THE HIGH COURT

[2015 No. 5515 P]

BETWEEN

GERARD REGAN

PLAINTIFF

AND

MARK MCNEVIN

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 12th day of May, 2016

1. This case was heard over a two day period at the High Court sessions in Galway High Court in April 2016. The personal injuries summons issued on 9th July, 2015. Evidence was heard that the plaintiff is a warehouse operator, his date of birth being the 24th August, 1963 and who resident in Ennis, Co. Clare.

2. At the time of this accident, on or about 15th April 2013, the plaintiff's claim was that he was lawfully sitting in his motor vehicle, bearing registration numbers and letters 08-CE-5273, which was lawfully parked in the public forecourt of a filling station at or near Gort in the County of Galway. It is the plaintiff's claim that, owing to the negligence and/or breach of duty and/or breach of statutory duty on the part of the defendant, his servants and/or agents in the driving, care, management, control, upkeep or maintenance of the defendant's motor vehicle, the same was caused, allowed, occasioned or permitted to violently collide with the front of the vehicle in which the plaintiff was travelling. As a result of this the plaintiff alleges that he suffered, sustained and incurred personal injuries, loss, damage and expense all of which continue. Particulars of negligence and/or breach of duty and/or breach of statutory duty were pleaded and particulars of personal injuries were set out.

3. The defence was delivered on 16th December, 2015 and at para. 1(b) the defendant admits that there was a very slight impact between the two vehicles and put the plaintiff on full proof that this was of any significance or caused the plaintiff to sustain any personal injuries, loss, damage or expense and put the plaintiff on full proof of same.

4. The items of special damage in this case were agreed at €5,321.10 but the defendant's liability to pay them was not agreed.

Evidence before the Court

5. The plaintiff confirmed his date of birth as the 24th August 1963, address in Ennis, Co. Clare and occupation details as a warehouse operator. He indicated that he had taken over a farm of sucklers from his father which he now was having to relinquish and go into dry stock farming as a result of the impact of his injuries.

6. The plaintiff indicated that on 15th April, 2013 at approximately 7pm the defendant's motor vehicle had reversed and hit his motor vehicle at an angle. The plaintiff gave evidence that, on the occasion of the incident, the defendant admitted that he never saw the plaintiff's car. The plaintiff confirmed that he was belted in his seat and stationary at the time. The plaintiff freely admitted that he was able to drive home but that the following morning he felt stiff all over. The accident occurred on a Monday and he worked for the following two days on the Tuesday and Wednesday and on the Thursday he had treatment with a physiotherapist.

7. On the Friday of that week the plaintiff told the manager of his company where he worked and where he had worked for the previous 22 years that he was having difficulty carrying out the tasks expected of him. The plaintiff indicated in his evidence that from that point on that arrangements were put in place for other workers to undertake any heavy lifting tasks for him and that finally a heavy lifting device was bought by the firm which alleviated the necessity for workers to carry out heavy lifting, which had previously been part of the plaintiff's work as a warehouse operative.

8. The plaintiff stated that he attended a physiotherapist and that he was given stretching exercises and that this relieved his symptoms to some extent. He had three to four sessions with the physiotherapist and an acupuncturist and later he went to his general practitioner, Dr. Eoin Galvin who referred him to Dr. John Burke, a spinal surgeon. The plaintiff described that he had been a jogger and hill walker and that he had played hurling until he was 43 or 44 years of age. He is now 53 years of age. He described how, on the farm, he could not do any physical activity and had to employ some workers to assist him.

9. The plaintiff gave evidence that he had an epidural injection on 30th May 2014 which he found stressful and while it eased the major pain, he had pain more often but not as severe as a result of this injection. Prior to the epidural he did not have cramping but afterwards he did have cramping between two and three times a week in his leg. The plaintiff also attended a sports clinic in Dublin where he was given exercises and he felt that made it easier to cope.

10. The plaintiff visited his consultant on five occasions. He described how, after a long drive, he would have pain in the leg and he would have to pull over his motor vehicle and he said that the pain was worse at night. He also described a loss of the amenities of life further in relation to football matches, which he had always attended but now he could not do so because he had to sit down regularly. The plaintiff indicated that the pain was severe at least three times a week although some days he would not have pain. The plaintiff went for acupuncture which he found gave him relief although he also regularly used Nurofen Plus.

11. The plaintiff gave evidence that he felt depressed for a very ling time because he had been very active previously and he was now feeling very tired all the time. The plaintiff then went for seven sessions of counselling with a Dr. Áine McMahon and he felt this assisted him in developing coping mechanisms. The plaintiff resented the fact that he believed the accident to have changed his life so quickly. The plaintiff described himself as having a fear of work and life. The plaintiff gave detailed evidence of how he felt the accident had caused a loss of the amenities of life in terms of a personal relationship which had ceased. He was also very concerned that his workplace was for sale at the moment and he understood that an American company was buying the company. The plaintiff indicated that he had concerns about that and how it would affect him, given the special work concession which had been afforded to him where his work colleagues completed the heavy lifting tasks which he would otherwise have had to undertake.

12. The plaintiff gave evidence that the defendant's motor vehicle reversed between seven and eight metres into him and that the cost of repair of the motor vehicle was €953 inclusive of VAT.

13. Counsel for the defendant put it to the plaintiff that this was a very minor accident and that there was damage to the plastic bumper but that it was a very minor touch. The plaintiff responded under cross examination that it was like a big jolt, that the defendant backed into him and that he jerked forward and that he was in shock. The plaintiff indicated that he could not remember regarding damage to the defendant's car but he said his own front bumper and head lamp were bashed in although he later accepted that the glass was not significantly damaged he said the impact was a fairly good thump.

14. The plaintiff accepted that he drove home without any difficulty but then he said that the following morning the pain in the lower back was significant. In all, the plaintiff took six to seven days off work after the incident and he stated that his back was in considerable pain. The plaintiff did accept that he waited three months before attending his G.P. initially because he thought that it would calm down by itself. The plaintiff stated that he went to a Mr. Brendan McCann, a sports therapist, for therapy as he was recommended to him by his brother.

15. The plaintiff did not accept under cross-examination that he had told his doctor that he was suffering no ill-effects from the accident. However, he did remember telling his doctor that he was on light duties at work. The plaintiff was asked about the general practitioner's first report and he said he did not accept its contents in that he did not actually recover from the accident and that he felt that the doctor had made a mistake in the initial report. He described attending his G.P. to see if he could go back to full duties at work although he said that they were very facilitatory towards him at work. He found that he could not do the work although he tried to go back but that his back was in a lot of pain despite taking anti-inflammatories, seeing the clinical psychologist and receiving treatment in the form of acupuncture.

16. Dr. John Burke, Consultant Spinal Surgeon, gave evidence that he took a history from the plaintiff and re-iterated, in his report, the plaintiff's description to him as to how this accident occurred. In terms of relevant medical history, Dr. Burke set out that the plaintiff was involved in a previous accident approximately ten years ago when he was walking and was hit from behind by a car which left the scene of the accident and although he sustained an injury to his left shoulder and right lower limb and facial injuries, within two years of that accident he had made a full recovery. Dr. Burke also asserted that the plaintiff did not have any pain in his low back or leg prior to the accident the subject matter of these proceedings. Dr. Burke, in his report of 15th July 2014, found the plaintiff's presenting complaints to include right sided lower back pain with right L5 distribution sciatica. Dr. Burke rates the low back pain as 6/10 and right leg pain as 7/10 on the visual analog score. The plaintiff complained to Dr. Burke that he is occasionally disturbed in his sleep by pain.

17. Dr. Burke confirmed that the plaintiff had a decreased range of motion of the lumbar spine to 80% of normal and that straight raised leg testing was limited by back pain at 60% of elevation on the right side. Dr. Burke found that the plaintiff had normal sensation, power and deep tendon reflexes in the lower limbs. The MRI of lumbar spine performed on 4th December, 2013 showed multiple level degenerative changes with conservation of disc height. The plaintiff had a left sided L5/S1 posterero lateral disc bulge which abutted his left SI nerve route and bilateral L4/5 lateral recess stenosis due to a combination of disc prolapse and facet joint hypertrophy with a focal disc prolapse on the right side. There was minor bilateral L3/4 lateral recess stenosis present.

18. Dr. Burke confirmed that the plaintiff had indicated to him that he had no pain in his low back prior to this accident and that the accident rendered symptomatic a pre-existing degenerative condition which was asymptomatic prior to the accident and that the MRI results were consistent with his presentation. In terms of anticipated treatment into the future, the doctor set out in his report that if his disc prolapse is not resolved satisfactorily then surgery to decompress the right L5 nerve route could be expected to give him good relief of symptoms. The doctor confirmed that in terms of the clinical presentation, an asymptomatic degenerative change in the spine was rendered symptomatic by this accident and that the plaintiff had to avoid standing for a long time, sitting for a long time, doing heavy work and that if he did not avoid these situations the pain would worsen.

19. Regarding the epidural injection Dr. Burke did reiterate that while these relieve the symptoms, within six or seven weeks the symptoms then became more frequent but less intense. Dr. Burke felt that the future was unpredictable, that the plaintiff's situation may settle completely by itself but he did accept that there was at least two further years of pain and suffering in this case before the pain would settle down. He felt that it was preferable to treat this patient conservatively and he did expect a further improvement with time but that he felt that the most recent MRI shows progression of degenerative change.

20. Dr. Burke also gave evidence that the plaintiff managed to go to work so far but that he was significantly accommodated at work and that if he were required in his working life to do heavier work he would not be able to do it and would most likely have to cut back on his hours. The doctor confirmed that the plaintiff takes occasional analgesics in the form of Nurofen Plus. Dr. Burke felt physiotherapy does not help this particular problem and usually makes it worse. As of the 15th July, 2014 the doctor felt that the patient would continue to have his current level of symptoms on an ongoing basis however that he may yet have some improvements over the next year with the conservative treatments.

21. Dr. Burke gave further evidence in relation to his report of 2nd February 2016 that it was likely that surgical treatment in the form of a right L4/5 microdiscectomy would give good improvement in symptoms. As a result of Dr. Burke's examination on 2nd February 2016 he thought the plaintiff would continue to have the present level of symptoms. Dr. Burke referred to studies of identical twins with disc degeneration and he said these studies showed 70% of such cases were genetic in nature but 30% of the difficulties were due to environmental aspects. He agreed that in this case the condition was degenerative in nature but that it was asymptomatic prior to the accident and became symptomatic post accident. Dr. Burke also indicated that a lot of damage can be caused even with a relatively small impact because this type of accident refers to the vulnerable part of the back. Dr. Burke found that the accident has accelerated the onset of degenerative change by three to five years. The doctor then went on to say that it is difficult to say when the soft tissue injury stops or comes to an end and the degeneration takes over. He referred to the disc prolapse higher up in the patient's neck which had not been there previously but pointed out that these come and go.

22. In Dr. Burke's further report of 2nd February, 2016, he found the present complaints included right sided low back pain with right L5 distribution sciatica where the plaintiff can sit for approximately an hour and stand for approximately an hour and is able to walk several miles but would get extra pain after doing this and that he is impaired in his ability to lift and bend and is unable to run as this exacerbates his pain he takes occasional analgesics for same. Regarding anticipated treatments into the future he felt that the plaintiff would require treatment with analgesics and activity modification. Dr. Burke also indicated that the plaintiff may benefit from a further right L5 nerve injection and that it is likely that the plaintiff will have his current level of symptoms on an ongoing basis.

23. Dr Burke stated in his conclusion that the injury, although a low velocity road traffic accident, occurred on a background of previously asymptomatic lumbar spine degenerative changes and rendered these degenerative changes symptomatic and that the plaintiff can now be considered to have reached a steady state and further improvement would not be expected with time.

24. The radiological medico legal report of Dr. Alexander J. Stafford was referred to in the evidence and handed in to the Court. This

report is dated 5th February, 2016 and the conclusion of this consultant radiologist is that the presence of muscle spasm in a post traumatic setting indicates an ongoing muscular ligamentus or soft tissue strain injury in the lumbar spine region which can also be attributed to the accident of April, 2013 and the assessment of any muscle spasm due to any muscular, ligamentus or soft tissue strain injury is best made on the basis of clinical evaluation. In the overall opinion section of this report, the doctor refers to the fact that three MRI examinations of the plaintiff were carried out in the aftermath of his accident in December, 2013, July, 2014 and March, 2015 and the conclusion is that a pre-existing degenerative condition particularly at L1/2 and L4/5 and to a lesser extent at L5/S1 is seen. A minor to moderate central left sided protrusion is seen on all three examinations with little interval change with some minimal dorsolateral displacement of the descending left SI nerve route at the L5/S1 level.

25. A degenerative central canal stenosis is seen of a minor to moderate severity at the L4/5 level which antedated the accident. There is also degenerative disc bulging extending to the lower intervertebral foramina which also antedated the accident. A degenerative condition antedated the accident at the L1/2 level but there has been some progression of the degenerative condition with the development of a focal minor to moderate right sided protrusion on the scan in March, 2015.

26. Dr. Alex Stafford sets out in his report that a significant degree of the plaintiff's degenerative condition of his lumbar spine antedated his accident but the trauma of his accident has almost certainly aggravated an underlying degenerative condition and aggravated and worsened the degenerative condition possibly at several levels in particular at L1/2 where there has been progression into the focal minor to moderate protrusion without nerve route compression at L1/2. Likely the trauma aggravated a pre-existing degenerative canal stenosis narrowing of the intervertebral foramina at L4/5 and the trauma of the accident may have de nova caused or worsened a lesser disc bulging or protrusion at L5/S1 where there was a pre-existing degenerative condition in the disc space.

27. The Court heard the evidence of Jim Breslin, Systems Supervisor at the plaintiff's place of work. This gentleman described himself as a supervisor in the company in which the plaintiff works. he identified that the company is, at present, in the course of being sold to an American company. He described the plaintiff as a warehouse operator who injured his back. Mr. Breslin described the plaintiff as having good and bad days and having bad pain two to three times a week rendering him unable to lift heavy items. He described the plaintiff as not wanting to take time off, that they work in a small team and that from the time he became aware of the plaintiff's difficulty there was a discussion of the team members to try and obviate the need for the plaintiff to do any heavy lifting. Mr. Breslin stated that this arrangement continued until the end of 2014 when a mechanical lifting device was put in place in the company for the general use of their operatives. This gentleman said the he himself was not involved in the transfer and sale in relation to the company and that there had been no issues since the lifting device had been put in place. Concerning heavy lifting, he describes the work of the company as involved in manufacturing pharmaceuticals and loading by forklift into trucks and that the main tasks involved shipping for customers and the distribution of raw materials.

28. Mr. Breslin described the use of a warehouse pick and the removal of pallets from a staging area and the operation of transferring to materials to a second pallet and sourcing boxes of a typical weight of 25 kilograms but with this device he described the working situation as being a 12 hour shift done in three cycles where the plaintiff does 120 hours work in three weeks. He also described the plaintiff's work as involving him driving a forklift truck. He described him driving to the racking system and the forklift to the load. He also described the necessity to manoeuvre 50 kilogram drums but that the plaintiff could do that he would be in pain. He described changing the work patterns of the plaintiff so that he did not have to lift heavy weights including a weight of 25 kilograms.

29. Mr. Pat Hayes, Consultant Forensic Engineer of Brennan Foy and Co. Engineers Ltd., referred to the circumstances of the accident confirming the plaintiff's version as described to him. Mr. Hayes said that the plaintiff described that it was six to seven metres of reversing mechanism which had occurred and that hit was almost eight metres before the plaintiff attempted to reverse himself this was described with reference from the witness box to the wall in the court room opposite as representing the distance. He described the solid structure through the bumper i.e. the chassis rail showing a bump as a result of the impact and he described grazing on the glass headlight where it was struck low down and then there was minor contact with the headlights and grazing on the cover of the headlamp.

30. Notwithstanding forgoing the engineer gave evidence that a low speed minor impact damage can rarely help regarding the scale of the impact and that very minimal damage at certain velocity can give significant rise to greater damage with the same level of velocity. He also felt that the protrusion on the bumper was inconsistent with an insignificant collision.

31. The engineer also gave evidence that there were extensive scientific studies over twenty years which showed that in situations where there was no vehicle damage people were still injured. He said that an extensive body of work over twenty years looked at any set speed below which a driver will not be injured and the variables include the person's age, their head rotation relative to the torso, and their state of health at the time. At para. 4.1 of his report, to which he referred in evidence, it was noted that numerous studies have been conducted to establish the minimum impact threshold below which whiplash injuries do not occur and a number of these tests tended to use human volunteers in laboratory environments and he noted that two issues affect these studies in that they tend to be conducted on a low number of relatively healthy participants and the participants are aware of the purpose and the mechanism of the study. Mr. Hayes further stated that evidence has shown that an awareness of an impending collision can significantly reduce the likelihood of an injury occurring. Mr. Hayes felt that such studies or tests are normally lacking in statistical significance.

32. The engineer then went on to say that there is no apparent minimum threshold value below which whiplash injuries cannot occur and that they have been reported in many incidents of low speed impact collisions with both vehicles travelling at speeds below 10km/h. One study to validate the neck injury criteria using clinical results for human subjects in rear end collisions found that 29% and 38% of subjects exhibited whiplash associated disorders (WAD) at rear end speed changes of 4 and 8km/h respectively.

33. Other studies have found that in low impact collisions, where there are usually no skid marks and minor or no visible damage to the vehicle, there is a lack of relationship between occupant injury, vehicle speed and or damage. These studies concluded that there does not seem to be an absolute speed or amount of damage a vehicle sustains for a person to experience injury.

34. This engineer, at para 4.3 of his report, referred to aggravating factors and stated that a number of factors have been identified that significantly increased the risk and severity of whiplash type injuries in low speed rear impact collisions and they are summarised as including:

> 1) the greater horizontal distance between the head and the head restraint, the higher is the risk of WAD
>
> 2) head rotation with respect to the torso on impact significantly increases the risk and in particular the severity of injuries

3) pre-existing degenerative conditions all increase the WAD injury risk and severity

35. A para. 4.4 of the report concerning estimating the force of low speed collisions based on impact damage, one of the key issues is the assessment and calculation of relative impact speed of the bullet and target vehicle and that studies have shown that the amount of damage to and speed of vehicles was not correlated to the severity of cervical injuries and that it had been shown that in a no damage accident the target vehicle can obtain an impact speed of 10mp/h or greater which is well into an injury producing range and it has been shown that it is extremely difficult to estimate the impact force in simple two car collisions and that knowledge of impact damage alone is of little use.

36. This report in conclusion para. 5, sets out:

1) There is no minimum speed threshold for whip lash type injuries. Injuries of varying severity and duration have been recorded for extremely low speed collisions.

2) A high percentage of victims involved in low speed collisions experience whiplash type injuries and a significant proportion of those injured or severely injured with symptoms lasting for a considerable duration (six months to several years).

3) Studies outlined above have shown that the calculation of impact speed is extremely difficult in low speed collisions even in circumstances such as these where the target (plaintiff) vehicle was stationary.

4) Additionally they have shown that an assessment of damage to the vehicles alone will be of little use when calculating the impact speed and that the amount of damage is not correlated to the injuries sustained in this type of incident and that "no damage" collisions can generate a sufficient differential forces to cause injury.

5) The studies are inconclusive on the relative injury risk between front and rear end type collisions and some studies show little or no difference in injuries while others show a slightly reduced risk of injury in frontal impact.

6) The literature shows conclusively that injuries can occur in an accident such as that the plaintiff was involved in.

37. Under cross-examination, it was put to Mr. Hayes that on the basis of the photographs of the defendant's vehicle and the defendants saying that there was no damage to it. When it was put to him that there was no damage to the defendant's vehicle save a "smudge", he indicated that he had not examined the defendant's vehicle but on the photograph he had seen all of the bumper cover and he did know that there was damage to the bumper bar on the plaintiff's vehicle. Mr. Hayes indicated that it was more than a touch in terms of damage to the plaintiff's vehicle and there was a crack in the headlamp unit and there was bumper cover damage.

38. Mr. Hayes saw the protrusion on the bumper and stated that he did not agree that it was a very low velocity impact. He said that there was no evidence regarding impact speed and he pointed out that with 13 – 14kp/h or even 9 – 10kp/h that if a vehicle were to accelerate quickly it can reach 21kp/h. He gave further evidence that the plastic bumper on the plaintiff's vehicle was supporting a steel bar and this steel bar was taking all the impact and he did not accept that it was a smudge. It was put to him that the defendant said he felt no force in the collision and he did accept that that would be indicative of a low speed collision. Mr. Hayes noted in evidence that at a low speed collision the level of damage to a vehicle may not be definitive in terms of showing that the collision was insignificant.

39. Mr. Cormac Hassett, Consulting Automotive Engineer, referred to four photographs showing damage to the headlamp and what he described a scraping or distortion to the bottom of the headlamp. He said that one of the bumpers was distorted and that the bumper had to have been pushed in considerably because the bumper bar absorbs impacts and that the very corner of the bar was protruding. Mr. Hassett said that the very edge of the bumper would be bolted to the chassis and that this would have taken considerable force to cause it to protrude. The bumper was repaired and the light cover replaced it is in itself non-repairable it is clear plastic and to pass the NCT it would have to be replaced and he considered that €953.02 represented quite a considerable repair.

40. Mr. Hassett described the repair time to the bumper as taking one and half hours because the bumper had to be taken off and that it had to be heated, painted and re-fitted and polished. He found no structural damage to the bar underneath. Mr. Hassett pointed out that you can have a lot of damage not seen until you remove bumpers and then you do find bumper damage and he agreed he did not inspect the defendant's vehicle.

41. Mr. Michael Gilmore, Consultant Orthopaedic Surgeon was called to give evidence on behalf of the plaintiff and had been requested by the personal injuries assessment board to carry out an assessment of this case. The date of his examination was the 15th December, 2014 and his conclusion was that he was not in a position to give a definitive prognosis as to the final outcome for this patient.

42. Mr. Gilmore confirmed that the plaintiff took Cataflam and Vimovo but that these upset his gastrointestinal tract and that he now takes Nurofen tablets instead. He described how the plaintiff, on 30th May, 2014, had an epidural carried out through Dr. Burke which did help a bit but then he started to get cramps in both legs at night and that he was reviewed by his G.P. The plaintiff was sent for further physiotherapy and dry needling by a Mr. Seán O'Meara in Ennis. At the time of his examination, the plaintiff presented with pain in the right leg radiating down to his toes if he drove a car but more pain on the sole of the foot, stiffness in the lumbar spine, positive pins and needles in the right leg after driving and numbness if he is really tired and difficulty with sexual relations and a tight feeling in his right lower back. On the examination of the plaintiff he found him to have forward flexion to his upper shin with pain in the lower back and right leg, straight leg raising on the left side is tight but negative and on the right side straight leg raising is positive at 60% with positive sciatic stretch test and posterior tibule nerve stretch test.

43. Mr. Gilmore referred to the two MRI scans carried out the first on the 4th December, 2013 showing degeneration at the lumbar L4/5 level with a disc bulge centrally and to the right side with marked right lateral foraminal stenosis and compression of the right L5 nerve route. At the lumbar 5/SI level there is central to the left sided disc bulge which does abut the left SI nerve route but does not give rise to any compression of it and essentially found that there was no change between the first two MRI scans. In his opinion at that time he found that the plaintiff suffered soft tissue injuries to his lower back in the accident in April, 2013 and continues to have ongoing difficulties. His reading of the MRI scans do show that he has ongoing issues and only time will tell whether any surgical intervention may be required and he has got some benefit from an epidural which may be repeated but in the heel of the hunt he may require surgical intervention if his leg pain remains a major issue for him and he felt at that stage he was not therefore in a position to give a definitive prognosis as to the final outcome for the patient. His evidence was to the effect that he felt that the plaintiff had genuine ongoing issues.

44. Mr. Gilmore did not agree with the analysis of Mr. Aiden Devitt or Mr. John Burke in that his opinion is that we all have degenerative changes but it does not necessarily always follow that we will have symptoms from these. He takes the view that as is seen in this case that trauma leads to symptoms that it is not inevitable that one would not have symptoms and that in this case there was precipitating injury. His finding is therefore that the degenerative change was aggravated and rendered symptomatic by the accident and that it is impossible to say for how long more that will continue absolutely. He said that normally with a soft tissue injury if it is going to settle at all it will do so between 18 months and two years. He however felt that the intruding degenerative change in this case colours the outcome. Mr. Gilmore said that six and seven years after such an event people still complain and have no prospect of a good recovery.

45. Under cross-examination on behalf of the defence Mr. Gilmore agreed that he saw the plaintiff on behalf of the personal injuries assessment board and that the assessment took place 20 months after the accident and that he relied on the plaintiff's version for all relevant factors. Mr. Gilmore said that he could not comment on the physiotherapy aspect that he did not specifically deal with that in his interview with the plaintiff but that people do frequently go for physiotherapy. Mr. Gilmore stressed that on his examination of the plaintiff he found him to be quite restricted in his forward flexion that he could only lower his fingertips to his shin and he felt that this gentleman now does not do any lifting that there is an machine in work to do what would have been heavy lifting in the past. Mr. Gilmore stressed that this plaintiff does his best to keep himself fit and healthy and that he knew that he took Nurofen but could not say how often.

46. The G.P's report of the 23rd September, 2013 and another report of the 27th November, 2013 were read into the record. However, Mr. Gilmore disagrees with the conclusion and he says back pain can come and go and that three days later there was pain and as a consequence of the degenerative change it is impossible to state categorically when there will be a resolution. He stressed the importance of the plaintiff following a proper back care routine, attending the gym and not doing any heavy lifting and said that he could not say for how long more this pain would continue.

47. Mr. Aidan Devitt, Orthopaedic and Spinal Surgeon was called to give evidence on behalf of the defendant his report is dated 21st January, 2016. Mr. Devitt sets out the circumstances of the accident exactly as described to him by the plaintiff how there was damage done to the front of his car which required approximately €1,000 to repair. Mr. Devitt also accepted that the plaintiff was wearing a seat belt at the time and that on the day he felt alright but the following morning he had stiffness in his lower back and did not go to work for a day or two.

48. Regarding current symptoms the plaintiff described to Mr. Devitt that he has pain in his back and intermittent pain in his right leg precipitated by standing for prolonged periods or by driving and that in the previous two weeks the plaintiff had noticed urinary frequency at night time. In terms of the effect on the plaintiff's lifestyle Mr. Devitt described the plaintiff as trying to get back more to walking recently but found that this precipitated low back pain. He described the plaintiff as having mild difficulty lifting or carrying bending, keeling and squatting.

49. On examination Mr. Devitt reported that the straight leg raise was 70% bilaterally with a negative sciatic stress test and the lumbar spine was normally aligned with flexion of 60 degrees. Regarding his opinion and prognosis he described low back pain radiating to his right leg in the SI distribution which he states occurred following the incident as outlined and that the MRI shows evidence of stenosis and narrowing at L4/5 in particular affecting both sides and he felt in his MRI particularly at L4/5 are degenerative in nature and not related to the accident. He felt that the disc bulge at L5/S1 is central and left sided and not concordant with his symptoms. The disc bulge at L1/2 is central and right sided but not concordant with his symptoms as it affects a different nerve route. He felt that he has bilateral facet hypertrophy and foraminal stenosis at L4/5 which is concordant with his right leg pain.

50. Mr. Devitt notes that Mr. Burke and Mr. Gilmore have classified this as soft tissue injury and he thinks that is reasonable however the impact would be very minor and any symptoms as a result of it would have been expected to resolve after a few months in his opinion any long term symptoms are much more likely due to his underlying degenerative condition. He feels that if surgery is required then he expects that it would be the result of his pre existing condition rather than the accident itself. Mr. Devitt took the view that the pain seemed to initially have resolved over a number of months as per the first general practitioner's report he refers to the September, 2013 which says that while the plaintiff has backed pain it is no longer symptomatic. Mr. Devitt felt that there was no specific demonstrative injury and that all the scientific literature regarding whip lash gave very little basis of agreement in the medical community. Mr. Devitt simply did not agree with Mr. Burke or Mr. Gilmore and he felt that the injury that the plaintiff had should not inhibit heavy lifting.

51. Mr. Mark McNevin, the defendant in these proceedings, gave evidence that he had a Volkswagen Polo motor vehicle that he reversed to pump up his tyres. He gave evidence that he thought that he was not reversing at speed but at rather 4 – 5km/h for a distance of three metres. The Court was reminded that according to the engineer called on behalf of the plaintiff the vehicle was seven to eight metres away at the point at which the defendant was when he began reversing. He did accept that his vehicle did touch the plaintiff's vehicle. However, he stated that both agreed at the scene that there was no damage done to his own car and that the plaintiff did not indicate any injury. The defendant said that he had been driving a motor vehicle for less than one year at that time and that this was his first car.

52. Mr. Niall Mahon motor assessor and engineer had taken photographs showing in photograph 3, a slight impact, slight low velocity impact and under cross-examination it was put to him that he was not in a position to estimate the speed of the vehicle and he did accept that the bumper was pushed in and damaged on the plaintiff's vehicle and that the light fitting unit had to be repaired and he said that there was no great overlap.

Findings of fact

53. This Court finds as a fact that the accident occurred as described by the plaintiff. The plaintiff described the impact as "quite a jolt". He was put on full proof that the accident had happened as described by him, by the defence which argued it had adduced evidence to suggest that this was a mere tip or smudge situation although the defence did accept that there had been an impact, however minimal as they put it.

54. The plaintiff's own evidence describing the situation very clearly as well as the very comprehensive engineer's report adduced on his behalf made it very clear to this Court that it was highly probable that the accident occurred as described by the plaintiff, and not by the defendant. This is particularly relevant in relation to, not only the level of impact but the result of that impact, and on the balance of probabilities the plaintiff has proven his case. It is quite clear from the engineer's evidence that a low speed, minor impact damage can rarely help to indicate the scale of the impact and that very minimal damage at certain velocity can give significant rise to greater damage with the same level of velocity. His evidence that the protrusion on the bumper was inconsistent with an insignificant collision must be taken very seriously by this Court as showing on the balance of probability, taking all of his evidence

and all of the plaintiff's evidence into account, that this accident was not an insignificant collision and did give rise to the injuries suffered by the plaintiff. The extensive scientific evidence, as set out above, form the Court's view as to the specific issues taken into account by the engineer giving rise to his conclusion. The items of special damage were quite significant for an accident of this type.

55. This Court also finds as a fact that the evidence of Mr. Hassett copper fastens the evidence both of the plaintiff in relation to this accident and his engineer Mr. Pat Hayes when Mr. Hassett points out with reference to photographs that one of the bumpers in particular was distorted and that the bumper had to have been pushed in considerably because the bumper bar absorbs impacts and that the very corner of the bar was protruding. Mr. Hassett went on to explain to the Court that the very edge of the bumper would be bolted to the chassis and that this would have taken considerable force to cause it to protrude.

56. The Court makes a finding of fact that the plaintiff was a very credible conscientious type of person. The Court observed the plaintiff as a tall and fairly lean person of athletic build. He confirmed in his evidence that he actually played hurling until he was 43 or 44 years of age and he had tried to keep himself as healthy as possible. He also convinced this Court that he tried to get over this accident by using massage through a physiotherapist but later had to go down the medical route.

57. In addition, the plaintiff was a conscientious worker, a warehouse operative, whose job involved heavy lifting. This Court was very impressed by the evidence of his supervisor who worked out a way with other workers of avoiding the plaintiff to have to lift heavy objects which was a good portion of the work being undertaken. This is clearly a man of good standing in his own employment who does not want to be absent from work and wants to do his best to do his work. Because of the arrangements he put in place through his supervisor and colleagues at work he was able to continue in his employment without losing anything other than a few days off work and without having to do any heavy lifting until the company bought a machine which obviated the need of any of the workers doing heavy lifting.

58. This Court finds as a fact that the accident did render symptomatic a previously asymptomatic condition and that the plaintiff did suffer pain and suffering to date and will suffer ongoing pain for at least two years going forward. While Dr. Gilmore gave an estimate of this type of injury lasting perhaps six to seven years in all, This Court heard the evidence of Dr. John Burke, Consultant Spine Surgeon, who attended the plaintiff and his estimate was that there would be at least two further years of pain and suffering into the future which this Court takes into account. The Court takes a balanced approach and measures the future pain on the evidence given at a three year time span.

59. While the plaintiff gives extensive evidence of a loss of the amenities of life the Court accepts that he did suffer in general terms a loss of the amenities of life to some degree, this Court feels that it should reject the plaintiff's evidence concerning his loss of a romantic relationship as being attributable to this accident.

Conclusion

60. In summary, this Court accepts the evidence adduced by and/or on behalf of the plaintiff and considers that an award of damages for pain and suffering to date in the sum of €36,000, is an appropriate one with a sum of €20,000 for future pain and suffering. That coupled with the items of special damages in the sum of €5,321.10, are agreed, and this Court finds, although disputed, that the liability to pay the said special damages rests on the defendant.

61. This gives a total, therefore, of €61,321.10. This Court has taken into account the decision of the Court of Appeal of Irvine J. delivered on the 10th November, 2015, (Court of Appeal No. 2015/67) as referred to by the defendants and in the light of the evidence offered as set out in this judgment, this Court is of the view that the appropriate amount is as set out above.