Neutral Citation: [2014] IEHC 574

HIGH COURT

[2011 No. 10601 P]

PAUL BENNETT

PLAINTIFF

AND

GAVIN CULLEN

DEFENDANT

JUDGMENT of Mr Justice Bernard Barton delivered the 14th day of November 2014

1. This is an action brought by the plaintiff against the defendant for damages for personal injuries and loss arising as a result of a road traffic accident which occurred on the 30th December, 2009, at or near Man-O-War, Balrothery, Co. Dublin when a Land Rover Discovery driven by the plaintiff was struck by the defendant's vehicle which had emerged from a minor road without stopping. Liability for this accident was conceded by the defence delivered 24th May, 2012 and there being no allegation of contributory negligence the case proceeded to trial as one for an assessment of damages only.

2. Although the court was not concerned with the issue of liability the facts of the collision are, never the less, relevant having regard to the nature of the plaintiff's claim in respect of both general and special damages, it being contended in respect of the former that the plaintiff's injuries have left permanent and ongoing sequelae and in relation to the latter have resulted not only in out of pocket expenses but in significant loss of earnings both to date and into the future.

3. The uncontested evidence of the plaintiff given at the trial was that on the evening of the accident, in atrocious weather conditions, the defendant's vehicle was driven out from a side road colliding violently with the side of the plaintiff's vehicle which was then travelling along the major road. The defendant's vehicle was a van. The plaintiff was driving a Land Rover Discovery. As an immediate consequence of the impact the plaintiff's vehicle was forcibly driven across and onto the other side of the road where it ultimately came to a halt. The Land Rover Discovery is a well known four wheeled drive marque. It is a heavy vehicle and carries an expensive price tag when new. This is relevant because the damage sustained was so extensive that the insurers treated it as uneconomical to repair and wrote it off. Also of significance in this context is the fact that the vehicle was only three years old at the time of the accident. Additionally, this is circumstantial evidence which the court accepts and which corroborates the plaintiff's description of the severity of the impact involved in the collision.

4. The plaintiff in his own evidence had described how he was aware that as a result of the severity of the impact his right shoulder struck the door pillar of his vehicle with extreme force. This was the main area of injury to his body.

5. Mr. Hannan Mullett, Consultant Orthopaedic Surgeon, who treated the plaintiff and prepared a number of reports which were admitted for the assistance of the court was called to give evidence.

6. In the course of his evidence Mr. Mullett explained the nature of the plaintiff's right shoulder injury and the treatment which he carried out to correct it. He emphasised that the nature of the injury to the right shoulder, to which I will refer in more detail later in this judgment, was such that it could only have come about in a man of the plaintiff's constitution and age as a result of what he described as considerable and severe force. Mr. Mullett's evidence in this respect was uncontested, there being no medical evidence led on behalf of the defendant. His evidence, which I accept, corroborates the severity of the impact described by the plaintiff, accordingly, I find as a fact that the impact involved in the collision between the two vehicles was of sufficient severity so as to cause the injury to the plaintiff's right shoulder described in the evidence of Mr. Mullett.

7. The plaintiff has brought a substantial claim in respect of a special damages and whilst the sum of €6,264 has been agreed in respect of the non loss of earnings special damages the plaintiff's claim in respect of both past and future loss of earnings was very much at issue between the parties. Before dealing with that aspect of the plaintiff's claim, however, it is appropriate that the plaintiff's claim in respect of his personal injuries be dealt with more specifically and with greater particularity.

General background

8. The plaintiff was born on the 25th January, 1975. He was a well built and physically fit man at the time of the accident with a love of horses which had been engendered from childhood. The plaintiff's involvement with horses extended to breeding, racing and training them at a level commensurate with a serious hobby.

9. The plaintiff has had the experience of falling from and being kicked by horses over the years with the result that he was well conversant with the aches and pains which sometimes follow upon events of that kind.

10. In this connection, the plaintiff disclosed a pre accident medical history arising from a fall off a horse in or about August, 2007 and as a result of which the plaintiff sustained an injury to the rotator cuff of his right shoulder. As it happens the plaintiff was treated for that injury by Mr. Mullett. No claim was made nor were proceedings brought in respect of that accident and in the course of his evidence Mr. Mullett explained in detail the nature of the injuries sustained by the plaintiff as a result of that fall. He produced hand drawn graphs and demonstrated how he had repaired the tear to the right rotator cuff. Significantly, it was clear from his evidence that the injury sustained by the plaintiff to his right rotator cuff was altogether different to the injuries sustained by him as a result of the accident giving rise to these proceedings.

11. Mr. Mullett described how he reattached the rotator cuff to the right greater tuberosity, that a good result was achieved by that surgery and that the plaintiff thereafter made an uneventful recovery with a return of function and good strength in his right shoulder.

12. When assessed on follow up review in June 2008, it being accepted that references to medical review in 2007 in his reports were probably incorrect, Mr. Mullett recorded that the plaintiff had no pain and an almost full range of movement with good strength in his right shoulder albeit with some residual weakness of the infraspinatus. He prognosticated that he expected such residual sequelae to resolve over a further period of six to twelve months.

13. For all practical purposes the plaintiff considered himself to have fully recovered from the injury sustained as a result of that fall due in part to physiotherapy administered by Lynne Weir, Physiotherapist, whom, as it happens, he also attended following the

accident with which the court is concerned. In this regard, a report prepared by the physiotherapist and dated the 9th September, 2014 was admitted into evidence.

14. As to the injuries sustained as a result of the incident accident Mr. Mullett explained that the force of the impact generated was sufficient to result in what he described as an avulsion fracture of the greater right tuberosity with supraspinatus and infraspinatus detachment.

15. Again by reference to graphics, Mr. Mullett demonstrated how a piece of the greater tuberosity and to which he had previously attached the rotator cuff, had essentially been torn away from the remainder of the bone. It was his evidence that that was significant since not only was it evidence of the force involved to cause such an injury but also established that this was a different injury to the injury sustained by the plaintiff as a result of the fall in 2007, it being clear that the rotator cuff which he had previously repaired did not fail but remained attached to the piece of bone which had been torn away.

16. When the plaintiff attended Lynne Weir, chartered physiotherapist in March, 2010, he was complaining of shoulder pain which was disrupting his sleep and that he was also aware of soreness when lying on his shoulder. In respect of these symptoms he was taking difene - to some effect.

17. The plaintiff was also complaining of pins and needles in the palm of his right hand and of a sensation of his right arm being dead.

18. In his evidence Mr. Mullett considered those particular symptoms to be consistent with carpal tunnel syndrome a condition which in his opinion was unlikely to be related to the accident.

19. The plaintiff attended his physiotherapist on two occasions post operatively for mobilisation and a strengthening programme. Ms. Weir in her report noted the plaintiff's past medical history and the fact that the plaintiff had resumed work and pony racing following attendance for physiotherapy on six occasions with her after the accident in 2007.

20. When reviewed by Ms. Weir in July, 2014 the plaintiff was still complaining of a right dead arm and pins and needles in his hand as well disturbed sleep and being on difene for pain on an ongoing basis. He said he had been able to work as a transport manager but was unable to work with horses and that he had restricted lateral rotation of his hand behind his back. Examination at that time showed the plaintiff was weak on resisted lateral rotation, biceps and abduction. The scapula thoracic power was poor and the shoulder was clicking during the range of movement. She felt that the plaintiff's power was unlikely to improve further but that he might benefit from some intensive physiotherapy and scapular strengthening exercises.

21. Mr Mullett in his evidence explained and demonstrated the restrictions in movement which the plaintiff had with his right arm with regard to any activity above shoulder height as well as a reduction of movement and weakness of external rotation. The plaintiff was left with an eight centimetre surgical scar over the anterior aspect of the right shoulder. The ongoing weakness is sited particularly in the infraspinatus and that is a situation which is likely to remain permanent. As to future complications, Mr. Mullett thought there was a small risk of the plaintiff developing degenerative change at the glenohumeral joint but that in medical terms this was more likely to be a possibility than a probability.

22. Mr. Mullet described the practical effects of the injury on the plaintiff in a post rehabilitation phase that is to say as it is now found and likely to remain. He gave as an example the plaintiff's ability to perhaps lift close into his body but not holding a weight further away. He would be restricted in lifting heavy weights and certainly restricted in overhead arm activities. He was certainly able for office work or supervisory work and, indeed, for driving but lifting or manoeuvring weights would be problematic.

23. The plaintiff told Mr. Mullett that he had engaged in an office type role for an eight month period without any difficulty and that he'd also returned to work as a truck driver but had experienced difficulty with tasks involving loading. This was all consistent with the evidence given by the plaintiff himself.

24. It was also clear from the evidence that the plaintiff had, in essence, ceased to be able to engage manually at any effective level, as he had prior to the accident, in his hobby with horses.

25. In the initial post operative period there was a risk that the injured greater tuborosity would redisplace or fail to unite, however, those negative outcomes did not occur. The weakness with which he has been left, however, in his supraspinatus and infraspinatus on the right side will remain and is unlikely to improve further. This means that the plaintiff will be left with the continuing restrictions and weakness already described, particularly with overhead activity and in holding his arm in external rotation as well with some discomfort.

26. In the immediate post operative period the plaintiff's right shoulder and arm was in a sling for some eight weeks, thereafter he was mobilised with the benefit of physiotherapy. He described himself as having well improved relative to his immediate post operative situation at six months post accident.

27. The plaintiff himself gave evidence that he didn't see himself getting back to full physical ability. He accepted that he could do supervisory work and, indeed, he was engaged in that role from May until September, 2013 in a company called Cyclic Ltd on Merseyside in the UK. That was actually quite a successful venture and the plaintiff gave evidence that had it not come to an end as a result of the intervention of the company's bankers he would most likely have stayed on as he enjoyed his role there. Allowing for his physical limitations the plaintiff says that he is contemplating returning to driving in the UK doing long haul work to the continent as this in his view is unlikely to involve him in having to lift or manoeuvre loads manually.

28. A question mark over the plaintiff's credibility was raised in the course of the trial by counsel for the defendant. Under cross examination it was suggested that the accident which occurred in August 2007 may have occurred in a different manner to that recounted by the plaintiff in his evidence and in this regard reference was made to a letter written by Mr. Mullet on the 10th December, 2007 to the plaintiff's GP indicating that the plaintiff had sustained his original shoulder injury as a result of horse play. The plaintiff rejected any such suggestion and contended that any such account arose as a result of a complete misunderstanding on the part of the surgeon. The plaintiff had always accepted and indeed asserted in evidence that a horse was involved but that what in fact had happened was that he had fallen from the horse.

29. It was further suggested that the plaintiff had been involved in one previous accident which had not been disclosed and that as a result of this accident the plaintiff had also injured his right shoulder. It was suggested that that accident had occurred as a result of the plaintiff falling off the step of a truck. The plaintiff accepted that on an occasion prior to the accident with which the court is concerned that he had indeed fallen from the step of a truck but insisted that he had landed on his back and not his shoulder. His

back had not been reinjured and so it seems that accident was considered by him to be irrelevant in relation to these proceedings.

30. Under cross examination it was put to the plaintiff that he had returned to the gym where he had engaged in weightlifting, however, the plaintiff's explanation for this was that he had brought his nephew to the gym but that he himself had not been engaged in or returned to the sport of weightlifting, however, he did accept and gave evidence that in order to rehabilitate himself he had used dumb bells at home and that he had also engaged a personal trainer.

31. Whilst it was quite proper for the defendant to put such questions to the plaintiff, I am satisfied, having heard all of the evidence and having had an opportunity of observing the plaintiff's demeanour in the witness box during the trial, that he was a truthful and credible witness.

32. The plaintiff has a strong work ethic as evidenced by his different employments both for others and for himself from the time of his late teens through to the accident the subject matter of these proceedings.

33. The impression I have of the plaintiff is that if anything he has understated his situation in particular with regard to his pre accident hobbies and also by his making little of the scar over his right shoulder. This may well have been because he had already been left with some scarring to his shoulder as a result of the surgery for the injury arising from the accident in 2007. No issue was made of that but one way or another the plaintiff had to have been left with some scarring as a result of the surgery carried out by Mr. Mullett.

34. The plaintiff presented generally as someone who had accepted the limitations placed on his physical abilities as a result of his injury and was trying to get on with his life.

General Damages
35. I accept the evidence of the plaintiff and of Mr. Mullet with regard to the plaintiff's injuries and as to the effect of these on the plaintiff's physical abilities together with the impact that that has had in relation to the plaintiff's vocational personal, social and recreational life.

36. In assessing general damages in a case such as the present for non pecuniary losses the court is concerned with and required by law to make a just award, namely one with is fair and reasonable, founded on the evidence, and faithful to the principle of restitution best described in the Latin phrase *restitutio in integrum*. Such damages are compensatory in nature and are to be distinguished from aggravated or exemplary damages which are essentially punitive. The purpose or object of compensatory damages is reparative, that is to say they are intended to restore the plaintiff, so far as that is possible by an award of money, to the *status quo ante* in respect of past and prospective losses pecuniary and non pecuniary caused by the wrong.

37. Of course compensation of itself cannot restore the plaintiff to the position he was in immediately before the infliction of the injury resulting in pain, suffering and inconvenience, together with the loss of the amenities and enjoyment of life. Whilst financial loss can be made good via a money award as Lord Morris of Borth-y-Gest observed in *H. West and Son Ltd v. Shephard* (1964) A.C. 326 at 346 "…money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation."

38. Loss of expectation of life, permanency of injury, mental distress, pain, inconvenience, sorrow, anxiety, irritation, mental strain and frustration, to mention but some of the consequences associated with injuries and whether categorised as separate heads or elements of damage or as constituent parts comprising what is described as pain and suffering, are all compensatable where they arise; the uninjured plaintiff being entitled to enjoy all of the attributes both physical and intellectual of which the plaintiff was possessed and were enjoyed at the time of the commission of the wrong giving rise to the injuries and loss.

39. Prior to the abolition by s.1 of the Courts Act 1988 (hereinafter referred to as the Act of 1988) of the common law and statutory right to jury trial in cases involving personal injuries, a right which was invariably exercised and which had been given statutory effect by s.48 of the Judicature (Ireland) Act 1877, and s. 94 of the Courts of Justice Act 1924, the function of assessing damages was vested in the jury.

40. Whether cast as a rule of law or as a rule of practice, whist the jury were directed in relation to the law applicable to the case, including the law as to the compensatory damages, neither the trial judge in the charge nor counsel in their addresses gave guidance or made any reference to the amounts in monetary terms that the jury might consider appropriate in respect of injuries and loss, that function being reserved exclusively to them.

41. After the abolition of the right to jury trial in such cases by the Act of 1988, the role of the jury in the finding of facts and in the determination of the questions put before them on the issue paper, including the assessment of damages, was thereafter vested in and discharged by the trial judge sitting alone.

42. The practice of making no reference to amounts of money in the submissions of counsel, when and if made to the trial judge at the conclusion of the hearing of the evidence in personal injuries actions, has survived the Act of 1988. Perhaps that is understandable because although the right of the citizen or any other party to trial by jury in such actions has been abolished, the separate and exclusive functions formerly reserved to the jury remain, albeit now performed by the trial judge.

43. Guidance as to the appropriate levels of compensation was, however, introduced into the assessment process as a matter of law by virtue of the provisions of s.22 of the Civil Liability and Courts Act 2004 (hereinafter referred to as the Act of 2004) which requires the court, in assessing damages in a personal injuries action to have regard to the Book Of Quantum prepared and published by the Personal Injuries Assessment Board under the Personal Injuries Assessment Board Act 2003.

44. Given that the court now discharges the exclusive function formerly performed by the jury in such actions, it seems to me that had the right to jury trial not been abolished the jury, in assessing damages, would have to had to have regard to the Book Of Quantum albeit with the same freedoms as the court enjoys and as are recognised and provided for by s. 22 subs. 2 of the Act of 2004.

45. Whether that would inevitably have led to comment by the trial judge or by counsel in their addresses as was the practice both in relation to the law applicable and the evidence adduced in the case we shall never know, however, given the practice and what was permissible, doing so would seem consistent, at least by reference to the appropriate bands or ranges provided for in the Book of Quantum though likely not to specific figures or amounts, that function being a matter for determination by the jury based on the evidence adduced and the facts found and now performed by the trial judge.

46. Accordingly, and given the requirement placed upon the court by virtue of the provisions of s.22 of the Act of 2004, both parties were invited to and did make submissions in relation to the appropriate band or range of compensation provided for in the Book of Quantum and into which the plaintiff's injuries might be said to fall of which there are three, namely,

(a.) "substantially recovered"

(b.) "significant ongoing" and

(c.) "serious and permanent conditions".

That task in this case is uncomplicated since it does not involve a multiplicity of injuries but rather one substantial injury involving the plaintiff's right shoulder.

47. The essence of the defendant's submission was that the appropriate range of damages attributable to the case was that of one falling into the band or range designated "significant ongoing" whereas the plaintiff submitted that this was a case where the injuries to the plaintiff's shoulder warranted an assessment of damages within the range "serious and permanent conditions".

Conclusion on general damages
48. Having regard to the evidence of Mr. Mullett and having found as a fact that there is unlikely to be any further improvement in the plaintiff's present condition I am satisfied that this is a case where the injury comes within the category or range designated "serious and permanent conditions" rather than in the category designated "significant ongoing injury". In my view this is necessarily so because whereas the category designated "significant ongoing injury" clearly refers to a situation where at the time of the assessment of damages the plaintiff has not made a recovery from a significant injury and is still suffering ongoing sequelae it is a category or band which accommodates and contemplates a case where the medical prognosis is ultimately for a good recovery whereas that is not so in a case where the injury is serious and the consequences permanent.

49. In this case the uncontroverted medical evidence is that the plaintiff's current position is unlikely to improve further and that being so, it seems to me that the court is warranted in inferring from the medical evidence that the plaintiff's present condition is permanent and that it is also serious especially having regard to the plaintiffs age he being now 39. Furthermore, the court is also mindful of the fact that, apart from discomfort and residual functional disabilities with which the plaintiff has been left and necessarily excluding any element of compensation for symptomatology most likely related to carpal tunnel syndrome not causely connected to the accident, the plaintiff has in addition been left in the position where he has to wear an eight centimetre scar over the anterior aspect of his right shoulder which is unquestionably permanent albeit, and to his credit, that the plaintiff makes little of it in terms of cosmetic appearance or otherwise. Nevertheless it is present and is a consequence of the accident.

50. Having considered the evidence, the submissions of counsel, having regard to the Book Of Quantum, and endeavouring to arrive at an award in respect of general damages which is fair and reasonable for the pain, suffering, inconvenience, loss of amenities of and interference with the enjoyment of his life, the court awards the plaintiff the sum of €45,000 for pain and suffering to date and €25,000 in respect of the future.

Special Damages
51. I will turn now to deal with the plaintiff's claim for special damages.

52. The plaintiff was born on the 25th January, 1975 and grew up in Dublin near St. Margaret's. He left secondary school after completing the inter cert exam and started working with his father who had a furniture and coal business which he joined, doing rounds with his father. Whilst engaged in this occupation and when old enough to do so the plaintiff learned to drive lorries. Ultimately he qualified to drive heavy goods vehicles obtaining an articulated lorry licence in 2002. Apart from a very keen interest in American Harness Racing and which led him to buy his own horse when he was seventeen, the plaintiff also got into training and breeding. Moreover, he attained significant prowess in the sport at a young age ultimately becoming Young Driver of the Year.

53. The plaintiff worked with his father until he bought his own lorry at the age of nineteen. His father helped him out financially and he got a contract with Chadwicks, employing his own helper. This was for a period 1996 through to 1999, in which year he secured a contract with a company by the name of Zellwood Limited. One of the moving forces in that family run firm was a Mr. Flanagan who was also a friend of the plaintiff through their mutual interest in American Harness Racing. At that time Zellwood had a contract with Tesco which was designated to the plaintiff on a sub-contract basis. Gradually, he progressed to the position of Supervisor/Organiser and ultimately, became an employee of Zellwood between 1999 and 2003, where he rose to the position of transport manager. In that year the plaintiff decided to go out on his own, albeit remaining friendly with Mr. Flanagan. He bought his own trucks in 2004 and by 2008 he owned ten of them, trading through a company called Tara Plant Limited. It had direct and indirect employees, most of whom were being supervised by the plaintiff but with whom he would also work.

54. With the onset of the financial recession, the plaintiff scaled back his operation. He sold off most of his trucks in order to meet his financial obligations, and eventually was left with one truck and a driver.

55. His friendship with Mr. Flanagan was important in this respect because the plaintiff still had a retainer with Zellwood several days a week on the Belfast/Dublin/Kilkenny run. It was the plaintiff's evidence that he had a contract with Zellwood for Marks and Spencer, but this essentially came to an end in week 42 of the year 2009. The plaintiff no longer employed anybody from that week on and laid up his lorry, going to work directly for Zellwood doing five shifts one week and, six shifts another week, and driving that company's lorry.

56. The plaintiff gave evidence that the runs were different each day and that driving was a physical job of itself, but that this also involved bringing trolleys in and out of premises both full and empty. His evidence was, however, that he was fit and able not only to engage in his hobby of breeding and racing American harness ponies, but also that he was fit and able for all of the physical tasks associated with the job of driving delivery lorries. That then was the vocational picture or position leading up to the accident.

57. The plaintiff gave evidence as to the effect of the injuries sustained by him as a result of the accident on his physical ability and, in particular, his ability to carry out the duties required of him in his work.

58. His evidence to the court was that he was significantly immobilised for the first eight weeks following the accident but that he gradually improved, although at that stage he had not yet gone back to work partly because of his ongoing symptomology and partly because Zellwood did not have any work for him which did not involve loading and unloading or the wheeling of trolleys. Ultimately, however, he mobilised sufficiently to be able to return to driving. What he experienced in this regard was an inability to pull or lift

anything involving heavy weights. He had a general weakness in his right arm and, in particular, using his right arm and hand to do any task above the level of his shoulder, including lifting his five month old baby.

59. It would seem that from in or about April, 2011 the plaintiff qualified for and obtained Job Seekers Allowance and, in this regard, he was registered with FAS. Apart from the evidence of the plaintiff himself, a vocational history was also given on behalf of the plaintiff by Mr. Roger Leonard, Occupational Therapist and Vocational Evaluator, and by Mr. Flanagan managing director of Zellwood to whom reference has already been made.

60. The plaintiff gave evidence that he had sought to try and get back to work and recounted his efforts in this regard. He told Mr. Leonard, that he had been offered employment in the fruit market delivering for a fruit and vegetable supplier but felt unable to cope with the physical demands of that particular work. Having registered with FAS the plaintiff made enquiries about the possibility of work as a driver and/or transport manager which would take into account his functional limitations caused by his injuries.

61. In May 2013, an opportunity presented itself through a contact which involved the plaintiff travelling to the United Kingdom to work for a company called Cyclic Ltd, located at Birkenhead, on Merseyside. The plaintiff obtained employment as a yard supervisor, weighbridge operator and ultimately as a transport manager. This company had been having trading difficulties. His contact, a Mr. David Nugent, was a moving force in that company and it appears from the evidence that the plaintiff's main role was in assisting Mr. Nugent in turning around the fortunes of the company. The plaintiff's employment did not involve him in having to engage to any extent in manual handling or manoeuvring of heavy loads or weights. Unfortunately the indebtedness of the company was such that its bankers appeared to have seized on an opportunity to sell the company's real property over which the banks had a charge. Whilst the banks may have been satisfied with the outcome it appears that the consequence of the sale for the company was that it had no premises from which to operate and as a result of which it ceased trading in September 2013.

62. Following the collapse of this particular venture the plaintiff returned home and through his contact with Mr. Flanagan, he was able to obtain a self employed driving and assistant supervisory role which was created for him by Mr. Flanagan. The evidence of the plaintiff and Mr. Flanagan establishes that the plaintiff worked on an average of three and a half shifts per week depending on market demand and that he was paid €140 gross per shift. Market demands and the reduction in the gross amount paid per shift to contractors had come about as one of the consequences of the recession and as a further result of which other employees of Zellwood had been let go. The company itself had had to be rationalised.

63. There had been a suggestion by the defendants that a petition to wind up the company by the Revenue was an indication that the company was in serious financial difficulties and that it is was unlikely that the company would have continued to trade with the result that the plaintiff would no longer have had employment, however, it transpired in evidence, which the court accepts, that the company was able to meet its obligations in full to the Revenue and that the company continued to and is still trading successfully. The court also accepts the evidence of Mr. Flanagan that had the plaintiff not been injured he would most likely have been treated at least as well as he had been after he returned from the United Kingdom and that despite the downturn in business and the loss of a number of employees, the plaintiff would, as a matter of probability, have remained in the employment of Zellwood.

64. As to whether, but for the accident and its consequences, the plaintiff would ever had gone to the United Kingdom, that is really a matter of conjecture. As a matter of probability, however, the improving market would most likely have resulted in additional work becoming available. The plaintiff, however, made it clear in his evidence that as he is licensed to drive heavy goods vehicles he is actually contemplating going back to the United Kingdom to drive long haul as this would be to his financial benefit, moreover, it was his belief that this kind of driving work was unlikely to involve him in having to manoeuvre or lift heavy loads thereby accommodating his residual functional deficit.

Past loss of earnings

65. Mr. Glen White, certified public accountant, prepared a report for the assistance of the court computing the plaintiff's claim for loss of earnings to the 3rd May, 2014. Mr. White is the plaintiff's accountant. According to his report the plaintiff's sub contract work for Zellwood generated an average gross weekly income of €800 per week. He computed the loss of earnings from the 7th January, 2010 until the 9th July, 2011 net of income tax at €47,062.86. As to the period from the 9th July, 2011 to the 15th March, 2013 the plaintiff's net weekly income was discounted by 31% to account for the deflationary effect that the recession had had on incomes. Allowance was also made for deductible social welfare benefits with the result that the plaintiff's net loss of weekly income for that period was calculated at €19,937.28.

66. For the period from the 15th March, 2013 to the 5th April, 2013, the loss of income was €679.68. The significance of the 5th April, 2013 is that this was said to be the date on which the plaintiff secured employment with Cyclic Ltd in the UK. According to the plaintiff's accountant's report no loss of earnings accrued until the 17th July, 2013 because the income in net terms from this employment was the same as or slightly better than what the plaintiff had been earning at the time of the accident. Mr. White computed the net loss of earnings from the 17th July to the 3rd May, 2014, at the sum of €17,724 making in aggregate a claim for past loss of earnings to the 3rd May, 2014 the sum of €85,403.82.

67. A further period of 22 weeks has elapsed since Mr. White prepared his report. Using the same computation of the net loss of earnings per week for that period would add a further €9,284 making a total claim for loss of earnings to date of €94,687.82. However, this claim proceeds on the premise that the plaintiff's losses for the period after Cyclic Ltd ceased trading commenced in July 2013 whereas on his evidence that company only ceased trading in September 2013.

68. Apart from the foregoing these figures do not, however, make any allowance for the hire purchase payments and for which the plaintiff would have been liable in relation to the one truck he retained from his sub contracting business between week 42 in 2009 and April 2010 nor has any deduction been made for subsistence allowances or expenses which would have been incurred in the course of the plaintiff's business as a self employed driver nor for other overheads such as the costs of accountancy services in preparing his books and making his tax return.

69. The defendant retained Grant Sugrue and Company, Chartered Accountants, to prepare a detailed report for the assistance of the court and Mr. Farrell, a chartered accountant with that firm, was called to give evidence in connection with his preparation of the report and the plaintiff's claim.

70. Mr. Farrell gave evidence that in his view the plaintiff's claim for loss of earnings to date had to be adjusted by making allowance for an additional €15,000 which he could have obtained had he sought and received social welfare from the date of the accident. It was also clear from the plaintiff's accounts and tax returns as well as from invoicing in respect of his self employed contracting business conducted through Tara Plant Services Ltd that that company had incurred a significant trading loss of €95,547 in the pre accident year ended the 31st December, 2009. Invoicing for that business up to September, 2009 suggested a loss of earnings at a

level much less than the €800 gross per week being claimed, moreover, there were no invoices for week 42 through to week 48 being the initial period that the plaintiff had commenced work for Zellwood as a self employed driver only sub contractor. He accepted, however, that the invoices for weeks 49 through to 52 showed an average of €800 gross. Further queries as to the plaintiff's actual income were also raised by the defendant's accountants arising in relation to the plaintiff's income in the years 2006 to 2008. When the possibility that no work may have been available to the plaintiff as a consequence of the petition to wind up Zellwood was taken into consideration in addition to the other matters, it was Mr. Farrell's opinion that the plaintiff's claim for loss of earnings appeared to him to be over stated and unsustainable.

71. In the course of his evidence Mr. Farrell accepted that he had not been made aware that the petition by the Revenue to wind up Zellwood had been satisfactorily resolved nor had he been advised that that company had continued to trade successfully. Mr. Farrell was also unaware that between the time of the accident the 30th December, 2009 and April 2011, when the plaintiff managed to obtain social welfare assistance, that the plaintiff had expended his own resources in providing for himself.

Conclusion: Past loss of earnings.
72. In his evidence the plaintiff told the court that he was well able for and enjoyed his work in Cyclic Ltd on Merseyside and that had that company not closed down for the commercial reasons already referred to in this judgment he would most likely have stayed there. This was hardly surprising since apart from the fact that he was helping to turn the company around he was also, comparatively speaking, as well off as he would have been if not more so had he not been injured. Save to the extent that the plaintiff was left with a residual functional deficit, the state of affairs in which he found himself after Cyclic Ltd ceased trading had little, if anything, to do with the accident. As it is the plaintiff is now contemplating returning to England to engage in long haul driving rather than remaining in the employment of Zellwood and this notwithstanding the rising economic tide and what that might bring. It seems to me, therefore, that with regard to the plaintiff's claim for past loss of earnings this essentially comes to an end in terms of a specific mathematically computed sum when he commenced employment in England in the April of 2013.

73. On the basis of the plaintiff's computations as comprised in the report of Mr. White the amount of the claim for loss of earnings up until the plaintiff's employment commenced with Cyclic is €67,678.96. Whilst an exact figure was not given in evidence as to the amount expended by the plaintiff on his own maintenance and upkeep from the time of the accident until the time when he ultimately obtained social welfare assistance in April 2011 and in respect of which it is submitted on behalf of the defendant that a deduction of €15,000 ought to be made from the plaintiff's claim, it seems highly likely that this sum would itself be offset by the amount which the plaintiff expended out of his own resources to provide for himself between the date of the accident and April 2011.

74. It was accepted by the plaintiff that he remained liable for and did make hire purchase payments in respect of the one lorry which he retained from the time he laid it up at the end week 41 and that these payments amounted to €2,000 per month. It follows that between that time and the date of disposal of the lorry in April 2004 that the plaintiff would have had a continuing liability to meet the monthly hire purchase payments, accordingly, a sum of €12,000 should properly be credited to the defendant against the plaintiff's loss of earnings claim in this regard. Again, whilst no figure was given in evidence as to what amounts the plaintiff would likely have incurred in respect of subsistence and accountancy costs in the period from week 42 of the year 2009 proceeding on what would be reasonable in relation to this issue it seems to me that a further sum of €6,000 ought to be allowed making in aggregate the sum of €18,000 which ought to be credited to the defendant against the plaintiff's claim leaving a net sum for loss of earnings to April 2013 in the sum of €49,678.96.

Claim for future loss of earnings.
75. With regard to the plaintiff's claim for future loss of earnings, this was based on the premise that as a result of his injuries the plaintiff is only able to work three and a half shifts instead of five to six shifts per week. Mr. Roger Leonard, vocational consultant, felt that the reality of life for the plaintiff was that despite his beliefs hopes and aspirations it was likely that his work would involve him, at least to some extent, in having to lift and manoeuvre weights especially were he to return to long haul lorry driving in the UK.

76. Unfortunately, in his opinion, the ability of the plaintiff to compete successfully for supervisory and managerial type roles is hampered by his lack of qualification and whilst the plaintiff has occupied such roles in the past the landscape in this area has, in his opinion, completely changed over the last decade both in terms of health and safety and in educational requirements and in which the plaintiff is now deficient. This, however, has in my view to be seen against a background where albeit through a contact, the plaintiff secured such a role in the United Kingdom as recently as 2013.

77. Mr. Joseph P. Byrne, consulting actuary, was called to give evidence on behalf of the plaintiff and also prepared reports for the assistance of the court.

78. Proceeding on the assumption of the plaintiff being able to continue to work for three and a half shifts per week earning €383 per week, his evidence was that the plaintiff's net loss of earnings would amount to €164 per week when taken with the plaintiff's current potential earnings were he able to work an average of five and half shifts per week as had been the case in the period commencing at week 42 in the year 2009. The capital value of that loss from the time of the trial to age 65 at a multiplier of 994 is €163,016.

79. By way of example Mr. Byrne also calculated the value of the loss from the present time for one year at €6,728; for two years at €8,528; for three years at €24,764 and for five years at €40,508.

80. These calculations, whilst being useful and illustrative are also based on certain assumptions. In this regard market forces prevailing rather than the plaintiff's residual functional deficit substantially explain the availability of shift work for the plaintiff.

81. Notwithstanding the residual functional deficit arising from the injury, which will be permanent, given the plaintiff's assessment of his own abilities, the fact that he did secure a supervisory role for which he was well suited in the UK, the fact that he is capable and licensed to engage in long haul lorry driving and to which he is contemplating a return and further having regard to the economic factors affecting the availability of work and shift work rates, I have come to the conclusion that this aspect of the plaintiff's claim for loss of earnings from April 2013 to date and into the future is more properly and appropriately dealt with by way of an award of enhanced general damages to compensate the plaintiff for the diminution of vocational opportunity as may fairly be said to be attributable to the residual functional deficit with which he has been left as a direct consequence of his injuries.

82. Accordingly, the court considers that a fair and reasonable sum to compensate the plaintiff under this heading is an award of €35,000. To this must be added the sum of €49,678.96 in respect of loss of earnings to April 2013. A sum of €6,264 having already been agreed between the parties in respect of the plaintiff's non loss of earnings special damages the court will make a total award under these headings of €90,942.96.

83. General damages having already been assessed in the sum of €70,000 the court will give judgment for the plaintiff in the sum of

€160,942.96.