Neutral Citation Number [2008] IEHC 200

**THE HIGH COURT**

**2004 No. 12621 P**

**BETWEEN**

**DESMOND DAVIS**

**PLAINTIFF**

**AND**
**JOHN JORDON**

**DEFENDANT**

**Judgment delivered by Mr. Justice Herbert on the 27th day of June 2008**

1. The first question requiring an answer in this case is, was the defendant guilty of negligence as alleged. In my judgment he was. There was no evidence that the defendant was driving at an excessive speed. However, he told the court that as he approached the location where the collision occurred, three motors cars were coming in the opposite direction. The first in line of these cars he said, had, or appeared to him to have, its headlights on full beam, but the other two, he was quite satisfied, were being driven with dipped headlights. He was dazzled by the oncoming headlights. He said that he found it very hard to see and started to slow down. He was travelling at about 45mph. Suddenly, there was a bang on the left side of his Ford Fiesta Van and, the wing mirror seemed to fly off. What appeared to him to be hay went across the windscreen and from there up on to the roof. He said that it gave him a bad fright and, he assumed that he had struck a bale of hay with the wing mirror of the van. At the time of this incident, the defendant had been driving for one year and held a provisional driving licence only. He stated that he had purchased the van some six to seven months prior to the incident. He is a mechanic by occupation and, I find no reason to doubt his evidence, which was not contradicted, that the lights, brakes and steering of the van were fully operational on the occasion.

2. This incident occurred on the public roadway between Ballinalee and Drumlish in the County of Longford at approximately 22.40 hours on the night of 2nd July, 2004. Both the plaintiff and the defendant, in statements made soon after the event to Garda Bohan, now retired, but at that time stationed at Drumlish Garda Station, agreed that it was fully dark at the time of the incident. I am unable to accept the present recollection of the plaintiff that it was only dusk. I find on the evidence that just before the incident occurred a very light and fine drizzling rain had started.

3. The road at, before, and beyond the point where the impact took place is and was, by reference to the evidence of Mr. Frank Abbott, Consulting Engineer and retired Garda Bohan, both of whom gave evidence in the case for the plaintiff, to the evidence of the plaintiff and the defendant and, to photographs taken by Mr. Abbott on the 6th June, 2006, during daylight hours, lined in the defendant's direction of travel by a high and dense hedgerow containing a number of mature trees overhanging the carriageway. On the opposite side of the road, there were a number of mature trees and a low wall and bank. The tarmac surfaced carriageway is and was 17ft wide, divided in the centre by a continuous white line. On the left side of the road, regarded from the defendant's direction of travel, there was no margin at all, only a rising vegetation covered bank, initially at least, at a relatively shallow angle. However, on the opposite side of the road there was a rough grass margin, 5ft in width. On the 2nd July, the plants, shrubs and, trees lining this road would have been in full and dense leaf.

4. The uncontradicted evidence of Mr. Abbott and retired Garda Bohan established that this road is straight and rising gently for more than a mile before the point of impact and, continues straight beyond that point until it crests a low hill a few hundred metres further on. Both were agreed and, their evidence was not challenged or contradicted, that there are and were in 2004, a number of shallow undulations in the surface of the road, though these do not in any way obstruct a driver's view of the road ahead. Mr. Fergal Geoghegan, a Consulting Civil Engineer was called in evidence on behalf of the defendant but I declined to hear his evidence on the objection of counsel for the plaintiff by reason of a breach of the provisions of O. 39, r. 46(2) of the Rules of the Superior Courts with regard to the exchange of expert reports. The defendant accepted that he was very familiar with the road, having driven along it at least once a day, sometimes during the hours of daylight and sometimes during the hours of darkness. He was aware, he said, that the road carries a good deal of vehicular traffic and, he had often come upon persons walking on the road during daylight hours. He stated that he had never met a pedestrian on this part of the road after dark.

5. I accept the evidence of the plaintiff, that from his perspective the drizzling rain was not, as he described it, "enough to wet a handkerchief" and, that the road surface was dry. Equally from the defendant's perspective it would have probably been sufficient to wet the windscreen of his van which was moving forwards at about 45mph and, it is therefore probable that the defendant, as he contended, had engaged the windscreen wipers at this time. By the time Garda Bohan arrived on the scene, it had turned into what he described as a heavy drizzle and the road surface was then wet.

6. Unfortunately, the wing mirror of the defendants van had not struck a bale of hay. It had struck the plaintiff in the area of his right buttock, throwing him onto the roadside bank from where he rolled onto the surface of the carriageway. From there he somehow got himself off the carriageway and back up onto the bank where he remained sitting.

7. What next occurred on the occasion led to a profound disagreement between the plaintiff and the defendant in the course of evidence, with an exchange of unflattering epithets. The plaintiff said that the defendant had stopped his car a little further on after the impact and, had then sped away over the brow of the hill. After about 10 or 12 minutes the defendant had returned driving slowly on the opposite side of the road to where the plaintiff was now sitting on the roadside bank. The plaintiff said that the defendant drove past him and turned further down the road and drove back up again beyond where he was sitting and stopped the car. After another 4 or 5 minutes the defendant got out of the car and walked back down to him. The defendant told the court that after the impact he had driven on a few metres where he used an area in front of a house – it was in fact the plaintiff's house, but the defendant did not know that then – to turn and, he then drove slowly back down the road looking for the body of the wing mirror which had become detached from the van. When he saw a man sitting on the bank he became alarmed. He turned his van again at the first available place and drove back up the road to where the man was sitting on the bank. The defendant considered that no more than 4 or 5 minutes in total had elapsed since he had heard the bang. The defendant denied that he had stopped his van briefly at the plaintiff's house and, had then "taken off like a bat out of hell", with tyres screeching and slipping on the gravel outside the plaintiff's house.

8. The defendant was not charged with leaving the scene of an accident and, neither party was charged with any other road traffic offence.

9. It was put to the plaintiff in cross examination, that in a statement he had made to Garda Bohan, he said that the defendant had come back after about 4 minutes. The plaintiff told the court that the defendant had asked him what had happened to him and, he had replied that he had been struck by a car. To this the defendant had replied that he was very sorry and he had not seen the

plaintiff. The plaintiff gave evidence that he said to the defendant, "so it was you then", to which the defendant had replied in the affirmative. The defendant in his evidence gave essentially the same account of the conversation, but said that he had also added that he was surprised that it was a person. He said that he asked the plaintiff if he was alright to which he replied that he was, but that his leg was sore. Both parties agreed that the defendant had then helped the plaintiff into the passenger seat of his van and had driven him the few metres up the road, to his house, where they both sat together and waited for the garda to arrive.

10. I am satisfied that the plaintiff's present recollection of events has become distorted and inaccurate. If the plaintiff considered on the occasion of the incident that the defendant had fled from the scene, leaving him in pain on the side of the road, I cannot imagine that they would have sat peacefully together in the plaintiff's house until Garda Bohan arrived. The present bitter recrimination of the plaintiff's evidence to the Court, is not at all reflected in Garda Bohan's recollection of what took place in the plaintiff's house. It was not until the plaintiff made a written statement to Garda Bohan on the 15th July, 2004, almost two weeks after the incident, that these allegations are made. Clearly, neither Garda Bohan nor his superior officers in Longford considered on the occasion that the defendant had left the scene of the accident.

11. It is incumbent upon the driver of a motor car on a public roadway to drive within the range of his or her lights and, to proceed only when he or she can see that the roadway ahead is clear. This is reflected in the Rules of the Road which state that if dazzled by the headlights of an oncoming vehicle a driver should slow down and stop if necessary and, should always watch for pedestrians or cyclists on his or her side of the road. In the instant case, on this relatively narrow and heavily shaded road, with no roadside margin on his inside, the defendant, on the evidence, when dazzled by the lights of the first of the oncoming motor cars, slowed down but only to something less than 45mph. He then pressed forward at this speed even though he very obviously could not possibly see in the circumstances that the road ahead was clear. It is hardly surprising therefore that he was entirely unaware that there was something ahead on his side of the road until he heard a bang, the passenger side wing mirror of the van shattered and, "hay" came across the windscreen and went up over the roof of the van. Even after the impact he still had no idea what he had hit, but assumed that it was a hay bale simply because he saw "hay" on the windscreen. In my judgment the defendant should have stopped his van as soon as he was dazzled and he was negligent in not so doing and, in continuing to drive when he was temporarily blinded by the lights of the oncoming car so that he had no or no sufficient view of the road ahead.

12. In his defence the defendant, in the alternative, pleads that the plaintiff was guilty of contributory negligence, in, *inter alia*, walking on the incorrect side of the roadway, having no illumination and carrying a bale of hay which acted as a camouflage in the circumstances, so that the defendant could not see him in sufficient time to avoid colliding with him.

13. The evidence established that the plaintiff was not walking on the side of the road facing the oncoming traffic, on which side, there was the rough grass margin which Garda Bohan measured and found to be 5ft in width. The plaintiff was walking in the dark close by the side of the high and, in places overhanging, roadside hedgerow, with his back to the defendant's approaching van. The evidence established that he was wearing on the occasion, green Wellington boots, dark trousers, a dark blue-green jacket, a white shirt and a grey jumper. I accept the evidence of the plaintiff that he was carrying a portion of haylage on a four pronged fork resting on his left shoulder. I do not however accept his evidence that this portion of haylage was no greater than the size of a football. The size of the fork, the purpose for which the burden was being carried – as extra food for a horse grazing near his house, - and the defendant's description, even allowing for some hyperbole, of the quantity of the "hay" which struck the windscreen of the van and flowed up over the roof, I am satisfied that the portion of haylage being carried by the plaintiff on the occasion was very considerably larger. I am satisfied that it was sufficiently large to mask the white of the plaintiff's shirt collar and his neck and, the outline of his head. In short, in the conditions prevailing at the time, the plaintiff had unintentionally but nonetheless effectively contrived a most efficient camouflage, which I am satisfied, would have made his presence on the roadway particularly difficult for motorists to detect.

14. The Rules of the Road state that where there is no footpath, pedestrians must walk as near as possible to the side of the road facing oncoming traffic and should always wear reflective clothing at night and should always carry a torch when walking outside built-up areas at night. I do not accept the suggestion by Mr. Abbott that it would have been more dangerous for the plaintiff to have crossed the road twice in order to walk facing the oncoming traffic, which was also the side of the road which had the grass margin 5ft in width. The evidence established that the plaintiff had for a number of years worked for Longford County Council as a machine driver. He accepted that he was fully familiar with the use and purpose of high visibility vests. He accepted that he possessed such reflectorised clothing but was not wearing it on the occasion. He explained that on the evening in question stud yard duties had detained him in the yard later than he had anticipated. From the evidence of Mr. Abbott I conclude that the distance between the entrance to the yard of the plaintiff's stud farm and the entrance to his dwelling house is 75m. The two are separated by a disused premises and lands of which the plaintiff is neither the owner nor occupier. To reach his dwelling house from the stud farm yard it was his custom to walk along the public roadway.

15. A failure to abide by the Rules of the Road does not necessarily amount to negligence. However, in the circumstances of the instant case, the failure of the plaintiff to walk on the side of the road facing the oncoming traffic and, his failure to carry a lamp or to wear any form of reflectorised clothing, - even a simple armband which could be kept constantly and easily in a coat or trousers pocket, - in my judgment amounted to a very high degree of contributory negligence. Even dazzled by the lights of the oncoming car and, even driving at a speed of somewhat less that 45mph with dipped headlights, it is probable that the defendant would have seen the plaintiff in time to have avoided colliding with him even with three motor cars passing in succession on the other side of this 17ft wide carriageway, had the defendant been carrying a lamp or wearing some form of reflectorised clothing.. The plaintiff told the court that he noted only one car coming towards him on the road prior to the impact. Though it does not really matter to the outcome of the case, as the defendant makes no complaint regarding the manner in which the two other cars were being driven, I think it entirely unlikely that he would have invented the presence of these two cars for no discernable advantage to himself.

16. In my judgment the plaintiff was more at fault and must therefore bear a higher degree of responsibility for this incident than the defendant. I consider that the plaintiff was 60 per centum at fault and the plaintiff 40 per centum at fault.

17. I accept the evidence of the plaintiff that he suffered an immediate onset of severe pain in his right leg with subsequent swelling and deformity in the area of the lower third of his right tibia. I am satisfied on the evidence of the plaintiff and from the medical reports, the contents of which were admitted into evidence, that the injuries sustained by the plaintiff were caused by the impact. I consider it unnecessary to determine whether the injuries were caused by the rear inside wheel of the van passing over the plaintiff's lower right leg as he alleges, or by the manner in which he fell after being struck by the wing mirror of the van.

18. Dr. Patrick Breslin, the plaintiff's customary general medical practitioner, in a report dated 18th July, 2004, made sixteen days after the incident, states that the plaintiff suffered a fracture of the right tibia and the right fibula. These injuries were repaired at Tullamore Hospital. The plaintiff was discharged on the 13th July, 2004, with a below knee plaster of Paris cast. He had limited mobility and was prescribed analgesics as required. Dr. Breslin stated that the plaintiff would be unlikely to return to full duties for some time. He considered that the plaintiff would make a full recovery but that a full prognosis at that time was difficult.

19. In his report, dated 24th January, 2005, Mr. David Cogley, Consultant Orthopaedic Surgeon, confirmed that the plaintiff had suffered a comminuted fracture of the intra-articular portion of this his right tibia. In the operating theatre an external fixator was placed across the ankle joint realigning the joint surfaces and maintaining reduction. The plaintiff's leg was then elevated to reduce swelling. On the 5th July, 2004, under general anaesthetic, the plaintiff underwent open reduction and internal fixation of the ankle fracture. It was found that there was a loss of some of the articular cartilage on the medial aspect of the joint. X-rays taken on 21st July, 2004, showed the fracture was healing. The plaintiff was advised to continue non-weight bearing. This continued until the 8th September, 2004. The plaster cast was removed on 25th August, 2004. On 8th September, 2004, the plaintiff was permitted to become partially weight bearing, though his foot at that time remained swollen. On 6th October, 2004, he was advised to continue weight bearing with the aid of two crutches. The range of movements in his right ankle was limited and there was persistent swelling. He had no pain at this time. On 22nd December, 2004, Mr. Cogley noted that the fracture was well healed. The plaintiff then walked with a limp and his ankle still remained swollen. He was advised to continue with an exercise programme for a further three months.

20. On 23rd March, 2005, it was noted that the plaintiff had a good range of movement in his right ankle and had little pain or discomfort. Unfortunately some degenerative changes were noted in the ankle joint. On review on 28th September, 2005, the plaintiff continued to have a reasonable range of movements in his right ankle and was experiencing no pain. However, x-rays showed the onset of early degenerative arthritis in the ankle joint. Mr. Cogley considered that the plaintiff would probably require an ankle arthrodesis, though this was then a matter of conjecture as the important consideration was the amount of pain being suffered by the plaintiff as opposed to the X-ray appearance of the ankle. Mr. Cogley considered that this was likely to come about within a two to ten year period from the 11th November, 2005.

21. In a report dated 15th January, 2007, Dr. Breslin stated that the plaintiff had done well since the 5th July, 2005. He had a good range of mobility but his walk was slow and deliberate. Dr. Breslin noted that the plaintiff still suffered pain in his right ankle. He referred him to Mr. Cogley for a follow-up report. That report is dated 2nd April, 2008, and is based upon reviews, including x-rays carried out on the 1st October, 2007, and 1st April, 2008.

22. Mr. Cogley records that on 1st October, 2007. The plaintiff told him that he was getting on well with his work as a farmer. However, he had recently done too much walking and had developed a pain in the medial aspect of his right ankle which prevented him doing all his work. He was using a single crutch. On clinical examination there was a 13cm surgical scar over the lateral aspect of the plaintiff's right ankle together with some healed "stab incisions". X-rays taken at the time showed that the fracture had united but moderate degenerative arthritic changes were already evident. The plaintiff had a diminished range of movements in all directions with a 50 per centum loss of subtalar joint movement. Further x-rays were taken on 1st April, 2008, which confirmed this position. The plaintiff was then complaining of pain, primarily posteriorly and anteriorly over his right ankle if he had to walk on uneven ground or stood on a surface which suddenly gave way or if he walked for more than twenty minutes. He had no pain at night in his right ankle and was not taking analgesics for pain.

23. Mr. Cogley considered that the plaintiff would require a right ankle arthrodesis in the not too distant future. This would require hospitalisation for two to five days, followed by a period of three months recuperation in a plaster of Paris cast, of which the first two months would be non-weight bearing. Mr. Cogley noted also that the plaintiff has some stiffness in his right subtalar joint and considered that degenerative arthritis might occur in the subtalar and talonavicular joints in the long term which might require to be addressed.

24. Dr. Breslin examined the plaintiff on 7th May, 2008. He found that the plaintiff had limited movement in his right ankle, particularly flexion and extension. The plaintiff complained of suffering pain and discomfort in his right ankle. Dr. Breslin noted that the plaintiff remained quite active, but was satisfied that he would require further surgical treatment to his right ankle in the future.

25. The plaintiff was examined at the behest of the defendant, by Mr. Martin G. Walsh, Consultant Orthopaedic Surgeon, on 20th December, 2007. Mr. Walsh concluded the plaintiff had suffered a serious injury. He considered that in the none too distant future the plaintiff would be a candidate for a fusion of his right ankle joint because of his then current level of disability in his right ankle. Mr. Walsh was in general agreement with Mr. Cogley as regards the period of hospitalisation involved and the duration and circumstances of the recovery period. Mr. Walsh expressed the opinion that following a successful fusion there would be no contra-indication to the plaintiff returning to work as a stud farmer and sheep breeder, if he so wished. Fusion, he stated, was designed to relieve pain and thereby enable persons to walk with some degree of comfort. Mr. Walsh stated that 92 per centum of patients experienced very satisfactory results from this operation.

26. The plaintiff claimed that as a result of the increasing pain and limitation of movement in his right ankle and, with the prospect of an arthrodesis in the short term, he was unable to continue with his pedigree Belclare sheep breeding herd project and was unable to continue with his stud farm enterprise. Mr Walsh records that on the 20th December, 2007, the plaintiff told him this and, stated that he had changed over to forestry. It was the plaintiff's evidence that following the accident he was unable to properly attend to the sheep, including to the proper tagging and registration of the progeny and the carrying out of blood testing of this progeny so that Genotype Certificates could issue enabling them to be sold as purebred pedigree Belclare sheep.

27. Having regard to the evidence of Mr. Martin G. Walsh, which was not in any manner gainsaid by Mr. Cogley, I am satisfied that there was nothing to prevent the plaintiff in continuing with these enterprises had he so wished. The plaintiff had informed Mr. Frank Hanley, a Certified Public Accountant, who gave evidence in the case for the plaintiff, that he had decided to abandon the pedigree sheep project and the stud farm business because they required hands on attention from himself which because of his injuries he was no longer able to provide. I am satisfied on the evidence, that this was a decision which the plaintiff took himself and, was not based on any medical advice.

28. It was perfectly plain from the evidence of Mr. Andy Egan, an Agricultural Consultant, who gave evidence in the case for the plaintiff, that the horses did not require the same amount of attention as the sheep and, there was very little handling involved in the sort of stud farm business which was being carried on by the plaintiff. Mr. Egan considered that the plaintiff might require some part time assistance in managing the sheep during the winter period as the flock expanded. One person for a few hours every day would, he considered be sufficient. If no family member was available to help, - the plaintiff is married with four remaining children, the son who usually assisted him having most tragically been killed in a road traffic accident in July 2005, - Mr. Egan considered that it would be possible to employ a person on a part time basis for about €12 per hour. I do not accept the suggestion made by Mr. Egan that this part time assistance would be necessary to such an extent that it, "would gobble up completely the profits of the enterprise".

29. The plaintiff's total land holding is only 25 acres without any modern or purpose built facilities. The plaintiff was fifty two years of age at the date of the incident and, was in receipt of €244 per week Farmers Allowance. In my judgment, as the initial nineteen Belclare ewes and rams were only purchased by the plaintiff on 5th August, 2003, and 26th September, 2003, it is impossible to state, as a matter of probability, that he would ever achieve a thirty ewe breeding herd, producing twenty to twenty five purebred Belclare

ewes and rams for sale annually. According to the evidence of Mr. Egan, allowing for culling but otherwise assuming no problems, it would take a minimum of three or four years to build up such a herd by breeding. The only alternative Mr. Egan said would be for the plaintiff to buy in a breeding stock of forty Belclare purebred ewes and, this would require a great deal of money. The only receipt produced in court during the hearing of the case for the purchase of sheep was for eight purebred Belclare sheep, purchased by the plaintiff at Kilkenny Co-Operative Mart on 5th August, 2003 for €3,208 inclusive of VAT (€2,075 net of VAT). There was some evidence that three more Belclare sheep had been purchased by the plaintiff on unspecified dates from a Mr. B. (name given) in Carlow and, that others, the number seemed to be uncertain, were purchased at Athenry Mart on 26th September, 2003. The plaintiff gave evidence that he had seven rams and three ewes left. He had sold all the rest as purebred sheep but without a Genotype Certificate at between €200 and €150 for rams and €100 or less for ewes. The plaintiff stated that he had suffered a minimum loss of around €200 per animal. It is significant that the figures which he supplied to Mr. Egan were different. The plaintiff said in evidence that all these sales were made from his own house and to persons in the general area. He said he was paid in cash or by cheques. No receipts, cheques, statements or documents of any sort were produced in court nor were any witnesses called to confirm these purchases or sales.

30. Even if I was satisfied that the plaintiff was unable to continue with this purebred sheep project as a result of the injuries sustained in the collisions, which for the reasons stated, I am not, on this evidence I should have not option but to hold that the plaintiff had failed to prove any loss.

31. Similarly, in the case of the stud farm business, the plaintiff said that he advertised in "The Journal" and, a (largely illegible) photocopy document was produced but not identified in court. The plaintiff stated in evidence that he had given all his books to Mr. Egan. Mr. Egan in cross examination stated that the plaintiff had informed him that the fee income from the stud farm in the year 2003 was €15,200 and in the year 2004, was €16,200. This did not take any account of the fixed and variable costs that obviously were involved. Mr. Egan accepted that no receipts for stud fees had been produced to him. Mr. Egan and Mr. Hanley had both produced their projections of alleged future loss solely on the basis of these statements made to them by the plaintiff. Mr. Hanley accepted in cross examination that he had no documents whatsoever to support these figures. The plaintiff stated in evidence that he had disclosed these gross earnings, as well as the purebred sheep breeding project, to a social welfare officer in Longford whose name he gave. The plaintiff stated that this official was prepared to accept these enterprises and his earnings from them as a Back to Work Scheme so that the Farmers Allowance would continue to be paid to the plaintiff at the rate of €240 per week for two years and then at €120 per week for a further year and would thereafter stop. This officer was not called in evidence.

32. The plaintiff stated in evidence that he had an Irish Draught horse stallion and a Thoroughbred horse stallion at stud since 1999, an Irish Cob stallion since 1996 and a Connemara Pony stallion since 1985. The Connemara pony stallion had died. He had returned the Irish Draught stallion to its British owner who was a leading breeder of these horses and who had not made any charge for the use of the stallion. Mr, Egan gave evidence that the plaintiff so far as he was aware had only one stallion left but he did not know which one that was.

33. Again, if I had been satisfied that the plaintiff had to abandon this stud farm business because of the injuries which he had sustained in the road traffic accident, - which, for the reasons stated above I am not. – on this evidence, or rather lack of evidence, I could not possibly find that the plaintiff had suffered a loss in the year 2005 and in any of the years since that date or will continue to suffer a loss in the future. It is for the plaintiff to establish any alleged loss by credible and admissible evidence. Unlike Mr. Egan and Mr. Hanley the court cannot simply accept figures and propositions put forward by the plaintiff entirely unsupported by any acceptable, oral or documentary evidence.

34. For these reasons the court will disallow the plaintiff's claim for loss of income to date and into the future. The other items of special damage were agreed between the parties in the total sum of €10,909.

35. The plaintiff undoubtedly suffered a serious injury. As result of that injury he now walks with a slight limp to the right. He has a 13cm medial scar over the antero-medial aspect of his right ankle. He has a loss of 20 degrees of dorsi-flexion and 25 degrees of plantar-flexion in his right ankle joint. He has gross restriction of movement in the subtalar joint. On 20th December, 2007, Mr. Martin G. Walsh was satisfied on clinical examination that the plaintiff had significant disability in his right ankle as a consequence of the trauma suffered in the collision. I accept the evidence of the plaintiff that his right ankle is frequently swollen and that he suffers constant pain in that ankle. This is progressively becoming more troublesome. Walking on uneven or rough ground causes the plaintiff pain as does walking on even ground for more than thirty minutes. The plaintiff experiences pain at the end of the day and if he sits for any length of time with his foot in a dependant position. On the medical evidence I find on the balance of probabilities that the plaintiff will require a surgical fusion of his right ankle joint in the near future. While this procedure will, on the medical evidence, relieve the increasing pain and discomfort being suffered by the plaintiff it will result in his having a rigid inflexible right ankle, which will be an impediment to some and will entirely prevent other ordinary day to day activities. The plaintiff will be fifty six years of age on the 18th August next, so this must constitute a moderate continuing disability which the plaintiff will have to endure for many years to come, following upon a further significant surgical procedure.

36. I have had regard to the Personal Injuries Assessment Board book of quantum at pp. 24 and 25. For pain, suffering, discomfort and inconvenience to date I consider that the appropriate sum to be awarded to the plaintiff by way of general damages is €48,000. For pain, discomfort and inconvenience into the future I consider the appropriate sum to be €40,000. The total sum of damages is therefore €98,909. The plaintiff is entitled to judgment for 40 per centum of this amount. The court will therefore give judgment in favour of the plaintiff in the sum of €39,563.60.