Neutral Citation Number: [2011] IEHC 487

THE HIGH COURT

2009 6904 P

BETWEEN

BERTIE (BARTLEY) FOLAN

PLAINTIFF

AND

MAIRTIN Ó CORRAOIN

(TRADING AS MAIRTIN Ó CORRAIN CARPENTRY)

PAUL CURLEY, THOMAS CURLEY AND

T. & P. CURLEY CONSTRUCTION (GALWAY) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Murphy delivered the 16th day of November 2011

1. Pleadings

1.1 Summons
By personal injury summons dated the 28th July, 2009, the plaintiff claimed relief for personal injuries suffered over two years earlier on the 5th April 2007, when he was an apprentice and employee of the first named defendant. The first named defendant was a roofing sub-contractor on a housing development at Carrig Linn, Loughrea, which, it was claimed, was under the control of the fourth named defendant, T. & P. Curley construction (Galway) Limited, whose directors were the second and third named defendants.

The plaintiff claimed that in the course of his employment with the first named defendant on a housing development within the control, ownership, responsibility and/or occupation of the second/third/fourth named defendants, he was required to climb a scaffold which had been improperly erected and/or maintained and did not have the facility of a ladder, causing him to fall from a considerable height onto a stone face, as consequence thereof he suffered personal injuries, loss, damage, inconvenience and expense which were claimed to be ongoing.

It was pleaded that the said personal injuries etc. were occasioned to the plaintiff by reason of the negligence, breach of duty, breach of statutory duty and breach of contract on the part of the defendants, one or all of them, their servants or agents.

Particulars were given of the failure to take adequate care of the safety of the plaintiff, to provide a safe system and a safe place of work and failure to alert the plaintiff as to the dangers posed by the condition of the scaffolding including the removal of the ladder.

In particular it was pleaded that the defendants failed to alert the plaintiff as to the dangers posed by the condition of the scaffolding including the removal of the ladder and caused and allowed, and/or permitted the plaintiff to scale such scaffold when same was missing a ladder.

1.2 Particulars of Injury
In relation to the particulars to the personal injuries it was pleaded that the plaintiff landed flat on his back and may have lost consciousness but regained it thereafter. When taken to University College Hospital Galway he complained of low back pain, torso pain and neck pain. It was pleaded that he suffered soft tissue injury to his cervical spine and lumbar spine and continues to suffer from paresthesia in both legs most of the time. Upon examination by Mr. Aidan Devitt on the 21st February, 2008, 8 months after the incident, it was noted that he had discomfort in his back together with pain in the lower lumbar region.

X-Rays on the lumbar spine taken on the 1st October, 2007, six months post, disclosed loss of normal lumbar lordosis and irregularities of the discs throughout the lumbar spine with some end plate changes.

An MRI scan taken on the 15th January, 2008 showed disc abnormalities at L1/2, L2/3, L3/4 and L5/1 which may have predated the accident which had precipitated pain.

On further review on the 9th October, 2008, eighteen months post, the plaintiff continued to describe low back pain, which had been particularly bad for the previous twelve months, in addition to pain radiating from his back to the buttocks, localising most of the pain to the upper lumbar region, particularly on the right. He also suffered from altered sensation in the lateral aspect of his right thigh.

He had not been able to return to work or to any form of sporting activity. He attended his GP on over twenty occasions since the accident. On the 26th March, 2008, he presented with a right lower back pain, with pain right down his right leg to the foot, and an associated "weird feeling" in the foot. He had insomnia associated with the symptoms. He had gained a lot of weight, was using crutches and had an antalgic gait.

On the 24th July, 2008, he presented with restricted range to movements in all plains especially in the left lateral rotation and fixation of his cervical spine and he was treated for muscle spasm for five days. He had continued to complain of back pain and said that he had become depressed again.

The development of depression on the plaintiff had also compromised his recovery in that he was unable to apply himself fully to his rehabilitative programme. Prognosis was guarded as to whether he would be able to return to a normal physical and psychological state.

2. Personal Injuries Defence

2.1 First Named Defendant
The defence of the first named defendant dated the 18th December, 2009, denied that the accident was caused and/or occurred in the manner alleged and required proof of the particulars of negligence, breach of duty and/or breach of statutory duty and that the plaintiff suffered personal injuries as a consequence of the accident and the negligence, etc, of the defendant. It assessed that the accident was caused by the negligence. of the plaintiff. The defendant relied on the failure of the plaintiff to serve a letter of claim as required by s. 8 of the Civil Liability and Courts Act 2004, within two months from the accrual of cause of the action. The letter of claim was dated the 16th July, 2007, over three months post the accident.

The ground of contributory negligence was based on the plaintiff failing to have due regard for his own safety in attempting to climb a scaffold without the aid of a ladder which he knew or ought to have known was required, failing to take any adequate steps to get another ladder to replace the absent ladder or informing the foreman of the absence of the ladder which he knew or ought to have known was necessary. The plaintiff was in breach of the Safety, Health and Welfare at Work Acts legislation.

It was denied that the plaintiff suffered as alleged.

The defendant asserted that if the plaintiff suffered or is suffering from personal injuries, the same was not caused or occasioned to the plaintiff by the accident, but derived from and was associated with the plaintiff's pre accident disposition towards depression; the pre existing arthritis in his hip; the pre existing lumbar disc irregularity and a road traffic accident in May 2005.

2.2 Defence of the Remaining Defendants
The defence of the remaining defendants delivered on the 27th May, 2010, denied the accident being caused in the manner alleged and required proof of negligence, injuries and extent of injuries. It was pleaded that the defendants were not negligent and that the accident was caused by the plaintiff's negligence. No letter, required by s. 8 of the Civil Liability and Courts Act 2004, was sent within the prescribed two month period. Particulars of the plaintiff's negligence were given.

The defendants asserted that the plaintiff had a pre accident disposition towards depression, a pre-existing arthritis in his hip, pre-existing lumbar disc irregularity and had been in a road traffic accident in May 2005.

2.3 An amended personal injuries defence of all four defendants was delivered on the 29th April, 2011, by the plaintiff on proof that the alleged accident occurred as alleged.

3. Further Particulars of Injury
Up to date particulars were given on behalf of the plaintiff on the 21st October, 2011. It was particularised that the plaintiff had persistent lower back ache, particularly on the right hand side which affected his sleep and he had "pins and needles" in both legs.

He had made efforts to improve his fitness and mobility and now played soccer locally. He had not been in a position to return to carpentry. He acknowledged that he could do light aspects of the work, but did not feel that he would be able for the heavier and any more physically demanding aspects of the job over a prolonged period. He made attempts on a couple of occasions to get back to carpentry work, but without success and he believes that this work is not suitable for him as a long term option.

He said he would have an expectation of earnings and an increased grade of €600 net per week in 2008, compared to the €400 net, cash in hand which he said he was earning at the time of the accident.

He particularised a number of courses which he had taken, including an access course to enable him to qualify for admission to the BA Degree in NUIG.

He said he could not accurately quantify his loss of earnings with ease. He had to change career as a consequence of the injuries sustained. Career change would entail his spending four to five years in full time study.

Based on his estimates, his loss of earnings for 2007 up to the end of 2009, would have been €31,200.

Particulars were given of his efforts to mitigate his loss which amounted to €9,640 from 2009 to 2011.

He said that apart from that he had not undertaken any gainful employment but helped out on the family farm at home.

4. Evidence of the Plaintiff

4.1 Evidence in Chief
The plaintiff was born on the 9th July, 1987 and was 19 on the date of the accident. He said that he had been working with the first named defendant for about three months, having started in January 2007. He had started his apprenticeship with Phase 1 on the job, Phase 2 in with FÁS in Galway and Phase 3 when he went back again to the employment of the first named defendant. It was a four year apprenticeship which would have required him to go to college in Sligo and finish the following February 2008.

He described the building site as a big housing estate where he was roofing the houses for the first named defendant which is a roofing sub-contractor. He thought that there would be about 40 houses in all, some of which were at roofing stage, others which had been roofed and others were at block laying stage. He said there was a scaffold and that he used to climb the scaffold from the outside. He said there was no ladder there most of the time. There was a shortage of ladders on the site. Block layers would have needed the ladders to finish the second floor on different houses. He said that the block layers would move the ladders and that he had only seen one ladder, or two ladders, while he was there.

On the 5th April, 2007, he was travelling with fellow workers and arrived at about 8.20am to start work on the felting of the roof at 8.30am. They were putting the felt down with batons on top before the tiles were put on the roof. Some of the felt rolls were lifted by the teleporter on a pallet. Other times they might have had to carry a roll of felt on their shoulder up the scaffold. Sometimes the batons would come on the teleporter. Other times they would stack them up against the scaffold and pull them up.

He said that Michael Conneely and Donal McDonnacha, apprentice carpenters, were on the roof with him. He was in Phase 5, Mr. McDonnacha was just starting Phase 5 and Mr. Conneely was just starting his apprenticeship.

He said that at approximately 10.00am he came down. He could not remember whether it was to go to the bathroom or to make a

phone call. He said he climbed down the side of the scaffold. There was no ladder on it. There had not been any ladder when they were going up to the roof. He said he remembered returning to the scaffold to go back up to his work and remembered climbing up the scaffold. He said that he was up over the first storey, he would say about half way up the second storey, when he lost grip and he fell off the scaffold. He was not sure whether he was unconscious or not. He said:

> "I just remember being on the ground on my back and I got up and I heard clicking noises in my back as I was standing up and then the pain started to hit me and I lay on the raft [kind of into the house]."

He said the raft was the foundation of the house. He said he had fallen onto crushed stone. He said he lay on the raft and Mr. McDonnacha came down after a while and had seen and asked him what happened. The plaintiff said he told him that he had fallen. Mr. McDonnacha said he was going to bring him to hospital and he went up and got Michael Conneeely and the three of them went to the hospital in the plaintiff's car.

He said that his employer was not on the site that morning. He was not sure when his employee was told about the fall, but said "I would say one of the lads rang him when we were on the way into hospital. I'm not really sure."

He said that he spoke to his employer that afternoon at his house in Spiddal where he had gone with his girlfriend. His employer lived about 20 miles from where he lived. He said he told his employer what had happened. He said he could not be sure whether he said to his employer at that stage anything about the ladders being missing.

He said there were three labourers who worked for the Curleys, the main contractors, who erected the scaffolding.

In relation to his use of the scaffold without any ladder he said that "we used to do it on a daily basis".

He said the week before he fell, his boss, (Mr. Ó Corraoin) had fallen from the scaffold. He did not see him fall. He said that one of his colleagues said he had fallen and he said that he saw marks on his legs from the fall and that he had carried on working.

He described being in hospital where a neck brace was put on him and he was sent for an X-ray. He said "they told me that I was badly bruised and that there was swelling, and they told me that I would be alright within a week or two and they discharged me".

He said that previously he had been in court on two occasions for assault. He had pleaded guilty in relation to the first event, a s. 3 assault. He said it was correct to say that he pleaded not guilty to the second assault that it was his position that there was no assault, but that he was convicted and he accepted this conviction.

He acknowledged that he had anger management issues and said that he was trying to deal with them. He said he did not drink and denied that he had ever taken alcohol.

He said it was right that that he had a "scrape" with the gardaí when, in 2003, he was a sixteen year old boy, in relation to driving a car he had bought without tax, insurance or a licence. He said it was right that the gardaí noticed him and chased him and that he tried to get away from them.

He agreed he was cautioned and that his father was very angry with him for that. His father knew he had a car, but he was not allowed to drive it on the road.

He agreed that it was correct to say that he had suffered from depression as a result of what had happened and that he had told one of his brothers that he thought that "there was only one way out". He said it was right that his brother had told his mother who was concerned and brought him to the GP who referred him for psychiatric treatment. He said that as far as he was concerned he got over the depression.

He said that he was involved in an accident in 2002, (then aged 15) when a car ran into the bus he was travelling in. He said he was sitting at the front of the bus and got a shake and agreed that he had hurt his back at that time. He said he had recovered from that and said that there was no claim for damages made by him in relation thereto. He agreed that he had no pains, aches or disabilities that prevented him working as a carpenter.

The plaintiff said that in climbing up the scaffold there were lugs sticking out every foot or so and that was how he had climbed up, by standing on the lugs and moving up one by one.

He identified a photograph of the scaffolding which looked more or less the same as the scaffolding he was on. He used to climb up at the back of the scaffold. He identified the point on the photograph where he was before he fell and marked the photograph with an "X". He was asked how he knew what had caused him to fall and he replied:

> "I don't know. I lost my grip. I'm not sure how I actually came off it. I lost my grip, you know."

His two colleagues were still up on the roof of the house.

He said he vaguely remembered being examined in the hospital. His mother turned up as his girlfriend had alerted her.

He said when he was talking with his employer he said that "They told me in the hospital I would be able to get back to work after, I'm not sure, it was after a few days or up to a week. They told me there was bruising."

He said that his employer paid him about four or five weeks after the accident. On the fifth week he said he went up to his employer who told him that he would give him €4,000, but he said he would have to sign some paper. The plaintiff said that his employer would pay him for a few weeks that he was off work. The plaintiff said that he had the intention of going back to work when he would feel better. His employer had said that the €4,000 would keep him going for a while. They spoke Irish. He said he went up and that his employer said that day "Tá seach le ceithre míle euro ort, and referred to "papair sign on". He said that he did not have the paper and that he did not give him the paper. He said that he told his employer he did not want to. He told him that he wanted to go back to work when he was fit to go back to work. He said he did not ever see the paper and that was the end of the discussion. His employer did not pay him after that.

(The Court was unclear whether the €4,000 had been accepted. It is unclear that was meant by the phrase "papair sign on".

When asked "an bhuil on papair agat anois" he replied "níl" and added "I didn't give him the paper" which would appear to be contrary to saying that he had never seen the paper.)

The plaintiff said he was not really sure whether he came back to his employer again the following week for wages or how his employment came to a halt. He said:

> "Its just we kind of lost contact then because he said he would give me the €4,000 and that would be it and it would keep me going because the doctors had told me at first I would be out for a few days or a few weeks, and then I was told it would be around September and he said that the €4,000 would keep me going until September, you know."

The plaintiff was asked what he said in relation to the signing of the paper. He answered:

> "I told him I wasn't signing any paper. I told him I didn't want any money. I wanted to go back to work if I could."

He said he could not remember when he first consulted his solicitor about bringing a claim. He said he did not consult a solicitor at that stage, it was afterwards.

He said he was going to his GP and into casualty regularly with bad back pain and they referred him to a physio and he went to a few physio sessions then and he had to stop it because it was too painful at the time. He said that the physiotherapist was working on his back and he said that the back pain was too sore during and afterwards.

He said he was not sure what medication he was on. He mentioned Solpadol, which he said worked for a while in easing the pain, but it would stop working and then he was also having stomach trouble. He mentioned Solpaladeine and Solpadol. He said he was on and off medication for over two years. He had very bad pain in the back - mostly in the lower back and to the right to the extent that he could not do anything at the time. It was getting him down. He was very "down in the dumps" then, he said. He was given anti depressives by the GP which he took for a few months then stopped taking them and then took them again for another few months. He was not taking them at the moment. He said he had forced himself to get active out of the house and try and stay kind of busy. He was in too much pain to do anything at the time. He said he gained an awful lot of weight and was up around 20 stone and he had gained over 4 stone. He said he started walking and had lost 2 stone and was now under 16 stone. He said he played soccer earlier this year 2011 with the local soccer club. He said he would be in pain after playing soccer and suffers that night, but if he does not keep active, the pain seems to get worse. He said he had gone swimming the odd time, but the swimming pool was too far away from him. He said he had done a scuba diving course this year as well in Leisureland and in Taradylin in Carraroe. He said he would be sore afterwards, but when he was in the water he did not feel it.

He said that he had been doing a few bits around the house and helped out with the horses and cows and had to go to the bog a few times this year also.

When asked whether he got back to the sort of activities he was accustomed to before the accident, he replied "no really, no". He used to play Gaelic football regularly before the accident and he was trying to build up to it again, but he did not feel able at the time. He played soccer because there was as not much physical contact.

He said that he did a bit of fishing as his land was on an island and he would be in a boat fairly regularly, in a currach with an engine.

He said he was out sailing in 2010 in a Galway hooker helping out.

He was asked whether he was in the currach or pull it ashore or anything like that and whether his back came against him. He replied that it causes him pain, but he felt like he had to get out of the house and do things just to stay mobile.

He said he did not feel he could work at carpentry or the heavy side of the carpentry, the roofing. He said he could do a bit of it a week and two weeks but it hurt his back and again he is in pain. He did not feel he had a choice anymore to carry on with it as a full time job.

The plaintiff described work he had done since the accident which are referred to in the updated particulars of the 21st October, 2011, referred to above.

The plaintiff explained that he was paid between €150 and €200 a week when working for the windscreen company. His employer told him he was able to work and to earn so much a week and still get his unemployment benefit. He did not get a P45 when he finished that work.

He said that he was roofing for another week and a half or about nine to ten days for a Mr. Billy Hession in June or July, 2011. He said that he was sore at night again when he lay down to go to sleep. He was in pain and would have restless nights and would be sore the day afterwards again. He said that he had hoped to go to NUIG to study Irish and history to become a secondary school teacher. The access course which was to start the following day (the 22nd October, 2011) and would go on until April or May 2012. His girlfriend was studying Arts in NUIG in first year and she hoped to be a teacher as well.

He said that the "back to education grant" would be €188 per week as distinct from the €144 which he was being paid for job seekers allowance and illness benefit which he got for nearly a year and thought that it finished in 2008 when he was "out of contributions" a year after the accident.

He denied having received training from his employer, but agreed that he had a safe pass (a certificate).

He agreed that he should have refused to go up the scaffolding where there was no ladder, but at the time he just felt like he had to do his job.

He was asked, often did he suffer from pain in the back, he replied that he had constant back ache. It was not as bad as it used to be, but it was constantly there and he had "pins and needles" in the legs. It was there throughout the day but when he lay down at night to go to sleep the pains got worse. He said he had disturbed sleep nearly every night. He said he had kind of coped with it. When he was out and about "its just you were in constant pain". It had improved. He was not under any care (from his doctor) at the moment and it was over a year going into two years since he had taken tablets on his GP's advice.

He said he had recovered from the accident referred to earlier which occurred in April 2002 (when he was 15). When asked if the pain

that he suffered from now and had suffered since the fall bore any similarity to what he suffered at the time of the accident in 2002, he said "I don't remember to be honest". He was not sure how long the pain from the 2002 accident lasted. He added: "I would say about a week or two afterwards".

He said he was not sure of the foreman's name on the day of his accident.

The plaintiff said that he was not sure how long after the accident he got his first Social Welfare payment. He said that when he went to hospital, there was talk of it being paid in September. He would say that it was three or four weeks after the accident that he applied for illness (benefit) and went to the Community Welfare Officer and put it through the motions for them. He thought he was giving him supplementary (welfare) about four weeks after the accident. That lasted for six or seven weeks and was €175, in or around that. The illness benefit then came into effect until 2008 when the contributions ran out which was at the same figure of €175 (per week). He then put in for jobseekers (allowance). He was not sure whether it was a €175 or a €196. He was on supplementary Welfare before he got jobseekers for about six weeks.

After being on the jobseekers allowance he went on an NUIG Diploma course in Irish and did the European Driving Licence for computers until May 2009. He was in receipt of €204 a week together with approximately €28 for travel. He then went back on jobseekers from May 2009 until the present.

He said he did an Aquaculture course that ran for about a year which would lead to FETAC Level 5 award. The course commenced some five weeks earlier. It would run for a year for one day a week.

He explained that he helped his father for a few days to clean out the place where he was working and did five or six days at a €100 a day in 2008 or 2009. That was the first job he had.

In April or May 2009, he worked with a friend of his for two days tiling a roof with him at €80 a day. He then referred to the windscreen from May or June 2010 to May 2011 for €150 to €200 a week depending on the number of repairs he did.

In June 2011, he worked with a Mr. Billy Hession on roof for nine days at €120 a day. He said it was a week and a half, nine or ten days he was not sure.

He was asked that if he was fully qualified the following February after the accident and what his wages would have been. He answered: "I would say they would be up on around €600 a week". Friends who were qualified were getting approximately those wages at the time.

It was put to him that the construction industry in Ireland had now collapsed and was asked what options he would have had if he were a fully qualified carpenter. He said he would have gone to Australia or Canada where he had friends. He said "some man was telling me they are getting over $2,000 a week" in Australia. He was not sure about wages in Canada.

He was asked what he had lost in terms of earnings since the fall. He replied that was not sure, to be honest. He said he would have continued working while there was work available for him. Otherwise he would have emigrated.

4.2 Cross Examination
Mr. Noel McCarthy S.C. asked the plaintiff what his father did and was told that he was a contractor for a while when he started building around 2005/2006, building houses and extensions. He would mainly get people to do the work for him until about 2009 when the work dried up. He said he used to help his father casually when he was seventeen. He had started his apprenticeship with Martin McDonagh, whom he knew to be a builder.

He had worked with Martin Devanny, a roofer, before that.

He agreed that while doing the carpentry with the master carpenter, he was also working every now and then with his father. He said he worked Saturdays with him. He said he would have been up and down scaffolds and could build scaffolding.

He was asked him who had told him to climb up and down the outside of a pole. He replied: "that's what they used to do on that site". He said he thought that is what he had to do to continue work. He said that on other sites there were ladders.

He was asked whether it was new to him, that the way to get up and down scaffolding was to use a ladder. He said he had seen this done, he had climbed up the scaffold himself on occasions, once or twice before he was on that site. He climbed it a few times, but it would not be common practice. It was suggested that this would not be bother to him. He answered: "well, I thought that at the time".

He said that they used to ask Mr. Ó Corrain, the first named defendant, where the ladder was. He asked him a few times. He agreed he had been there for about three months and was involved in about sixteen houses. Roofing with a recognised builder was part of his apprenticeship. There were also other people doing roofing. He agreed that there would be no need to have planks in the middle floor until plastering was being done. He agreed that the scaffolding had two boards and that the only thing missing was the ladder. He was asked why he did not get a ladder and he replied that there was no ladder there, it was taken that day by someone else; it was not there that day on the scaffold. He had felted a number of other houses – he was not entirely sure, maybe four, felt which had been left on as pallet having been lifted by the teleporter. They would just ask the teleporter driver to pick up a crate and put it on the scaffold.

He said he was not sure who the foreman was, he thought his name was Danny. He said he did not go to Danny looking for a ladder. He said: "we walked around and would look for the ladder and if it was not there, someone else was using it and we would climb up the scaffold".

He agreed that the foreman had no idea that he was missing a ladder because he never approached him. He said that there was no ladder there. He said he just wanted to get on with doing his work, so he "would climb up the scaffold to get up onto the roof".

He was asked whether he would be heavily criticised for not looking for or not getting a ladder. He said that: "on previous days he would look for the ladder and block theirs as somebody else would have it and on this day it was gone, so somebody else was using it".

He said that he would be on one side and the ladder could be on the other side, but he looked to the houses on the other side and

into the scaffolding and (the ladder) was not there and he just proceeded with going up the scaffold then. He said he had Mr. Ó Corraoin's mobile number. He was asked why he did not ring Mr. Ó Corraoin and replied that that is what he would have done as well. (The court notes that this was not in his direct evidence).

He said he used to see the first named defendant climb up on the scaffold. He was asked whether he himself used to do this on other sites and he said that he had done it a few times, but that there used to be a ladder mostly. Usually there was a ladder fixed to the scaffold and it did not move from the scaffold. He used that ladder every day then. He agreed that he could easily have put a ladder and tied it at the top, but there was no ladder available. He followed what was the practice.

He was referred to the photograph and said that at the time there were no broken tiles at the bottom of the scaffold. He agreed that there was nothing unusual about the ground conditions.

He said his recollection of it was that he fell on the flat of his back, he said he was not sure whether he lost any consciousness, but he did not think that he did.

He was asked whether he called for help and answered that he lay on the raft at the house and he thought he called Mr. McDonnacha. He said he went in and he just lay on the raft in the doorway, for he would say, for about four or five minutes.

He was referred to the record of the A & E Department of the hospital, which refers to "fall on back, injury back plus neck" and "18 feet off ground on scaffold, tripped and fell".

The plaintiff said he told the doctor that he slipped and fell. He said that he was neither wearing a helmet nor were helmets supplied.

He said his jumper was ripped and his t-shirt was ripped down the side and he had a scrape on his side, kind of abrasion.

It was put to him that there was no bang on his head, no cuts, bruises, cracked ribs, elbow graze which he agreed. He said that he had fallen and landed on his back. The radiologist report was put to him which referred to normal contour, ... No evidence of degenerative change or any other abnormality. . . . "no abnormality seen. Lumbar spine, the boney alignment is normal and no fracture, and there is a bit of disc space narrowing at L5/S1".

The plaintiff replied that they told him that day that there was swelling and bruising on his back inside. That is what he was told in the hospital. He was told that it would go down in a few days and he would be back in work within a week or two.

He agreed that he was discharged home on that afternoon. He had no injuries that warranted admission to hospital after a fall of some 18 feet on what could only be described as rough ground. He again replied that "they told me I had swelling and bruising and they told me I would be alright after a few days. I took their word for it and I went".

He was referred to the PIAB form question which asked him to describe the circumstances of the accident where it was replied: "fell from scaffolding onto his back from a considerable height".

It was put to him that he said that he injured his head, his back and his neck. He said it was just his back and his neck. He said he was assisted in filling the PIAB form in, and that he would have skimmed over it. He said he never suffered from an injury to his head.

He said he did not know that his claim at that stage was for around €30,000. He was not sure that that is what he reckoned he had lost up to August 2008.

He said it was agreed that his boss had paid him for a number of weeks. He said that he was being paid before he fell and agreed that it was fair.

It was put to him that he was getting monies from the Department of Social Welfare and also getting money from his boss. He replied that his boss said he would pay him for six weeks anyway and that there was talk of coming back to work in September. He said he went in and applied for social welfare at the time. He was not sure of the date or anything like that, but he went and put in for it.

He agreed that he could have gotten a cheque from Social Welfare while (his boss was paying him). He said he was getting €175 from the former and €400 from the latter. He was asked whether there was an overlap and he said he could have got one or two social welfare payments but he was not sure. He did not give the money back to Social Welfare, but kept it.

He said he was not sure whether a doctor would give evidence that he could not go back to work. He said he was with a lot of doctors at that time and had been in A & E a few times, but did not know the number of times. He said that a doctor had told him that it would be around September before he could go back to work. That is what he told his boss and he said that was fine.

Mr. McCarthy S.C. continuing his cross examination asked if all the X-rays were clear and that he was not detained and was discharged from hospital on the afternoon of the accident, that his GP then took care of him.

He said he did not have to produce certificates for not turning up to work. He said it was right to say that he would turn up as soon as he was medically fit and that he was being treated on anti inflammatory medication which was prescribed in the hospital. He could not remember the name of the chemists that dispensed it nor how many times the prescription was renewed, but that it was over the course of two years up to late 2009 or early 2010.

He said he had physiotherapy with Kieran Byrne in Carraroe for a month or two after the accident over six or seven sessions over a couple of months which did not take him up to September. He said he knew that, but the symptoms were too bad at this stage, and he had to stop the physio. He said that the physio suggested that "we would stop, because she was hurting me". He had no physio at all since those few sessions in May or June of 2007. He said he was put on a waiting list, but was never called. He agreed that his employer had stopped paying him and offered him €4,000 because it was going to take that length before he could get back to work. (The court observes that at €400 per week, this sum would have been in respect of ten weeks).

It was put to the plaintiff that he rejected that. He replied that he told the first named defendant that he would prefer to get back to work. He said that he thought he could get back to work sooner than September. He agreed that he was taking money from social welfare on the understanding he would be out until September and was not entirely clear about the dates he started getting it.

The witness replied he was not sure, if the papers were an indemnity, he did not see the paper. It was further put to him that he

must have been tempted at the sight of €4,000. He answered he would rather have gone back working. He said that first named defendant said he would pay him for six weeks but paid him until four weeks and it was on the fourth week that he had offered him €4,000. He said he had hoped to get back to work before September, which he agreed was given as a target date.

He was then asked why he issued the letter claiming damages in June 2009 and he answered because things were getting worse, he was in pain, he sought solicitor's advice and acted on that advice.

He disagreed with the suggestion that if he held out for a bit more, that he would get more from his employer.

He was asked what he was doing during the day and he said: "nothing to be honest. I was just back and forth between home and the girlfriend's place and I was not doing anything really." He agreed that he was looking after the horses at his own place. He had two horses and his father had a few at the time as well, they were Connemara mares.

Mr. Folan said that his was the inspections at the Costello Horse Fair after the accident. That involved showing one's horse and getting it inspected and graded before the members of the Connemara Breeders Association by marching the horse up and down. He agreed that it also involved running up and down to show off the pony's gait so that the veteran surgeon would pass it. He agreed that he was running up and down with the grown animal on a trot.

He was asked whether he had no problem doing this a few weeks after the accident. Mr. Folan said that he was pain doing it that he had to get his horse inspected at the time and they always did it themselves.

He disagreed that this was not consistent with the man who could not work. He said his father was with him. He said he was in pain afterwards. He was asked why his father did not do this and he said his father had his own horse and he had his there. He believed that it was in May or June 2007 which was a month after the accident. He said he had look after his own animals. He said he did not tell not tell any of his doctors about that. He said he did not go to any shows with the pony.

He said his family had about 50 acres in total which were found and the land was not great. His mare had a foal in 2008 or 2009. He said he would not be buying and selling but he would give his mother a hand. He said the horses would be used to having a bridle on them though some of them might not be used to having it on them all the time and they would jump about a bit.

He agreed that in January 2008 he was taken off disability and put on jobseekers allowance. He agreed that to get jobseekers allowance one had to be available for work. The community welfare officer told him to go on to unemployment benefit because he wouldn't get disability allowance. He said he was not calling the community welfare officer to give evidence. He said that he had been on unemployment assistance since.

He was asked what jobs he had looked for or tried to get since 2008 and he referred to the ECDL computer course and the diploma in Irish and put CVs in to a lot of places to do administration. He didn't have a copy of any of those applications. He didn't think anything of it – he just posted his CVs to a lot of places.

He said there was a bit of work going on in carpentry in 2008. He agreed it was not looking as good towards the end of 2008. He agreed that "at the time he would have been able to work out his entire apprenticeship with Mairtin Ó Corraoin" but added, when asked by the court, at what time, that that was before the accident.

He did not think that his job might be in some jeopardy, nor had he heard that he was going to be laid off.

He said the course finished in May 2009 and that he applied for work after the course. He said he did not apply for work at all in 2008 because he didn't have the skills to do administration work or anything like that.

He said he worked cleaning out buildings for a few days in 2008. He was asked whether he was telling the court that he couldn't do any other work while he was working these animals and working for his father. He replied that he could not do the carpentry work. He was working but was in pain in every night after doing it and in pain while he was doing it. He said:-

> "I was constantly in pain. I was trying to force myself to get out of the house and trying to back into the swing of things".

He said that the family had a bog land but he was not sure how much he was allowed to work. He said his father had cattle as well and that he gave him a hand with them. They had not cut turf until the previous year, 2010 and this year 2011. He added that it was only maybe one day every two weeks or a few hours up on the bog every time he would go up.

He said he was waiting to get the course done so he could have skills to do something and drawing unemployment assistance while he was available to work. He had not been back to the physiotherapist in 2008 and was not sure what medication he was taking in 2008.

He started back with the football club, Naoimh Bricken, in 2011. He said when he was active he was in less pain and his aim was to go back playing Gaelic football.

He agreed that it was correct, up-dated particulars given almost two years after the accident that he had worked for his father for five days at €120. He said it could have been in 2008.

He was referred to his affidavit of verification which stated that he had nothing in 2007 and in 2008, but in 2009, was given work by Michael Folan (his father). He said that he had started the job with his father in 2008 which ran over a year and worked with him a few days, about five days in total altogether. Some of those days could have been in 2008, some in 2009, he was not entirely sure. He said he had worked with Aidan Lynch in two days in May (2010) when Aidan Lynch wanted help in finishing a roof. He added that he was back roofing for two days and that it "killed him" to do it. He was asked whether he told his doctor this and he said he did not go to the doctor, that he had stopped medication and was trying to rehabilitate and wanted to improve, wanted to get back roofing. He was helping out with cows and horses and, asked whether he was the registered breeder, he said he didn't know that his name was on the book and supposed that the answer to that was yes.

He described the full-time job with a windscreen Repair Company in 2010, where he worked from 9am to 5pm or 6pm, though if it rained he would go home early. It was not continuous work and it wasn't heavy work. He was paid between €150 and €200 a week for 50 weeks.

He agreed that he was not registered and could not get any form of record of the monies that were paid and that he was paid up to €150. He added that sometimes he would get €200. He agreed that he was getting unemployment assistance. He was not blaming his boss who told him that he was allowed to work up to €200 and keep his dole. That is the agreement he had with them. He assumed that is the way it worked.

He said he was going to the doctor because his back was bad and agreed that he was in pain every day. It was dull ache and not as bad as it was at first.

It was put to him that in October 2008 he visited Dr. Harty, his G.P., for the last time, that there were a number of visits in 2007 and seven in 2008. He said he was not sure. Dr. Harty had advised him to come off the tablets, if he could and that the sooner he could get off them and tried to force himself to come off them and tried to get active and fit, it would help his recovery.

He was asked why he had used crutches in 2008 and he said he had crutches himself at a time when his back was really bad. He had got them of his friend Aidan, for whom he had done work in 2010. He was using the crutches going into the doctor. He agreed that he was able to work but he was not able to do carpentry. He was able to do it for a while but then he was not able to do it as a long term job. He said "it just kills me too much". He agreed that there was no carpentry work out there, no building or roof work but said that he could have gone to Australia. He agreed that he did not apply nor tell his doctor that he wanted to go to Australia. He agreed that he had been roofing with Billy Hession for nine days.

It was put to him if there had not been cut backs he would still be working and getting paid and getting money of the dole. He said he would have taken the work, yes.

The Court asked him whether this would include have social welfare. He said that if it came to full-time work he would go on full-time and would go on whatever one had to do, he would have done it. When pressed by Mr. McCarthy, he agreed.

He was asked about his brushes with the law and referred to the 2005 and 2007 incidents in respect of which he pleaded guilty and not guilty to the second act which involved an allegation that he hit someone in a pub in 2010. He said he didn't drink nor did he hit him, but agreed that the Court did not believe his sworn evidence.

He said he was able to use the currach which had an engine.

He was asked about hooker racing and said that in 2010 that he wanted to get active and was starting to feel better, he went in the hooker races from June to August. He agreed that the hooker was a heavy boat and had no engine and involved pulling sheets, raising and lowering sails and effectively re-buffeted around by the wind.

He was asked whether one would have to be fit man for that and said "not really, no".

He said he went into the hooker races a few times and said it could have happened that he raced against his former boss Mairtin (Ó Corraoin) and that Mr. Ó Corraoin's boat beat his boat.

He said that everyone helps each other on the boat. He said it hurt when he did it but he had to do it, he did not want to be down again. He wanted to go out and about and wanted to be fit, get active and get mobile and he wanted to go back working and improve the best he could.

He was asked whether he was looking for loss of earnings from the date of the accident up to the present. He replied that he had not been able to get back doing the carpentry job he had left school to do and that is why he was training to be a teacher. He would be working in Australia or Canada if he could do the carpentry. He said he felt that he could not do it as a career anymore over a long period of time, because it got to him and hurt his back. He was always in pain after it. He had tried it and now he had to look and try something different and that is why he was going back to college.

He denied that he had not fallen and that he had fallen from around that height.

He was asked that if he had fallen from such a height, he would have had more serious injuries. He replied that he had marked the scaffold where his hands were and that when he came around he was flat on his back. (Mr. Folan did not answer nor explain why he had not suffered more serious injuries).

He was asked about his scuba diving and the questionnaire which he agreed he filled out for the PADI course.

One of the questions raised was about back or spinal recurrent problems.

He agreed that he filled in the medical statement to say that he was able to do scuba diving.

It was put to him that he was able to lift tanks, scuba dive, race boats, work for an entire year full time with windscreens, able to work with some roofing with Billy Hession and get paid unemployment benefit and yet tried to claim for loss of earnings. He replied that the course was one day over a few months.

He said that he had seen Mr. Mackie, the consultant in October, 2009 and October 2010 and October 2011. Mr. Mackie reported:-

> "I detect no particular orthopaedic injury which would about rule a satisfactory recovery in due time."

Mr. Folan replied that he tried carpentry on a number of occasions and he had improved, he had improved greatly.

It was put to him that the MRI scan confirmed that there was no disc prolapse.

The court allowed re-examination by Mr. Jordan S.C. in relation to the PADI course. Mr. Folan said that he was not sure if he recollected getting the form as there was so many forms. He agreed that he signed whatever he was asked to sign before he started the course. He was asked whether he remembered there being a question about his back condition. He replied that he did not remember it to be honest.

In further cross examination by Mr. McCarthy S.C, he was asked to deal with the photographs introduced previously at the place where his co-worker pointed out to the insurance man, that the fall had taken place.

He was asked to point out where he had gone to look for a ladder and he replied that he would have gone down at the front of the house, but he did not know if the blocks were complete there but they had started on it and he moved along there. He just looked along for the ladder. He added "I just quickly looked". He did not know if his colleagues had looked because he would say that one of them was gone or maybe two of them were gone putting the felt on the teleporter. In the morning where they started, they were all on the ground and eventually went up.

It was put to him that there was a ladder at the site of the place across the avenue. Mr. Folan said he was not sure, like he said, he looked along those houses.

He was asked whether he had a problem with his hip in 1997, when he went to see Mr. Michael Gilmore. He said he could not remember as he was only ten years old and he did not remember Michael Gilmore.

He said he had not been interviewed in relation to being on unemployment assistance since the 7th January, 2008, as to why he was not back at work.

He described the equipment he was wearing for scuba diving EBCD and regs, and points he controlled device and a weight built.

He was referred specifically to the questions on the questionnaire regarding past or present medical history which required to be answered with a yea or no and if not sure to answer yes. If any of those items applied to the diver he was requested to consult with a physician prior to participating in scuba diving. He agreed that his GP, Dr. Harty, had not heard of him since March 2010. He said he did not go to any doctor. He was not sure if he signed the (form), but he signed forms for the dive school. He was not sure what he signed or what they were. He said he had tried to get the documents. He did not remember the questions. He said he could have filled it and he was not arguing with that. He added that he had told one of the instructors, Paul Holland, that he had hurt his back previously. He added that Paul Holland had told him that he had broken his back and he was diving. When asked whether Mr. Holland would give evidence, Mr. Folan said that they were trying to contact him. Counsel for Mr. Folan said they did not have him as a witness.

He added that when he told him that he had hurt his back, Mr. Holland said that it would not be a problem.

It was put to Mr. Folan that he did not have recurrent back problems when he filled in the questionnaire.

He replied: "I have constant back pain. Now it is not as bad as it used to be but I do have it, and like I said, I spoke to Mr. Holland and his words were that he had hurt his back". (This is inconsistent with saying that he had broken his back, rather than hurt his back. He repeated that "he had told me that he had hurt his back and it would not be a problem).

He admitted that it could be true that what he told him was completely different to what he signed in the form.

It was put to the plaintiff that if he had a bad back he would not have been let into the water unless he went back to Dr. Harty to be medically checked out, because otherwise he would be exposing his instructors to a huge risk, that he could sue them. He answered:-

> "I know that, like I said, I could not have put "no" down on it. I'm not entirely sure. I'm trying to get a medical statement to show you so you know what is written down on it."

He said that he had improved, he was not saying he had not improved. It was put to him that up to the previous Friday before the trial, he had been looking for compensation into the future on the basis of having been unable to work as a carpenter. That claim was being made that he had not worked.

He said that he did not know what the figure was that he had earned.

He said he would work from whichever way he would have to work. His boss had told him in the windscreen job that he was allowed to earn so much a week.

Mr. Folan was asked by the court what the weight of the oxygen cylinder was. He replied he was not sure what the weight of it was. He would say that the whole gear would be about 3 or 4 stone and added that when you are in the water it was weightless. You do not feel any weight on you when you are in the water. The heaviest part would be the lead belt. He said that he puts the gear on as you are going towards the water.

5. Medical Evidence

5.1 Mr. Steven Young's report of the 26th September, 2009, two years and five months after the incident, said that the plaintiff had told him that he had lost his grip when he was two stories up on the scaffold and had severe back pain and was unable to return to work. He told Mr. Young that any exertion provoked pain.

Mr Young noted that he walked with a limp and bent posture.

An MRI scan showed degenerative changes.

He diagnosed the injuries as soft tissue, muscular skeletal chronic change in muscles. No surgery was indicated, but pain management was required. He noted that there was no mention of a limp by the GP nor could he see any reason for the limp.

He said that if there had been an 18ft fall on his back it was remarkable that he did not have more serious injuries. Admission would be mandatory after a fall like that. His treatment of 5 to 7 sessions of physio indicated soft tissue injury which was more consistent with a lower fall.

In relation to the future, he could not see any reason for Mr. Folan not to return to work. In cross examination he said that a fall on the back even if 15ft to 16ft would be considerable and would cause bruising to the back.

Dr. Harty, Mr. Folan's general practitioner knew him from 1985, and described him as quite hardworking.

He saw him on the 11th April, 2000, after his fall on the 5th April. He said he had constant pain in his back and neck and pins and needles in his leg.

He did not give details of the fall.

In his report dated the 1st October, 2008, to the plaintiff's solicitors he found, on examination on the 11th April, 2007, he had pain on extremes of all movements of his neck.

He concluded that he had sustained significant muscular skeletal injuries without evidence of boney injury. He had attended a chartered physiotherapist on a number of occasions. He had attended an orthopaedic clinic on three occasions. His x-rays and MRI scan showed degenerative changes in his lumbar spine. He had degenerative disc diseases in L3/4, L4/5 and L5 SI areas. He had suffered from moderate to severe depressive symptoms as a result of the accident and had been on medication on an intermittent basis since the accident. It was then almost eighteen months since the accident. In that period of time he had suffered severe pain in his back and legs associated with the accident, the treatment of which had been compromised because of his inability to take anti inflammatory drugs. The development of depression, Mr. Folan has also compromised his recovery in that he has been unable to apply himself fully to his rehabilitive programme. Eventually Mr. Young hoped that his symptoms would settle and that he should be free of pain. However, he has marked degenerative disc disease for one so young and Mr. Young felt that he would be subject to bouts to low back pain in the future, particularly of a barometric nature and especially if he continues in work in the construction industry. Because of his protracted history of pain and depression, he felt that his prognosis for a complete return to a normal physical and psychological state must be guarded.

In cross examination he said he was not aware of the plaintiff's conviction for assault and if he had been aware he would have changed his opinion. He assumed that he fell two stories, but he did not ask what he fell on. He had found no bruising abrasions or lacerations and agreed that he would not have given a clean bill of health at the Accident and Emergency Department of the hospital. There was no complaint of injury to his head nor any lacerations. He could not explain why he had no head injury. There was no objective sign of boney injury. The only sign was that he could not bend forward. He agreed that he could not objectively verify a lack of movement. He said he did not carry out an examination of muscle wasting, but did not observe any. Mr. Folan had suggested pain of 9 out of 10 but was taking a lower form of analgesic up to the 20th December, 2007, when he presented with low mood requiring anti depressants.

In March 2008, he stopped the anti depressants. He presented with right lower back pain and was pain free before that. He presented with crutches. That was the first time Mr. Young observed his gait.

It was put to him that Mr. Young said in his report that there was no evidence of disc lesion not prolapse or nerve entrapment. He agreed that there was no reason for deterioration into the future.

He agreed that there was soft tissue injury, but he advised him to be careful because of the disc problem.

He said that Mr. Folan did not inform that in 2007/2008 he was feeding cattle and lifting hay. He thought he would not be able to do that. However, he said that he would be advised to exercise.

He said that he had seen him on several occasions over three plus years and the last occasion was eighteen months beforehand and he had not seen him since.

He agreed that he had come back to normal if he was scuba diving and playing some football. If he was involved in regattas in 2010 with the Galway hooker he would say that he had made a good recovery.

5.2 Dr. O'Gorman's report of the 24th February, 2011, three years and ten months after the incident related that Mr. Folan fallen backwards approximately two stories by working the scaffold onto the stone surface and landed flat on his back. This caused the onset of painful symptoms which reduced the quality of life secondary to pain and reduced mobility. Dr. Gorman concluded that Mr. Folan reported the onset of his painful symptoms subsequent to his work related injury. His clinical history and examination appeared too consistent with pain secondary to the incident as described. He did report previous history of depression, which was treated by his GP and subsequently his progress was excellent. Unfortunately his symptoms had deteriorated since the accident and this would be most likely related to the impact that the accident had on his life. Given the duration of time since his accident and the persistence of his symptoms, despite ongoing medical management, Mr. O'Gorman believed that it was likely that Mr. Folan would continue to suffer from pain in the long term. He would have to exercise caution in relation to heavy physical activity and prolonged repetitive activity which might have an impact on his ability to perform the duties required as a carpenter.

In cross examination, Dr. O'Gorman said that he had no discussions with Dr. Harty, but most likely would have written to Dr. Davitt. He agreed that the x-rays were clear and there was no neck nor thoracic lumbar spine injury and Mr. Folan was discharged from hospital. He agreed that the changes seen on the MRI were not referable to the accident. He said that Dr. Harty had sent him to Dr. Davitt. Mr. Folan had six sessions of physiotherapy. He was taking over the counter drugs.

He said his gait was normal and there was no complaint of limping.

He agreed that Mr. Folan had not mentioned farming nor horses, sailing or scuba diving. He was surprised at the level of activity which was not disclosed to him. He would encourage activities and would encourage patients to work and continue interests.

It was put to him that he was the last doctor that Mr. Folan had seen on the 3rd September, 2010. Dr. O'Gorman said that he was dealing with what the patient had told him. He was asked whether the injury was subjective. He said that a patient gives a history and the doctor examines by way of snapshot. He had reported pain on bending and flexing notably.

It was put to him that in June 2011, the plaintiff was back roofing on and off. Dr. O'Gorman felt that it was good that he was able to work, but it would depend on how he felt after that. He had not examined him since. The issue was whether he could do that until retirement age and how he felt and was able to hold on to work.

6. Evidence of the Plaintiff's Mother

Agnes Folan, the plaintiff's mother had brought him to Dr. Harty regarding the depression. She wanted him to continue in education, but he wanted to do carpentry after the Junior Cert. He did a FÁS course.

He said that on the day of the incident, his girlfriend had called him to say that he had fallen from the scaffold and was in the Regional Hospital in an A&E cubicle. His neck was in a head brace, he looked to be in pain and was told not to move. He was there for two and a half to three hours.

For the past two years he had been living with his parents.

She said that after the accident he was depressed and in pain all of the time. He was always the one to help at home and tried hard. He started going to the gym and scuba diving to lose some weight.

She said he was in pain especially at night time. He could not handle the boat and go for a walk for ten minutes. For the first year he was not himself, he was upset. In the second year he improved and looked for odd jobs. He was better mentally and got the windscreen repairing job.

She said that he would like to do an access course to NUIG as he would not be able to do carpentry. If he was fit he could go back to carpentry. Many of his friends had gone to Australia as carpenters and plumbers and labouring. His girlfriend would like to go there, she said.

He was helpful at home when her husband was ill and he did housework.

In cross examination she said that he was helping out at the farm as the running of the farm had been left to her and to him. He had two or three horses, three cows and a few calves on the mainland and 36 acres on an island, which they had rented.

She said that he would help out with her husband's building business in 2005/2006.

She said that her son managed the farm as he could handle the boat to get to the island farm.

He had his own van and was driving afterwards.

She said he should not have been discharged (from hospital). She said "he was in bed most of the time and in pain all of the time". She did not speak to the GP.

She said that since March 2010, he had not gone to the GP.

She wanted him to go to college. She did not want him to do carpentry. His girlfriend was living with him at the moment and would help out at home. She said that the plaintiff played an important role at home. She was not sure what jobs he had applied for. She said that he did not get in touch with the first named defendant, but knew of him. She said he had worked felting roofs for nine days - he could have completed the FÁS course – but there was no work on site.

She said he had not been seen by the medical doctors or physiotherapists since March 2010.

She agreed that he had improved greatly, but was not back to his pre-accident state.

7. Consideration of Plaintiff's Evidence
At the close of the plaintiff's evidence, Mr. McCarthy S.C. applied for a direction as detailed below.

The court is of the view that it is appropriate to consider the plaintiff's own evidence at this stage.

At the outset, the court is conscious of the absence of corroboration in relation to the circumstances of the plaintiff's fall. His two companions who were working with him on the roof, before he left, either to make a telephone call or to answer a call of nature did not give evidence.

> Indeed, the plaintiff's own evidence is unclear as to why he came down from the roof. No evidence was given in relation to him calling for help whether he was unconscious or dazed, or how long he was on the ground or on the raft or doorway.

His account of his injuries were of pain and a click that he gave no evidence of discomfiture in the journey to hospital in Galway.

What is clear, however, is the evidence of the hospital when he did arrive. These were not regarded as serious enough to require the plaintiff to stay overnight in hospital.

The court has also had regard to the time it took to consult the GP, who did give evidence and to the fact that there had been no visit to the GP after the 7th August, 2008, a period of over three years before the trial of the action.

The court is satisfied that the injuries received from the fall were relatively minor in nature. It is likely, on the balance of probabilities, that the fall could have been from the height claimed. Even if this were so, the injuries he received as he landed on his back were not consistent with a fall from such a height. The A&E deemed the plaintiff's injuries as not requiring hospitalisation and that he would recover in a week or two. To the extent that further medical intervention was sought, it would appear that this was more for forensic than for therapeutic purposes. That the plaintiff's GP had advised that he exercise, but it would appear that this advice was neglected or delayed.

The court has difficulty with the plaintiff's evidence regarding the cessation of physiotherapy. No evidence was given by the physiotherapist. To say that the treatment caused soreness, is on the balance of probabilities, unlikely. He is unclear why the plaintiff ceased having physiotherapy.

The evidence in relation to weight gain may, indeed, have many causes. However it does seem to the court that this was a contributing factor to the plaintiff's deteriorating condition. The pre-existing disposition to depression was indicated, by the medical specialist, to have also been a factor.

In his evidence to the court, the plaintiff said that he was in constant pain. In cross examination, however, he said that had improved.

His use of crutches and an affected limp at a consultation can only be interpreted as a deliberate attempt to exaggerate his symptoms.

The evidence of his medical witnesses in cross examination was clear, they relied to a great extent on the history given to them by

the plaintiff in giving a snapshot at the time of consultation.

The court must also consider the effect of the recession in the building trade as a factor in the plaintiff not finishing the final year of the apprenticeship. Given the work he had undertaken since his accident as evidenced by the updated particulars of the 21st October, 2011, he should have had no difficulty in completing his apprenticeship. The reference by the consultants of this action being a factor militating against his recovery is noted.

The court has to assess the credibility of the plaintiff in relation to the evidence which he gave. In this regard the court relies on the compendious statement of Lord Pearce in the Hose of Lords in *Onassis v. Vergottis* [1968] 2 Lloyd's Rep. 403 at 431, in what was a dissenting speech:-

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

Having heard the plaintiff's evidence it seems to me that he is a truthful person, but that he may be telling something less than the truth on the issue of his fall and, more importantly, on the deterioration of his health since the fall.

There was no evidence of the plaintiff discussing the matter with others, but the court is of the view that his recollection may have subsequently been altered by unconscious bias or, indeed, wishful thinking and influence by a degree of depression resulting from the downturn in the construction industry. The court notes, though precise evidence was not given in relation thereto, that the building site where he worked remained incomplete. The court also did not believe that there had been of critical importance that the plaintiff did not seek to complete his apprenticeship doing lighter work or, when indeed he was doing some temporary roofing, to use that to complete his last year of apprenticeship. It seems to this Court more probable that the reason why he did not do so was because of lack of prospects.

His evidence in relation to seeking work in Australia or Canada as a carpenter seems to me to fall into the category of wishful thinking. No evidence was given at any attempt to seek work abroad.

The court is of the view that, in this case, the plaintiff's memory did become fainter to the point of not being able to recollect the circumstances of the fall, while at the same time he attempted to relate his subsequent lack of wellbeing with that incident.

The court is of the view that the evidence of what was taken down in writing immediately after the accident in the hospital is preferable.

In this regard the court has to consider the specialist medial evidence.

8. Application for Direction
Mr. McCarthy S. C. sought a direction on behalf of the defendants stating that, if such direction were declined, he would adduce evidence.

He said that there were no witnesses to the accident and that a fall from 18ft was improbable given the plaintiff's evidence that he fell on his back and had not suffered any abrasions or bruising. The evidence of his t-shirt being ripped on the left hand side without any evidence of the cause is inconclusive. No evidence was given by either of his companions, Michael Conneely and Donal McDonnacha.

The plaintiff's claim was for loss of earnings to date and into the future including loss of earnings in attending NUIG to change career which was not justified.

Counsel queried whether the plaintiff was telling it as it happened and whether he was receiving unemployment assistance from the 7th January, 2008.

Counsel referring to the replies to the notice of particulars said that the plaintiff was exaggerating his injuries and his claim and referred to the *Carmello v. Casey and Another* [2007] I.E.H.C. 362 decision where Peart J. dismissed a claim for lack of disclosure of an intervening accident under s. 26 of the Civil Liability and Courts Act, 2004.

In *Carmello*, the plaintiff had not disclosed an intervening accident caused by the fall of a tree branch on his face, which was a significant increase in injury suffered in a car accident. Peart J. dismissed his claim.

Counsel referred to s. 26 of the Civil Liability and Courts Act 2004.

That section provides as follows:

> "26(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that –
>
> (a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

The court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that –

(a) is false or misleading in any material respect, and

(b) that he or she knew to be false or misleading when swearing the affidavit

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

(4) This section applies to personal injuries actions –

(a) brought on or after the commencement of this section, and

(b) pending on the date of such commencement."

Mr. Jordan S.C. in reply referred to the Accident and Emergency Department in the Regional Hospital in Galway having placed a head brace on the plaintiff. There was a prima facie case of injuries which was consistent with the evidence.

There was an absence of a ladder when the safety code provided that there should be one secured to scaffolding and lack of supervisions.

He referred to the updated particulars.

He said that the medical reports had been admitted.

The plaintiff had suffered pain from the incident.

The court decided that it would not, at that time, make a direction that the defendants were entitled to dismiss the plaintiff's claim at that stage.

In *Mary Farrell v Dublin Bus* [2010] I.E.H.C. 327, the court adopted the standard proof in respect of a finding in civil proceedings as the appropriate standard of proof to prove that a plaintiff had knowingly given or adduced false or misleading evidence for the purpose of s. 26 of the 2004 Act. A high probability was necessary.

Henchy J. in *Bonco Ambrosiano SPA v. Ansbacker* [1987] I.L.R.M. 669, held that:

> "If the court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find."

In *Higgins v Caldark Limited and Michael Quigley* (Unreported, High Court, Quirke J. 18th November, 2010), the plaintiff's brother through the first named defendant paid him €40,000 even when the plaintiff was disabled which the plaintiff failed to disclose in those affidavit of verification. The court found that it was highly probable he knew of this when he swore that affidavit. The court also found that the claims advanced on behalf of the plaintiff were largely based upon false and misleading information which the plaintiff gave and so knew.

Notwithstanding that, the court decided, at that stage, to proceed to give direction at the close of the plaintiff's case and the defendant proceeded with the evidence of Dr. Larkin. The reports of Mr. Mackey and Mr. Gilmore were agreed.

9. Defendant's Case.
No evidence was given by any of the defendants.

Dr. Larkin GP for Galway said that the sole complaint of the plaintiff in 2011 was to his back. The plaintiff had told him that he got up immediately, snagged his clothing on the way down and had scratches to his back. He stated that he was able to "jump up" right way. Mr. Folan stated that the sole injury sustained was to the lower back. He denied any injuries to his face, head or limbs. He stated there was no loss of consciousness. He stated that the sustained a small scrape/abrasion to the right flank (above the hip) which healed within a week. He stated that his overlying clothing (ie. hoodie and shirt) were torn.

The A&E notes made no reference to scratches. Dr. Larkin accepted that there should have been a complaint made to the GP and was surprised that it was not mentioned before.

He was asked about the plaintiff's work and absences. He said the plaintiff told him that he had been out of work since the accident and would have done bits of work at home. He did not say he had worked with Autoglass or that he was felting roofs or dealing cattle and horses.

He referred to the previous injuries in a car accident where the plaintiff had back injuries which cleared up quickly, within weeks.

He described the plaintiff's "flat" behaviour with depression.

He had an aspiration to get back to GAA through a limited amount of soccer.

He did not say that he was sailing in 2010, or scuba diving in 2011. He implied that he was unable to do it.

He said that if he had known that he had been felting and roofing and helping out with cattle and horses, he would have changed his opinion very significantly.

Dr. Larkin's clinical findings were that the plaintiff had what he termed to be "flat affect". He was able to touch his toes, but did not seem to be handling his injury. There was no deficit seen in the neurological examination. The witness did not have access to the MRI of the 27th April, 2009, where Dr. Young described the L3/4 and L5/S4 where there was no evidence of nerve root or spinal cord compression.

In his report Dr. Larkin had referred to the plaintiff stating that it was heard to find any work in his area due to the economic downturn.

He had complained of a constant dull ache in the lower back which he located to the mid lumbar region centrally and to the right to mid line. He said that he found his lower back symptoms were worse when he lay down to go to bed. This interfered with his sleep and while he used to be in bed around 11.00pm he now stays up until 1.00am and is usually rising again by 5.30am stating that once he wakes up in the mornings he has to get up right away otherwise his lower back symptoms worsen.

Dr. Larkin's clinical finding was that the plaintiff presented as a pleasant and cooperative young man whose effect was slightly flat. Examination revealed central obesity. Where mental health was mild as was bending-kneeling-squatting, standing and walking lifting was moderate and standing and climbing stairs was normal.

Anticipated treatment required in the future was regular application to this home exercise routine as well as a general conditioning and weight loss programme with specific focus on his core musculature. On the second test his lifting was then normal rather than moderate.

In his evidence he said that the injuries were not consistent with the accident which appeared to be broken fall. He had relied from 70% to 80% on the history given to him and on 10% to 15% on the examination and the remainder on tests.

He said that a plaintiff's false or misleading history of complaints can have a huge effect on, and can mislead, a clinical examiner who needs to know a patient over time to get a more accurate picture.

If the plaintiff were sailing and scuba diving and roofing that would give a totally different story and would indicate functional recovery.

He said the MRI scan was no different to the general population and might not be symptomatic.

As fall such as indicated would result in a terminal velocity of some 15mph and one would expect bruising and broken ribs, smaller bones or a secondary blow to the occipital. He said that a patent would not be comfortable after such a fall while he noted that the A&E report said "looks comfortable".

In cross examination he agreed that the GP seeing a patient over time is better than a GP seeing a patient once. He had to see and review the reports of other doctors. What he heard given in evidence at the hearing made him review his opinion of the independent medical reports. He says he was independent and he examined the patient for one to one and half hours on the 22nd September, 2011. He said he clearly asked the plaintiff if he had not returned to work because of the accident and economic circumstances and he had replied that it was "hard to find work in this area".

He said that the plaintiff's mother's evidence did not accord with the nurse's evaluation.

10. Agreed Medical Reports.
The reports of Mr. Mackey dated the 1st October, 2009, the 7th October, 2010 and the 17th October, 2011, and that of Mr. Gilmore of the 22nd September 2011, were considered.

Mr. Mackey stated that it was agreed that the MRI scan was showing irregularities of the discs throughout the lumbar spine and then the pitch changes predated his fall and there was no evidence of disc carneation or nerve root entrapment. He said that the limping gait had now almost become a habit for the plaintiff.

He said that the meralgia parasthetica, the entrapment of the nerve at his pelvis, was not directly because of the injury (he landed on his back. The nerve was on the frontal pelvis). The continuing pain came about because of the plaintiff's weight increase to 19 stone which put pressure on the small nerve. Further weight reduction would help relieve it.

He concluded in his first report that he could detect no particular orthopaedic injury which would out rule a satisfactory recovery through time and noted that the recommendation of exercise and gym activity had not happened to the date of his report on the 1st October, 2009. He also said that the presence of the claim was probably not helping the situation.

In his assessment of the 7th October, 2010 the plaintiff said that he had not tried to return to his carpentry training and, nearly four since the fall, he had not been able to get back to it. Regarding his neck, he claimed that he was in "pain every day" and that his lower back, the more significant complaint, if anything was worse. Mr. Mackey said that the plaintiff had made substantial recovery from the fall. No doubt he had complaints at his neck and lower back, but these were essentially related to his overweight state and lack of any effective rehabilitation.

Mr. Gilmore, consulting orthopaedic surgeon in his report of the 26th April 2011 considered the history, x-rays and noted no evidence of bruising. MRI scan showed pre-existing changes which perhaps related to the bus crash when the plaintiff was 16 years old.

There was nothing on scans which accounted for a feeling of leg pain or loss of sensation. There were inconsistencies in straight right leg testing. He would have anticipated more progress.

11. Decision of the Court
The court has carefully considered the application made on behalf of the defendants in relation to s. 26 of the Civil Liability and

Courts Act 2004, in relation to the alleged false or misleading evidence given in relation to the injuries suffered by the plaintiff.

The court notes that s. 26(1)(b) which provides that ". . . a plaintiff in a personal injuries action gives or adduces, or dishonesty causes to be given or adduced, evidence that is false or misleading in any material respect and he or she knows to be false or misleading, the court shall dismiss the plaintiff's action unless for reasons that the court shall state its decision, the dismissal would result in an injustice being done.. Pursuant to s. 26(3), an act is deemed to be dishonest by a person if he does the act with the intention of misleading the court.

The court is satisfied that the plaintiff has exaggerated the consequences of what he said was a fall from a second story of a house. The court, however, acknowledges that the plaintiff in his evidence and, in particular, in indicating on the photograph the position he was in before he fell indicated that it was not from a two story height. This indeed is more consistent with the lack of any bruising or abrasions.

The court has also some misgivings regarding the history recounted by the plaintiff to the medical consultants. The use of a crutch, which had not been indicated or required by his General Practitioner nor consultant together with the limp which had not been diagnosed seem, indeed to be dishonest. It was false and misleading which caused the medical consultants to adduce evidence that his injuries were more serious than those which appeared from the medical records from the Accident and Emergency Department of the Regional Hospital where he had gone after the incident.

The court was referred to the verifying affidavit sworn by the plaintiff pursuant to s. 14 of the Civil Liability and Courts Act 2004.

The court has considered whether the dismissal of the action would result in an injustice being done to the plaintiff. The court notes that the plaintiff appears to have continued being depressed, which resulted in his not finishing his apprenticeship and not wanting to accept the reality of difficulties in employment where the defendants did not, in fact, complete the building project. Evidence of pre-accident depression was given.

While depression may explain his initial inactivity, the evidence was clear that after that initial period of inactivity, he was involved in his family farm, particularly after his father's illness and in using the boat to go to that part of the farm on the island, engaging in racing with the Galway hooker and in scuba diving. Moreover, the plaintiff did take up employment in the car windscreen repair company for a considerable period and, notwithstanding his claim to having been disabled by the accident, did the very work he said that he could not do, that is, roofing and felting for several days on his own admission.

It is significant that the plaintiff was not on any medication other than over the counter analgesics. It is also significant that he did not attend his GP after August 2008, over three years before the trial. This is not consistent with somebody who alleges that he was in constant pain and who claims damages to date and, indeed, into the future.

The argument that the court disallows that part of the claim which was based on false and misleading averments was not accepted.

While it is not directly relevant to the consideration of the dismissal of the action the court notes the following.

While the plaintiff had said that the main contractor, the fourth named defendant, had erected the scaffold, there was no admission nor corroboration of that statement. It was unclear from the pleadings as to which defendant was obliged to provide a ladder.

The plaintiff had stated in his evidence that there was no ladder at the scaffold "most of the time". Indeed, he said that he had looked for a ladder. The court, accordingly, is entitled to assume that there was a ladder available though not at the scaffold.

While not directly relevant, the court notes that the plaintiff was not sure if he had said anything about the ladder to his employer.

No. s. 8 letter was sent to the defendant within the two months prescribed by the Civil Liability and Courts Act 2004.

The plaintiff agreed that he was receiving social welfare payments when his subsequent employer was paying him.

The plaintiff had pleaded that "he was required" to climb the scaffold. The court is not satisfied from the evidence that he was, in fact required to do so. His evidence was that he had climbed scaffold, in other jobs, that the first named defendant had done likewise and that the plaintiff had done so.

No evidence was given of any of the defendants removing the ladder as pleaded.

12. Conclusion

The court is satisfied that the plaintiff gave and, in exaggerating his symptoms to his doctor and medical specialist, dishonestly caused to be given evidence that was false and misleading in a material respect. The court is also satisfied that the plaintiff, on the balance of probabilities, knew such evidence to be false or misleading. The court is further satisfied that such evidence must, on the basis of probability, have been done with the intention of misleading the court and was, accordingly, a dishonest act.

It was clear from the evidence given by the medical witnesses on behalf of the plaintiff and from the evidence given by Dr. Larkin for the defendant that they were misled by the history recounted to them by the plaintiff to a significant degree.

In the circumstances the court dismisses the plaintiff's claim.