THE HIGH COURT

[2012 No. 4121 P.]

BETWEEN

LIAM CAHILL

PLAINTIFF

AND

GLENPATRICK SPRING WATER COMPANY LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 19th day of June, 2018

1. The plaintiff confirmed his date of birth as 2nd May, 1973 and that he is a father of four boys aged 22, 20, 18 and 16 years. He described his employment history, having left school at seventeen years, as mostly being based in the manufacturing sector and factory type work.

2. The plaintiff gave evidence of having had a previous accident at work in a previous employment in or about 2008 in a dump truck seat, which failed because there was a temporary weld on the seat as a result of which the plaintiff suffered a back injury. The plaintiff didn't have ongoing difficulties in that area of his body as a result of that accident. He described himself as interested in sport, hunting, fishing, football and hurling.

3. The plaintiff began his work with the defendant company initially as a seasonal contract worker. He began that work in May, 2010, originally with 5pm-10pm shifts. At that time the plaintiff explained that he was undertaking a course to train as a nurse's aide/care worker in the hope of obtaining work with the Heath Service Executive.

4. The plaintiff described his main job as manning the Sidel 2 machine within the tabard area where "preform" plastic bottles were blown into full size bottles. The plaintiff gave evidence that at 10pm at night his duties changed and he would then work when the night shift took over, in the palleting area. His work hours were extended after a period of time to 1:30am.

5. The plaintiff gave evidence that the accident occurred on 15th September, 2010 at 9:30pm. The problem developed in the timing in his own machine and, as he was trained to do, the plaintiff attempted to reset the timing but was unsuccessful. The plaintiff then went to Pioter Czernejwski who was standing on the frame of Sidel 3 and was removing a blockage of preforms in the top of the machine by hand. He gave evidence that he was invited to change places with this gentleman who asked him to finish up what he, Mr. Czernejwski, was doing while he went to investigate the problem with the plaintiff's machine. The plaintiff's evidence was that he climbed onto the frame of the machine, stood on the uppermost bar while clearing the blockage by hand but that while he was throwing an armful of preforms back into the hopper at the foot of the conveyor, he lost his balance and fell backwards. The plaintiff describes striking his head off something as he fell and that he hit the ground landing on his coccyx and elbows. He then met and had a discussion with Anthony Dignam who was the nightshift supervisor and who chided him for being up there. The plaintiff then said his own machine was not working. It was close to changeover time so he went to work in the palleting area but that he wasn't able to do the work of lifting wrapped bottles due to pain and, having indicated to the evening shift supervisor Mattie O'Brien that he was injured and would have to go home, he left the plant.

6. The plaintiff gave clear evidence that when he got as far as the nearby carpark in Tesco he was obliged to telephone his wife and get her to collect him because he could not drive his motor vehicle. The following day he explained to Tom Weste, who was the day shift manager, what had occurred and the plaintiff says that he furnished medical certificates for a number of weeks before he received a P45 from the defendant in the post.

7. The plaintiff was treated by Dr. John Carey, his general practitioner, with anti-inflammatory and pain killers and given a sick note for work for one week with a diagnosis of probable soft tissue damage. He was sent for various x-rays and then he got a referral to an Orthopaedic Consultant in Ardkeen Hospital. He saw Dr. Chhabra but also Professor Molloy in Cork and he went privately regarding his neck and back. Professor Molloy gave him a set of exercises for his neck and back. The plaintiff gave evidence that these exercises are very painful but that he does them very regularly and that he also does light gym work and walks. However, he avoids uneven ground. He felt that he was left with a weak left leg and has had falls. He is on two different nerve suppressants. The plaintiff described how hard it was for him to sit for too long or to stand for too long and how he has to take pressure off his back. He described it as like being winded between the shoulder blades with pain down the right arm to above the pelvis and he said that his lower back was causing him greater difficulty at the moment with spasms every couple of weeks and that he was getting a lot of sciatica.

8. The plaintiff described how he missed three weeks of his FETAC course which would have allowed him to work in a hospital setting as a nurse's aide or carers assistant and that it was a quite intense eleven-month level 5 course. He couldn't continue with that because physically he couldn't put himself forward, he couldn't drive a car and he felt that his legs were going to explode. The plaintiff described himself on social welfare disability allowance ever since the accident and says that he has rarely been able to drive since then. If he goes for a walk he has to be picked up and if he stays too long on his feet, he gets very stiff. The plaintiff indicated that he hadn't cleared blockages on machine no. 3 before the accident but that he had seen it done. The plaintiff felt that prior to this he had been a very active sociable person and very family orientated but that now he tends to be isolated from his own family and has suffered depression difficulties and is now on an antidepressant. The plaintiff described himself as a person who doesn't like to show weakness and he found it very hard to admit that he was depressed.

9. The plaintiff described considerable pain in 2012, with particular irritability, agitation and moodiness. He said that he had separated from his wife in 2012 but feels the loss even though he has contact with his children. He is now in shared accommodation within walking distance of his own home. The plaintiff accepted when cross-examined that he had been assigned to Mr. Bates who had trained him in use of the Sidel 2 machine and that he had worked with him for an eight-week period. He agreed that Mr. Bates had shown him how to reset the timing on the Sidel. The procedure was that he would climb up on the hopper and Mr. Bates would show him how to free it and that if he couldn't free up the machine Mr. Bates would climb up on it. The plaintiff also agreed that his colleague at Sidel 3 sent him up on his machine and that that is when he fell.

10. The plaintiff described how he tried to work for Sky Television cold-calling but he said that for the hours he needed to put in,

there was no financial gain. The plaintiff then gave evidence that he tried to work for Homestead who were looking for workers. He found that work just too uncomfortable to do, mostly concerning discomfort in the neck and back.

11. Under cross-examination the plaintiff described himself as having good days but bad weeks and that he was quite uncomfortable 99% of the time.

12. The plaintiff was cross-examined in detail about a number of social activities from photographs of holidays and socialising with his family and friends. He was asked about his cutting up blocks and loading them onto a trailer with other family members which he freely admitted doing and he indicated that he was able to do this physical activity within reason until his back or neck would no longer allow him to do it. The plaintiff indicated that he can use a chainsaw but only for a limited period of time. He denied that he sawed, split and loaded the wood all in one day and indicated that the wood would have been sawn prior to that by either himself or his son. Some of the specific contents of Dr. Gleesons's report were put to this witness but the plaintiff did not accept that there was nothing wrong with him as asserted by Dr. Gleeson. The plaintiff freely admitted that he helped his sons with the timber and he said that it was not a case that he ever said that he is an invalid 100% of the time. He did not accept the contention that his claim was fabricated.

13. On re-examination the plaintiff clarified that he did not have back pain at the point at which he ceased to work for Roadbridge and that at the time of the accident in Glenpatrick he was quite fit but slightly overweight. He used to play AstroTurf soccer as well as indoor soccer. The plaintiff agreed that he had lost three stone in weight in seven weeks prior to the accident and that it is referred to in Dr. Carey's notes dated July, 2010. The plaintiff indicated that he was treated for bacteria in the intestine and he said when he stopped working in Glenpatrick he started putting on the weight and he agreed with the clarification that Dr. Maria Kelly recorded on 23rd July, 2010 that his weight has stabilised in the previous week.

14. Mr. Thomas Weste gave evidence on behalf of the plaintiff. He described himself as a day shift supervisor taking responsibility for the regulation of production within the plant. He had worked there for eighteen years and had interviewed the plaintiff in respect of the job concerned. This witness indicated that he had no role in induction or training and he confirmed that the day after the accident the plaintiff indicated to him by telephone that he had had a fall and that he expected to be back at work within a matter of days. He reckoned that the plaintiff was off work for about four nights. The following Monday the plaintiff telephoned to confirm that he would be coming to work with a sick certificate. This witness indicated that he was made redundant a couple of weeks after that, after 18 years' employment.

15. Thomas Sheehan gave evidence for the plaintiff and said he worked in the plant until 2014 where he had begun as an operator and gone on to become a product manager over a 25-year period with the firm. He had worked sixteen years as production manager. He described the stages in the process, stage 1 buying in the preform items, stage 2 involved heating them in order to turn each one into a bottle. He said he himself had never actually worked with the plaintiff and he agreed that he had his own difficulties with the company and he agreed that at that time while he took redundancy there had been an attempt on the part of his then employer to dismiss him and that he has a case against the company. He confirmed that he never worked on the plaintiff's shift nor does he know him. He explained that if there wasn't a major blockage he would use a stick to clear the fault on the machines and he confirmed that he had worked on the machines for sixteen years and had climbed them to do maintenance.

16. Mr. O'Reilly, Consultant Engineer, gave evidence that he attended the premises on 28th May, 2013 and that the plaintiff brought him to Sidel 3 where they were making the plastic bottles. He took the court through the photographs taken and made reference to the fact that, in his opinion, ten feet above floor level, it was not a safe place to work. If a person were climbing the structural bars, one would climb to the fourth bar, which would be 81 inches high, and one would then need a safe means of access to a platform or tow board and ladder. He said there was an obligation to have a safe means of access to and egress from the place of work and that s. 15 of the Health & Safety at Work Act 2005 came into play.

17. He referred to the risk assessment hazard and an ID sheet as a precursor for the preparation of a safety statement. This classified the risk level as medium on the subject machine. He said that hands were used with the moving machine and that there is a risk of entrapment with manual removal of a blockage. He said that was the position with regard to Sidels 1 and 2 and he believed that it also referred to Sidel 3 and he said that he would identify this is a hazard i.e. the manner in how a blockage is removed. He said there is no means of climbing up, that it is unacceptable and clumsy to try and clear blockages in the manner used. He said there was no reference to climbing machines and that this part must be accessed on a frequent basis and there should be a platform ladder. He confirmed under cross-examination that if he were required to climb in the manner described by the plaintiff that that would be an unsafe system.

Evidence of Marie Cahill, wife of the plaintiff

18. Mrs. Cahill gave evidence that she was married in 1995 and confirmed that she had separated since the accident but that the parties had brought up four children and that all but one are now adults. She described how her husband telephoned her to say that he had had a fall at work and that he was coming home. Five to ten minutes later he asked her to collect him from Tesco. She got her sister to come with her to Tesco to pick him up. This witness said that he telephoned Tom Weste and that she drove him into the factory to explain what had happened and that she brought in medical certificates three or four times and that she got these certificates week by week from Dr. John Carey and handed them into reception.

19. She described the husband as having mood swings the entire time since the accident. They separated two years post-accident. He had been taking out his bad moods on the boys, was snappy and that he had moved out, but that most days he would pop down and that they still talk. The witness confirmed that her husband had had an accident while working with Roadbridge and that he was in pain for a few weeks after that accident but that it was not severe. The witness was cross-examined to the effect that her husband was claiming to have complete disability. She was shown photographs of him lying on the floor and the defence put to her that he seemed to be in the whole of his health while he was saying that he couldn't ever work after this event. The witness said her husband was not in a new relationship that she was aware of, that he had gone on a family outing to Wales and that he had wanted to make it a day out and that she didn't see him cutting logs. She was aware that he had lost 70 pounds in weight prior to the accident.

20. Dr. George Karr, Consultant Neurosurgeon, gave evidence of his qualifications to the Court. He said that he had seen the plaintiff on 15th February, 2018 and found him to have stenosis or degenerative change of the joints from being flexible to less movement. He referred to nerve study conduction tests carried out and he said that the symptoms can cover pain, pins and needles and burning sensations. He found that this patient had chronic long term changes going on for at least six months, L2 to S2 changes and L2 to L4 on the left side. He said that these were indicative of compression of the nerve root and can be degenerative or be due to a trauma where there is stretching or irritation of the nerve root. He said that is present in the MRI scan and that he thinks a fall from seven foot high is likely to give rise to a sign of stress to the neck and lower back. He said the plaintiff has pain in the shoulder blades. His

diagnosis is of degenerative changes in the lower cervical spine and lumbar spine and he said there was a loss of sensation with trauma to the lumbar spine. He said that in December, 2015 in terms of prognosis, the pain remained severe at that stage and he felt surgery would aggravate matters. He said the plaintiff was due to be seen by a pain specialist and was to exercise as much as possible. The symptoms would continue for one to two years.

21. This witness indicated that it is now five years since the accident and said that non-impact exercise was recommended with no excessive twisting. He said that there is a 5% risk of serious change and he envisaged a further one to two years towards recovery. He said when one is five years post accident that after two to three years it is very rare to become completely pain free. He feels that the plaintiff's back pain is worse and that he has a dead pain in his right leg as if cold water was running down the right leg and going into the right arm and hand.

22. The plaintiff is on antidepressants which he gets from his GP and he said that in some cases this becomes an overriding problem where there is an unresolved upset and there can be psychological disturbance which can lead to severe mental distress. He found this plaintiff's neck movement restricted and shaky and that the pain went through the right shoulder and right elbow and to the rest of the lower back. He said he felt that the second MRI was unchanged and that the diagnosis was the same as previously. In terms of symptoms and clinical findings he said these are much the same as before and that over time the plaintiff became more upset regarding his case.

23. The prognosis seven years following this accident is that the plaintiff is in constant pain and discomfort and it is unlikely that one would see significant improvement.

24. This witness said that it was unlikely that the plaintiff would be unable to do physical work or exercise. He can do non-impact exercise. He said that there was a physical and psychological basis to the problem and that basic exercise was all right but that he did not see him returning to his previous activities.

25. In relation to the fact that the plaintiff was chopping firewood, this witness indicated that every time he saw the plaintiff he encouraged him to exercise and to do activities i.e. short burst activities.

26. Under cross-examination this witness said that at the early stage there was no bone injury but that the scans in 2015 showed that degeneration could be found and that there is no clinical evidence of nerve malfunction. He said he relied on x-rays and the scans of the spine as well as neurological symptoms. This witness strongly said that he relied on both x-rays and scans but also on his physical examination and that in 2015 he found a restriction of movement of the neck and back with obvious pain and he found a restriction in movement in both legs.

27. This witness was asked about a previous accident where the plaintiff suffered in 2008 an injury from a dumper truck and he told Dr. Kaar that he had fully recovered within six months of the accident and it was remarked that three and half years after the full recovery the plaintiff issued High Court proceedings regarding that claim. This witness, asked that about Dr. Gleeson's findings, said that in 2015 the plaintiff's movements were a little better than they are now. He said that Dr. Gleeson appeared to have missed the whole upset and psychological aspect of the case and, while she concluded that the plaintiff was in some way exaggerating, she was looking at him physically, not holistically and that while the plaintiff is capable of moving and doing things with his symptoms, he doesn't believe it is false. The plaintiff has developed progressive symptoms since the accident. He said the plaintiff's difficulty begins with physical problems which then becomes pain plus psychological upset with difficulties of self-perception where it can be very difficult to return to previous activities. This witness was shown photographs of 16th July, 2014, showing the plaintiff on the ground. He said it is very difficult to comment on a brief snapshot in time and its interpretation is really a matter for Mr. Cahill.

28. This witness was asked about Mr. Cahill being on a fairground ride where the instructions said that if you have a bad back you should not use this equipment. This witness answered that the plaintiff is sitting down in the photograph and that he felt the force of such rides would be carefully calculated. Photograph 2 shows a vertical ride and it was put to this witness that there was no attempt to protect his back and he said the plaintiff does not seem to be supporting himself with his arms in the photograph and that it is difficult to know how often he did this or for how long he was engaged in the activity.

29. He was asked about the plaintiff chain sawing, splitting wood and glowing wood and he said that when he reviewed the plaintiff, he tried to encourage him to do things, although not on his own.

30. This witness said that he believed that the plaintiff undertook Homestead care work since the accident and he said on the evidence of one occasion of leg activity that it was very poor evidence and he could not comment. He said it would be different if he carried out a complete trailer full of material with an axe. He said it would not be consistent if he was on his own rather than with his sons as was the case here.

Evidence of Susan Tolan, Occupational Therapist

31. This witness saw the plaintiff on the 11th July, 2016. He set out his complaints and his full work history. He was in the course of undertaking health care assistance training and there were jobs in that area. He also tried telephone sales which was not competitive for employment and she felt that there were significant barriers to employment for this patient. She described his physical complaints, his loss of confidence, his isolation, his injuries, the fact that he was depressed and described this as a vicious circle. For any employer he would have to update his skills and any employer would have a duty of care regarding manual work and would not be a suitable occupation for him. She stated categorically that he was not employable at the moment.

32. This witness also stated clearly that if a person is depressed it is very difficult to get that person to cope with vocational rehabilitation. With disability one can earn €120.00 maximum per week. One could work part-time but the plaintiff does not have a skill at present and is now on anti-depressants.

33. It was put to this witness that the plaintiff had been involved in using a chainsaw. Her response to this was that one must look at the purpose of the activity. It was more important that occupational deprivation leads to social isolation and it might well have been necessary for his physiological wellbeing that he would do something with his family. This witness said we must view the chainsaw in a wider perspective.

34. With regard to photographs where a lady is seen falling over the plaintiff in an accidental way, her response was that it might well have caused him severe pain. This witness also felt that even though he was working with a trailer, it did not mean that he could sustain that type of activity over a period of time. Regarding his history, her observation and his medical reports, this witness concluded that the plaintiff is not a candidate for employment. The plaintiff would not have had enough stamps to give him an invalidity pension. He was refused disability and got it on appeal and therefore this witness argued that he was by definition unfit to

work.

35. In 2017 in terms of the certificate of recoverable benefits the plaintiff indicated to this witness that he was getting disability allowance at the time she saw him.

Evidence of Dr. Gleeson, witness for the defence
36. Dr. Gleeson, Specialist in Occupational Health, described her qualifications both as a general practitioner and as a member and fellow of the Royal College of Occupational Health Specialists. This witness looked at fitness for work in terms of safety, capacity and tolerance. She claimed to use the holistic method and said the plaintiff was sent to her for a medico-legal examination in 2015. She said that he sat in front of her for 45 to 60 minutes with no difficulty. This witness claimed that he was inconsistent and that he could dress himself with no difficulty and that he either had Munchausen's Syndrome or that he exaggerated or had a psychological difficulty. She said that there were no clinical signs and that all his joints had the full and normal range of movement and that his difficulties are non-organic or psychosocial. She referred to "black flags" which would indicate a lack of happiness at work or that there was litigation pending.

37. This witness said that he had chronic pain syndrome with "black flags" and felt that he was part of the compensation culture. She said that there were no signs that any allegation of chronic pain was work related and she felt it was more psychological/social. She did not find him depressed and deemed him fit to work. This witness said that the plaintiff needed rehabilitation but that there is no reason to get back to work and his previous injury would not preclude him from work.

38. This witness said that he had a full normal range of movement and that a forklift vibration would be nothing like the vibration on a fairground machine for example.

39. She was shown where the plaintiff was crouching. She said he was able to hold that position without any distress and that he was functional and she deemed him to be fit to work and felt that there was deliberate exaggeration or a psychosomatic aspect and that with a period of rehabilitation of four to six weeks he should be back to work.

40. Under cross-examination she agreed that she would defer to the opinion of a neurosurgeon regarding the spinal issues and to an orthopaedic surgeon. She agreed that she did not have the MRI test to hand when she examined the plaintiff and she did agree in conclusion that it would be worth an orthopaedic and surgical opinion. She did not have the nerve studies conduction reports at that stage and she said she did not wait on the results to do the report. This witness argued regarding the back pain revolution referred to in a lot of UK studies that the MRI can have a negative effect on opinion. She says we all have a certain amount of degenerative difficulty that does not need surgery and that MRI's are not routinely indicated.

41. This witness indicated that she saw the plaintiff five years post-accident, that his clinical examination was normal, that his reflexes were normal and his function was normal. She felt that the MRI and testing was for legal purposes and she said that it was good that he was referred to the pain clinic and that is part of excluding a red flag scenario.

42. This witness indicated that a lot of English studies show that there is no clinical evidence of neurological lesion and that a person can still be fit for work and despite having an abnormal ENG study, she deemed the plaintiff fit for work. This witness claims that the ENG is not relevant to her assessment even though the neurological experts say they are in this case. This witness holds that scans are for exclusion studies and that even if one is treating patients with chronic neuropathy he should still go back to work if he can sit and move normally, he can do so. She found that he had a glove and stocking distribution of nervation and that this was not consistent with nerve lesion and jelly legs include faintness and that pins and needles signal cervical radiculopathy.

Evidence of Dr. Seamus MacSuibhne Consultant Psychiatrist of St. Luke's Hospital Kilkenny.
43. This witness described the plaintiff as having a depressive disorder consequential to physical disorder. He described the plaintiff as suffering from low mood, loss of hope, and as showing some suicidal ideation which was quite severe and that this patient perceived a loss in many domains.

44. The plaintiff indicated to this psychiatrist that he had had a shotgun in his mouth at one stage. The consultant psychiatrist distinguished his condition as that of Post-Traumatic Stress Disorder. He described the plaintiff as having dreams every few weeks in the nature of Post-Traumatic Stress Disorder but he said it was more depression itself which was the problem for the plaintiff. He described the plaintiff as having a profound loss of his sense of self.

45. This witness described the plaintiff as suffering an impact on his masculinity and on his sense of purpose and said that there had been an impact on his family life which included the breakup of family life and the loss of relationship with his sons. Prior to the accident, while the plaintiff had a previous accident, he did not have any traumatic experience as a result.

46. This witness described the plaintiff as being depressed in mood and that he does hope more things can be done in the future for him and that he is on anti-depressants at the moment. He described the plaintiff's condition as less than one would hope for, suboptimal in his view. This witness advised a change in the medication and advised that the plaintiff be given this at night because it would help his sleep problems. He described the plaintiff as having had a number of losses and said that he needs clinical assessment with a psychologist and CBT.

47. This witness indicated that there are positive signs, however, in that the plaintiff had a determination to get better and he described the effect of this accident as having had multiple effects on the plaintiff.

48. The first interview with the plaintiff occurred on 2nd March, 2018 and the second interview ten days prior to the case being heard. This witness agreed that he was aware that the case was listed at the time of the second interview. He confirmed under cross-examination that the plaintiff does not suffer from Post-Traumatic Stress Disorder and has rather a depressive disorder and he based this clinical judgement on the presenting symptoms at the time. This witness described the prognosis as guarded and that the psychiatrist cannot give a terminal diagnosis.

49. Under cross-examination it was put to this witness that Dr. Gleeson gave evidence that the plaintiff is capable of going back to work. This witness disagreed with that, but did add that he could get back to a position of functioning where he would then be able to go to work. The psychiatrist then added that the plaintiff has depression in the context of psychical symptoms and he described it as an after effect of his injuries and that in his clinical judgement depression is the condition he has. He described making that clinical diagnosis in the context of his own medical reports and the reports the plaintiff had. He said that this witness added that it was a free standing depression and that it was independent of pain, but he agreed that he had chronic and daily pain.

50. Regarding a photograph, shown to the psychiatrist, he was asked whether this photograph was consistent with pain or loss of daily function. He said that it was consistent and didn't mean that someone never laughs, nor did he feel that the other photographs were inconsistent with the plaintiff having depression and he said that he wasn't in court himself as a pain specialist.

51. This witness was shown a photograph which showed a stationary roller coaster and he felt that it wasn't the plaintiff in that picture that had his hands in the air but he said it wasn't inconsistent with what he knew of the plaintiff.

52. A photograph was put to this witness which showed the plaintiff using an axe/chainsaw chopping wood and again he said this was not inconsistent with a person having a depressive disorder. This witness added that the occupational therapist looks at activity in the broad sense and he said with regard to the photographs showing activities such as that of a chainsaw these are snapshots as opposed to a clinical examination. He hoped that with anti-depressants and psychology that the moderate depression which the plaintiff suffers from would alleviate within a year, but that he cannot work at present and he would hope that after one year the depression would be better and that he could work.

53. The parties agree that the Court could consider the actuarial report provided on behalf of the plaintiff as a guide. No evidence was called in relation to this aspect of the case but it was pointed out on behalf of the plaintiff that he was seven years out of work and that there were loss of earnings figures that he had hoped by February 2012 to work as a nurses' aide but wasn't able to complete that training. The report from the actuary was described as not being part of the claim as such. It was stated that while figures were given, the Court was not bound to follow it.

54. Reference was made to *Billy Nolan v. O'Neill* [2012] IEHC 151. The plaintiff was described as having a disability as a result of the accident he is not fit to do what he would otherwise have done had he not had the accident. His plan A was to work as a health care assistant.

The defendant's case – evidence of Declan Clarke, Private Investigator
55. This witness indicated that he observed the plaintiff for the purposes of this case and that he was compliant with the Data Protection Act. He indicated that on 5th August, 2015 he saw the plaintiff receive timber delivered in the form of two bags taken off a lorry.

56. He made a reference to day 2 six weeks later when he observed the plaintiff between 10am and 12:30pm using a cutting chainsaw behind a ditch. This witness described himself as passing by the plaintiff every ten minutes. He said there were two men working together on that date.

57. With reference to his observations on Monday 21st September, 2015, he did not see the plaintiff but there was a trailer full of blocks parked at the plaintiff's home. On 22nd September, 2015 and 24th September and 29th September between 3 and 5pm there was no sign of the plaintiff. On 30th September, the plaintiff was observed by this witness between noon and 1:35pm and he described the trailer on that occasion as blocking his view.

58. With reference to a photograph, he said the plaintiff showed no sign of disability under observation by him on 30th September, 2015. On 1st October, 2015 between 1pm and 3:30pm, the plaintiff was the only person present splitting logs and he was using a big axe i.e. a full sized axe. The plaintiff was continuing this activity and was still there when this witness left.

59. On Friday 2nd October between 1 and 4pm the plaintiff drove the trailer to his house and had the axe up over his head and was bending down throwing logs. He was working fast and was twisting and throwing and carried out a variety of different tasks and there was no sign of restriction on that date between the hours of 1pm and 4pm.

60. This witness confirmed that the plaintiff was still working with the logs when this witness left the scene and that he was quite surprised to see the plaintiff walking showing a restriction of movement.

61. He referred the plaintiff's open forum on facebook which showed him at a theme park called Oakwood where patrons are advised not to ride with a back or neck injury or ailment or pre-existing condition. Photograph 11 showed the plaintiff on a circular pole which shoots into the air and drops back to the ground and he said it and a rollercoaster where the two most severe rides.

62. Under cross-examination this witness confirmed that he was not watching continuously but was driving up and down the road passing the plaintiff every ten minutes. He confirmed that the longest period of observation every ten minutes would have been between seven and eight seconds in terms of his view because he felt he couldn't stop the car.

63. This witness confirmed that the plaintiff was only on his own during one of the days on which he was observed. For example, on 17th September, 2015 the plaintiff was cutting but there were other people present and thirteen days later when the plaintiff was cutting with a chainsaw there was a second person present. One day after that he found the plaintiff on his own splitting logs. He confirmed that there was no activity on the part of the plaintiff on 21st, 22nd, 28th or 29th September, 2015 and he said that over two days other people were doing similar work but the plaintiff was not there.

64. With reference to 2nd October, 2015 he confirmed that others were working that day, not the plaintiff.

Evidence of Anthony Dignam
65. This witness was an employee working now with Bulmers but had worked with the defendants for eleven years prior to this as a production manager until June 2016. At the time of this accident this witness confirmed that he was a night shift supervisor. This witness said that it was not permitted to ask a person to get down from the machine and that he doesn't recall the plaintiff coming to him and felt that he would have reported it himself. He said that if a person was injured severely one would call for medical assistance and that it therefore would have come to his attention.

66. Under cross-examination this witness confirmed that he would have very little to do with the area in which the plaintiff allegedly fell and that it wasn't his shift or area of responsibility. He clarified that it would not have been his duty to do an accident report form but he still would have reported such an incident.

67. He said that he would have been aware that there were issues about the number of bottles and that there was a premium on clearing blockages but not at the risk of safety and he agreed that he probably had used the phrase attributed to him by the plaintiff.

Anthony O'Loughlin, Operations Manager
68. This witness confirmed that the plaintiff was taken on a seasonal shift and that in 2010 there was an extra shift in the evening

and that the plaintiff at the time was doing a course of study and he was free from 5pm to 10pm and it was ideally suited to him. He described the plaintiff's employment as due to stop at the end of the summer in any event. The plaintiff had a forklift licence and had been five to six weeks on the particular machine in question.

69. With reference to the photographs this witness confirmed that it was very rare that blockages occurred higher up on the machine past the rail but it was not unknown. He said that guys normally get a ladder and this involves a technician or senior operator and he said that such a person was allowed to go up a ladder. The general operative would report to the senior operative. The general operative was not allowed to go up He had never seen a person climbing. The frame was for an electrical panel. He said Peter would never have asked the plaintiff to go up on the machine as described by the plaintiff.

70. Mr. O'Loughlin described the accident procedure and said he would come within five minutes if something serious had arisen. He said that the accident hadn't occurred and he said it was a small working environment like a village and he said we would all know about it. This witness said that it would be a rare event to receive a letter about a claim and that he would have taken directions from solicitors before replying. He said he remembered a reply in response to Mr. McGrath's letter. There were no documents or no incident report form received. This witness had it put to him that the evidence of Mr. Weste was that he handed in one sick certificate. There was no challenge to the accuracy or otherwise of this. He said he wasn't aware what the wife was going to say and he asserted that there was no evidence of sick certificates having been handed in, and that perhaps they weren't given in or perhaps that Mr. Weste made an incorrect statement. He said that he contacted Mr. Weste to find out what was his recollection and was surprised now to hear what Mr. Weste was saying.

71. This witness said that Mr. Weste is not in good health at the moment.

72. This witness said that he was twenty years with the company, had worked his way up, and that he would have taken it personally if somebody was making up a story. There are no certificates on his file. He presumes that the plaintiff was absent without leave and that no inquiries were made and he presumed therefore that the plaintiff left the workplace early and he said the operation was being scaled down at that stage in any event.

73. This witness confirmed that the machine in question produces 100 bottles per minute and that all machines run simultaneously. This witness confirmed that there was three to four minute lead time before there would be actual loss in production and that then the machine would lose 100 bottles per minute in terms of production.

74. It was put to this witness that the plaintiff said that he had lifted armfuls of proforma and had thrown them back and this witness said that that made no sense.

75. Mr. Yron Potes gave evidence and said that he was eleven years working in the factory and that he himself was a training co-ordinator. He said that he worked on how to run and start and stop the machine and that he would never touch mechanical parts. He said Sidels 1, 2 and 3 were identical machines. He confirmed that photograph 1 showed the rail dropping down and photograph 2 showed that new employees would be told not to touch machines as they have no mechanical experience. This witness said that the employees were told that if the machine broke they were to call the shift supervisor or the senior operator and to let him know.

76. Under cross-examination this witness confirmed that he was on holidays on 15th September, 2010. He said lots of things can go wrong and that employees are not told what to do but to go to a senior operative.

77. Peter Czernezewki described his position with the company as a general operative for the previous eleven years and that he had been promoted eight or nine months ago. He confirmed that he was working on the date in question in September, 2010. He denied the plaintiff's version that he went to Sidel 2 and that the plaintiff went to Sidel 3 and said he was never working up there without a ladder.

78. He first asked whether they could free the blockage from the floor by using a bar, and said that if they weren't able to fix it they would call a supervisor. He denied going up on the machine because he said if he did he would be sacked. He said first of all one would see could one free the blockage from the floor and one would have two to three minutes to get the ladder up to the top and see the problem. He said that any problem Mr. Cahill had he would have to call him and that he was not allowed to clear the blockage himself unless it could be freed from the floor. This witness said that there was always a ladder behind C2 or C1 or that it could be in the store in the same area. One could then bring it to Sidel 3, climb up to the top, and the time starts when one is at the top. It costs two to three minutes in production and he said one could not take short cuts when afraid of losing one's job.

Submissions of the defendant

(a) That the accident the subject matter of the within proceedings did not occur.

(b) That if the accident did occur, the plaintiff acted contrary to his training in climbing the Sidel 2 bottling blowing machine and not using a ladder

(c) If, which is not accepted, the accident did occur, the plaintiff has exaggerated his injuries.

79. The defendants argue that the plaintiff's evidence is both inconsistent and unreliable and raises the Supreme Court decision of *Shelley-Morris v. Bus Átha Cliath – Dublin Bus,* (unreported judgment dated 11th December, 2002).

80. In addition, the defendants argue that s. 26 of the Civil Liability and Courts Act 2004 applies to this case and should lead to the case being struck out by reason of false and misleading evidence on the part of the plaintiff. Denham J. in the *Shelley-Morris* case observed that there are three possible circumstances where s. 26 might apply. Firstly, where the whole claim is concocted i.e. a fraudulent claim. Secondly, where there is a genuine claim but where there is an exaggeration by the claimant of his injuries because of his subjective belief that the injuries have a worse effect than they have. She described this as involving no conscious lying by a plaintiff and indicated that in such circumstances the judge ought to determine the value of the damage suffered in accordance with the evidence but would not condemn the evidence of the plaintiff.

81. The third type of situation occurs where a genuine case establishing negligence is made, but with a plaintiff deliberately exaggerating injuries. At this point the judge hearing the case must exercise judicial discretion with reference to the credibility or otherwise of the witness leading to a situation where, if the court finds that the credibility of the witness is so undermined that the burden of proof has not been met, then the trial judge will dismiss the claim. Before this is done the trial judge may assess the credibility of the witness in light of the evidence of other witnesses. It is important to note that the Supreme Court upheld the finding

in *Shelley-Morris* that the plaintiff exaggerated her injuries but the court declined to dismiss her claim in its entirety. That position has now changed as a result of s. 26 of the Civil Liability and Court Act, 2004 where it is now mandatory for the Court to dismiss a claim where the Court finds a plaintiff guilty of exaggeration of the type envisaged in *Shelley-Morris*. It is mandatory for the Court to dismiss the plaintiff's claim where the Court has found that the plaintiff has given or reduced or dishonestly caused to give evidence that is either false or misleading in any material respect and secondly, that he knows that evidence to be false or misleading.

82. Eleven principles arise in the recent Court of Appeal decision of Irvine J. in *Platt v. OBH Luxury Accommodation Limited* [2017] 2 I.R. 382.

> (a) Section 26 requires that the defendant establish an intention on the part of the plaintiff to mislead the court and secondly that he or she as adduced or caused to adduce evidence that is misleading in a material respect.
>
> (b) A false and/or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim fraudulent.
>
> (c) The defendant is not required to establish that the entirety of the plaintiff's claim is false or misleading in order to succeed on such an application. Proof, for example, that a plaintiff's claim for loss of earning was false or exaggerated to a significant extent may justify the dismissal in total of another wise meritorious claim.
>
> (d) The defendant in the course of the hearing must afford the plaintiff an opportunity of counteracting the assertion that he gave false and/or misleading evidence or caused such evidence to be adduced on his behalf, knowing it to be fraudulent.
>
> (e) The burden of proof initially rests on the defendant in a s. 26 application. The court should not rush to judgment where the court is relying on an inference from a proven or admitted fact. That interference should not be made likely or without due regard to all the relevant circumstances including the consequence of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty.
>
> (f) Once the Court is satisfied that the plaintiff has knowingly sought to mislead the Court to a material extent, the onus must be on the plaintiff to then establish by whatever means or argument as may be available to him or her that it would be unjust to dismiss the action.
>
> (g) The provisions of s. 26 are not to be used as an opportunity of allowing a defendant to escape liability by reason of the frailty of human recollection or the accidental mishaps as so often occur in the process of litigation. (O'Neill J. in *Smith v. Heath Service Executive* [2013] IEHC 360.
>
> (h) Section 26 is designed to operate as a significant deterrent to claimants who might be minded to achieve an unjust result by misleading the court and/or their component concerning the truth of their claim in some material respect. Once the Court is satisfied that the plaintiff has given false and/or misleading evidence and the plaintiff has not adduced evidence that to dismiss the claim would cause an injustice, then the claim as a whole must fail and the legitimate parts of the claim cannot survive. Irvine J. at p. 90 of her judgment took the view that where a plaintiff furnished expert reports, which he or she later withdrew, either before or after the proceedings having commenced, the fact that they are withdrawn does not prevent a defendant from relying on s. 26 provisions, but equally the fact that a defendant has not sworn an affidavit verifying a claim does not bar a defendant from invoking the provisions of s. 26.
>
> (i) When seeking to construe s. 26 of the 2004 Act, in a proportionate and fair manner, it is relevant to consider the extent of the falsity of the evidence, what the plaintiff hoped to gain from the false and/or misleading evidence tendered and whether the plaintiff had sought to deceive their own experts as well as those of the defendant.

83. What the court must consider:

> 1. The pleadings and reports and updated particulars of personal injuries. It is not necessary for me to repeat these in detail but it is quite clear from an examination of the "Further particulars of injuries" and also from the updated particulars of loss that the plaintiff claims that his quality of life is poor with pain from the neck of the left Temporomandibular joint as well as Paraesthesia in his hands with tingling and numbness and tenderness along the Para spinal muscles in the lower lumbar area with straight leg rise 80 degrees on both sides. In addition, the plaintiff advised the court and the defendant that he was unable to drive due to his symptoms or to undertake any work and was on disability benefit with severe pain particularly in the lower back and right leg and in the neck and right upper limb and that he was experiencing constant pain and discomfort in these areas.

84. In the updated particulars of loss, a claim for loss of earnings to date and for future loss of earnings (assuming retirement age at 68) were included. There was no qualification in the updated particulars of loss as to the extent of past and future loss of earnings being claimed.

85. Susan Tolan, Occupational Therapist, identified a number of significant barriers to employment as a result of her assessment, including the fact the plaintiff does not believe that he will work again in her view, and that he is therefore unlikely to either seek employment or undergo vocational training while he believes that he is unfit for work. Dr. Deirdre Gleeson, Specialist in Occupational Health, noted his complaints but felt that her physical examinations of him was normal.

The Defendant's submissions on the Plaintiff's evidence

86. The plaintiff described falls and lack of stability and that he had difficulty in standing for too long and that he was quite uncomfortable. He said it was like being stabbed in the lungs and that he felt that it was like "knocking the wind out of you" and that he could suffer massive spasms. In his view he is unemployable. He was particularly asked about being able to roll about the floor with reference to a photograph where his sister-in-law was falling upon him and he was laughing, and about his getting onto a rollercoaster which he described as a small mini-rollercoaster, although he accepted it it had a steep gradient and he said that he had no qualms on that. The plaintiff was also shown a different ride where he was shown descending at rapid speed and he agreed that he was enjoying himself and was not nervous and that he didn't seem to have any pain or disability. It was pointed out that, significantly, the plaintiff admitted that his back did not trouble him after these rides. It is argued by the defence as being at variance with the reality for a man who claims to be in constant pain 99% of the time and liable to suffer a severe spasm on "sneezing".

87. The plaintiff was shown photographs of himself cutting timber, loading and sawing, and admitted that he split the timber with an axe, that he was able to bend down, pick up blocks, load them onto a trailer and that he was able to use a chainsaw. The plaintiff admitted that he had used a chainsaw to saw the blocks and cut blocks and load the trailer all in the "one day". He denied experiencing a velocity of vibration when it was put to him that if the log doesn't split at all that all that velocity and momentum comes to an abrupt halt and gives a jar to the shoulder up the arm and shoulder. He said he had not experienced that. He said he did all this work in one day and that he could only use the chainsaw for a limited amount of time. He argued that he told the doctors he could do physical activity within reason until his back or his neck would no longer allow him do it.

88. The evidence of the private investigator is referred to and in particular that on the 17th September, 2015 the plaintiff's home was put under surveillance from 10am till 12:30pm. The plaintiff was observed splitting timber for that period together with another person. Likewise, on 30th September, 2015, reference was made to the evidence gathered when surveillance was carried out on that date from 12noon till 4pm during which time the plaintiff was observed using a chainsaw. He was also observed with a younger male filling the trailer with cut logs. The plaintiff was the only person present observed cutting timber on 1st October, 2015 from 1pm to 3:30pm.

89. Again on 2nd October, 2015 the plaintiff was observed cutting timber with an axe. It was argued that none of the events referred to were once off events nor were they for a short period of time.

90. In terms of the plaintiff's description of the accident reference is made to the reply to para. 3A of the particulars, when the plaintiff asked the question as to who had instructed the plaintiff to climb upon the hopper. By reply on 2nd August, 2013, "it was normal practice to climb onto the hopper in order to free the blockage. On the occasion in question the plaintiff had informed his supervisor (Mattie) that the hopper was blocked and that he was going to climb up to free it. While he was on the hopper freeing the hopper, he was observed by the nightshift supervisor 'Anthony' who passed no comment as this was a regular occurrence".

91. At the hearing, the plaintiff described his own Sidel 2 machine breaking down and that he then went to Peter who was working on Sidel 3. The plaintiff identified that Peter was at the top of Sidel 3 machine emptying the preform orientator redbox. His evidence had been that he went to his colleague Peter and told him that he had a problem with Sidel 2, that he had tried to reset the timing on it and couldn't get it to restart, and that Peter said to him to clean up the orientator and that Peter would go and fix the plaintiff's machine. He then climbed on the machine where Peter was and started bending in forward, catching the preforms and throwing them back into the hopper. The defence point out that this an entirely different account was given by the plaintiff in his replies to particulars, and that his evidence of how the accident happened should have been included properly in the replies to particulars, and that the two accounts could not be reconciled. It is also pointed out that there is no independent evidence of any witness seeing the plaintiff falling or being paralysed on the factory floor. His colleague Peter denied outright any suggestion that he had directed the plaintiff to climb up on the Sidel 2 machine.

92. Although the plaintiff claimed to have reported the accident to Anthony Dignam, he said in his evidence that no such complaint was made to him.

93. It is argued that regarding a previous accident suffered by the plaintiff, he indicated in his evidence that he was only out of work for four or five weeks in relation to that accident. Nonetheless, his personal injury summons, which issued in March, 2012 regarding those injuries stated that: "the plaintiff's injuries resulted in gross soft tissue injuries to his lower spine and his prognosis and outlook should be regarded".

94. It is argued on behalf of the defendants that, given the plaintiff's personal presentation in court, he sought to promote his disability. He was slow climbing into the witness box throughout the trial and maintained his varying positions of sitting and standing in court. His own subjective presentation of his symptoms, it was suggested, was misleading, and could not be reconciled with the surveillance carried out by Declan Clarke in September, 2015. In particular it was argued that a man who feels that his own hand is not his own accepted that he used a chainsaw, and a man who believes that he is liable to fall, that his legs are dead, that it is unsafe to drive a car, willingly took up a chainsaw. The plaintiff in their submission describe their clients' employment with the defendant as a seasonal temporary employee in May, 2010, working 5pm to 10pm evening shift initially. He was obliged to man the Sidel 2 machine within the tabard area where "preform" plastic bottles were blown into full sized bottles. The work then was extended till 1:30am. The accident occurred on 15th September, 2010 at 9:30pm when the plaintiff was working on his Sidel 2 machine and a problem developed with the timing. He then went to the Sidel 3 machine and found Piotr Czernejwski standing on the frame of the machine clearing by hand a blockage of preforms in the top of the machine. Having explained his difficulty to this gentleman, he was told by him to finish up what he was doing while Mr. Czernejwski went to investigate the problem with the plaintiff's machine.

95. The plaintiff proceeded to climb onto the frame of the machine and stood on the uppermost bar while clearing the blockage by hand. While throwing an armful of preforms back into the hopper at the foot of the conveyor he lost his balance and fell backwards. He described striking his head off something as he fell before hitting the ground, landing on his coccyx and elbows. He said that he was on the ground for one to two minutes, no more than three minutes, and that no one observed him during the period as there were only two people working in that area. After that he met Anthony Dignam, the night shift supervisor, to whom he described what had happened and whose response was to chide him for being up on that machine. The plaintiff then worked on the palleting area and was unable to do so due to pain. He told Mattie O'Brien, the evening supervisor, what had happened and that he would have to go home. The plaintiff's evidence was that he went to a nearby carpark when driving home but that he was unable to continue and had to telephone his wife to collect him. He telephoned the following day to the day shift manager Tom Weste to explain to him what had happened and gave medical certificates for a number of weeks before the plaintiff received a P45 from the defendant in the post.

96. Tom Weste gave evidence that on 16th September, 2010 he received a phone call from the plaintiff to tell him that he had suffered a fall while clearing a blockage and the plaintiff told him he would not be able to come to work that night. Mr. Weste advised him to take the next two nights off and the plaintiff telephoned him the following Monday saying he had been to the GP and that the GP had given him a sick certificate for the following week. The plaintiff's case was that he handed in the sick certificate in the factory. Without specific recollection, he believes that he would have handed it to the factory receptionist. His wife confirmed his version of events and that she picked up three or four medical certificates and left them into the factory over the following number of weeks and the defendant did not challenge the evidence of either of these two witnesses in relation to the medical certificates being provided to the factory. There is a conflict on the evidence in this regard in that in the plaintiff's preliminary letter of claim, Anthony O'Loughlin, Production Operation Manager, stated by letter of 3rd March, 2011 that they had no reported accident on site on 15th September, 2010, that no accident report form was filled out, nor had they received any doctor's cert or hospital certs to say that the plaintiff was out on sick leave. It is pointed out that it is very difficult to reconcile Mr. O'Loughlin's evidence in this regard with the unchallenged evidence given by Mr. Weste and Mrs. Cahill.

97. The defendant failed to make contact with the plaintiff after 15th September, 2010 and the plaintiff argues that the factory was well aware that the accident had occurred and that the plaintiff had suffered an injury. That is consistent with the fact that medical

certificates were handed in for a number of weeks before the plaintiff was given his P45. It is argued that the plaintiff therefore has established on the balance of probabilities that the accident described by him occurred in the course of his employment with the defendant on 15th September, 2010.

The Plaintiff's submissions on the negligence of the Defendant
98. It is common case that there was a practice whereby employees climbed onto the frame of a machine to free a blockage and that same constituted an unsafe system of work. Mr. Jack O'Reilly, Consulting Engineer, gave detailed evidence in relation to the dimension and functions of the machine in question and stated that the upper most bar of the frame of the machine was seven feet above ground level and this was the bar on which the plaintiff says he was standing when he fell. He expressed the view that if an employee climbed onto this bar it would not be a safe system of work. The correct means of access ought to be by way of a platform with handrails and toe boards. While the defence did not dispute Mr. O'Reilly's evidence, they claimed that the practice of climbing onto a machine did not exist and that where a blockage occurred it would a task for a fitter or senior operator to gain access using either a scissors lift or ladder. Evidence was given by Thomas Sheehan who worked as a production manager for the defendant for sixteen years. He said that the tabard was his main area and he described the different types of blockages in the preform orientation rollers which could occur a number of times in the course of a twelve-hour shift when it would be necessary to climb the machine in order to free it.

99. There was a dispute on this evidence, with a number of employees called to give evidence to refute this. The risk assessment document provided by the defendant on discovery and referred to in the evidence of Mr. O'Reilly, Engineer, identifies as a hazard the risk of a hand becoming trapped in the preform orientation rollers. Such a risk could only arise if an employee was trying to clear a blockage at the top of the machine by hand. Mr. O'Loughlin said in evidence that once a machine stopped running it would be three to four minutes before production would be affected. Mr. Pitor Czernejwski stated that once one had access to the top of the machine, it would typically take three to four minutes to clear a blockage by hand. This meant that time spent looking for a ladder or other means of access and setting it up would reduce production time. It is submitted therefore that it is entirely understandable that a practice of adopting a convenient but unsafe means of access to the top of the machine developed.

The Plaintiff's submissions on the medical conditions of the Plaintiff
100. The objective evidence, it is submitted, shows that the plaintiff sustained a soft tissue injury to the neck, lower back, elbows and between the shoulder blades. He was treated with anti-inflammatory and pain killing medication by Dr. John Carey GP. He underwent physiotherapy. He developed, over time, radiation of pain to the lower back and to the legs, his right leg in particular, and pins and needles going down the right arm into his hand as well as pain. X-ray investigations included the following:

> (i) X-rays of the lumbar spine taken on 4th February, 2014 showed an absence of the normal lumbar lordosis which was considered consistent with muscle spasm with reference to the second report of the 16th February, 2018 of Mr. Kaar.
>
> (ii) An MRI scan of the cervical spine of 3rd June, 2015 showed degenerative changes from C3 to C7 with bilateral foraminal stenosis and degenerative change at C6/7 more so on the right than the left;
>
> (iii) MRI scan of the lumbar spine taken on the same date, which also showed degenerative changes at L4/5 with moderate stenosis;
>
> (iv) EMG studies of the upper and lower limbs carried out on 28th day of September, 2015 which showed chronic neuropathic features of the C7 T1 distribution on the right, implying right lower cervical radiculopathy and similar features of the LS S2 and the L2-L4 distributions in the legs, implying lumbosacral polyradiculopathy.

The plaintiff was prescribed Neurontin for nerve pain and the antidepressant Fluoxetine by his GP Dr. Morrissey in the summer of 2017. Dr. George Kaar, Consultant Neurosurgeon, saw the plaintiff on 21st December, 2015 and on 15th February, 2018, when he made positive findings on clinical examination in relation to the movement of the lower back and he considered that a fall from a height such as that described by the plaintiff would give rise to a significant strain to the neck and lower back. This doctor found that the results of EMG studies indicated irritating or stretching of the nerve roots emerging from the cervical and lumbar spines and that this was more likely to be due to trauma where there was a background of stenosis in the cervical and lumbar spine as shown on the MRI scans.

105. The doctor found that there was no improvement in the plaintiff's symptoms and that problems with radiation of pain had increased and that the plaintiff had become depressed and he felt that that was a significant factor militating against his recovery. He described the plaintiff's symptoms as being both physical and psychological but he did not see the plaintiff returning to his pre-accident levels of activity and he was likely to remain unfit for physical work.

106. In the plaintiff's submissions it is argued that Dr. Seamus MacSuibhne, Consultant Psychiatrist, shortly prior to the commencement of the trial, diagnosed the plaintiff as suffering from a depressive disorder which he described as being between moderate and severe, and he said that this was an independent diagnosis and he was not reliant on medical reports concerning physical injuries suffered by the plaintiff. Its context was the pain and the impact on his life and activities of daily living. He found him not to be currently fit for work. This doctor put the plaintiff on a different medication and recommended cognitive behavioural therapy. He said the plaintiff might be fit from a psychological point of view to return to some work within a period of twelve months, all going well.

107. Dr. Gleeson by contrast felt that the plaintiff could return to "full normal duties without restriction". She did not consider it necessary to consider the results of investigations such as MRI scans and nerve conduction studies before concluding that the plaintiff was fit for work.

108. The defendants did not challenge Dr. MacSuibhne's evidence that the plaintiff is suffering from a depressive disorder. The Court is urged to prefer the evidence of Dr. Kaar because of his particular expertise and his clinical examination but also because of the x-ray, MRI scans and EMG studies and because of Dr. Gleeson basing her opinion solely on her clinical examination and that she did not consider the results of the various investigations had any relevance one way or the other. It is noted that Dr. Gleeson's opinion did not appear to take into account the plaintiff's depression and how that might be affecting his capacity to rehabilitate himself. The plaintiff argues that there is inconsistency in the defendant's position in that initially they argue that no accident occurred and then they proceed to argue that the plaintiff exaggerates his injuries.

109. It is argued on behalf of the plaintiff that he did not give evidence to the effect that he was completely disabled. He said he had good days and bad weeks. He candidly admitted that he had used a hedge trimmer to cut hedges and a saw and axe to cut and chop timber and he agreed that he did this with the assistance of his four sons in autumn 2015, when he was under surveillance by Mr.

Clarke.

110. Regarding the Facebook profile of someone other than the plaintiff who showed the plaintiff engaged in various activities, as well as the photographs taken by Mr. Clarke, Dr. MacSuibhne did not consider that any of these activities were inconsistent with this diagnosis of depression and Ms. Susan Tolan, Occupational Therapist, felt in particular that engaging in the chopping of timber was part of a family activity and that that could possibly have a therapeutic effect for the plaintiff. While the defence submissions note that Dr. Kaar accepted a proposition put to him in cross-examination that the depiction of the plaintiff in the photographs and surveillance "would not be consistent" with his presentation to Mr. Kaar, the plaintiff has no note or recollection of Mr. Kaar giving this evidence, but does recall that Mr. Kaar drew a distinction between the plaintiff chopping timber at his own pace, and as part of a regular activity which he would be expected to carry out in the course of full time employment. It is submitted that the photographic and surveillance evidence does not demonstrate that the plaintiff gave false and misleading evidence as to the extent of his disability and his inability to work. It is submitted that this material does not demonstrate that the plaintiff is fit for physical work on a full-time basis. As the report and evidence of Susan Tolan indicates, the plaintiff had a history of continuous employment prior to this accident but the work he did was of a physical nature. Although the plaintiff has obtained a FETAC qualification to work as a care assistant this is pointed out to be a physically demanding job involving heavy lifting, carrying and manual handling.

111. The submissions of the plaintiff point to the fact that it is not sufficient for a defendant to establish that the plaintiff has given false and misleading evidence on a material issue but that critically, the defence must also establish that same was knowingly given by the plaintiff. The subjective test in *Aherne v. Bus Éireann* [2011] IESC 44 at para. 34 is referred to. The Court must be satisfied as a matter of probability that the plaintiff knows he is giving evidence which is false and misleading. This is an important consideration in circumstances where the evidence shows that the plaintiff suffers from a significant depressive disorder. It is clear from the evidence of Dr. MacSuibhne and Mr. Kaar that the plaintiff's depression may be affecting his perception of his injuries and his capacity to engage in meaningful activity. Dr. Gleeson suggests in her report and evidence that the plaintiff may have chronic pain syndrome, a condition which she described as having "biological, psychological and social influences".

112. It is argued that the medical evidence in the case and the fact that the plaintiff's mood swings in the years following this accident where this contributed to the breakdown of his marriage is at odds with the picture which the defendant seeks to paint of the plaintiff as a "malinger". The actuarial report was admitted in evidence without formal proof. It is submitted that figures for both past and future loss of earnings are calculated on the assumption that, but for his accident, he would have obtained work as a care assistant earning €641.00 net per week. The report gives a range of figures for both past and future loss of earnings depending on the assumptions applied and the fact that the figures are put forward in the actuarial report does not equate with the plaintiff claiming that he has an entitlement to recover such sums and reference is made to *Nolan v. O'Neill* [2016] IECA 298 at para. 56 where Irvine J. in the Court of Appeal indicated:

> "I find myself in significant agreement with the submission made by Mr. Counihan S.C. on the plaintiff's behalf that claims for loss of earnings postdating any particular accident are always a matter of some speculation and that this is why actuaries, when they prepare their reports, often offer a range of options to a court as to the level of earnings which a plaintiff might have expected to earn had they not been injured."

113. It is argued on behalf of the plaintiff that it is a matter for this Court to determine the extent of which the plaintiff has been or remains unfit to work and if so for how long that is likely to be the case as well as the likely path his career would have taken had the accident not occurred. In this regard, the evidence of Dr. MacSuibhne may be of some importance insofar as he expressed the view that if the plaintiff received the appropriate therapies he might be in a position from a psychological point of view to undertake some work within a period of twelve months. It is submitted that the losses set out in this report do not involve false or misleading evidence so as to engage the provisions of s. 26 in circumstances where there is no evidence to suggest he has been engaged in paid employment since the accident. The plaintiff therefore argues that the defendant has failed to discharge the onus under s. 26 of the 2004 Act.

114. The defence summed up their case by saying that there was fabrication in this case and that if the accident did happen it was the plaintiff's own fault.

Findings of Fact

115. This Court has considered all of the evidence in the case and notes that there will always be inconsistencies to be balanced and teased out. In terms of the plaintiff's personality, he comes across as having a willingness to please and to cooperate and, having viewed him carefully as he gave his evidence, it seems to this Court that he is a credible witness. The description of how the accident happened and the description of how he fell and the very particular injuries he suffered, are consistent with the medical evidence, in particular the medical evidence of Dr. Kaar who conducted objective testing and these are listed in the plaintiff's submissions. Dr. Kaar, giving his particular expertise and objective testing, made findings which in the view of this Court are completely consistent with the description of his difficulties as described by the plaintiff in the medical sense. The Court pays particular attention to the expert evidence of consultant psychiatrist Dr. MacSuibhne. Dr. Kaar also felt that the Court had to take into account the impact of the man's mental health difficulties on his capacity to rehabilitate. This was also the evidence of Dr. MacSuibhne.

116. The finding of this Court is that the plaintiff did not either exaggerate his injuries in the context of the medical evidence and suffering he had to endure, nor did he willingly mislead the court. The reverse is the case because he willingly and freely admitted that he had been assisting with the preparation of wood with other family members. Dr. Kaar pointed out that he recommended that he exercise during his visits to him.

117. This Court accepts the evidence of the plaintiff that he did produce medical certificates and the Court also accepts the evidence of his wife, from whom he is now separated, who confirmed that she brought some of the certificates in to his workplace for him when he was unwell.

118. This Court finds that the incident did in fact occur and was reasonably foreseeable and that an unsafe system of work was in place. In that regard, the Court accepts the evidence of Mr. O'Reilly, Engineer, in particular when he identified an unsafe system of work in breach of the statutory regulations with the risk of entrapment concerning manual removal of a blockage and a hazard created in how a blockage is removed with no means of climbing up.

119. The Court notes that the plaintiff had been in the course of training to take up what would have been a very good source of income for him and was unable to complete that training as a result of this accident. The Court accepts the position of the plaintiff as expressed through Counsel in relation to the guide as furnished in terms of actuarial figures, but notes also that it was submitted that the Court might prefer to deal with the matter in a general way. This gentleman has been out of work for a long period of time since

this accident and at a minimum will be unable to work for at least one year from this point on in accordance with the evidence of Dr. MacSuibhne. If he receives appropriate therapies in the meantime, he may be able to resume employment.

120. This Court prefers the medical evidence adduced on behalf of the plaintiff and the evidence of Dr. Gleeson that the defendants ought to have considered the objective medical findings in terms of MRI testing etc.

121. The point made by Dr. Kaar in relation to the photographs put to him taken by the private investigator for the defence, Dr. Kaar noted that these were snapshots in time and that there was no indicator of the capacity of this particular plaintiff to resume fulltime work.

122. In relation to the other photographic evidence of the private investigator the plaintiff freely admitted to cutting wood himself but he also said in his evidence that he had "good days and bad weeks". In the overall context of this case, the Court's view is that this man suffered an injury which he simply should not have suffered at work, nor should he have been put in a position where he was carrying out the task which led to the accident. Sufficient equipment ought to have been in place to comply with the safety regulations as described by Mr. O'Reilly, Engineer. In addition, this Court finds that there was no fraudulent claim in this case, nor did the plaintiff mislead this Court. On the balance of probabilities this accident happened as described by the plaintiff as consistent with his injuries which are consistent with the evidence of his medical advisors. This Court considers that the sum of €85,000 to include pain and suffering to date and pain and suffering into the future is an appropriate award in the light of the above findings, and in particular in light of the medical evidence. This takes into account for at least one year as a minimum the plaintiff will not be in a position to undertake employment. His future is somewhat uncertain because if the therapies recommended by Dr. MacSuibhne do not work then he is at risk of an absence of any further improvement. The court has taken into account very carefully the link made by both Dr. Kaar and Dr. MacSuibhne of the impact of the plaintiff's depression and mental health issues on his capacity to achieve full recovery.

123. The figure for agreed special damages is €3,450.00 and the figure awarded in general damages is €85,000 giving a grand total of €88,450 and costs on the High Court scale. Stay refused.