THE HIGH COURT

[2013 No. 9964 P.]

BETWEEN

MARTIN STOKES

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 7th day of April, 2017

Introduction

1. This action arises out of an accident which occurred on 18th September, 2011, at a caravan park or halting site, owned by the defendant at Oldcastlepark, Bownogue, Dublin 22. The plaintiff, who lived with his parents in a caravan at the park, was jogging up a footpath leading from the entrance to the halting site, going towards the caravans, when he alleges that he tripped over a depression or hole in the surface of the footpath, causing him to fall to the ground and suffer a fracture to the knuckle on the third digit of his right hand.

2. The defendant accepts that on or about 18th September, 2011, the plaintiff suffered a comminuted fracture of the knuckle on the third digit of his right hand. Other than that, all matters are in issue. In particular, the defendant argued that having regard to the nature of the injuries, they were unlikely to have occurred in the manner suggested by the plaintiff. They argued that in all probability, the plaintiff had met with his injuries while pursuing his sport of boxing. They submitted that it was more likely that the plaintiff had injured his hand boxing and was fraudulently trying to place the blame on the defendant, by alleging that his injuries happened due to a trip and fall on an unsafe section of the footpath. They submitted that this was the more likely explanation of how his injuries occurred, having regard to the medical evidence in relation to the injuries which are usually suffered as a result of a trip and fall and having regard to the fact that the plaintiff delayed in informing his solicitor or the defendant, of this accident until in or about March 2013.

3. The defendant also argued that the road and footpath in the caravan park constituted a public highway and in these circumstances they were entitled to rely on the defence of non-feasance.

4. In the alternative, it was submitted that as the plaintiff was engaged in jogging, when he allegedly met with his accident, he was a "*recreational user*", within the meaning of the Occupiers Liability Act 1995 and therefore the defendant only owed him a duty not to act with "*reckless disregard*" for his safety. They submitted that there was no evidence that they had so acted in this case.

5. Finally, the defendant submitted that having regard to the state of the locus as shown in the photographs taken by the plaintiff's engineer, the hole or depression in the footpath was clearly visible. They submitted that if the plaintiff had kept a proper lookout while jogging up the path, he would not have met with his accident. They submitted that he was either entirely the author of his own misfortune, or was guilty of a substantial element of contributory negligence.

The Evidence on Liability

6. The plaintiff was born on 18th March, 1993. He was approximately 18.5 years of age at the time of the accident. He had lived with his parents in their caravan at the Bownogue halting site since it opened in 1998. He stated that on 18th September, 2011, at approximately 18:30hrs, he had gone jogging around the roads in the area and was returning up the footpath which led from the entrance to the halting site, to the caravans. The general layout of the footpath was shown in photograph 1 taken by Mr. Conlon, the plaintiff's engineer. The depression or hole shown in photograph 2, was taken approximately 2m from the depression. A closer view of the depression was shown in photograph 3.

7. The plaintiff stated that as he ran up the footpath, his right leg went into the hole or depression and he fell forward. He stated that he fell onto his right hand, which had been turned inwards with the palm facing his body. This meant that his knuckles had come into direct contact with the ground. He felt severe pain in his right hand. On the following day, he went to his G.P. in relation to his hand injury. He was seen by Dr. Lindy Barnes, who was one of the doctors in the practice. She referred him for an x-ray of his right hand. This was carried out on the same day and revealed he had suffered a fracture of the knuckle on the third digit of his right hand. On the following day, 20th September, 2011, the plaintiff was brought to theatre where open reduction and internal fixation was carried out of the fracture site. The nature of the injury, its treatment and sequelea will be dealt with later in this judgment.

8. The plaintiff was asked about access to the halting site generally. Referring to photograph 12 of Mr. Conlon's photographs, the plaintiff stated that this showed the entrance to the caravan park. On the extreme right, there was a pedestrian entrance which led to the footpath on which the plaintiff was jogging at the time of the accident. In the centre of the photograph, there were closed gates. The plaintiff stated that these were kept closed and were only opened by arrangement with the caretaker employed by the defendant, or by arrangement with the Traveller Accommodation Unit, which was based in Tallaght. The gates would be opened to enable caravans to be brought onto the site and taken from the site. To the left of the gates was another open entrance on which there was a fairly steep ramp. This entrance was always open. It was to allow vehicular entrance to the compound. The ramp was designed to prevent the entrance being used for the purpose of bringing caravans onto or out of the site. The plaintiff stated that in relation to the pedestrian entrance to the right and the vehicular entrance with the ramp to the left, these were open all the time and permitted 24hr access to the site.

9. The plaintiff stated that on 17th September, 2011, he had been involved in a road traffic accident, when he was a passenger in a car which was hit from the rear. He had suffered soft tissue injuries to his neck and back as a result of that accident. He confirmed that he had consulted a solicitor in relation to that accident and a claim had been submitted on his behalf to P.I.A.B. The plaintiff stated that he did not inform his solicitor about his trip and fall on 18th September, 2011, nor of the injury to his hand, as he did not realise that he would not get better quickly from this injury and would not be able to go back to his sport of boxing.

10. In cross examination, it was put to the plaintiff that it was somewhat incredible that he would decide to go jogging on the day after he was involved in a road traffic accident. The plaintiff stated that he had had neck and back pain on the day of the road traffic accident. On the following day, he had gone out jogging in the hope that this would alleviate his symptoms.

11. The plaintiff was asked about his initial visits to the G.P. practice. He stated that he went to that practice on 19th September, 2011 in relation to his hand injury. He saw Dr. Lindy Barnes on that occasion. He returned to see his G.P. on 23rd September, 2011, in relation to his neck and back injuries arising out of the road traffic accident. He saw Dr. Murphy on that occasion. By that time, he had had the operation on his hand, which had been carried out on 20th September, 2011.

12. The plaintiff was asked as to when he first consulted his solicitor. He stated that he went to his solicitor on 19th October, 2011, in relation to the R.T.A. He said his hand was in a cast at that time. However, he did not tell the solicitor about the hand injury, or why his hand was in a cast. He stated that he could not offer any explanation as to why he did not tell his solicitor about the accident and the hand injury at that time.

13. It was put to the witness that there was a caretaker employed by the defendant on the site. It was put to the witness that the caretaker was on site for a number of hours each day, Monday to Friday. The plaintiff accepted there was a caretaker employed on the site and that he had seen him after the accident. He was asked as to why he did not report his accident and his hand injury to the caretaker. The plaintiff stated that he thought that the hand would heal quickly and that he would be able to return to the sport of boxing. It was only later, when he realised that he would have ongoing symptoms in his hand and that he would not be able to return to boxing, that he went to his solicitor and reported the matter to him.

14. It was put to the plaintiff that he had had a number of consultations with his solicitor in relation to the R.T.A. and if his hand was the more the serious injury, why had he not told his solicitor about this injury. The plaintiff accepted that his hand injury was causing him more difficulty than the other injuries. He accepted that he knew how to make a claim to P.I.A.B. and that he had accepted their assessment of compensation in relation to the injuries arising out of the R.T.A. He accepted that in the weeks and months following the accident, he knew that his hand was not healing, but he did not tell any representative of the defendant about the accident.

15. It was put to the plaintiff that he had returned to his G.P. in relation to the injuries sustained in the R.T.A., at a time when, according to him, the hand injury was not healing, yet he did not mention it to his doctor. The plaintiff accepted that he had not mentioned the ongoing complaints in relation to his hand, when he consulted the G.P. on various occasions in relation to the neck and back injuries.

16. It was put to the plaintiff that on 4th March, 2013, he had received the compensation from the defendant in the R.T.A. as assessed by P.I.A.B. and that on the following day, his solicitor wrote to the defendants concerning this accident, which was the first that the defendant was made aware of any such accident. The plaintiff accepted that he had only informed his solicitor of the accident and the hand injury, in early 2013. There had been some delay due to the plaintiff being unsure of the date of the trip and fall accident and for this reason, the initiating letter from the solicitor did not issue until 5th March, 2013.

17. It was put to the plaintiff that it was not credible that if he was badly injured in the R.T.A., that he would go jogging on the following day. The plaintiff stated that he had gone for a little jog even though his back was sore. It was put to the plaintiff that it was not credible that if the accident had happened in the manner alleged by him, he had never reported it to the defendant's caretaker on site. The plaintiff stated that he was very clear that he had fallen in the pothole. He did not know why he had not reported it to the caretaker, or made complaint to him. He was asked as to whether there was any logical reason why he did not report the matter to the caretaker. The plaintiff stated that he could not think of a logical reason for not reporting it to him, or to the Traveller Accommodation Unit in Tallaght. He accepted that his mother had a telephone in her caravan, yet they did not report the matter to the defendant.

18. It was put to the plaintiff that, where he had had surgery and his hand was in plaster and where pins and screws had been inserted in his hand, and four weeks later he had gone to his solicitor in relation to another claim, that he did not take the opportunity to tell his solicitor about the trip and fall accident, which had caused the hand injury. The plaintiff stated that he had gone to his solicitor in relation to the road traffic accident, for the purpose of making a claim. He stated that he did not mention the injury to his solicitor, because he thought that the hand would make a full recovery and he would be able to return to boxing. He accepted that his hand was the most painful of the injured areas, but he did not tell his solicitor about it at that time. He waited to see if he would get back to boxing.

19. The plaintiff was asked how long he had lived at the halting site. He stated that he had lived there with his parents since the site opened in 1998. He confirmed that the footpath shown in Mr. Conlon's photographs was the only footpath in the site. He accepted that he had used it on an almost daily basis. However, he stated that he had never noticed the defect in the footpath as shown in the engineer's photographs. It was put to him that, if he had been taking proper care and attention while jogging on the footpath, he would have seen the hole and could easily have gone around it, or jumped over it. The plaintiff stated that when he was jogging, he had kept a lookout of the general area in front of him. However, he was not looking directly down at the ground and for that reason did not see the hole as he approached it. He stated that if he had seen the hole, he would not have stepped into it, he would have run around it. He denied that he was not keeping a proper lookout at the time. He stated that he was looking generally ahead of him and not down at the ground immediately in front of his feet.

20. The plaintiff stated that his right leg went into the hole and he went down and landed with his right hand turned inwards. It was put to him that the defendant's medical expert, Mr. McManus, would say that normally where people trip and fall forward, they land on their outstretched hands with their palms facing outwards towards the surface of the road. The plaintiff stated that he had fallen with his hands turned in and slightly in a fist and for that reason, he had broken his knuckle. It was put to him that Mr. McManus would say that this was a classical boxing injury. The plaintiff did not agree with this. He stated that in boxing, the hands are taped and gloves are worn, so it is not usual to get a fracture of the knuckle.

21. Evidence was given on behalf of the plaintiff by Mr. Alan Conlon, Consulting Engineer. He confirmed that he had inspected the locus and taken the photographs on 8th April, 2013. He had not needed to obtain any permission from anyone to inspect the locus. He merely drove in through the entrance, parked his car, met with the plaintiff and took the relevant measurements and photographs.

22. Mr. Conlon stated that the footpath was approximately 1.2m wide. The hole was approximately 400mm (16 inches) wide and at its centre it was 63mm (2.5 inches) deep.

23. Mr. Conlon stated that the damage to the footpath appeared to be made up of a hole and scoring which ran across the entire width of the footpath. He stated that the most likely cause of this damage, was either by vehicles bringing caravans onto this area of the halting site or alternatively, it was caused by the bucket of a JCB when bringing boulders onto the site as shown in the photographs, or the damage could have been caused by the boulders themselves when being placed in situ.

24. Mr. Conlon stated that a hole of the dimensions and depth of this hole, constituted a hazard on the footpath. While the damage

to the footpath was clearly visible from some distance away, the exact depth of the hole and therefore the danger it posed, was obscured by the grass in the centre of the hole itself. This was clearly evident from photographs 2 and 3. Given the extent of grass growth at the locus, he thought that the hole had been there for quite a while.

25. In cross examination, Mr. Conlon accepted that a person standing in the position of the cameraman in photograph 1 which was approximately 12m from the hole, would be able to see the damaged area of the footpath. However, such a person would not be aware of the danger posed by the damage, due to the fact that the grass obscured the depth of the depression. He stated that he had had to use a ruler and a spirit level in order to demonstrate the exact depth of the hole. He accepted that if a person using the footpath saw the damaged area, they could elect to run around it, or step over it. He accepted that the damage was clearly visible in photograph 2, but the depth of the depression was obscured by the grass. Thus, the depth of the hole would not have been apparent to a jogger.

26. Mr. Conlon accepted that as the plaintiff had lived at the locus for a considerable number of years, he would have been familiar with the area. However, because this was an isolated area of damage to the footpath, a person using the footpath may not have been aware of the damage until the accident happened. He accepted that when jogging, a person must keep a proper lookout of the path in front of them.

The Evidence on Causation and Quantum

27. The plaintiff was asked about his involvement in boxing. He stated that he had been boxing since the age of 8 as a member in Drimnagh Boxing Club. He had taken part in the Dublin leagues. He had a boxing card. He stated that he had not been able to get back to boxing, as a result of the injury to his right hand.

28. The plaintiff stated that he had never tried to get back to boxing after the accident. He was afraid to try it. He stated that he had not done any jogging since the accident. He had not really done any other sporting activity since then.

29. The plaintiff was asked as to whether he had fallen into any other potholes. Initially he stated that he had not, but then corrected himself to say that in September 2013, he had fallen into another pothole, where he suffered bruising to his leg. It was put to him that the hospital notes from that admission stated "walked into a pothole". The plaintiff accepted that that was correct. He accepted that he had had two falls in two potholes. This accident and the second one which caused bruising to his leg.

30. The plaintiff was asked whether he had had any physiotherapy treatment. He stated that he had had a few sessions of physiotherapy initially after the operation after his hand had been taken out of the cast. He stated that he had had difficulty closing his fingers for approximately a year after the accident. He was shown a number of exercises to improve hand and finger mobility.

31. The plaintiff stated that after the operation, his hand had been immobilised in a cast, which he had worn for a couple of months. His hand was very sore and painful. He had not been able to go to the gym, or to do any boxing. He never returned to the boxing. He stated that he missed the boxing and had become somewhat unfit. He did not have any actual hobbies. He stated that he had been doing a FAS course in woodwork and allied trades, in Bownogue Community Centre. He was not able to do that after the accident and he did not finish the course.

32. In relation to his present condition, the plaintiff stated that his hand was coming on "OK". He would get pain in the hand now and then. It tended to be painful in cold weather.

33. Evidence was given on behalf of the plaintiff by Dr. Lindy Barnes, who was one of the doctors in his G.P. practice. She confirmed that she had seen the plaintiff on 19th September, 2011, when he had told her that he had fallen while out jogging the day before and injured his right hand. Examination revealed swelling and tenderness of the third metacarpal bone in the right hand. She sent the plaintiff to hospital for x-rays, which were done on the same day. He was admitted to hospital for operative treatment on the following day.

34. In cross examination, she stated that she may have seen the plaintiff at the practice before 19th September, 2011, but she had not seen him after that as far as she was aware. She stated that she accepted what she had been told by the plaintiff about the accident. He did not tell her about the R.T.A. on 17th September, 2011.

35. Evidence was also given on behalf of the plaintiff by Dr. John Murphy. He stated that he was the plaintiff's G.P.. The plaintiff and his family had been patients of his, since he joined the practice in 2000. Dr. Murphy confirmed that the plaintiff had initially seen Dr. Barnes at the practice on 19th September, 2011. According to his records, he first saw the plaintiff on 15th June, 2012, approximately nine months post injury. At that time, the plaintiff complained of stiffness at the site of the fractured metacarpal on the right hand. He had a pin inserted in that area. There was decreased grip power in the right hand due to stiffness. The wound was healing well. He referred the plaintiff for physiotherapy treatment, as he had only had a short course of physiotherapy treatment in hospital after the operation. He also prescribed pain relieving medication.

36. The plaintiff was reviewed on 21st February, 2013, when he complained of ongoing episodes of pain and parasthesiae overlying the fracture site, particularly noticeable when the hand was cold. As a result of these symptoms, the plaintiff had been unable to return to his hobbies of boxing, or lifting weights at the gym. Examination revealed a scar consistent with a well healed wound overlying the right third metacarpopalangeal joint. There was prominence of this joint, due to the internal fixation which remained in situ. There was a satisfactory range of movement of the right third finger. Grip power of the right hand was satisfactory. There was no evidence of neurological deficit. The doctor noted that he remained moderately impaired in relation to reaching, manual dexterity and lifting/carrying. He expected that a full resolution of symptoms without any sequelea should occur within a period of six months. An x-ray was being arranged to confirm the situation. Treatment with anti-inflammatory analgesics or simple analgesics may be required intermittently for pain, whilst resolution of symptoms was occurring. He expected a full recovery to be made within approximately six months, depending on a satisfactory x-ray result.

37. The plaintiff re-attended at the surgery on 1st August, 2013, complaining of persistent pain in the right hand at the site of the fracture. An anti-inflammatory analgesic medication, Ibuprofen, was prescribed. The plaintiff re-attended on 16th October, 2015, complaining of ongoing right hand pain at the fracture site. He had decided to avoid taking analgesic medication if at all possible and only did so, when he was experiencing severely troubling symptoms. He was given a further prescription for Ibuprofen, to be taken as required.

38. The plaintiff was most recently reviewed by Dr. Murphy on 25th August, 2016. He reported that he had experienced severe pain at the fracture site at a level 8/10 in severity for the first three years following the injury. Subsequently, he had been experiencing almost constant pain at the site, which was at a level of 7/10 in severity for most of the time. The pain was noted to be more severe

in cold weather. As a result of the symptoms, the plaintiff stated that he had been unable to return to boxing and was unable to lift or carry heavy weights and as a result, he had been unable to attend the gym since the accident, which was a pursuit which he had previously enjoyed. Dr. Murphy noted that he was right hand dominant. In view of the chronic nature of the pain, the plaintiff had not been keen to take analgesic medication, apart from when the symptoms were particularly distressing for him.

39. On examination on 25th August, 2016, there was a well healed scar over the third metacarpophalangeal (hereinafter, MCP) joint. There was tenderness to palpation at the scar, which was at the site of the fracture to the joint. Neurological examination was normal. There was no evidence of swelling of the third MCP joint. Flexion of the joint was slightly reduced to 90% of normal range, with extension of the joint also being reduced to 90% of normal range.

40. Dr. Murphy was of opinion that the plaintiff continued to experience moderately severe pain at a severity level of 7/10 on most days since the fracture had occurred almost five and a half years previously. This had interfered with his general lifestyle and had restricted his ability to lift and carry heavy objects. He noted the conclusion reached by Mr. O'Shea in September 2014, that it was unlikely that any further resolution of these symptoms would occur. That remained the situation as of August 2016.

41. Dr. Murphy stated that in the R.T.A., the plaintiff suffered a moderate soft tissue injury to his neck and back. In relation to the issue of the plaintiff going jogging on the day after the accident, he stated that after a car accident, some people would rest for a number of days to see if their injuries would settle, however, other people and in particular those who were involved in sports, may elect to try to "*run it off*". They might go for a gentle jog in an effort to see whether the pain and stiffness in their neck and back would go away. He did not think that it was that unusual that the plaintiff should go jogging on the day after he was involved in the car accident.

42. He stated that given that the plaintiff had a plate and screw in situ, he would not recommend that the plaintiff return to boxing. However, he said that that was really a question for an expert.

43. A medical report from Mr. Kieran O'Shea, Consultant Orthopaedic Surgeon, dated 8th September, 2014, was admitted in evidence. Although the dates in this report appear to be incorrect, it appears that the operation carried out to the plaintiff's finger consisted of plate and screw fixation of the metacarpal head fracture. Pre-operative x-rays had revealed a very comminuted fracture of the metacarpal head. A CT scan confirmed the extent of comminution and disruption of the joint surface at the metacarpal side of the MCP joint. A subsequent x-ray carried out on 23rd December, 2011, confirmed plate and screw osteosynthesis of the metacarpal head fracture, with satisfactory alignment of the fracture.

44. X-rays taken on 22nd September, 2014, demonstrated complete healing of the fracture. There was some alteration in the contour (flattening) of the metacarpal head, but no evidence of degenerative changes or secondary arthritis within the joint.

45. When examined on 8th September, 2014, the plaintiff complained of ongoing pain and swelling in the right middle finger. He was sensitive to cold weather and occasionally developed pins and needles in the hand. He attended his G.P. for analgesic prescriptions. He had previously enjoyed boxing, but he felt that he could not train any more. In particular, he could not hit a bag and he was afraid to use the right hand for weight training exercises. Clinical examination revealed a well healed scar measuring approximately 5cm over the knuckle of the middle finger. There was normal alignment of the digits. There was no neurological deficit. In terms of range of motion, there was flexion from 10 – 80 degrees at the middle finger MCP joint, compared with 0-90% in the normal contralateral side. There was near full composite digital flexion, there was no particular pain or tenderness to palpation. Mr. O'Shea did not anticipate that any further treatment would be required.

46. Mr. O'Shea noted that the plaintiff suffered a comminuted fracture of the right middle finger metacarpal head. Treatment consisted of plate and screw fixation of the fracture. Following from this injury, he had rehabilitated well. There was a modest loss of mobility at the joint where the fracture occurred. X-ray evaluation confirmed satisfactory healing and alignment with no evidence of secondary degenerative changes. In spite of this, the plaintiff reported significant symptoms and functional issues with his right hand as a result of the fracture. Due to the fact that the fracture involved the joint, there was a risk that he may go on to develop post traumatic arthritis, but he put this risk as low, given the fact that no changes were evident on the most recent x-rays and that three years had elapsed since the injury and surgical treatment. In terms of a prognosis, he was of the view that as the symptoms reported by the plaintiff, had not improved during the three years since the accident, it was unlikely that any further resolution of these symptoms would occur.

47. Evidence was given on behalf of the defendant by Mr. Frank McManus, Consultant Orthopaedic Surgeon. He first saw the plaintiff on 28th January, 2014. The plaintiff gave him a history of the accident and told him that he had not returned to boxing, as his hand was not one hundred percent recovered. Examination revealed that the plaintiff had a scar at the fracture site, otherwise his hand was relatively normal. The knuckle on the third finger was a little smaller than the adjoining knuckle. Mr. McManus said that the plaintiff had no disability when he saw him. He went on to state that when people suffer falls, usually the hand is outstretched in front of them, so they get a dorsi-flexion injury. Most commonly, this results in a Colles fracture to the wrist. If the hand is turned inwards, it causes what is known as a reverse Colles fracture. The plaintiff's injury was unusual for a fall, but was a classic injury in boxing. The plaintiff injured the knuckle which is most prominent and to the fore in a boxing action.

48. Mr. McManus stated that it was difficult to explain how the plaintiff met his injuries from a fall. A split condyle, was caused by impact to the middle of the joint. This would be similar to having a chisel held directly over the joint and a hammer knocking down on the chisel, so that the knuckle itself would split. He could not recall ever seeing such an injury after a fall. If one had this injury to the third metacarpal, the cause would be either by hitting something in front of the person, or falling directly onto it.

49. In cross examination, Mr. McManus conceded that it was possible that the plaintiff could have got this injury in a fall. It was put to the witness that when the plaintiff had described his fall in his evidence, he had shown the hand turned inwards and the fingers somewhat closed over, but not in a fully closed fist. Mr. McManus stated that if the accident happened in that manner, the fracture to the knuckle could have happened, but the blow to the knuckle would have to be hit spot on, like a hammer and chisel to the knuckle. Counsel put it to the witness that if the plaintiff was boxing, with the hand bandaged and wearing boxing gloves, it would be unlikely that he would break his knuckle. Mr. McManus conceded that in those circumstances the plaintiff would be unlikely to suffer the injury that he did. Such an injury would be possible if there was a bare fist, as in bare knuckle boxing, but would be unlikely in ordinary boxing, where bandages and gloves were worn.

Legal Submissions

50. The defendant submitted that there were a number of features in the case which were quite simply incredible. Firstly, it was incredible that the plaintiff would go for a jog on the day after he had been involved in a car accident. Secondly, if the plaintiff had met with this accident in the manner alleged by him, it was incredible that he did not mention the accident or the injuries suffered by

him, in the weeks and months following the accident, when he had been consulting with his solicitor in relation to his compensation claim arising out of the car accident. Thirdly, it was submitted that if the plaintiff had, in fact, tripped on the footpath, due to a hole in the surface of the path, it was hard to believe that he would not have made some complaint either to the caretaker, who was on site for a number of hours each day between Monday and Friday, or to the Traveller Accommodation Unit in Tallaght. Fourthly, there was no credible explanation furnished by the plaintiff as to why it was, that he delayed in bringing the accident to the attention of his solicitor until the early part of 2013. It was submitted that the plaintiff's explanation in relation to his delay in this regard, was not credible.

51. The defendant's second submission was that the locus of the accident, was a public highway. The uncontested evidence was that there was free access to the halting site for both pedestrians and vehicular traffic at any time during the day or night, throughout the week. Any member of the public, and not just those residing at the halting site, had a right of access to the locus whenever they wished. In these circumstances, it was submitted that the defendant was entitled to rely on the defence of non-feasance in relation to the condition of the footpath.

52. It was submitted in the alternative, that the plaintiff was a recreational user within the meaning of the Occupiers Liability Act 1995, due to the fact that he was jogging at the time that he met with his accident. In these circumstances, it was submitted that the duty owed to the plaintiff in respect of a danger on the premises, was a duty on the defendant not to act with "reckless disregard for the safety of the plaintiff". It was submitted that there was no evidence before the court that the defendant had acted with reckless disregard for the plaintiff's safety.

53. In support of this submission, counsel for the defendant referred to the decision of Barton J. in *Fitzgerald v. South Dublin County Council* [2015] 1 I.R. 150. In that case, the plaintiff lived on a council housing estate. On the day of the accident, he and some friends had gone to a green area within the housing estate, which was adjacent to his home. The boys set up a temporary football pitch by placing jackets and other items of clothing on the ground to act as goals. While the plaintiff was crossing the common area to retrieve a football, he slipped and fell to the ground, causing injury to his upper back, when it came into contact with a broken bottle which was lying in the grass. Barton J. held that in the circumstances of that case, the plaintiff was a recreational user within the meaning of the 1995 Act. He stated as follows at para. 54 of his judgment:-

> *"The plaintiff was involved in a 'kick-about' with some of friends. They had erected a temporary goal by using some clothes. What else was this if it wasn't a recreational activity within the meaning of the Act? The plaintiff was a recreational user of the open green space and as such the defendant's duty towards him was that as set out in s.4 of the Act."*

54. Mr. O'Scannaill, S.C., on behalf of the defendant submitted that the factors to which the court can have regard when determining whether a defendant acted with reckless disregard towards a plaintiff, were set out in s. 4(2) of the Act. He further submitted that the correct interpretation of what might constitute "*reckless disregard*", meant conduct which was greater than "*gross negligence*". He referred to the dicta of Barton J. at para. 29 of his judgment:-

> *"In choosing the terminology 'reckless disregard', the Oireachtas determined that the point at which the occupier was to have a liability should be quantitatively greater than that which may be said to constitute 'gross negligence'."*

55. Finally, counsel submitted that the hole or depression in the footpath was clearly visible in Mr. Conlon's photographs. Photograph 1 showed the view of the locus from a distance of 12m. The subsequent photographs showed the view as one moved closer to the locus. Counsel submitted that the plaintiff had lived in the halting site for a large portion of his life. In these circumstances, he must have known of the presence of the hole or depression and he should definitely have seen it, if he was keeping a proper lookout. Had he done so, he could easily have gone around it, or jumped over it. Accordingly, it was submitted that the plaintiff must be found guilty of a considerable element of contributory negligence.

56. In response, Mr. Brennan, S.C., on behalf of the plaintiff stated that in regard to the assertion that it was incredible that the plaintiff would elect to go jogging on the day after being involved in an R.T.A., the evidence of the plaintiff's G.P., was that some people will try to "*run it off*", and in such circumstances, the plaintiff's actions could not be seen as being unusual or incredible. In relation to the other areas where the defendant had suggested that the plaintiff's behaviour was incredible having regard to the case made by the defendant, counsel submitted that although the defendant had not done so explicitly, it was clear from the tenor and content of the questions put to the plaintiff, that they wished the court to draw the inference that the plaintiff's injuries had been sustained when he was boxing and that he was telling lies about this accident in an effort to blame the defendant for those injuries to wrongfully obtain compensation for them. Counsel stated that if the plaintiff had suffered his injury while boxing and he wished to obtain compensation in respect of that injury, he was in the almost unique position, in that he had an ideal opportunity to obtain compensation, due to the fact that he had been involved in a road traffic accident on 17th September, 2011, where liability was not in issue. Counsel suggested that it would have been far easier for the plaintiff to make the case that he got his hand injury in that accident, rather than dreaming up the trip and fall accident.

57. The plaintiff's counsel accepted that there had been delay on the part of the plaintiff in pursuing the matter. Counsel suggested that that may have been because the defendant was effectively the landlord of the site and was landlord to the plaintiff's parents. In these circumstances, it was understandable that he would have been reluctant to bring a claim against them. It was suggested that this was a logical explanation for the delay on the part of the plaintiff in pursuing the matter.

58. It was submitted that the locus was not a public highway. It was a footpath within an enclosed site, which was in the ownership of the defendant. The road leading from the entrance to the halting site, only serviced the caravans on the site. While members of the public did have an unrestricted access to the halting site, that did not convert the road into a public highway. Section 10(5)(a) of the Roads Act 1993, provides that a road authority shall keep a schedule and map of all public roads in respect of which it has responsibility. Counsel submitted that if the defendants wished to put forward the case that this was a public road in respect of which it had responsibility, they should have produced a copy of the statutory map or schedule showing the particular road and footpath marked thereon. They had not produced this evidence. Counsel pointed out that in a letter dated 10th November, 2014, the defendant confirmed that in relation to Oldcastlepark estate, residential caravan park, the roads, footpaths, sewers, water mains and public lighting abutting the above premises were in charge of the County Council Housing Department. When the defendant's solicitor was asked to clarify the meaning of that letter, they replied by letter dated 4th June, 2015, stating that the basis for the letter of 10th November, 2014, was that responsibility for the maintenance of the entire of the Oldcastle Park residential caravan park lay with the housing department of South Dublin County Council. Counsel submitted that in light of these admissions, the defendant itself had accepted that the locus was under the charge of the Housing Department rather than the Road's Department.

59. Counsel further submitted that even if it was held to be a public road, the defence of non-feasance was not available to the

defendant, as the damage was not caused by ordinary wear and tear, but was a "scoring" across the path, which was probably caused by a caravan being pulled onto the path, or more likely by the bucket of a JCB, or by one of the boulders.

60. Counsel also made reference to the decision in *Smeltzer v. Fingal County Council* [1998] 1 I.R. 279, where Costello P. stated that the law relating to highways and the creation of public rights of way was a very ancient one. The relevant principles were well established. A distinction is made between a permission granted by an owner of land to members of the public to walk on pathways on his land, and the dedication to the public of those pathways. To establish a public right of way, what has to be proved is an intent on the part of the owner to dedicate his land to the public, an actual dedication and acceptance by the public of the dedication. It was submitted that none of these things had happened in relation to the locus of the accident.

61. In relation to the issue as to whether the plaintiff was a "*recreational user*" of the property within the meaning of the Occupiers Liability Act 1995, it was submitted that as the plaintiff lived at the caravan park, he was a "visitor" within the meaning of the 1995 Act. The fact that he was jogging up the footpath, instead of walking on it, did not convert him from a visitor into a recreational user. The defendant as the owner and occupier of the premises, owed him the common duty of care as defined in s. 3 of the 1995 Act. It was submitted that the defendant had breached that duty of care by failing to repair the damage to the footpath, which was reasonably longstanding, due to the growth of grass within the hole itself.

62. Finally, in relation to the allegation of contributory negligence, the plaintiff relied on the evidence of Mr. Conlon, that while the dimensions of the depression were visible, the depth of the depression of 2.5 inches, was not readily apparent due to the growth of grass in the depression. Thus, as the plaintiff was jogging up the path, he may have been aware of some scoring across the width of the path, but he would not have been aware of the depth of the depression. In these circumstances, it was submitted that he was not guilty of contributory negligence when his foot went into the hole.

Conclusions

63. The first question is whether the accident happened in the way described by the plaintiff. The defendant argued that this type of injury was typical of a boxing injury. Mr. McManus described it as a classical boxing injury, where there is the application of considerable force to the knuckle of the third digit, which causes the knuckle to split in two. He said that it was similar to someone holding a chisel against the knuckle and hammering on it. He stated that this injury was atypical for a trip and fall accident. Usually in such circumstances, a person will fall forward on their outstretched arms and hands, which will normally lead to a Colles fracture of the wrist. However, in cross examination, Mr. McManus conceded that one could get this injury in a fall to the ground. He also accepted that if a person was wearing bandages and boxing gloves when participating in boxing, they would be unlikely to suffer a comminuted fracture of the knuckle, as suffered by the plaintiff.

64. The defendant also pointed to the extraordinary delay in the plaintiff informing his solicitor or the defendant, of this accident. They maintained that it was significant that the initial letter from the plaintiff's solicitor dated 5th March, 2013, had been written the day after the plaintiff had received a cheque from the defendant's insurers in respect of the traffic accident, pursuant to acceptance of the P.I.A.B. offer. The defendant submitted that it was incredible that the plaintiff had attended with his solicitor on a number of occasions in relation to pursuing his claim for compensation arising out of the car accident, but did not mention his hand injury until 2013.

65. In considering this issue, the starting point must be that we know de facto that the plaintiff had a comminuted fracture of the knuckle on the third digit on his right hand on 19th September, 2011. This required operative treatment, which was carried out on 20th September, 2011. The defendant makes the case that it was incredible that the plaintiff would go jogging on the day after he had been in a road traffic accident in which he suffered soft tissue injuries to his neck and back. I accept the evidence of Dr. Murphy that some people, in particular those who are engaged in sport, would tend to try to "*run off*" a soft tissue injury, which may not have been that acute on the day after the accident. While some people would rest after an accident, others may try to "*run it off*". I accept this as a credible explanation for the plaintiff going jogging on the day following the car accident.

66. While the defendant did not directly put it to the plaintiff that this was a fraudulent claim, it was obvious from the content and tenor of the questions put to the plaintiff, that the court was being invited to draw that conclusion. The defendant submitted that the plaintiff probably suffered the fracture in the course of boxing, but decided to fraudulently claim that his injury had occurred due to a trip and fall on the path in the caravan park on 18th September, 2011.

67. I do not think that this allegation is established on the evidence before the court. I think the submission made by Mr. Brennan S.C. on behalf of the plaintiff, which was to the effect that, if this plaintiff had in fact injured his hand while boxing and wanted to wrongly claim compensation for such injury, this plaintiff had an ideal opportunity to do so, by stating that he had suffered the injury in the course of the car accident on 17th September, 2011. Liability was not in issue in respect of that accident, so it would have been relatively easy for the plaintiff to ascribe the hand injury to that accident, particularly as there was no dispute but that the plaintiff did have a fracture of his knuckle when he attended hospital on 19th September, 2011.

68. The defendant also stated that the delay in the plaintiff mentioning this accident to his solicitor and failing to make any complaint to the caretaker, or to the Traveller Accommodation Unit in Tallaght, was highly suspicious. While the delay is certainly unusual, I am of opinion that it actually supports the proposition that this accident did in fact happen in the way alleged by the plaintiff. Usually, if a party wants to put forward a fraudulent claim, they do two things; firstly, they obtain the assistance of one or more "*witnesses*", who will support their version of the accident. Secondly, they usually make sure to make complaint soon after the accident to the proposed defendant and to their solicitor. In other words, they take care to tee up their claim properly. They do not wait over a year to mention their fraudulent case to any one. I am satisfied that the plaintiff's conduct after the accident, is not indicative of this being a fraudulent claim.

69. In the course of his submissions, Mr. Brennan put forward an argument that the delay in notifying the defendant and bringing the claim, could be explained by the fact that the plaintiff was a young man of eighteen and a half years, who lived with his parents at the caravan park, which was owned and run by the defendant. The defendant was effectively the landlord to his parents. He also wished to obtain a caravan in the same park in the future. It was submitted that in such circumstances, he was not likely to want to rush and bring a claim against the defendant.

70. That may well be an attractive and logical explanation for the delay on the part of the plaintiff, but unfortunately no evidence was given that this was in fact the reason for his delay. The plaintiff stated clearly that he did nothing about his injury, as he thought that it would go on to heal fully and that he would not have any lasting problems with his hand and in particular, that he would be able to return to boxing. It was only when it became clear that he would have ongoing symptoms and he would not be able to return to boxing, that he decided to bring a claim for compensation in respect of this injury. I am satisfied that, while it was certainly unusual for a plaintiff to wait approximately eighteen months to bring the accident to the attention of his solicitor and the defendant,

the plaintiff has given a credible explanation for this delay. The court also notes that the plaintiff's account is supported by the evidence of Dr. Barnes, who testified that the plaintiff had told her on 19th September, 2011 that he had fallen and hurt his hand when out jogging the previous evening. Thus, while he delayed in bringing the matter to the attention of the defendant, or his solicitor, he has been consistent in his account of the accident, since the day after the accident. Taking all of these matters into account, I am satisfied that this is not a fraudulent claim and that the accident happened in the manner described by the plaintiff. Having accepted the plaintiff's explanation for the delay in notifying the defendant, I am satisfied that there has been sufficient explanation for non-compliance with s. 8 of the Civil Liability and Courts Act 2004.

71. The second issue is whether the locus was a public highway. From Mr. Conlon's photographs, in particular photographs 1, 2, 4, 5, 8 and 12, it is clear that the caravan park is an enclosed space, which appears to be bounded by walls. The road and footpath lead from the front entrance to the caravans. They do not lead anywhere else, either to shops, or to another housing estate, or anything like that.

72. I accept the submission made by counsel for the plaintiff, that this road is similar to an internal road leading to a block of corporation flats. I also accept the fact that if the road was a public road, which had been taken in charge by the defendant, then it should have been noted in a schedule or map maintained by the Road's Authority pursuant to s. 10(5)(a) of the Roads Act 1993. The defendant did not lead any evidence that this road was entered in any such schedule or map.

73. I have also had regard to the correspondence from the defendant and its solicitors, which confirmed that the area was under the control of the defendant's housing department. Taking all of these matters into account, I am satisfied that the road and footpath at the locus, were not a public highway. Counsel for the defendant referred to the decision in *McGeown v. Northern Ireland Housing Executive* [1995] 1 A.C. 233. In that case, the plaintiff had suffered injury while walking on a footpath in a public housing estate, over which the public had acquired a right of way. In the House of Lords, it was held that a person using a public right of way did so by right and could not be the visitor of the owner of the land over which the way passed for the purposes of the Occupier's Liability Act (Northern Ireland) 1957, or the Occupier's Liability Act 1957 of England and Wales; accordingly the landowner was not liable to the user of a public right of way for negligent non-feasance.

74. The House of Lords further held that although the plaintiff would have been a licensee of the housing authority in respect of the path on which she had fallen, before it had become a public right of way, that license had merged in the right of way subsequently established; and accordingly it made no difference that the path had formed part of a means of access for the plaintiff to and from the house of which her husband was tenant. I do not think that this case is of relevance to the circumstances of the present case as we are not dealing here with the creation of a public right of way. Furthermore, I am not sure that the courts in Ireland would reach the same decision, having regard to the provisions of the Occupier's Liability Act 1995.

75. Even if I am wrong in holding that the road and footpath did not constitute a public highway, I am satisfied that the defence of non-feasance would not apply in this case. The damage to the footpath was not caused by normal wear and tear. I accept the evidence of Mr. Conlon that the scoring across the footpath was most likely caused by the servants or agents of the defendant when placing the boulders in situ. In particular, that the damage was caused by the bucket of a JCB or a boulder being dragged across the path. I note that the same conclusion as to the probable cause of the damage to the footpath, was reached by Mr. Rowan, the engineer retained on behalf of the defendant, whose report was admitted in evidence. I am satisfied that the creation of the hole and the scoring across the path constituted misfeasance by the defendants, its servants or agents, rather than being due to normal wear and tear.

76. The next issue is whether the plaintiff was a "*recreational user*" within the meaning of the Occupiers Liability Act 1995, at the time of the accident. Again, one must look at the uncontroverted facts. The caravan park was owned and controlled by the defendant. Accordingly, they were the occupiers of the site pursuant to the 1995 Act. The plaintiff's parents had lived there since the park was opened in 1998. The plaintiff had lived with them at that location since that time. In these circumstances, I am satisfied that he was a "*visitor*" on the premises, within the meaning of the 1995 Act. This meant that the defendant owed him the common duty of care as defined in s. 3 of that Act.

77. The defendant has relied on the decision of Barton J. in *Fitzgerald v. South Dublin County Council*, as authority for the proposition that, as the plaintiff was jogging at the time of the accident, he was on the premises as a "*recreational user*". It was submitted that in such circumstances, the defendant only owed him a duty in respect of any danger on the premises, not to act with reckless disregard for his safety. They further rely on the dictum of Barton J. in that judgment, to the effect that in choosing the terminology "*reckless disregard*", the Oireachtas determined that the point at which an occupier was to have a liability should be greater than that which may be said to constitute gross negligence. The defendant submitted that on the evidence, it was not established that the defendant had acted with reckless disregard for the safety of the plaintiff.

78. Prior to the 1995 Act, the common law set out the duties which an occupier owed to various entrants onto his property. The extent of the duty varied according to the category of the entrant. The most onerous duty was owed to the invitee, who was seen as conferring some social or commercial benefit on the occupier. The next level was the duty owed to a licensee, who had permission to enter the land, but did not confer any particular benefit on the landowner. The lowest duty was owed to the trespasser, who entered the land without any permission at all, or did so contrary to the express wishes of the landowner.

79. This area of the law was changed by the provisions of the Occupier's Liability Act 1995. The statutory code provides for different duties of care being owed by the occupier to different classes of entrant onto the property. A "*visitor*" is defined as (a) an entrant other than a recreational user, who is present on premises at the invitation or with the permission, of the occupier or any other entrant specified in para. (a), (b) or (c) of the definition of "*recreational user*"; (b) an entrant, other than a recreational user, who is present on premises by virtue of an express or implied term in a contract, and (c) an entrant as of right, while he or she is so present as the case may be for the purpose for which he or she is invited or permitted to be there, for the purpose of the performance of the contract or for the purpose of the exercise of the right, and includes any such entrant whose presence on the premises has become unlawful after entry thereon and who is taking reasonable steps to leave.

80. The occupier owes a duty of care known as "*the common duty of care*" to a visitor. The common duty of care means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety, and if the visitor is on the premises in the company of another person, the extent of the supervision and control of the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage from any danger existing thereon.

81. The next category is the duty owed to "*recreational users*" and "*trespassers*". A "*recreational user*" is defined in the Act as an entrant who, with or without the occupier's permission, or at the occupier's implied invitation is present on premises without a charge

(other than a reasonable charge in respect of the cost of providing vehicle parking facilities) being imposed for the purpose of engaging in a recreational activity, including an entrant admitted without charge to a national monument pursuant to s. 16(1) of the National Monuments Act 1930, but not including an entrant who is so present and is – (a) an member of the occupier's family who is ordinarily resident on the premises, (b) an entrant who is present at the express invitation of the occupier or such a member, or (c) an entrant who is present with the permission of the occupier or such a member for social reasons connected with the occupier or such a member.

82. A "recreational activity" is defined in the Act as meaning any recreational activity conducted, whether alone or with others, in the open air (including any sporting activity), scientific research and nature study so conducted, exploring caves and visiting sites and buildings of historical, architectural, artistic, archaeological or scientific importance.

83. The duty owed by an occupier to a recreational user is set out in s. 4 of the Act. It provides that in respect of a danger existing on premises, an occupier owes towards a recreational user of the premises or a trespasser thereon "the person" a duty – (a) not to injure the person or damage the property of the person intentionally and (b) not to act with reckless disregard for the person or the property of the person except insofar as the occupier extends the duty in accordance with section 5. The section goes on to set out a number of factors which can be looked at in determining whether or not an occupier has acted with reckless disregard towards the recreational user.

84. It follows from the defendant's submission, that a person could have a changing status depending on the exact activity being carried out by them at any given time. If one applies this argument to this case, it would mean that the plaintiff would be classed as a "*visitor*", when he walked along the footpath when going to and from school, or when getting a message from the shops, but would be classed as a "*recreational user*", when he went for a jog around the roads and jogged down the path on his way out and up the path on his way back. If, having returned to his caravan, he got cleaned up and walked down the path to meet his friends, or to go to the shops, he would revert to being a visitor.

85. I do not think that the legislation intended that there should be changing duties of care owed to an entrant, depending on what activity he or she was doing at any one time. It would be absurd that if I invited a man to come to my house he would be a visitor while he walked up to the front door and entered the property, but would be a recreational user if he went into the back garden to kick a ball with my son, only to revert to being a visitor when he finished the game and came back into the house to have a drink or a meal.

86. I am satisfied that the logical interpretation of the statute, is that the classification of the entrant as either a "*visitor*", or a "*recreational user*", is determined by the circumstances in which they enter the property in the first place. If they are present as a visitor as defined in the Act, they do not loose such status, merely because they engage in some form of recreational activity while on the premises. Accordingly, I am satisfied that the plaintiff did not loose his status as a visitor, merely because he was jogging up the footpath on the evening that he met with his accident.

87. I do not think that this interpretation of the law, is at variance with the decision of Barton J. in *Fitzgerald*. In that case, the plaintiff and his friends had entered onto the green space near his home for the express purpose of playing football. The green space was separate and distinct from the land constituting his house and garden. So when he entered onto the green area, he was entering a different locus separate from his house and he did so for the sole purpose of playing football. In these circumstances, it was reasonable to hold that he entered onto the green space as a recreational user.

88. Turning to the nub of the case on liability, the essential question is, whether the defendant as occupier, breached the common duty of care which it owed to the plaintiff on the day in question. I am satisfied that the depression and scoring on the surface of the footpath, constituted a danger to people using it. I am satisfied that on the balance of probabilities, this state of affairs had been caused by the servants or agents of the defendant, when placing the boulders in situ. Even if the damage was caused by some third party, it is clear from the growth of the grass in the depression, that it had been done a significant time prior to the plaintiff's accident. The defendant, as occupier, should have taken steps to repair the damaged footpath. In the circumstances, the defendant must bear responsibility for the dangerous state of the locus on the day of the accident. In failing to repair the footpath, the defendant breached the common duty of care which it owed to the plaintiff.

89. In relation to the allegation of contributory negligence, I accept the evidence of Mr. Conlon that, while the existence of the depression and scoring was visible from a distance of approximately 12m, given the growth of grass in the depression, the depth of the depression was not readily apparent to someone using the footpath.

90. I also accept the plaintiff's evidence that he was not looking directly at the ground while jogging. That is reasonable. A jogger will have a general view of the ground in front of him, when he is some distance away, but because his eyes are around 2m above ground level, he is not likely to see dangers on the surface of the path where he is actually running, unless he makes a conscious effort to look down at the ground immediately in front of him. As this hole and scoring were not readily apparent from far back, it was reasonable that he was not looking at his feet when traversing this area of the path. In the circumstances, I decline to make any finding of contributory negligence against the plaintiff.

91. In relation to the issue of general damages, the plaintiff suffered a nasty fracture to the knuckle on the third finger of his right hand. This required surgical treatment in the form of open reduction and internal fixation, which was carried out two days after the accident. The plaintiff's wrist and hand was initially immobilised in a cast. He had some physiotherapy treatment in hospital and there is a suggestion that he had further physiotherapy after that. He stated that his hand was in a rigid position for approximately a year after the accident and that it took some time for him to gradually regain movement in all his fingers.

92. When examined by Mr. Kieran O'Shea, Consultant Orthopaedic Surgeon, in September 2014, the plaintiff complained of ongoing pain and swelling in the right middle finger. He experienced this pain from time to time and particularly in cold weather. He also complained of occasional pins and needles in the hand. Mr. O'Shea noted that there was a modest loss of mobility at the joint where the fracture occurred. However, he noted that the plaintiff had significant symptoms and functional issues with his right hand as a result of the fracture. As the symptoms had not improved during the three years since the accident, Mr. O'Shea was of opinion that it was unlikely that there would be any further resolution of these symptoms. Thus, it would appear that, while the symptoms were not terribly severe or grossly disabling, they would nevertheless be with the plaintiff into the longer term. This is significant having regard to the fact that he is only 23 years of age at present.

93. Part of the plaintiff's case is that he has not been able to return to his sporting activity of boxing. This was a sport which he had been playing since the age of eight years. However, the plaintiff conceded that he had never in fact tried to get back to boxing after the accident. It seems to me that while loss of a sporting pursuit can be a serious loss of amenity for some plaintiffs, it is not

appropriate in this case to award substantial damages in this regard. This is due to the fact that I am not satisfied that the plaintiff has made any reasonable attempt to get back to his sporting pursuit. One would have expected that he might have gone back to the club and tried boxing against a punch bag for a short period of time and perhaps built this up over a period of weeks. Thereafter, he may have tried to do some gentle sparing for a short period and again built this up over time. If things had progressed reasonably well, he may then have tried to get back to full boxing. However, as the plaintiff did none of these things, I do not propose to take this into account as a substantial element in the assessment of damages.

94. The plaintiff also stated in evidence that he had been doing a FAS woodwork course at the time of the accident. He stated that given his injury and in particular the limitation of movement of the fingers in the right hand, he was unable to proceed with the course. He did not give any evidence of having tried to reapply to take the course again at a later date. In fairness, he did not make much of this issue and I do not propose to make any substantial award on account of the interruption in his training with FAS.

95. I have had regard to the fact that, while the plaintiff has complained of ongoing symptoms, he does not appear to have found it necessary to attend with his GP on a frequent basis since the accident. Finally, I have had regard to the scar, which I viewed during the course of the hearing and which would appear to be permanent. It is a relatively small scar covering the knuckle on the third digit of the right hand. While it is visible, it is not particularly disfiguring. Taking all of these matters into account, I award the plaintiff the sum of €35,000 as general damages for pain and suffering to date. In measuring an amount for future general damages, I have had regard to the opinion given by Mr. O'Shea that the complaints which he had in September 2014, were likely to continue indefinitely. Given the plaintiff's young age, and in the absence of any specific evidence that his lifespan is necessarily shortened by virtue of his membership of his particular ethnic minority, it would appear that he will have these symptoms for the next 55/60 years. In these circumstances, I award the plaintiff the sum of €20,000 in respect of future pain and suffering. There are no items of special damage.

96. There is one further matter for consideration. Having regard to the decisions in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305, *Phillip v. Ryan* [2004] 4 I.R. 241 and *Lackey v. Kavanagh* [2013] IEHC 341, it is clear that this Court can have regard to the nature of the defence run by a defendant when considering whether it is appropriate to make an award of aggravated damages. In this case, the defendant put forward the defence that the plaintiff had probably suffered his injuries while boxing, but had fraudulently tried to blame the defendant for these injuries. In essence, they accused him of putting forward a fraudulent claim. The court has found that the plaintiff did injure himself in the manner alleged by him. The court has found that he has not made a fraudulent claim in this case. He is entitled to be compensated for the upset caused to him by virtue of the nature of the unsuccessful defence put forward by the defendant. I award the plaintiff €5,000 as aggravated damages. This gives an overall award in favour of the plaintiff of €60,000.