on Merrion Row facing in the Baggot Street direction which captured the movement of the defendant's vehicle along Merrion Row immediately prior to the accident.

6. Although the plaintiff was initially represented in these proceedings, by the time the matter came to trial she had discharged her lawyers and conducted the liability module of the trial herself. However, when the quantum module began, she had instructed a new legal team. At the hearing of the appeal before this court, the plaintiff was again representing herself. As will become apparent, this is relevant in the context of some of the issues arising on this appeal. On the liability issue, the plaintiff and the investigating garda gave *viva voce* evidence for the plaintiff. For the defendant, only the defendant himself gave oral evidence. However, and significantly, by agreement of the parties, engineering reports were submitted to the court by both sides from Mr. Peter Johnston on behalf of the plaintiff and Mr. Sean Walsh on behalf of the defendant.

The Liability Judgment

7. The trial judge set out a summary of each side's evidence and in reality, there was very little conflict between the two. The plaintiff gave evidence in accordance with the summary above. She said that she had crossed approximately half way across the far carriageway at the time of the impact. She thought that the pedestrian lights were showing yellow when she crossed. She thought that the defendant's car was driving at a fast speed because she was thrown into the air and spun around as a result of the impact. It was put to

her in cross-examination that she had said in her garda statement that the car "looked like it was driving very slow, so I thought he was letting me cross".

8. The judge referred to the CCTV footage from the camera on Government Buildings saying (at p. 4): -

> "It shows that the plaintiff had crossed approximately two thirds of the way across Mount (*sic*) Street Upper, when she was struck by the car. She had crossed in front of two lines of traffic to her immediate right and had crossed approximately one third of the far carriageway prior to the impact. The plaintiff was the only pedestrian crossing the road at the time. In the footage she appeared to have been walking at a normal speed."

9. The judge then referred to Mr Johnston's evidence to the effect that Merrion Street Upper was 12.4 metres wide and it would have taken the plaintiff, walking at normal speed, approximately 6 seconds to walk from the footpath to the point at which she was struck. Significantly in the context of this appeal, the judge referred to the fact that Mr. Johnston was able to look at other CCTV footage from different cameras which were not shown to the court, a reference to the camera on Merrion Row. Mr. Johnston noted that this camera showed that the defendant had a green light in his favour as he drove down Merrion Row approaching the junction and the traffic light turned amber as he commenced making his turn into Merrion Street Upper.

10. Mr. Johnston's evidence was that if the defendant had a green light in his favour, it was almost inconceivable that the pedestrian lights facing the plaintiff could have been anything other than red. Mr. Johnston was of opinion that the defendant ought to have seen the plaintiff walking across the junction but apparently did not see her, as the defendant in his statement to the gardaí said: -

> "I checked the corner beside the passenger side to make sure it was clear. I then looked to the right side and I hit a female the exact instant that I say here [(*sic)* – should this read 'saw her'?] I did not notice the female before the impact."

11. Mr. Johnston's evidence was that the plaintiff was there to be seen and given her direction of travel, the likely impact with the defendant's vehicle would have been immediately obvious to him had he looked at the road ahead. Mr. Johnston's conclusions were quoted verbatim (at p. 7) by the trial judge and it is worth repeating them: -

> "10. In as much as Mr. Farrell's car was there to be seen by Ms. Zhang, Ms. Zhang, walking across the road, was there to be seen by Mr. Farrell as he approached and then entered the junction. Any motorist with even a passing familiarity with this junction would know that this is a busy pedestrian crossing point (certainly on weekdays, though much less so at weekends). Even without such knowledge, Mr. Farrell ought to have had Ms. Zhang in sight for a significant length of time as he prepared to make his turn. At normal walking speed, it would likely have taken her about four seconds to reach the centre line of Merrion Street and another one to two seconds to reach the point where she was struck.
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> 11. In his own statement to the investigating Garda, Mr. Farrell admits that his first sight of Ms. Zhang was the 'exact instant' that his car hit her. Furthermore, he admits that this happened when, apparently for the first time, he looked in that direction as he continued his turn. Although he does describe checking the corner of the junction to his passenger side, only then turning to look to his right (his car hitting Ms. Zhang at that moment), he makes no declaration of looking at the overall mouth of Merrion Street previously, although Ms. Zhang, walking across the first half of the road, must have been in his most obvious line of vision, crossing

> the road in a region that would have been in Mr. Farrell's 'straight ahead' orientation once he commenced his turn."

12. The defendant's evidence was that he had gone into town to pick up his girlfriend on Dawson Street. He arrived a little early and as there was no parking on Dawson Street, decided to drive in a loop to pass the time. His evidence was largely in line with his statement and the evidence of both engineers. He said he was travelling at approximately 25 km/h as he approached the junction and he had slowed down to take the turn in second gear. He said that as he was making his turn, he looked to his left. He then looked up and at that moment struck the plaintiff, who impacted with the right front of his vehicle. Under cross-examination, the defendant said that he stopped as soon as he heard a noise and felt an impact.

13. The judge also referred to Mr. Walsh's report, quoting from it (at p. 11): -

> "At the time of the accident, the plaintiff was walking on a designated traffic light controlled pedestrian crossing at the junction. All available information supports the defendant's account that at the time of the accident he was being shown a green traffic light in his favour and the plaintiff was being shown a red pedestrian signal on the pedestrian crossing being used by her."

14. Mr. Walsh made this statement prior to viewing the CCTV footage and after he had done so, added an addendum to his report, again quoted by the judge at p. 12: -

> "In summary, the CCTV footage establishes that the defendant drove around the corner at the end of the green phase of his traffic lights and during the orange phase. The orange phase may not have been visible to him as he had passed the traffic lights on his left. In any event, the driving did not breach any regulation or

good practice relevant to the traffic lights. The defendant drove in an appropriate position on the road and at an appropriate speed. The footage establishes that the plaintiff was being shown a red pedestrian signal as she crossed the road."

15. The trial judge then reached his conclusions on liability. He said (at p. 13): -

"45. I find the evidence of Mr. Johnston and Mr. Walsh compelling in relation to what they saw on the CCTV recordings. Accordingly, I find that when the plaintiff proceeded to cross Mount (*sic*) Street Upper, she did so, when the pedestrian lights were showing red against her. I also find that the defendant had a green light in his favour as he proceeded up Merrion Row. I find that his left indicator was flashing, indicating his intention to turn into Mount (*sic*) Street Upper."

16. Dealing with the question of the speed of the defendant's vehicle, the judge said (at p. 14): -

"50. Having viewed the CCTV recording at normal speed which was taken looking down Mount (*sic*) Street Upper towards the junction with Merrion Row, which shows the impact, the court is satisfied that there was no evidence of speed on the part of the defendant shown in that recording. The car appeared to come to a halt quickly after the impact.

51. Taking all these matters into account, the court finds that the defendant was not speeding at the time that he made the left turn into Mount (*sic*) Street Upper.

52. From its viewing of the CCTV recording, the court is satisfied that the plaintiff was walking at normal speed across Mount (*sic*) Street Upper. She did not run out in front of the defendant's vehicle."

17. The judge's determination of the liability issue appears as at pp. 15-16: -

"53. It is clear from the engineer's photographs that each of the parties had a good line of sight of the approach of the other. The plaintiff stated that she saw the defendant approach with his indicator flashing. She thought that he had seen her and was going to let her proceed across the road. She was very surprised when the defendant kept coming towards her and struck her.

54. The defendant had a clear view of the junction. The plaintiff was there to be seen walking across the junction. She had been on the road for approximately 6 seconds prior to the impact. She had walked across two thirds of the road. However, perhaps because he was glancing to his left, the defendant did not see her until the moment of impact. This would explain why there was no evidence of braking prior to the impact. The simple fact is that the plaintiff was there to be seen and if the defendant had been keeping a proper lookout, he would have seen her prior to the impact.

55. Even though the traffic lights were green in favour of the defendant as he approached the junction that is not conclusive of the question of liability. When driving in the city, one must anticipate that pedestrians will cross the road if they see a gap in the traffic. For this reason, a driver must watch the road carefully when coming to a junction. I am satisfied that the defendant did not keep a proper lookout when turning into Mount (*sic*) Street Upper. In these circumstances, I find that the defendant must bear the greater share of the blame for this accident.

56. However, the plaintiff elected to cross the road when a pedestrian light was showing red against her. She could easily have stopped and pressed the button for the pedestrian lights and waited until she had a 'green man' in her favour. In

> electing to cross the road when she did, not only did she act in breach of the Road Traffic (Traffic and Parking) Regulations 1997, but she also failed to take reasonable care for her own safety. The plaintiff felt that she was not in danger, because she assumed that the defendant had seen her and was going to let her cross the road. Unfortunately, he had not seen her and for this reason, he collided with her as he made the left turn into Mount (*sic*) Street Upper. In these circumstances, I find the defendant, 55% responsible for causation of the accident and the plaintiff is found guilt (*sic*) of contributory negligence in the amount of 45%."

The Appeal on Liability

18. The primary contention of the plaintiff on this appeal is that she should have succeeded 100% because the defendant broke a red light immediately prior to striking her. The basis for this contention is that the plaintiff says she had three CCTV clips to show to the court, two from the camera on Government Buildings which captured the impact and a third from the camera on Merrion Row which she claims shows the defendant to have broken a red light. She says that she forgot to show the third clip to the trial judge because she got distracted during the hearing and it slipped her mind. She also suggested that this was in some way associated with a "depersonalisation" event of a kind brought on by her psychiatric injuries.

19. The hearing took place in October 2016 and on the 1st December, 2016, the day before the trial judge was due to deliver judgment, the plaintiff tried to make contact with him to introduce the third clip. The plaintiff raised the issue again with the trial judge in open court before he delivered judgment. The judge confirmed that he had not looked at the new clip which had been sent to his judicial assistant. He felt he could not reopen the case at that stage. The plaintiff contends that had the judge viewed this material, he would

have come to a different conclusion. Furthermore, she contends as one of her grounds of appeal, that there was no evidence or CCTV footage showing that her pedestrian light was red as she was crossing and therefore the judgment on liability is not fair.

20. It seems to me however, that in this the plaintiff is mistaken and is perhaps labouring under a misapprehension as she is a litigant in person. Although the trial judge may not have viewed the footage from the Merrion Row camera personally, there was more than ample evidence from both sides as to what it showed. Indeed, there was no dispute about it. The evidence of the plaintiff's own engineer, led by her, was that the lights on Merrion Row were green in the defendant's favour as he approached them and turned to amber as he commenced making his turn into Merrion Street Upper.

21. Evidence to the same effect was given by the defendant himself and his engineer Mr. Walsh. The judge expressly referred to the fact that these witnesses had viewed CCTV footage that was not shown to the court. Furthermore, both engineers agreed that the overwhelming likelihood, amounting to a virtual certainty, was that the plaintiff's pedestrian light was showing red against her. She herself thought that the lights were showing yellow against her when she crossed but in her statement to the gardaí, she said she glanced at them but didn't pay much attention to them.

22. The CCTV footage from both cameras was made available by the plaintiff to this court and counsel for the defendant very fairly agreed during the hearing that the members of the court could view all the footage to assuage the plaintiff's concerns. Having viewed the footage from the camera on Merrion Row, I am perfectly satisfied that it does not show the defendant breaking a red light as the plaintiff suggests but on the contrary, is entirely consistent with the evidence given by both engineers. There was equally more than ample evidence, contrary to what the plaintiff suggests, that as a matter of probability, the

pedestrian lights were showing red against her as she crossed. There is accordingly, in my view, no basis whatever for impugning the findings of fact of the trial judge, less still any basis for a suggestion that those findings were unsupported by credible evidence.

23. The footage from the Government Buildings' camera is dramatic. It shows the plaintiff walking at normal speed across the junction at a place designated for pedestrians to cross and where it could reasonably be anticipated that they would cross irrespective of the condition of the lights. Visibility was excellent. The engineers on both sides agreed that the plaintiff was walking across the road for about 6 seconds up to the moment of impact. The defendant's car was moving at a slow speed as he rounded the corner and the plaintiff must have been in his "straight ahead" view for a number of seconds.

24. As he came around the corner, the plaintiff had already traversed half of the road and was walking in the defendant's lane. At the point he collided with her, she was approximately in the centre of his lane and directly in front of him. His vehicle does not appear to react in any way to her presence and simply drives into her. This is consistent with his own evidence which makes clear that he did not see her at any time before he struck her.

25. There is simply no explanation for this state of affairs, other than that the defendant was not looking at the road at all when the collision occurred. It would of course be idle to speculate on the reason for that. Perhaps the most fundamental obligation on the driver of any motor vehicle is to watch where he or she is going – to keep a proper lookout. As is often said, a motor vehicle is a potentially lethal weapon and to take one's eyes off the road even for a split second is to court disaster, as this case shows.

26. The duty to be vigilant is all the more onerous in the urban environment where drivers must constantly anticipate that pedestrians will cross the road, even where there is

no designated pedestrian crossing, or perhaps against the traffic lights where there is. The trial judge's finding that the pedestrian light was showing red against the plaintiff is, as I have said, unimpeachable and it is therefore difficult to avoid the conclusion that there must be some finding of negligence against the plaintiff.

27. In fairness to her however, the situation here is not quite the same as if she had been crossing against the lights in front of, or between, moving vehicles. The fact that vehicular traffic to her right was halted by a red traffic signal to some extent, as one might often observe, may tempt the pedestrian to cross in front of the stationary traffic in spite of the condition of the pedestrian signal. When the plaintiff started to cross the road, there was no approaching traffic from either direction, at that point at least, which inhibited her movement.

28. If there had been no traffic or pedestrian lights of any kind at this junction, it would I think be difficult to avoid the conclusion that the defendant was entirely responsible for the accident. Given however that the plaintiff undoubtedly failed to heed the red pedestrian light against her, I agree with the trial judge's view that there must be some apportionment of liability.

29. The trial judge apportioned marginally more responsibility to the defendant than to the plaintiff. I must respectfully disagree with that assessment. In my view, the magnitude of the defendant's negligence was of a much higher order than that of the plaintiff such that, in my judgment, the defendant must bear the overwhelming responsibility for this accident. While the trial judge's findings of fact cannot be disturbed by this court where, as here, they are supported by credible evidence, the apportionment of liability is a matter of law.

30. In my opinion, a finding of merely 5% on either side of an equal apportionment must be regarded as an error of law and does not correctly represent the respective degrees of fault of the parties. I am accordingly satisfied that liability should be apportioned as to 80% against the defendant and 20% against the plaintiff.

The Quantum Judgment

31. The lengthy and detailed judgment delivered by the trial judge on this aspect of the case speaks to the quite extraordinary course that the plaintiff's injuries, both physical and psychiatric, took in the years following the accident. The plaintiff was born in China on the 13th January, 1982 and was 29 years of age when the accident occurred. She came to Ireland from China in 2003 and studied English for four years in a language school in Bray. In 2008 she registered with BPP Accountancy College to study for the ACCA qualification in accountancy. She passed two accountancy exams in June of 2009 and around that time, obtained employment with O'Hagan & Company, a firm of chartered accountants in Dun Laoghaire. She did some further examinations in June 2010 which she failed.

32. She continued her studies and at the time of the accident was working part time for O'Hagan and Company presumably to give her sufficient time for her studies. She was attending lectures at weekends in a business college in Lad Lane and was returning from a lecture when the accident happened. Although the defendant's vehicle was travelling at low speed, the plaintiff believes that she was thrown into the air and spun around before landing on the ground. Her physical injuries however could be described as being relatively modest and primarily soft tissue in nature. She did not lose consciousness. She appears however to have suffered a severe psychological reaction to the accident.

33. She felt she was paralysed and unable to move or communicate for approximately one hour after the accident. This developed ultimately into a very severe form of post traumatic stress disorder with other features such as anxiety. The plaintiff alleged that she developed other conditions such as fibromyalgia and irritable bowel syndrome. There was relatively little dispute concerning the plaintiff's physical injuries and the main contest between the parties focused on the psychiatric aspect. Consistent with that, all the medical reports were agreed except for the reports of the psychiatrist on both sides who gave oral evidence, Dr. Margaret Fitzgerald on behalf of the plaintiff and Dr. Richard Blennerhassett on behalf of the defendant.

34. Dr. Fitzgerald was of the opinion that the plaintiff would never work again as a result of her psychiatric injury so potential future loss of earnings was a very significant issue, particularly in view of the plaintiff's relatively young age. As against that, the defendant contended that the plaintiff had many physical complaints for which no organic basis could be found and the claim of psychiatric injury came into the case very late in the day. Dr. Blennerhassett accepted that the plaintiff did suffer from PTSD but that her current problem was one of an anxiety disorder causative of her various physical complaints. He felt that with treatment, the plaintiff had the potential to return to work in about two years, in stark contrast to the views of Dr. Fitzgerald.

35. The trial judge recorded in detail the plaintiff's background and educational and work history prior to the accident. The plaintiff is an only child whose father was an architect who died in 2004. Her mother is a retired accounts assistant. The plaintiff obtained a primary degree in English and accountancy in China before moving to Ireland, having completed her degree in 2003. She had a number of part time jobs between 2003 and 2009. When she got the job in O'Hagan and Company, her immediate supervisor was

Ms. Amanda Dodd, who gave evidence. She said that the plaintiff was a happy and outgoing person prior to the accident, got on well with her work colleagues and clients and was very competent at her work.

36. About a month after the accident, the plaintiff returned to China to avail of medical treatment there, particularly in relation to an injury to her left knee. She had a lot of investigations while in China and returned to Ireland in October, 2011. She went back to work with O'Hagan and Company but was only able to manage days here and there totalling 36 days between October 2011 and January 2012. She went back to China the following month and remained there until the 16th September, 2014 when she returned to Ireland as her case was listed for hearing. By this stage, the plaintiff had a new legal team.

37. However, for various reasons, the matter was adjourned and the plaintiff again discharged her lawyers. The plaintiff's progress and the medical evidence is set out in great detail in the trial judge's judgment. In commenting on the plaintiff's career prospects, the trial judge said that he was satisfied that but for the accident, the plaintiff would in all probability have gone on to qualify as a certified accountant and would have secured full time employment (at p. 48). That finding appears to have been somewhat contrary to the case that was made by counsel for the plaintiff in closing submissions, where it was said: -

> "… While we can't make the case that on the balance of probabilities that the plaintiff would have qualified as a chartered or chartered and certified accountant, we ask the court in assessing damages for loss of opportunity to acknowledge the fact that the plaintiff was, in fact, enrolled as a student to qualify as an ACCA, which is the Association of Certified Chartered Accountants. So that that

opportunity, having regard to her injuries, has been lost to her." (Transcript 4th April, 2017, pp. 25 – 26)

38. From page 48 onwards of the judgment, the trial judge summarises his findings in relation to the injuries suffered by the plaintiff as a result of the accident. As regards her left knee, she suffered a total rupture of the ACL and a partial rupture of the MCL. Her ACL was surgically reconstructed in China. She had extensive physiotherapy and regained full movement of her knee. However, it continued to be mildly unstable and Mr. McGoldrick, consultant orthopaedic surgeon, thought there was a low but definite risk of her developing degenerative changes in the knee. The second area of physical complaint was in relation to the plaintiff's right sacroiliac area. She complained of continuous pain and inability to sit on low seats. The trial judge accepted the evidence of Mr. O'Toole, consultant orthopaedic surgeon, that the plaintiff suffered a sacroiliac joint disruption. He felt her symptoms would subside.

39. The trial judge accepted that the plaintiff was deeply traumatised by the accident and she believed she would die or be left paralysed. The judge also felt that the plaintiff had other physical complaints directly related to the psychological trauma she suffered. The first of these was irritable bowel syndrome. He accepted the plaintiff's evidence of the symptoms arising from this including incontinence which caused her great distress and affected her everyday quality of life, dignity and ability to work.

40. The IBS manifested itself in the plaintiff's case in a vacillation between constipation and diarrhoea which is not unusual. The plaintiff's gastroenterologist, Dr. Weston, gave evidence that her symptoms would require cognitive behaviour therapy suggesting a significant psychological component. Professor Hegarty for the defendant agreed that the plaintiff had moderately severe IBS. He also felt it had developed as a

result of the stress and anxiety associated with the accident. The trial judge was therefore satisfied that the plaintiff had developed IBS as a direct result of the accident.

41. The plaintiff's next physical complaint was in relation to fibromyalgia. There was some divergence between the medical experts on both sides although there was agreement that the plaintiff had generalised muscle and joint pain, headaches, panic attacks, difficulty with sleep, forgetfulness, confusion, depression and anxiety. She had ongoing neck and back pain and bilateral shoulder pain and hand pain. She had tender trigger points throughout her body but a good range of movement in her joints. The defendant's expert, Dr. McCarthy, disagreed with the plaintiff's expert, Professor Duffy, that the plaintiff had a formal diagnosis of fibromyalgia but rather that her symptoms were the product of a general anxiety state and mood disturbance.

42. However, having analysed the evidence of both experts, the trial judge expressed himself satisfied that the evidence of Professor Duffy was compelling that the plaintiff does in fact suffer from fibromyalgia as a result of the accident. He also accepted Professor Duffy's evidence that it is a chronic condition that will not improve significantly in the future. Both experts however felt that there was room for improvement in conjunction with psychiatric treatment and the conclusion of litigation. Professor Duffy did not think the plaintiff would be able to work as an accountant. This was because of the existence of what was described as "fibrofog" caused by cognitive difficulties of an ongoing nature. The plaintiff also had a complaint in relation to her vision which the trial judge found to be unrelated to the accident.

43. Having detailed the plaintiff's physical complaints, the trial judge then turned to what he described as the most significant aspect of the plaintiff's injuries, being her psychiatric injuries. He noted again that there was not a very significant divergence of

opinion between Dr. Fitzgerald for the plaintiff, and Dr. Blennerhassett for the defendant. The trial judge described Dr. Fitzgerald as a most impressive witness and he accepted her evidence that the plaintiff had suffered extensive and extreme mental health issues caused by the accident with the prominent diagnosis being PTSD, with secondary depression and anxiety features.

44. He also accepted her evidence that there had been a catastrophic change in the plaintiff's mental state. The judge described in detail the plaintiff's post-accident history of erratic and indeed bizarre and challenging behaviour in her interactions with other people. He accepted Dr. Fitzgerald's evidence that the plaintiff's symptoms are severe, chronic and enduring and the prognosis remains guarded. It is to be noted that Dr. Fitzgerald's evidence was strongly challenged on cross-examination with particular reference to the fact that the case as originally pleaded had featured no complaints related to psychiatric injury which were only claimed for the first time many years later coincident with the plaintiff's instruction of a new legal team shortly prior to the quantum hearing.

45. Dr. Fitzgerald's evidence was also challenged on the basis that she and her team only saw the plaintiff for the first time in August 2017, over 6 years post-accident, and particulars of psychiatric injury were pleaded for the first time in supplemental particulars of the 27th April, 2018. Despite those factors, the trial judge found Dr. Fitzgerald's evidence persuasive and convincing and his findings in that regard are not challenged by the defendant on this appeal, at least on the basis that those findings were unsupported by any credible evidence. The defendants do however plead in their cross-appeal that the trial judge attached disproportionate weight to Dr. Fitzgerald's evidence to the effect that the plaintiff was not able to work during the 6 year period between the accident and Dr. Fitzgerald's first consultation which was necessarily speculative.

46. There is similarly a complaint that the trial judge attached insufficient weight to the evidence of the defendant's rheumatologist, Dr. McCarthy, and Dr. Blennerhassett that the conclusion of the proceedings would assist a gradual resolution of the plaintiff's symptoms. The defendants also complain of the judge's finding that the plaintiff would have gone on to qualify as an accountant as I have noted above but again, having regard to the concession made on behalf of the plaintiff, the trial judge did not, it seems to me, assess her past or future loss of earnings on the basis of a qualified accountant.

47. Clearly the trial judge was faced with a significant difficulty in reconciling the evidence of Dr. Fitzgerald who considered that the plaintiff would not return to work on the one hand with that of Dr. Blennerhassett on the other, whose view was that she should be able to get back to employment within a further two years or so following treatment.

48. The trial judge recognised that this was the most difficult aspect of the case. However, he did make the important observation that in addition to having the benefit of oral evidence from Dr. Fitzgerald and Dr. Blennerhassett, he also had the opportunity of observing the plaintiff as she conducted the case herself over 5 consecutive days in October and November 2016 and also when she gave evidence. He also had the opportunity to observe her on various other occasions when the case was listed for case management purposes and also during her further oral evidence at the quantum hearing.

49. There were a number of features that struck the judge as significant. First, the plaintiff has an excellent command of English. Second, she had an excellent knowledge of all of the voluminous paperwork in the case. Third, she was able to deal with a lengthy and robust cross-examination by a very experienced senior counsel. He noted that she presented her case as a lay litigant, not supported by any McKenzie friend or anybody else but was totally alone. He observed that for a Chinese national, for whom English is not her

first language, she was able to navigate the Irish legal system in a way that he found very impressive. Fourth, her ability to present the case was in his view quite extraordinary and the presentation of her paperwork was excellent. Fifth, her ability to understand complex issues that arose in the course of the litigation was remarkable. Sixth, from a review of the transcripts, it was evident that the plaintiff's evidence was coherent and chronologically correct unlike in the case of some lay litigants who are "all over the place" and make farfetched arguments unfounded in logic or reality. The plaintiff did none of these things.

50. He summarised his findings in this regard (at p. 59): -

> "150. Taking all of this into consideration, I am satisfied that this is a woman of extraordinary intelligence and resilience. I agree with the views of Dr. Blennerhassett, that the conclusion of this case, which will result in an award of damages in favour of the plaintiff, will effectively remove the three major stressors in her life, being the litigation itself, her financial difficulties and her accommodation difficulties. Allied to that, while her mental condition has remained serious, as is evidenced by the fact that she needed in patient treatment in January 2018, there has been improvement in her condition since her engagement with Dr. Fitzgerald's team. In particular, she has agreed to and complied with an increase in her medication, and perhaps more importantly, she has developed an insight into her mental difficulties, which has resulted in her being able to redirect her behaviour when under conditions of particular stress.
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> 151. One must also have regard to her pre-morbid functioning, where she was clearly intelligent, having obtained a third level qualification in China and having gone on to complete an English language course in Ireland and had enrolled in a course leading to the ACCA qualification. Taking all of this into consideration, I

> am of the view that on the balance of probabilities the plaintiff will, at some stage in the future, make sufficient recovery, that she will be able to make a gradual return to the workforce. However, it is very difficult to say when this will occur. Doing the best I can, I find that the plaintiff will remain unfit for any work for a further period of five years. I accept that in adopting the period of five years, one is somewhat gazing into a crystal ball. She may make her recovery earlier, for example four years, but equally it may take longer and be six years or more. For that reason, I have adopted the period of five years.
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> 152. Thereafter, I am satisfied that the return to work will be on a gradual basis. I will allow her 50% of her pre-accident earnings for a further period of two years. Thus, I am of opinion that in seven years from the present time, she is likely to be able to obtain a job similar to that which she had prior to the time of the accident, which was a part-time job at the level of an accounts assistant."

51. The trial judge went on to detail all the factors he had taken into account in coming to a view on the general damages to which the plaintiff was entitled, and having regard to those, he assessed her general damages to date at €95,000 and into the future, at €75,000, making in total €170,000.

The Appeal on Quantum

52. The plaintiff appeals against that award on the sole ground that it is insufficient. That is not a stateable ground of appeal in itself, but having regard to the fact that the plaintiff is a litigant in person, I propose to view it as a contention that the award of damages by the trial judge was so disproportionately low as to amount to an error of law.

53. The principles to be applied by an appeal court in reviewing the assessment of general damages by a court of first instance have been restated in a series of judgments of this court in recent times. It is unnecessary to revisit these in any detail but rather to summarise the general approach adopted by an appellate court. The award of damages must be proportionate in the context of the limit for general damages for the most serious injuries, currently set at €500,000 by the Supreme Court in *Morrissey and Anor. v. HSE and Ors* [2020] IESC 6. Awards of general damages must also be proportionate *inter se* and in the context of awards given by the courts for comparable injuries. It must be fair to the plaintiff and the defendant. If the Book of Quantum is relevant to the particular injury or injuries in issue, the court is obliged to have regard to it as a guide to the ultimate award.

54. Before an appellate court can interfere with an award of damages, it must be satisfied that no reasonable proportion exists between the award and what the appellate court would be inclined to give – see *Rossiter v Dun Laoghaire Rathdown County Council* [2001] 3 IR 578. A court of appeal should only interfere with an award of general damages where it considers that there is an error in the award which is so serious as to amount to an error of law.

55. In the present case, an award of €170,000 cannot be viewed as other than very substantial. This is not a case where the Book of Quantum is of assistance in circumstances where the main component of the injuries is psychiatric. The purely physical injuries suffered by the plaintiff were of a relatively moderate nature. The most debilitating injuries from the physical perspective were those that appear to have a direct connection to the psychiatric component, namely the IBS and fibromyalgia. These were expected to ameliorate in line with the purely psychiatric symptoms.

56. There is no doubt that the plaintiff suffered a psychiatric response to this accident that could not be viewed as other than very severe. Her own psychiatrist suggested it was catastrophic. The trial judge did not entirely accept that having had careful regard not just to the evidence of the psychiatrists but also the opportunity he had to evaluate and assess the plaintiff from his observation of her over an extended period of time. The fact that he considered that the plaintiff will ultimately make a return to the workforce, albeit with some degree of ongoing psychiatric and related symptoms, must be viewed as removing this case from the realm of catastrophic.

57. The ultimate prospects for the plaintiff are for a return to a relatively normal life, albeit one subject to some degree of limitation and disability as identified by the trial judge. This, as he found, is particularly likely to be the case when the three stressors he noted that very significantly affected the plaintiff at the time of the trial in the High Court were removed by the award of damages. Speaking from my own perspective, having had the opportunity to observe the plaintiff presenting her appeal to this court, I find myself in complete agreement with the views expressed by the trial judge about her presentation.

58. The award of general damages in this case amounted to more than one third of the maximum that would be awarded in the case of, for example, a young plaintiff with quadriplegia or severe cerebral palsy requiring lifelong nursing and medical care. I am not satisfied that the plaintiff has demonstrated that this award could be regarded in all the circumstances as disproportionate, and certainly not disproportionate to an extent that would amount to an error of law.

The Cross-Appeal

59. Turning now to the defendant's cross-appeal, as previously noted this is concerned solely with the issue of loss of earnings, past and future. I have already referred to the trial

judge's rationale for the conclusion that the plaintiff was unlikely to return to the employment market for a further period of five years and for another two years after that, at only 50% capacity. The judge reached that conclusion reconciling as best he could the conflicting psychiatric evidence on both sides but also the plaintiff's own evidence, conduct and demeanour throughout the trial.

60. I do not think it can reasonably be said that his conclusions in this regard were unsupported by any credible evidence and appear to me to be a realistic and rational reconciliation of all the factors at play in the case. The principal complaint advanced by the defendant at the appeal was that the trial judge was wrong to conclude that the plaintiff could not have returned to work after the accident because there was evidence that she had contacted her former employer, O'Hagan and Company, with a view to resuming her position, which was no longer available by that stage.

61. However, Dr. Fitzgerald's evidence was that the plaintiff was labouring under a lack of insight into her own capacity to work at the relevant time and she remained of the view that she was unable to do so. The trial judge was entitled to accept this evidence as he did and make an award of damages in respect of the loss of earnings to date as per the actuarial report in the sum of €86,463. It is also important to emphasise that in assessing a figure for loss of earnings both past and future, the trial judge did not assess that figure based on any potential earnings that the plaintiff may have had as a qualified accountant but rather on the basis of her pre-accident employment and earnings which were at quite a modest level. He also relied on the same baseline figure to assess the future loss of earnings for five years at €112,750 and a further two years at 50% capacity of €23,452.00.

62. Although as I have already pointed out, the case was not made by counsel for the plaintiff that on the balance of probabilities, she would have qualified as an accountant, an

argument which if sustained would have resulted in a much higher award for future loss of earnings, nonetheless a claim was made for loss of opportunity arising out of the loss to the plaintiff of the chance to pursue her vocation of choice. The trial judge assessed a figure of €30,000 under this particular heading which, in all the circumstances, does not appear to me to be an excessive figure or one that he was not entitled to award.

63. In *Rossiter*, the Supreme Court held that it was appropriate to award a sum for loss of job opportunity even where it had not been clearly established that the plaintiff's future income may be adversely affected, albeit that the range of jobs open to him would be reduced. In his judgment, Fennelly J. noted (at p. 582): -

> "Undoubtedly, the effects on future employment prospects are an element that must be taken into account in assessing the plaintiff's damages. However, in my view, it should be considered as an element of the general damages."

64. I am therefore satisfied that the trial judge's assessment in this regard was appropriate. The remaining ground of the cross-appeal advanced by the defendant is that the trial judge erred in failing to take into account social welfare payments received by the plaintiff as deductible from an award for loss of earnings. However, that contention was not made or argued before the High Court and is not one that this court can entertain *de novo* on appeal.

Conclusion

65. I am accordingly satisfied that the trial judge's assessment of damages in this case, both general and special, ought not be disturbed for the reasons I have explained. At the hearing of this appeal, the plaintiff did suggest that she ought to be entitled additionally to aggravated or punitive damages for the fact that the defendant broke the red light, as she

described it. Even if that arose, it could not form a basis for such damages and in any event was not pleaded as part of the plaintiff's claim at any relevant time. However, in the circumstances where the trial judge held, correctly as I have found, that the defendant did not break the red light, there is clearly no basis in any event upon which such a claim for damages could be advanced. The total of the damages under all headings assessed by the trial judge amounted to €465,526. Adjusting that figure to take account of the revised apportionment of 80% in favour of the plaintiff, the total of the plaintiff's damages come to a sum of €372,420.80 and I would substitute for the order of the High Court judgment in that amount. I would accordingly allow the plaintiff's appeal and dismiss the cross-appeal.

66. With regard to the question of costs, my provisional view is that as the plaintiff has been successful in her appeal, as an unrepresented party, she is entitled to her reasonable expenses in the matter. With regard to the costs of the High Court, the plaintiff is entitled to those costs to be adjudicated on the basis of the award of this court. If either party wishes to contend for an alternative form of costs order, they will have liberty to file a written submission not exceeding 1,000 words within 14 days and the other party will have 14 days to reply. In default of such submissions being received, an order in the terms I have proposed will be made.

67. At the outset of this appeal, counsel who formerly represented the plaintiff appeared and advised the court that his instructing solicitors had been given liberty to come off record by O'Regan J. in the High Court on 16th August, 2018 and the judge also made an order pursuant to s. 3 of the Legal Practitioners Act 1876 charging the damages and costs recovered by the plaintiff with the plaintiff's costs including any solicitor and client costs when taxed and ascertained. The court agreed that the solicitors concerned would be notified of this judgment in advance of final orders being made and consistent with that

ruling, a copy of this judgment will be sent to those solicitors at the time of delivery. If the necessity for any further application arises, the solicitors will have liberty to notify the office of the Court of Appeal in writing of same within 14 days and shall copy the parties with any such correspondence.

68. As this judgment is delivered electronically, Birmingham P. and Whelan J. have read and agree with it.