

THE HIGH COURT

[2002 No: 16350P]

BETWEEN

MARK SMYTH

PLAINTIFF

AND

SARAH GILBERT AND MATTHEW DAVIES

DEFENDANTS

Judgment of Mr. Justice Budd delivered on the 22nd day of July, 2005.

1. The plaintiff is a fitter by trade and resident at 30 Headfort Woods, Kells in County Meath, now a married man born on 16th January, 1973, and is aged 32. About 6.45 p.m. on 28th November, 2000, when he was then 27, he was driving his Mitsubishi 400 van going south in the fast lane on the M50 driving about 60mph. He was suddenly confronted by the first defendant's Honda motor car which had been propelled from the other carriageway through the hedge in the middle of the motorway by the second named defendant's vehicle which had hit Sarah Gilbert's car from behind. He vividly described how the Honda appeared in front of him "like a headless horse" as she could not be seen as her seat had broken in the earlier impact and she was lying flat on her back. He recounted how he had grasped the wheel and braced his knees against the dash board. The front of his van dipped as he braked and there was a head on collision with her Honda Civic which went back through a second hole in the hedge. He recalled the rear of his van lifting in the air on impact and then the van ended up facing north on the east side of the middle verge. The plaintiff was wearing his seatbelt which gripped his chest. The front of his head hit the sun visor. The plaintiff explained that he was working at the time as a mobile contractor who mended forklifts. He carried a heavy tool box in the van separated from the seats by a sheet of plywood. When the front of the van dipped with his braking, "the front of the van nose dived" into Sarah Gilbert's Honda and the back of the van went up causing the toolbox to break through the plywood and push his seat forward.

2. The plaintiff was shocked. He was helped out of his van by a man. Both his knees, especially the left, had swelled up. He stopped on the verge and fell being in a bit of shock and with the pain in the knees. He was shaking; he was cut and grazed. He was worried about the driver of the Honda whom he could not see as Sarah Gilbert's seat had been broken in the first and previous impact. He was taken by Fire Brigade ambulance to casualty in Tallaght hospital. He had difficulty in walking and was brought in by wheelchair. He had pain in his lower back, knees, both forearms and in his chest from the seatbelt. He was walking within two hours after the accident and was discharged about 5 a.m. X-rays were taken of his back and x-rays of his knees were taken later that week.

3. During counsel's opening of the case, liability was conceded and the case proceeded as an assessment of damages. The plaintiff was a very fit 27 year old. He had been brought up on his family's 30 acre farm in Co. Cavan as the eldest of four children. His one brother is a service engineer as is their father and both his father and brother are part-time farmers, while one of his sisters works as a food scientist and the other is a married home maker. On the farm there would be about 22 cattle, three show jumping horses and they had a JCB, 3 tractors, a dumper, trailers and other farm implements. He attended St. Bridget's National School and then St. Brinin's in Belturbet where he sat and passed his Leaving Certificate examination in 1989 obtaining honours in mathematics. He then worked as an extra on a film set. In 1989/1990 he studied at Ballyhaunis Agricultural College and was selected for a scholarship to study agriculture and mechanics at Reasheath College in Cheshire. He did the first year of a City and Guilds scholarship course at Reasheath. He was enticed back to Monaghan by the GAA football manager who secured him a job as a fitter/welder working at Patton Mills in Monaghan for 14 months. He then returned to Cheshire to complete his diploma in the College. From 1982 to 1995 he worked as a plant engineer with JCB in Shrewsbury; he was offered a job as a manager but preferred to return home. From 1995 to 1997 he worked as a service engineer maintaining heavy equipment with Gerry McCluskey at the JFK Industrial Estate. In 1997 he began to work as a self employed service engineer with Henleys, Mitsubishi agents in Dublin, serving a company who specialized in servicing forklifts such as special reach stackers. While based in Kells he travelled all over Ireland doing this work including going to Belfast, Gorey and Athlone. Henleys had depots in Cork, Galway and Belfast and would have as many as 40 fitters on the road, some of whom were employees and others of whom were contractors.

4. The plaintiff was a fit, energetic and hardworking man with a positive attitude towards work and sport and a desire to work hard and to prosper. He had played rugby and soccer in England up to the age of 24 but after that he concentrated on Gaelic football. In 2000 he was playing football on the Redhills team which involved training twice a week and playing a match on Sunday. He said he was "fairly fit" and "did work every hour I could get" as he was starting off on his own. He said that when younger he had "parked cars in the hedge" a couple of times but was unscathed. In 1990/1991, when at college in Cheshire, he had had to have two screws put in his right index finger while in hospital in Crewe. He was left handed. Some four years before 2000 he had had a problem with a midback strain from football but this was higher up than the injury in the accident in November, 2000. His back and knees had been all right before his road traffic accident ("RTA") and he was able to play football as a midfield player doing much running.

5. The plaintiff is of forthright, very energetic and hardworking personality. He has a determination not to let pain prevent him from getting on with his life and he has the capacity to endure considerable pain in order to get work done.

6. In this case there are several areas of considerable contention. The first is the proposition on behalf of the plaintiff that the injuries, including the back injury and knee injuries, suffered in the RTA on 28th November, 2000, caused physical damage and after effects which compromised the plaintiff's capacity to work long hours and to earn as much as he had been earning doing servicing of forklifts for Henleys so that he has lost income from servicing plant from the accident to the present day. It is suggested on behalf of the defendant that, while the plaintiff did suffer a back injury in the RTA, he was able to carry on at the servicing work most of the time since and also went back to playing football and it is contended that a football injury at training in August, 2001, caused the long term problems in his lower back.

7. Secondly, counsel for the defendants has objected to the manner of the presentation of the plaintiff's claim for loss of earnings from November, 2000, to date and also to the failure by the plaintiff to provide, via his accountant and solicitor, accounts and records and documents supportive of this claim as to his earnings in the past. Counsel for the defendants further complains of inadequate disclosure of all the sources of the plaintiff's income so that the defendant's chartered accountant, Fergal Gaynor, would have adequate material and time to scrutinise and check out the plaintiff's records and documents properly. Counsel for the defendant has strongly argued that the mere production of invoices of the plaintiff is inadequate and says also that ample notice had been given of all the documents required by Mr. Gaynor to check out and verify the authenticity of the figures about the plaintiff's earnings presented on behalf of the plaintiff. Counsel strongly criticises the failure to furnish requested documentation to Mr. Gaynor and the approach adopted of trying to demonstrate loss of earnings from compilations of hours purportedly worked from invoices given by the plaintiff to Henleys which are unsupported by statements from the Henley Forklift Group or the plaintiff's own accounts and back

statements and other requested supportive documentation.

8. I propose to set out the gist of the plaintiff's evidence, the medical evidence, the evidence adduced in respect of the past and future loss of earnings and also the strong contention on the part of the defendants that the plaintiff has several other sources of income besides his earnings from the servicing of forklifts for Henleys and that the plaintiff's reduction of hours worked since November, 2000, could be ascribed to his other activities, such as his half ownership of a public house near Christchurch, his servicing and sale of forklifts and pallet trucks and his work particularly on the machinery on the family farm.

The plaintiff's evidence

9. The plaintiff's description of the collision was clear, graphic and matter of fact in respect of his injuries. He made it clear from his demeanour and attitude that he was determined to cope with the effect of his injuries and to get back to his work, his former fitness and to his football and training. On 29th November, 2000, the day after his RTA, he attended his GP, Dr. Eamon McDwyer, whose five reports are dated respectively 22nd March, 2001, 3rd August, 2001, 3rd February, 2003, 3rd November, 2003, and 4th November, 2004. The plaintiff informed Dr. McDwyer of his history of past injuries including a back injury some four years before while playing football; this muscular strain had cleared up. Likewise a ruptured right index finger had not prevented him from keeping on his playing football nor had torn ligaments or muscle strain. Dr. McDwyer particularly noted the plaintiff's very positive attitude for success. On examination Dr. McDwyer found the plaintiff had suffered on 28th November, 2000:

1. Whiplash injury to neck.
2. Soft tissue injury to the lower back area.
3. Soft tissue injury to the right hip
4. Soft tissue injury to the right shoulder
5. Soft tissue injury to the thoracic sacral lumbar spine and right sacro iliac joint.
6. Soft tissue injury to both his knees with persistent effect to his left knee.
7. Soft tissue injury to both thumbs which resulted from his grip on the steering wheel and the force in the impact.

10. Dr. McDwyer in his report dated 3rd August, 2001, enclosed an MRI report dated 5th July, 2001, which confirmed that:

1. The plaintiff had damaged the posterior horn of the medial meniscus of the left knee which will require arthroscopy and treatment.
2. He has two protruding discs at L3/L4 and L5/S1 which are small and settling down quite satisfactorily.

11. Dr. McDwyer decided to refer the plaintiff to Mr. Mark Dolan, Orthopaedic Surgeon, and Mr. Sean O'Laoire, Consultant Neurosurgeon, and then to Mr. Aiden Devitt, Consultant Orthopaedic Surgeon, in respect of his left knee.

12. The plaintiff in his evidence said that on the day after the RTA he had pain in his thumbs, knees and lower back with pain running down the back of his legs particularly the right. His back pain was lower down than his muscular strain from the football; this pain was more like a shock as if "hit by lightning". He also had constant pain on the inside of his left knee. The pain in his right knee subsided after a couple of weeks. His right hip was sore up to about 11 o'clock in the mornings but eased with movement. It felt as if a nerve was caught in his right hip. The pain in his right shoulder subsided also after a couple of weeks. His thumbs affected by the impact also cleared up after a few weeks. His left knee suffered pain and swelling from the RTA until arthroscopy operation on the 10th July, 2002.

13. The plaintiff continued to have pain in his lower back and went to both a chiropractor and to a physiotherapist. When his back "gave up" he would lie on a plinth at home. The pain could be so severe he could not go to the toilet. He suffered back spasms and had to try to keep weight off his back.

14. Mark Dolan, Consultant Orthopaedic Surgeon, in his report dated 15th October, 2001, based on his examination that day, said that the plaintiff told him that about three years ago playing football he had a collision and had bilateral anterior knee pain intermittently since but this was no great problem and did not interfere significantly with his life. Mr. Dolan concluded that the left knee sustained significant trauma in the RTA as swelling came immediately after the impact. The MRI suggested a medial meniscus tear. Clinical findings of medial joint line, tenderness and pain on full extension supported this and, given the absence of these symptoms prior to the RTA, it is probable this occurred at the time of the RTA. As for the lumbar spine, this again was consistent with the accident described.

15. Aiden Devitt in his first report dated 29th January, 2003, noted the history of the RTA and that the knees struck the dashboard and were stiff and painful for a week with pain and swelling persistent in the medial aspect of his left knee which became more swollen over time. After examination in July, 2002, the plaintiff underwent arthroscopy on 10th July, 2002, which confirmed a tear of the medial meniscus which was resected. On 29th January, 2003, the deep pain in his left knee had resolved and he had full range of movement in both knees. However, the plaintiff had difficulty kneeling particularly on his left knee and his left tibial tuberosity is slightly more prominent than his right which may be due to direct impact. The trauma is consistent with residual discomfort in the patello-femoral joint and crepitus and with his difficulty in kneeling. The pain in his left knee was due to the meniscal tear now resected. Swelling was due to a ganglion of the hamstring probably coincidental. In his further report dated 6th October, 2003, Mr. Devitt said the plaintiff described some patello-femoral pain with symptoms in both knees. These knee symptoms will incapacitate him to some extent as his job requires a certain amount of kneeling. On 25th January, 2005, Mr. Devitt pointed out that he and Martin Walsh, who had been consulted by the defendant's solicitor, both agreed that the plaintiff suffered a cartilage tear as a result of the RTA. He agreed with Mr. Walsh that ganglia can occasionally be the result of trauma but they occur more commonly for no apparent reason in the general population. He had not ascribed this to the RTA. Both agreed that the risk of significant degenerative changes in the medial compartment of the left knee is small. Mr. Devitt confirmed the history given in, and the contents of, his three reports and stressed certain aspects. Firstly he said the damage to both knees was caused by direct frontal injury consistent with the blunt trauma of the knees hitting the dashboard in the impact. I interject that this confirms the plaintiff's account of the fierce impact which is otherwise borne out by the damage to the cars and the deep bruising at the base of the plaintiff's thumbs as he grasped the steering wheel before and during the crash impact. Secondly, Mr. Devitt confirmed that because of the pain in the anterior compartment of the left knee on the medial side caused by a tear of the medial meniscus, using arthroscopy on 10th July, 2002, he took away a bit of the posterior horn of the meniscus which left a small scar at the point of entry of the scope. The scar was larger

than usual because at the same time he also removed a cyst or ganglion which was probably not related to the RTA. The pain caused by the blunt trauma of the impact of the knees on the dashboard would be expected at the front of the knees below the kneecap. The meniscal tear and the pain in the meniscus coming after the RTA are both consistent with the trauma and the plaintiff's complaints after the RTA. Mr. Devitt said that in July 2002 he found crepitus in both knees. There was a grating sensation palpable at the front of both knees consistent with chondromalacia and wear at the back of the kneecaps. The tibial tuberosity (the top of the tibia below the kneecap) on the left is slightly more prominent than that on the right which may be due to impact damage. The trauma to both knees is consistent with the residual discomfort in the patello-femoral joint and crepitus and this is also consistent with the plaintiff's difficulty in kneeling. Mr. Devitt confirmed that such pain in the knees can be persistent and the pain would be worse when kneeling. Mr. Devitt also remarked on the plaintiff being a hardworking man who was keen on his work. While the position of the knees is static, the symptoms are unlikely to improve and this applies to both knees so it is likely he will continue to have pain in both knees as he has a determination to persist in doing fitter's work far as long as he can bear the pain.

16. Sean O'Laoire, Consultant Neurosurgeon, examined the plaintiff on 17th September, 2001, at request of Dr. McDwyer. He noted the plaintiff's history of his problems from pain in his back radiating down the back of his legs and pain in the knees. The plaintiff described a head on collision at speed. I quote from Mr. O'Laoire's report of 3rd December, 2001:

"He dated the problems to a road traffic accident in November 2000, when the van that he was driving was struck at speed in a head-on collision. He was wearing a seat belt and the vehicle had a fitted head restraint. A heavy load on the back of his van came through the bulkhead pressing his seat forwards. His knees were jammed against the dashboard. He suffered knee injuries and immediately had pain in the low back. He is a keen footballer and on returning to training in January 2001, he noticed pain in one or other of his lower limbs. He stated that in the past, he injured the back when playing football, and the mid-back had never been absolutely right since then, but it never prevented him leading an active life. Approximately a month ago, he had been struck in the shoulder during football and developed immediate acute low back pain, which shot all the way down the left lower limb to the foot. He had become quite restricted in his activities and had a great deal of difficulty in stooping, and was unable to train properly feeling extremely stiff and uncomfortable afterwards.

Findings on examination: Fit lean looking. Normal stance and gait. Normal surface appearance of the lumbar spine. Restricted lumbar flexion, unable to bend with outstretched hands beyond knee level. In the sitting position straight-leg raising very restricted 60° bilaterally limited by pain in the left buttock and hip area. No neurology, motor, sensory or reflex.

I noted a report of MRI scan of lumbar spine from Beaumont Hospital dated 05/07/01, that there was 'minor central disc protrusion' at L3/4, and similar lesions at 4/5 and 5/1, with some compromise of the left L5 root and the right S1 root. I noted that he had a problem also in the left knee, on MRI.

On 9/11/2001 this man's lumbar MRI films became available to me. Review of the study showed degenerative changes at L3/4, L4/5 and L5 disc levels. The most significant lesion was at L4/5 where there was a combination of central disc protrusion and facet joint hypertrophy that was producing significant spinal canal narrowing.

Comment: It is likely that Mr Smith suffered injury to the L4/5 lumbar disc as a consequence of the road accident in November 2000. It is likely that the disc subsequently ruptured as a result, giving rise to pain in the limbs as well as the back. The MRI appearances would suggest pre-existing mild degenerative change (multiple degenerate discs, facet joint degeneration at L4/5) compatible with his previous mild symptoms (and with absence of any complaints). While he may have been a candidate for spontaneous disc rupture at some stage there are no changes severe enough on the MRI that would indicate a probability of spontaneous rupture. There is some possibility that spontaneous shrinkage of the ruptured disc may lead to improvement to this pre-accident state. Should it fail to do so and should symptoms remain troublesome, surgery to remove the ruptured disc might be considered."

17. In his second report of 29th September, 2002, Mr. O'Laoire said the plaintiff complained of increased pain in his back with radiation of pain down the front of his thighs as well as the back. He also had a patch of numbness in the right thigh above the knee. An MRI scan on 20th May, 2002, showed increase in size of the L4/5 disc rupture centrally and to the right producing quite marked narrowing of the nerve exit canal. There were no changes at the right sided L5/S1 disc where there was probably enough room for the nerve. The L3/4 disc was a little degenerate with a very minor bulge. The plaintiff was admitted to the Mater Private Hospital on 20th August, 2002, and on the following day he had micro surgical removal of a large ruptured disc from the spinal canal. He was discharged on 24th August, 2002, to attend for reviews. Mr. O'Laoire specifically commented:

"The disc rupture that required surgery is attributable to the road accident in 11/ 2000, rather than its progressive spontaneous degeneration".

18. In his next report of 30th March, 2003, Mr. O'Laoire said he had reviewed the plaintiff on 27th January, 2003, five months after the disc surgery. While the plaintiff had relief from pain in his leg and he had returned to work about 6 or 7 weeks after his operation, he had twisted his back and was having difficulty, for instance when using a spanner and when getting out of bed. As the day went on, his back eased. In December, 2002, he had a bad cold and while carrying two suitcases at the airport he had sneezed and he fell to the ground with acute low back pain. Since that time any jolting, such as stepping off a kerb, walking on a pothole or a cough or sneeze caused a feeling like lightening in his back. He was aware of altered sensation down the front of his right thigh near the knee. On examination of the plaintiff Mr. O'Laoire found quite marked scoliosis concave to the right. An MRI of the lumbar spine on 10th February 2003 showed multiple degenerate disc segments at L3/4, L4/5 and L5/S1 as before. The scan also suggested that there may be a small disc fragment in the right side corner at the site of the surgery. Mr. O'Laoire thought that this may resolve by shrinking or by dehydration but if he continues to have trouble, then repeat surgery could be considered.

19. On 7th October, 2003, Mr. O'Laoire reviewed the plaintiff just over a year after the disc surgery. While without pain in his leg, the plaintiff is very stiff in the mornings and has difficulty dressing, particularly when getting into his overalls. Most days it takes 1½ to 2 hours to loosen up. After a day of driving or hard physical work he needs to take a day off to let his back settle down. It tends to become very twisted at times. Swimming and physiotherapy prove very helpful. Exercises prescribed assist him to keep mobile. Because he has found his maintenance work so difficult, he had become involved in ownership of a public house but was then surprised to find that standing behind a counter serving or bending and putting glasses into a dishwasher and doing other bar tasks is not comfortable. His back movement was restricted bilaterally, but worse on the left. At further review on 28th October, 2003, an MRI scan showed degenerative changes at L3/4, L4/5 and 5/1 involving disc signal and some facet joint change. Symptoms are ongoing. Mr. O'Laoire wrote "he is an extremely hard working individual who simply cannot stop working even though it hurts. He has found that difene in suppository form gives good relief. The one thing he cannot do is play golf or football, but he can do a great deal of work despite the discomfort, although it is not very pleasant". Mr. O'Laoire commented that with the plaintiff's psychological make-

up (his determination to work hard):

"... he would therefore be much better keeping going to the extent he can, but perhaps using anti-inflammatory medication on a more regular basis. The likelihood is that this level of symptoms will continue for a number of years, but as he gets a little older and stiffer, they may become somewhat less troublesome. This man seems to be of an unusually robust nature, continuing to work hard at quite physical activities despite discomfort and pain induced by those activities. Many individuals would simply be unwilling to push themselves as he does. However, it is difficult to see how he could keep this level of activity, especially the bar work, over a long time even if symptoms ease when he is older."

20. On 16th November, 2004, Mr. O'Laoire found the plaintiff much improved though not symptom free. The back tends to be stiff and in the morning he had trouble tying his shoe laces. He still has numbness in his right thigh. Physiotherapy had helped him to straighten up. He continues to work very hard, including in the pub. Mr. O'Laoire again stressed that the plaintiff is a very motivated individual and has a positive outlook despite having ongoing symptoms.

21. The plaintiff gave evidence that his wife is a nurse in the Lourdes Hospital in Drogheda and that she would massage him on a plinth when he came home with his back in spasm two or three times a week. He would usually be up at 6 a.m. and then drive to service machines doing such work as changing forklift masts or working on brakes or prongs. Henleys had been good to him and gave him an apprentice after the RTA to work with him. They had sent him to Italy to train prior to the RTA on machines which came in to Ireland in December, 2000. They were Fantuzzi container handlers and arrived from Italy in kit form. Assembling these cranes was robust work, one had to climb up and down to bolt the cranes together. It was tough to keep going with constant lifting and dragging. He believed in getting on with the work but was fearful about his back. Henleys sent him on a mechanical course in Monaghan; they very fairly did not "put him in at the deep end after his operation". With pain in his back persisting, the plaintiff had had the lower back operation on 21st August, 2002, a microdiscectomy at right L4/5 as described above.

22. It is significant that Dr. McDwyer had referred the plaintiff for an MRI scan which was done on 5th July, 2001. Mr. O'Laoire, as the treating surgeon, having seen the MRI from the scan of 5th July, 2001, concluded after clinical examination that the plaintiff suffered injury to the L4/5 lumbar disc in the RTA in November, 2000. This ties in with the account of a fierce impact and the heavy tool box coming through the plywood into the back of the plaintiff in the driver's seat. An MRI scan on 20th May, 2002, showed an increase in the size of the L4/5 disc rupture. On 21st August, 2002, Mr. O'Laoire did the operation on the L4/5 disc rupture. The history was consistent with Mr. O'Laoire's findings. Mr. O'Laoire confirmed that the cause of disc rupture at L4/5 was the RTA and not the progressive spontaneous degeneration. Under cross examination, Mr. O'Laoire commented on the proposition that an injury in August, 2001, on a football pitch was the cause of the plaintiff's back problems. He pointed out that while the plaintiff might have been a candidate for symptoms from degrees of degenerative change in the upper range, nevertheless the degree of degenerative change prior to the RTA would not have given rise to spontaneous problems. Furthermore the plaintiff was struck on his shoulder at the football. This was a minor knock to his shoulder and the acute low back pain which shot down the plaintiff's leg to his left foot was indicative of activation of his lower back injury which had been from the trauma caused in the RTA. Indeed such a blow to the shoulder could only cause precipitation of lower limb pain by activation of a pre-existing lower back injury. Martin Walsh, Consultant Orthopaedic Surgeon, was called by counsel for the defendant. He gave evidence in conjunction with his report dated 19th September, 2003, based on examination on 15th May, 2003. The history taken was similar to the description given above. Mr. Walsh noted that the plaintiff had immediate pain in his neck and shoulder girdle area as well as in his lower back after the collision on 28th November, 2000, and the following day he had generalised aches and pains as well as difficulty in both thumbs. There was gradual improvement in his neck and shoulder girdle complaints but he had ongoing problems in his knees, particularly the left, and in his lower back. Mr. Walsh's history and diagnosis in respect of the knees, and particularly the left knee including the report on the arthroscopy of the left knee by Mr. Devitt on 10th July, 2002, when the medial meniscal tear was resected, all were mainly in conformity with Mr. Devitt's findings and prognosis. Mr. Walsh felt that the plaintiff might need re-exploration of a ganglion regarded as coincidental to the meniscal tear. Mr. Devitt was not inclined to offer surgery on the meniscal cyst as it would be likely to recur but, if there were a lot of symptoms related directly to this portion of his knee, a further resection would be justified. On his last assessment, most of the plaintiff's pain seemed to come from his patello-femoral joints and, on clinical diagnosis, this was consistent with injury to the patello-femoral joints from a direct blow which also accorded with the history of the injury. Mr. Devitt said he agreed with Mr. Walsh that the risk of significant degenerative changes in the medial compartment of the left knee was small.

23. Mr. Walsh noted "An MRI scan of the lumbar spine dated 5th July, 2001, revealed evidence of degeneration involving the L3/4, 4/5 and 5/S1 discs. A small central bulge was noted at L3/4 level but no evidence of a spinal cord or nerve root compression was noted. At the L5/S1 level there was a small central and right sided prolapse which was deemed to be abutting the emerging S1 nerve root (I would welcome an opportunity to review all his scans)." Mr. Walsh said this disc was more vulnerable and with disc bulge the risk increased. The majority of problems requiring treatment occurred without trauma but rather from degeneration. While the MRI scan suggested a slight bulge at L3/4, on examination the only clinical sign was slight alteration of sensation. He noted that as the plaintiff's back and right leg pain persisted he was seen by Mr. O'Laoire and, on 20th August, 2002, there was exploration and decompression of a lower lumbar disc.

24. Mr. Walsh on examination found that the plaintiff held his neck in a normal manner and had a full range of movement of his cervical (not lumbar) spine and he found no asymmetry of his shoulders. In his opinion Mr. Walsh wrote:-

"He states that whilst he had occasional pain in his lower back prior to his accident of 28th November, 2000, he reports that it was never sufficiently troublesome to warrant taking time off work (I confirm that I have written to Dr. McDwyer seeking details of his pre and post accident history). It would appear as a result of the impact that Mr. Smith sustained trauma to the lumbo-sacral area, which produced a disc prolapse at the right L5/S1 level. At today's assessment, Mr. Smith has clinical signs of ongoing problems in his lower back which may well be aggravated by prolonged periods of standing, repetitive bending and heavy lifting and hence he may continue to experience some difficulty during the course of his work as a service engineer especially following prolonged periods of bending or working in confined areas."

25. Mr. Walsh made clear he was seeking details from Mr. O'Laoire of the surgery and also wished to see MRI scans. I stress this in fairness to Mr. Walsh as it is clear that the prolapsed disc was at L4/5 where there was a central and left sided disc protrusion "which could be causing some impingement on the exiting left nerve root", while at L5/S1 there was a small central bulge, which Mr. Walsh said in his Report dated 12th July, 2004, was not of any clinical significance.

26. Mr. Walsh in his report dated 12th July, 2004, noted, as he did before, that "the MRI scan of 4th July, 2001, of the lumbar spine revealed evidence of decreased lumbar lordosis of disc degeneration involving L3/4, 4/5 and 5/S1 discs."

27. He then adverted to what is set out above about the disc protrusion which could be causing impingement on the left nerve root at L4/5 and the less significant small bulge at L5/S1.

28. The MRI scan of 7th February, 2003, once more confirmed significant reduction in lumbar lordosis with ongoing degeneration of the L3/4, 4/5 and 5/S1 discs. There was no convincing evidence of spinal stenosis or any indication of a recurrent disc at the L4/5 level.

29. Lumbar lordosis is a protective mechanism for and indicative of back pain.

30. Mention was made that Dr. McDwyer had referred the plaintiff for an MRI done on 4th July, 2001, which indicated that the plaintiff was complaining well before July in 2001 of continuing lower back pain.

31. Dr. McDwyer also informed Mr. Walsh that the plaintiff had complained of pain in his lower back some five years earlier after playing football but that this problem had fully resolved before the RTA and had not stopped the plaintiff from doing strenuous work or playing football.

32. In his second report Mr. Walsh suggested that the football incident involving the blow to the plaintiff's shoulder and ensuing acute pain could have been the triggering factor for his GP sending him for an MRI scan in early July, 2001. However, since this football injury was in August, 2001, he conceded that this theory was an error. He also confirmed that the significant lesion was at L4/5 and not at L5/S1 as suggested in his first report.

33. Mr. Walsh accepted that Mr. O'Laoire had greater knowledge of the plaintiff than he himself could gain having seen the plaintiff for 25 minutes, but he pointed out that degenerative changes in the plaintiff's lumbar spine would have predated November, 2000; the plaintiff had had a difficulty some years previously when playing football and in the weeks of 2nd December, 2000, and 9th December, 2000, after his RTA he did 65½ hours of work per Invoice 164. He thought it was unlikely the plaintiff could work for 65 hours if his disc was injured. I shall return to the topic of the plaintiff's invoices for work after his RTA shortly as I suspect there is an explanation which makes this discrepancy more explicable.

34. Since the plaintiff had the discectomy and the joining of the facet joints, he was liable to back pain and this would not be conducive to a return to playing football. He should avoid repetitive bending. Mr. Walsh said that one could not say the plaintiff would only be able for 5 or 10 years more work as some patients with severely degenerative backs do not have to stop work.

35. Mr. Walsh was subjected to a robust cross-examination, including an unfair insinuation which he sharply rejected. He was justified in so reacting and the less I say about this incident the better as it is best consigned to oblivion.

36. In Mr. O'Laoire's first report it was clear that the plaintiff had told him of injuring his back in the past while playing football and that his midback had never been absolutely right since but that this never prevented him leading an active life. On foot of this Mr. Walsh was challenged as to why he had prefaced his remarks about the plaintiff's "previous problem in his lower back" with the words: "It would now appear that" Mr. Walsh responded that the context was in respect of the lower back. He accepted that there could be a man willing to work through the pain barrier. His advice would be that, if you have a disc prolapse, you should not play football. Mr. Walsh wrote that there was no doubt that as a result of the impact of 28th November, 2000, the plaintiff sustained some trauma to his lower lumbar area with immediate onset of pain in his lower back and this, in his opinion, was secondary to trauma to the facet joints and furthermore a component of his pain may well be related to disc bulge at the 4/5 level.

37. Several points seem to be relevant at this stage on this aspect. The first is that the plaintiff told his doctors all along that he had previous incidents of injury including a strain of his middle back some four years before his RTA. He had recovered from this without recourse to doctors and he had got on with his active working and sporting life. He is energetic and hardworking and clearly has stubborn determination in trying to keep working at strenuous maintenance work and also at staying fit by training for football. Dr. McDwyer confirms my view of his being a hardy fitter whose attitude is positive and who gets on with a job. Dr. McDwyer also pointed out that while the plaintiff had told him of his suffering a midback strain at football some four years before the RTA, he had not attended the surgery in respect of this nor had he needed to have any X-rays, whereas he had twice attended in respect of respiratory infections and once for a tendon injury torn at football.

38. The plaintiff himself described to Mr. O'Laoire that his problems of pain in his back radiating down the back of his legs dated from the RTA on 28th November, 2000, when the toolbox hit his back through the plywood and the seat and immediately caused him pain. Mr. O'Laoire was the treating surgeon and had the MRI scans and in his report dated 3rd December, 2001, he concluded that it was likely that there was pre-existing degenerative change but also that there was injury to the L4/5 lumbar disc in the RTA on 28th November, 2000, and it is likely that the disc subsequently ruptured as a result, giving rise to pain in the limbs as well as the back. He stated that whilst the plaintiff may have been a candidate for spontaneous disc rupture at some stage, there were no changes severe enough on the MRI that would indicate a probability of spontaneous rupture. He was hoping that some spontaneous shrinkage of the ruptured disc might occur. On 14th May, 2002, the plaintiff attended Mr. O'Laoire with increased pain in his back with radiation down the front of his thighs. An MRI scan on 20th May, 2002, showed increase in size of the L4/5 rupture centrally and to the right producing quite marked narrowing of the nerve exit canal. On 21st August, 2002, at the Mater Hospital, Mr. O'Laoire performed a microsurgical removal of a large ruptured disc from the spinal canal. He commented: "The disc that required surgery is attributable to the road accident in November, 2000, rather than the progressive spontaneous degeneration". Mr. O'Laoire, as an experienced Consultant Neurosurgeon who was alert to the alternative suggestion of degenerative causation, from his knowledge of the plaintiff and his history, from his scrutiny of the MRIs in respect of degenerative change as compared with traumatic damage, and from what he saw and found when operating to remove the ruptured disc, has stated firmly and unequivocally that the significant cause of the disc rupture was the RTA and that he had quite enough information to make this diagnosis. The MRI scan of 20th May, 2002, showed progressive deterioration in a previously ruptured disc which can compromise nerves on both sides. He stressed that the history given by the plaintiff confirmed his own findings. He made categorical comment that the trauma in the RTA and not progressive spontaneous degeneration was the cause. I accept this evidence as being much the more probable and the correct diagnosis supported by findings at operation.

39. I have one proviso. While I accept the plaintiff's evidence as being candid and forthright about his history, his determined disposition and stubborn drive to keep working and playing football, I have considerable reservations about the accuracy or adequacy of his keeping of records and accounts. For instance, his Invoice to Henleys No. 000164 dated 9th December, 2000, would seem to indicate that he charged for 65½ hours of work between 2nd December, 2000, and 9th December, 2000, a few days after his RTA on 28th November, 2000. There are four points about this to be made. First, the plaintiff is, according to his doctors, a stubborn man determined to carry on at his work as a fitter; secondly, he can bear pain both so as to work and to play his sport and keep fit. Thirdly, he made it clear that Henleys were sympathetic to him and let him have an apprentice with him for the heavier work. Certainly his disposition was to persevere in trying to do his job even if this meant having pain and arriving home with his back in spasm to such an extent that his wife often had to massage him on the plinth at home. Fourthly, the plaintiff's accountant Mr. O'Reilly said in respect of Invoice No. 164 that the plaintiff had three weeks of work done and had sent in the invoice for work already done before his RTA which had not already been invoiced to Henleys. This has the implication that perhaps Henleys were willing to pay for

work done without too strict scrutiny at times of the dates listed in respect of the doing of the task.

40. I now propose to summarise the salient features in Dr.McDwyer's evidence and three reports dated respectively 3rd February, 2003, 3rd November, 2003, and 4th November, 2004. The plaintiff was seen by his GP on 28th January, 2003, being six months after the right L4/5 microdiscectomy and decompression on 21st August, 2002. The whiplash injury to his neck and his right shoulder crepitus had both resolved. He still had ongoing low back and right hip problems and ongoing soft tissue injury to his right knee and to the base of both thumbs from the impact trauma. He still had marked weakness of his right hip which Dr.McDwyer ascribed to spinal stenosis causing pain in the hip. Since no surgical intervention would help his hip, he felt the plaintiff would have to accommodate himself to the pain. In his report dated 3rd November, 2003, Dr.McDwyer found the plaintiff's neck and shoulders after over 40 sessions of physiotherapy had full free movement. His thumbs were better and the swelling at the base had subsided. His lumbar sacral spine is still restricted in extension, flexion and rotation. As for his knees, both have crepitus and at times he has great difficulty in coming down stairs. He will have problems on rough, uneven surfaces. His lumbar spine since the operation on 21st August, 2002, has had restricted movement so that he has a daily problem tying his shoes, he cannot sit or stand for periods in excess of twenty minutes; he is only pain free while lying on a bed. Dr.McDwyer anticipates that there is no prospect of helpful intervention or of further improvements which means that the plaintiff is likely to have a stiff and painful spine from age 32 years for the rest of his life. His doctors have already advised him to take care of his back and to avoid heavy work. He fears that his knees may lock or let him down on the stairs, although Dr.McDwyer feels there could be a minimal, say 5% to 10%, improvement in his knees. However his life will be affected by his difficulties with his spine and knees and he is going to have constant pain. Being self employed the plaintiff pushes himself to the pain barrier. Dr.McDwyer regards him as being 30% disabled permanently.

41. Dr.McDwyer in his report dated 4th November, 2004, was anxious about both the plaintiff's knees with continued effusion in both knees. A most acute instance on 20th September, 2004, led to a further referral to Mr.Devitt. Dr.McDwyer thinks that arthritic changes in the knees are almost a certainty in later life. Since the pain comes from his patello-femoral joints consistent with a direct blow, this seems to coincide with his injury and the symptoms are likely to persist particularly as the arthroscopy involved removal of bits, washing out and replacing with oil. Since five years have passed since the RTA and the cause of the hip injury is not yet located, this is unalleviated and likely to persist. Dr.McDwyer said that the plaintiff is anxious and determined to work and does continue to work, enduring the pain involved. His prognosis is that:

1. He has a damaged lumbar-sacral spine which will never return to full mobility as a result of the RTA;
2. He has bilaterally damaged both knees; this gives rise to recurrent effusion and to changes in later life and this is almost a certainty. I have doubts about this because of the prognosis by Mr.Devitt and Mr.Walsh.

42. Dr.McDwyer said the plaintiff could work in the pub but will not be able to hoover or to do bending jobs, such as changing the wheel of a car. He can no longer do cramped heavy work or do work on his knees. Since he will not be able to carry on as a fitter, he is sensible to do work in the pub in St Thomas Street nearby Christchurch Cathedral.

43. Under cross-examination by Jack Fitzgerald S.C., Dr.McDwyer said that on 26th June, 2001, he sought an MRI on the lumbar-sacral spine and the left knee. Dr.McDwyer had a note on 1st August, 2001, to the effect that the plaintiff was getting married and so may not need an operation. When the suggestion was made to him that the football injury in August, 2001, could be significant, the experienced GP replied that "I would agree with you but I don't have any evidence (supporting that). Also I had referred him previous to that for an MRI". Dr.McDwyer concluded by saying that "the plaintiff's work as a fitter is heavier than he should be doing as a man with a bad back."

44. The plaintiff said his intention had been to keep working on contract for Henleys as a mobile service engineer after his return from England. Over the last two years the pub had taken up much of his time. The pub trade had not been great but his attitude is to get on with life.

45. He said that the force from the impact in the RTA was way beyond comparison with any knock he had taken in GAA training. He had not gone off work but however the outlook for him as a fitter was bleak but he had not been off work but had carried on with the help of an apprentice and by dealing with his situation and living with pain. He believed that in future he would not be able to do his agreed work servicing the fork lift and outreach trucks. Up to July, 2001, he had not eased off or held back at work. He found that if he walked on rough, uneven ground this caused him spinal pain. He had had numbness in his right leg and shooting pains down his right leg to his toes. He couldn't stoop or bow down. In August, 2002, he had the operation on the ruptured disc and then he was laid up for 12 weeks. However, six months after the operation, once his back was straighter, he felt much better. Five months after the operation, Mr.O'Laoire reviewed him and referred him because of his scoliosis to a physiotherapist in the Mater Hospital for manipulation. By Christmas, 2003, he had improved although he had stiffness and some sharp pains in his back after getting into awkward positions. While the physiotherapy was improving him, he still had difficulty after time standing behind a counter. He got on with life. Apart from his back problem he had a click in his left knee and some numbness of his right knee; Mr.Devitt had operated on his left knee. His knees had been grand before the RTA but after that he had had constant pain but was much improved since the arthroscopy. He remarked in character: "I am not half the man I was; but I am still mobile."

46. Under cross-examination, the plaintiff said that before his RTA he was "pretty fit", doing 50/60 hours of work per week and doing up a house at Palmerstown. Also after driving up to Cavan he would help out on the farm and also train for football. After the RTA he required another van as he wanted to hold his contract with Henleys. He spent two weeks in December 2000 repairing the shelving from the old van and installing it in the new van. In early 2001 a second reach stacker hoist came in from Italy; he was one of the three specialist experts trained to assemble and modify this type of high stacker fork lift. Although since the RTA he had back pain which got worse and worse, he was doing work as a fitter and helping on the farm, if needed, as he enjoyed the farm work. He had a plan to buy and sell forklifts but since starting for Henleys at the end of 1998 to early 2001 he had not started doing this. His idea was that if he could afford it he would buy equipment. He had sold two or three forklifts in the last three years. He did not think there were documents about buying and selling forklifts but he had sold forklifts and pallet trucks. He was asked about invoices about these and he replied that he had not got invoices to do with pallet or forklift trucks and he didn't know if there are such invoices but every invoice he had done, he had handed in to his accountant. He agreed to look overnight to see if there were any invoices in respect of pallet or forklift trucks. He stressed that he was not a forklift dealer but he would be given broken pallet trucks which he repaired from time to time, perhaps four over the years since 1999. He gave one to a colleague fitter, and sold a couple. They are a table with a handle on them and cost about €150. He had bought a forklift off Henleys; it had not been working but he had repaired it for use in lifting round bales. Buying and selling forklifts would not be profitable or practical for him as he lived in a housing estate in Kells: he would need a yard.

47. He was asked about his life style before and after his RTA. He said that his work as a fitter on forklifts and stackers was the major part of his work; he did some work on the farm and was also involved in the pub near Christchurch. He was asked about building work

and he replied that he was not a builder but he had built a shed at the back of his house in Clondalkin; also he had helped with the renovation of the pub. He was asked about a Mark Smith Mechanical Services Invoice No 000345 of 20th February, 2004. This was for installation of a shower of €380 and replacement of woodwork in kitchen and living room area for €460, sub total €840 with VAT at €113.40, total €953.40. He explained that this was for work done for Bernie O'Malley, a friend of his partner in the pub venture, as she needed the invoice for insurance purposes. He reiterated that he was not a builder but he did help with much of the pub renovations and he had also worked on a penthouse in Temple Gardens, Santry for his business partner and there should be an invoice in about 2002 or 2003 for about €1,000 in respect of that. The penthouse was not a building job but involved taking up of floor boards as the penthouse had been destroyed by water. Both penthouse and pub were part owned by the plaintiff. The rental income of the penthouse went to his business partner.

48. When asked about the servicing of lorries, the plaintiff said he did servicing of lorries, along with forklifts, for Lett Brothers of Clondalkin in January, 2002, and he had serviced a lorry in Kells. He would service two or three lorries a year. He always gave invoices. As a fitter mechanic he serviced his own car as well as forklifts.

49. Overnight the plaintiff looked at invoices given to his accountant and had pulled out two for pallet trucks, one for a lorry, one for inspection of a roller and one for repairs to a JCB and pump. He explained most of his income came from work for Henleys. The pub had made a loss for a couple of years, so he had taken no income out of it but it was improving since St Patrick's Day. He reiterated the odd bits of work he did repairing pallet and forklift trucks and stressed he was neither a dealer nor a builder as he was only doing the odd occasional jobs already mentioned.

50. The plaintiff was again asked about the shoulder clash in August, 2001, at football training. He did not play on because of the pain in his shoulder and lower right back when he went down. This type of acute pain had occurred before since the RTA with pain in his low back going in to his legs. He had had such pains in his back between November, 2000, and August, 2001. He started wearing a strap for support shortly after the RTA. After this August 2001 back pain he gave up the football as his wife thought he was foolish to keep on at it. He had the microdiscectomy on August, 2002.

51. As for work, the plaintiff said he would continue on as best he could. He hoped that the pub would be run without him being present. He would keep repairing pallet trucks – he was a handyman from his father's training of him on the farm, and he was not a plumber or an electrician.

52. The plaintiff described how he carries supportive belts, including a belt with magnets at the back, to protect his back; he would put tension on the belt if having to do work involving strain. He enjoyed the work servicing the plant for Henleys. He said that he had a share in a pub as well as he felt that he only had a couple of years more with his "disc vulnerable back". His intention had been to establish himself as self employed, mainly doing the maintenance work for Henleys. He also said that he had an interest in the family's small farm of about 50 acres in Co. Cavan which had road frontage. He is married and his wife is due to have a child in September, 2005. He had another child, by a previous relationship, who lived in England. He was clearly a man determined to adapt and get on with life, read to keep working by putting up with pain and persevering as best he could.

53. Next I propose to give a summary of the manner of the adducing of evidence in respect of the special damages and loss of earnings and the plaintiff's various sources of income and also the matter of his future employability.

54. On Friday 22nd April, 2005, Patrick O'Reilly was called as the plaintiff's accountant. Counsel for the defendant had already previously made clear he would object to this evidence as no report from the accountant had been furnished in accordance with S.I. No. 391 46 (1) and (2). Furthermore, by letter dated 25 January, 2004, Fergal Gaynor, the Chartered Accountant engaged by the defendants, had communicated the need for him to have sight of the documents set out in para E on page 2 of his letter. The request for documentation, supportive of and allowing verification of the plaintiff's claim, was conveyed to the plaintiff's solicitors but Mr. Gaynor on 27th January, 2005 was still writing to the defendants solicitor, Walsh Warren and Co, complaining about the defendants' failure to respond with the documents sought.

55. It is quite clear that the plaintiff's legal advisers have been aware since January 2004 that the defendants' Chartered Accountant had given a list of the basic documents which he would require for the purpose of investigating and verifying the claim being made for loss of earnings. Furthermore, instead of using the time given at the eleventh hour by the calling of Dr. McDwyer and Mr. Martin Walsh and several other medical witnesses to gather the documents suggested as relevant by Mr. Gaynor, the plaintiff's legal advisers argued that the "accountant was not an expert for the purpose of S.I. 391 but only a book keeper" and that Mr. Gaynor had seen the plaintiff's figures which the "accountant" would produce. Jack Fitzgerald S.C. for the defendants renewed his objection and pointed out that his clients' accountant had only been given copy invoices and had not been furnished with the other material listed in paragraphs 3(i) to (vi) in his letter dated 27th January, 2005 to the defendants' solicitor.

56. I took cognisance of Mr. Fitzgerald's objection but decided that I needed to be told about and consider the nature of the evidence to be adduced before ruling on relevance and admissibility, particularly as much of this could be relevant to the plaintiff's future employability as well as to his future earning capacity.

57. Patrick O'Reilly was called and said that he had been asked by the plaintiff's solicitor to inspect the plaintiff's books and to consider the hours worked by the plaintiff both before his RTA and after his RTA and the rates charged. He produced a sheaf of papers purporting to be an analysis of the hours worked by the plaintiff for Henleys Forklift derived from copies of the plaintiff's invoices furnished to Henleys. Sheet 1 covers January – December 1998. From this sheet it can be seen that Mr. O'Reilly has compiled from the rather illegible copy invoices the hours stated to have been worked, standard pay, standard rate per hour, overtime hours and overtime pay; further columns deal with number of miles travelled, mileage allowance and charge per mile. A similar exercise was done for the period January – December 1999, January – December 2000, January – December 2001, January – December 2002, January – December 2003, and January – December 2004. Mr. O'Reilly then summarised his calculations given on a further sheet: - Paragraph A setting out Standard Earnings with two further columns namely "Alleged Reduction in Standard Hours post accident" and "Standard Alleged loss per hour". Paragraph B setting out overtime earnings with two further columns namely alleged reduction in overtime hours post accident and overtime alleged loss per hour. Paragraph C setting out Total Earnings and Total above losses at €35,110.11.

58. At 2pm on Friday 20th April, 2005, I was informed that a figure for the plaintiff's loss of earnings to date had been agreed at €23,000. The point was made by Mr. Carty for the defendants that this figure was agreed as being the amount of the difference in earnings for the plaintiff from Henleys from the RTA on 28th November, 2000, to date. However, Mr. Carty pointed out that there was a further difficulty in that the plaintiff has diversified his activities and has been working in other income earning ventures as well.

59. Furthermore, there is a further problem in that these figures are based on invoices some of which relate to figures for servicing lorries, repairing kitchens and working on floors for people other than Henleys.

60. Mr.O'Reilly said he was the plaintiff's accountant and had acted for him since January, 1998.He has self employed clients and he liaises with the tax office on their behalf.Counsel suggested to him that after the RTA one would expect the plaintiff to be out from work for 8 or 9 months but his work pattern was much the same and Mr.Gaynor had calculated that the plaintiff carried on at about 50 hours per week from 4th December, 2000, to 17th August, 2001.Mr.O'Reilly responded that between May, 2000 up to November, 2000, the plaintiff had been working on average about 60 hours per week.Mr.O'Reilly stressed that he was the plaintiff's personal accountant and not the accountant to "Simply Denmark", the company running the pub.

61. On Tuesday 26th April, 2005, counsel for the plaintiff said Mr.O'Reilly had produced clearer figures at his request.Mr.Fitzgerald objected to this "Report".However, since the parties had already looked at the earlier less clear figures and an agreed figure for loss of earnings to date subject to a proviso had been agreed, it seemed fair at least to explore whether this further "Report" would clarify the situation.I have marked this Report with an 'I' and propose to annex this to this judgment in Appendix I.I was informed that the sum of €40,027 was agreed for the gross claim for loss of earnings for 2001, 2002 and 2003; after deductions of 25% for administration expenses, this reduces to €30,005; and then a further 25% deduction from this for Income Tax, PRSI and levies further reduces this to €22,504 as an agreed calculation, leaving it for the court to decide if the plaintiff has in fact suffered such loss.As for the year 2004, Mr.O'Reilly calculated the value of the total hours lost at €24,421.65.After carrying out similar deductions of less 25% for administration expenses; this reduces to €18,316; and then a further 25% deduction for Tax, PRSI and levies, leaves the net loss for 2004 claimed as being €13,737.

62 Mr.Carty for the defendants said it was for the plaintiffs to prove their case on this aspect.

63. Mr.O'Reilly then explained how he calculated the number of hours lost in 2004 and looking at the document entitled "Estimate (sic) of Loss of Hours and Loss of Earnings 2004" one can see how this came to €24,421-65 for gross loss of earnings, less administration expenses at 25% €6,105.41 giving €18,316.24, which after further deduction of 25% for income tax, PRSI and levies at €4,579.06 leaves a net loss of earnings figure of €13,737.18 for 1st January to 31st December, 2004.

64. Mr.Fitzgerald, senior counsel for the defendants, renewed his objection under the Courts Act and strongly criticised the presentation of the figures in respect of loss of earnings.Mr.Moylan S.C.for the plaintiff said the further documents were a clarification of figures given last week giving a total for loss of earnings to date of €36,700.Furthermore the defendants' advisers were aware from the actuary Mr.Byrne's Report since October, 2004 that the plaintiff was claiming a gross loss of profit of €40,027 before tax for the years 2001, 2002 and 2003.He also added that the new sheet showing how the figure of €63,000 for the loss of hours in 2001, 2002 and 2003 were calculated was based on evidence given the previous Friday (which was subject as to the calculations being agreed at €23,000 to the proviso that the plaintiff must prove that the cause of the loss of hours was related to injury sustained in the RTA).

65. Mr.O'Reilly was asked by counsel about Invoice No.000344 dated 24th February, 2004, for plumbing and heating and repairing of flooring.No hours were given.The sum sought was €4,056 which included costs including labour and material supplied.Mr.O'Reilly said that this job was for Mr.McHugh, the plaintiff's business partner, and so he did not include this as he surmised it was done outside normal working hours.The point was cogently made that while the plaintiff had done this work, the number of hours done was not included for the purpose of calculating how many hours he can work, a critical matter in respect of a claim based on reduction in capacity to work the same number of hours as before injury.

66. Mr.O'Reilly said that while his degree was in agricultural science he had been submitting accounts to the Revenue for the past 16 years for clients.He thought that his client's accounts for 2003 had been agreed with the Revenue but had not been given to the defendants' solicitor.It was suggested that particulars about the purchase of the public house and the penthouse premises in Temple Gardens should have been given.Mr.O'Reilly said he became aware that the plaintiff purchased the shares in the company which owned the pub in 2002; at first the plaintiff had a one third interest but then he had a half interest as one of the three shareholders pulled out.No cash or equity was put up as a full loan was obtained from Bank of Ireland.Mr.O'Reilly said he accepted the word of the plaintiff who told him he had no income from the company.He conceded that he would not have the exact hours worked by the plaintiff; the hours worked in the public house were not included in his sheet.The plaintiff had told him he was limited in his work for Henleys and only worked in the pub if unable to work for Henleys at the time.His impression was that the plaintiff hated to be idle.Mr.O'Reilly said he was not aware that the plaintiff did building work, a broad term, before the case.However, the income from this was included in the accounts as was income from servicing of vehicles such as lorries and so this would have made no difference.I think this may be so for the purpose of income but it certainly complicates the calculation of number of hours worked.It was pointed out to Mr.O'Reilly that the defendants' accountant got invoices and accounts for 2001 and 2002 but received no confirmation from Henleys about the services being done by the plaintiff.As for Invoice No.000164 from 9th December, 2000, this appeared to be for 65½ hours for work done in the week after the RTA but Mr.O'Reilly explained that he now understood that the plaintiff had three weeks of work done before the RTA and that the plaintiff had included this work already done in the invoice.He assumed the plaintiff would explain this.Invoice No 000157 dated 27th November, 2000, showed the plaintiff as having worked for 75 hours in the week before his RTA.Invoice No 166 dated 23rd January, 2001, showed work done of 56 hours in a week in January, 2001 after the RTA.

67. Two points need to be made.First the plaintiff could have been recalled to explain the invoices, particularly No.000164 and others in December, 2000.Secondly, the plaintiff married in September, 2000, and one might expect his wife might advise him to change his life style by reducing his workload and long hours of work, particularly while recovering from the effects of his RTA.

68. In re-examination Mr.O'Reilly said that the plaintiff had married in September, 2000 and that since the RTA, the plaintiff had worked less hours than before the RTA and has never since worked as many hours as before the RTA.

69. Patricia Coughlan, Vocational Rehabilitation Consultant, was called.Counsel for the defendant objected to her giving evidence on the basis that her evidence about the plaintiff's future work prospects was not warranted as it was clear that the plaintiff is able to work in a number of jobs.The evidence was allowed on the basis that Dr.McDwyer regarded the plaintiff as suffering from a 30% disability which would persist and Mr.O'Laire was pessimistic about the plaintiff being able to persevere with strenuous work over a length of time.Furthermore, counsel for the plaintiff pointed out that the plaintiff was a fitter working long hours; his injury would probably lead to his being unable to pursue his vocation as a fitter and he contended that the plaintiff would make more money as a fitter paid for hours worked than he would doing lighter jobs such as "pulling pints in a pub".I should add that while the plaintiff has a number of irons in the fire, he will have a vulnerable lower back for the rest of his life and in the not too distant future is likely to have problems doing heavy strenuous work as is normal with the work of a fitter maintaining forklifts and special reach stacker trucks, servicing lorries or doing some aspects of farm work; even standing behind the counter of a pub is likely to cause him discomfort.

70. Ms.Coughlan had taken a careful history in her Report of about 12th November, 2004.She noted that the plaintiff's wife is a nurse and that he has an interest with his father and brother in the family farm of over 50 acres, where he was brought up in Cavan.He has been working as an independent service fitter maintaining forklifts and is one of three specialists who service and modify Special Reach Stackers.Henleys have been very sympathetic in his allocation of work and often provide an apprentice to help him on the

heavy work. He owns half the shares in a pub near Christchurch where there are three full time bar staff employed. His role there is supervisory and on the farm he leaves the strenuous work to his father and brother because of his residual low back pain. She noted his employment history to be as set out above. He had attended secondary school and obtained the Leaving Certificate before studying in England and later becoming a plant service engineer. He was a keen sportsman but can no longer play football and finds golf difficult. He has ongoing back pain made worse by bending and heavy lifting; sitting and long distance driving can be very uncomfortable; he is very conscious of his back and has to be selective about his tasks; both knees can become sore and kneeling is uncomfortable as is his right hip which snaps and clicks at times. Having had operations of his L4/5 disc and on his left knee, and with both his lower back and knees remaining symptomatic, he may have to seek alternative work although he himself wishes to carry on at his work for Henleys for as long as he can.

71. Ms. Coughlan thinks that with his training and experience he might be able to cope with a supervisory position as a foreman or charge hand in the mechanical engineering line where he could delegate physical work. Alternatively he might seek further training and consider sales and marketing such as service sales management. He might also find light work in a suitable factory environment or as foreman in Quality Control. She concluded that with his physical restrictions he will encounter problems securing a job on the open employment market as a man of 32 years who has had back and knee problems. She said current salary for a self employed service engineer would be about €30,000 gross p.a.; a supervisory manager would enter at €30,000 to €35,000 gross p.a.; a sales representative would start at about €25,000 to €30,000 gross and a supervisor or quality controller in a factory would earn about €20,000 gross. She said, in my view correctly, that the plaintiff will do what he is doing until he can't.

72. John Byrne, actuary, gave evidence after counsel for the defendants reiterated his objection on the basis that the ground had not been adequately laid for the introduction of actuarial evidence based on a differential. Counsel stressed that the plaintiff has been working long hours and accumulating assets. On the other hand, counsel for the plaintiff pointed out that both Dr. McDwyer and Mr. O'Laoire regarded the plaintiff as unlikely to be able for the strenuous, stooping, kneeling and bending work for much longer despite his determination to keep on at the service work and his capacity to soldier on while in pain. The plaintiff himself said that he could no longer do the heavy parts of the work as before and at times he had to stop and lie down to rest.

73. Mr. Byrne had read Mr. O'Reilly's report. John Byrne's own report is dated 30th October, 2004. Mr. O'Reilly's figures pointed to the plaintiff having a gross income of €36,372 gross per annum if not injured with his current profit amounting to €19,497 gross per annum which would indicate a differential of about €16,000. Mr. Byrne indicated a range of options but with the duration of the loss from now until age 65 the capital value of €1 per week with tax (i) at 20% would be 1147 and with tax at 42% would be 1257. The question remains whether the plaintiff's advisers have established a probable differential as to the likely lesser earnings per week in the future.

74. Fergal Gaynor, Chartered Accountant, was called by counsel for the defendant and said he was given only draft accounts of the plaintiff's business from 1998 to 2002, a copy of his tax assessments from 2000 to 2002 and a bundle of invoices from 1998 to 2004. He requested further information:

75. Accounts to date

Tax returns for 1997/8/9/2000

Bank Statements

Statements from Henleys to verify customer statements

76. The defendants' solicitor wrote seeking these and also wage slips. Mr. Gaynor said neither accounts nor tax returns for 2003 and 2004 were provided. He received no information about the plaintiff's other employments, sources of income or investments such as the pub asset or properties nor was he given information about the farm. He had analysed the invoices in the bundle and listed hours worked from the documents provided. He expected at a minimum to be given:

Purchase book

Sales book

Bank accounts and statements

Bank ledger

Receipts under customer's names

77. Mr. Gaynor pointed out that Mr. O'Reilly was trying to determine hours worked so as to determine loss of plaintiff's earnings. This involved different rates of hourly charge. In order to confirm the correctness of the figures one would require statements from the plaintiff's customers namely Henleys, Lett Brothers, and the Forklift Centre in Ballyfermot with dates and times to corroborate the information on the invoices produced to Mr. Gaynor.

78. The lack of supportive documents and then the changed additional information clouded the conclusions made. The O'Reilly report did not take into account the overheads involved in doing extra work or the costs and tax involved payable on profits realised. Furthermore, the plaintiff had worked in the pub and on the penthouse apartment and these should have been taken into account. The hours spent on the pub and apartment would affect the hours available for forklift servicing. There were invoices for the servicing of trucks and an invoice for €4000 for the installation of central heating at the apartment.

79. Mr. Gaynor doubted if the plaintiff had any loss in 2004 but there was a lack of documents or evidence about this alleged loss. He conceded that if the figures in the invoices were correct then possibly the alleged losses for 2001, 2002 and 2003 at €23,000 could be accurate. Normally he would audit figures against the client's bank statement and invoices and customer statements. Mr. Gaynor indicated several blatant deficiencies in the documents provided. By letter dated 30th March, 2004, to the plaintiff's solicitors from the defendants' solicitor the following documentation had been sought:

"1. All primary documentation including accounts, wages slips, tax returns and any other relevant documentation pertaining to the earnings of the plaintiff, Mark Smith for three years prior to the 28th November 2000. We will require copies of the plaintiff's P60s for the tax years ending 1996-2000 inclusive.

2. We will require primary documentation evidencing all income received by the plaintiff in these proceedings since the

28th November 2000 including revenue documentation, tax, returns, wage slips and copy P60s.

3. We will require full details in relation to the client's current earnings including details of his gross and net income.
4. We will require details of any social welfare payments received by the plaintiff since the 28th November 2000.
5. We will require details of any other state benefits or income of the plaintiff received since the 28th November 2000.
6. We will require full details of any employment undertaken by the plaintiff since the 28th November 2000 and details of income received by the plaintiff as a result of such employment including details of his gross/net income benefit, bonuses of any other remuneration."

80. This request should have alerted the plaintiff and his advisers as to what was the sort of corroborative documents which would be required. Similarly the *subpoena duces tecum* sent to the plaintiff on 13th January, 2005, listing several categories of documents which he should bring to court with him, should have galvanised them to gather such of these documents as were available. Likewise the *subpoena duces tecum* served on Patrick O'Reilly listing documents should also have warned him as to what needed to be brought and was likely to be needed. I accept Mr. Gaynor's point that he received no co-operation from the plaintiff's representatives in respect of the documentation he sought and required in order to verify the plaintiff's claim in respect of future loss of earnings.

81. The claim for loss of earnings for the future cannot be reasonably quantified on an actuarial basis. The method of calculation based on hours is of dubious validity but also it is full of gaps and inadequate documentation and to rely on the haphazard figures thrown up would be like standing or building on quicksand. After hearing the preferred evidence purporting to establish a basis for actuarial evidence, I have concluded that the inadequate financial records were provided to Mr. O'Reilly who was being asked "to make bricks without straw". I accept Mr. Gaynor's criticism of the dearth of supportive documents and verifiable accounts.

The plaintiff is entitled to:

82. General damages for pain and suffering and loss of amenities of life from the RTA on 28th November, 2000, to date; (including the trauma and shock of the RTA, the lumbar back injury which required the L4/5 discectomy and decompression on 21st August, 2002; the injury to the knees which required an arthroscopy of the left knee with resection of the medial meniscus on 10th July, 2002. Much distress, pain and muscle spasm as the plaintiff continued to service plant despite pain).

Loss of earnings to date:

83. A figure of €23,000 was agreed as being the plaintiff's loss of earnings between November, 2000 and December, 2003. This was subject to the proviso that this loss was related to, and caused by, injury suffered in the RTA on 28th November, 2000. I prefer and accept the diagnosis of Mr. O'Laoire that the impact in the RTA was the cause of the back injury and the disc rupture. I think that by the year 2004 the plaintiff had sensibly diversified his activities; there was a failure to establish any loss in respect of earnings in that year on the part of the plaintiff.

84. A sum of €20,600 was agreed in respect of special damages. The plaintiff claimed a sum of €3,000 in respect of travel and this was not challenged, so there is a total for special damages to date of €23,600.

85. As for future loss of earnings, having listened at length to the attempts to establish an evidential basis in this respect, I have come to the conclusion that the attempt to establish a differential between past and likely future earnings has failed. However, it is clear that the plaintiff suffered injuries in the collision on 28th November, 2000 including both a damaged lumbar back and injury to both knees. This has left this 32 year old hard working man with a bad back which will be vulnerable for the rest of his life. The very fact of having had an operation on his lumbar spine and the arthroscopy of his left knee will have a dire effect on the plaintiff's employability. I think the plaintiff will persevere at servicing the forklifts for as long as he can endure the pain, but he is likely to have to give up strenuous heavy work, which involves bending or heavy or repetitive lifting, in the not too distant future. Despite his other interests, such as his interest in the home farm, and his share in the pub near Christchurch, I think the plaintiff will continue to rely on his work as a fitter to earn his living for a time and will probably not be able to rely on the home farm for an income to him. The pub may prove a sound investment but this is by no means certain. Certainly the plaintiff's capacity to earn from his manual skills as a fitter has been damaged. He will be caused by the aftermath of the lumbar injury to curtail his work as a fitter in the not too distant future. His continuing disability will in the future come against him. He is likely with his determined personality to strive to find a job but he has been rendered less employable by his injuries in the RTA. The vicissitudes of life may push him back on the labour market where he has been rendered much less employable by the injuries in the RTA. Accordingly I include in the general damages for the future a sum in recognition of the effect which the aftermath of his injuries will have in curtailing his capacity to keep up strenuous activity for much longer and because this disability is likely to persevere and particularly affects him in his vocation as a self employer service plant fitter. The appropriate sum for general damages in future includes a reasonable sum for his loss of future employability.

General damages to date €80,000

Loss of earnings to date €23,000

Special damages €23,600

€126,600

General damages in future €125,400

Including loss of employability

€252,000

86. Counsel for the defendants contended that the plaintiff's case purporting to show loss of earnings based on a difference in hours worked since the RTA was based on very inadequate, incomplete and misleading documentation. I have accepted his criticisms of the rudimentary system of keeping account of his business dealings apparently used by the plaintiff. I do not think that audited accounts are required but there needs to be more cogent evidence than a mass of half illegible invoices of dubious accuracy. Neither the defendant's chartered accountant or this court should have to undertake the arduous task of disentangling a heap of invoices in order to discern the validity of the plaintiff's case in respect of loss of earnings to date and future potential loss of earnings. While I noted that the plaintiff was not recalled to deal with Invoice No 164, his answers previously had been forthright and frank and often against his interest. I think he is impatient of over-precious or very precise administrative detail in respect of accounts, even perhaps tending

towards insouciance, but he would refrain from deliberate exaggeration, hence he did not return to the witness box when he realised that this documentary supportive evidence was so deficient. This case falls well short of the criteria set out in *O'Connor v. Bus Atha Cliath* [2003] 4 IR 459 and *Shelly Morris v. Bus Atha Cliath* [2003] 1 IR 232 where a successful plaintiff has been penalised in costs by reason of deliberate gross exaggeration or other abuse of process, rather than for deficiency of corroborative vouchers and financial records.

87. Counsel for the plaintiff suggested that the manner in which the defendants had fought this case should be marked by aggravated damages. In the light of the difficulties encountered, not just by the defendants' chartered accountant and the Court, but also by the accountant and legal representatives of the plaintiff in the presentation of his case in respect of loss of earnings, this being due to the paucity of verifying and supportive material, I do not accede to this application. I am reminded in respect of this application of the proverb "He who lives in a glasshouse, should not throw stones."

88. Judgment for €252,000 and costs to the plaintiff.