Neutral Citation [2015] IEHC 793

THE HIGH COURT

[2011 No. 2047 P]

BETWEEN

JASON PLATT

PLAINTIFFS

AND

OBH LUXURY ACCOMODATION LIMITED AND CIARAN FITZGERALD

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 11th day of December, 2015

1. Shortly after 11 pm on the 15th of February 2009, the Plaintiff, who was a guest in The Old Bank House, Kinsale, Co. Cork (the premises), fell from the open window of his bedroom onto the roof of the adjoining post office. As a result of the fall the plaintiff suffered multiple and potentially life threatening injuries in respect of which he brings these proceedings.

2. Quite how the plaintiff came to fall from the window is but one of several hotly contested issues which the Court is required to determine. That the plaintiff fell onto the roof is not in question. He says he lost his balance. The defendants say he threw himself out of the window; in short, that he jumped. If the plaintiff jumped it was agreed that that would be the end of the case. Accordingly, it is proposed to determine that issue first.

3. The first and second named defendants are sued as the owners and occupiers of the premises, which, at that time, was run as an adjunct of or annex to the Blue Haven Hotel, Kinsale. The plaintiff brings these proceedings against the defendants for breach of contract and/or alternatively for misrepresentation, negligence and breach of duty at common law or, alternatively, for breach of statutory duty pursuant to the provisions of the Occupier's Liability Act, 1995 and the Hotel Proprietor's Act, 1963.

4. The defence delivered on the 21st of December 2011, put the plaintiff on full proof of his claim save for an admission that he and his fiancée were lawful visitors and that the premises was in the occupation and ownership of the first defendant. The defence otherwise raises a plea that the plaintiff was guilty of negligence, including contributory negligence, the essence of which is that the plaintiff was the author of his own misfortune, in particular by throwing himself out of the window of their bedroom following a row with his fiancée. A special reply to the defence joining issue with those pleas was delivered on the 21st of November 2012.

Background

5. The plaintiff was born on the 7th of March 1972 and resides with his partner, Ms. McKenna, at 7 Queensland Avenue, Thatto Heath, St. Helens, Merseyside, England. The plaintiff and Ms. McKenna have known one another since 2005 and came to Kinsale on a short break for Valentine's weekend.

6. Some six months earlier the plaintiff had commenced a training course with a view to changing career and qualifying as a Sky installation engineer. He had completed his training and was due to start work the week following the break away in Kinsale. The plaintiff's previous vocational history included twelve years working as a commis chef after which he qualified for and undertook work as a heavy goods vehicle driver.

7. With regard to his sporting and recreational life, the plaintiff had engaged in judo and boxing for some ten years and had also played rugby from the age of eleven until he was nearly thirty years old. Early in his rugby playing career, and whilst on a rugby tour of Ireland, the plaintiff had stayed in Kinsale. He had fond memories of his stay there and wanted to bring his fiancée to stay and see the town.

8. On the Saturday of the Valentine's weekend the plaintiff and his fiancée spent the day sightseeing and ended it with dinner in the Blue Haven Hotel. They had become engaged, had celebrated with champagne and had thoroughly enjoyed themselves. On the Sunday morning Ms. McKenna awoke feeling ill. She has been diagnosed and treated for epilepsy or anxiety fits; consequently she is not supposed to take alcohol. She had a cup of tea but was unable to eat a breakfast. Afterwards they went back up to the room and packed their suitcases as they wanted to have the rest of the day free of that chore. Ms McKenna was still feeling unwell. She thought she might have been pregnant but a test proved negative. They then went out for some lunch during which, on the plaintiff's evidence, he had two pints of Murphy's stout. Afterwards, they went for short walk following which they returned to their bedroom where they watched television.

9. At about six o'clock, and as it was their last night, they decided to go out. They went to the White House Inn where the plaintiff had stayed previously whilst on the rugby tour. His recollection was that his fiancée had one or two peach schnapps. She might also have had vodka. Her evidence was that she had had three or four drinks. She felt better. As to his own consumption the plaintiff's evidence was that he had consumed three pints of Murphy's stout.

10. Having had their drinks the plaintiff and his fiancée went to a Chinese for a meal. They arrived there at between half nine and ten. Ms. McKenna had started to feel unwell again and asked the plaintiff to order her some soup, which he did. The plaintiff also ordered a couple of starters and a couple of main courses.

11. By the time Ms. McKenna came back from the ladies toilet, the plaintiff had eaten the starters and also had started to eat Ms. McKenna's soup to which she reacted badly. She described herself as being a bit obsessive / compulsive about her food and in particular did not like anyone touching it. The plaintiff was aware of that. Annoyed by his behaviour, and because she was also feeling unwell again, she went back to their accommodation, taking the room key and leaving the plaintiff alone.

12. He ate some of the food and, according to his evidence, had a few sips out of another pint of Murphys but did not finish that drink before paying his bill and leaving. The plaintiff accepted that there had been some cross words between himself and Ms.

McKenna whom he described as being in a bit of 'a mood' before she left. The plaintiff did not have a room key and as it was approaching eleven o'clock he had to go down to the Blue Haven to get a key. He met the duty manager, Seamus Healy, whom he took to be night porter.

13. The plaintiff returned to the Old Bank House with Mr. Healy. As they approached the room it was the plaintiff's evidence that he thought the door was closed. His recollection was that Mr. Healy was walking in front of him. The door was then opened slightly. The plaintiff tried to speak to Ms. McKenna but she closed the door. The plaintiff told Mr. Healy that he would talk to Ms. McKenna and felt sure that eventually she would let him in. Mr. Healy left indicating that if necessary the plaintiff could stay in the Blue Haven for the night.

14. Mr. Healy having departed, the plaintiff made a number of efforts to get Ms. McKenna to open the door. He was concerned that Ms. McKenna had become more ill because of the mix of medication and drink.

15. Rather than returning to the Blue Haven to get a key, the plaintiff decided to break into the room by shoulder barging the door. He gained entry by doing so, breaking the lock and door frame in the process; the door was left hanging off its hinges.

16. On the plaintiff's evidence Ms. McKenna had been sick and was in the bathroom where she remained. She declined his offer of help. He decided to have a cigarette. There was a large double window in the bedroom which was essentially made up of two inward opening window sashes. There was a low window sill which was of sufficient dimensions that it could be used as a seat. The plaintiff's evidence was that he opened one of the windows and sat on the window ledge or sill. He was facing in towards the room. He knew that he ought not to have been smoking so was trying the blow the smoke out of the window.

17. On the plaintiff's engineering evidence, the distance from the window opening down to the roof of the adjoining post office was 7 metres. When he got to the end of the cigarette the Plaintiff put his arm out of the window and tried to flick the cigarette away so that if seen it would not be considered to have come from their room . It was at this juncture that he lost his balance. He couldn't recall whether he had kneeled to flick the cigarette away and that his knees had slipped or quite how he had come to fall, but one way or the other he described himself as going backwards and sideways out of the window. Ms McKenna gave evidence that when she visited the plaintiff in hospital in Cork he told her that as he stood up he fell out backwards.

18. The plaintiff did not accept that his alcohol consumption had rendered him intoxicated or that he had been in any way affected by the drink he had consumed that day. As far as he was concerned he 'felt fine' whilst sitting on the window seat smoking a cigarette.

19. On the 18th of February 2009 the plaintiff made a cautioned statement to Garda Michael Heffernan in which he said:

> *"I vaguely remember going back to the room. I was on my own. I think Christine was inside. I remember knocking on the door, there was no answer. I shoulder barged the door open. I remember sitting by the window having a cigarette with both windows open. I remember trying to get back in and loosing my balance and falling."*

There was some controversy as to whether or not both windows had been opened by the plaintiff. Although his evidence was that he thought it was just one, it is clear from his statement, made three days after the event, that he thought both windows were open. Under cross examination he accepted that he was not sure.

20. Under cross examination the plaintiff accepted that he could not remember whether he was sitting or kneeling at the time when he fell. He thought that he had only opened the right hand window but accepted that he was unsure.

21. In the replies to particulars the plaintiff gave an account of the accident in which he said that he was sitting on the window seat before falling backwards from it, that he had been drinking alcohol and estimated that he had consumed about seven to eight pints in the twenty-four hour period prior to the accident. When this account was put to him under cross examination he agreed that that was essentially correct although he took issue with the suggestion that he had consumed seven or eight pints on that day. He accepted that whilst Ms. McKenna was in a mood he rejected any suggestion that because of that he had jumped out of the window.

22. In a cautioned statement made to Garda Keating on 16th February, 2009, Ms. McKenna recalled that there had been some arguing in the room and that the next thing she heard was the plaintiff shouting in pain because "*…he had gone out of the window*". This is the same phrase that is attributed to Ms McKenna in the statements of Garda Kelly and Garda Heffernan of the 1st of November 2010.

23. In her evidence, Ms. McKenna said that when she came out of the bathroom she recalled looking around the room but not being able to see the plaintiff. She heard some screaming. She looked out the window. She could see nothing because it was dark but she could hear the plaintiff screaming below. She had a vague recollection of being spoken to by a police officer in the bedroom.

24. Garda David Kelly and Garda Michael Heffernan both gave evidence that they first met Ms. McKenna in the hotel bedroom and that she was in a very agitated and distressed state. Garda Kelly made two statements, one of 1st November, 2010 and the other on the 1st March, 2011. In his first statement he referred to Ms. McKenna as saying that the plaintiff had "*gone out the window*" and that he and Garda Heffernan were shown where the plaintiff was on the roof. In his second statement, Garda Kelly also refers to the conversation which he had with Ms. McKenna in the hotel bedroom but records that she told him that she and the plaintiff had had an argument; that he had gone to the window and "*had jumped*" out. The statements are contradictory. Garda Kelly explained that he did not have sight of the first statement, which he though he had mislaid, at the time when he made the second.

25. Garda Heffernan made a statement of 1st November, 2010. He also recorded Ms McKenna telling him that the plaintiff had "*gone out the window*". In that statement, Garda Heffernan also referred to a conversation which took place between Ms. McKenna and Garda Kelly when she and Garda Kelly were down by the ambulance outside the hotel premises and in the course of which he says that Ms. McKenna made allegations to Garda Kelly that the plaintiff had tried to commit suicide following a fight earlier that night.

26. In evidence, Garda Kelly said that the first occasion on which it was said to him by Ms. McKenna that the plaintiff had jumped out the window was when he first met with her in the bedroom. Accepting that Ms. McKenna was in a distressed state both in the bedroom and also when he spoke with her again later outside the hotel, his recollection was that Ms. McKenna said that she and the plaintiff had had an argument earlier on in the night and that the plaintiff had "*jumped*" out the window.

27. Garda Kelly accepted that no notes were taken on the night and that when he made his statements he was working from memory. He accepted that there was no reference to Ms. McKenna telling him that the plaintiff had jumped out of the window in his first statement and he also accepted that the account of the plaintiff jumping out of the window referred to in the second statement was made to him when they were standing outside the premises. He accepted that when he first met Ms. McKenna it was likely he would

have asked her what had happened. Garda Heffernan was with him at that stage but left very shortly afterwards to attend to the plaintiff on the roof.

28. In his evidence, Garda Heffernan's recollection as to what was said or indicated was that the plaintiff had "*gone out the window*". There was no suggestion in his evidence that he was told or had a recollection of Ms. McKenna telling Garda Kelly, whilst they were in the room together, that the plaintiff had "*jumped out of the window*".

29. Ms. McKenna rejected any suggestion that she had told the gardaí, when they first met her in the room, that the plaintiff had "*jumped*". However, she did accept that she had made such a statement to Garda Kelly when they were standing on the street beside the ambulance. Mr. Seamus Healy, the duty manager, gave evidence that when he spoke with Ms. McKenna on the street outside the premises, she told him that there had been an argument in the bedroom and that the plaintiff had said that "*he would jump out of the window, which he did*".

30. Ms. McKenna said she did not witness the accident. She did not know whether the plaintiff had fallen or jumped out. Her explanation to the Court for telling Mr. Healy and Garda Kelly that the plaintiff had "jumped" was that this suggestion had been made to her in the course of a telephone conversation which she had had with her son whilst she was standing with Garda Kelly and Mr Healy outside the premises.

31. She explained that she was in a distressed state, her mind was everywhere and she started thinking the worst. She thought the plaintiff was dead or was going to die and that she might be accused of murder. She thought she was going paranoid. It was in this context that her son had made the suggestion that if it came to it she would just have to say that the plaintiff had jumped. Garda Kelly could not recall whether he had been present during such a call but Mr Healy gave evidence that he remembered Ms McKenna having a phone conversation with her son when they were standing outside the premises.

32. Ms. McKenna developed serious physiological problems subsequent to these events and gave evidence that in 2010 the Mental Health Services in England had tried to section her for what was said to have been psychotic episodes. She was not, however, hospitalised at that time but she went on to be hospitalised having been 'sectioned' in 2013. She had two hospital admissions that year, one lasting four to five weeks and the other some six weeks.

33. At the time of these events Ms McKenna was taking Keppra, Clobazam and Codeine. She explained that she had suffered with fits which were diagnosed either as being epileptic or caused by anxiety. Either way, she had been treated with as high a dose of this medication as was permissible.

Decision on the conflict of evidence and cause of the fall

34. I had an opportunity to observe the demeanour of Ms. McKenna as she gave her evidence in the course of the trial. I found her to be unreliable as a witness. She often displayed poor recall or no memory at all about many of the matters or questions of importance in these proceedings, including conversations which had taken place during appointments between the plaintiff and the experts examining and or carrying out assessments for the purpose of these proceedings and at which she was present. In reaching this conclusion I am conscious that she has had significant medical difficulties involving serious psychological problems which required proactive medical intervention and treatment.

35. The evidence of Garda Kelly, Garda Heffernan and Mr. Seamus Healy, in so far as it concerned the emotional state of Ms McKenna on the night, was that she was distraught, distressed and agitated when first encountered by the Gardai in the hotel bedroom and also later when standing outside the premises beside the ambulance. Indeed, she refused to go in the ambulance because she thought the plaintiff was dead or was dying and did not want to go hospital, on the contrary, she wanted to get a plane and go back home to the U.K. that evening.

36. Ms. McKenna left the Chinese restaurant in what the plaintiff described as 'a mood'. She was still in 'a mood' when the plaintiff and Mr. Healy came up to the hotel bedroom. I accept Mr. Healy's evidence that after getting no response to his knocking on the door he used the master key to open it but, that having done so, the door was then shut. That Ms McKenna shut the door is not in question. She gave evidence of doing so when she saw the clothes on somebody outside in the corridor which she did not recognise. This is consistent with Mr. Healy's evidence that it was he and not the plaintiff who was attempting to gain entry to the room.

37. The plaintiff's evidence was that he would talk Ms. McKenna around and that ultimately he felt that she would let him in. This was corroborated by Mr. Healy who was content with that and left the scene. Before doing so he was able to overhear the plaintiff trying to persuade Ms. McKenna to let him into the room. The conversation was neither loud nor argumentative. Nevertheless, it is quite clear that after Mr Healy departed the scene, the plaintiff's attempts to persuade Ms. McKenna to let him in were unsuccessful.

38. The plaintiff freely acknowledged that he did not go back to Mr. Healy to get a key, rather, he decided to break into the room; damaging the lock and doorframe in the process and for the cost of which the plaintiff accepted responsibility.

39. His explanation for shoulder barging the door was that he had become increasingly concerned about Ms. McKenna who was ill inside. Considering the combination of her admitted alcohol intake that evening in the White House Inn and her prescribed medication it is, in my view, both plausible and probable that she was as ill as both herself and the plaintiff said she was on returning to their room. In the circumstances there was little the plaintiff could do to be of assistance. There was no independent evidence of any ongoing significant argument or row between them after the plaintiff had gained access to the bedroom.

40. It is undoubtedly the case that the plaintiff had certainly annoyed his partner by commencing to eat her soup, especially in circumstances where he knew she was not well and in any event had a problem with her food being touched. She was clearly not disposed to let the plaintiff re-enter the bed room and he broke down the door to do so. At that stage I am satisfied that she was ill in the bathroom. I am also satisfied that references in witness statements to the plaintiff and Ms McKenna having an argument are, as a matter of probability, references to what had happened in the restaurant and not what had happened in the hotel bedroom.

41. This couple had known one another since 2005. They had become engaged. The Plaintiff had retrained and was due to commence work in a new career as a Sky engineer the week following their break away. They were well settled and suited to one another. They are still together and have ended up being carers for each another for which they both receive State benefits. There was no evidence to suggest that on that evening plaintiff was mentally disturbed or otherwise mentally unstable, depressed or behaving in a way indicative that he was contemplating self harm; never mind suicide.

42. They had been in occupation of the bedroom since the previous Friday and had spent a considerable amount of time there during daylight hours. It cannot but have been obvious to both the plaintiff and to Ms. McKenna, as it would have been to any reasonable

person, that there was a very significant drop from the bedroom window to the roof of the adjoining post office. Viewed objectively, as it must be, to jump or fall out of the window of the bedroom could only have resulted in very serious and potentially fatal injuries.

43. If Ms. McKenna had told Garda Kelly, when she first met him in the bedroom, that the plaintiff had jumped out the window that would be very significant evidentially because it would have occurred at a point of time prior to the conversation he had with her outside the premises when she accepts that she did make such a statement.

44. Whilst Garda Kelly gave evidence that it was his recollection that that was what he was told when he first met Ms. McKenna, he accepted that he was relying on his memory for these events. He did not have his first statement at the time when he made the second statement.

45. The statements made by both officers on the 1st November, 2010, specifically refer to Ms. McKenna saying that the plaintiff had "*gone out the window*". Both of these officers are highly experienced. Given the traumatic nature and potential consequence of a statement to the affect that somebody had jumped out the window of a bedroom on the top floor of the premises it is, in my view, improbable that if such a statement had been made by Ms. McKenna to either of these officers when they first met her that that would not have been remembered by them as, indeed, it was remembered by both Garda Kelly and Mr. Healy when subsequently made by her to them outside the premises. Moreover, when Mr. Healy spoke with the plaintiff that evening he had no impression or concern that the plaintiff might be or was considering self harm or that he would attempt to take his own life.

46. The subsequent statement made by Garda Kelly as to what was said to him by Ms. McKenna when he first met her contradicts the account of what she said recorded in the statements of the 1st November, 2010. As those statements are consistent in so far as they refer to what she said to the gardaí about what had happened when they first met her in the hotel bedroom and as both of those statements were made much closer in time to the events to which they refer, I think it likely that they are more reliable as evidence of what Ms McKenna said than the later statement and the evidence of Garda Kelly.

47. Furthermore, it seems to me that the use of such language by Ms. McKenna is more sensible and consistent with a finding that she did not witness how the plaintiff came to fall onto the roof of the adjoining post office. In reaching this conclusion I also consider it significant that she used the same phraseology to describe what had happened to the plaintiff when she made a cautioned statement to Garda Keating as was recorded in the first statements of the Gardaí.

48. To jump out of the window in question must necessarily have involved the formation of an intention to commit that act and in the particular circumstances of this case to find as a fact that that is what the plaintiff did would require the Court to come to the conclusion that the plaintiff knew that by deciding to jump he would, as a matter of probability, sustain fatal injuries and that accordingly he intended to commit suicide. Having regard to the evidence and the findings of fact already made I am satisfied that it is improbable that Mr. Platt intended to do any such thing.

49. The general rule is that he who alleges must prove. The plea in this case is that the plaintiff threw himself out the window. It was submitted on behalf of the plaintiff that the gravamen of this plea given the distance through which he would fall was that the plaintiff intended to commit suicide and that whereas in this case that was an improbability, cogent evidence to displace that improbability would be required if the defendant was to succeed. In this regard the plaintiff relied on the recent decision of the Supreme Court of the United Kingdom in *Braganzav v. BP Shipping Ltd* [2015] 1 WLR 1661. Whilst I have no difficulty in adopting the legal principal enunciated by the Court in that case as a persuasive authority in the case of an unexplained fatality, it seems to me to be of limited assistance where, as in this case, the plaintiff survived the fall and takes issue with the plea that he threw himself out of the window.

Conclusion

50. I accept the plaintiff's submissions that the defendants have not discharged the onus of proof placed upon them by the law to establish, on the balance of probabilities, the plea in the defence that the plaintiff threw himself out of the window. In reaching this conclusion the Court has also had regard to the nature of the plaintiff's injuries which, in my view of the medical evidence, are more consistent with an accidental fall from the window than with jumping out of it. Finally I am satisfied on the engineering evidence that it would not have been necessary for the plaintiff to open both windows if he had intended to jump. The fact that both windows had, as a matter of probability, been opened by him is, in my view, consistent with his decision to smoke a cigarette in the room in a manner where the risk of detection was minimised or eliminated altogether.

Liability

51. Engineering evidence on behalf of the plaintiff was given by Mr. Spitere, consulting engineer. He attended the accident locus and took a number of photographs which were admitted in evidence. He prepared a report for the assistance of the Court. He gave evidence as to the dimensions of the window including the distance between the floor and the sill edge, which he measured at 480 millimetres. The significance of that measurement, in his opinion, was that it was below the window sill height above floor level which would constitute a guard in itself and which he said is 800 millimetres.

52. Under the 1997 building regulations, where the distance between the window sill and the floor is less than 800 millimetres there is a requirement for guarding to prevent falling. The ope of each window sash was measured at 600 millimetres which would have been a sufficient width when taken with the height of the window to permit a person, such as the plaintiff, to jump or fall without the necessity of opening the adjoining window sash. The window sill was measured at 365 millimetres in depth which, when taken with its height from the floor is sufficient to be taken as a seat.

53. Mr Spitere considered the window sill to be very low and to be part of a window which was equivalent to a door that opens fully; there ought to have been a guard across the window opening in such circumstances. Although the building was old, his view was that the windows were relatively modern and certainly put in place after the 1991 building regulations had come into force. There had been a joint engineering inspection and it had not been suggested to him by the defendant's engineer nor had he been advised that the windows had been inserted before 1991.

54. Consideration also had to be had to the fact that this was a window in a hotel bedroom where guests might not be familiar with the window, where there would be children staying in the room, or where a guest could be intoxicated or might be at risk of stumbling around in the dark at night such as a guest who was sleepwalking. The window sashes were inward opening and could be fully opened. The window ope was too big and the sill or 'seat' too low. There was no restriction on the distance to which the window sashes could be opened.

55. It was his opinion that if fitted in a house that an ordinary householder would consider, if thought about at all, that the window was dangerous. Its dimensions were such that in the fully open position if a person stumbled in the room they could quite simply and

easily have fallen out through it. There were a number of inexpensive safety precautions which could have been adopted to render the window opening safe. The fixing of a window bar across the ope or the fitting of opening restrictors to the window sashes would have sufficed. Mr. Spitere's evidence as to the safety or otherwise of the window arrangement was not challenged and no engineering evidence on behalf of the defendants was called.

56. Apart altogether from the common law duty of care owed to the plaintiff in respect of any activity on the premises , the first named defendant, as hotel proprietor and occupier of the premises owed a statutory duty of care towards the plaintiff under the provisions of the Occupiers Liability Act 1995 (the Act of 1995) and the Hotel Proprietors Act 1963 (the Act of 1963)

57. S.3 of the Act of 1995 provides :

> *"(1) An occupier of premises owes a duty of care ("the common duty of care") towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5 .*
>
> *(2) In this section "the common duty of care" means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."*

In addition to the statutory duty owed by the occupier under s.3 of the Act of 1995, s.4 of the Act of 1963 provides that:

> *"…Where a person is received as a guest at a hotel, whether or not under special contract, the proprietor of the hotel is under a duty to take reasonable care of the person of the guest and to ensure that, for the purpose of personal use by the guest, the premises are as safe as reasonable care and skill can make them."*

58. Both Acts have been pleaded and relied upon by the plaintiff. Accepting, as I must, the evidence of Mr. Spitere, I am bound to conclude that the window in question was unsafe and constituted a danger to lawful visitors in the premises, including the plaintiff who fell from it, thus rendering the occupier and hotel proprietor of the premises – in this instance the first named defendant – liable both in common law negligence and for breach of its statutory duty of care under the relevant provisions of the Acts already referred herein.

Contributory negligence
59. It was not seriously contended on behalf of the plaintiff that there should not be a finding of contributory negligence on his part. However, it was submitted that whilst there was no moral blameworthiness in the circumstances giving rise to the plaintiff falling out of the window, accepting the existence of the apparent risk, it was conceded that an apportionment of 20% against the plaintiff would be reasonable in all the circumstances.

60. The question for determination by the Court therefore is not whether the plaintiff is guilty of contributory negligence but rather the degree of fault which should be attributed to the plaintiff.

The Law
61. Commenting on the meaning of "fault" in s. 34 (1) of the Civil Liability Act 1961 Kenny J. in his judgment in *Carroll v. Clare County Council* [1975] I.R. 221 at pages 226/227 observed:

> *"I think that "fault" in s. 34 … means a departure from a norm by a person who, as a result of such departure, has been found to have been negligent and that "degrees of fault" expresses the extent of his departure from the standard of behaviour to be expected from a reasonable man or woman in the circumstances. The extent of that departure is not to be measured by moral considerations, for to do so would introduce a subjective element while the true view is that the test is objective only. It is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contributions of the plaintiff and defendant to the happening of the accident which is to be the basis of the apportionment. I think that the use of the word "moral", when addressing a jury in connection with blameworthiness, is likely to mislead them."*

60. In *O' Sullivan V Dwyer* [1971] I.R. 275 The Supreme Court held that a distinction between causation and fault had to be observed and that the degrees of fault are not to be apportioned on the basis of the relative potency of their respective causative contributions to the damage. Such fault is to be measured by objective standards and in this regard Walsh J stated:

> *"…Blameworthiness is to be measured against the degree of capacity or knowledge which such a person ought to have had if he were an ordinary reasonable person …. Fault or blame is to be measured against the standard of conduct required of the ordinary reasonable man in the class or category to which the party whose fault is to be measured belongs …"*

61. Intoxication does not relieve a person of legal responsibility for their acts or omissions and so it is that in evaluating the conduct of someone in the context of negligence or contributory negligence the court is bound to approach that task from the perspective of what would be expected of an ordinary reasonable person in full control of their faculties, having due regard to the circumstances of the case. This is not intended to be taken as a statement of law to the effect that the fact of intoxication is altogether irrelevant to the determination of fault. However it is a matter which may properly and ought to be brought into account when assessing the reasonableness or otherwise of the plaintiff's conduct.

Evidence of inebriation
62. It was accepted by the plaintiff in reply to particulars, and in his evidence, that on the day of the accident he had consumed alcohol. In replies to particulars the plaintiff accepted that he had consumed between seven and eight pints in a 24 hour period prior to the accident. In his evidence the plaintiff said that on the day of the accident he had had two pints of Murphy's in the afternoon and three and a half pints in the evening. He had taken a few sips out of his pint in the Chinese restaurant but did not finish it.

63. It was submitted on behalf of the plaintiff that whilst he had consumed some alcoholic drinks he was not particularly intoxicated and in support of this submission relied on the evidence given by Mr. Healy, the defendant's duty manager, who had spoken with the plaintiff very shortly before the accident and in whose opinion the plaintiff was not intoxicated.

64. The plaintiff insisted that whilst he had consumed the admitted number of drinks over the afternoon and evening, he "felt fine"

when he was sitting on the window seat having his cigarette.

65. In determining the extent to which, if at all, the plaintiff was intoxicated at the time of the accident the Court is fortunately not dependant on his evidence alone. Shortly after speaking with Ms. McKenna in the hotel bedroom, Garda Heffernan went to see what assistance he could render. He attended the plaintiff on the roof of the post office. The plaintiff was in a lot of pain. Garda Heffernan was in very close proximity to him on the roof when they spoke. Whilst acknowledging that the plaintiff was hurt and in a lot of pain, it was also his evidence that the plaintiff's speech and a clear smell of alcohol from his breath indicated to him that the plaintiff was intoxicated.

66. Garda Kelly was involved in assisting the removal of the plaintiff when he was being carried down the hallway in the post office to the waiting ambulance. He gave evidence that the smell of alcohol from the plaintiff's breath was very strong. At that stage the plaintiff had been on the roof for over an hour. Under cross examination both Garda Kelly and Garda Heffernan accepted that Mr. Healy might be in a better position to assess whether or not the plaintiff was intoxicated as he had been speaking to and walking with the plaintiff shortly before the accident, though what a police officer and a civilian might consider by the term 'intoxication' would most likely be different.

67. Like the gardaí, Mr. Healy had also made a statement which dealt with the question of intoxication. His evidence was that whilst it was obvious that the plaintiff had drink taken and that as a result he would not have given the plaintiff the keys of his car. He did not consider the plaintiff to be intoxicated; he wasn't falling down drunk.

68. In the course of his duties he would have had to assess whether someone who had drink taken should or should not be served more alcoholic drink and accepted that a hotel manager or barman's definition of intoxication might differ from that of a policeman when making such an assessment.

69. Mr Healy gave evidence as to his own opinion of what constituted intoxication. In his view any person who was falling down, staggering, or slurring words too much would be intoxicated; the plaintiff wasn't like that, he wasn't falling over. As to what it was that made it obvious to him that the plaintiff had been drinking and was not, therefore, someone to whom he would give the keys of his car, Mr Healy explained that there were a number of factors involved and which he identified as: the smell of drink, the way in which the plaintiff had spoken to him, and his manner, which he explained as being more friendly than would have been the case if he had not been drinking.

70. These attributes and those described by the Gardai warrant the Court in coming to the conclusion that the plaintiff had consumed a sufficient quantity of alcohol to cause inebriation to the extent that his faculties were so affected as to make that obvious to the sober observer. If Mr Healy would not have given him the keys of his car I think it safe to infer that if considered by the gardaí to be intoxicated, as he was, the plaintiff's judgment would have been affected to the extent that it would have been both unlawful and unsafe for him to drive.

71. There were various descriptions – including kneeling and slipping – given by the plaintiff in reports, statements and in his own evidence to explain how he fell out of the window but all of which are a variation on the same theme. The fact is that the plaintiff has no clear recollection as to why or what it was that caused him to fall from the window.

72. In his direct evidence he recalled that he was leaning, that his arm was outside the window, and that he was trying to flick the cigarette away from the window so that it wouldn't land underneath. It was at that point that he lost his balance. He couldn't be sure whether or not he fell because he kneeled to flick the cigarette away and his knees slipped. All he could remember was just going out of the window backwards and sort of sideways (to paraphrase the plaintiff's own words). Prior to flicking out the cigarette the plaintiff said that he was sitting on the windowsill. He was facing into the bedroom but blowing the smoke out the window. The description of the accident first given by the plaintiff and closest to the event is that contained in his statement of the 18th of February 2009 in which he says that he remembered sitting by the window having a cigarette with both windows open, of trying to get back in, losing his balance and falling.

73. Whether he lost his balance and fell as a result of leaning out the window opening when trying to flick the cigarette away or lost his balance in the course of trying to get back into the room from the window seat, his loss of balance is, on the evidence, most likely explained, at least in part, by the plaintiff's state of inebriation.

Decision on the apportionment of fault.

74. The engineering evidence given on behalf of the plaintiff by Mr. Spitere as to the configuration of the window in general was that an ordinary householder, if thinking about it at all, would consider the window to be dangerous.

75. That evidence is unchallenged. The depth and height of the windowsill was such that it could easily be sat upon. Indeed, it could have been taken as a window seat. The two window sashes were inward opening. There was no restriction on their arc of movement; they could open fully. In the absence of any restraint there ought to have been safety bar across the window ope.

76. As this accident so clearly demonstrates, the dimensions of each window alone were sufficient to enable a fully grown man, without restriction, to fall through the opening onto the roof below. That situation was dangerous and unsafe not just for the plaintiff but for anyone having reason to be in the room, including children. The Court has already found that the first defendant has a liability in law for that state of affairs.

77. Having due regard to the opinion of the plaintiff's engineer given in evidence that the danger was such that it would have been obvious to an ordinary householder if any thought was given to it at all, viewed objectively the plaintiff cannot but have known of the danger. If for some unexplained reason he didn't, then he ought to have known of it. I am satisfied that once he opened both windows and sat on the window seat the serious risk of injury consequent upon his doing so was apparent and obvious. I am also satisfied that the plaintiff opened both of the windows which, unfortunately for him, probably explains, at least in part, his evidence that there was nothing to catch hold of when he made a grab to try and prevent himself falling.

78. That he opened both of the windows is consistent with his desire to ensure that the smoke from his cigarette would not enter the room. Moreover, his description in evidence of leaning out to flick away the cigarette is also consistent with that purpose and from which it would seem reasonable to infer that immediately before the fall the plaintiff was sitting at or very close to the edge of the seat nearest the window ope and certainly much closer than the edge of the seat or sill facing the bedroom.

79. The actions or inactions of the plaintiff are to be assessed – as with those of the defendant – objectively. The fact that the plaintiff's appreciation of the danger and his failure to take any precautions commensurate with that danger were dulled by his state

of inebriation affords him no excuse in law. It is no more of an excuse than the failure of an inebriated passenger to appreciate that the driver of a car with whom he or she has agreed to travel was also inebriated or with the failure of an inebriated passenger to wear a seat belt.

Conclusion
80. The plaintiff acknowledges that he knew smoking in the hotel bedroom was not permitted. In fact what he was doing was unlawful. Mention was made in the course of the evidence to a smoke alarm in the room which, given the nature of the accommodation, would not be surprising. It was the plaintiff's desire to engage in what he knew to be a banned activity and to ensure that that activity was not discovered, including the act of flicking away the finished cigarette, which brought the plaintiff into a position where he was in close proximity to and was an actor in the danger of which he must, I am satisfied, have been aware. If he wasn't then he ought to have been.

81. If the Court were concerned with the apportioning of fault on the basis of the potency of the parties' respective contributions to the injuries and loss then, in the particular circumstances of this case, I would have been inclined to attribute at least the same degree of fault against the plaintiff as against the first defendant. However, that is not the basis in law on which fault is to be apportioned.

82. In assessing and apportioning fault on the basis of the blameworthiness of the respective causative contributions of the parties to the injuries and loss , the Court must have regard to the fact that the negligence and breach of statutory duty on the part of the occupier and hotelier was an ever present source of real danger to all persons having reason to use the bedroom in question, including children. Such danger arises from the provision of windows in the bedroom the configuration and the dimensions of which enabled the windowsill to be taken and used as a seat and the window sashes to be opened fully, and the absence of a safety bar across the window ope; whereas the negligence on the part of the plaintiff is concerned with carelessness for his own safety.

83. Having regard to the findings made and applying the law, the Court considers the blameworthiness of the plaintiff's carelessness in the circumstances of this case to be of a high degree and in respect of which an apportionment of 40% responsibility on his part is considered appropriate with the remaining 60% being attributed to the first named defendant.

The injuries and special damages claim.
84. As a result of the accident the plaintiff sustained what, on any view of the evidence, were very serious and potentially life threatening injuries. In addition to physical injuries the plaintiff also developed psychiatric injuries and psychological sequelae. The physical injuries may be briefly summarised as follows:

(i) Right sided rib fractures from the sixth to the eleventh rib

(ii) Small right sided haemothorax

(iii) A minor crush fracture of the T5 vertebra

(iv) A crush fracture of the T10 vertebra

(v) A comminuted fracture of the body of T11 vertebrae

(vi) A comminuted fracture of the body of L1

(vii) A burst fracture of the body of L3

(viii) A anterior partial fracture of the body of L5

(ix) A complex comminuted subtrochanteric fracture of the right femur which was grossly comminuted.

85. The subtrochanteric fracture of the right femur was treated surgically. The surgery resulted in an eleven inch long surgical scar over the lateral aspect of the upper right femur which was described as being pale thin and neatly sutured. Over the distal thigh there were two neat healed scars a half inch long representing the insertion site for the distal interlocking screws.

86. Repeat x-rays taken on the 17th of June 2014 disclosed that the subtrochanteric fracture is ununited and that the plaintiff has got a hypertrophic mal-union. The distal nail used to fix the fracture was broken at the screw/nail junction and there was some metal debris around the tip of the proximal nail. X-ray examination taken on the 18th of May 2009 indicated that the head/neck angle on the right femur was 135 degrees as opposed to 170 degrees on the left which means that there had been a collapse of some 15 to 20 degrees into varus from the correct head/neck angle for the femur. The x-rays taken in 2014 showed some further angulation with the head/neck angle being 110 degrees.

87. There was considerable controversy in the course of the trial as to whether or not the plaintiff's right subtrochanteric fracture had been successfully treated to the point where it had healed. It was the opinion of Mr Pennie, Consultant Orthopaedic surgeon retained by the defendants, and contained in a report prepared and handed in for the assistance of the Court, that, when successfully treated, symptoms from a subtrochanteric fracture of the femur would be expected to settle down in an otherwise fit individual and that most people would return to a normal full and active life with, at most, some non-disabling aching discomfort on heavy activity.

88. The plaintiff's evidence was that he was crippled and in severe pain with symptoms worsening instead of getting better – especially in relation to his right leg – and that his ability to ambulate independently was significantly affected to the extent that he needed assistance with mobilisation, and was compelled to use crutches as well as a wheelchair, as well as a commode which doubled for toileting. He could walk unaided but not very far. He was essentially house bound and needed to be cared for because of the seriousness of his injuries. He was unable to attend to ablutions unaided. He could only wash the upper part of his body. He had a mobility scheme car which he could use to go to the shop or chemist or for medical appointments or otherwise when necessary or in emergencies.

89. The physicians who treated him in the two year period following the accident advised him that the fracture to the right femur had healed. He, on the other hand, felt it hadn't: he couldn't weight bear or walk properly on it and was in excruciating pain and discomfort. Notwithstanding, when the plaintiff was seen by an orthopaedic surgeon, Mr. Manning, in 2011 and was told by him that the fracture had healed. The plaintiff had by then been discharged from further orthopaedic care and remained so.

90. However, Mr. O'Driscoll, a Consultant Orthopaedic surgeon retained on behalf of the plaintiff, having reviewed the earlier x-rays and also having arranged to take up-to-date x-rays in 2014 reported and gave evidence that the fracture had not only not healed in the sense that there was non-union and that some of the metalwork was broken, but also that there was an abnormal angulation between the neck and head of the fractured femur which had worsened with the passage of time.

91. The plaintiff was cross examined on the basis of the medical opinion expressed by Mr. Pennie in his report. However, when Mr. Pennie came to give evidence he had had the benefit of the evidence given by Mr. O'Driscoll as well as sight of the up-to-date x-rays as a result of which he accepted that the subtrochanteric fracture had not united. He accepted that in the case of non bony union there were surgical treatments which could be offered and which would most likely result in there being a very good chance that full bony union could be achieved. Accepting the existence of non union and abnormal angulation Mr. Pennie did not think, however, that the complaints and disabilities made to him by the plaintiff were consistent with his condition. The presentation and reporting by the plaintiff in relation to the seriousness of his injuries and the on-going consequential disabilities and disablement suffered by him became a central feature in the case calling into question, as will be seen, the plaintiff's credibility.

92. The plaintiff made a claim in respect of past and future special damages totalling £1,493,103.13 sterling. He swore an affidavit of verification in respect of that claim on the 30th of April 2015, having previously sworn affidavits of verification in respect of the personal injury summons and replies to particulars delivered in the proceedings. In the particulars of personal injury indorsed on the personal injury summons the plaintiff pleaded that he:

> *"…remains severely incapacitated following his accident. His right arm feels cold. He has suffered electric shocks down his left arm from his neck. The scars on his right leg causing a burning sensation. He has severe back pain which never settles. He suffers shooting pains into his right leg which is constant, the skin goes red and the whole leg feels extremely hot. He cannot sleep and suffers nightmares. He continues to take numerous medications including amitiptyline, diclofenac, gabapentin, oramorph, zomorph, zopiclone and paracetamol in addition to medication for asthma and unrelated problems. The plaintiff requires two crutches to stand and needs significant assistance to mobilise. The plaintiff completely non weight bears on the right leg."*

93. With regard to injuries to his lumbar spine the plaintiff pleaded that he had no movement and that he had an absent knee-jerk on the right side and that he was in constant pain. He also pleaded that his disabilities were such that he:

> *"…finds it very difficult to get about at present and spends most his time lying down on his bed or, if he can get up, lying on his sofa. He has become very depressed as a result of his ongoing difficulties….Other than for attending hospital appointments, the plaintiff has been house bound since his return to his home. He feels imprisoned in his home.'*

94. With regard to care it was pleaded that:

> *"As a result of his injuries the plaintiff has been unable to independently live and is much dependant on his partner, Christine McKenna, for ongoing assistance. He has required assistance in the past and he is likely to require ongoing assistance in that respect. He will need limited assistance during the day and care at night. His considerable difficulty with stairs and his home has had to be rearranged so as to permit him to gain access to the bathroom/and/or light facilities. Concern arises in relation to his future care requirements."*

95. The plaintiff's presentation to the Court was one of a person who was profoundly disabled as a result of his injuries; sitting as he did, sometimes semi-reclined, and except when giving evidence, in a wheelchair. He mobilised with assistance from the wheelchair to the witness box with crutches and with great difficulty. Having regard to the case as pleaded and the opening, his presentation was not unexpected.

96. As to his claim for special damages, apart altogether from a claim for past and future loss of earnings, and past and future care, the plaintiff also made a number of other claims based on his disabilities and which included a claim for future aids and equipment. Under that heading a claim was made for a light wheelchair; a powered wheelchair; an Invacare Comet scooter; a clutch holder; a long handled shoehorn; fissure handles for elbow crutches; a long handled foot sponge; a self-propelled shower chair; a rambler trolley; an adjustable toilet seat and frame; a stair lift; a Theraposture 2 motor lift and recline chair; a boot lift mini hoist; a skilled handyman seven days a year; a gardener one hour per week for 52 weeks; a cleaner for 1.5 hours per week for 52 weeks; provision for payment in respect of the mobility scheme or, in the event that the plaintiff could not access mobility allowances, provision to purchase a suitably adapted vehicle.

97. Ms. Gail Russell, rehabilitation consultant, was retained on behalf of the plaintiff to assess and report on all aspects of his daily living, the claim for gratuitous family care required by reason of his disability and the need for any aids and appliances as well as future care that maybe of assistance to him in the future. She prepared an expert report dated the 7th of November 2012 and gave evidence at the trial.

98. In October 2014, Ms Jane Toplis, rehabilitation consultant, a co employee of Ms Russell, was retained on behalf of the Plaintiff to assess and report on the plaintiff's accommodation needs in the short and long term. She prepared a report on the 11th of November 2014 and gave evidence at the trial.

99. Mr Paul Jackson, rehabilitation consultant, was retained on behalf of the Plaintiff to report on the employment and earnings implications as a result of the plaintiff's injuries. He prepared a report dated the 15th of May 2013 and gave evidence.

100. These reports were prepared following interview with the plaintiff. Ms McKenna, who was generally in attendance, rendered assistance and participated when required during interviews by Ms Russell and Ms Toplis. Each of these experts refer to the medical reports, notes and records of the plaintiff made available to them by way of assistance in completing their assignment. The reports of all three experts were furnished to and relied upon by Mr Brendan Lynch, Consulting Actuary, in the preparation of his report dated 14th of May, 2015. He also gave evidence.

101. Medical evidence was given on behalf of the Plaintiff by Professor LP Ormerod, Professor of Respiratory Medicine, regarding the plaintiff's chest injuries; by Dr Forsyth, Associate Specialist in Chronic pain in relation to his painful symptoms and relevant treatment; Dr John Wills, Pain Specialist, in relation to the plaintiff's condition and capacity to work; Dr Benjamin Hugh Green, Consultant Psychiatrist, in relation to the plaintiff's psychiatric condition and psychological sequelae; and Mr Michael O'Driscoll, Consultant Orthopaedic Surgeon, in respect of the plaintiff's orthopaedic injuries. A report of Mr Khan, Consultant Orthopaedic Surgeon, who examined the plaintiff in January 2012, was also admitted. All of the medical witnesses who gave evidence prepared reports which were handed into court during the trial.

102. Medical evidence was given on behalf of the defendant by Mr. Bruce Pennie, consultant orthopaedic surgeon, by Professor Wilkinson, consultant psychiatrist, and by Professor Jack Phillips, consultant neurosurgeon. Evidence in relation to the care and rehabilitation aspects of this case was given on behalf of the defence by Ms. Bukowski, occupational therapist and by Mr. John Parkinson, rehabilitation consultant. The defence witnesses all prepared reports which were handed into court in the course of the trial.

103. The presentation of the plaintiff both to the experts retained to give evidence on his behalf and the experts to give evidence on behalf of the defendant was of a man so disabled by his injuries that he was almost incapable of doing anything or, if doing anything, then only with the assistance of or reliance upon others. His disabilities were such that even when he came to be assessed by his own experts a full medical examination appropriate to the plaintiff's injuries and complaints could not be carried out.

104. When the plaintiff was being assessed by Ms. Toplis he was so immobilised by his pain and disability that he was unable to demonstrate to her the very limited mobility which he admitted to having. The plaintiff claimed that he spent most of his day either in bed or on a sofa in the living room. He was incapable of going up or down the stairs. He needed assistance to mobilise from his bed to a commode and from there to a settee or vice versa. He was unable to weight bear on his right leg and had developed a painful symptomology in his left leg which he used to take the weight of standing or walking the very short distance he admitted to being able to walk, such weight bearing being assisted by the use of crutches. The plaintiff rarely left the house. He had difficulty negotiating the front two steps without assistance. He could not drive and shopping was done online or with the assistance of neighbours. Although he had a car through the motability scheme, when used it was driven by his partner Ms. McKenna. On the rare occasions when he did leave the house that was for the purpose of attending medical appointments to which he was taken either by ambulance or by being driven. He did not know when, if at all, he would ever be able to return to driving. Save for the short distances inside his home and then only on the ground floor, where he had his bed, the plaintiff was dependent on crutches, a wheelchair or commode for mobilisation.

105. Relying on the medical evidence contained in the reports furnished, on their own assessment, and the veracity of the plaintiff's account of his disabilities and corroborated by Ms. McKenna, the rehabilitation experts concluded that the plaintiff was profoundly disabled and that even with the holistic approach to treatment suggested by Mr. O'Driscoll being successfully carried out, there were question marks as to whether or not with appropriate retraining the plaintiff would ever be able to hold down a permanent job.

106. Unlike Ms. Toplis, Ms. Bukowski, reporting for the defendants, was able to observe the plaintiff transferring from his bed to the wheeled commode by hopping on his left leg, using his crutches for support and with assistance from Ms. McKenna. The distance required to carry out that transfer was four to five steps. Ms. Bukowski observed the plaintiff did not put any weight through his right leg and relied heavily on crutches, facially grimacing whilst carrying out the transfer which was slow and appeared to cause a great deal of pain and effort. Ms. Bukowski's conclusion was that the plaintiff was likely to require crutches to mobilise for many years to come and possibly for the remainder of his life.

107. When the plaintiff was seen by Mr. Pennie for the purposes of preparing a supplementary report on the 6th May, 2014 the plaintiff told Mr. Pennie that he would try to get out of his bed onto a couch most days and that he would probably and usually do that using a wheelchair; although on good days he would walk up and down the living room using crutches. He described his disability as being essentially the same as when first medically reviewed; he had been not out of the house except for appointments with medical professionals. On medical examination he was able to get out of his wheelchair and stand with the use of two crutches and the assistance of Ms McKenna and her son.

The plaintiff's evidence

108. The plaintiff gave evidence as to the extent of his injuries and the effect that those have had and continue to have upon him. He described himself as being destroyed; of only being able to sleep 2-3 hours a day and that for about 21 hours a day he is in agony. In terms of his mobility, his evidence was that he was very confined and had to sleep downstairs in the house. When his symptoms were really bad he had to have his right leg lifted out of the bed, and that he could then get onto crutches. If he needed to get to the front door of the house then he would use a commode. Mobilising in the house, limited though it was just left the plaintiff in more and more pain. With regard to the use of his right leg, he said that if he put weight on it he was in agony; it had not gone up or down since he had come out of hospital. When asked by his own counsel whether he had gone out to the shops with his partner in a wheelchair and with crutches he replied that he had done it all, like coming to the court (in a wheelchair); he had also gone out crutches. His intimate life had essentially come to an end. His partner had also developed serious mental problems with which he had had to cope and to which reference was made earlier in this judgment.

109. As to why and when he would leave the house his evidence in chief was that this would generally only happen when he had to attend medical appointments, when his partner was ill or if they had no money or had no food, were not able to shop online, or were not able to get friends or family to buy things for them.

110. Both himself and his partner have joint employment and support allowance and they both get carers allowance for each other. He knew he was in agony with his leg but was distressed by the physicians – whom he had seen before Mr. O'Driscoll – telling him that his right leg injury had healed. He described pains running down his legs like he was being electrocuted and that his groin felt that there was something stabbing in it. In addition to this he had back pain. He thought he was taking between twenty-four to twenty-six tablets a day including liquid morphine, anti-depressants and sleeping tablets. Despite all of this medication when he was awake he was in pain.

111. There was a local shop about 100-150 yards away which he could get to but then he required to take extra medication to deal with the pain which would then turn him into a "zombie". He said that he did not drink and had not taking an alcoholic drink since the accident. He described having a mobility car which he could use to get to the shops or the chemist. Generally he would get to the door of the house on his commode but then negotiate the two steps down at the front door and could then get himself into the car. He always got a mobility car with a higher roof so as to assist him getting in and out of the vehicle. Psychologically he described his head as being a complete mess. He had been unable to make a number of appointments because of his problems.

112. The social services had broken a number of promises to him including the provision of a stair-lift, a wheelchair, new crutches, and ramp to enable to him to negotiate the two steps at his hall door. He could do with the doors of his house being widened so that he could get about in a wheelchair if he was really struggling. He was very despondent; his life had simply been destroyed.

113. When cross-examined in relation to his capacity to drive a car provided under the mobility scheme, the plaintiff confirmed that he did drive when he really had to do so. That could be as often as every day depending on what he had to do. Since the accident he had become addicted to marijuana. Some times he would drive to the Tesco supermarket in Prescott and wait for a lad from whom he could buy his marijuana. He gave evidence that sometimes he could buy the product every day or sometimes it was once a week.

It depended how bad the pain was and also upon how much money he had at the time. He accepted that he had not told any doctor about his addiction to marijuana because he felt embarrassed and ashamed for himself. He accepted that he had not told any of his doctors that he was able to shop by using a trolley onto which he would put his weight.

114. When asked as to whether he had told his experts that he was able to drive, the plaintiff gave evidence that he would have done so. In fact, it was his evidence that he was sure that he would have told them that he needed to get to the shops sometimes because he had no help. As far as he was concerned he told the doctors that he did drive.

115. He accepted that sometimes he could walk up from the car to a house to get marijuana and that he could walk short distances without crutches but not very far without them. He could also mobilise outside without a wheelchair. When it was suggested to the plaintiff that he told his experts precisely the opposite, he rejected that and said he thought he had told them that sometimes he would have to go out especially when his partner was not well, such as to go and get food. When it was suggested to him that he had told his doctors that he could not weight bear, the plaintiff rejected that and said that he told them he could. He was asked whether he could negotiate the steps at the front of the house without crutches. His answer to that was that he probably could not. He described having to hold on to the wall or bounce down on his left leg if he wasn't using a crutch.

116. When the particulars of the disabilities resulting from the injuries given in the reply to particulars were put to the plaintiff and in respect of which he swore an affidavit of verification, the plaintiff said he could not remember what the position was in the year 2011 or 2014 or, for that matter, 2015 and whilst he accepted that the signature must have been his, he could not remember actually signing the affidavit. He did not even remember going to see his solicitors. When he was asked about the particulars which indicated that he was unable to weight bear on his right leg the plaintiff replied that he told his doctors that he was trying to get the weight down on his leg but that when he did so he was crippled.

117. With regard to the apparent contradiction between the evidence he was giving in relation to what he was able to do as far as his right leg was concerned and what was contained in the replies to particulars, his evidence was that whilst he could not remember everything there had obviously been what he described as "a big cock-up". He accepted that he could in fact take weight on his right leg but that it was like walking on a broken leg and that hr could be left in crippling pain.

Surveillance evidence.
118. The defendants retained the services of the Cotswold Group located at Montpellier Court, Gloucestershire Business Park, Gloucestershire, England. The private investigators who undertook the surveillance were named as witnesses to fact on the defendant's disclosure schedule dated the 27th of May 2015. The plaintiff refuted the suggestion made to him by counsel for the defendants that the reason he had given evidence as to his ability to mobilise without the aid of crutches, a wheelchair, a commode, to go shopping, and to drive a car was because he had become aware, albeit very late in the day, that he had been placed under surveillance.

119. Video surveillance of the plaintiff was introduced into evidence and shown to the Court. Recordings of the plaintiff were made on the 9th of March 2014, on the 6th of May 2014, on the 1st of December 2014, on the 6th of January 2015, on the 7th of January 2015 and on the 9th of March 2015. That evidence amply demonstrated that the plaintiff's ability to negotiate the steps of his house unaided, to open the gates of his driveway, to bend down to do so, to go supermarket shopping unaided, to walk without the use of crutches, to load the contents of his supermarket trolley into the boot of his car, to raise his arm and close the boot lid of his car, to drive, and that when attending a medical appointment he mobilised with crutches and the use of a wheelchair.

120. Suffice it to say that the presentation of the plaintiff on the video was in stark contrast to the reporting and presentation made by him to his own experts and to those retained on behalf of the defendant in this case. The video evidence was put to the plaintiff. He accepted what the video showed but did not accept that these were regular occurrences; rather, that he only drove in emergencies or otherwise when he had to and he made a similar observation in relation to shopping. The video didn't show the pain that he was in when doing those things.

121. The plaintiff explained his failure to recollect attendances at medical and other expert appointments and particularly what had been said during the course of those appointments by virtue of having serious memory difficulties. This was particularly evident in the course of his cross examination. On Tuesday the 9th of June he said he couldn't remember anything about the previous Friday in court other than the fact that he was there. Ms. McKenna had similar difficulties especially when being cross examined in relation to her attendances with the plaintiff at expert appointments. She accepted that while she may have been physically present, her mind was somewhere else. She said that in their house it was like the blind leading the blind.

122. With the exception of Professor Green, all of the expert witnesses were afforded an opportunity of reviewing the video evidence before they gave their evidence to the Court. Mr. O'Driscoll commented that the video showed the plaintiff to be walking with what he described as a dreadful lurch consistent with an unhealed fracture. However, he accepted that the surveillance evidence did not show the severe behavioural chronic pain reactions that were evident at the time of examination or when the plaintiff was talking about his problems. He made an assumption that the plaintiff was unable to drive because of his injuries. He agreed that he was in possession of Ms. Russell's report and that she had clearly been given to understand that the plaintiff was not driving. It was his evidence that when the plaintiff came to see him on both occasions for the purposes of medical examination and report that he was told that the plaintiff had been driven.

123. Under cross examination Ms. Russell accepted that the video showed the reality of the plaintiff's abilities. Without assessing the plaintiff it was a challenge to her to give evidence in relation to the plaintiff's claim for care but having viewed the video she thought that there was little personal care that the plaintiff would need. She accepted that the presentation made to her was quite different to that seen in the video. She had prepared a report and made her assessment on the basis of the presentation made to her.

124. The expert witness accepted that Ms. McKenna had been present at interview and had given information when requested. Both Mr. O'Driscoll and Ms. Russell agreed that the picture of the plaintiff seen in the video evidence was not the picture given to them. Mr. O'Driscoll agreed that had he been given that picture he would have dwelt less on the chronic pain and the psychological problems but he would still have said the plaintiff had a significant disability and would have not be able to undertake manual work. He agreed that there were many behavioural abnormalities exhibited when the plaintiff came to see him and, presumably, when seen by other specialists which were not seen on the video. He wasn't able to carry out a full examination of the plaintiff.

122. If the plaintiff had presented as shown in the video evidence, Mr. O'Driscoll said that he would have expected to have been able to examine the plaintiff. In his view the truthfulness of an account was a matter for the Court rather than for him. Mr. O'Driscoll described the presentation made by the plaintiff to him at the time of medical examination and assessment as an "exaggeration" when compared to what was seen on video. He had to proceed on the basis of the medical notes and records, the x-rays, and what the

plaintiff told him and on his examination. He thought that there were behavioural factors at play which were attributable, at least in part, from being told that his orthopaedic injuries had essentially healed whereas the severe injury to his right leg had not healed but nobody believed him.

123. Dr. Wills also agreed that the picture of the plaintiff presented to him was not what was seen on video. The presentation to him was of a man who was almost immobilised. He had given his opinion relying on that presentation.

124. Professor Wilkinson gave it as his opinion that there was a marked difference in terms of the plaintiff's ability to mobilise between what the plaintiff was claiming when examined by him and what was evident on video. He agreed that that there were a number of psychological factors at play which might be said to explain the plaintiff's behaviour. However, he considered that the plaintiff knew what he could and could not do. A failure to disclose that was, to his mind, something deliberate; it amounted to deliberate exaggeration. He considered the elaboration of physical symptoms for psychological reasons to be a bit of a nebulous idea. His view was that one would expect a person elaborating physical symptoms for psychological reasons to behave consistently. In his view, that was absent in this case and constituted a discrepancy in terms of the claim versus what was to be observed on video.

125. When asked to comment on the picture of the plaintiff as presented in the video evidence, Mr. Parkinson's answer was that it was a video of a man not as he described himself to him, but rather the plaintiff was a different man. He was walking but he told him he wasn't able to walk. He was driving but he was told he could not drive. When he assessed the plaintiff he was lying in bed; the plaintiff could just about potter across to the sofa five paces away on a good day and that was his limit.

126. Mr. Parkinson had asked the plaintiff to complete a questionnaire. In answer to a question as to whether he could reach up and down the plaintiff answered no but it is clear from the video surveillance that he was able to reach up to close the boot lid of his car.

127. Ms Bukowski, like Ms. Toplis and Ms. Russell, having seen the video expressed the view that in order for her to give an opinion as to the plaintiff's requirements it would be necessary to carry out a full reassessment of the plaintiff, preferably after appropriate medical treatment had been carried out.

128. From a neurological perspective of the case Professor Phillips's opinion, having seen the video, was that the plaintiff's presentation was unusual and not explained from his perspective on any scientific basis. He accepted that the plaintiff had a dysfunctional right hip but did not accept that the plaintiff had a chronic pain syndrome. The plaintiff was certainly capable of being rehabilitated. He thought that the plaintiff needed a hip replacement which, despite its complexity, could be done. The plaintiff then needed a pain management programme as well as a programme of cognitive behavioural therapy. He agreed that if the tripartite intervention suggested by Mr. O'Driscoll was undertaken, the plaintiff's ability to rehabilitate more quickly and more successfully was achievable.

129. He accepted that there would be a disability of walking around with a limp accompanied by pain and discomfort localised in the muscles around the hip and he also accepted that there was a significant psychological component in the plaintiff's case.

Application for dismissal of the plaintiff's claim.
130. At the conclusion of the evidence counsel on behalf of the defendant applied to the Court to have the plaintiff's claim dismissed pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004 (the Act of 04). Detailed written as well as oral submissions in relation to the case in general, and this issue in particular, were made by the parties and have been read and considered by the Court.

131. Having regard to the evidence given by and on behalf of the plaintiff in this case and the nature of the issue now under consideration, it is considered appropriate to observe that when asked whether the Court could rely on the content of the expert reports insofar as they referred to his presentation and what the plaintiff was recorded as saying to the experts, the plaintiff accepted that the Court could rely on the reports.

The submissions.
132. It is not intended to set out an exhaustive summary of the written and oral submissions which were made. However, given the nature of the application I consider it appropriate to outline the essence of these as follows.

133. It was submitted on behalf of the defendants in relation to this issue that on all of the evidence there could be no controversy but that the presentation and account of his disability given by the plaintiff to each expert retained to examine and report, was exaggerated. Insofar as he gave the experts to understand that he could not drive, that he couldn't weight bear through his right leg, that he was housebound, and that he required at least two elbow crutches to carry out a very limited ability to walk, he knew that to be false and misleading.

134. It was also not in dispute that the plaintiff had sworn three affidavits of verification some of which he knew to be manifestly untrue in several material respects. The experts who had been called to give evidence did the best they could to assist the Court having regard to what they had seen on the video; that was substantially different to what they had reported. All of the experts, with the exception of Professor Green, had seen the video. However, what was in dispute between the parties, were the consequences which should flow as a result of those matters.

135. It was accepted that on an application under s. 26 of the Act of '04, the onus of proof lay on the defendants. The test to be applied was subjective but, once established, the plaintiff was not entitled to recover damages even for those injuries not directly tainted by false and misleading evidence.

136. The presentation of the plaintiff to his experts had resulted in the furnishing and particularisation of a claim for special damages to the defendant on the 29th of April, 2015 which, when actuarialised, amounted to £1,493,103.13 sterling.

137. It was submitted that the only tenable explanation for the difference in the plaintiff's evidence between what he had admitted he was able to do in evidence and the accounts given by him to his experts was that he had become aware, after receipt of the defendant's disclosure, that he had been placed under surveillance.

138. It was submitted that the contents of the personal injury summons and replies to particulars insofar as they portrayed the extent of the plaintiff's disabilities arising from his injuries and the consequences of those disabilities for the future were false and misleading and which had been verified in three affidavits of verification sworn in accordance with the provisions of s. 14 of the Act of '04.

139. Apart altogether from the case as pleaded and verified on affidavit, it was submitted that the plaintiff had had given false and misleading evidence at the trial and had knowingly caused false and misleading evidence to be adduced by his presentation and reporting to the experts retained on his own behalf and on behalf of the defendant. It was submitted that there could not be any innocent reason or explanation or excuse by reference to psychological sequelae to explain the reporting and presentation to the experts. The plaintiff knew that his presentation and reporting in relation to the extent of the disabilities consequent upon his injuries were grossly exaggerated by him. Moreover, no step was taken by the plaintiff to inform his experts as to the true state of affairs concerning his ability to mobilise independently before the trial, nor to instruct his solicitors to inform the defendants of that by way of service of a notice of additional and updated particulars and verified on affidavit. In his evidence the plaintiff gave various conflicting explanations on his change of position which, by inference, were false. Otherwise he sought to avoid answering difficult questions by claiming memory loss. No credible explanation was given by him for the adjustment of his position as presented to the experts and that in his evidence to the Court particularly with regard to his ability to mobilise, shop, and drive.

140. It was further submitted on behalf of the defendants that if the Court took the view that they had not met the bar for an order under s. 26 the Court was, on the evidence, entitled under common law to strike out the plaintiff's claim on several grounds set out in the decisions of *Shelley Morris v. Bus Atha Cliath* [2003] 1 I.R. 232, *Vesey v. Bus Eireann* [2001] 4 I.R. 192, *Arrow Nominees v. Blackledge* [2002] 2 BCLC 167, *Summers v. Fairclough Homes Ltd* [2012] 4 All ER 317.

141. In support of their application under s. 26 the defendants relied upon *Ahern v. Bus Eireann* [2011] IESC 44, *Higgins v. Caldark* [2010] IEHC 527, *Meehan v. BKNS Curtain Walling System Ltd & Anor* [2012] IEHC 441, *Ludlow v. Unsworth* [2013] IEHC 153, *Salako v. O'Carroll* [2013] IEHC 17 and *Waliszewski v. McArthur & Company* [2015] IEHC 264.

142. In reply it was submitted on behalf of the plaintiff that the section did not apply at all to the circumstances of this case. The plaintiff had given truthful evidence. Mr. O'Driscoll gave a perfectly good explanation as to why the plaintiff would think that he was walking on a broken leg.

143. Whilst accepting that the video evidence clearly presented a different picture to that conveyed to the experts and to the plaintiff's own evidence given in chief before he was cross examined, and that that could fairly be described as an inconsistency or exaggeration, it was submitted that this was not an inconsistency or exaggeration within the meaning of the section because in this case the plaintiff was not knowingly or deliberately intending to mislead. He had an honest subjective belief that he was seriously injured and disabled as a result of those injuries.

144. On any view of the evidence the plaintiff has a serious injury and the only question is how devastating those injuries are for him. The inconsistencies or exaggerations were, it was submitted, excusable. The circumstances of this case would not warrant a dismissal of the claim. The plaintiff's experts had given evidence taking into account the existence of the inconsistencies so no further reduction in relation to special damages would arise. This was a clear case where, if the section applied, an injustice would be done were the plaintiff's claim to be dismissed. Whatever else this was not the claim of a chancer engaging in skulduggery. It was a very different case involving a man with serious physical and psychological difficulties.

145. It was also submitted on behalf of the plaintiff that the common law in relation to the making of an exaggerated claim prior to the coming into force of the Civil Liability in Courts Act, 2004 remains instructive in identifying the approach which the court should take in relation to evidence given in personal injuries actions. Referring to the decision of the Supreme Court in *Shelley Morris v. Dublin Bus Atha Cliath* [2003] 1 I.R. 232 and in particular to the judgment of Denham J. at p. 239 the plaintiff submitted that this was a case which fell into the second of the three scenarios set out by Denham J. in her judgment when dealing with the issue of exaggeration by a plaintiff in court proceedings and which were as follows:

> *"First, there is the case where the whole claim is concocted. The accident did not happen or did not happen as claimed. This is a fraudulent claim and will be dismissed by the trial judge.*
>
> *Secondly, there is the situation where there is a genuine claim but the effect of the injuries is exaggerated by the claimant because of a subjective belief that the injuries have had a worse effect than they have. This type of approach involves no conscious lying by a claimant. The trial judge would determine the value of the damage suffered in accordance with the evidence, but would not condemn the evidence of the plaintiff.*
>
> *A third scenario exists where there is a genuine case made establishing negligence but the plaintiff deliberately exaggerates the injuries, knowing that he or she is exaggerating the injuries and their effects. This may take on the appearance of a fraudulent claim. The lies of the plaintiff are apparent to the judge. It is at this stage that the trial judge (who has heard all the evidence and seen the witnesses) must exercise his or her judicial discretion. At issue is the credibility of the witness. If the credibility is so undermined that the burden of proving the claim has not been met then the trial judge will dismiss the claim. However, to achieve a fair result in all the circumstances, the trial judge may assess the credibility of the witness in light of the evidence of other witnesses. It may be that the negligence of the defendant is established but that the evidence of the plaintiff as to the injuries or some of the injuries may not be credible. This may arise in circumstances where injuries are not easily assessed objectively but great reliance has to be placed on the evidence of the plaintiff, for example in soft tissue injuries. The evidence of a plaintiff is critical. In a situation where the plaintiff has told a mixture of the truth and lies, his or her credibility is completely undermined. It is for the plaintiff to prove his or her case on the balance of probabilities. It may be that the deliberate exaggeration is such that the credibility of the witness is called into doubt and the burden of proof is not carried. Consequently, the plaintiff will not succeed in proving the claim to which such deliberate exaggeration applies.*

146. It was submitted that the history as given by the plaintiff to the experts did not mislead them and that truthful evidence was given at the trial such that any exaggeration did not result in any misapprehension as to the plaintiff's current condition and the type of treatment which would benefit him.

147. It was accepted that if the Court took the view that the plaintiff was deliberately misleading the experts, was going about matters deviously, conscientiously and knowingly in order to try to exert momentum in his claim then certainly the case would fall outside the second category in the *Shelley Morris* case. However, it was contended that in the particular circumstances of this case the plaintiff himself would not call or consider his presentation or reporting as exaggeration. One way or the other he had disabling injuries and he honestly believed in the extent of his disabilities.

148. With regard to the evidence given at the trial and his affidavits of verification, it was submitted that to the extent that any of the plaintiff's evidence was false or misleading in any material respect or that any affidavit of verification sworn by him was false or misleading in any material respect, that the plaintiff did not know that such evidence was false or misleading.

149. It was also contended that although his reporting to doctors as reflected in the replies to particulars and affidavits of verification contained inaccuracies, when regard was had to the evidence of Mr. O'Driscoll and the ultimate acceptance by Mr. Pennie of the true nature of the plaintiff's injuries, the plaintiff's evidence was not false or dishonest but was, instead, a manifestation of his subjective perception of his condition and response to the blindness of a series of doctors to the true objective causes for his pain.

150. Undoubtedly the plaintiff was not as catastrophically injured as he honestly believes himself to be. The Court should award damages for what it now knows on the evidence is the truthful position of the plaintiff; a person who has suffered and continues to suffer from his injuries. In such circumstances this was a case where the Court should exercise discretion in his favour; to do otherwise would result in an injustice – as contemplated by the Act – being done to him. I took this to mean that even if the Court concluded that the section did apply, it had discretion to award damages representing what the Court knew to be reality of the plaintiff's injuries. If the section did not apply there was, on the authorities, an unquestionable discretion to do so.

The Common law

151. The issue of exaggeration by a plaintiff in court proceedings at common law has been considered and outlined in a number of decisions in recent years. The law was extensively reviewed by the Supreme Court in *Vesey v. Bus Eireann* [2001] 4 I.R. 192 and *Shelley-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232. Both parties relied on these decisions and accepted that the provisions of the common law were not ousted by the Civil Liability and Courts Act 2004. In essence there may be cases which fall outside the strict provisions of s. 26 of the Act which would, nevertheless, be governed by the common law position as enunciated in those authorities.

152. In *Vesey* it was held by the Supreme Court that it was not the responsibility of a trial judge to disentangle the plaintiff's case where it had become entangled as a result of lies and misrepresentation systematically made by the plaintiff. The rationale for this is that if the trial judge were to embark on the task of doing so it would risk a perception of bias. Whilst the plaintiff might rely on the advice of his lawyers, doctors, engineers and other professionals none of the professional advisors were responsible for the factual contents of the pleadings or information given in replies to particulars.

153. That there could be circumstances in which the court would be entitled to dismiss a claim in its entirety as a result of the prosecution of what in effect amounted to a fraudulent claim is undoubted and was fully recognised in the decision of the Supreme Court in *Shelley-Morris*. In that case the Court observed that the issue is not a new one; exaggeration may arise in different ways in different cases. The extract from the judgment of Denham J. in this regard has already been set out earlier in this judgment.

154. Both Denham J. and Hardiman J. observed that the deliberate exaggeration by a plaintiff in the prosecution of a claim could, in an appropriate case, amount to an abuse of the judicial process. The rationale at law for this being that the courts have a duty to protect their own processes from being made a vehicle of unjustified recovery.

155. These decisions are also authority for the proposition that the onus of proof, lying as it does on the plaintiff, is to discharge that onus in a truthful and straightforward manner. Where that has not been done a court is not obliged to nor entitled to speculate in the absence of credible evidence as to do so would be unfair to the defendant. As to what action the court should take when satisfied that there has been an abuse of process, the court has an inherent jurisdiction, in a proper case, to stay or strike out the plaintiff's proceedings.

156. Where a plaintiff has been found to have engaged in deliberate falsehoods to the point where the issue arises as to whether or not there has been an abuse of process of the court, Hardiman J. observed that a number of corollaries would arise from such a finding namely:

> *"(a) the plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree;*
>
> *(b) in a case, or an aspect of a case, heavily dependant on the plaintiff's own account, the combined effects of the falsehoods and the consequent diminution in credibility mean that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case;*
>
> *(c) if this occurs, it is not appropriate for a court to engage in speculation or benevolent guess work in an attempt to rescue the claim, or a particular aspect of it, from the unsatisfactory state in which the plaintiff's falsehoods have left it."*

The Civil Liability and Courts Act 2004.

157. Section 26 of the Act provides:

> *"—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—*
>
> *(a) is false or misleading, in any material respect, and*
>
> *(b) he or she knows to be false or misleading,*
>
> *the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.*
>
> *(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—*
>
> *(a) is false or misleading in any material respect, and*
>
> *(b) that he or she knew to be false or misleading when swearing the affidavit,*
>
> *dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.*
>
> *(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court."*

158. There have been a number of decisions on the meaning and effect of this provision which were reviewed by this Court in the recent decision *of Waliszewski v McArthur and Company* [2015] IEHC 264. The provisions of s. 14 and s. 26 of the Act were in force and governed the proceedings in this case. It is pertinent to observe that the section is by its terms confined to a plaintiff's personal injury action and as I observed in *Waliszewski*:

> *"It is a provision which places in the hands of a defendant a weapon to attack and destroy a plaintiff's case where evidence in any material respect which the plaintiff knows to be false or misleading has been given by the plaintiff, or where the plaintiff dishonestly causes such evidence to be given or adduced."*

159. It is quite clear from the authorities that when successfully invoked, there are serious and potentially penal consequences for the plaintiff. The court is obliged to dismiss the action altogether unless to do so results in an injustice being done.

160. It is well settled that the burden of proof under the section rests on the defendant who must satisfy the requirements of the section on the balance of probabilities. See *Aherne v. Bus Eireann* [2011] IESC 44; *Meehan v. BKNS Curtain Walling Systems Ltd & Anor* [2012] IEHC 441; *Salako v. O'Carroll* [2013] IEHC 17 and *Waliszewski v. McArthur & Company* [2015] IEHC 264.

161. The Act vests in the court a statutory jurisdiction to dismiss proceedings where a plaintiff gives or adduces, or dishonesty causes to be given or adduced, evidence that is false or misleading in any material respect where he or she knows such evidence to be false or misleading. The swearing of an affidavit of verification by a plaintiff which is false or misleading in any material respect and which the plaintiff knew to be false or misleading when swearing the affidavit is no less significant than the giving of false or misleading evidence. Quite separately and independently of the adducing or giving of evidence at the trial, the court has also vested in it by virtue of the provisions of s. 26 (2) a statutory jurisdiction to dismiss the action.

162. In either case s. 26 subs. 3 provides that an act is done dishonestly by a person if he or she does the act with the intention of misleading the court. It is significant that in the context of applying the provisions of the section with regard to the committal of a dishonest act that the court is concerned with the intention of the person committing that act rather than with whether the court has actually been misled.

163. The draconian effect of the provisions requires that they be construed strictly. It is not, as I observed in the judgment of this Court in *Waliszewski*:

> *"…intended to be nor should it be viewed as a vehicle for a defendant to have a plaintiff's claim dismissed in the presence of unexplained circumstances where there are anomalies or inconsistencies in the evidence. See Dunleavy v. Swan Park Ltd [2011] IEHC 232… [and] Nolan v. Mitchell and Anor [2012] IEHC 151."*

164. Where the court finds that a plaintiff has knowingly sworn an affidavit which is misleading in any material respect or where a plaintiff has knowingly given evidence or dishonestly caused evidence to be given which is misleading in any material respect, the court is required by the provisions of s. 26 to dismiss the claim unless to do so would result in an injustice being done. The question of injustice fell for particular consideration in the case of *Higgins v. Caldark Ltd* [2010] IEHC 527. In that action the plaintiff suffered very serious injuries which included the necessity of surgically amputating his right thumb. A very substantial claim for special damages was advanced, part of which was abandoned three days prior to the date on which the case was listed for hearing. The Court found on the evidence that the claim for future costs advanced in the amount of €137,415 was largely based upon false and misleading information which the plaintiff gave to his experts. It was contended on behalf of the plaintiff that when he swore his affidavit verification he did not know or was not fully aware that some of the averments within his verifying affidavit were false and misleading. However, the Court found that the averments within the plaintiff's affidavit of verification were materially false and misleading and that the plaintiff was aware of that when swearing his affidavit. With regard to the evidence given at the trial the Court found that the defendant did not discharge the onus of proof.

165. With regard to the question as to whether a dismissal would result in an injustice being done, and in respect of which similar submissions had been made on behalf of the plaintiff as are made in this case, the Court found that in his evidence the plaintiff had made no attempt to exaggerate the nature or extent of his injuries or their consequences and that, in common law, he had an entitlement to recover damages from the defendants to compensate him for those injuries and his consequent losses. However, the Court held that that entitlement had been statutorily qualified by the provisions of s. 26 of the 2004 Act. Commenting upon the draconian nature of the provision and the precise sanction which the court was required to impose where there had been a finding of the type made in that case, Quirke J. stated:

> *"…the imposition of the sanction has the effect of depriving the claimant of damages to which he or she would otherwise be entitled. The court must disallow both that part of the claim which has been based upon materially false and misleading averments, and also that part of the claim which would otherwise have been valid and would have resulted in an award of damages.*
>
> *That sanction must be imposed unless its imposition 'would result in an injustice being done'."*

165. It had been submitted on behalf of the plaintiff that the Court should disallow that part of the plaintiff's claim which had been based upon his false and misleading averments and should allow that part of his claim which was valid and which would otherwise have resulted in an award of damages. It was contended that the relevant provision within s. 26 of the Act conferred a discretionary power upon the Court to make such an award. The learned trial judge, referring to this submission, observed as follows:

> *"…however, when the court has made a finding of the kind made in this case, its power to award damages is restricted and may only be exercised for certain stated reasons based upon evidence of certain exceptional circumstances. It must be satisfied, on the evidence, that dismissal will result in injustice and it must identify the nature and extent of the injustice.*
>
> *The fact that the dismissal of an action would deprive a plaintiff of damages to which he or she would otherwise be entitled cannot, by itself, be considered unjust. Section 26 of the Act contemplates and requires such a consequence. Evidence in some proceedings may disclose the likelihood of injustice consequent upon dismissal. For instance, it may be unjust if the claim of a catastrophically injured claimant for the cost of ongoing care is dismissed because he or she has knowingly adduced some (perhaps trivial) misleading evidence in respect of some other category of damages. Similarly, the dismissal of a fatal injuries claim based upon misleading evidence knowingly adduced by an adult plaintiff, may unjustly penalise an infant or incapacitated dependents. In this case, dismissal of the plaintiff's action will have severe consequences for him. It will deprive him of significant compensation for his injuries and their consequences. It will*

affect his life and lifestyle in the future.

However, the court's discretion is limited. It may not be exercised simply because the statutory sanction required would have very severe consequences for a hard working and likable man who suffered a serious injury. The misleading evidence within the plaintiff's verifying affidavit was not trivial. It was intended to support claims for very substantial sums by way of damages."

In that case the Court found that there had been no evidence of exceptional or other circumstances adduced which would warrant the exercise of its discretion by refusing the application and the proceedings were dismissed.

166. That rationale was adopted and applied by this Court in *Meehan v. BKNS Curtain Walling Systems and another* [2012] IEHC 441. Ryan J. held that:

"Section 26 is mandatory. If it applies to the case, the legitimate parts of the claim cannot survive with only the false or misleading elements dismissed".

Addressing the question of what constitutes injustice in the context of the section, the learned trial judge observed:

"One of the examples given in the cases is if a plaintiff who told a relatively trivial lie had catastrophic injuries then it would be wholly disproportionate in that situation and accordingly unjust to dismiss the whole action because of a relatively unimportant or peripheral or trivial untruth".

The Court found that there was no evidence of exceptional or other circumstances adduced which would have enabled it to find that the dismissal of the action would result in an injustice and accordingly the plaintiff's claim was dismissed.

Decision on the defendant's application to dismiss the proceedings.
167. I have had the opportunity during the course of the trial to observe the demeanour of the plaintiff as he gave his evidence and also in the way in which he sat in and transferred from a wheelchair to and from the witness box. He presented as a man who was grossly disabled in terms of his mobility with the expression of a person in constant pain. As I have already observed earlier in this judgment, the plaintiff's presentation came as no surprise having regard to the pleadings and the opening of the case made on his behalf. This, in my view, is significant having regard to the evidence which enfolded and in particular the surveillance evidence of the plaintiff. The plaintiff carries the onus to prove his case on the balance of probabilities. The law requires that onus to be discharged in a truthful and straightforward manner. I am satisfied on the evidence that, with particular regard to the issue in respect of the extent of the disabilities consequent upon his injuries, the plaintiff did not do so in giving his evidence. In that regard I found the plaintiff's answers to questions put to him as to what he had or had not said to the experts concerning the level of his disabilities neither honest, credible nor reliable.

168. The defendants submitted that if for any reason they failed to meet the onus placed upon them in relation to the application under s. 26, then they sought to rely on the common law as enunciated in the decisions of *Vesey* and *Shelley-Morris* to have the plaintiff's claim dismissed. The application of the defendants under s. 26 involved a two-pronged approach. They sought an order for dismissal not only on foot of the provisions of s. 26 (1) but also pursuant to the provisions of s. 26 (2).

169. The application under s. 26 (2) is based on three affidavits of verification sworn by the plaintiff in relation to his claim; the most recent of which was an affidavit of verification sworn by the plaintiff on the 30th of April 2015 in respect of the plaintiff's claim for special damages and future loss. Whilst it was accepted in submissions made on behalf of the plaintiff that there were some inconsistencies in the pleadings and particulars, these were not made knowingly to be either false or misleading.

170. The affidavit of the 30th April exhibited a preliminary schedule of special damages and future loss totalling £1,493,103.13 sterling. At para. 3 of the affidavit the plaintiff averred that:

"…I have studied the contents of the said preliminary schedule of special damage and future loss which was drafted pursuant to my instructions and I state that the particulars included in same and that all the averments and/or pleas contained within same are correct, true and accurate in every respect to the best of my knowledge."

171. The plaintiff went on to aver at para. 4 that:

"I have been advised by my solicitor that if I make a statement within this affidavit which is false or misleading in any material respect and/or which I note to be false or misleading, I will be guilty of an offence pursuant to s. 14 of the Civil Liability and Courts Act, 2004".

172. The plaintiff concluded his affidavit of verification by averring that:

"…the matters contended for by me within this suit are correct and accurate to the best of knowledge and belief."

173. The surveillance video in this case commences on the 9th of March 2014; some thirteen months prior to the affidavit of verification in relation to the claim for special damages. The surveillance video shows the plaintiff's ability to mobilise unaided, including his ability to shop, and drive a car, on the 9th of March, 18th of March, 6th of May and 1st of December 2014, and on the 6th of January, the 7th of January and 9th of March 2015. I find as a fact that the surveillance evidence represents the truth concerning the plaintiff's ability to mobilise independently of crutches or a wheelchair, to drive his car, to go shopping, and to walk on his right leg albeit with a pronounced limp.

174. That surveillance of the plaintiff was completed on a date prior to the swearing of his affidavit of verification in respect of his claim for special damages. Mr. Brendan Lynch, consulting actuary, prepared a report on behalf of the plaintiff dated the 14th of May 2015 in relation to the plaintiff's future loss of earnings, care, aids, appliances and services, and recurring costs associated with accommodation. The capital value of these heads of damage was given in a range of £784,962 to £928,267 sterling. Mr. Lynch gave evidence at the trial. He confirmed in evidence that he had relied in the preparation of his report on the reports of the experts retained and furnished by the plaintiff. Having viewed the video evidence, the plaintiff's experts gave evidence on the basis of what they had seen. This resulted, during the course of the trial, in an abandonment or modification of a significant portion of the claim for special damages.

175. Whilst there was no video evidence in relation to the plaintiff's ability to mobilise until 2014, it was conceded that the pleadings

and particulars delivered prior to that time did contain some inconsistencies. It is clear that Ms. Jane Toplis assessed and reported as recently as the 11th of November 2014. What is also clear from the video surveillance is that when the plaintiff was seen by Ms. Toplis in November 2014, by Mr. Pennie in May 2014, by Ms. Bukowski in November 2014, by Professor Phillips and Mr. Parkinson in January 2015, he had the ability to mobilise in the way seen and could not but have been aware of his abilities in this regard at the time when he was examined and/or assessed by those experts. It follows from the foregoing that he also possessed that knowledge at the time when he swore his affidavit in April 2015. That affidavit was sworn by the plaintiff in circumstances where his solicitors had advised him of the consequences, which he acknowledged, of his swearing an affidavit which was false or misleading in any material respect.

176. It was submitted on the plaintiff's behalf in respect of the application under both sub paragraphs 1 and 2 of s. 26 that the plaintiff had an honest subjective belief in the extent and seriousness of his disabilities. Whilst it is an incontrovertible fact, founded on the evidence of both Mr. O'Driscoll and Mr. Pennie, that the plaintiff's subthrochanteric fracture has not in fact healed and that the limp with which he walks is consistent with and attributable to that condition, I am satisfied that this has not resulted in the level of disability represented by the plaintiff both to his experts and to those of the defendants. In my view of the evidence, the level of disability portrayed by the plaintiff to the experts was not consistent with the injuries or what is seen on video, but is and was a gross exaggeration of the truth of the plaintiff's ability to mobilise unaided.

177. What is relevant to this issue, however, is whether the plaintiff had a subjective, genuine and honest belief that he was so disabled when he swore his affidavits of verification. In this regard the Court has to be satisfied on this application that the exaggeration by the plaintiff, about which there cannot on the evidence be any doubt, was deliberate. As to that I accept the evidence of Professor Wilkinson that it was so. In answer to question 133 as to whether there was any explanation for this presentation, Professor Wilkinson's evidence was as follows:

> *"..Well, I think I would say that it's deliberate exaggeration. He knows that he can do these things but he doesn't tell anybody. So, to my mind, that is something deliberate. I am making an inference that he is aware of what he does. He is aware and he has, I think, admitted in evidence that he does these things and I think he has always been aware of that. So, to my mind that is deliberate exaggeration. If you turn up, for example, to Mr. Phillips with your leg outstretched in that bizarre way, how does that fit in with just a bit of exaggeration to make it clear that there is something wrong, I don't know."*

In answer to question 148 Professor Wilkinson said:

> *"…elaboration of physical symptoms for psychological reasons is a bit of a nebulous idea and it is what it is, it is what it says except that you would expect people to behave consistently. So, they should behave all the time as if they've got that condition and that's where there is a discrepancy in this case in terms of the claim versus the observed finding."*

178. I find the evidence of Professor Green to be of no assistance on this issue as he was not afforded an opportunity to view and could not comment on what was to be seen on the video.

Conclusion on the application under section 26 (2).
179. Having regard to these findings I reject the plaintiff's submission that this is a case to which the provisions of S. 26 do not apply. Being satisfied, as I am on the evidence, that the truth concerning the plaintiff's ability to mobilise unaided is that as portrayed in the surveillance video, and accepting as I do the evidence of Professor Wilkinson, I am satisfied that when the plaintiff swore his affidavits of verification he knew what the truth was and that, with particular regard to his affidavit in respect of his claim for special damages, he knew that that claim was based on the presentation of his disabilities made by him to his own experts, that that presentation was grossly exaggerated, and that his intention in doing so was to maximise the damages he sought to recover from these defendants.

179. The fact that part of the claim for special damages was either abandoned in full or substantially modified at trial – the plaintiff's experts doing the best they could on the basis of the surveillance evidence they had seen – affords no excuse in relation to this application. Rather, what is relevant is what the plaintiff intended at the time when he swore his affidavits of verification. I am satisfied that the swearing of the affidavit in respect of his claim for special damages in particular was a dishonest act within the meaning of the section.

180. When it was suggested to the plaintiff that the only reason he gave evidence accepting that, on rare occasions and generally in the context of an emergency, he could in fact weight bear on his right leg unaided, that he could mobilise without crutches or the use of a wheelchair and that he could drive was because he had recently become aware that he had been placed under surveillance, the plaintiff denied that was the reason and said that he would have always given such evidence. I do not accept that answer was truthful.

181. The plaintiff made no effort to correct the record by, if necessary, seeking an adjournment for the purposes of having his experts and those of the defendant reassess and report on what is in fact the truth concerning his ability to mobilise, nor did he instruct his solicitors to deliver further particulars to represent to the defendants and to the Court what was in fact the truth. Rather he was content for the case to commence and to be opened, as it was, with what his own counsel portrayed as a very significant claim for future loss both in respect of aids and appliances, loss of earnings and future care.

182. I am satisfied that were it not for the surveillance evidence the plaintiff would have proceeded with the claim as presented; with his experts giving evidence in line with the reports which they had prepared for these proceedings. It was only after the video surveillance was shown to the rehabilitation and vocational experts that they modified their evidence in relation to the plaintiff's requirements; doing the best they could on the basis of what they had seen. Accordingly, I am satisfied that the defendants have discharged the onus of proof placed upon them in relation to the application under s. 26 (2) of the Act.

183. Insofar as the application pursuant to s. 26 (1) is concerned, I am satisfied that when the plaintiff gave evidence that his right leg had not gone up or down since he came out of hospital, he knew that that evidence was false and misleading. I reject as untrue his evidence that he was only able to walk a short distance without crutches and only went out of the house on rare occasions – generally in the case of emergencies – when his partner was unwell, when there were no family or friends to do the shopping, or when having to attend medical appointments. The surveillance evidence taken over the period of a year gives the lie to that. Moreover, when it was put to him that none of the experts had recorded his ability to mobilise, especially outside of the house without the benefit of crutches or a wheelchair, or his ability to drive a car, the plaintiff's evidence was evasive; answering either that he couldn't remember or, alternatively, that he had told them what he could do. As I have already found, his answers were neither honest, credible or reliable.

Conclusion under S. 26 (1).
184. When pressed, the plaintiff accepted that in relation to both his presentation and reporting to the experts that the Court could rely on the contents of the reports as a record of what he had said when being examined or assessed. In their turn, each of the experts variously accepted that the picture conveyed by the surveillance video was different, not in accordance or was otherwise inconsistent with the presentation and reporting made by the plaintiff to them. I am satisfied and find as a fact that when the plaintiff was giving evidence in relation to what he had told the experts concerning his disabilities, the record of his presentation and disabilities contained in the expert reports correctly reflected the presentation and what had been said by the plaintiff. There was no record made of his true abilities to mobilise independently. Moreover, I am satisfied and find as a fact that he knew his presentation and reporting to be an exaggeration of the truth, and am driven to the conclusion, as a matter of probability, that his intention was to mislead for the purpose of maximising his claim. No plausible or satisfactory explanation or evidence which the Court could accept for not informing the experts of his ability to mobilise independently and to drive was given. Having due regard to all of these findings, I hold that the defendants have also discharged the onus of proof in relation to the application under S. 26(1) of the Act.

Injustice
185. Having reached these conclusions it is necessary for the Court to consider, as was submitted by the plaintiff, the question of whether the dismissal of the plaintiff's claim will result in an injustice being done to him.

186. In the particular circumstances of this case I adopt the views expressed in the judgment of Quirke J. in *Higgins v. Caldark*, and applied in *Meehan*. Whilst the dismissal of the plaintiff's claim will have severe consequences for him and will deprive him of significant compensation for the severe injuries which he undoubtedly sustained as a result of the accident – the Court having made the findings it has in relation to liability and the apportionment of fault – that cannot, by itself, be considered unjust since it is clear from the provisions of the section that such a consequence is both contemplated and required.

187. Considering the nature and magnitude of the claim in these proceedings, the matters in respect of which misleading or false averments were made or evidence was given were neither trivial nor excusable. On the contrary, evidence was given and averments were made which were knowingly misleading and/or false in a material respect and intended to support a very substantial claim by way of damages.

188. Insofar as it was part of the plaintiff's submissions that the court has discretion envisaged by the section to award the plaintiff damages in respect of those injuries about which there is no real dispute, that submission has to be rejected. The discretion of the court under the section is limited and may not be exercised simply because the statutory sanction required will have very severe consequences for the plaintiff. That the court could, in an appropriate case, accede to such a submission in circumstances where it had decided that dismissal of the action would result in an injustice being done would seem to follow. In that event, the discretion of the court would fall to be exercised in accordance with the principals of common law referred to earlier in this judgment. This, however, is not such a case.

Conclusion on the question of injustice.
189. Notwithstanding the conclusions reached in respect of liability and the apportionment of fault, there are not, in my view of the evidence, exceptional or other circumstances which would warrant the Court in finding that a dismissal of the plaintiff's claim would result in an injustice.

189. Having reached these conclusions, I find it unnecessary to express a view in relation to the application of the common law to this case save that, had it been necessary to do so, I would have rejected the plaintiff's submissions that this was an action which fell within the second category of claim enunciated in the judgment of Denham J. in *Shelley Morris*.

Ruling.
190. Upon the findings made and the conclusions reached the Court is required to dismiss the plaintiff's claim and I will so order.

191. There being no evidence that the 2nd named defendant was either the owner of the hotel or occupier of the premises, or otherwise evidence of negligence on his part, the proceedings also fall to be dismissed against that defendant on those grounds.