Neutral Citation: [2015] IEHC 810

THE HIGH COURT

[2004 No. 5848P]

BETWEEN

DAVID MCLAUGHLIN

PLAINTIFF

-AND-

DAMIEN MCDAID, MICHAEl MCDAID, CHARLES MCDAID, MCDAID

AND MCDAID QUARRY

DEFENDENTS

JUDGMENT of Mr. Justice Hanna delivered on the 10th day of December, 2015.

1. This case arises from an injury which the plaintiff suffered on the 26th day of June, 2003. The incident occurred at a quarry at Crislaghkeel, Burnfoot, Co. Donegal. The quarry belonged to the defendants or one or some of them. No issue concerning the ownership of the quarry surfaced in any meaningful way at the hearing. By any yard stick, the plaintiff was occasioned a serious injury to his right foot. As a consequence, following multiple surgeries and rehabilitative treatment, he is left minus most of his right foot. However, notwithstanding significant educational shortcomings and aided by an apparently keen work ethic and the utilising of prostheses he is able to engage in full-time employment, currently in the United States of America.

2. The plaintiff, whose date of birth is the 24th August, 1985, was but seventeen years of age when this misfortune befell him.

3. Beyond the very bald and limited narrative there rages a sea of controversy between the parties as to what, in fact, did happen on that day. There is dispute as to the plaintiff's entitlement to be on the said premises, the nature of and legal status of his relationship with the defendants. A central question arises as to how the plaintiff came to be injured in the first place.

4. The plaintiff first commenced proceedings against the first to fourth named defendants inclusive by plenary summons on 21st January, 2004. These proceedings were discontinued and a second set of proceedings, those with which we are directly concerned, commenced on the 30 April, 2004 citing the present defendants and the Motor Insurers' Bureau of Ireland as an additional party.

5. The statement of claim was delivered on the 1st March, 2006. It alleged that the alleged accident occurred during the course of the plaintiff's employment with the second, third and fourth named defendants at the quarry aforesaid. The first named defendant drove the other defendant's lorry over the plaintiff's right foot, or so the statement of claim alleges. The statement of claim goes on to seek damages from the first to fourth named defendants and to satisfy such judgment against the then fifth named defendant, the Motor Insurers' Bureau of Ireland (the "Bureau") pursuant to the agreement between that organisation and the Minister for the Environment dated the 21st day of December, 1988. As to how the liability of the Bureau might arise, the statement of claim is silent. The statement of claim was supported by an affidavit of verification purportedly sworn by the plaintiff on the 5th September, 2006.

6. The Bureau entered an appearance on the 5th October, 2004. The second named defendant did so on the 20th December, 2004. There was a subsequent change of solicitor representing the Bureau.

7. A significant landmark in the case is the order of this Court made on the 18th May, 2009 by Cooke J. striking out the claim against the Bureau. Effectively from that date the involvement of the Bureau's solicitors, Messrs. Peter J. Sweeney, ceased. They had acted, in effect, as the sole solicitors for the defence. The application which led to that order and the circumstances leading up to it are of some relevance to this entire matter.

8. Without going into minute detail, Messrs. Sweeney sought particulars of the circumstances of the accident both as to how and where same occurred. The insurance company concerned (Quinn Insurance) who had instructed Messrs. Sweeney conducted its own investigations into the claim. Apart from the significant question as to whether or not the alleged accident, assuming it was a road traffic accident, occurred in a public place, important questions also arose as to the circumstances in which the injury was caused to the plaintiff.

9. It seems that the plaintiff's account of what had occurred, to use the colloquialism, had started "ringing alarm bells". For example, the statement of claim rather blandly stated that the lorry ran over the plaintiff's right foot. It seems that the plaintiff expanded somewhat on that otherwise bald narrative by telling a doctor who examined him on behalf of the defendants as then represented that he was intending to get into a lorry on the front side seat beside the driver. Apparently the driver did not see him as he was walking up the side of the lorry and the driver proceeded to drive off. The wheel of the lorry went over his right foot. The plaintiff told another doctor that he was "about to climb in the passenger side of the lorry".

10. It was submitted at the application to strike out the proceedings against the bureau that the description of the accident proffered by the plaintiff was completely at variance as to what was noted in the accident and emergency department in Derry where the plaintiff went for treatment. In an affidavit grounding the aforesaid application to strike out, Mr. Patrick J. Sweeney, solicitor, highlights the following.

> (a) An entry in the Accident and Emergency Department records stating "works in quarry, caught right foot on the digger .... digger ran over right foot extensive injury to foot."
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> Reference made to a further narrative describing a digger/tractor running over the plaintiff's foot.
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> (b) The statement of Sergeant Daniel Devlin, member of An Garda Síochána of Moville Garda Station, Moville, Co. Donegal was also submitted to the Court. Sgt. Devlin says that he encountered the plaintiff while on duty on the 31st August, 2003 and that plaintiff told him that he had been working in the quarry and that a track machine has caused the injury to him.

11. It would appear that the Court took the view that the accident the subject matter of the proceedings had not occurred in a public place and, more specifically, on the public highway. Nor was the vehicle involved one which attracted compulsory insurance. Therefore, liability on the part of the Bureau did not arise and the proceedings against it were struck out.

12. Where did this leave the plaintiff's narrative to date? This we discover in the amended statement of claim which was furnished by the plaintiff on the 11th March, 2014. Out goes reference to the lorry and its registration number. In its place is substituted the single word "digger". There is no other material alteration to the narrative set forth in the statement of claim as to what occurred. Of course, more than the simple description of the vehicle involved had changed. The whole picture had changed from that of a case of negligent driving of a motor lorry to the negligent operation of a substantial piece of machinery in a quarry. The physical location itself had not changed but took on the heightened significance in that the plaintiff was a minor and was employed in a quarry and in circumstances governed not only by common law but by a body of statutory and regulatory law designed to afford protection to the plaintiff as a minor, as an employee and, indeed, as a member of the public.

13. In brief terms, the case made by the plaintiff in the form in which it came on before me alleged that he was employed by the second, third and fourth named defendants. During the course of his employment and while approaching a fellow worker (also under age) the latter caused or permitted the track of a heavy machine to go over the plaintiff's right foot causing him to suffer the injury in question. This was a clear case of negligence and breach of statutory duty. The previous story about the involvement of the lorry was a fiction conceived, distilled and promoted by the defendants with a view to engaging the involvement of an insurance company to meet what was clearly going to be a substantial claim for damages arising from the injuries suffered by the plaintiff.

14. Not so, say the defendant's. The plaintiff was not employed by them at all. In an amended defence on behalf of the second, third and fourth named defendants' which was delivered on the 19th March, 2015 it was alleged that the plaintiff had occasionally visited the quarry prior to the accident and had been on occasion permitted to clean and tidy the office, canteen and weighbridge. It was claimed that the third named defendant gave the plaintiff small amounts of cash from the petty cash of the fourth named defendant as pocket money. Apart from that, he was not employed and was not authorised or engaged to deal with or operate any of the machinery in the quarry. The quarry was closed at the time of the accident and he should not have been there. Two of the defendants were away at a trade show in England. The plaintiff had been "messing" for want of a• better word with a friend of his and his injury resulted from wholly prohibited use of machinery on the defendants' quarry premises. The narrative concerning the lorry was a composition solely of the plaintiff's making.

15. The defendants further urge that, even were I to find in the plaintiff's favour, this Court should, nevertheless, dismiss his claim pursuant to section 26 of the Civil Liability and Courts Act 2004 because of the false and misleading evidence that the plaintiff has brought before the Court. At this point it may be useful to summarise the evidence

David McLaughlin

16. The plaintiff, David McLaughlin, was born on the 24th August, 1985. He is from Buncrana. He left school at fifteen years of age and now works as a technician in the United States of America. When he left school he worked for a year approximately with a transportation company and went to work in McDaid's quarry in 2002. The workings of the quarry involved the excavation of rock, the transportation of that rock to a crusher and crushing the rock into the various requisite dimensions of stone or rubble for delivery and sale. The plaintiff says that on the first day he was asked to load a crusher. He was asked could he run a machine. He was fully employed in 2002. During the course of his employment he said he was driving a loader and a tractor. He remembers Declan Doherty who was then aged about sixteen also being there. Michael Lynch, who was a bit older, was employed as a machine driver. The McDaids were in and out. The foreman was a Mr. Sean Breslin and it seems he was the person generally in charge. One Pamela Toland worked in the office which was situated beside the weighbridge.

17. The incident in which the plaintiff was injured occurred, he tells us, on the 26th June, 2003. He was operating a thirty tonne tracked excavator loading rock into a crushing plant. The rock was being fed to him by Declan Doherty (known as "the Goose") who, in turn, was operating a fifty-five tonne Halla 555 excavator. He was operating this machine at a higher level to the plaintiff. His function, according to Mr. McLaughlin, was to push rock using this excavator from an upper level and to cause it to drop down towards the plaintiff who would then load that rock onto the crusher.

18. Due to an over-accumulation of rock the plaintiff had difficulty in accessing same for the purpose of loading it onto the crusher. He dismounted from his own machine and went off towards Mr. Doherty. He had no other means of communicating with Mr. Doherty. There was nobody else there to guide them or to assist in communicating the difficulties which the plaintiff says he was experiencing. As he approached Mr. Doherty's machine the boom on that machine dropped and the digger tracked forward. The plaintiff's left leg became caught in a rock and the track of the machine went over his right leg. The plaintiff started screaming. Mr. Doherty, the plaintiff says, got out of the machine and started climbing down the hill. The plaintiff says that Mr. Michael Lynch drove the car up, picked up the plaintiff and took him, firstly, to Burnfoot and thereafter the first named defendant, Damien McDaid, drove the plaintiff to Altnagelvin hospital in Derry. The plaintiff says that once he got to the hospital he could not remember anything until sometime later and after he had been initially treated. He remained in the hospital up to the 22nd of July and underwent up to eight operations. He left the hospital on crutches and used them for about three weeks. For the present, it is sufficient to say that the plaintiff suffered extremely serious injuries causing him to lose the greater part of his right foot. He has been left with a "club foot". He has, eventually, managed to forge a career for himself in the United States where he is able to work although obviously seriously hampered by his injury and having to avail of prosthesis. Subsequent to the accident, he went to work in the United Kingdom and, after about a year or so made his way to the United States. In the interim, following the injury, he had some difficulties with criminal activity in this jurisdiction involving road traffic and public order matters and, apparently, a failure to answer bench warrants. His interface with the law was not such as to prevent him coming home to deal with this case nor, indeed, to return to and remain in the United States of America where, I am informed, his status is fully legal.

19. The plaintiff recalls that while he was in the hospital the McDaids or one or another of them would visit him nearly every day. He says that he was told by Michael McDaid to say that the accident was caused by a lorry and this was the narrative which he presented to his lawyers at that time. He did not, however, tell this to the doctors.

20. During the course of his employment, he says that he was paid approximately €300-€400 per week in cash. After he was injured he was out of work for a period of two years. His disability payments were organised through the post office by his mother. On the day of the accident, Mr. Breslin, the foreman was not present and the plaintiff believes he was in England with the second and third named defendants at a trade show.

21. Under cross-examination of the plaintiff it was put to him that he was not employed contrary to what he had asserted both on his pleadings and in evidence. It was put to him that, in effect, he hung around the premises and involved himself in tidying the canteen and sweeping the weighbridge and other menial tasks for which he was paid small sums, such as €20.00 now and again out of petty

cash. The plaintiff, on the other hand, maintained that he employed and was paid in or around €300 "into his hand" at the end of every week and that he "clocked" in and out every morning and evening like other employees.

22. It was further put to him that he was not allowed to go near any of the machinery. The plaintiff maintained that he was so permitted and indeed it was part of his job. It was specifically put to him that Charles McDaid, the third named defendant, and Michelle Kearney and Pamela Toland would give evidence supporting the defendants' case as to the nature of the plaintiff's engagement (if any) with them. (I should observe at this point that neither Pamela Toland nor, more significantly, Charles McDaid, the third named defendant, were proffered as witnesses). Apart from the rather modest tasks in which he was engaged, they would confirm that he would have been stopped from going near any of the machines. He was not allowed to operate the crusher. Only Jason Doherty, Sean Breslin and the third named defendant, Charlie McDaid, could do this.

23. It was put to the plaintiff that the quarry was closed. He said it was not. However, he did not disagree that two of the defendants and Mr. Sean Breslin were away at a trade fair in England. He denied that himself and Declan Doherty were trespassers.

24. The plaintiff stated that Michael McDaid had concocted the story about the lorry going over his foot. That entire narrative was concocted and maintained by the McDaids and Michael and Charlie McDaid in particular. At all material times, the plaintiff says that he was under the influence of Charlie McDaid and that he went along with their version of events up until recent times when the statement of claim was amended and he came to Court to make his case.

25. As to the actual "mechanics" of the accident, he says that as he approached the excavator the driver, Declan Doherty, lowered the boom and the machine tracked forward. The plaintiff maintained that his left foot had become stuck and that his right foot was caught by the tracker. He says that he tried to attract the attention of the driver by throwing rocks or whatever he could. (He accepted that he had only introduced this narrative at the hearing). He says he was screaming and in pain and trying to attract Declan Doherty's attention in whatever manner he could.

26. The plaintiff was also pressed by Mr. Mac Aodha on behalf of the defendants on the circumstances in which he instructed his solicitor, swore an affidavit of verification and a corrective affidavit and, importantly, the extent of any alleged influence over him held by the McDaids.

Mr. Pat Culleton
27. Mr. Culleton, a consultant engineer, was called to give evidence by counsel for the plaintiff. In broad terms, both he and the consultant engineer called on behalf of the defence, Mr. McKay, were in agreement on central issues. Were the plaintiff's recollection as to the nature of his engagement with the defendants and the general circumstances surrounding the accident to be correct then the plaintiff's employer would fall foul of a substantial corpus of statutory and regulatory provision governing the operation of mines and quarries and places of employment generally not to mention the pre-existing common law obligations of an employer to an employee. The injury, as reported to Mr. Culleton by the plaintiff, was caused as the plaintiff approached the excavator at a time when the plaintiff was or ought to have been visible to the operator of same. It is possible that any cries from the plaintiff may have not been audible to the said operator. I should observe that Mr. Culleton did not visit the quarry and did not inspect the machine in question.

Mrs. Joan McLaughlin
28. The plaintiff's mother told us that he was a troubled child who had difficulty at school suffering from ADHD. The general family background was both industrious and successful. She herself was taxi driver and funeral director. Of her children, two had become teachers and one an architect. David was problematic at school and she described him as being both streetwise and vulnerable. He was friendly with Michael McDaid's son and, for reasons she could not understand, worshipped Charlie McDaid, the third named defendant.

29. The plaintiff was in secondary school for some twenty-eight days and, despite his parent's best efforts that ended the formal education phase of his life. He was good at fixing things. After he started working at the quarry he went every day leaving home at around 7.20am. Sometimes she brought him to work. He was paid between €300 and €350 per week and sometimes €400. He would work late and was always paid in cash. He told her this. She thinks he used to work in Moville as well.

30. She heard about the accident from Michelle Kearney (née Galbraith) who worked in the office in the quarry and who had gone to tell the plaintiff's father at home (this gentleman was unwell and did not give evidence). Ultimately, the plaintiff's mother went to Altnagelvin Hospital in Derry. The plaintiff was not able to communicate with her that evening or for a few days thereafter. Michael McDaid arrived back from England that night. He told her that a lorry ran over David's foot and told her that Damien Doherty was driving it at the quarry. David was not in good shape. He had lost a lot of blood and she apprehended that he was going to die. She noted that when she saw Charlie McDaid there at a later stage he was crying.

31. She never got to speak to David for a few days. He was unable to communicate. When he was able to speak, her recollection is that there was always a McDaid in the room with them. Thereafter, the plaintiff underwent numerous operations and it was thought he was going to lose his leg. Michael McDaid gave her a document to take to her solicitor after about two weeks. This document set out the details which were reflected in the narrative of the original statement of claim in these proceedings.

32. Mrs. McLaughlin described how the plaintiff progressed after about two years, firstly going to the United Kingdom and then to the United States where he now lives. She gave some evidence with regard to an approach from one of the defendants but for the purposes of this judgment I have entirely disregarded any what might broadly be termed "without prejudice" discussions involving the parties in person.

33. Under cross-examination, Mrs. McLaughlin confirmed that the plaintiff had been in hospital for approximately one month. She was pressed as to the manner and extent of the remuneration received by the plaintiff and paid by the defendants but held to her evidence in this regard.

Mr. Michael Keane
34. This witness was an official of the Department of Social Protection (formerly Social Welfare). He confirmed that an application was made and processed for occupational injury benefit for the plaintiff up to the 18th September, 2003. This application named McDaid Quarries Ltd. as the plaintiff's employer (the plaintiff being in insurable employment). He produced the application form for disability/injury benefit. This was signed by both the plaintiff and by Michael McDaid. It bears the stamp of McDaid's Quarries Limited, Crislaghkeel aforesaid. It states that the accident occurred at McDaid's quarry in Bumfoot and that a lorry crushed and injured the plaintiff's right foot. The plaintiff observed on the said form that "no one saw me" when he was injured. This was admitted to be a lie by his counsel, Mr. Lyons SC. The form named the plaintiff as an employee of the defendants for the purposes of the application and

describes him as a labourer PT (part time).

Mr. Greg Murphy
35. This witness was an inspector with the Health and Safety Authority. He carried out an inspection of the quarry and interviewed various witnesses. In general terms, Damien McDaid described the "motor lorry version" of the injury to Mr. Murphy. Mr. Charlie McDaid confirmed that he employed the plaintiff albeit part time and that the plaintiff only worked the odd day at the quarry. He described his duties as being in the office doing office work. The plaintiff told Mr. Murphy that on the day of the accident he was tidying around the office and he was sent to get stuff for the office in Burnfoot in a lorry and this was when the accident occurred. Damien McDaid was driving the lorry, he said. Mr. Murphy had some reservations about the case. His observations in this regard were noted and transmitted to his line manager. Mr. Murphy was concerned arising from a conversation he had with two members of Garda Siochana who had the conversation with a somewhat intoxicated plaintiff one night in Buncranna. The plaintiff told them about the track of the excavator going over his foot. It seems that the file was kept open but matters were not pursued beyond a recommendation relating to Health and Safety and unrelated to the accident in question.

36. When he attended the premises, Mr. Murphy did not observe any gate or barrier. He carried out his inspection on the 14th July, 2003.

Mr. Tom Heneghan
37. Mr. Heneghan is a solicitor by profession. He worked at all material times as a claims process manager for Liberty Insurance, formerly Quinn Insurance. An accident report form was submitted and he gave evidence regarding the concern of the insurers with regard to whether or not an indemnity applied in the circumstances. As we know, this concern eventually led to the nominated solicitors, Messrs. Patrick J Sweeney, coming off record.

38. Mr. Heneghan had not personally dealt with this matter since this occurred before he was employed by Liberty Insurance. He confirmed that the plaintiff was referred to as a labourer working for the McDaids in the course of the investigation by the then insurers.

Mr. Sean Breslin
39. This was the first witness to be called by the defence. Prior to Mr. Breslin giving evidence the court was informed that both Declan Doherty and Michael Lynch had been served with subpoenas by the defence although they had hoped that Mr. Doherty would have been called by the plaintiff. He was not. The hearing proceeded on the basis that, should the plaintiff so wish, Messrs. Doherty and Lynch could be interposed as witnesses. Otherwise, of course, it was entirely open to the defence to call these gentlemen having secured their attendance. Any sanction arising from failure to answer the subpoenas was not pressed at that point.

40. Sean Breslin was employed at the quarry. He was a machine operator and his principal job was feeding stone into the crusher. He carried out this work in conjunction with one other employee and he would use an excavator to lift the stone into the crusher where it would be reduced to the various sizes required for sale. He was with Charles and Michael McDaid in England when the accident occurred. He says that the quarry was closed on that day. He remembers the plaintiff being there.

He initially said he vaguely remembered the plaintiff who was hanging around the quarry and could have been doing tidying up jobs for Charlie. He expanded this somewhat under cross examination to say that the plaintiff was there fairly frequently and he would have to say that the plaintiff was working for Charlie McDaid. He never saw the plaintiff driving lorries or doing any other duties. He never saw him operating machines.

41. As regards Declan Doherty, Mr. Breslin said that he couldn't remember much about him, that he wasn't about the place and was not working there. As far as he was concerned, the accident was caused by a lorry and such was his belief up until the time he came to court. He hadn't been working for the McDaids for some five or six years. He said that Charlie McDaid told him that the lorry went over the plaintiff's foot.

42. The keys of the machinery were left in the office at the end of each day which he presumes was locked. He has been working in farming for the past five or six years. He displayed some vagueness of memory throughout the course of his evidence. He did not, however, dispute that the plaintiff was operating machinery on the day of the accident. He had no reason to disbelieve that Declan Doherty ran the track of the machinery over the plaintiff's foot. As regards the premises, he said that there was some kind of barrier there but he agreed that people could get in and out and there was nothing to stop the plaintiff and Declan Doherty doing so. He had been asked to come and give evidence by Charlie McDaid.

43. It appears that Sean Breslin was in a position of some authority. He was part of the group that attended the trade fair on the day of the incident. He gave evidence that it was his job to check the machinery during the course of the working day. He described the quarrying operation as being fairly small.

Jason Doherty
44. This witness worked from time to time at the quarry. He was an excavator driver. He had trained as such. He was doing a lot of work for Coillte at the time. He would be drafted in as needed by Charlie McDaid. He was not continuously employed at the quarry. This happened two or three times per month. He would drive an excavator. He worked in conjunction with Sean Breslin. There were just two persons involved in his work.

45. He felt that he would have seen Declan Doherty coming in and out some years later and he was sitting as passenger in a McDaid lorry. He never saw the plaintiff involved with machines.

46. The Halla machine in question was extremely valuable. It would have cost a few hundred thousand Euros. He doesn't know if Declan Doherty was driving it on the occasion of the accident. The system involved arriving at the premises, getting the keys and checking the machine. If the quarry or office was closed you wouldn't be able to access the key. Like Sean Breslin he was asked to come by Charlie McDaid. During the course of the last twelve years he has been working for the McDaids with some periods of unemployment. He was not working for anyone else.

Damien McDaid
47. This witness is the first named defendant. Around the time of the accident he was not working at the quarry but at a petrol station in Burnfoot which I understand he operated with his girlfriend, Pamela Toland. At the request of his brother Michael, he drove a lorry from Michael's house to the quarry on the day of the accident to collect stone. He recalls that there was a barrier of sorts and as far as he knows he had to unlock the barrier to gain access with the lorry to the quarry. However, he qualifies this by saying that it all happened a long time ago.

48. He drove in and parked the lorry. He saw the plaintiff running down. The plaintiff was "squealing". He says that he got the key of his brother Michael's car which was parked at the quarry and put the distressed and injured plaintiff into the car. He drove to Burnfoot, collected Pamela Toland, and thereafter to Altnagelvin Hospital in Derry. Subsequent to the accident he had a fallen out with his brothers and didn't speak to them for years. It appears this falling out was unrelated to the subject matter of these proceedings.

49. He admitted in evidence and under cross examination that narrative of the accident to the effect that the plaintiff was injured by a lorry driven by him (Damien McDaid) was a lie. This fictitious account, according to him, was conveyed to his co-defendants, Charles and Michael McDaid as well as Messrs. Sweeney, the solicitors acting for the Insurers and to the Health and Safety Inspector, Mr. Murphy. He claimed that the story was made up because the plaintiff was fearful of getting into trouble because he had been driving the digger himself (as the witness understood it) and this had caused his injury. He had thought the plaintiff was driving the digger. Under cross examination, he sought to say that he first told his brothers about the injury being caused by the digger when they came to court some months before the hearing when the case didn't get on and that they were "gob smacked" (to use Mr. Lyons expression) when they heard it. He was properly pressed on how this could be so since the question of the digger being involved had been clearly canvassed in the application some five years earlier by Messrs. Sweeney and Company to come off record for the defendants. He could not answer this.

50. He insisted that he did not make up the story about the lorry being involved because of the fact that the defendants had no insurance cover. The story was made up on the way to the hospital in Derry by the plaintiff and himself with a view; it would seem, to keeping the plaintiff out of trouble. This happened at time, by any stretch of the imagination, when the plaintiff was clearly highly distressed and was, apparently, lapsing in and out of consciousness.

51. Most tellingly, this witness could offer no satisfactory explanation as to why the hospital records in Altnagelvin refer to a digger running over the plaintiff's foot at a time when it would appear highly probable that the only source of this information was himself who had driven the plaintiff to the hospital. It would seem clear from the evidence that, by this stage the plaintiff was unconscious or physically and mentally in extremis or intermittently in either state.

52. It is worth noting that, notwithstanding professed illiteracy and an absence, according to him, of any communication with his brothers, this witness did not provide a satisfactory explanation as to why a well constructed and articulate defence had been typed out and signed by him.

Declan Doherty
53. This witness, like the plaintiff, was some seventeen years of age. It appears he, too, had left school although he did allude to the fact that this accident happened during his school holidays. He said that he was scared about giving evidence and that he was very much a reluctant witness. He had been served with three subpoenas (at least one of them on behalf of the plaintiff rather than the defendants). He turned up in court under threat of sanction from the court.

54. He wasn't an employee of the defendants. He used to hang around the quarry from time to time occasionally going on "runs" in lorries. He didn't give evidence of doing anything particularly useful around the place.

55. He said that he turned up at the quarry on the day of the accident. The place was quieter than usual. It is notable that did not say that it was completely silent in the sense of being closed. He heard a noise and went towards it. He observed the large, orange coloured track digger, the Halla machine and that it was being driven by the plaintiff. The bucket on the machine appeared to be digging at the ground. There was immediate objection to this line of evidence from Mr. Lyons SC for the plaintiff in that this was the first time in ten years and more of the history of this case that he had been suggested the plaintiff was driving the digger. There was, however, more to come from this witness. Briefly put, Mr. Doherty wanted to have "a go" on the digger so the plaintiff facilitated this. Mr. Doherty climbed into the digger and started tracking it forward. The plaintiff was wearing steel toe capped industrial style boots and, in a bizarre passage of events, seemed to want to test the durability of his protective footwear against the tracker of this 50 ton plus machine and volunteered his foot for this purpose. This turn of evidence came as something of a surprise to all present, even to Mr. Mac Aodha, counsel for the defendants.

56. In a nutshell, the machine tracked forward. The plaintiff's foot appears to have got stuck and the track went over it. The plaintiff started yelling and, at this, the witness brought the digger to a halt, dismounted and, as suggested by counsel for the plaintiff, "legged it out of there". He did not take steps to see if the plaintiff was alright. He thought everything would be okay. At that point, he simply vanished from the history of the case until, it would seem, he encountered the defendants sometime prior to the proceedings and recounted some (but not apparently all) of what he says transpired. On a number of occasions he indicated that he was scared (his description) because of his involvement in what happened he had not involved himself in any of the evidence gathering by the previously involved insurance company or their solicitors or the Health and Safety Inspector. Prior to the case he had been interviewed by Mr. Henry, the defendants' solicitor but thinks that he did not give him any "direct answers".

Michelle Kearney
57. This witness was a relative of the defendants' and worked in the quarry office between 2001 and 2009. She did general office work and paid the wages and did the accounts. There were up to six full time employees of whom the plaintiff was not one. There was a clocking in and off system. Wages were paid in notes and/or coin. She would calculate the hours and cash was put into an envelope for the employees. She also collected money from debtors.

58. The plaintiff was certainly around the place and involved in cleaning the weighbridge and the canteen. He got money here and there she said, maybe €20 out of petty cash. Charlie McDaid was very good to him. She didn't remember the plaintiff's mother dropping the plaintiff off now and again or the plaintiff turning up every day at the quarry. She remembered him coming and going with Charlie and at other times was doing small jobs and sitting on lorries. However, she said she wouldn't really know what was going on outside the office. He wasn't getting paid for driving diggers and she said he didn't have a login card. She imagined that he wouldn't be allowed to drive a digger. She couldn't remember Michael Lynch working there.

59. She was very careful to stress on a number of occasions during the course of her evidence that the plaintiff was not "an employee". Otherwise, she seemed to have a very vague recollection of what occurred. It all happened some twelve years previously. She thinks she was phoned on the day of the accident by Damien McDaid. She thinks the quarry was closed on the day and the "the boys" were away at the Trade Fair. There was a key box in the office. On a normal day she would be there at around 8 am and the keys would be out at that stage. The office was kept locked. Maybe the keys were left in a machine, she didn't know. This was nothing to do with her.

60. She couldn't remember the plaintiff's mother leaving up the plaintiff's lunch. She couldn't remember visiting the plaintiff some five

times in the hospital. She remembered being in the car park there with Charlie. It was not up to her to visit the plaintiff. There was no talk of insurance that she remembers.

61. On cross examination, it was put to her that it was never suggested that Michael Lynch was not working there until years later. She said she could ascertain if he was working there although she did not work there anymore and couldn't say when he worked there. This evidence was not pursued.

Laurence McDaid
62. This witness is a brother of the defendants' and although not involved in the quarry he was the owner of the Halla 555 digger machine. He purchased it the previous December for around £100,000.00 sterling. He had been using it on another job and it was being stored in the quarry. He had been using it on a job in Letterkenny previously and there was not work for it just at that time. Any key from a similar machine would start this digger (Damien McDaid also stated this). He stated that Declan Doherty was not employed by him.

Norman Jones
63. This witness was a summons server and he was called to outline the efforts he had made to serve a witness summons on Michael Lynch whom, it would be recalled, the plaintiff said was in the quarry and was in charge on the day of the accident and who drove him to Burnfoot. It would appear from Mr. Jones' evidence that Mr. Lynch did not wish to involve himself with the proceedings notwithstanding the efforts by Mr. Jones (at the instigation of the plaintiff's solicitor, Messrs. C. S. Kelly and Company) to serve him. Although given the opportunity to do so, the plaintiff's lawyers did not seek any sanction against Mr. Lynch and were content to let matters rest without his evidence. It was apparent that a similar view was shared by the defendants. It should be observed that Mr. Lynch's presence on the day was disputed in questioning of the plaintiff on behalf of the defendant, Mr. Lynch was also named during the course of the plaintiff's cross examination as one of the persons (another being Mr. Charlie McDaid) who would deny that the plaintiff was ever allowed to drive a digger or operate machinery at the quarry. I will return to the absence of such evidence hereunder. Whatever about the non-involvement of Mr. Lynch, as to the absence of evidence from Messrs. Michael and Charlie McDaid I will comment later.

Damien McKay
64. A Chartered Engineer, called by the defendants. Like Mr. Culleton on behalf of the plaintiff's, he prepared a report and took some photographs. The history of the accident he took as set out in Mr. Culleton's report. He had first been instructed the previous March and his report would not have reflected any evidential developments since that date including the rather dramatic suggestion that the Halla 555 machine was used as some means of testing the durability of the plaintiff's protective footwear.

65. As with Mr. Culleton, it is not necessary to recount for the purposes of this exercise the minutiae of his technical evidence. If what the plaintiff says is correct, a raft of statutory and regulatory provisions were breached. Indeed, he conceded that, whatever way one looked at this case, there was breach of statutory obligation.

66. He did question whether the accident could have happened as described by the plaintiff in a sense that the operator of the Halla machine may not have been able to observe the plaintiff approaching. Further, unless the plaintiff sought to draw the machine operator's attention to the fact that his foot was stuck, throwing stones at the undercarriage of the machine would not have been audible to the operator.

67. The plaintiff and his mother were re-called briefly. The plaintiff denied the suggestion that he put his foot under the track of the machine to test the boot. His mother disputed the evidence of Michelle Kearney with regard to the plaintiff's attendance and indeed her own attendance at the quarry to bring the plaintiff his lunch.

Submissions
68. It was considered appropriate by the parties and the court that there be oral and written submissions in this case. The case, as should be readily apparent, had a long and chequered history. It had a couple of false starts including one where I permitted an adjournment to enable the defendants then unrepresented, to take up the opportunity afforded them by an adjournment to seek legal representation. This they did. This was of particular assistance given the stark variation in the accounts of what happened when the plaintiff was injured (the fact of such injury not being in dispute) and the complete change in character of the allegations made by the plaintiff in the amended statement of claim, represented, peculiarly, by such a simple textual amendment.

69. For the plaintiff, Mr. Richard Lyons SC, stated that the injury stemmed from the negligence of the defendants in permitting two unlicensed and untrained seventeen year old boys to operate excavating machinery without supervision, banksmen or any adequate communication system. The plaintiff placed reliance upon the evidence of Mr. Keane from the Department of Social Protection. His receipt of Occupational Injury Benefit evidenced his employment by the fourth named defendant. Such payments are only available to an individual who has been in insurable employment at the time of an accident. A signed, stamped and verified report had been completed by the fourth named defendant, McDaid Quarries Limited. The plaintiff's hospital admission records, in addition, describe the accident as an "injury at work" and the place of the accident as "work". Further, under cross examination, Michelle Kearney, the office manager at the quarry at time of the accident, gave evidence of the payment of the plaintiff in cash as directed by the third named defendant Mr. Charlie McDaid.

70. Were the court to find the plaintiff to be an employee it was submitted that a number of statutory breaches of duty were identifiable. These were, *inter alia,* breach of section 27 of the Mines and Quarries Act 1965 which requires "close and effective supervision" over operations. Section 109 of the said Act prohibits a "young person" (being a person under 18 years of age) to be employed at a mine or a quarry. Further, sections 6 and 7 of the Health and Welfare at Work Act 1989 impose general duties on employers in relation to work places, training, supervision as well as a requirement to conduct their undertaking in a way which does not expose employees to risks to their safety and health.

71. It was also argued that the defendants had a duty under common law and the Occupiers Liability Act 1995 to take reasonable care of the plaintiff.

72. If, contrary to what was asserted on the plaintiff's behalf, the court were to be persuaded that the plaintiff was a trespasser, liability would still arise. The defendants were negligent in allowing two teenagers access heavy machinery. This machinery was not properly stored, secured and/or immobilised. In this latter instance it was conceded that contributory negligence could arise. Such would not be the case were the accident to have occurred in the manner as described by the plaintiff in the course of his employment and while he was engaging in system of work caused, permitted or actively acquiesced in by his employer.

73. Turning to the fact that the plaintiff proceeded under two different statements of claim and the two affidavits of verification

sworn by him, the plaintiff's counsel relied upon the plaintiff's immaturity and the overweening influence of the third named defendant upon the plaintiff. The first statement of claim and the narrative it promoted was brought about and devised by the defendants. This was done with a view to setting up a false insurance claim to meet the defendants' liability to the plaintiff. In anticipation of the defendants' reliance upon Section 26 of the Civil Liability and Courts Act 2004 it was pressed upon me that injustice would result were this court to contemplate dismissing the plaintiff's claim. Mr. Lyons identified a number of criteria which would distinguish the present case from much of the case law in the relevant area. The plaintiff did not exaggerate his injury. Secondly, the plaintiff disclosed the true facts prior to and in the course of his trial. Thirdly, the initial narrative would have benefited the defendants and not specifically the plaintiff who could still seek to satisfy any judgment against the defendants' assets in the absence of any indemnity from an insurance company. Finally, were the plaintiff's claim to be dismissed, tortfeasors so found would walk away from their collective liabilities notwithstanding their own egregious conduct.

74. Counsel, *inter alia,* cited *Looby v Fatalski* [2014] IEHC 564 and *Mulkern v Flesk* [2005] IEHC 48 as examples of cases where applications were made under Section 26 to strike out plaintiff's claims and which were refused. Both cases concerned untruths authored by plaintiffs but which were not found to be sufficient to effect the dismissal of the plaintiff's claim.

75. Counsel for the second, third and fourth named defendants Mr. Sean Mac Aodha BL, while emphasising his clients' denials of negligence and breach of duty towards the plaintiff, submitted that the plaintiff was not an employee. The quarry was closed on the day of the accident. The plaintiff was a trespasser. The plaintiff prompted Declan Doherty to track the digger over the plaintiff's foot to test his steel capped boot.

76. Referring to the variations in the statements of claim and the affidavits of verification sworn by the plaintiff, Mr. Mac Aodha argued the case that the plaintiff's case should be dismissed pursuant to section 26 aforesaid.

77. He sought to rely on a number of authorities. He quoted the comments of Peart J in *Carmello v Casey* [2008] 3IR 524 in relation to the nature and purpose of section 26 which stated the section was introduced to avoid injustice "... to defendants to whom false or exaggerated claims are mounted in the hope of recovering damages to which such plaintiffs are not entitled." He referred to the comments of Quirke J in *Higgins v Caldark and Quigley* [2010] IEHC 527. In that case, the learned judge found that where the court finds that a claim has been based upon materially false and misleading evidence, "...the fact that the dismissal of an action will deprive a plaintiff of damages to which he or she would otherwise be entitled cannot, by itself, be considered unjust."

78. The defendants disputed that there was any question of any overbearing influence on the plaintiff's will. There was no evidence to suggest anything such as bullying of the plaintiff. The plaintiff's replies to particulars and his affidavit of verification supporting the first statement of claim (that which described the lorry as the mechanism of the plaintiff's accident) had been sworn in September, 2006 by which time the plaintiff had moved to the United States of America. By that stage, he must have been beyond the influence of the defendants if he ever was so in the first place.

Injuries

79. No dispute of any significance arose as to the nature and extent of the plaintiff's injuries or the consequences for him in the future. The medical reports of a consultant surgeon, two consultant orthopaedic surgeons and the plaintiff's general practitioner were agreed. They were as follows,-

(a) Report of Mr. J. A. Hanley, Consultant Surgeon, dated 12th January, 2004.

(b) Two reports of Mr. A. R. Wray, Consultant Orthopaedic Surgeon dated respectively 13th February, 2004 and 7th January, 2005.

(c) Report of Dr. D. A. McLoughlin, General Practitioner, dated 11th January, 2005.

(d) Report of Mr. Aidan F. Lynch, Consultant Orthopaedic Surgeon, dated 3rd July, 2014.

For reference purposes, copies of these reports will appended to this judgment.

80. A report was also obtained from Ms. Margot Barnes, Occupational Therapist. The report was dated November, 2014. Ms. Barnes gave evidence before me. Again, for reference purposes, her report will be appended to this judgment. Also appended will be an agreed report of Mr. Nigel Tennant, Consulting Actuary, setting out figures representing suggested items of future loss, principally prostheses and related matters.

81. It should be noted that all of the medical reports apart from that of Mr. Lynch identify a motor lorry as being involved in the accident rather than the digger.

82. It is clear that the plaintiff suffered an extremely serious injury to his right leg. He was clearly highly distressed and in great pain by the time he presented at Altnagelvin Hospital in Deny. He was, by that stage, effectively unconscious and up to that time had been suffering a significant loss of blood.

83. He had sustained a crush injury to his right foot. This injury involved multiple fractures. The toes of his foot became ischemic. He underwent a number of procedures, up to eight in all. I am satisfied that the plaintiff was in a life threatening condition and that, consistent with taking all necessary steps to preserve his life, every expertise was employed which, in all probability, saved the plaintiff's leg from amputation. However, notwithstanding the efforts of the emergency, surgical and orthopaedic staff at Altnagelvin Hospital, the front portion of the plaintiff's right foot could not be saved and he underwent an eventual amputation over the distal half of this foot. As a consequence, his foot is approximately half the size that it was. It has been described as a "club foot".

84. He was in hospital for a period of some four weeks. His foot became infected during his stay there - his mother recalls a very strong odour during one of the occasions upon which she visited him. The plaintiff left the hospital in a wheelchair and, after a number of weeks, graduated to crutches. His wounds were dressed on a regular basis.

85. It appears the plaintiff returned to work after a fashion some nine weeks after the accident although experiencing pain and discomfort. It appears he went to the United Kingdom and then to the United States of America where he now lives and works. Despite ongoing difficulties with balance, occasional pain and discomfort he still has managed to hold down employment. It appears that he is married and is enjoying a supportive relationship with his spouse. I should observe that, given the severity of the injuries experienced by the plaintiff and the fact that he had significant educational disabilities which greatly impeded and foreshortened his education, he seems to have dealt with his incapacity remarkably well.

86. When he was examined by Mr. Aidan Lynch in July, 2014 a 17cm scar over the front of the plaintiff's ankle was noted where the skin from the sole of the plaintiff's foot had been replaced over the site of the amputation. He exhibited mild tenderness over the navicular bone of his foot and had a callosity under the cuboid bone. Movements of the plaintiff's hips were equal. Straight leg elevation was 70 degrees on both sides. Movements of his knees were equal. There was no dorsiflexion of his right ankle and he had restricted plantar flexion to 30 degrees. There were 20 degrees of inversion and 10 degrees of eversion at his heel on examination. At his left ankle there was noted to be 15 degrees of dorsiflexion and 40 degrees of plantar flexion. There were 30 degrees of inversion and 10 degrees of eversion at his heel.

87. The most recent medical report on behalf of the plaintiff, that of Mr. Aidan Lynch, concluded that the plaintiff's foot is approximately half the size of its original shape. This restricts the amount of heavy physical work which the plaintiff can undertake. He is working as a driver and is unable to undertake any heavy physical activities.

88. He isn't available to participate in any sporting activities since his accident. His foot tends to become sensitive especially in cold climatic conditions. He requires an orthotic support in his shoe and requires industrial boots while working. Clinically, the plaintiff does have a milder degree of stiffness of his ankle and of his heel. There is, however, no increased risk of arthritis about the ankle or the back of his foot in the future.

89. It is clear, however, even with the excellent outcome the result and injury has significant lifetime consequences for the plaintiff. His foot is unsightly and he is conscious of it if he is walking barefooted or wearing sandals, for example. His balance is not good. He takes no comfort walking and can only walk a few hundred yards. Emotionally, according to Ms. Barnes the injury impacted upon him to a very significant degree. He has to use a pumice stone and creams to maintain his foot in good condition. The prosthesis needs to be replaced on an annual basis. His right foot can swell and be painful with moderate use.

90. Ms. Barnes gave evidence of the plaintiff requiring gym membership as a substitute for the sporting activities in which he is now no longer able to engage. He is unable to carry out domestic chores such as cutting the grass and needs to pay someone for this.

91. Mr. Nigel Tennant, Consultant Actuary, provided a report dated 19th February, 2015 which was admitted into evidence and which set out the future estimated costs of prosthetic aids and other related matters. The substantial items are an annual cost of $6,451.00 for a partial foot, moulded socket, tibial tubercle height, toe filler. As well as this, he would require annually an addition to the lower extremity test socket. These would cost $1,138.00 annually. He also, for example, requires special socks at an annual cost of $22.00 per pair.

92. Ms. Barnes also noted some complaints from the plaintiff about postural difficulties consequent upon his injury. There is some suggestion that he is developing a stoop. This was not dwelt upon in evidence and it is not referred to by Mr. Lynch in his report.

93. For the purposes of assessing damages in this case, I will assume that prosthetic aids can accommodate any such difficulties in the future.

94. It would appear that the aids and appliances alone come to a fairly substantial sum. The individual costs of these items were ascertained by Ms. Barnes by telephone to the United States. Were the plaintiff to return to Ireland, it is not clear to me whether these items might be provided free of charge or at a lesser (or perhaps greater) cost. In assessing damages, this is one of the eventualities I will have to bare in mind.

Conclusion

95. It is important in setting out my conclusions that I should preface same with some short observations on some of the witnesses. This may assist in indicating the impact of the various witnesses in giving their evidence and my observation of them while doing so.

96. The "neutral" witnesses, if I might so term them, require no comment other than to observe that they did their utmost to assist the court. In this category I include Messrs. Culleton and McKay, the Consultant Engineers who dealt with the evidence as presented to them and as they understood it. Witnesses such as Mr. Murphy and Mr. Heneghan, again, gave their evidence succinctly and dispassionately.

97. I took considerable care in observing the witnesses who were more personally involved in the case. The plaintiff, firstly, had undoubtedly been the author, in nominal terms at the very least, of what was a false claim. I am satisfied that he did so at the behest of and under the influence of the second and third named defendants. This frame of mind continued and extended, in my view, to the affidavit of verification sworn by the plaintiff in September, 2006 notwithstanding that, by then, this vulnerable plaintiff had left this jurisdiction. By the time the matter came on before me, however, circumstances had altered considerably in the manner described above and this case proceeded in its entirety before me on the basis of the case as set out in the amended statement of claim. Such evidence as the plaintiff brought before this court was, I am satisfied, truthful, to the best of the plaintiff's knowledge and efforts, and was not done with any attempt to mislead this court. It goes without saying, of course, that the earlier statement of claim was an unlawful fiction.

98. The plaintiff's mother impressed me as a forthright and truthful woman and I had no difficulty in accepting her evidence.

99. The evidence proffered on behalf of the defence was not, I fear, satisfactory as far as this Court was concerned. I take into account, however, that many years have passed since these events with which we are concerned and allowance must be made for this as far as witnesses both for the plaintiff and the defendant are concerned. Thus, I do not think it is unfair to observe that I found there to be a degree of caginess and partisanship in the evidence of Mr. Sean Breslin, Ms. Michelle Kearney and Mr. Jason Doherty. For example, Ms. Kearney went to some lengths to point out that the plaintiff was "not an employee". I felt there was something of a *mantra-esque* aspect to her evidence in this regard that I found unsettling. Mr. Breslin was particularly cagey in the manner in which he gave his evidence. Mr. Doherty was but an occasional employee of the defendants' and, thus, was of limited assistance. Even so, I did note his evidence to be somewhat partisan in the defendants' interest.

100. The evidence of Mr. Damien McDaid and Mr. Declan Doherty I found to be, in certain major respects, wholly implausible. I do not accept Mr. McDaid's evidence that he and the plaintiff made up the narrative of the original proceedings. I do not accept that he drove the plaintiff to Burnfoot although he did drive him thence to Derry. I do not accept that the false narrative to which I have referred was concocted in the car on the way to the hospital. I am satisfied, on the balance of probabilities, that the only source of the history of the accident taken at Altnagelvin hospital was Mr. Damien McDaid and that this history referred to injury caused by a digger. I found the totality of Mr. McDaid's story of estrangement from his brothers since around the time of this accident (not because of) difficult to accept. Given the production by him of a defence in his personal behalf which I believe was authored by his brothers and at a time when he professed not to be talking to them, the assertion is not credible. I do not believe that his brothers

were in any way surprised by his relation of the "digger narrative" at the hearing when he turned up for the hearing of the case.. I don't believe any such conversation took place.

101. Neither do I believe the evidence of Mr. Declan Doherty as regards the actual mechanics of the injury occasioned the plaintiff. I expressly reject his evidence that the plaintiff volunteered his foot to the track of the digger for testing or any other purposes. I prefer the plaintiff's narrative that Mr. Doherty was there at the time and was operating the digger. I do, however, accept that Mr. Doherty fled the scene after the accident. I find it difficult to reach a precise conclusion as to why he absented himself thereafter from the proceedings. He stated on a couple of occasions that he was scared. Of whom or what it was not quite clear. In any event, I find his description of what occurred in and around the actual accident to be implausible and I do not accept it.

102. Turning to the question of employment, I am satisfied that the plaintiff was employed by the second, third and/or fourth named defendants or any combination of them. They were the owners and operators of the quarry. The plaintiff's employment was, I am satisfied, full time in its nature and extent. His duties would have included a number of menial tasks such as cleaning up the office and around the weighbridge. However, I am satisfied that, from time to time, he also operated machinery as part of his general terms of employment. I am not persuaded that he drove diggers on a day to day basis but I accept what the plaintiff says that, at an early stage he was checked out as to his capabilities in handling machinery and that, thereafter, as required would operate same in and about the quarry.

103. I am satisfied that he attended on a daily basis at the quarry and to this end I expressly accept the plaintiff's evidence and that of his mother. I accept, further, that he took home into his hand a sum in the order of €300 per week.

104. I accept that Michael and Charles McDaid and Sean Breslin were absent from the quarry on the day of the accident. However, I am satisfied that the quarry was functioning on that date albeit in a very limited way. To be fair to Declan Doherty he did observe that the quarry was "quieter than usual" when he turned up. He did not say that it wasn't functioning at all.

105. I am satisfied that there was a system of work or a "culture" which caused or permitted the plaintiff, notwithstanding his tender years to operate machinery in an unsupervised way from time to time. I am satisfied that the operational arrangements were of such laxity that there was nothing untoward about Declan Doherty operating the machinery at least as far as the plaintiff was concerned. However, the plaintiff was not in charge. I am satisfied that Mr. Michael Lynch was in charge although he was absent from the actual scene of the accident when it occurred.

106. As already noted, I am satisfied that the quarry was not closed. Further, neither was there any means whereby it could be securely closed because there were no gates, contrary to what was suggested in cross examination. Indeed, none were observed by Mr. Murphy, the Health and Safety Inspector when he attended at the scene. There may have been a barrier present but this was, effectively either not functioning or was no bar to anyone gaining access to the quarry. I am further persuaded that the quarry was functioning on the day in question. There was no reason that it should not do so. We were informed (there was no dispute about this) that this was a quarry employing approximately 6 people. Two only of the active workforce were absent at the trade fair. In my view, the quarry was functioning with Mr. Lynch in charge as aforesaid.

107. I am satisfied that the machinery which was stored or operated in the quarry was inadequately secured. The machinery was easily rendered operational either by keys which were accessible in the office at the quarry or by using a key from another machine. This included the Halla 555 machine which was involved in the injury to the plaintiff.

108. I am satisfied that the gravely deficient and uncontrolled system of work which was permitted at the quarry was such that the plaintiff had no cause to be alarmed or to be on particular guard by the fact that he was operating machinery without supervision or a means of communication with the Halla digger.

109. I am satisfied that the plaintiff, going about his employment, approached the Halla digger and that it was tracked forward. Its operator, Declan Doherty, was unable to observe the plaintiff either because he wasn't keeping a proper look out or because of his view of the plaintiff was obscured by the boom on the digger. I am satisfied that the plaintiff by screaming and grabbing rocks and throwing same at the cab of the digger alerted Declan Doherty to what had happened and he stopped the digger. I am of the view that the plaintiff was in enormous and immediate pain and shock as a consequence.

110. I am satisfied that Mr. Michael Lynch drove the plaintiff as far as Burnfoot and, in this regard, I reject the evidence of Damien McDaid. I accept that Damien McDaid drove the plaintiff to Altnagelvin Hospital in Derry thereafter but I do not accept that there was any agreed story as to what occurred. I am satisfied that, when the plaintiff arrived at the hospital, he was fully unconscious and that the history was probably recounted by Damien McDaid. That history included reference to a digger and no reference to any lorry. In addition, I find it highly implausible that the plaintiff would have been in any condition to hatch such a story at the time.

111. I am satisfied that the description of the accident involving the lorry as opposed to the digger was, in all probability, created and promulgated by the second and/or third named defendants. This was done with a view to ensuring that there would be indemnity from an insurance company to meet any claim which the plaintiff might bright against the defendants. I am satisfied that this was a deliberate attempt at engineering a false and misleading claim against the insurance company. I accept the evidence of the plaintiff's mother that whenever she visited the plaintiff in hospital a McDaid was always present. This was to ensure that the intended narrative was not disturbed in any way. I say that the plaintiff was persuaded to go along with the story because of the emotional hold which Charlie McDaid seemed to exercise over him, the fact that the plaintiff was a minor and someone suffering from learning difficulties. The plaintiff was a vulnerable person.

112. I am satisfied that the plaintiff was remorseful about what happened. This was reflected in his subsequent aberrant behaviour and the incident in Buncrana when, in an intoxicated state, he blurted out the true story to a member of An Garda Síochána as was referred to in the solicitor's affidavit grounding the application of Messrs. Sweeney and Company to come off record for the defendant's.

113. I am satisfied, therefore, that the plaintiff is, in the first instance, entitled to succeed in an action for damages on the grounds of the negligence and breach of duty and breach of statutory duty of the second and third and fourth named defendants. The plaintiff, although but seventeen years of age, was caused or permitted to operate machinery for which he was neither trained nor qualified and to do so without any adequate supervision, means of communication with another machine operator or operators or the presence of a banksman. The defendants were, in my view, in breach, *inter alia,* of the following provisions:-

a. The Mines and Quarries Act, 1965 sections 12, 27, 109 and 110.

b. The Safety, Health and Welfare at Work (General Application) Regulations Statutory Instrument 44 of 1993. In particular, regulations 13 and 19 thereof.

c. The Safety, Health and Welfare at Work (Construction) Regulations Statutory Instrument No. 481 of 2001 and, in particular, regulation 41(d) thereof.

This is not intended to be an exhaustive catalogue of the breaches of statutory duty in this case. I think I fairly reflect the views of the consultant engineers called on behalf of the plaintiff and the defendants in this case that this system of work as described by the plaintiff and accepted by this Court was simply impermissible in common law and in statutory provision.

114. Of greater particularity, the second, third and fourth named defendants or any of them or any combination of them, their servants or agents were also in breach of their common law duties as employers. Such a breach was occasioned by failing to take proper or adequate precautions for the safety of the plaintiff, failing to provide a safe system of work, failing to provide a safe place of work and failing to provide any or any adequate supervision and/or training for the plaintiff. Further, they were negligent in failing to have or any adequate regard to the plaintiff's tender years and vulnerable state of mind.

Damages
115. On the existing evidence, the plaintiff is entitled to a substantial sum for damages for pain and suffering to date and into the future. There is no evidence upon which I can make any finding with regard to future loss of earnings. However, it is appropriate that I take into account the fact that, giving the nature of the injuries suffered by the plaintiff, there must be a significant impact upon the plaintiff's future employability were he, at some point, to become available on the employment market. Equally, I have regard to the fact that, notwithstanding his significant physical handicap, he has managed to secure and hold down remunerative employment.

116. As regards the claim for loss of earnings to date, I am satisfied that the plaintiff was at a loss of €300.00 per week for a period of ten weeks applicable to the accident and, after that point, would have been able to take up employment at a level of remuneration commensurate with his previous level of employment. I am unaware of what deductions (if any) should be made from this sum having regard to occupational injury benefit and the like received by the plaintiff in the interim. Counsel may wish to address me on this.

117. As regards the claim for other items of special damage, these relate in greatest substance to prostheses and related matters including creams and special socks. A claim has been made for a number of items into the future including gym membership, grass cutting and a variety of items which I do not propose to allow since these could very well arise without any injury. The prostheses to replace the missing part of his foot and matters such as creams and pumice stones all of which require annual replacement were costed but in a manner that was somewhat unsatisfactory based on United States' pricings and on information ascertained by telephone or other communication with United States rather than Ms. Barnes' personal experience and knowledge. This was not, however, disputed in any meaningful way by the defence. It is not clear to me whether or not the plaintiff would be required to pay for these matters were, for example, he to return to Ireland in the future. Equally, it may well be that these items could be cheaper in Ireland. Perhaps, more expensive? I don't know and it is not a matter for me to speculate on this. There will, however, undoubtedly be substantial expenditure into the future which should be taken into account in the calculation of compensation in this case doing the best one can with the available evidence.

118. In the circumstances, I consider the appropriate award of damages to be the following:-

Pain and suffering to date

€100.000.00

Pain and suffering in the future

€150,000.00

Special damage to date (including loss of earnings and allowance for prosthesis to date)

€3,000.00

Special damage into the future

€200,000.00

TOTAL AWARD:

€453,000.00

119. I will not accede to the defendants' application to dismiss the plaintiff's case pursuant to section 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. ... "

120. In my view, the plaintiff in this case has not given or adduced or dishonestly caused to be given or adduced evidence of and in the manner described in the said act. His evidence and that called by or on his behalf has been, as I have found, substantially truthful and I have accepted same. He has candidly accepted that the description of the accident in which he suffered injury as outlined in the first statement of claim served on his behalf was false. I accept his evidence that this narrative was a concoction devised by the defendants with a view to securing indemnity from an insurance company against the plaintiff's claim. Insofar as the plaintiff went along with this, he did so under the influence of and, indeed, in thrall of the third named defendant. I am satisfied that the defendants attended on a regular basis with the plaintiff while he was in hospital in part, at least, with a view to insuring that the fiction regarding the lorry be maintained. I am equally satisfied that, on a night in Buncrana late in the August following the accident, the plaintiff while inebriated went "off message" and blurted out to what really happened to members of An Garda Síochána.

121. I am satisfied that the influence of the defendants extended beyond the immediate aftermath of the accident and included the time when the plaintiff signed the affidavit in 2006.

122. There is no doubt that the plaintiff has played some part in promoting the initial false claim. False or misleading statements and information in replies to notices for particulars and, more especially, in affidavits are extremely serious matters and must weigh heavily against a plaintiff. This is the case even when a claim is substantially genuine. The act specifically mandates the Court to dismiss proceedings when misleading evidence has been advanced by or on behalf of the plaintiff. This governs what occurs at trial. Thus, previous misconduct by a plaintiff in the provision of information and related matters is of significance and must be considered in the overall context of the case but with particular emphasis on what transpires at the hearing. A plaintiff may, at the hearing, take sufficient steps to redeem previous malefaction. On the other hand, impeccable pre-trial conduct can be undone by false evidence at trial by virtueb of the section. Here and, from the outset, the plaintiff has openly and candidly accepted what has occurred to date of trial and has offered evidence in support of his case that I find to be truthful.

123. Even though the issue does not now arise, to me it would seem a grotesque injustice that the authors of a bogus claim on an insurance company should seek successfully to rely upon the provisions of section 26 against a plaintiff such as this, drawn by them into a web of deceit spun to shelter them from their obligations in law.