

THE HIGH COURT

Record Number: 2004 No. 15010P

Between:

Tony Kennedy

Plaintiff

And

Noel Faherty

Defendant

Judgment of Mr Justice Michael Peart delivered on the 30th day of June 2015:

1. Almost 12 years ago the plaintiff sustained very serious facial injuries and understandable psychological sequelae when he was the victim of an unprovoked assault in the foyer of a night club in Sligo town where he worked as a 'meet and greet' person. He saw his assailant for a split second only prior to the assault. The moment he was struck he knew he had been seriously injured, and he immediately fled the night club by a back entrance to the car park, and drove himself to hospital. He was not therefore involved in and did not observe the fracas that ensued. He did not know or recognise the person who had assaulted him, but has been informed subsequently that it was the defendant.

2. One of the difficulties which the plaintiff faces in establishing as a matter of probability that his assailant was the defendant is that this assault happened so long ago.

3. Another problem that he has faced is the absence of any CCTV footage save that from what has been referred to as 'Camera 13'. It appears that although this night club was fitted with a most expensive and up to date CCTV system, within quite a short time from the date of this assault no footage was available to be viewed save that from Camera 13. It does not cover the assault itself in the foyer, but only some of the activity in the bar area prior to and after the time of the assault. The plaintiff made early inquiries from his employers about the availability of CCTV footage of the foyer area to assist him in establishing what happened and who had assaulted him but was told that for some reason which was not explained no footage was recorded on any other camera that night even though all the cameras were working on the night.. He is sceptical about the truth of that statement, and has been informed by the manufacturers of the system that if the cameras were on, there must have been footage recorded.

4. While his scepticism is very understandable, the fact remains that there is no CCTV footage available which can assist him in establishing as a matter of probability that it was the defendant who assaulted him. He must therefore rely on his own recollection of events, as well as the recollection of Martin Feeney, a security man on duty in the foyer who saw the assault happen, and who says that the man he saw hit the plaintiff is without any shadow of a doubt the defendant. It was Martin Feeney who pulled the assailant away from the plaintiff. In addition to that evidence the plaintiff has attempted to corroborate Mr Feeney's evidence by carefully viewing the footage from Camera 13 frame by frame in respect of the minutes before and minutes immediately after the assault happened, and coming up with a theory as to what happened.

5. From his viewing of the available footage he is satisfied that the defendant was part of a group of young men seen in the bar area who were attending the night club as part of a stag night, some of whom, shortly before the assault, are to be seen going through swing doors from the bar area into the foyer area, and are observed by the plaintiff in the foyer standing in a circle having what the plaintiff calls 'a council of war'. He sees this group then return to the bar area. He is seen to follow them into the bar area, and he is seen also returning to the foyer a few moments later. Some of this group are again seen to leave the bar area through the same swing doors into the foyer area, as do other patrons not connected to the stag group. The evidence is that within moments of this group of people leaving the bar area and entering the foyer area, the plaintiff is assaulted. It is the plaintiff's belief from viewing this footage that the group which he saw gathered in a circle in the foyer was planning an assault on him for some reason that he is unaware of and about which he cannot even speculate.

6. The defendant has given evidence also. There is no doubt that he was part of the stag group seen in the footage. In fact it was his brother Darragh's stag night. But he denies categorically that he assaulted the plaintiff, even though he acknowledges that he was in the foyer area close to the front door when the fracas took place. In his evidence he has explained why in the footage he is seen on his mobile phone as he exits the bar area, and why he is seen coming and going from the bar area into the foyer around the relevant time. I will come to that evidence and the other evidence shortly.

7. Another piece of evidence which the plaintiff relies heavily upon is that when the Gardai arrived on the scene a few minutes after the plaintiff was assaulted, Martin Feeney identified the defendant to a Garda as being the person who had started off the entire incident by punching the plaintiff in the face. He did not know the name of the man but he says that he told the Garda "*this is the man who struck Tony Kennedy and started the trouble*" or words to that effect. The defendant was asked to accompany a member of An Garda Siochana to the Garda Station nearby where he remained in a cell for about an hour and a half, and was then released without charge or questioning. The custody notes record that he had drink taken. It appears that the following day the plaintiff's two brothers went to the Garda Station to make arrangements for the plaintiff to make a statement, and that during whatever conversation one of his brothers had with a Garda in the station he saw the name 'Noel Faherty' written in a book as having been arrested the night before. The name meant nothing to him at the time, but he remembered seeing it written down.

The plaintiff's evidence: Tony Kennedy, Martin Feeney, Robert Kennedy:

8. The plaintiff has said that he was on duty on the night of the 28th June 2003 as a 'meet and greet' person as opposed to security, and that it was not a particularly busy night in the night club. He had been working at the premises for two or three years prior to this incident, and was also training to be an electrician. He was aged 42 on the date of this assault. His duties included keeping a general eye out for trouble as well as meeting and greeting patrons as they entered the premises.

9. He states that at some point in the early hours of 29th June 2003 he was standing at his station in the foyer near the front doors

when he saw a group of 8 or 10 young men gathered in the foyer in a circle having a discussion. This could have been some time between 1.30am and 1.45, even though the CCTV footage would suggest that it was more like 2am. However, the timings on the CCTV may be out by as much as 15 minutes, given that the Garda records show that the defendant arrived in the Garda station at about 2.05am. The precise time at which this gathering of men or the assault occurred is not crucial, save to note that it was said to be a very short time before the assault on the plaintiff occurred.

10. The plaintiff's evidence is that having observed this circle of young men, he followed them back into the bar area where they returned to the same bar table that they had been standing at previously. He says that he tried to listen to their conversation to get some idea of what they were planning but could not do so. He then returned to the foyer area. Having returned to his station in the foyer he then noticed two men approaching him. One man was much taller than the other. He did not know them. He says that they approached him quite slowly, but said nothing. He thought he should say something to make them feel welcome, and asked if they were enjoying the night. But he got no response. He says that the taller man had a mobile phone in his hand and the shorter man appeared to be just staring at the plaintiff. This seemed unusual behaviour, and he made some comment to the shorter man about the day's weather but again got no response. He then describes how, as he was leaning down, he received a heavy punch to the head, and his head went numb. He knew immediately that something very serious had happened, and he feared that these two men were going to kill him.

11. The plaintiff recalls that immediately he had received this blow to his head, Martin Feeney, who was close by, said to the two men something like *"what are you after doing?"* and that he grabbed the taller of the two men who had thrown the punch.

12. The plaintiff cannot say what happened after that because he immediately ran out of the foyer and exited the premises by a back corridor to the car park. But he has been told that a general melee ensued involving quite a large number of males, and that it went on for some time before the Gardai arrived. He says that as soon as he received this blow to his head he knew that he needed to get to hospital quickly, so he drove himself to hospital where he received appropriate treatment. He was told that he would need to be transferred to St. James's Hospital in Dublin, but that this could not happen until the following Tuesday. He therefore went home later having received some treatment.

13. He states that while he was at the hospital in Sligo that night the porter asked him if he had reported the assault to the Gardai. He had not. He could not recall if the Gardai had come to the hospital to talk to him, but stated that if they did they had not stayed very long.

14. The plaintiff was cross-examined on his evidence. It was immediately put to him that he has simply developed a theory of what happened that night from his viewing of the CCTV footage from Camera 13, and that he does not actually recall the events as he now describes them. The plaintiff denied this of course. It was put to him that he has created his theory that the persons seen exiting the bar area around 2am (on the footage) and proceeding into the foyer area were in a circle planning to attack him, and that this plan was then put into effect some minutes later by the assault by the defendant which he has described. The plaintiff has denied that this is the case and says that he has no doubt about this. His certainty about this is total and unshakeable.

15. In the face of these assertions about the attack group gathering in the lobby area, Counsel referred to the statement which the plaintiff made to the Gardai on the 10th July 2003 – barely two weeks after the incident – in which he made no mention of this group gathering in the lobby area before the attack. Counsel referred also to his evidence that neither the man who attacked him nor the shorter man who was with him had said anything to him before the attack, yet in his statement he stated that when he asked them if they were having a good evening and where they were from one of the men said *"we're from up the road"*. The plaintiff accepted that what was in his statement was more likely to be correct. He was also referred to the fact that in his direct evidence he stated that the man who hit him was holding a mobile phone, yet this is not mentioned at all in his statement. It was put to him that he has referred to the man having a mobile phone because he has since seen the CCTV footage which at a time close to the time of the assault shows the defendant exiting the bar area with a phone to his ear, in order to try to link the defendant to the assault. He was also questioned about his evidence now that he could not remember whether the Gardai came to the hospital to talk to him before he went home, and was pointed to the fact that in his statement made on the 10th July 2003 he had stated *"two Guards came to see me and I spoke to Garda Phillips and I told him what happened and I told him that my jaw was in bits and he told me to call to the Garda Station to make a statement"*. He was referred to a passage from Garda Phillips's statement in which the latter stated that he spoke to the plaintiff at the hospital and that he was unable to give a description of the assailant. The plaintiff states now that his recollection is unclear about this, and he cannot recall a conversation with the Gardai at all. He was also referred to the fact that a large number of witnesses had been interviewed by the Gardai and had made statements, and that a list of these names had been given to the plaintiff's solicitors, yet the plaintiff had not spoken to any of these persons to see if they could assist him in this case. In fact the plaintiff says that a couple of named security staff who were interviewed by the Gardai, and who made statements, were not on duty that night at all. The persons who made these statements were not called by either party to give evidence, so the statements made by them do not constitute evidence. However, some cross-examination questions certainly suggested that they were in the premises and in fact may have observed the fight. However, the plaintiff has denied that this is the case. I place no reliance on those questions or infer anything contrary to the plaintiff from the questions asked in that regard. Nevertheless, it is strange indeed that the plaintiff, who is clearly concerned to fix the defendant with liability for this attack, and which he knows the defendant denies, would not even speak to potential witnesses in case they might have been in a position to corroborate the allegations he makes against the defendant.

16. Martin Feeney gave evidence in support of the plaintiff. He stated that before the plaintiff was punched as described, he had been standing about ten feet away, and had been dealing with some issue about the theft of a lady's handbag, and that having dealt that issue he observed a tall man approaching the plaintiff. He stated in his evidence that this man was about 6'5" in height, and that the smaller man with him was about 5' 7" – 5' 8" in height. In the statement which he made to the Gardai on the 11th July 2003 he stated that the taller man was "definitely 6'5 or 6'6". He himself is 6' 2". He recalls seeing the taller man raising his arm, but did not see the blow land on the plaintiff as a lady passed between him and the plaintiff at that very moment. But he heard a sound which he described as being a "thwack", and immediately saw the plaintiff holding his jaw and staggering backwards. He says that he ran over to the taller man and said *"what are you after doing?"* or words to that effect. He described how they both fell to the ground, and how he tried to restrain the taller man on the ground, gripping him with both hands. At that point he recalls receiving a heavy blow to the back of his head from another man, and while engaged with the taller man on the ground, he had to try and fend off this other man behind him. At that point he saw a group of men coming towards him and he knew that he was in danger of being assaulted again. He was able to call for help from security colleagues, but nevertheless received a number of blows to his head and body. He covered his head as much as he could. In his direct evidence he stated that he had not released his grip on the taller man, despite defending himself from others. However, when cross-examined he accepted that he had let go of him during the struggle.

17. He accepted also that it was two or three minutes before the Gardai arrived. He accepted that it may have been longer than that, but he thinks it was 2 or 3 minutes before Gardai arrived. One way or another this fracas went on for several minutes before

Gardai arrived, and appears to have involved at least a dozen men. Mr Feeney has stated also that after Gardai arrived he saw four or five men making to exit through the front doors, and that he was determined that the man who had struck the plaintiff should not escape. He says that he grabbed that man again, and told a Garda that this was the man who had hit the plaintiff and had started the fight. He says that he handed the assailant over to the Garda inside the doors and not outside on the street. This was the worst incident that Mr Feeney has ever experienced in his life and he says that he has a very clear recollection of the events that occurred that night, and that he needs no assistance from anybody else to recall precisely what he saw..

18. During his evidence he stated that he did not meet or know Noel Faherty before this incident, even though the two appear to have been students at Sligo IT some years prior to this date, albeit on different courses. He stated however that he is "110% certain" that the man who hit the plaintiff is the same man who he grabbed after the incident and handed over to the Gardai at the front door of the premises, and that it is Noel Faherty. He has no doubt whatsoever about this, and that his memory of the events that evening is very clear still. However, he was unable to recall if, as the plaintiff has now said, the assailant was holding a mobile phone when the assault took place.

19. The only other witness called by the plaintiff was the plaintiff's brother, Robert Kennedy. He had not been on the premises that night, but in the early hours of the 29th June he got a call from the plaintiff's wife who told him about what had happened. He went to the plaintiff's house that morning and spoke to him there. Later that day he and his brother, Noel, went to the Garda station to make arrangements for the plaintiff to make a statement. He spoke to a Garda whose name he does not know, but who said that a person had been arrested that night and pointed to a name in a book which was "Noel Faherty", and he understood this to be a man arrested in connection with the incident in which the plaintiff was injured. The name meant nothing to him at the time. He was told that they would need to meet Garda Phillips about making a statement. The three brothers met Garda Phillips on a later date so that the plaintiff could make a statement, but following something being said to them by Garda Phillips no statement was made. Garda Phillips has not been called to give evidence but it is clear from what Mr Kennedy has stated that whatever was said by Garda Phillips suggested that there was no point in making a statement. They were not permitted to say what Garda Phillips said to them as this would be hearsay evidence, and inadmissible in the absence of Garda Phillips being called.

Defendant's evidence:

Noel Faherty, Garda Eddie MacHale, Ronan Faherty

20. Noel Faherty gave evidence. He is now aged 36 years and is an operations manager at Connaught Packaging, and described this as a middle management role in that company. He described his educational background which included obtaining a Certificate in Industrial Engineering in 1997, a Diploma in Production Engineering in 1998, a Batchelor's Degree in Quality Management 1999-2001, and finally a Masters in Operations Management. He went on to say that while he was a first year student at Sligo Institute of Technology he had met and socialised with Martin Feeney who for a time was prominent in the Students Union there, and shared a house with a friend of Mr Faherty, namely a Paddy Devaney. He stated that for a number of months during his first year at Sligo I.T he had some lectures in subjects that Mr Feeney was also studying, and that he not only knew him to see but had had many conversations with him. Implicit in this evidence is Mr Faherty's surprise that if Mr Faherty was truly the person seen so clearly by Mr Feeney to assault Mr Kennedy he would have recognised him as somebody he knew from college only a short time previously, bearing in mind that this incident occurred in June 2003. However, Martin Feeney denied that he ever met or socialised with Mr Faherty while at Sligo I.T, and that he does not know him.

21. Moving to the events of this particular night, he stated his brother, Darragh, had become engaged to be married a few weeks previously and that a group of 12 family members and friends had met in Sligo town for a 'stag party'. He named the 12 men attending which included some college friends of Darragh who had travelled from London for the occasion. Not all the 12 men were from Sligo town. He described the course of the evening. They were all staying the night in the Riverside Hotel, and met up there at the start of the evening. They had a meal there together before going to McHugh's Bar. He thinks that he would have had a pint with that meal. After the meal the group decided to go to a night club in the town. They found that there was a long queue of people waiting to get into one called Toffs, and so they headed for another called Equinox which is where this incident occurred. Mr Faherty said he knew the premises as he had been there on a number of occasions during his college days in Sligo. He had never been involved in or encountered any trouble at that premises on any previous occasion.

22. He went on to describe how the group had entered that premises and gone to the bar area where they would all have had a few drinks during the course of the night, and were chatting together in a group. Apparently there is a dance area also, and he says that some would have got up to dance though he himself did not. He stated that the group was very well behaved. He feels sure that during the course of the evening he and presumably others would have had occasion to leave the bar area from time to time to go to the toilets as they were all drinking during the evening.

23. According to his evidence the stag party began to break up around 1.30am when some decided to leave the premises. It appears that his brother Darragh may have drunk more than the others as it was his stag night and drinks were being bought for him by the others. At any rate, according to Mr Faherty's evidence, Darragh seems to have decided to go back to the Riverside Hotel ahead of the others.

24. Mr Faherty explained why he and his brother, Ronan are seen on the available CCTV footage leaving the bar area and heading into the front foyer area at around 1.58am which is approximately 7 minutes before the assault on the plaintiff occurred. He says that they had thought that Darragh had left with somebody from the group, but realised later that he must have left on his own because eleven of them were still in the premises, and they were concerned about him because he had had more to drink than the rest. He says that Ronan left the bar area first in order to phone Darragh and make sure that he had got back safely to the hotel, and that he himself had left that area a short time after in order to check whether Ronan had been able to make contact with Darragh. He says that he himself had also tried to phone Darragh but unsuccessfully. He says that Darragh had rung him back and that he had not in fact got back to the hotel and was asking him for directions to the hotel, but was not making much sense. Noel Faherty says that he suggested to Darragh that he return to the Equinox night club and to ring him when he got there, and that he would go outside and meet him outside. In the meantime, he says, he and Ronan returned to the bar area to wait for Darragh to come back. This return to the bar area is seen on the CCTV footage. He says that in due course he received another call from Darragh, but because of the loud noise in the bar area he again exited into the front foyer to take the call. Darragh told him that he was now outside Equinox.

25. It was at this precise time according to Noel Faherty that the fracas broke out in the foyer. The plaintiff says that he saw a large row in progress, and that the numbers involved grew quickly. He says that the row was first of all at the door area but gradually spread to the area just in front of the cloakroom where he happened to be standing near the front doors. He says that his brother Ronan had followed him very soon from the bar area. They apparently paused a short time while this row was in progress, and then decided to leave the premises. However, they found the front doors closed. He suggested to Ronan that they go back to the bar area, but then the doors opened and a number of Gardai entered.

26. As the Gardai entered, he and Ronan went to exit through the doors. Ronan was apparently walking ahead of Noel Faherty. At that point, according to Noel Faherty's evidence, a Garda put his hand on his shoulder and asked if he could speak with him outside the premises. He is absolutely certain that no other person touched him at this time, and that he was not grabbed by any bouncer and handed over to the Gardai. In that regard it will be recalled that Martin Feeney stated in his evidence that after the plaintiff had been struck he had wrestled with the assailant but that he had had to let go of him for a short while in order to defend himself from other attackers, and that he had grabbed the assailant again before he had been able to leave the premises, and had handed him over to Gardai saying that this is the man who had struck the plaintiff.

27. Having been asked to go outside by the Garda, the defendant says that he did so without demur. The Garda apparently asked him to go to the Garda station with him, and he says that he did so willingly, and that he walked freely with the Garda to the Garda station which is only a short distance from the night club. He was not hand-cuffed, or held or in any way restrained by the Garda at this time. Having reached the Garda station he was apparently asked what had been going on in the night club. He says that he immediately told the Gardai that he had not been in any way involved in the fracas, and he recalls specifically pointing out to the Gardai that his clothing was in no way disturbed, and that there were no marks on him whatsoever. He says that this fracas was of such a size and nature that nobody involved in it could have come out of it without some marks, scratches, scrapes etc.

28. Nevertheless, it is a fact that Noel Faherty was detained in a cell at the station for just under 2 hours. He says that he was given some form to sign and that he did so. He says he was told that he had to wait there till things settled down and the crowd dispersed. An objection was taken to his saying this on the basis that it is hearsay evidence since the Garda who is supposed to have said this was not called to give evidence. I therefore place no reliance upon that evidence. He says also that he answered every question he was asked, but could not recall if he was specifically asked if he had assaulted anybody.

29. The custody record has been produced. That indicates that he was placed in a cell at 2.30am having arrived at the station at 2.05am. It is clear that the time shown on the CCTV footage is not accurate since 2.05am seems to be the approximate time at which the fracas first broke out in the foyer of the premises, and it was certainly a number of minutes thereafter before the Gardai arrived. But nothing turns on that.

30. The custody record notes that Noel Faherty had "drink taken" and under the heading "offences or other matter in respect of which arrest was made" the words "Section 4 and 6 C J (Public Order) Act 1994" are written. There is no mention of any suspected assault. The record notes that at 4.20am he was "released for summons". In fact no summons was ever issued, and no charge of any kind was ever brought against him, despite what appears to have been a very thorough investigation, as the evidence given by retired D/Garda Eddie MacHale shows. I will come to that evidence, but one aspect of it is that until the hospital telephoned the Gardai about the plaintiff's presence at the hospital and the injuries sustained by the plaintiff, nobody, including Garda Judge who brought Noel Faherty to the Garda Station, was even aware that any assault had taken place on the plaintiff or on anyone else. That evidence goes very much against the evidence given by Martin Feeney that he had grabbed the defendant as he was trying to exit the hotel and had handed him into the control of Garda Judge saying that this was the man who had started off the whole incident and who had struck Tony Kennedy.

31. The defendant has stated that upon his release from custody he immediately made his way back to the Riverside Hotel. Everybody got up in the morning, had breakfast and went their separate ways. It appears that Noel Faherty himself went off to play in a football match, and he points to that fact to support his evidence that he in fact did not have a huge amount to drink that night because he knew that he was playing in a football match in Gort the next day. He thinks he may have had a total of four pints throughout the night.

32. The defendant heard no more about this night until he received a request from the Gardai for an interview. He readily agreed to meet with D/Garda MacHale at a hotel in Oranmore on the 19th September 2003 and he made a cautioned statement which has been referred to in evidence. He has stated that when making his statement he simply answered questions that were asked by D/Garda MacHale. In it he describes how his brother Darragh had left ahead of the others, and had later phoned to say he was outside the night club. He went on to say that when he went to leave the premises to meet his brother outside, the row in the foyer was in progress. In the statement he stated that he was anxious to get outside to see Darragh, but that the door was closed. He went on to say that the door was then opened and Gardai appeared. He said also that neither he nor his brother Ronan was involved in the fracas, and that he had hit nobody. He also stated that there were CCTV cameras all over the premises and that this would show that he hit nobody. He expressed annoyance that he was being accused of assaulting someone. He was shown some still shots from CCTV footage and confirmed that one of them showed him holding a phone to his ear and he said that it was probably when Darragh had phoned him. He was also shown a still taken from CCTV footage timed at 2.05.05 of a man with his hands in his pockets but said that he did not know who that was, and that he had never seen him before, and is certain that he was not a member of the stag party. The plaintiff is unhappy with that evidence as he maintains that the CCTV footage shows this man standing beside Noel Faherty in the bar area and thinks that he was part of the group and is to be seen chatting to Noel Faherty. He does not understand how Noel Faherty can say that he does not know this man and that he is a total stranger to him. Part of the plaintiff's theory is that this man is the smaller man who was with the tall man in the foyer who struck the plaintiff.

33. Detective Garda Eddie MacHale is now retired but was not at the date of this incident. He was attached to Sligo Garda Station for some 35 years prior to his retirement, and was put in charge of the investigation of the assault on the plaintiff a number of days after it occurred. It appears that initially Garda Brendan Phillips and Sgt. Harney were dealing with the case, but D/Garda MacHale received a request from his superintendent to take over the investigation, and did so. He has stated that he immediately set about interviewing any people who might have seen what happened in the foyer that night. A large number of statements were taken, including from the defendant, the plaintiff and Martin Feeney. But statements were also taken from a number of members of staff of the night club. Eventually a file was prepared by Sgt. Harney, which was sent to the superintendent, and then to the Chief State Solicitor and onwards to the DPP for a decision on whether Noel Faherty should be prosecuted for the assault on the plaintiff. In due course, the DPP decided not to prosecute him. Having been asked by Counsel if he was surprised by the decision not to prosecute Noel Faherty for this assault upon Tony Kennedy, he replied that he was not surprised by that decision.

34. The plaintiff has expressed dissatisfaction with the manner in which this investigation was handled from the outset. There seems to be no doubt that he had grounds for complaint as to how matters were handled initially by Garda Brendan Phillips. He appears to have made a complaint about that, and this was upheld, and some form of disciplinary sanction was imposed upon Garda Phillips. But D/Garda MacHale has said that as far as he is concerned he investigated this matter thoroughly and seriously. He rejects the suggestion made by the plaintiff that when he was conducting his interview with the plaintiff he did so in a cavalier manner, as was put to him. He went on to say that prior to investigating this case he had never met with or heard of Noel Faherty. Conversely, he knew the plaintiff's family very well and for all the right reasons, describing them as the most decent family one could meet. He appears to have enjoyed a very close friendship with the Kennedy family over a period of 35 years while serving as a Garda in Sligo, and in particular with the plaintiff's father for whom he expressed great regard and close friendship. He described him as having been

his best friend in Sligo since his arrival in that town some 35 years previously. He said that there would be no question of treating a Kennedy in a cavalier fashion. He has stated that on the 10th July 2003 he interviewed the plaintiff, and wrote down a statement from the plaintiff which was dictated to him by the plaintiff, and which was read over to the plaintiff, and agreed with by the plaintiff who then signed it in the normal way.

35. In relation to Noel Faherty, D/Garda MacHale has stated that he made arrangements by telephone to meet with him in order to take a statement. They arranged to meet in a hotel in Oranmore on the 19th September 2003 about 4 months after the date of the incident. Apparently the plaintiff asked if he could be accompanied by his brother, Ronan, but D/Garda MacHale indicated that he would prefer to talk to him alone. He may have indicated to Noel Faherty that he wanted to talk about an alleged assault at the night club, but he thinks that nothing of any detail was discussed when making arrangements to meet him. They met as arranged, and D/Garda MacHale has stated that almost the very first thing said by Noel Faherty was that if the CCTV footage was viewed it would be clear that he had had no involvement in any assault that night. It would appear that before the two met, D/Garda MacHale had not been aware that Noel Faherty knew Sligo town very well, and the Equinox night club. He had thought he was from Galway, and had not been aware that he had been a student at Sligo I.T and had lived in Sligo town. That fact emerged because it appeared from what Noel Faherty was saying about the CCTV footage that he was familiar with the Equinox premises, and that is also how Martin Feeney's name came into the conversation, as can be seen from the defendant's statement where he refers to having known Martin Feeney during his college years at Sligo I.T. D/Garda MacHale was also well aware that there was a very expensive and sophisticated CCTV system in the premises as he had on many occasions viewed footage there in relation to other incidents. He also confirmed in his evidence that he had not at any stage informed Noel Faherty that the CCTV footage was missing, even though that fact had emerged within a very short time after the incident. That statement was made in response to a suggestion put to him in cross-examination that if the defendant knew that the cameras were not working that night, or that footage had not been retained then there was nothing to be lost by the defendant saying that the CCTV footage should be viewed and that it would show conclusively that he had not assaulted the plaintiff, or had been involved in the assault or indeed the fracas.

36. Ronan Faherty, the defendant's brother has also given evidence. He made a statement to the Gardai also, but on a different date to his brother. He made his statement on the 26th November 2003. He was part of the stag party for his brother, Darragh. He was not familiar with Sligo town, but recalls that they met up at the Riverside Hotel, and had a meal there before going to McHugh's for drinks and on to the Equinox night club. He stated that his brother Darragh left the premises at about 1.30am, though he had not been aware of that until later. He had tried to get Darragh on the phone but could not do so. He and his brother, Noel, the defendant, became concerned about his whereabouts since Darragh did not know the town either. He confirmed that on the Camera 13 footage which has been shown to the Court he is seen exiting the bar area into the lobby area in order to make a phone call. He said that he was unable to get through to Darragh. He went on to say that his brother Noel can be seen getting the call-back from Darragh while he (Noel) was still inside the bar area, to say that Darragh was outside the premises on the street. He has stated that the defendant can then be seen exiting the bar area to take that call, and that the rest of the group remained standing at the table in the bar as seen on the footage. He then decided to follow his brother out of the bar to meet up with Darragh. He is seen on the CCTV footage exiting behind a couple of other men who he did not know. It was put to him in cross-examination that he seemed to be in a rush to get out, and seemed anxious about what was going on in the lobby. He was asked whether this was because he thought that the row involved his brother, Noel. But he denied this completely, stating that he was not at all concerned about his brother being involved. In so far as he is seen rushing to get out of the bar, he replied that this was because there was a commotion in the lobby and he was curious about what was happening, and in particular because he had seen a bouncer exiting a full speed moments before that.

37. He says that when he got into the lobby area there was fighting in progress among people whom he did not recognise, and that his brother Noel was still on the phone. He said that there were several rows going on at that stage. He went over to his brother Noel, who was apparently standing to the left as one exits the door, and close to the cloakroom area, and he says that they both made their way towards the front door in order to exit onto the street. However, the door was shut at that point and they could not do so. He says that at that stage Noel was beside him but that he (Ronan) was leading the way. He thinks that between 60-90 seconds passed from the time he exited the bar area and got to the front door as the area was very congested. He also stated that at this point Noel made to go back in the general direction of the bar area but that he beckoned him not to. He says also that he himself had had one unsuccessful operation for a hiatus hernia by the date of this incident and for that reason could drink no more than 3 pints in an evening, and for that reason says that he was completely sober. He still suffers in this way, and has had two further similar operations.

38. He describes the Gardai – perhaps 2 in number – coming through the door and into the lobby which was still congested even though the fighting had ended. He did not engage with the Gardai at that point. He was beckoning Noel to leave the premises, whereupon he saw and heard someone (a bouncer) from afar pointing to Noel and saying to the Garda that he was a trouble-maker. In cross-examination he was adamant that Noel was sober and had not engaged in the fight and had not assaulted anybody. He has stated that Noel went through the door. Noel went out with the Gardai, but that he did not hear the conversation that took place between Noel and the Garda. He says that he tried to find Darragh outside but could not find him in the vicinity of the night club. He is adamant that at no stage did anybody hand Noel Faherty over to any Garda that evening as Martin Feeney has stated he did, and that he believes Martin Feeney to be in error in that regard.

39. After he left the premises and having not located Darragh, he states that he decided to go to the Garda Station to find out what was happening in relation to his brother, Noel and to assure them that he was not a trouble-maker. He says that he spoke to a female Garda at the station she was very courteous to him, and advised him to go back to his hotel, and he did so. He got lost on his way back to the hotel, and apparently could not even remember the name of the hotel he was staying in. However, he eventually got back to the hotel, and by that time his 2 brothers, both Noel and Darragh, were back in the hotel. The following day he returned home to his wife in Moycullen.

40. He heard no more about that evening until he got a call from a Garda in November 2003 to meet for the purposes of making a statement, and he did so.

Conclusions:

41. The first and most obvious thing to say is that it is the plaintiff who has sued this defendant for damages, and he therefore bears the burden of proving that on the balance of probabilities it was the defendant who struck him on this night and caused him the horrific injuries which he sustained that night. In other words he must show that it is more likely that it was this defendant than that it was some other person. It will not be sufficient for the plaintiff to demonstrate by whatever evidence he can muster that there is a possibility that it was this defendant. He must adduce evidence which establishes an evidential basis for a finding that the probability is that it was the defendant. He does not have to go so far as one would in a criminal trial and prove matters beyond a reasonable doubt, but nevertheless a probability must be established.

42. The plaintiff's own evidence is that he did not know or recognise the man who struck him, and that immediately upon being struck

and injured he hastily exited the premises by the back door and drove himself to hospital for treatment. He therefore saw none of the subsequent fracas which went on for a few minutes after that first blow was struck. But it has become clear from other evidence that the ensuing fracas involved up to a dozen men. More than that number was in the lobby area, and it is clear that not everybody present in that area was involved in the fighting that followed the initial blow to the plaintiff's face. The plaintiff was unable to give a description of the assailant to the Gardai when they went to the hospital to talk to him that night, though he himself does not now recall that any Gardai called to see him at all at the hospital. However, in his statement taken by D/Garda MacHale on the 10th July 2003 he was able to recall the taller of the two was 6 foot tall and the smaller man was about 5 foot 10 inches. In the statement he recalled that before the blow was struck he had engaged two men beside him in some brief conversation asking them were they having a nice evening and asking where they were from, and that in answer to the latter question the smaller of these men apparently said "we're from up the road". The defendant is not from "up the road" but from Moycullen, Co. Galway.

43. Martin Feeney, from a distance of about 10 feet, saw the blow being struck by a man, or to be precise he saw the man raise his arm as if to strike, but the blow itself was obscured by somebody passing between him and the plaintiff at the precise moment that the blow landed. His evidence to the Court is that this man was 6 foot 5 inches tall, and that the smaller man was 5 foot 7 or 8 inches tall. In his statement to the Gardai he had stated that the taller man was "definitely 6 foot 5 or 6 inches". He himself is 6 foot 2 inches, and the defendant, according to the Garda custody record, is 6 foot 3 inches.

44. If one ignores for the moment the CCTV footage from camera 13, the plaintiff has to rely firstly on Martin Feeney's evidence that after the blow was struck he tried to restrain the assailant, wrestled him to the ground but had to let go of him to defend himself from another attacker, and that after the few minutes of general mayhem while the fighting was in progress, he grabbed a man by the shoulder who he knew to have been the assailant and delivered him into the hands of a Garda saying "this is the man who struck Tony Kennedy" or words to that effect. Noel Faherty says that he was never grabbed by the shoulder by any bouncer or anybody else, and nor was he handed over to a Garda, but rather that a Garda came to him while he was just inside the front door of the premises and asked him to step outside, and that he was then asked to accompany the Garda to the Garda station. He was not handcuffed or restrained in any way, and walked with the Garda to the station. Mr Feeney did not know the man's name and did not know him. This Garda was Garda Judge.

45. The second piece of evidence upon which the plaintiff must rely in order to try and prove to the point of a probability that the defendant is the man who struck him is that a few days later when his brothers, Robert and Noel were in Sligo Garda Station to try and make arrangements for the plaintiff to make a statement, his brother Robert was shown the name Noel Faherty in the Garda custody record as a man taken into custody that night. He understood that to have been in connection with the incident in the night club, but the name meant nothing to him – in other words he did not know any Noel Faherty.

46. There is no reference to any suspected assault being the reason for Noel Faherty's arrest and being held for just under 2 hours that night in the Garda station. The custody record indicates that he was held on the basis of suspected breaches of section 4 and section 6 of the Criminal Justice (Public Order) Act, 1994 only – in other words being drunk and disorderly in a public place. D/Garda MacHale gave evidence, which I accept, that as part of his investigations he spoke to all Gardai who had been involved that night, including Garda Judge, and all stated that they were unaware of any assault complaint at that time, and that the first occasion on which any Garda became aware of an assault having been visited upon the plaintiff was when they got a call from the hospital, by which time of course Noel Faherty had already been taken into custody.

47. The absolute and unshakeable certainty with which Martin Feeney states that he personally handed Noel Faherty into the hands of Garda Judge and told him that this was the man who started the fight and struck Tony Kennedy must be judged in the light of the evidence from the custody record and the evidence of D/Garda MacHale which I have just mentioned. It must also be judged by his absolutely unshakeable belief that he could not possibly gain any assistance in recollecting the events of that evening by taking a look at the statements of a significant number of other persons who had been present on the premises and were interviewed by Gardai subsequently as part of the investigation. These statements were handed over to the plaintiff's lawyers only a few days before the hearing commenced, but nevertheless there was ample time for Mr Feeney and indeed the plaintiff to read over these statements had they wanted to. Neither did so. Mr Feeney was asked why this was the case, and he stated firstly that he and the plaintiff were the only staff present in the lobby when the assault took place, and that others had arrived only 30-40 seconds later. In cross-examination, he was questioned by reference to some of the contents of statements made to Gardai by certain members of staff and others (i.e. Lucas Williams, Ronan Dykes, Cillian McNamara, Ruth Kelly, John Curley). However, even though these people had made statements in relation to the events of that night, neither the plaintiff nor Martin Feeney considered that there would be any benefit to be derived from looking at those statements. He also stated in his cross-examination that he did not need to look at the statements made by other staff, as he did not need anybody's help to remember everything that happened. He has stated that it is very easy for him to remember everything that happened that night, and that what happened will stay with him for the rest of his life.

48. I must immediately make clear that none of those persons to whose statements I have referred have been called by either side to give evidence. Therefore nothing that was put to Mr Feeney by reference to the contents of any such statements constitutes evidence in this case. But the fact that the statements were taken from people who were present on the premises, and the fact that neither the plaintiff nor Mr Feeney considered that they should even take a look at the statements is something to which I am entitled to have regard when considering the reliance to be placed upon what is an absolute and unshakeable conviction on the part of the plaintiff and Mr Feeney as to the accuracy of their recollection of events and their total belief in the veracity of what they have stated in evidence.

49. Another reason to doubt Mr Feeney's certainty that it was the defendant who he saw hit the plaintiff is that he has stated in his evidence quite clearly that although he could not recall if the tall man who hit the plaintiff was holding a mobile phone (as the plaintiff has stated in his evidence) his clear recall is that the man was 6 feet 5 inches or 6 feet 6 inches in height. He said that he was a good bit taller than himself and he is 6 feet 2 inches tall. It happens that Noel Faherty is about the same height as Martin Feeney, and certainly not 6 feet 5 inches. If Martin Feeney is so adamant about the clarity of his recollection I am entitled to accept from his evidence that the man he says he saw hit the plaintiff was between 6 feet 5 inches and 6 feet 6 inches tall. In such circumstances I cannot be satisfied as a probability that the man he saw hit the plaintiff is the defendant, Noel Faherty. Therefore, assuming that it was in fact Noel Faherty who he pointed out to the Garda as having been the assailant, and who started the entire fight, I cannot be satisfied that he identified and handed over the correct man. In my view these matters by themselves bring the plaintiff's case against the defendant below the level of a probability given the importance of Martin Feeney's evidence to the plaintiff's case. The very clear evidence given by the defendant himself, and his brother, both by way of denial of any involvement, and the manner in which they have dealt with the CCTV footage, and the fanciful inferences which the plaintiff seeks to draw from that footage in support of his case that it was the defendant who struck him, gives further support to the lack of a probability that it was the defendant who inflicted this blow upon the plaintiff.

50. The plaintiff has sought to draw support from what can be seen on the CCTV footage from camera 13. It is impossible to put

down in words everything that can be seen on the footage. Any Court being asked to consider that evidence would need to view the footage. I have viewed it over and over again in order to follow the sequence of events shown and in order to follow the plaintiff's account of what he notes, and what the defendant has explained from his own viewing of the footage. I note also that in an affidavit sworn by the plaintiff on the 27th May 2014, he has set out, almost frame by frame, what he believes the footage shows. I would just caution that apart from stating what can be seen in the footage, the plaintiff in this affidavit goes further and draws speculative inferences from what he is seeing. By way of example, and there are several others, he states: "At 02.00.53am, Martin Feeney passes by heading into foyer. In less than one minute 11 gang members leave the night club [which, by the way, is a reference to what I have referred to as the bar area] to have a meeting in the foyer." Firstly, he has introduced the notion of 'a gang', and secondly he has introduced the idea of 'a meeting' which he now says took place in the lobby for the purposes of planning an attack on him.

51. The plaintiff has sought to draw support for Mr Feeney's identification of the defendant as the assailant by creating a scenario from what can be viewed – that scenario being that at very close to 2am a group of men who, up to the defendant's denial in evidence, he believed were all part of the stag party, are seen exiting from the bar area in the direction of the lobby area, and he has said in his evidence (though he never mentioned it at all in his statement to the Gardai) that this group formed a circle in the lobby and were at that point planning an attack on him. He says that he observed this 'huddle' and saw the group return to the bar area, and that he followed them to try and see and hear what they were up to. It is clear from the footage in question that Noel Faherty is part of the number of persons seen exiting into the lobby, and the plaintiff says that the defendant was part of the 'huddle' planning an attack on him. He then notes from the footage that just before the attack on him takes place the stag party group leaves again in the direction of the lobby in order to carry out their plan to attack him. This is a scenario that he has had to invent in order to support the identification by Mr Feeney of the defendant as the man who hit him. In my view, the plaintiff's assumption or inference that the group in the huddle in the lobby at just after 2am is there planning an attack on him is just speculation designed to help point to the defendant being the assailant, combined with the fact that the defendant is the man who was brought by Gardai to the Garda station. It cannot provide that support. The most it can do is demonstrate that the defendant was one of several men who went to the lobby just before the incident, that he returned to the bar area with some of the others, and that some, including the defendant, returned to the lobby some minutes later immediately before the moment at which the plaintiff was struck. It does no more than that.

52. The defendant does not deny that he was in the bar and that he is seen in the bar area on the CCTV footage. He accepts that, and also that he is the man seen with his mobile phone to his ear leaving the bar area for the lobby area at about 2. 04. 57 which is very shortly before the attack takes place. This explains why the plaintiff now says, though he never mentioned it to the Gardai, that the man who hit him was carrying a mobile phone. But the defendant says, and I accept this evidence, and accept him as an honest and credible witness overall, that his brother Darragh at that moment had rung him to say that he was outside the premises, and that he (Noel Faherty) was exiting the noisy bar area in order to reach a quieter area so that he could speak to his brother.

53. I also bear in mind and accept Noel Faherty's evidence while the footage was being viewed in court that a number of the persons who the plaintiff has assumed were part of the stag group and who are seen leaving the bar area together, and who the plaintiff says were then part of the attack group who got into a huddle to plan the attack, are not in fact part of the stag group at all.

54. The theory created by the plaintiff from his viewing of the CCTV footage is entirely speculative, relying only on inferences which I do not accept. Even without the defendant's explanations of his activity as seen on the CCTV footage, and the activities of others within the stag group, I could not accept what is simply a theory devised by the plaintiff in order to assist his case that as a matter of probability it was Noel Faherty who threw the punch which injured him so badly.

55. I understand completely the concerns that the plaintiff has about the fact that all CCTV footage except that from camera 13 disappeared very quickly after the date of the incident. Indeed, the defendant is also entitled to have been very disturbed by its absence. When he was interviewed by Sgt. MacHale one of the first things he said was that the CCTV footage would show clearly that he was not involved in the attack upon the plaintiff, or indeed involved in the fracas. I understand also the plaintiff's concerns about Garda Brendan Phillips urging him to drop the case as he would never be able to prove anything, and his apparently being told that there was an offer of money for him to drop the case. But I accept without hesitation the defendant's denial that he had anything to do with any such urgings or offer (if such occurred) when it was put to him in cross-examination. It appears that Garda Phillips was the subject of a disciplinary proceeding arising from his handling of this investigation up to the point when D/Garda MacHale was given charge of it. I can fully understand all the plaintiff's concerns in this regard. But as I have said, I am satisfied that the defendant had nothing to do with any of that.

56. In the light of these matters I cannot be satisfied that the plaintiff has proved the case against the defendant as a matter of probability. I am not satisfied as to the probability that it was the defendant who threw the punch which caused the plaintiff his injuries. His action against the defendant must fail for that reason.

57. I cannot end without expressing my very sincere sympathy to the plaintiff for the position that he finds himself in. He suffered a horrific injury as a result of a completely unprovoked attack. I can understand why he is most anxious to establish who was responsible for those injuries and to try and recover damages for his injuries and losses. This incident has had a profound effect on his life and no doubt has had a collateral effect on his family too. He has suffered a permanent injury to his jaw which has left him with numbness and other consequences which will stay with him for the rest of his life. He has also had to endure some very understandable psychological injuries which he has described. The damages which these injuries would attract if they had to be assessed would be very substantial. But before the plaintiff can be awarded those substantial damages this Court must be satisfied on the balance of probabilities that it is Noel Faherty who must pay them. I cannot make an award only on the possibility that it may have been the defendant who threw the punch. It is a matter of profound regret to me that the plaintiff will leave this Court without some form of satisfaction for this insult to his person and his life.