THE HIGH COURT

[2017 No. 1236 P.]

BETWEEN

NIALL HEALY

PLAINTIFF

AND
TERENCE O'BRIEN

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 11th day of October, 2018

1. The Plaintiff was born on the 15th December, 1972. He is married with three children and resides at 10 Bawn na Grinne, Carrigtwohill, County Cork. He brings these proceedings to recover damages in respect of personal injuries and loss arising as a result of an accident which occurred in the course of his employment by the Defendant on the 22nd October, 2015, when he was thrown from a racehorse that he was exercising.

2. The Defendant is a racehorse trainer by occupation and resides at Woodstock, Carrigtwohill, Co.Cork.

The Accident

3. The accident occurred when a filly known as 'Westy', which the Plaintiff was riding out, became spooked on approach to a tractor which the Defendant had parked close to the gallops where she was to be exercised. 'Westy' was a three year old national hunt horse with a nervous temperament; she was flighty and could kick up. On approach to the tractor in line with two other horses she took flight, turned away and headed back in the direction of the stables notwithstanding the Plaintiff's best efforts to regain control and dissuade her from this course. In the process she unfortunately came into contact with a live electrified fence line as a result of which she received a shock with predicable consequences. She attempted to dismount the Plaintiff by bucking and plunging and ultimately succeeded in doing so. In the event he was thrown clear over the fence line into an adjoining field. He landed heavily on his head sustaining serious injuries, including fractures to two of his thoracic vertebrae, in the process.

4. Liability for the accident was hotly contested by the Defendant. Without prejudice to the outcome on that issue, the Defendant contended that the accident was caused by the Plaintiff and that he was guilty of contributory negligence.

Background

5. The Plaintiff had no real interest in acquiring an academic education. He left school at fifteen. He had a passion for everything equine and sought out anyone who could give him a ride. He eventually secured work riding out horses for several people before ultimately travelling to Scotland in 1995 where he went to work for a well-known trainer. After a year he returned home and secured employment with the Defendant looking after his farm and breaking and exercising the few horses which he kept. Farming was the Defendant's principle business at that time but it but subsequently evolved into fulltime horse training. In the five years prior to the accident the Plaintiff worked for the Defendant as his head lad.

6. The word "lad" is a rather unfortunate term in this context. To the outsider it hardly conveys the importance of the position in a riding establishment such as that of the Defendant. As head lad the Plaintiff was in charge of the horses and was responsible for other staff and for managing all practical aspects of the Defendant's business. By the time of the accident the Plaintiff had acquired immense experience in riding, racing and breaking horses, an occupation which exposed him to an ever present risk of being thrown from the horses he rode out. In common with the Defendant he had experienced numerous falls from horses and on occasion had been injured in the process. Injuries suffered by the Plaintiff included nose, collarbone, rib and pelvic fractures.

Accident locus

7. The gallops on the Defendant's premises consist of a circular fenced in exercise track from which at a certain point linear gallops proceed. The circular gallops are reached by a fenced access lane which runs through fields and commences several hundred yards distant in a stable yard where stabling, horse walking facilities and an indoor arena are located. Access to and egress from the circular gallops is through a gap in the fencing sufficient in width to comfortably accommodate the passage of horses and riders. The circular gallops are set out on what is essentially flat ground; the linear gallops are set out over rising ground.

8. The gallops were designed for all weather use. The exercise track is laid over with sand or sand like material several inches in depth. At the time of the accident it was the practice to harrow the track after each group of horses, known as a 'lot', had been exercised. The number of lots using the track on any given day depended on the number of horses which had to be exercised and the number of available riders. Harrowing was carried out by a tractor to which a unit designed for that purpose was attached.

9. For several reasons the time of arrival or departure of a lot from the gallops varied. On completion of the harrowing it was usual for the tractor to be driven back to the yard until it was required, generally after the next lot of horses had completed their exercise. It was not unusual for a lot to come up to the gallops at or just after the harrowing was being completed. In that event the tractor was usually parked about 5 metres back from the entrance to the gallops in what the Plaintiff's equestrian expert, Mr. John Watson, described as a three o'clock position.

10. So parked it was said that the risk of the tractor spooking approaching horses was considerably reduced, a proposition consistent with the Plaintiff's experience and his evidence that he did not give any thought to the tractor when parked in that position. Once the horses had moved away from the entrance to what was deemed a sufficient distance by the driver, the tractor was driven back down the access lane to the stable yard. It was common case that horses can be frightened or spooked for any number of reasons including mechanical noise, consequently, when horses approached the vicinity of the tractor it was the practice to turn off the engine to reduce the risk of causing fright.

Decision

Circumstances leading up to the Accident

11. On the occasion of the accident a lot of three horses, including 'Westy', headed up to the gallops from the yard. At the same time s the Defendant was completing the harrowing of the track. The Plaintiff had broken 'Westy' earlier that year and was intimately acquainted with her nature particularly her propensity to be skittish and flighty, knowledge which the Defendant also shared. These features of 'Westy's' temperament had caused problems for the rider who exercised her the day prior to the accident, accordingly, it was decided that the Plaintiff would ride her out the following day. The lot was originally intended to consist of four horses, one seven year old, two four year olds and 'Westy'.

12. Having regard for her inexperience and her temperament she was placed last in the line with the oldest horse leading the way. Mr. Watson explained that as herd animals horses have a heightened sense of alertness and are acutely aware of the behaviour of other horses. Younger and less experienced animals will take a lead from older and more experienced horses. Translated from the wild this behaviour is utilised in many equine activities, including racehorse training, by placing the oldest and most experienced horse to the front of the lot, a practice which generally has a calming and stabilising effect on the younger and less experienced horses.

13. Westy's lot was reduced to three in number when the eldest of the horses turned out to be lame. In the course of the hearing there was some debate as to the contribution which this may have had to the accident, however, the evidence offered by Mr. Watson was that the omission of the eldest horse was non-contributory; the next eldest horse in the lot approached and passed by the tractor without issue.

14. The Defendant first noticed the lot approaching from the yard just as he was finishing the harrowing of the track. The topography of the land between the stable yard and the gallops undulates and in one place forms a dip of proportions sufficient to hide from view horses and riders as they descend into it, however, once traversed horses and riders emerging have a clear view to the gallops entrance of at least one hundred metres or more, a view shared by anyone sitting in a tractor at or standing in the vicinity of the entrance.

15. Having exited the gallops, the Defendant decided to back the tractor up into a field immediately adjoining and to the right of the entrance. He estimated that he had brought the tractor to a halt about fifteen metres up from the entrance close to the right hand fence of the gallops. He thought the distance between the fence and the tractor was between one and a half and two metres, once parked he turned off the engine. The Defendant fairly accepted that parking the tractor in that position ran the risk of spooking a horse approaching or attempting to pass the tractor along the gallops, and so it turned out.

16. In addition to a harrowing unit the tractor was fitted with a front loaded shovel or bucket used in connection with other farming activities; this unit has no application to the process of harrowing. When not in use the bucket or shovel is elevated up to a point above the field of vision of the tractor driver; it was in this position at the time of the accident. Mr. Watson's evidence was that the elevated bucket would have struck a threatening pose to a horse especially an inexperienced horse with a flighty disposition. In his opinion, parking the tractor with an elevated bucket so close to the gallops created a risk of spooking one or other of the horses in the lot as they attempted to pass by in the gallops.

Positioning of Tractor; Whether Risk Created; Cause of the Accident.

17. Mr. Watson is an acknowledged equine expert and very experienced rider in his own right. His was the only expert evidence on liability made available to the court; I accept his evidence on the positioning of the tractor close to the gallops. Accordingly, I am satisfied and the Court finds that the tractor parked as it was constituted a threat and created a risk of spooking one or other of the horses in the lot as they approached or attempted to pass along the gallops.

18. As the three horses approached the gallops entrance the riders had the option of turning left or right. It was plain to them that a decision to turn right would inevitably bring the horses into close proximity with the tractor, nevertheless, the lot turned right. The explanation advanced for doing so was twofold; firstly, the distance to the linear gallops with the rising ground was at least a hundred metres less than if the lot had turned left and, secondly, the rising ground conferred a distinct advantage; the horses were less likely to kick up or otherwise get out of control, an advantage known to the riders and to the Defendant. The Plaintiff was particularly keen to avail of the advantage in light of 'Westy's' nature and the difficulties which had been experienced during the ride out the previous day.

19. The first horse and rider approached the tractor and passed without incident, however, when the second horse, ridden by Mr. O' Sullivan, approached it shied away and backed up onto the left bank of the gallops. Mr. O'Sullivan was acutely aware that the presence of the tractor parked as it was so close to the gallops created a risk that his mount might be spooked by it; he had had just such an experience some months earlier when passing a tractor while riding out. His assessment of the situation, of his own ability and of his mount was that he would be able to control his horse if it took fright or shied away, and so it proved. When his mount shied he was able to bring it under control and pass the tractor. The Plaintiff's experience was altogether different.

20. He was riding approximately two horse lengths behind Mr. O'Sullivan's horse when it shied away from the tractor and mounted the left bank of the gallops, an event which he witnessed. Unfortunately for him it was also seen by 'Westy' whose reaction was to take flight by turning away from the source of the fright and heading back towards her stable notwithstanding the Plaintiff's best efforts to stop her and regain control.

Conclusion

21. I am quite satisfied and find on the evidence that the *causa causans* of the accident was the positioning of the tractor close to the fence of the circular gallops with its front loading shovel in an elevated position. The accident unfolded in front of the Defendant as he sat in the tractor. To be fair to him his evidence other than with regard to the cause of the accident was uncontroversial. He accepted that the presence of or noise from the tractor could spook a horse depending on the circumstances in which the tractor was encountered; it was for that very reason that he had positioned it where he did.

22. He could not recall whether he had had a conversation with the Plaintiff the previous day concerning the problems which had been encountered by Westy's rider when she was being ridden out. I accept the Plaintiff's evidence that such a conversation took place and that the Defendant's decision to position the tractor where he did rather than in the usual three o'clock position to the gallops entrance is consistent with concern that the presence of the tractor might pose a risk of spooking horses, in particular 'Westy'.

23. By adopting this course the tractor ended up further away from the gallops entrance than would otherwise have been the case. The Defendant's assessment was that in doing so he had minimised the risk of spooking any of the horses as far as was reasonably possible. And so he would have done if, as he expected, the riders had turned left when they came to the gallops entrance.

24. This assumption appears to have been based on the premise that when the riders saw where the tractor was parked they would realize the potential of the positioning to spook the horses and would thus turn left to avoid that risk. The Defendant very fairly accepted, I thought, that parking the tractor where he did would defeat the object of minimizing the risk if, contrary to his expectation, the lot turned right; which is just what it did. Having done so his evidence was that it was too late for him to have done anything to ameliorate the risk.

25. That the lot might turn right was not just a matter of chance, there were practical reasons to do so; the significantly shorter distance to the linear gallops and the advantage conferred by the rising ground, reasons which appear not to have been taken into

account by the Defendant on the assumption he made and upon which his expectation was based. The decision to park the tractor where Defendant did was entirely dependent on the behavior of the riders when they became aware of its location. As events proved, it was a fateful decision.

26. Absent an instruction the lot could have turned left or right; given the practical reasons why the riders would have wanted to take the latter course a manifest safety risk arose from the positioning of the tractor, a risk unfortunately evidenced by the circumstances of the accident. It follows that parking the tractor close to the fence of the gallops with its front loader in an elevated position created a reasonably foreseeable danger and the likelihood of an accident occurring.

27. I am fortified in reaching this conclusion by the probable outcome had the tractor been positioned in its usual position relative to the entrance. So parked it would have been approximately 5 meters away from the gallops entrance, a sufficient distance to permit the passage of riders and horses without any reasonably foreseeable risk of mishap. There is no suggestion that when so positioned previously the tractor had caused any problem for horses and riders as they passed into the gallops.

28. Consistent with that history it seems reasonable to conclude on any view of the evidence that had the tractor been so positioned on the day the lot would have passed by without incident. For completeness, I should add that had the tractor been so located it carried with it the distinct advantage that on reaching the entrance the riders and horses faced no impediment as to the direction they should take.

29. Accordingly, I am satisfied and the Court finds that the Defendant was in breach of his duty of care to the Plaintiff, a duty which he owed to the Plaintiff at common law as well as under statute pursuant to the provisions of the Safety, Health and Welfare at Work Acts pleaded in these proceedings. That, however, is not the end of the matter.

Contributory Negligence
30. The Plaintiff did not accept that he ought to have assessed the situation created by the presence of the tractor so close to the gallops or that he ought to have appreciated the risk caused by turning right. Nor did he accept that he should have made any number of other decisions, including a decision to turn left or stop or do otherwise than proceed in the way he did. Mr. O'Sullivan had had the experience of his mount shying on encountering a tractor with its bucket raised several months earlier. Under cross examination by Mr. Creed the Plaintiff accepted that he too had had a similar experience, nevertheless, he did not accept that he should have appreciated the risk posed by the tractor if the lot turned right on entering the gallops.

31. On his evidence he wouldn't have given a thought to the tractor had it been parked in its usual place, evidence consistent with the conclusion reached in relation to the parking of the tractor in its usual position. However, when he saw the tractor parked where it was he did not stop to assess the situation and whether or not this posed a risk to the safe passage of the riders and horses once they entered the gallops. Under cross examination his evidence was that jockeys didn't think about risks like that when riding a horse. He didn't anticipate that the proximity of the tractor to the gallops fence created any risk that it might cause his mount to shy away or worse still frighten her to the point where she would take flight.

32. To say the least I find the Plaintiff's evidence in this regard to be unconvincing. As the lot approached he saw the tractor in plenty of time to assess the situation which presented itself and to decide how best to respond, including the direction which the lot should take on reaching the gap, a decision which as head lad was entirely his. If he wasn't thinking about the risk or didn't anticipate that the tractor constituted a risk, as was his evidence, it seems to me given his vast experience and the position of responsibility which he held not just for himself and his mount but for the other jockeys and their mounts, that he most certainly ought to have been so thinking.

Conclusion; Contributory Negligence
33. As it happens, I am satisfied it is much more likely that, like Mr. O'Sullivan, he made an assessment of the situation and took a conscious decision to turn right and thus to proceed past the tractor for the purposes of attaining the two advantages conferred by that course of action. In my judgment he believed, as did Mr. O'Sullivan, in his ability to deal with any issue that might arise. He knew 'Westy' well; after all he had broken her and knew how to ride her. He felt confident he would be able to keep control and get her past the tractor if she became spooked; had he felt otherwise it is unlikely he would have taken the decision he did. In the circumstances evidenced by the occurrence of the accident, his was a serious misjudgment. The failure to properly assess what to a man of his experience and responsibility was such an obvious risk constitutes a failure to take reasonable care for his own safety.

34. In this one regard, when it comes to assessing the consequences of the Plaintiff's actions or omissions in law I cannot accept the evidence of Mr. Watson about how jockey's think. Whatever might be said concerning how jockeys think in general, about which the Court is not concerned in these proceedings, having regard to the Plaintiff's experience and knowledge of matters equestrian and in particular the behavior of horses with a difficult temperament, I am quite satisfied that he was in a position to assess the situation which presented itself in the same way as Mr. O'Sullivan, a rider who, it ought to be observed, had less experience than the Plaintiff.

35. For all these reasons the Court finds that the Plaintiff was guilty of contributory negligence.

Apportionment of Fault.
36. The law on the apportionment of fault under s. 34 (1) of the Civil Liability Act 1961 as amended is well settled. The Court is not concerned with the potency of the respective causative contributions by the parties against whom liability has been found to the damage caused by the wrong but rather with the blameworthiness of their respective causative contributions. In this regard fault or blame is to be measured against the standard of conduct required of the ordinary reasonable man or woman in the class or category to which the party whose fault is to be measured belongs. See *O'Sullivan v. Dwyer* [1971 IR 275 at 286.

37. Having carefully considered all of the circumstances of the case and applying the law as laid down, I am satisfied and find that as the author of the danger which resulted in the accident and with which the Plaintiff and the other riders were presented the greater degree of fault should be found to rest with the Defendant.

38. This is not a case of a young, inexperienced, uneducated or untrained plaintiff rather the category into which the Plaintiff falls is one of an individual possessing considerable experience, expertise, knowledge and responsibility in a particular field which must be reflected in the degree of fault to be apportioned to him. Accordingly, the Court will apportion fault as between the Plaintiff and the Defendant, two thirds to the Defendant and one third to the Plaintiff.

Injuries
39. From the very outset those learning to ride are made aware that horse riding carries with it the risk of falling, a risk which increases depending on the particular riding activity being undertaken. Provided no serious injury is involved when a fall occurs, the

rider is encouraged to get back up on the horse as much to maintain confidence as anything else. Falling from a horse when racing is a not an unusual experience, particularly for national hunt jockeys. The Plaintiff stated in evidence that he would always try to get back up on a horse after a fall if at all possible. However, on this occasion he quickly realized that he had suffered serious injuries as a result of landing on his head. He was aware of acute pain in his right shoulder and back area. He was immediately attended to by those in the vicinity, including the Defendant, who told him to lay still pending arrival of a doctor and the emergency services.

40. He was attended at the scene by a local GP, Dr. Doran who administered morphine to control the pain. The emergency personnel placed him on a spinal board and transferred him by ambulance to Cork University Hospital where he was admitted as an acute emergency. He underwent a CT scan of his brain and an MRI examination of his neck and upper thoracic spine. Radiological examination disclosed a fracture to the spinous process of the T2 vertebra and a compression fracture of the T3 vertebral body. In addition degenerative changes were noted at the C6/C7 levels of the cervical spine with disc/osteophyte protrusions accompanied by a moderate to severe foraminal stenosis at C6/7 on the right side. He was prescribed analgesic and pain killing medication and was discharged from hospital after approximately 36 hours.

41. In addition to the fractures the Plaintiff suffered a multiplicity of soft tissue injuries from which he suffered acutely painful symptoms in his neck, right shoulder right arm, upper chest and back. He developed a disturbed sleeping pattern. At review four weeks post-accident by Dr. Chris Luke, Consultant in Emergency Medicine, he particularly noted neuralgic pain radiating to the right arm, described by the Plaintiff in evidence as 'a pins and needles' sensation. He was referred to physiotherapy but could not tolerate this therapy due to the level of pain experienced. His symptoms deteriorated and as a result Dr. Luke referred the Plaintiff to Mr. George Kaar, Consultant Neurosurgeon for further investigation.

42. He first reviewed the Plaintiff in March 2016 and subsequently carried out surgery to decompress the Plaintiff's right ulnar nerve at the elbow. He gave evidence at the trial and prepared medical reports dated 9th December 2016 and 4th November 2017, in which he outlined his findings on examination, the treatment afforded and his opinion. The reports were admitted as an aide mémoire for the Court.

43. Mr. Kaar referred the Plaintiff to Dr. Brian McNamara, Consultant Clinical Neurophysiologist for nerve conduction studies/EMG of the cervical spine. These were carried out on the 15th June 2016 and disclosed moderate right ulnar neuropathy at the right elbow consistent with severe paresthesia radiating to the right ring and little fingers of the right hand accompanied by reduced grip and reduced power in the intrinsic muscles. Mr. Karr carried out decompression surgery on the 2nd August 2016 following which the Plaintiff made an uneventful recovery and gained substantial relief from his neurological symptoms.

44. Although the decompression surgery was successful the Plaintiff continued to be otherwise symptomatic. He suffered from ongoing pain in the neck and upper back area which deteriorated and was accompanied by heat sensations. Mr. Karr advised a graduated non-impact resistant programme to build up strength and stability in the upper body over a period of two to three months. The Plaintiff underwent a gym based programme and attended a sports physiotherapist, however, he continued to experience pain in the lower cervical and inter scapular area. He was referred back to Mr. Kaar.

45. He reexamined the Plaintiff in December 2016 and found neck movements remained restricted accompanied by chronic pain, accordingly, Mr. Karr referred the Plaintiff to Dr. John Brown, Consultant Pain Specialist who administered a number of pain killing injections the response to which initially was a good relief of symptoms, however, the symptomology gradually returned. The Plaintiff underwent a further course of stronger injections in August 2017 which provided better and more lasting relief though the Plaintiff continues to have some pain in his back intermittently. His neck pain has also improved.

46. On awakening in the morning he is stiff and sore. At present he can have days at a time when he is almost symptom free and then for no apparent reason the pain returns before once again abating. When he experiences episodes of pain he takes over the counter pain killing medication as and when required. At review by Mr. Kaar in November 2017 the Plaintiff was still experiencing ongoing pain around the inter scapular area; clinical examination showed ongoing stiffness in the Plaintiff's neck evidenced by reduced rotation to the right.

Conclusion

47. I accept the uncontroverted evidence of Mr. Kaar, accordingly, the Court finds that as a result of the accident the Plaintiff suffered an undisplaced fracture of the spinous process of the 2nd thoracic vertebra and a compression fracture of the 3rd thoracic vertebra resulting in a 25% loss in vertebral height together with soft tissue injuries superimposed on pre-existing asymptomatic degenerative changes at the C6/7 levels of the cervical spine with possible stretching of the lower cervical nerve root as well as soft tissue injuries to the chest and to the right elbow resulting in a neurapraxia to the right ulnar nerve.

48. These injuries resulted in significant sequelae which manifested as pain and discomfort in the Plaintiff's neck, back, right arm, right shoulder and chest as well as paraesthesia and loss of power in the musculature of the Plaintiff's right arm and hand which necessitated decompression surgery to release the right ulnar nerve at the elbow. The injuries were particularly painful in the acute stages following the accident. Although the surgery was successful and the Plaintiff has made good progress towards recovery from his injuries he remains intermittently symptomatic and is at a small risk, assessed at 5%, of developing a delayed deterioration in the cervical and thoracic spine with more severe degenerative disc and facet joint changes at an older age.

Vocational Implications; Special Damages

49. In Mr. Kaar's opinion the nature of the Plaintiff's injuries have vocational implications which contraindicate a return to breaking and riding horses, although in evidence he stated that from a medical perspective he would not rule out a return to recreational horse riding. This advice has had a psychological impact on the Plaintiff in the sense that he finds it very hard to accept that he cannot return to his previous occupation which he so enjoyed. Nevertheless he accepted the advice and sought out alternative employment, returning to work in 2017.

50. He engaged in some unpaid work for his father and also secured some remunerated shift work in a licensed premises consisting of one or two five hour shifts per week at €10 Euro an hour, an aspect of the claim in respect of which there was some considerable controversy. I pause to observe that no negative inference falls to be drawn from the withdrawal of a claim for substantial future losses in circumstances where the Plaintiff very fairly accepted that he had made considerable progress towards recovery as a result of the treatments afforded, particularly the decompression surgery carried out by Mr. Kaar and the injective therapy carried out by Dr. Browne.

51. In fairness to the Plaintiff it has to be observed that Mr. Kaar went out of his way to emphasize to the Court that in the immediate aftermath and acute stages, certainly in the first year after the accident, the injuries sustained, particularly the injuries to the thoracic spine, would have been the source of immensely painful and distressing symptoms.

52. The number of shifts worked by the Plaintiff was hotly disputed. There was no documentary evidence adduced to support the claim and under cross examination the Plaintiff fairly accepted that he had been receiving and continued to receive social welfare benefits into 2018. The Court was conscious as I'm sure was apparent in the course of the trial that the Plaintiff was essentially declaring himself to the State as unable to work, when in fact he was working as a barman.

53. His evidence was that he didn't have to lift kegs or anything of a heavy nature, nevertheless, the fact of the matter is that he was working and receiving income but did not disclose that fact to the Department of Social Protection at a time when he ought to have done so. It need hardly be said that the Court cannot and will not condone any behavior which in any sense could be construed as misleading or fraudulent. In fairness to the Defendant the circumstances of the failure to notify in this case were recognized as not warranting a certain course of action under the Civil Liability and Courts Act 2004, nor was the Court so invited.

54. Potentially such a course could have had immensely serious consequences for the Plaintiff, however, it is quite clear to me from the pleadings and vouching documentation furnished in connection with the claim for special damages that the information concerning his employments and the income and amounts of illness benefit received was disclosed to the Defendant and appropriate credit given for same in the computation of the claim for loss of earnings.

55. What was not clear, however, was whether the Department of Social Protection had been informed by the Plaintiff that he had returned to part time paid employment and if so when. The potential consequences for the Plaintiff's claim which might have flowed from non-disclosure don't arise in this case; I am quite satisfied about that. The Plaintiff freely accepted under Oath that he had not advised the Department at the time of his return to work and that his failure to do so was wrong.

56. There was an evident misunderstanding on the Plaintiff's part when, as a result of this admission, he was invited to withdraw a certain aspect of his claim for loss of earnings. In the circumstances Mr. Creed took quite the correct course in not pressing the point further when it became apparent that the Plaintiff remained confused about the potential significance of question and the answer which might be given; in the interest of completeness suffice it to say that it seems clear there was no intention on the part of the Plaintiff's to mislead or deceive the Defendant in regard to his claim for loss of earnings or otherwise.

Conclusion; Special Damages
57. In the event, the justice of the situation is best dealt with in my judgment by disallowing any claim in respect of past loss of earnings beyond a certain point, namely, the date when the Plaintiff returned to remunerated employment. Agreement was reached between the parties on the other items of special damages to date, accordingly, the Court will allow by way special damages the sum for loss of earnings recomputed to the date of return to remunerated employment together with the other pecuniary losses agreed in the amount of €16,017.

General Damages
58. Turning to the assessment of General Damages, I think it worth mentioning, because it is not evident from the phrases '*pain and suffering to date*' and where appropriate '*pain and suffering into future'*, terminology with which judges and lawyers alike are familiar, that in carrying out an assessment of general damages the court is concerned not only with compensating the plaintiff for the physical or mental pain suffered or likely to be suffered but also for the interference with the ordinary amenities of life caused as a consequence of the wrongdoing. See *Bennett v Cullen* [2014] IEHC 574; *Murphy v. The Minister for Public Expenditure and Reform* [2015] IEHC 868; *Mullen v The Minister for Public Expenditure and Reform* [2016] IEHC 295.

59. The purpose or object of an award of compensatory damages in a tort action is reparative, that is to say it is intended to restore the plaintiff, so far as that maybe achieved by a sum of money, to the *status quo ante* in respect of the past and prospective pecuniary and non-pecuniary loss sustained as a consequence of the wrong. Since the abolition in 1988 of the citizen's right to a trial by jury in cases involving personal injury other than in actions for trespass to the person or false imprisonment, the assessment of damages, previously the preserve of the jury, is vested in the trial judge.

60. The addresses and the charge to the jury on the law applicable to the issues it was given to decide, including the basis upon which damages, if any, were to be assessed, served as reminder to all those involved in the trial not only of the object or purpose but also the ambit of the constituent effects caused by the wrongdoing, including the effect on the enjoyment of life, which damages are intended to embrace. It follows that in assessing damages for "*pain and suffering to date*" and "*pain and suffering into the future*" account has to be taken not only of the sensory experience of pain but also of the effects on other aspects of the Plaintiff's life caused by the accident. As a matter of probability he is not going to ride horses again, at least not professionally, and so he has been deprived of the enjoyment which that career bestowed on him.

61. It is quite clear that most everyone involved in riding horses and certainly professional jockeys try to jump back up on a horse after a fall. This Plaintiff was not able to get back up on his horse, he was very seriously injured and the injuries that he suffered are not to be underestimated. It was put to the Plaintiff by Mr. Creed that having made a reasonably good recovery he like another famous jockey, 'Ruby' Walsh, who had also suffered serious injuries in the past, ought to have been able to get back to horse riding. In answer he very fairly accepted that no one had told him he couldn't get back on a horse again.

62. Having had the opportunity of observing his demeanor the Plaintiff struck me as a credible and genuine witness who quite obviously sees the world through a particular prism formed by his involvement in a very nasty accident which resulted in very serious injuries. The fact that he hasn't ridden at all since the accident is most likely a psychological reaction; he misses riding but doesn't want to risk falling again. While Mr. Kaar's evidence was that the Plaintiff could certainly return to riding socially or recreationally should he wish to do so, he also felt it would be inadvisable for the Plaintiff to return to riding vocationally in light of his age and the injuries he sustained. In all the circumstances the Plaintiff's reaction is not unreasonable and hardly surprising.

63. It is not suggested that the preexisting degenerative changes at the C6/7 levels of the cervical spine have anything to do with the accident; however, soft tissue injuries were superimposed and have caused what Mr. Kaar described as mechanical pain. In addition, there is a small risk, assessed by Mr. Kaar at 5%, of a delayed increase in degeneration at those levels later in life. Small though it may be and mindful of that it is nevertheless a sequelae which the Court must take into account in carrying out the assessment.

64. So far as the Plaintiff's vocational future is concerned, we know that he is able to carry on bar work in a licensed premises and that he has also worked in his father's motor business. A friend has returned from America and is setting up a business in which the Plaintiff feels confident he will be involved and for which he feels physically able. The Plaintiff accepts that between the benefit derived from the treatments received and the extent of the recovery to date, even if that option does not work out he is going to able to work albeit not in his chosen career and that in future he will secure a remunerative and satisfying employment. In the circumstances the claim for future loss of earnings which had previously been advanced was quite properly not proceeded with.

65. So far as the Plaintiff's injuries are concerned he has yet to make a full recovery and is unlikely to do so for some time to come. He still experiences ongoing intermittent musculoskeletal symptoms which he is able to manage with the benefit of the treatments he has received and where necessary with over the counter medication. Although these sequelae are likely to continue for the foreseeable future they are not in any way disabling.

66. It is practice in my Court to invite counsel to make submissions in relation to appropriate range of damages specified in the Book of Quantum applicable to the Plaintiff's injuries and within which damages should be assessed. I do so because the Court is compelled by s.22 of the Civil Liability and Courts Act 2004 Court to have regard to the Book of Quantum when carrying out an assessment of damages though not bound by the recommended range of damages for any given injury, accordingly, I take the view that in fairness to the litigants and the legal teams representing them an opportunity should be afforded to make submissions albeit that there is no requirement to do so.

67. Counsel accepted the invitation and made submissions in relation to the fracture injuries. In essence the submissions were to the same effect, namely, that these injuries fell within the 'moderate' range of €54,900 to €92,700 specified in the updated Book of Quantum. If one looks at the original Book of Quantum there is an astonishing statement, repeated in slightly different wording in the updated book, which I suspect but don't know, was intended for the purposes of assisting assessors in the Personal Injuries Board, but also others consulting the book, in how to approach the assessment of damages in a case involving multiple injuries. Putting the most favourable gloss on what is said the thrust of the statement is that the valuation range for the most serious injury should be adjusted to take account of the other injuries.

68. The statement does not reflect the law on how to approach the assessment of damages; rather the correct approach is to treat the plaintiff holistically. In my judgment it is almost self evident that tweaking one range of damages applicable to a given injury as a means of compensating for a different injury with which the particular range of damages is not at all concerned cannot be correct and is an inappropriate way to measure compensation if the objective of compensatory damages is to be properly achieved.

69. Where one suffers a serious injury to an arm and by way of example other injuries to the pelvis and a leg or an ankle, each of which results in painful symptomology, the unfortunate victim is generally aware that different parts of the body have been injured and experiences separate and distinct symptoms, the intensity and duration of which may be quite different. In carrying out an assessment account has to be taken of all of the injuries sustained and the contribution each has had on the victim as a whole person; to do otherwise runs the risk of under compensating the Plaintiff.

70. I am aware of the decisions of the Court of Appeal in relation to the assessment of damages in cases such as the present and which this Court is bound to follow where applicable. The Court is conscious that in arriving at an award compensatory damages must be fair and reasonable to the parties involved if justice is to be achieved between them. To that end suffice it to say that the award of damages by the Court in every such case must be commensurate with and proportionate to the injuries and loss sustained by the Plaintiff.

Ruling

71. Accordingly, applying the well settled principles of tort law to the assessment of general damages in this case and having regard to the findings made and the conclusions reached for the reasons given the Court considers that a fair and reasonable sum to compensate the Plaintiff for pain and suffering to date commensurate with the injuries sustained is €75,000 and that a fair and reasonable sum for pain and suffering into the future is €25,000, making in aggregate the sum of €100,000 for General Damages, to which will be added the sums allowed by the Court and agreed by the parties in respect of Special Damages.

72. Fault having been apportioned one third against the Plaintiff, when so deducted from the aggregate sum for general and special damages the Court will give judgment for the net amount. I will afford the parties an opportunity to consider and confirm the figures and will then discuss with Counsel the final form of the order to be made.