THE HIGH COURT

IN THE MATTER OF THE GARDA (COMPENSATION) ACTS, 1941 AND 1945

[2010 No. 8565 S.P.]

BETWEEN

AIDEN FLANAGAN

APPLICANT

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 23rd day of March, 2018.

1. The Applicant was born on the 17th September, 1974, is married and resides with his wife Siobhan and their three young children in Middleton County Cork. On the 22nd of October 2010, he was authorised to bring these proceedings pursuant to the Garda Síochána (Compensation) Acts, 1941 and 1945, (the Acts) in respect of personal injuries and pecuniary loss arising as a result of an assault which occurred on the 23rd August, 2008.

Circumstances leading up to the Assault

2. The Applicant and Garda Orla Kenneally were on duty in a patrol car attached to Togher Garda Station, Cork. They received a call to investigate the theft of alcohol from a local supermarket. The robbery had been recorded by a CCTV camera on the premises. The officers went to the store and viewed the CCTV footage. Several youths were seen to be involved, one of whom was identified by the Applicant in Court as G.M. The Applicant knew this individual from encounters he had had with him through his involvement in juvenile community work. The officers left the store and went in search of the culprits. Within a short time they encountered a group of youths, including G.M., walking along a footpath in the vicinity of the supermarket.

3. Both officers got out of the patrol car and approached the youths; G.M. was noticeably intoxicated. It transpired he had consumed the contents of a bottle of vodka stolen from the supermarket and had also taken some ecstasy tablets. As the officer's approached he became verbally abusive and adopted an aggressive and threatening attitude. The officers decided to arrest him under the Public Order Act, partly for his own safety. He resisted arrest.

4. Garda Kenneally and the Applicant managed to get the prisoner onto the ground where they eventually managed to handcuff him after a struggle. He was put into the back of the patrol car where he continued to be verbally abusive and aggressive, kicking at the door and the uprights of the front seats. G.M. was described by the Applicant as the most violent individual he had ever had to deal with in the course of his policing career.

5. Concerned for the safety of his colleague Garda and although he was the official driver, the Applicant decided he should accompany the prisoner in the back of the patrol car on the journey back to the station. The assault occurred when he attempted to sit into the back seat of the car; as he did so the prisoner kicked out and struck him forcibly in the back.

The Issues

6. That the assailant acted maliciously and that the Applicant sustained an injury and pecuniary loss as a result of the assault was accepted by the Respondent, however, the nature, extent and causation of the injuries and loss was in controversy and hotly disputed. Pending the judgement of the Court and strictly without prejudice to the matters in issue between them, the Respondent agreed, on certain terms, to pay the Applicant €125,000.

7. On any view of the evidence, during the decade which followed the assault there was a most serious and significant deterioration in the Applicant's physical and mental capacity to function as a police officer, a deterioration which ultimately led him to conclude that he could no longer continue serve in any position. With the support and on the advice of his treating physicians he applied for retirement on health grounds. Although that application was unsuccessful, by the time the hearing came to an end it was fairly accepted on all sides that the Applicant's career in policing was over and that whatever the future held for him, leaving the force was in his best interests. Absent retirement or discharge on health grounds, he decided to resign at the conclusion of the litigation.

8. Quite apart altogether from his claim for general compensation, the Applicant mounted a substantial claim for pecuniary losses totalling approximately €1,472, 557.00 with which the Respondent took issue.

9. The Court made an order that the grounds of Defence should be particularised in order to fully identify and crystallise the issues between the parties. On the 7th October 2015, the Chief State Solicitor wrote to the Applicant's setting out particulars of the defence; the full text of the letter follows:

> *"Dear Sirs,*
>
> *Take notice that grounds of defence are set out as follows:*
>
> *1. It is accepted that the incident occurred on or about the 23rd August, 2005.*
>
> *2. Malice is accepted.*
>
> *3. With regard to the Applicant's alleged physical injuries sustained in the incident on or about the 23rd August, 2005, (sic) opinion of the independent medical expert engaged at the request of the respondent is that*
>
> *(a) The Applicant sustained musculoskeletal soft tissue contusion and strain injuries to his lower back and apparent aggravation of underlying existent degenerative and post surgical condition of the lumbar spine of his lower back. The injury apparently caused some soft tissue contusion and strain injury and*

strain induced exacerbation of the pre-existing underlying degenerative condition and post-surgical condition of the lumbar region of the lower back;

(b) The apparent musculoskeletal contusion and strain injuries the Applicant sustained to his lower back apparently precipitated symptoms due to injury induced exacerbation of the underlying degenerative condition of the lumbar spine of his lower back, but did not cause or substantially accelerate the progress and deterioration of the pre-existing degenerative conditions of the lumbar spine of the Applicant's lower back. The subsequent and ongoing symptoms and disabilities the Applicant suffered over many years were due to the progression and deterioration of the degenerative conditions affecting the lumbar spine of the Applicant's lower back, and were not solely, predominantly or substantially due to muscular skeletal tissue contusion and strain injuries of the apparent nature and degree that he apparently sustained to the lumbar spine of his lower back (sic) incident on or about 23rd August, 2005.

In addition to the reports of the independent medical consultants who examined the Applicant at the request of the Chief Medical Officer, the Respondent will rely on the reports furnished by the Applicant's medical advisors.

4. With regard to alleged psychiatric/psychological injury, (sic) independent consultant psychiatrist who examined the Applicant at the request of the respondent found that

(a) Arising out of the incident on or about 23rd August, 2005 the Applicant reported experiencing symptoms of pain and immobility.

(b) The incident of the 23rd August, 2005 itself could not be considered emotionally traumatic.

(c) The Applicant's emotional reaction to physical symptoms included feelings of frustration, irritability, low mood, and reduced self esteem. These psychological symptoms were indirectly related to the incident which occurred on or about the 23rd August, 2005 and these psychological symptoms reflect aspects of the Applicant's personality and coping mechanisms. On review the Applicant continued to feel frustration, anger and lack of trust. The Applicant's frustration was compounded by his belief that discharge from An Garda Síochána on medical grounds was imminent;

(d) The Applicant appeared to have some difficulty in accepting that he required a more intensive psychological approach in dealing with this (sic) physical symptoms;

(e) The Applicant found his limited garda duties at the time of examination and report demeaning, however there was no evidence that he was mentally incapable of carrying out these duties;

(f) The Applicant did not suffer from any mental illness and in particular, did not suffer from post traumatic stress disorder arising out of or as a consequence of the incident of the 23rd August, 2005.

No serious psychological sequelae have been sustained as a result of the said incident.

In addition to the report of the independent medical consultants who examined the Applicant at the request of the Chief Medical Officer, the Respondent would rely on the reports furnished by the applicant's medical advisors.

5. It is denied that the Applicant's other complaints including pain management issues, or neurological condition or sleep problems/insomnia are caused by the incident the subject matter of these proceedings.

6. Apart from the Applicant's initial absences from work in 2005 it is denied that the absences from employment are/were related to the incident which occurred on or about the 23rd August, 2005.

7. It is denied that the Applicant's claim for special damages, in particular the claim in respect of past and future losses of earnings, arises as a consequence of the incident which occurred on or about the 23rd August, 2005.

8. It is denied that the alleged injuries sustained in the incident on or about the 23rd August, 2005 caused the Applicant to seek early retirement.

TAKE NOTICE

That without prejudice to the foregoing the respondent reserves the right to deliver further grounds of defence to the items of special damage, including a claim for loss of earnings, on receipt of further expert report(s), further applies, discovery and any such evidence as may come to light.

Yours faithfully, Eileen Creedon, Chief State Solicitor".

9. The Applicant is on proof that he suffered a mental illness and/or serious psychological sequelae together with the physical injuries and pecuniary losses which he claims were caused by the assault; causation was to feature as the fundamental issue between the parties.

10. It should be noted from the outset that the Applicant did not make the case he had suffered a post traumatic stress disorder, though that condition was referred to by one of his treating physicians who was not a psychiatrist. However, the case was made for serious psychological sequelae which included a chronic pain syndrome together with depressive and adjustment disorders.

Family, Vocational and Recreational Background; Relevant Pre-Assault Medical History

11. The Applicant has a pre-assault medical history which the parties accept is relevant and material to issues which fall to be decided.

12. The Applicant was born and brought up near Cashel, County Tipperary. He has two siblings, one sister and one brother. He is also a member of An Garda Síochána. Having obtained a good leaving certificate the Applicant attended UCG where he read for an Arts

Degree. He also applied to become a member of the Garda Siochana. He did not enjoy the degree course and so transferred to Waterford RTC where he read for a degree in Recreational Leisure Management. Before completion of that course he was notified that his application to become a police officer had been successful. Policing was his preferred career option; accordingly, he left Waterford RTC and took up his place at Templemore Training College.

Vocational Background
12. The Applicant was attested in 1996 and immediately assigned to Pearse Street, Garda Station, Dublin, and served there for a few months before being transferred to Togher Garda Station, Cork, where he served until 2006, carrying out general and community policing duties which he thoroughly enjoyed.

13. Following the assault, the Applicant was temporarily transferred to Divisional Headquarters at Anglesea Street, Cork, in early 2006 where he was assigned light duties until he was temporarily transferred back to Togher before being permanently reassigned to Anglesea Street in May, 2007. The Applicant was always interested in community policing, particularly working with young people. In that connection, he was Secretary of the Board of Management of the Juvenile Crime Diversion Project, as well as being Treasurer and member of the Board of Management of the Togher Drugs Education Project, both of which were funded by the Department of Justice.

Sporting Background
14. A fit young man with no significant medical issues, the Applicant had been born and reared with hurling, a sport in which he excelled. He started playing for his club, Boherlahan, at seven or eight years of age, quickly became proficient, and was ultimately selected to play for Tipperary at underage level. He went on to win an All-Ireland medal with the under-twenty-one Tipperary team; hurling occupied a prominent place in his life.

15. It was no real surprise to those in the know when, in 1996, he was called up to the Tipperary senior hurling panel. He was immensely proud of that achievement; not for the first time, Tipperary were the reigning county champions. During the National Hurling League in 1997, the Applicant captained the county team for several months. He also played for the Gardaí in interdivisional and other competitions and was generally facilitated by Garda Management in pursuing his sporting career which extended to golf in which he also developed proficiency; he got his handicap down to 9 and won a number of amateur competitions.

Road Traffic Accident 1998
16. On the 17th June, 1998, he was involved in a serious road traffic accident on the 'link road' Cork, when the patrol car in which he was travelling as an observer was involved in a high-speed collision with another vehicle which had driven onto the dual carriageway from a slip road without yielding right of way; the vehicle crossed into the path of the patrol car which was travelling at high speed in the overtaking lane of the carriageway.

17. The Applicant gave evidence about the violence of the impact between the two vehicles; the other car went through the air like a football, turning over six or seven times in the process and ended up as a wreck. Serious damage was also caused to the patrol car; the left front near side took the brunt of the collision.

Consequences of the RTA; Injuries
18. The Applicant suffered multiple soft tissue injuries, the most serious of which were to his neck and lower back. Following the accident he attended Cork University Hospital where he was examined, treated and discharged back to the care of his GP.

19. Within a few days he realised that his back injuries were more serious than he had first thought. And so, it turned out; he eventually had to have back surgery. This was carried out by Mr Rawluk, Consultant Neurosurgeon, in July 2002. Apart from his GP and Mr Rawluk, the Applicant also attended Dr. Michael Molloy, Consultant Rheumatologist, (subsequently Professor Molloy) and Mr. Maha Lingam, Orthopaedic Surgeon. Mr Rawluk and Dr Molloy examined the Applicant and reported on his injuries following the assault,

20. The Applicant also developed psychological sequelae as a result of the RTA. He experienced episodic frustration and depression with thoughts of self harm which he attributed to a lack of sympathy and support from management and an inability to carry out full policing duties and participate in sport as a result of the persistent neck and back pain matters which would again resurface after the assault. The psychological sequelae did not feature in the medical reports furnished in connection with the RTA proceedings which issued in May 1999.

21. That case was brought on for hearing early at the Michaelmas Sessions of the High Court at Kilkenny. Mr Rawluk gave evidence at the trail. On the 16th November, 2000, the action was settled and disposed for IR£27,000 plus costs, two years before the Applicant's back condition deteriorated to the point where he needed surgery.

22. In 2006, during an assessment carried out by Dr O'Leary Consultant Psychiatrist in respect of the psychological sequelae which had developed following the assault, the Applicant disclosed the history of depressive episodes, frustration and suicidal ideation which had followed the RTA. The omission from the subsequent proceedings was never satisfactorily explained but it was apparent from his evidence in this case that the Applicant was reticent about and did not want to be labelled with a mental illness, a common enough attitude alluded to and supported by Dr Patrick Devitt, Consultant Psychiatrist, who assessed Applicant and reported to the Chief Medical Officer (CMO) to An Garda Síochána in these proceedings.

23. I am satisfied that the omission is not significant in the context of the issues under consideration. On the available evidence, any psychological sequelae arising from the RTA had fully resolved long before the events and matters with which the Court is concerned.

24. I have read and considered the pleadings and the medical reports commissioned and used in the RTA together with a medical report dated 8th May, 2000, prepared by Mr Rawluk, which came to light during the course of the hearing in this case. This is significant because not only would Mr Rawluk go on to perform back surgery in 2002 but he was also involved in assessing and reporting on the Applicant's injuries and vocational capacity both before and after the assault.

25. Mr Rawluk refers in his report to an MRI scan taken in March 1999 disclosing a central to right sided L4/L5 disc prolapse associated with localised stenosis together with some local exit canal stenosis on the left side at the L5/S1 level. The relevant content of the report was particularised in the RTA proceedings under cover of letter dated the 14th August, 2000. The particulars included a reference to the development of severe back pain radiating down the left leg associated with a 'pins and needles' sensation in the toes of the left foot, symptoms that would persist and worsen before surgery in 2002. The significance of this is that these symptoms would again reappear following the assault.

Vocational, Recreational and other Consequences of the RTA.

26. Vocationally, the Applicant was out of work for approximately six weeks. Over the next eighteen months his neck symptoms, which were always less troublesome than those from his back, gradually settled down. Recreationally he tried to return to training in the autumn of 1998 in an attempt to get back to playing hurling but found that doing so exacerbated his back symptoms. However, by June, 1999 when he was seen by Dr. Molloy, he reported undertaking some light training and was hopeful of being able to return to playing hurling.

27. Degenerative changes which developed in the Applicant's neck during the years following the assault would progress and cause seriously painful symptomology by 2009/10 for which he required extensive and invasive treatment. The degenerative neck condition and continuing symptomology is not causally related to the assault.

Exacerbation of Injuries
28. In January, 2000 the Applicant experienced an unprovoked relapse of significant symptoms in his back and to a lesser extent in his neck. The development of neurological symptoms already described resulted in a referral back to Mr. Rawluk. At the time of medical assessment for the report of May 2000, he noted that the symptoms of left leg pain and paraesthesia had settled spontaneously, that the Applicant had returned to some gentle training and that he had benefitted from an intensive course of physiotherapy undertaken as part of a rehabilitation programme.

29. Although Dr. Molloy expressed the view in a medical report dated 23rd October 2000 for the RTA proceedings that there was considerable uncertainty about the future and long term prognosis concerning the Applicant's participation in sport and to some extent in relation to work, the opinion expressed by Mr Rawluk in his report of May, 2000 was that absent any progression in the degenerative changes seen on the scans taken over the previous two years, the contribution of the RTA to any further major deterioration in the back condition would be negligible, a view which likely explains and is reflected in the amount recovered on foot of the RTA proceedings.

30. Unfortunately for the Applicant not only did his lower back pain not resolve, symptoms deteriorated to the point where they became so severe there were times when he could not get out of the bed or would have to come down the stairs sitting on his bottom or would walk bent over like a very old man.

31. It was against this background that he was referred to Mr. Rawluk in February, 2002. Having carried out an examination and review he advised that surgery was necessary; this was performed on the 1st July, 2002. At surgery, a laminectomy and disctomy of the disc prolapse and lumbar stenosis seen at the L4/5 level was performed. Post operatively there was some improvement but a full recovery was not achieved; the Applicant continued to be troubled by some level of back pain for which he underwent further treatment options which included anti inflamatories, epidural injections and acupuncture; ultimately a combination of these treatments proved successful in substantially abating symptoms.

Vocational and Sporting Consequences of Post Operative Recovery
31. The Applicant's evidence was that he had experienced such a significant improvement following these treatments that he was well enough to return to the gym and take up training. He regained his strength and fitness to the point where he was able to return to playing golf and club hurling. Vocationally he was able to return to work, initially on light duties for about six months, before a return to full duties during the summer of 2003. In evidence, the Applicant described himself as having become very fit and possibly even stronger than ever.

32. Although he returned to playing hurling for his club, the Applicant was never again selected for the county panel nor did he play for the county team. There were various reasons to explain this turn of events not the least of which was that his personal circumstances had changed.

33. Of these, given his age, he was probably coming to the end of his playing career; his recollection in this regard was that he had finished playing senior hurling at the end of the 2004 season. Furthermore, despite his rehabilitation and return to a high level of fitness, he was prone to experiencing back soreness at the end of a game. Other circumstances included the formation of a relationship and move to live in Cork which militated against travelling to and from his club in Tipperary.

34. What had been important to him following the surgery was that he would recover a level of fitness which allowed a return to playing club hurling and golf rather than a return to the level of fitness necessary for selection to the county panel. Happily he had achieved that goal.

35. While it is undoubtedly the case that the Applicant did return to work and ultimately was certified fit for full policing duties following his back surgery in 2002, the medical reports from that time and the correspondence passing between the GMO and Mr. Rawluk in 2004 suggest that he is mistaken in his recollection that he had been certified and had returned to full policing duties during the Summer of 2003. On the face of it the CMO did not certify the Applicant fit for full policing duties without medical restriction or limitation until October, 2004 a status which he continued to enjoy until he was involved in another accident the following month.

Slip and Fall Accident November 2004
36. In November, 2004, the Applicant and a colleague entered the garden of a private house in pursuit of a number of suspects. While exiting around the side of the premises he slipped and fell on a wet piece of plywood, landing heavily in the process. Given his previous history, the Applicant was concerned that he might have suffered another significant back injury. As there was some controversy between the parties concerning the significance and consequences of this accident, the consequences require examination.

Consequences of the 2004 Accident prior to the Assault
37. Vocationally, the Applicant's recollection was that he was out of work for a very short period of time. With regard to the injuries, his evidence was that although he suffered a flare up of back symptoms, necessitating a single visit to his GP, these had settled down quickly to the relatively symptom free position he had enjoyed before the accident. Some of the treating physicians who prepared reports for these proceedings were unaware and appear not to have been told about the 2004 accident. The explanation provided by the Applicant for the omission of this event from his medical history was that he considered it to be minor and of no medical significance in the context of these proceedings. Having regard to the content of the GP's medical notes, he was clearly mistaken both in his recollection and in his belief in relation to the significance and duration of symptoms.

38. It is evident from the medical notes, records and from correspondence passing between his GP, Dr. O'Connell and his Neurosurgeon Mr. Rawluk, that not only did symptoms not settle down relatively quickly after the fall, he continued to experience intermittent lower back pain during the Winter of 2004 and into the following Spring and that throughout this period he received on going treatment in the form of anti-inflammatories and acupuncture; eleven relevant GP visits are recorded. Indeed, the persistence

and level of symptoms in the spring that Dr. O'Connell decided to refer the Applicant back to Mr Rawluk and wrote a letter of referral in April 2005. However, it appears from subsequent correspondence that the referral was not proceeded with because the back symptoms settled down spontaneously.

39. Consistent with that scenario there is no entry in Dr O'Connell's notes of any visit with a complaint of back pain by the Applicant between the 29th April and the date of the assault. He did attend on the 22nd August but this was for a vaccination preparatory to going on annual holiday to Thailand some days later. Significantly, Dr O'Connell also made a note at the time that the Applicant reported not having been troubled by any significant back problems for the previous few months.

40. An issue emerged during the hearing with regard to the length and prognostic significance of the time period during which the Applicant had been asymptomatic prior to the assault. Dr O'Connell wrote a letter to Mr Rawluk in November, 2005 in which, having mentioned the intended referral the previous April, he confirmed that the problems which the Applicant had been having with back pain following the 2004, accident had settled down spontaneously. Dr. Pat O'Neill, Specialist in Occupational and Sports Medicine, who gave evidence on behalf of the Respondent, expressed the opinion that this history was consistent with the nature of the underlying back condition and exampled a pattern of quiescent periods between recurring symptomatic episodes.

Conclusion: Asymptomatic Period Pre-Assault
41. I am quite satisfied that the medical status of the Applicant which resulted in certification for full policing duties without restriction was likely to have continued were it not for the accident in 2004. That accident resulted in relatively minor soft tissue injuries being superimposed on the underlying back condition which provoked symptoms of back pain and discomfort that persisted until the following April, when there was a spontaneous resolution. Thereafter the Applicant apparently carried out full policing duties up to and including the day of the assault.

Vocational Implications
42. While the Applicant accepted he had pre-existing asymptomatic degenerative changes in his lower back which had been rendered symptomatic as a consequence of the RTA, that these injuries were serious and had subsequently resulted in the surgery of 2002, his case was that he had recovered to the point where he had returned to full policing duties and to playing his favourite sports, hurling and golf. It was submitted on his behalf that for all intents and purposes he had fully recovered and would likely have continued to enjoy that status but for the assault. Furthermore, in 2003, and in order to realise his ambition to become a Juvenile Liaison Officer, he had completed a Diploma in Adolescent Psychology. Thereafter his intention was to seek promotion by sitting his sergeant's exams.

43. I pause here to observe that the Applicant never applied for the sergeant's exams and that even if he had done so and had been successful, this would not have assured a promotion to the rank of sergeant. Passing the exams is but part of a process that also involves an interview which guarantees only that a successful candidate will be considered for promotion should a vacancy arise. Accepting that the Applicant was determined and ambitious, on my view of the evidence and in the particular circumstances of the case, it is simply not open to the Court to proceed on the premise that the Applicant would likely have been promoted to the rank of sergeant; it was certainly possible but it cannot be put further than that.

44. Unfortunately for the Applicant, he was kicked in the same area of his back where the previous surgery had been carried out. On his case the ferocity and location of the blow to an already vulnerable back caused serious injuries that set off a chain of events which has had and will continue to have devastating consequences for him.

45. The Respondent's case is altogether at odds with this proposition; apart from some minor soft tissue injuries resulting in a transient exacerbation of his pre-existing back condition lasting no more than eighteen months to two years, it was contended that all other consequences are attributable to an already symptomatic underlying back condition which is not casually related to the assault for which the Respondent is not legally responsible.

46. For reasons which will be discussed later, the Court does not accept the proposition that the assault was an insignificant insult resulting in minor soft tissue injuries accompanied by some transient consequences for the underlying condition, however, absent the assault I am satisfied the underlying degenerative changes would have been the source of recurring episodic symptomology especially as the changes progressed with age, a consequence for which the Respondent is clearly not legally responsible.

47. In the circumstances and having particular regard to the Respondent's case, encapsulated in the grounds of Defence, it is considered appropriate and useful to review in some detail the medical opinions and prognosis apparent from the medical reports, notes and correspondence admitted in evidence relating to the Applicant's back condition which came into existence before the assault. These opinions also carry a forensic benefit; unlike opinions on prognosis expressed after the event, they were not informed or trammelled by the occurrence and consequences of the assault.

Medical Opinion and Prognosis in respect of the Pre-Assault Medical Condition and Back Injuries.
48. The medical evidence in relation to the Applicant's neck and lower back injuries arising from the RTA and the slip and fall accidents establishes that while there were no degenerative changes apparent on x ray or MRI scanning of the cervical spine, such were present in the lumbar spine at the L4/5 and L5/S1 levels. These changes were described by Mr. Maha Lingam as disc bulges incidental rather than related to injury, a view also shared by Mr. Rawluk, save that he described the changes shown on the MRI scans of 1999 and 2000 at the L4/5 level as involving a central right-sided disc prolapse with stenosis.

49. Mr Rawluk's opinion in May, 2000 was that the contribution of the RTA to any future deterioration in the Applicant's back condition would be negligible but he also stated that it had caused the pre existing but asymptomatic degenerative changes in the lumbar spine to become symptomatic; furthermore, as these changes had continued to be symptomatic for over eighteen months post accident it was unlikely there would be any major improvement in the future and that the Applicant would have to modify his lifestyle. That prognosis was borne out in dramatic fashion when two years later he had to have back surgery.

50. Indeed, in the years before and immediately following the assault, the CMO classified the Applicant's absences from work due to back symptoms as being 'injury' related thus entitling him to receive his salary while out of work. In later years following the assault this view was to alter with serious financial consequences for the Applicant and his family; work absences from 2008 were reclassified by management on the basis of medical advice received from the CMO, Dr. Devitt and Dr. O'Neill as due to illness rather than injury. As will be seen later, that reclassification was abandoned following a further review in the course of the hearing.

51. The medical prognosis provided in the medical reports furnished by Mr Maha Lingam for the RTA proceedings was '*guarded*'. Dr Molloy described the future as one of '*considerable uncertainty*'. Between January, 2003 and October, 2004 correspondence passed between the CMO and Mr. Rawluk arising out of certain medical examinations carried out for the purposes of assessing the Applicant's fitness for duty in the short, medium and long term. The Court was invited by the Respondent to pay particular attention to the

content of this correspondence.

52. The Applicant presented a picture to both physicians of a man who enjoyed his life as a member of An Garda Siochana and was anxious to get back to full policing duties without restriction. While satisfied that it was appropriate to support the Applicant in his desire to return to work and that he could be certified fit for moderately active duties, Mr Rawluk also expressed concerns about the nature of the duties he would be required to carry out. In that regard, he advised that the Applicant most likely experience recurrent back symptoms which might well necessitate absences from work, consequences which the CMO accepted were 'very predictable'. It follows that before there was ever any further back trauma, a very definite prognosis had been given to Garda management in the context of the work duties to which the Applicant might be assigned.

53. On the face of it these conclusions contra indicated a return to full unrestricted policing duties; however, it appears such were never conveyed to Garda management, or certainly not in the form expressed by Mr Rawluk; an explanation for this turn of events is also to be found in the correspondence passing between the CMO and Mr Rawluk. Dr. Collins made it clear that he was anxious not to place any undue work duty restrictions on the Applicant notwithstanding that unrestricted certification might result in some back pain and discomfort, particularly if he was required to stand or sit for long periods or if he was required to restrain and arrest an awkward prisoner.

54. In those circumstances, he sought Mr Rawluk's opinion as to whether it was reasonable for him to advise Garda management that he would find the Applicant fit for duties without medical limitations. On my view of the correspondence, the likely problem areas mentioned in the correspondence were by way of example rather than an attempt to provide an exhaustive list of what might be problematic.

55. This approach reflects an aspect of Garda management policy towards vocational rehabilitation and opportunity which would later be shared by the CMO, Dr Pat O'Neill, and Dr Patrick Devitt, each of whom were retained to examine and report on behalf of the Respondent in relation to the injuries arising from the assault, the Applicant's fitness for work and whether or not he should be retired on medical health grounds.

56. For operational reasons, it is readily understandable that Garda management would want to have available officers who are capable of carrying out full policing duties and that in the event of injury or illness, such officers would eventually be certified fit for full duties where possible, a policy clearly evident in the approach to certification taken by the CMO when he wrote to Mr Rawluk.

57. It is also evident from his response, that Mr. Rawluk seems to have been persuaded that it was reasonable for the CMO to give the suggested advice, nevertheless, he added a caveat, to be noted on his record, that the Applicant had some problems of reference to his lumbar spine which might affect him at some stage in the future; how he might be affected was difficult to predict at that time.

58. The CMO replied and confirmed that he had advised Garda management that the Applicant be found fit for normal policing duties without medical limitations, recognising that he maybe more vulnerable than another to some back discomfort in the future. That advice begged a number of questions which appear not to have been addressed; the nature of the identified vulnerability and potential consequences of any back discomfort to name but two.

59. The medical assessment and categorisation of the Applicant as someone with pre existing degenerative changes which had been rendered symptomatic as a result of previous injury necessitating surgery and which had left him with a vulnerable back susceptible to recurrent symptoms of pain and discomfort in certain circumstances proved to be almost prophetic in the context of what happened afterwards; ironically, the modified indoor duties to which he was eventually assigned following the assault also involved prolonged periods of sitting.

60. Whatever about the views of the CMO and Mr Rawluk and whether or not the Applicant ought to have been assigned to modified, restricted or light duties, it is relevant to the appropriateness of the duties assigned to him post the assault that the Applicant's evidence regarding the reasons why he had wanted to pursue a career in policing was that it afforded him an opportunity to be involved in working out in the community, particularly with juveniles.

61. Whilst there is always an element of office based administrative duties associated with most roles in policing, the Applicant never saw himself nor did he contemplate pursuing a career path in the Gardai which would have substantially taken him indoors. This view and the desirability of finding a vocational accommodation for the Applicant enabling him to combine his interests in community policing and psychology with rewarding and satisfying Garda duties was identified and specifically recommended to Garda management by Dr Devitt when he first advised on the psychological sequelae following the assault in August, 2009. On the Applicant's evidence this advice was never properly or fully implemented; the assignment of duties and accommodation made was inappropriate to meet his needs and was based on other considerations.

62. I digress for a moment to observe that while there is no doubt on my view of the evidence that the Applicant's personality and preference for operational rather than administrative duties played a psychological role in his attitude to what happened vocationally after the assault, I am satisfied that had an accommodation been implemented of the type recommended by Dr Devitt, this aspect of matters was unlikely to have featured, at least to any significant extent, in the Applicant's post assault psychological reaction.

63. It is no answer to say, as was submitted on behalf of the Respondent, that the Applicant was accommodated in what he accepted was an important and worthwhile role, if as occurred in this case, the accommodation fails to meet the criteria suggested and recommended by Dr Devitt whom the Respondent had retained to give that advice. Nor is this to be conflated with the way in which local management had accommodated the Applicant when he was playing hurling or with the way Garda welfare had reacted following his admission to St John of God's in 2015.

64. As will be seen later, the Court accepts that the psychological sequelae were caused by the Applicant's physical injuries and not the other way around. The Applicant's personality type, psychological disposition and personal preferences, including vocational preferences, are as much a part of the make up of an individual as anything else; the wrongdoer must take the victim as found, blaming the victim's personality for his reaction to a wrong has no basis in the law of tort.

65. While the Minister is not a wrongdoer and is not vicariously liable for the wrong of the assailant, so far as the assessment of compensation is concerned, the scheme established by the Acts places the injured Applicant in the same position at law as an injured Plaintiff, the ordinary principals of tort law with regard to the assessment of compensation apply. See *Mullen v. The Minister for Public Expenditure and Refo*rm [2016] IEHC 295; *Murphy v. The Minister for Public Expenditure and* Reform [2015] IEHC 868; *Carey v. The Minister for Finance* [2010] IEHC 247 and *O'Looney v. the Minister for Public Service* [1986] 543 at 546.

Conclusion; Medical Opinion and Prognosis; Vocational Implications arising from the Back Condition Pre-Assault
66. On my view of the pre assault medical evidence, absent any acute trauma, it is highly likely the Applicant would have continued to experience recurrent intermittent episodes of low grade back pain and discomfort, particularly on sitting or standing for lengthy periods at work or if engaging in any heavy work or other strenuous physical activity, moreover, it is probable that from time to time the level and duration of symptoms would have led to work absences as well as medical attention and treatment apart altogether from the consequences of any problems emanating from his neck.

67. Accordingly, I cannot accept the submissions made on behalf of the Applicant that prior to the assault he had essentially made a full recovery and that in the future he was likely to have been asymptomatic in respect of the underlying degenerative back condition.

68. My impression of the Applicant given his very definite preference for operational police duties, is that he would have tolerated recurring episodes of intermittent pain and discomfort as a quid pro quo for what he enjoyed most about being a police officer as evidenced by his work routine firstly following the accident in 2004 and, secondly, during the first year following the assault.

69. It does not necessarily follow from continuing with a pre-booked and paid for holiday within days of the assault and or the relatively low rate of medical attendance complaint and treatment record in the year following the assault that it was of no lasting consequence; this is especially so against the background history of injury and surgery which rendered the Applicant's back vulnerable to further injury. In this context it is significant in my view that Dr. O'Neill described the assault as *'moderately severe'*. It maybe trite to say so but the Applicant is clearly not to be placed in the same position as someone of the same age and physical constitution with a perfectly healthy spine; such a comparison would be grossly unfair, unwarranted and unjustified.

70. Given that he had been certified fit for and had returned to carrying out full policing duties in October, 2004 and that he was performing these up to and at the time of the assault, it is probable that the Applicant would have continued to serve in that capacity had it not been for the assault. As to how long he would have been able to do so is certainly open to question especially when regard is had to the progressive nature of the degenerative changes in his neck and back.

71. As already stated, since as long ago as 2000, well before the surgery in 2002, the accident in 2004 and the assault in 2005, the prognosis in relation to the Applicant's future participation in sport and to some extent his ability to work was *'guarded'* and one of *'considerable uncertainty'*.

Pre-Assault Neck Injuries; Cause of Degenerative Changes in the Cervical Spine
71. No degenerative changes were discernable on cervical spine x-rays and MRI scanning carried out following the RTA as a result of which the Applicant had also suffered soft tissue injuries to his neck as well as his back, indeed, he made a full symptomatic recovery in respect of his neck injuries. However, in the years following the assault degenerative changes developed in the cervical spine which caused prolonged and painful symptomology which, as will be discussed later, necessitated extensive treatment, including injection therapy.

Conclusion; Vocational Consequences of Neck Condition;
72. Whether or not the RTA or some other circumstance is responsible, the assault is not implicated in the development of the degenerative neck condition, which most probability developed co incidentally. When the severity of the symptoms and the time and treatment involved is considered, it seems highly that the Applicant's neck problems would have impacted negatively on his ability to carry out normal policing duties and would have led to absences from work quite independently of the underlying back condition. Taken together, or independently of one another, the potential impact of these conditions on the Applicant's capacity to serve until a stated retirement from the force at age 60 cannot be excluded from consideration and fall to be taken into account.

From Assault to Surgery (2005-2007)
73. The degree of force and nature of the damage caused by the kick was controversial. Expressing an opinion as to that issue in a letter dated the 24th April 2007, which he wrote to the Applicant's solicitor; Mr Rawluk opined that the assault had upset the mechanics of the spine, a view which the CMO found difficult to reconcile with what he took to be the earlier opinions of Mr Rawluk. Whatever way those had been interpreted by the CMO, it is clear from the letter that Mr Rawluk believed his opinion was the same as that stated in his earlier report of March, 2006.

74. The Applicant gave evidence of a forcible kick to the same area of his back where he had had surgery in 2002. Within seconds he experienced back and sciatic pain radiating into his lower limbs, symptoms similar to those he had experienced prior to the surgery and as a consequence of which he knew that he had suffered what he described as another bad injury to his back. Nevertheless, he continued with his duties, taking the assailant back to the station and then to hospital before returning to the station where he reported the assault and the injury to the sergeant in charge.

75. The Applicant awoke the next morning with pain and stiffness in his back. He attended his GP, Dr O'Connell, who noted limitation of back movements with muscle spasm accompanied by parasthesia, initially in the right but then predominantly in the left leg. He also noted a reduction in the straight leg raising (SLR) test, limited to 30 degrees on the left side. These complaints are consistent with the Applicant's evidence that following the kick he experienced symptoms similar to those prior to the surgery in 2002. Dr O'Connell prescribed painkilling medication and administered a muscle relaxant injection. The Applicant was out of work for a few days before he went on holiday at which stage he signed himself off sick leave, taking holiday leave instead.

76. Throughout the flight to Thailand and during his holiday, the Applicant continued to experience back pain which placed significantly restricted his planed holiday activities. On return to work he carried out light duties and some community policing, however, his back symptoms persisted and deteriorated to the point where he again had to take sick leave from the 25th October to the 22nd November, 2005.

77. Given his medical history and presenting complaints, Dr O'Connell referred the Applicant back to Mr. Rawluk and arranged to have an MRI carried out on the 8th November, 2005. Mr Rawluk carried out an examination, reviewed the scan and wrote back to the GP on the 28th November, 2005. He advised that the scan showed no evidence of a focal left sided disc prolapse giving rise to nerve root compression; if anything, the appearances were better than those seen on the MRI taken prior to the 2002 surgery.

78. Accordingly, he reassured the Applicant he had not sustained any significant damage or injury and that in the fullness of time he was hopeful an improvement would occur with conservative treatment. However, Mr Rawluk also expressed concern to the GP that the Applicant would not be fit for any occupation in the future that would involve direct physical confrontation such as might occur when trying to arrest or subdue an awkward prisoner, a view very similar to that which he had expressed to the CMO in 2004. Consequently, he suggested that it might be appropriate to consider moving the Applicant to a more administrative position within the Gardaí. As to the likely explanation for the ongoing left leg symptomology, he attributed this to the underlying degenerative changes;

there was no indication for further surgery, an opinion and prognosis which was not to be borne out.

79. When the Applicant returned to work on the 22nd November, he was assigned light duties doing clerical work which included keeping lost and stolen property books. He remained in Togher Garda Station until early in the New Year when he was sent on temporary transfer to Divisional Head Quarters at Anglesea Street Garda Station, Cork. He was assigned and carried out office based duties until he was once again out of work on sick leave due to back pain from the 21st to 28th December, 2005.

80. Subsequent to his examination by Mr Rawluk, the Applicant discussed his immediate future with Superintendent Ger Lehane to whom he gave a letter from Mr Rawluk concerning his medical status and fitness for work. Based on the content of that letter and as a result of their conversation, the Applicant was informed that it was unlikely he would be appointed to the position of Liaison Officer; moreover, his promotional prospects in general would also be affected since it appeared his injuries rendered him only fit for light duties. And so, it proved to be; the Applicant would never again be certified medically fit for full policing duties.

81. Against the backdrop of what he had been told by Superintendent Lehane, the Applicant found his return to office based duties after Christmas particularly frustrating and demeaning. The fact that he might be confined to such work for the foreseeable future had a profound affect on his psychological functioning and well being; this was not the type of work he had envisaged when choosing a career in policing. In addition to frustration he became stressed and experienced an alteration in his mood; he became depressed and noticed that he had developed an increased frequency in micturition, a complaint Mr Rawluk noted as early as November, 2005.

82. In March, 2006 Dr. Molloy carried out a medical assessment during which he noted that the Applicant was tearful, depressed and despondent, a presentation in marked contrast to the cheerful, outgoing, and positive young man he had seen in connection with the injuries arising from the RTA and, it will be recalled, who had presented to Mr Rawluk and the CMO in 2003/2004. Accordingly, he referred the Applicant to Dr. Mairead O'Leary, Consultant Psychiatrist. She carried out an assessment and set out her findings and opinion in a comprehensive medical report dated the 17th May. She also gave oral evidence.

83. Although not apparent to Dr Molloy nor otherwise disclosed by the Applicant during medical examinations following the RTA, as mentioned earlier, he gave Dr O'Leary a history of the injuries arising from that accident which included significant psychological sequelae which had manifested in sleep disturbance, irritability, anhedonia, loss of interest, frustration, feelings of worthlessness, depressed mood and thoughts of self harm but in respect of which he had made a full recovery. These sequelae reappeared following the assault but were accompanied by new complaints of panic attacks and of being sweaty and anxious at work.

84. Dr O'Leary noted that the Applicant was worried about his future and how he would provide for his family; his first child was due in November, 2006 and he was due to marry the following February. She also noted that he had given up medications because they were causing him to feel dazed and were impairing his concentration and memory. In her opinion, he had developed significant depressive and prolonged adjustment disorders which were being maintained by his conditions of work; she thought he might ultimately have to retire. She prescribed antidepressants and referred the Applicant for psychotherapy.

85. EMG studies carried out at the request of Dr Molloy in July, 2006 disclosed mild neuropathic features in the L5/S2 distribution which were considered to be in keeping with a chronic back problem. He noted that the Applicant continued to be very depressed and despondent and that his physical symptoms had persisted and had been unresponsive to powerful painkilling medication. The Applicant accepted that there were times over the years following the assault when he was noncompliant with taking prescribed medication for reasons which he explained in evidence; when he took all of his prescribed medication he experienced significant side effects such as impairment of his mental faculties, including concentration memory and a tendency to fall asleep.

86. Dr Molloy's assessment in October 2006, was that the Applicant was unlikely to improve significantly or be able to get back to full policing duties; his quality of life was very poor and he was not fit to continue as a police officer. In the interests of his health and wellbeing he would need retraining for a new career and recommended that he be discharged on medical grounds, a view he repeated several times in the years following up to and including trial

87. The Applicant had ceased work the previous month due to a combination of physical as well as psychological sequelae and remained out of work until the following May. Having regard to his ongoing difficulties Dr. Molloy arranged a repeat MRI scan of the lumbar spine which was carried out by Dr. Martin O'Driscoll on the 12th October, 2006. He reported that the L4/5 and the L5/S1 discs were dehydrated and at the L4/5 level reduced in height with associated disc bulging exacerbated by hypertrophic degenerative changes seen in the lower three levels. At the L4/5 level there was also a degree of spinal stenosis due to a diffuse disc bulge with disc material lying very close to the descending nerve root. In his report, he also noted a history of left sciatica with potential causes for this at both L4/5 and L5/1 levels.

88. Armed with this information Dr. Molloy decided to refer the Applicant back to Mr. Rawluk who carried out an examination and reviewed the up to date MRI scan in November, 2006. He thought that Dr. O'Driscoll had "*over dramatised*" the extent and nature of the degenerative changes and did not think that there was any need to consider surgery at that time. At re examination in March, 2007 he found restriction of lumbar flexion with reduced pin prick appreciation on the left side in the L5/ S1 distribution.

89. Although he maintained the view that surgery was not indicated, Mr Rawluk advised that a TENs machine might go some way towards offering some symptomatic relief and whilst he reassured the Applicant that he was unlikely to cause himself any major damage or injury while continuing to experience his symptoms, at the end of the day it would be a matter for him as to whether or not he would be prepared to tolerate his symptoms having regard to his occupation or whether such would be grounds to consider retirement. Dr Molloy did not share Mr. Rawluk's view that no progress in the degenerative changes was evident from the scans.

90. In the autumn of 2006 the Applicant came under the care of a new GP, Dr. McGarry who referred him to Mr Michael O'Sullivan, Consultant Neurological Surgeon. He carried out an examination and referred the Applicant to Dr. Donal Harney, Consultant Anaesthetist and Specialist in Pain Medicine, who performed RACZ epidural adheliolysis procedures on the 24th January, 29th March and 17th May, 2007, treatments from which the Applicant derived minimal benefit.

91. The Applicant continued to suffer from typical depressive features including poor sleep, diminished appetite, poor concentration and motivation, loss of libido, loss of enjoyment in life generally and despondency regarding the future with no clear sense of purpose.

92. Dr McGarry had referred him to another psychiatrist, Dr. Dennehy, in January, 2007. In his opinion, the psychological sequelae were causally linked to a series of events which had been triggered by the assault. It was significant that the Applicant was well adjusted and had been functioning effectively within An Garda Síochána until the time of his injury in August, 2005. Any improvement in his psychological status was interlinked and dependant upon prognosis for his physical condition. Absent any improvement in that regard, the psychological prognosis was poor, a prognosis which was to be borne out. The Applicant attended Aine O'Rourke, Clinical

Psychologist, to help him deal with his psychological sequelae but he derived little lasting benefit from the therapy afforded.

Medical Reviews on behalf of the Respondent 2006-2007
93. The Applicant had been reviewed by the CMO in mid-2006 following which he was examined in August and December, 2006 by Dr. Pat O'Neill. The Applicant was also referred to Professor Anthony Clare and subsequently to Dr. Tobin, Consultant Psychiatrists, for assessment of his psychological sequelae.

94. Their reports, which were not relied upon by the Respondent to meet the claim, were made available to the Court in the course of the hearing. It appears that Professor Clare, who died subsequently, saw the Applicant on the 23rd August. In his opinion, the Applicant's mental state was related to and caused by the injuries and not the other way around. Noting the view of Mr Rawluk that the Applicant was very vulnerable to additional stresses and strains placed on his lower spine, Professor Clare's opinion was that the Applicant appeared to meet the criteria of a pain disorder associated with both psychological factors and a general medical condition in (Code 307.89) the Diagnostic and Statistical Manual (DSM) of Mental Disorders, 4th edition, a view also shared by Dr Tobin.

95. He reviewed the Applicant's history and carried out an assessment on the 3rd April, 2007, following which he prepared a report in which he observed that the Applicant had developed a reactive depression of fluctuating nature secondary to the injuries sustained as a result of the assault. Significantly, he ruled out a psychosomatic component to what had then become what Professor Clare had described as 'a chronic pain disorder' and what Dr Pat O'Neill would later describe as 'a chronic pain syndrome', which, it is to be observed, is also classified as a psychiatric condition/ disorder in the 10th revision of the International Classification of Diseases and Related Health Problems (ICD)-10.

96. Noting that the Applicant's drive and ambition was in conflict with his physical disabilities, Dr Tobin advised that medical discharge might have to be considered unless local Garda management was able to facilitate him with a position which would resolve the conflict. These views are broadly in keeping with those of Dr. O'Leary and Dr. Dennehy, both of whom gave evidence.

97. Dr O'Leary told the Court that she had spoken to Dr Tobin about the Applicant and that they were both in agreement that he was suffering from adjustment and depressive disorders as a result of the assault. Her view of Professor Clare's report was that he considered the Applicant's psychological illness was caused by the back pain; these opinions are clearly significant having regard to the issue of causation, views which were not shared by the CMO or by Dr Devitt save that in his first report in August, 2009 he expressed a similar view to Dr Tobin concerning the desirability of finding a vocational role which would take account of the Applicant's interests in community policing and psychology to provide him with a rewarding career.

Further Treatments and Progress 2006-2007
98. By mid-summer 2007 the Applicant found himself caught up in a vicious circle of psychological and physical sequelae. The epidural treatments which he had received from Dr. Harney, which had been so successful following the back surgery in 2002, failed to produce the same result in 2007. The Applicant was in constant pain and neither anti inflammatory and pain killing medication or antidepressants which had been prescribed for him by Dr. Dennehy were having any lasting benefit or effect; accordingly, he was referred to Mr. Stephen Young, Consultant Neurosurgeon, for a second opinion. He reviewed the Applicant on the 7th August, 2007.

99. In common with Dr Molloy, his view of the scans, contained in a report, dated 13th February, 2008, was different to that of Mr Rawluk who, it will be remembered, did not think there had been any change in or progression of the degenerative discs in the period between scans. Mr Young on the other hand described these changes as including "a collapsed degenerative disc at L4/5", an opinion expressed differently but consistent with what had been reported by the radiographer, Dr. O'Driscoll, moreover, it is significant that Dr Pat O'Neill, who gave evidence on behalf of the Respondent, concurred with the view that the scans disclosed a progression in the changes.

100. In order to ameliorate his ongoing back pain, Mr Young recommended treatment with a Wallis Implant to stabilise the vertebrae at L4/5. At surgery, he discovered that the spineous processes at that level had been removed during the surgery in 2002; consequently, it was not possible to proceed. He advised an alternate treatment; the fusion of the two vertebrae at L4/5, surgery which he performed on the 17th December, 2007.

101. The initial response was very encouraging; the Applicant experienced a marked improvement in his back symptoms and began to feel optimistic, however, Mr. Young cautioned that it was too early to assess the long-term prognosis. In his report dated 13th February, 2008, he stated that whatever the eventual outcome it was unlikely the Applicant would ever be able to return to the physical rigours normally associated with the work of a police officer nor would he be able to return to any physically demanding sport. Vocationally, he would be confined to carrying out work duties of a sedentary nature, news which caused the Applicant profound disappointment.

102. Throughout this period, he was out of work for a progressively longer period of time notwithstanding what he accepted was a worthwhile role in the emergency control room at Divisional Headquarters, Anglesea Street. He had returned to work in April, 2007 through financial necessity but was again out of work on certified on sick leave from early August to early September during which time the unsuccessful Wallis Implant surgery was undertaken.

103. Following the subsequent surgery in December, the Applicant was again absent on sick leave until mid summer. Unfortunately for him, the initially positive response to the 2007 back surgery was not maintained, Mr Young's note of caution proved to be warranted.

Treatments, Progress and Medical Reviews 2008 to 2010
104. Although he had commenced reading for a diploma in Sports Science via long distance learning from Setanta College, the Applicant was forced to give up the course because of ongoing issues which he had with memory, concentration, attention and pain. In August, 2008 he was referred to Collette Garvey, Physiotherapist, and attended her over the following months for physiotherapy and acupuncture treatment. The Applicant was also referred to a pain psychologist, Dr. Richardson, in the Mercy Hospital, Cork, whom he attended on approximately eight to ten occasions. Notwithstanding the various treatment modalities afforded, he regressed psychologically and physically.

105. Having exhausted the treatment option he was able to offer, Dr. Harney referred the Applicant to his colleague Dr. Paul Murphy, Consultant Anaesthetist at the Blackrock Clinic; he reported and gave evidence. His first assessment was conducted in February, 2009 and at which he advised a trial implant of a spinal cord neuro stimulator; this was implanted on the 3rd March, 2009. The Applicant responded positively, accordingly, a full spinal cord stimulator implantation was carried out on the 15th April, 2009. EMG studies in April had shown ongoing neuropathic features at the L4-5 and S1-S2 distribution consistent with lower lumbar upper sacral polyradiculopathy.

106. The Applicant had been on sick leave since the 25th February, 2009. His positive response to the implantation and degree of recovery was such that he was able to return to work on the 29th June, however, recovery was not maintained and he was again out of work from the 13th July until the 6th October. Dr Molloy had reassessed the Applicant in August, 2009 following which he wrote a report repeating and confirming the opinion expressed in his initial report of October, 2006 recommending retirement from the force on medical grounds.

Psychological Assessments on behalf of the Respondent.
107. While he had been assessed, and reported upon by Professor Anthony Clare in August, 2006 and by Dr. John Tobin in April, 2007 the Applicant was subsequently referred to and assessed by Dr. Patrick Devitt whose initial findings and opinion were set out in a report dated the 27th August, 2009. He concluded that from a mental health perspective there was no evidence that the Applicant was incapable of carrying out Garda duties. He had been furnished with the reports of Professor Clare, Dr Tobin and letters from Dr Dennehy but made no reference to nor observation or comment upon any of the views had they expressed. This omission is significant in light of his opinion to the contrary which he formed in relation to the nature, cause and categorisation of the Applicant's psychological condition, an opinion on which the CMO relied in giving his advices to Garda Management, the consequences of which, as will be seen later, were financially and psychologically devastating for the Applicant.

108. The first meeting between Dr. Devitt and the Applicant was not propitious. The Applicant's evidence was that Dr Devitt greeted him by saying "*So you're a bit of a nutcase, are you?*" a question which surprised, shocked and angered him at the time. He gave evidence that he thought it was a horrendous thing for anyone, particularly a psychiatrist, to say to him. He did not agree, when it was put to him in the course of cross examination, that while words to such effect may have been used they were intended as "*an icebreaker*" to put the Applicant at his ease. Dr Devitt disputed that he had used those exact words but accepted his modus operandi at the commencement of an assessment was to try and put the individual being assessed at ease.

109. If that was Dr. Devitt's intention, it backfired dramatically. Accepting that he had gathered himself and had participated in the assessment, the Applicant continued to be upset afterwards; he subsequently instructed his solicitor to complain about the remark and make a request that further psychiatric assessment be carried by another consultant; that request was declined.

110. The Applicant again met with Dr Devitt on the 2nd February, 2010, following which he wrote a further report and concluded that the assault could not be considered emotionally traumatic, that the psychological symptoms, which included frustration, irritability, low mood and reduced self esteem, were indirectly related to the assault and that the symptoms reflected aspects of the Applicant's personality and coping mechanisms. He reaffirmed his view that from a mental health perspective there was no evidence that the Applicant was mentally unfit to carry out Garda duties, noting that the Applicant found these demeaning. An intensive course of psychotherapy was recommended and prognosis was considered excellent if undertaken.

111. Dr Devitt's impression of the Applicant's attitude to psychiatric diagnosis was that he wished to avoid being labelled with a psychiatric illness, a position which was entirely reasonable and appropriate since in his opinion such would not in any event have been medically warranted, views which he stood over in evidence. He did not agree with the Applicant's psychiatrists. In his opinion, the Applicant was not suffering from any mental illness or disorder and such a diagnosis was inappropriate; labelling someone was counter productive to recovery. The Applicant's own personality traits were at the centre of his problems and had yet to be addressed.

Other Medical Problems; Neck Pain; Treatments
112. By early 2010 the Applicant was experiencing left sided neck pain which developed gradually as a result of degenerative changes in the cervical facet joints in respect of which Dr. Harney carried out a left sided C2-C7 medial branch blockade on the 14th May, 2010. This was followed on the 24th June, 2010, by a left sided C2-C7 classical radial frequency lesioning of the medial branch facet joints. The Applicant derived transient benefit from these procedures but remained symptomatic with regard to his neck.

113. Nerve conduction studies in November, 2013 showed chronic neuropathic features in a bilateral C8/T1 distribution as well as in the L4/L5 distribution consistent with lower cervical and lower lumbar radiculopathy. It was accepted by Professor Molloy and Dr. Murphy that the Applicant's neck symptoms were not causally related to the assault; the consequences are not compensateable.

114. I should mention in passing it was not suggested in the grounds of defence that the Applicant's neck symptomology has any bearing on the matters which fall for consideration by the Court; no causal connection is made with the assault. Suffice it to say in passing that it was the back and not the neck problems which formed the basis for the retirement recommendation. When he was being reviewed by the multidisciplinary pain team at the Mercy Hospital on the 26th April, 2010, it was indicated to the Applicant that they considered he was unfit for employment as a member of An Garda Síochána by reason of his back problems and that they would support an application for discharge on medical grounds, a view which was repeated in subsequent years.

Right Hip
115. Apart from the development of symptomatic degenerative changes in his cervical spine, the Applicant had other medical problems unassociated with the assault with which he had to cope but which did not impact significantly on his capacity to work. He had a long-standing history of pain in his right groin, generally experienced on vigorous exercise, particularly when playing hurling and golf, but not at rest. He attended Mr Carton, Consultant Orthopaedic Surgeon, in October, 2009, for investigation into the cause. Clinical examination disclosed positive femoroacetabular impingement signs in the right hip.

116. A diagnostic arthroscopy was carried out on the 13th November 2009, which demonstrated a thickened dysplastic acetabular labrum completely detached and torn on its under surface from the acetabular rim associated with delamination of the chondral surface together with a minor cam-type femoroacetabular deformity at the femoral head interface. Corrective surgery was performed without any perioperative difficulties. The Applicant undertook rehabilitation exercises, including swimming and made a relatively good recovery.

117. Apart from his neck and hip problems the Applicant also developed urgency of micturition and sleep disturbances about which causation was in issue and is considered later in the judgement.

Assessment of Physical Injuries on behalf of the Respondent.
118. With regard to his physical injuries, the Applicant was reviewed on behalf of the Respondent by Dr John Walsh, Specialist Occupational Physician (CMO) on the 14th December, 2009, following which he wrote a detailed report which was followed by an addendum dated 16th February, 2010. The Applicant was also examined by Dr Pat O'Neill whose initial findings and opinion were set out in a report dated 21st January, 2010.

Review of the Applicant; Opinion and Advices of the CMO

119. The CMO wrote a number of reports and letters between 2009 and April, 2015 in which he set out his opinion and advices. It is evident from the outset that he took a quite different view from that of the Applicant's physicians concerning the nature of the injuries and consequential vocational implications attributable to the assault. At the time of his assessment in December, 2009 the CMO had been furnished with medical reports prepared on behalf of the Applicant by Dr Connolly, Mr. Rawluk, Dr. Molloy, Dr. O'Leary, Dr. O'Sullivan, Dr. Delaney, Mr. Young and Dr. Murphy.

120. It is evident from his first report and the addendum dated 16th February that the CMO was also aware that the Applicant had been referred to Dr Pat O'Neill for orthopaedic assessment and had been assessed by Professor Clare, Dr Tobin and Dr Devitt for psychiatric assessment; however, it is unclear whether he had received Professor Clare's report. Although not included in the list of reports which the CMO indicated he had read, the reports of Professor Clare and Dr Tobin were requested by and addressed to the CMO so it seems reasonable to infer that he had received and read them.

120. The management of the Applicant's position vocationally until the hearing of this application was unquestionably influenced by the views of the CMO and those physicians described as "*independent specialist advisors*" to An Garda Síochána. Indeed, in the course of the hearing the Respondent sought to rely upon the 'independent' status of these advisors and their opinions in support of the approach which had been adopted in managing the Applicant's vocational position, especially with regard to his capacity to work.

121. The CMO did not give evidence at the hearing. It was submitted on behalf of the Applicant that the Court should draw a number of significant inferences adverse to the Respondent by reason of his failure to do so. Given the importance which Garda management attached to his views and those physicians categorised as 'independent specialist advisors' relied upon so heavily by the CMO and the Respondent and given his knowledge that Professor Clare and Dr Tobin had assessed and reported on the Applicant, the Court is left with no explanation why he did not refer to either of their opinions particularly as they had also been retained to advise 'independently' on the Applicant's psychological status and fitness for work.

122. Having regard to the opinions of Professor Clare and Dr Tobin and the Respondent's grounds of Defence set out in the letter of October, 2015 one can readily appreciate why the Respondent did not seek to rely on their reports in seeking to meet the claim. It was accepted by the Respondent, indeed, it is evident from the reports and correspondence sent to Garda management, that the CMO deferred to and relied upon the opinions of Dr. Pat O'Neill and Dr. Devitt, in the formation or confirmation of his own assessments such as they were.

123. While there is no evidence to warrant a conclusion that the reports were suppressed, in the absence of an explanation as to why the opinions of Professor Clare and Dr. Tobin were not relied upon, the Court is driven to the conclusion that their opinions were considered at least unhelpful to the position which had been adopted by management and at worst as supporting the position advocated on behalf of the Applicant.

124. This conclusion is particularly significant in the context of the CMO's opinion, set out in the addendum of February 16th that he could not support the recommendation contained in the reports of Dr Molloy, Dr. O'Leary and Dr Dennehy that the Applicant be permitted to retire on health grounds. In so far as he explained differing with their views that was based on his meeting with the Applicant in December, 2009 and the medical information he had considered at that time.

125. The information considered to found his conclusion and advice to Garda management has not been identified or explained in his report or in evidence, nor has he addressed the medical reasons to support his disagreement with the opinions and conclusions of the Applicant's physicians on the matter of medical health retirement never mind why he apparently chose to disregard the views of Professor Clare and Dr. Tobin, nor is this the end of the matter.

126. In a further addendum dated 25th March, the CMO advised that the Applicant's treating physicians had expected a recovery to have taken place within approximately 24 months of the assault; advice which, not to put to fine a point on it, was a misrepresentation and factual distortion of their opinions. While Mr Rawluk had expressed such a view in an early report, in a later went report he went on to state that in addition to causing soft tissue injuries, the assault had also upset of the mechanics of the Applicant's back and was responsible for his ongoing symptoms.

127. As stated previously, when that opinion was subsequently drawn to the attention of the CMO, he stated that he could not reconcile it with the view which had previously been expressed. Whatever may be said about the meaning of the wording of Mr Rawluk's earlier report, it is quite clear from the report dated 24th April, 2007, that his view of what he had said in the earlier report was the same as the view he was expressing in his later report, namely that the assault had upset the mechanics of the Applicant's back, a conclusion which ought to have been clearly evident to the CMO when he read that report.

128. It is difficult to come to any conclusion other than the likely explanation for the selective reference to the early view of Mr Rawluk is that it coincided with the view of Dr. O'Neill that the assault had merely caused a transient progression and acceleration of the underlying degenerative condition which, alone, was responsible for any ongoing residual symptoms. The kernel of the advice given by the CMO was that whatever injury was caused by the assault the effects were transient and that after eighteen months to two years any ongoing symptoms were solely attributable to the underlying degenerative condition.

Conclusion on the Probative Value of the CMO's Reports and Advices

129. It follows from the foregoing that the Court is bound to approach the content of CMO's reports and medical advice correspondence sent to Garda management with considerable circumspection. In so far as the reports and correspondence constitute the evidence of the CMO, I consider the probative value of that evidence to be undermined and diminished by reason of the foregoing observations, the most important of which may be summarised as (i) the apparent failure to take into account and address the opinions of Professor Clare and Dr Tobin, medical experts retained on behalf of Garda management as *'independent specialist advisors'* for the same purposes as Dr Devitt, (ii) If considered at all, the absence of an explanation as to why the opinions of Professor Clare and Dr Tobin were not accepted, (iii) having regard to the purpose of the assessments, the absence of any medical explanation for disagreeing with the opinions and conclusions of the treating physicians, and (iv) the apparent failure to reconcile and take into account the opinion of Mr Rawluk that the assault was responsible for upsetting the mechanics of the Applicant's back and was responsible for the ongoing symptomology.

Review of the Applicant; Opinion and Advices of Dr Pat O'Neill

130. Specialist orthopaedic and vocational assessment of the Applicant was carried out by Dr. Pat O'Neill in January, 2010, following which he prepared a report on the 21st of that month in which he reviewed the Applicant's history, recorded his findings on examination and gave his opinion and prognosis. He concluded that the mechanism of the injury, the initial subjective symptoms and findings on clinical examination and MRI of the lumbar spine were consistent with the Applicant having sustained a moderately severe soft tissue contusion injury to the lumbar region of the lower back and an injury induced exacerbation of pre-existing degenerative

changes in the lumbar spine which were rendered symptomatic.

131. In his view, the symptoms attributable to the nature and degree of the injury caused by the assault would have been expected to have gradually diminished over a two year period to a low intensity level, however, acknowledging that the Applicant had remained unusually symptomatic for an extended period of time, for which he had undergone lumbar spinal fusion surgery and had subsequently had implantation of a neurostimulator in the thoracic lumbar spinal canal, he felt it was unlikely the Applicant would improve any further, a prognosis shared by Dr. Molloy and Dr. Murphy.

132. With regard to his fitness for work, Dr O'Neill's view was that the Applicant ought to be able to resume some form of modified and restricted work provided the work task did not involve any physical restraint, confrontation, extended periods of sitting and standing or walking, with a facility to mobilise from any of those situations for a period of five minutes in any given hour.

133. Dr. O'Neill did not agree with the recommendation that the Applicant should be considered for retirement on medical grounds. In his opinion, the Applicant was not totally and/or permanently disabled by the injuries arising from the assault, rather he expected him to be in a position to undertake some form of modified and limited occupational work tasks and duties in the future, particularly in view of his age.

134. That said, he added a caveat to his advices; there was a significant probability that the Applicant would continue to experience persisting pain in his lower back and lower limbs in the future which would result in further periods of work related disability and limitations, moreover, he would not be able to resume regular operational police duties or other work tasks involving confrontation, physical restraint, pursuit, or long periods of sitting, standing or walking.

135. With regard to the medical management of the ongoing symptoms, he thought it probable that the Applicant would require further medical treatment including therapeutical intervention procedures and possibility more extensive lumbar fusion surgery in the future. Dr. O'Neill categorised the assault as contributory rather than causative of the ongoing back symptoms. He very fairly said that the quantification of the contribution of the assault to what were very significant ongoing physical sequelae was problematic.

136. Doing the best, he could he considered a 20% to 30% apportionment to the assault was reasonable, a view not shared by Dr Murphy whose evidence on this question was that the assault was not only contributory, it was by far and away the predominant cause of the overall medical situation in which the Applicant found himself.

137. Whatever about the exercise of quantifying the contribution of the assault, commenting on the practical effect of the contribution in response to a question from the Court, Dr O'Neill, considered this to be fourfold:

> (i) The underlying degenerative changes had been rendered continuously symptomatic whereas prior to the assault there were established periods where the condition was essentially asymptomatic;
>
> (ii) The aggravation of the underlying degenerative changes was an ongoing contributory factor,
>
> (iii) The rate of progression and the extent or degree of deterioration in the degenerative changes had been accelerated beyond that which would have been expected had there been no assault, and
>
> (iv) The rate of the progression and extent of the deterioration was unlikely to have ever occurred had it not been for the assault.

The significance of this evidence in relation to causation cannot be understated, particularly in light of the way in which Garda Management dealt with the Applicant's vocational position on the basis of the opinions previously expressed by Dr O'Neill in his reports. He did not reassess the Applicant between 2010 and February, 2014 and even then, it was not until 2015 that his report arising from that assessment was sent to the CMO.

Fitness for Work; '*Imminent Retirement*'; Application to Retire

138. Dr. O'Neill corroborated the Applicant's evidence that they had discussed his vocational situation at the examination consultation in January, 2010 and that this topic also featured prominently at subsequent medical reviews; however, they disagreed about the content. The Applicant's evidence was that Dr. O'Neill had informed him that his retirement from the Gardaí was imminent, whereas, Dr. O'Neill's recollection was that while such an outcome may have been mentioned, such would have been in the context of and conditional upon whether or not the Applicant was found fit to work in any capacity.

139. Whatever about Dr O'Neill's explanation it did not accord with the Applicant's recollection. When he informed the CMO during a later assessment that he had been told by Dr O'Neill his retirement was imminent the Applicant's evidence was that the CMO had called him a liar, evidence which is uncontroverted and led to further complaint which was subsequently categorised by the CMO as a '*misunderstanding'*. However, Dr O'Neill's evidence was that he had no recollection of being invited to comment about any of this by the CMO.

140. It would appear from Dr O' Neill's reports that the criterion against which he was working to found a discharge or retirement recommendation on health grounds was one of total and/ or permanent disablement. While he would later go on to advise that the Applicant might not be considered fit to resume some modified police duties for reasons other than total and permanent physical disability and subsequently categorised the physical disability as permanent but partial, his view in January, 2010 was that the Applicant was not totally and or permanently disabled and was thus fit, within certain parameters, for light administrative duties. It is also evident that whatever the Applicant may have thought, the decision on whether or not he should be retired was not one made by him but by Garda management on the advice of the CMO.

141. Garda management acted quickly on the CMO's advices. It was decided that all absences on sick leave from November, 2008, until May, 2010 were reclassified as periods of sickness due to ordinary illness rather than injury. Given that the Applicant had been absent due to sickness in excess of 183 days by the 1st September, 2009, his pay was to be retrospectively reduced to half rate from the 2nd September, 2009, in respect of all absences up until the 2nd May, 2010, and from that date his pay was to be reduced to the pension rate. The decision to reclassify was reversed during the course of the hearing.

142. On the 7th May, 2010, Assistant Commissioner Fanning wrote to the Chief Superintendant at Anglesea Street directing him to meet with the Applicant and inform him of the decision which was to be implemented within seven days. The Applicant was shocked and responded by letter dated the 13th May complaining about the decision and the reasons given for it. Not for the first time Professor Molloy, Dr. Dennehy, and the Applicant's solicitors took up the cudgels on his behalf, taking issue with the opinions of Dr.

O'Neill, Dr. Devitt and the CMO.

143. The ensuing correspondence not only brought into sharp focus the division in medical opinion between the physicians treating the Applicant and those advising Garda Management but also crystallised the position of Garda Management in two critical respects (i) the Applicant's vocational position and capacity to carry out light duties and (ii) the view that his continued absences from work were not attributable to the assault or any injury.

144. Significantly this position appears to have been based entirely on the advices of the CMO and the opinions of Dr. O'Neill and Dr. Devitt, opinions which, on the face of it, not only failed to address or take into account the opinions of Professor Clare and Dr. Tobin but also failed to provide any cogent explanation for the disagreement with the treating physicians recommendation that the Applicant be allowed to retire early on health grounds.

145. In addition to being factually inaccurate in a number of respects and as became evident during the hearing, the opinions on which Garda Management relied were fundamentally flawed by these deficiencies, exampled by Dr O'Neill's very fair acceptance that the assault had had a continuing contributory effect on the Applicant's underlying condition not only in terms of acceleration and deterioration but also in rendering continuous the previously intermittent symptomology.

146. The financial consequences of the position adopted by Garda Management could not have been starker. The Applicant ceased to receive any pay as and from the 27th July, 2010. To say he was distraught would be an understatement. This decision was just a continuum of what he perceived to be unsympathetic and unfair treatment by senior management and just added to his sense of anger and frustration. His financial situation was desperate; he felt he was being compelled to choose between his medical advice and the necessity to earn an income by going back to work carrying out duties which he felt demeaned him and aggravated his symptoms.

147. Finding himself in this position, on the 14th September, 2010, he applied for retirement with a special pension. The Assistant Commissioner replied on the 17th September, 2010, stating that the question of retiring on a special pension did not arise in circumstances where the Applicant had been deemed fit for light duties by the CMO. Further correspondence would ensue in relation to his application but it would not be until October, 2013 before the Minister made a decision; the application was refused.

Conclusion; Application to Retire
148. On the issue, as to whether the application to retire arose as a result of injuries caused by the assault, the Court is satisfied and finds that the application arose directly as a result of and in all likelihood, would not have been made but for those injuries and that this conclusion is applicable to all applications made subsequently by the Applicant to be permitted to retire or be discharged on health grounds. None of the applications were acceded to with the result that the Applicant ultimately decided he would resign at the conclusion of the litigation.

Injuries; Medical Treatment and Vocational Developments (2010 to Hearing)
149. In the absence of an income the Applicant's financial circumstances deteriorated rapidly. Notwithstanding his ongoing symptomology and belief that he was unfit for work, he felt compelled to return. He gave evidence of suffering constant back pain, headaches, insomnia, and urgency of micturition, which he found particularly embarrassing during shifts in the emergency control room. In addition, he regularly experienced a sensation of overheating in a warm and very stressful environment where he felt bullied and teased and which he disliked intensely.

150. Although arrangements were made for an ergonomic assessment of his work environment and the provision of a special orthopaedic chair, which was subsequently broken through misuse by others and being facilitated to attend a Degree course in Strength and Conditioning in 2008 as well as a vocational training course, *'Start Your Own Business'* at the Cork Institute of Technology in 2014, the Applicant's perception of Senior Garda Management's attitude towards his plight in general was one devoid of understanding and almost entirely unsympathetic.

151. He also gave evidence about making mistakes at work especially when he took extra pain killing medication in order to get through the day. Unfortunately, this resulted in negative side effects such as with a tendency to fall asleep on the job and when driving. He gave an example of momentarily going to sleep in the course of a telephone call at work on one occasion and of falling asleep in front of his sergeant on another. Although he only lived twelve miles away from work he recounted occasions on which he had to pull off the carriageway because he sensed he was dropping off.

152. Because of the way in which the neurostimulator functions, the Applicant had to turn the impulses down when driving. To control the consequential increase in his pain he would increase his pain killing medication which in turn provoked drowsiness. The tendency to fall asleep in abnormal or unusual circumstances was witnessed by his G.P., Dr. McGarry, by his wife Siobhan, and by a colleague, Garda Corcoran, all of whom gave evidence which I accept.

Sleep Disturbances and Urological Problems
153. Quite apart altogether from his symptoms of neuropathic back pain, the Applicant developed a problem of recurrent sleep disturbances in respect of which he was referred and investigated by Dr. Liam Doherty, Consultant Respiratory and General Physician in 2011. He also developed urgency of micturition, in respect of which he was referred to and investigated by Mr. Dermot Lanigan, Consultant Urological Surgeon, in 2012. Both physicians prepared reports for the assistance of the Court, which have been admitted.

154. The Applicant underwent a full polysomnography at the Bon Secours Hospital on the 19th September, 2011, which was essentially normal. There was no evidence of obstructive sleep apnoea or periodic limb movement disorder. In essence, Dr. Doherty's opinion was that the Applicant suffered from severe sleep fragmentation secondary to chronic back pain and the effects of his neurostimulator. He reviewed the Applicant over the next couple of years and expressed the opinion that he suffered from untreatable chronic insomnia caused by a combination of factors; his back discomfort and the effects of his neurostimulator, his medications and psychological factors.

155. He arranged for a further full polysomnography, which was carried out on the 11th December, 2013, and was followed by a multi sleep latency test. Both studies produced normal results. While the CMO considered Dr Doherty's findings reasonable he attributed the Applicant's subjective sleep problems to his underlying degenerative back condition.

156. The Applicant gave graphic evidence of how his back pain and urgency of micturition affected him; indeed, he regularly stood in the witness box to give his evidence because he was more comfortable when doing so and also had to take breaks in order to use the lavatory. Urological symptoms first developed following the assault and were noted by several of his treating physicians within the first year; these symptoms gradually worsened. He was ultimately referred for and underwent a cystoscopy and urodynamics tests following which he was treated with two forms of anticholinergic, a skin patch and a tablet. His symptoms were of a constant feeling

of urinary urgency which persisted after voiding. The skin patches caused skin reactions so he gave those up. Bladder function tests carried out in August, 2012 tended to confirm the clinical impression that the Applicant suffered from an *'overactive bladder syndrome'*.

157. Although the urological symptoms were not associated with a direct neurological or urological injury, Dr. Lanigan's opinion was that these were due to and were bound up closely with the ongoing chronic pain syndrome and psychological difficulties. While he did not think that the bladder symptoms would resolve spontaneously he was hopeful that a resolution of what he described as the Applicants employment and legal problems might result in an improvement.

158. The CMO was unable to comment on whether psychological, emotional and circumstantial factors were implicated in the urological symptoms but if so he also thought same might improve with resolution of what he described as the Applicant's personal and legal situations. However, he did not think these problems either directly or indirectly attributable to the assault.

Alternative Vocational Planning
159. In the belief that he would ultimately be forced to leave the force if his attempts to retire or be discharged on health grounds proved unsuccessful, the Applicant signed up for a part time "*Start Your Own Business*" course, which involved a couple of two and a half hour weekly sessions on a Friday and Saturday at the Cork Institute of Technology. He found the course particularly stimulating, especially when compared to working in the emergency control room at Divisional Headquarters.

160. Ironically, it was as a result of operational experiences answering 999 calls that the Applicant went on to develop an App with a partner who owns an app. development company in Galway; the app. has yet to be developed commercially. The Applicant explained that a major issue encountered by the Gardai in dealing with 999 emergency calls was to identify the exact location of the emergency and that it was this problem that had inspired him to invent and design the app.

161. Apart from medical investigations into his urological problems and sleep disturbances, the Applicant also had a replacement neurostimulator implanted on the 4th November, 2011, following which he was again out of work. Throughout 2012 the Applicant was in and out of work due to his symptomology and ongoing inability to perform the tasks assigned to him. On occasion his pay was cut.

162. At psychiatric review by Dr. Dennehy in December, 2012 the Applicant stated he had decided to resign because he felt unable to continue in the force. In May, 2014 he had to have a revision of his spinal cord stimulator following lead migration which had resulted in loss of coverage when he had been knocked over by his child. Coincidently, the CMO wrote to Garda management in April and advised that he considered the Applicant fit for light duties.

163. Acting on the advice received, Assistant Commissioner Fanning wrote to the Chief Superintendent at Anglesea Street directing that the Applicant should resume duty on the 13th May, 2014, a direction with there was non-compliance. This resulted in an exchange of correspondence which ultimately led to his suspension from the payroll with effect from the 14th July.

164. The direction was issued notwithstanding the Applicant's contention and the opinions of his treating physicians, that he was unfit for work. Dr. McGarry had written to the CMO outlining the Applicant's ongoing difficulties, advised that he was taking the equivalent of four bags of heroin every day to manage his pain and that he considered the Applicant not only medically unfit for work but a hazard to his colleagues and the general public. The failure to respond appropriately to that letter was to have serious repercussions for the Applicant.

165. His financial circumstances were such that the bank had initiated proceedings to seek a possession order of his home; the stress was mounting and without any income he was unable to pay for the medication which he needed to help control his pain. In desperation and despite the advice of his own physicians, he felt compelled to return to work.

166. On the 10th September, he wrote to the superintendent advising that because of his very difficult financial circumstances and the threat of legal proceedings, he was willing to be rostered notwithstanding the advice of his physicians that he was unfit for work. Superintendent McPolin promptly replied by letter in which he set out the rosters and advised the Applicant he was to return to work on ten hour shifts with immediate effect; the Applicant went back to work the following day.

167. For reasons which have already been discussed it wasn't long before he started to make mistakes in the discharge of his duties; he struggled on for two days. Finally, he suffered a panic attack when he was assigned to call dispatch duties having arrived an hour late for work: he could not cope with the demands the task imposed on him and left the station. He knew then that his career in policing was finally over and could never again go back to work in a police station, a decision which, notwithstanding the huge financial difficulties in which he found himself, brought a strange feeling of relief.

Disciplinary Proceedings
168. A Board of Enquiry was convened in early June, 2015 to hear the disciplinary charges proffered against the Applicant arising from his failure comply with the direction to return to work in July, 2014. The enquiry, to which the CMO gave evidence, took place over three days. The Applicant had experienced immense stress in the early months of 2015 as the hearing date of the disciplinary charges approached, stress which was further accentuated by the service on him of papers in connection with the enquiry. The Applicant was aware that it was intended to call the CMO to give evidence against him in support of the charges; not surprisingly, he described feelings of huge relief when advised that the charges had been dismissed.

169. It will be recalled that the decision to reclassify the Applicant's work absences from 2008, as being due to ordinary illness, was reversed during the hearing of this application. Correspondence in that regard, admitted in evidence, disclosed a minute from the CMO to Mr J. Barrett of Garda HR, dated 22nd July, 2015, in which it is stated that he only became aware of the neuro stimulator procedure undertaken by Dr Paul Murphy on the 18th July, 2014, and that he had not been requested by local management or the absence section of the HR department for clarification prior to the 4th July, 2014, and 14th July, accordingly, he advised it was reasonable to accept that as a result of the procedure it was unlikely that the Applicant would have been in a position to attend work.

170. The significance of this statement is that the 4th July and 14th July were the dates by which, if the Applicant did not attend for work, he would be suspended from the payroll. It was his failure to comply with this direction, notwithstanding his illness, which led to suspension of pay and the subsequent disciplinary proceedings. It follows from the CMO's minute there was no proper basis for proffering disciplinary charges against the Applicant or for the enormous unnecessary stress and anxiety visited upon him as a result. The suggestion by the CMO that it was only in July, 2015, he had come to an understanding that the Applicant had undergone the procedure boarders on the preposterous; it is certainly untenable.

171. The Applicant wrote to Inspector John Deasy on the 10th July 2014, enclosing a copy of Dr Murphy's report, dated 3rd July. The report detailed the reasons for and nature of the revision surgery and was received by Inspector Deasy the following day. He promptly forwarded the report to the CMO for his advices; he acknowledged receipt on the 18th. It is abundantly clear from the report that the CMO could not have been under any misunderstanding about the procedure which had been carried out by Dr Murphy or for that matter about the Applicant's unfitness for work.

172. The CMO must have known the advices he had given previously and on which that Garda Management would have acted. Nevertheless, he did not initiate any review nor did he give any advice following receipt of the report. His failure to do so is all the more surprising in circumstances where it is clear from Assistant Commissioner Fanning's letter to him requesting his advices on the report contents.

173. In my judgement, it was disingenuous on the part of the CMO to suggest, as he did by way of explanation in the minute, that he hadn't been contacted by local management or HR prior to or on the 4th; the failure to give the advice sought a few days later on the 11th is unexplained. Moreover, having regard to his subsequent acceptance that it was reasonable to accept the Applicant would not have been in a position to attend work, in other words was unfit for work, advice which should clearly have been given at the time in response to the request from Inspector Deasy, the Court is warranted in drawing an inference adverse to the Respondent that such advice, which would have been contrary to advices given previously, would have undermined not only the views concerning the cause of the Applicants continuing symptomology but also the decisions concerning the classification of his work absences.

174. Following the dismissal of the disciplinary charges against him, the Applicant began to believe that he was finally over the worst and that perhaps there was now a real possibility his application to retire might be reconsidered, an assumption which he soon came to realise was foolish and unrealistic. There was no approach from management to resolve his situation and worse still, he had no money.

Admission to St John of God's
175. Without being able to purchase the medication he required on a daily basis his psychological and physical status quickly deteriorated to the point where he contemplated suicide. Unable to speak with his psychiatrist and seeking help he contacted a local Garda Welfare Officer who suggested admission to St. John of Gods Hospital. The Applicant left home in a distressed state and drove to Dublin via Mitchelstown, where he met his father who gave him some money for petrol. He was admitted to hospital on the 10th August, 2015, and remained an in patient in St John of God's until the 25th when he was discharged and was again followed up by Dr. O'Leary.

176. Whilst a patient in St. John of Gods, the Applicant came under the care of Dr. Cian Denihan, Consultant Psychiatrist, who wrote a detailed report to the CMO dated the 25th September, 2015, in which he set out his findings opinion and recommendations. In his view prognosis was intimately interwoven with the likelihood of the Applicant being able to achieve an exit from the situational difficulties in which he found himself that allowed restoration of self esteem, reinforcement of his masculine self image and the preservation of a sense of dignity. He considered that the likelihood of the Applicant making a successful return to An Garda Síochána was bleak.

177. On the other hand, he was optimistic that a retirement exit package which preserved the Applicant's dignity and that facilitated overcoming the emotional impasse that had brought him to St. John of Gods, would ultimately result in a reduction of psychological disability to a level sufficient to enable him to engage in an alternative career within the limitations of his chronic pain syndrome. Absent such, the expected outcome would be poor; he would likely become increasingly angry and might act to demonstrate his distress in dramatic terms. He diagnosed a mixed anxiety depressive disorder. His views were shared by Dr. O'Leary, save that she thought the Applicant would also need to remain on long term anti depressant and pain control medication as well as requiring ongoing psychiatric care.

178. The Applicant's conviction that his policing career was over and that he could never again return to work in the Gardaí was underscored by his decision in the course of the hearing to resign from An Garda Síochána at the conclusion of the litigation in the event that his application to retire on health grounds was not granted by then. No such indication having been received, the Court will proceed to judgement on the premise that the Applicant has resigned from the gardaí.

Decision
179. Comprehensive written and oral submissions made on behalf of the parties have been read and considered by the Court. This judgement is long enough without a incorporating a submissions summary; suffice it to say that the essence of the Applicant's case is that the assault was the substantial cause of his continuing injuries and loss for which he is entitled to be fully compensated whereas the kernel of the Respondent's case is that save for some transient consequences, the ongoing injuries and pecuniary losses as claimed are attributable to matters unconnected with the assault for which the Respondent has no responsibility in law, moreover, the Applicant failed to discharge the onus of proof to establish that the assault was the substantial cause of such injuries and loss.

The Law; Causation
180. The law on causation in actions brought in Tort and under the Acts is well settled. See *Carey v. The Minister for Finance*, [2010] IEHC 247 and *Roche v. The Minister for Finance* [2011] IEHC 482. With regard to that issue and the interpretation of s.2 of the Act which arose in *Carey*, Irvine J. stated at para. 4.37 of her judgment:

> *"Section 2 of the Act requires the Court to compensate a claimant who has suffered "personal injuries maliciously inflicted" upon them. It is these words which require interpretation when considering the issue of causation. Having regard to the aforementioned wording I have concluded that the causation test that ought to be applied by the Court is whether or not the assailant's malicious conduct was the substantial cause of the injuries complained of. In interpreting the section in this manner, I have been influenced not only by the language of the section itself and by the overall provisions of the act but also by the decision of the Court of Appeal in R. v. Criminal Injuries Compensation Board, ex parte ince [1973] 1 W.L.R. 1334 and the decision of Carroll J. in Gavin v. Criminal Injuries Compensation Tribunal (1997) 1 I.R. 132, to which I will later refer. I have also taken some guidance from the various causation tests commonly considered by the courts when dealing with claims for damages for negligence at common law."*

181. Addressing the question of causation and compensation to which the Applicant was entitled she observed at para. 4.49 of her judgment that:

> *"The aforementioned decisions have convinced me that even if I were to adopt the defendant's interpretation of s. 2 of the Act, and the plaintiffs had to prove that their injuries were directly caused by the malicious act, I would only have to be satisfied, which I am, that the plaintiffs injuries were in whole or in part caused by the malicious act to award them*

full compensation under the Act. Accordingly, the fact that the plaintiff's injuries may have been partially caused by incorrect medical advice subsequent to the respective assaults cannot diminish their entitlement to compensation unless the defendant can establish that such intervention amounts to something equivalent to a novus actus interveniens at common law such that I could no longer conclude that the malicious act complained of in each case was a substantial cause of the injury sustained."

This passage from the judgment was heavily relied on by the Applicant as authority for the proposition that he is entitled to full compensation for all of the injuries and loss established by the evidence on the grounds that the substantial cause of same was the assault, however, it is clear from what is stated later in the judgment that full compensation in this context relates to injuries and loss substantially caused by the malicious act and does not extend to the consequences of other unrelated events. In this regard Irvine J. stated at para 4.59:

"The court cannot compensate a claimant under the Act for any injury caused, for example, by another assault not the subject matter of a compensation claim. Neither can it award damages in respect of all of the injury complained of where there is clear evidence that a significant portion of the pain and suffering relates to another unrelated event such as perhaps an earlier accident or may be ascribed to a medical condition that predated the malicious event. To conclude otherwise would be award compensation beyond that which would be recoverable in a claim for damages at common law and this would be inconsistent with the views expressed by Walsh J in O'Looney (O'Looney v. The Minister for Public Service [1986] I.R. 543 at 546) when he stated that a claimant under the Act should find himself in virtually the same position as the plaintiff maintaining a claim for damages at common law. Further, as Carroll J. made clear in Gavin, (Gavin v. The Criminal Injuries Compensation Tribunal [1997] 1 I.R. 132) if the causa causans of the injury or some part of it lies elsewhere such as in another assault or accident the court must adjust the compensation to reflect that fact. Clearly, there are no circumstances in which double collection can be permitted to occur. Neither should a claimant under the act receive damages substantially different from those he would recover if maintaining a claim for damages in respect of the same injuries at common law."

The learned judge reaffirmed these views subsequently in Ro*che v. The Minister for Finance* [2011] IEHC 482. I adopt these eminently sensible statements of the law, which as it happens are particularly apposite to the circumstances in this case. Accordingly, what the Court is required to do is to ascertain from the evidence what or which of the injuries and losses claimed were substantially caused by the malicious act in respect of which the proceedings are brought and to compensate the Applicant for all such injuries and loss in accordance with the well settled principals of Tort Law applicable to the assessment of compensation.

The Applicant
177. I had ample opportunity to observe the demeanour of the Applicant during the several days over which he gave evidence during the hearing. My initial impression of his behaviour from the way he gave his evidence, sat, moved and stood in the witness box, was one of over dramatisation to the point of exaggeration, an impression which changed utterly as the case progressed.

178. In fairness to him, whilst it was suggested that he was mistaken in his recollection on a number of matters, particularly with regard to the consequences of the slip and fall accident in 2004, it was never suggested that the Applicant was anything other than an honest historian, an assessment confirmed by all of the physicians who carried out clinical assessments and gave evidence.

179. Through all his trials and tribulations, the Applicant has been supported by his wife Siobhan who impressed me as a truthful witness on whose evidence the Court could rely. In the course of this judgment reference has been made to the particular personality traits of the Applicant which Dr Devitt considered were largely responsible for a lot of the psychological complaints, personality traits which led to what was portrayed as a *'battle of wills'* with Garda management and a less than fair attempt to come to terms with his changed circumstances, particularly with regard to his work.

180. That the Applicant is variously a stubborn, driven, ambitious, intelligent, creative, resourceful and proud individual who loves his family and has suffered greatly for what is more than a decade is manifest from the evidence. In the circumstances of this case the cause of his suffering and what the future holds for him are questions which principally fall to be determined on the medical and other expert evidence.

181. So far as my assessment of the Applicant is concerned I am satisfied that he was a truthful and credible witness; there were certainly instances of forgetfulness and mistakes in recollection during medical assessment and in evidence but I am quite satisfied that these were genuine and not a deliberate attempt to mislead the expert witnesses concerned or the Court.

Psychological Injuries; Expert Evidence; Differences in Approach to Advice
182. Certain observations have already been made concerning the probative value of the CMO's evidence which will not be repeated here. Otherwise, a stark difference emerged between the approach taken by the Applicant's treating physicians in the advice and treatment they gave and the approach taken by the CMO, Dr. O'Neill and Dr. Devitt in providing their advices. The approach taken by the treating physicians was to view the Applicant holistically whereas the approach taken by Dr. O'Neill and Dr. Devitt was to examine, assess and to give advice confined to their respective areas of expertise. If ever there was a case which cried out for a holistic approach to be taken towards the Applicant's welfare, this was one.

183. Unlike Professor Clare, Dr Tobin and the treating physicians, Dr Devitt and Dr. O'Neill provided advices without also taking into account the interrelationship between the physical and psychological sequelae, an approach which also appears to have been adopted by the CMO in formulating his advices to management. Although Dr. Devitt and the treating psychiatrists were presented with an almost identical history and clinical profile, Dr. Devitt was unable or unwilling to conclude that the Applicant was suffering from any recognised psychological condition or illness, and certainly nothing that could be attributed to the assault. It was submitted on behalf of the Applicant that his approach was medically unwarranted and amounted to one of 'blaming the victim'.

184. The explanation for non diagnosis offered by Dr Devitt was essentially threefold (i) he did not want to label the Applicant with a diagnosis, a view he believed the Applicant also shared, (ii) the complaint and symptom profile was not sufficiently specific to warrant a diagnosis of the disorders or conditions identified and diagnosed by the treating psychiatrists (iii) the Applicant's personality was a significant contributor to the situation as he perceived it; one way or the other, his opinion was that labelling someone with a diagnosis was therapeutically unhelpful, a view he said was shared by other psychiatric colleagues.

Non-Diagnosis; Approach of Dr Devitt;
185. Following his cross examination and the conclusion of his evidence, I was left with the distinct impression that this approach adopted by Dr Devitt coincided with and to some extent may also have been influenced by awareness of Garda a management policy objectives, one of which was to keep officers in the force where at all possible which, it must also be said is a perfectly laudable

object where appropriate. I am compelled to conclude that to have made a diagnosis, as the treating physicians did, that the Applicant was suffering from a chronic pain syndrome together with depressive and adjustment disorders on the basis of clinical assessments at which he obtained substantially the same information as was elicited by the treating physicians would have corroborated their opinions and would have supported the recommendation that the Applicant be retired or discharged on health grounds.

Status of 'Specialist Expert Advisors'
186. There was some debate in the course of the hearing concerning the categorisation of Dr. O'Neill and Dr. Devitt as '*specialist expert advisors*' to Garda management. In the absence of an explanation to the contrary it seems reasonable to infer from the failure to refer to or explain why he was taking a view contrary to the treating physicians that this 'status' was used by the CMO either to elevate the opinions of Dr O'Neill and Dr Tobin above those of the treating physicians in formulating his advices or to disregard them.

187. Furthermore, in the absence of an explanation as to why the CMO appears to have disregarded the opinions of Dr Tobin and Professor Clare, who also enjoyed the exulted status of '*independent experts'*, as mentioned earlier I am driven to the conclusion that their opinions were considered, put at its mildest, to be unhelpful in the context of formulating an opinion which was unsupportive of the recommendation that it was in the best interests of the Applicant that he should be permitted to retire on health grounds.

188. Notwithstanding his contract with the Department, Dr. Devitt sought to establish his independence and distinguish his position from that of the treating physicians by ascribing to them the duty to advocate on behalf of their patient, a categorisation which I reject. It is undoubtedly the case that treating physicians are under a professional duty to their patients, which includes standing over the advice given and the treatment afforded. The suggestion that this places the treating physician in the position of having to advocate on behalf of the patient and that this in some way calls into question the independence of any advice given is misconceived.

Function of the Medical Expert; Conflict of Medical Evidence; Approach to Resolution
189. Apart from giving notice of the evidence it is intended to adduce at trial, the purpose of an expert report and the giving of expert opinion evidence is to assist the court; it is not to advocate on behalf of the patient. It may be said that in general where it is necessary to resolve a conflict between the expert medical evidence given by treating physicians on behalf of a plaintiff, applicant or claimant as the case maybe and medical evidence given by those physicians examining and advising on behalf the defendant or respondent, as the case may be, unless there is compelling evidence or other good and sufficient reason to do otherwise, the court is entitled to prefer the evidence of the treating physicians in relation the provision of advice and treatment afforded to their patient having due regard to the professional duty of care owed in the provision of such services.

Conclusion; Conflict of Evidence, Resolution; Causation
190. For all of these reasons and subject to the proviso which follows in relation to the future, so far as there is a conflict of psychiatric opinion evidence the Court prefers the evidence of the Applicant's psychiatrists and finds that the Applicant suffered a prolonged adjustment disorder characterised by symptoms of anger, worry, tension and stress; a severe depressive disorder characterised by anxiety, irritability, frustration, sleep disturbances, low mood, anergia, social withdrawal, pessimism and loss of libido together with a chronic pain syndrome/disorder, psychological injuries which I am satisfied on the evidence were substantially caused by the assault. I should add that with regard to prognosis regarding the Applicant's future psychological status, I found Dr. Devitt's evidence to be of considerable assistance.

191. He felt that the removal of what up to now were several major stressors in the Applicant's life, such as the litigation, financial uncertainty, and retirement or resignation from the Gardai, would each have a positive psychological impact on psychological function. He accepted that the Applicant would continue to experience pain and that that would continue to have a negative impact psychologically unless it was addressed; he recommended psychotherapy and felt that this had an important role to play in rehabilitation. It would help the Applicant achieve acceptance of and deal with his perception of pain. Once that was achieved and he became focused and took up activities, including a return to work in a chosen and rewarding role or career, he would flourish and would have a good psychological prognosis.

Conclusion; Neurological Problems and Sleep Disturbances
192. The reports of Mr. Dermot Lanigan and Dr. Liam Doherty were admitted in evidence. No expert evidence was adduced on behalf of the Respondent in relation to the Applicant's complaints of insomnia, sleep disturbances and urinary urgency; rather the case made was that these problems were not causally related to the assault. I accept the evidence of Dr. Doherty, contained in his report of the 9th January, 2013, and find that there was a significant psychological component to the Applicant's symptoms in respect of which he had recommended that the Applicant attend a clinical psychologist and undergo a course of cognitive behavioural therapy. Addressing the issue of causation in a letter to the Applicant's solicitors dated the 30th November, 2012, Dr. Doherty stated that whilst the Applicant did not have a treatable sleep disorder, his sleep disturbances were directly and indirectly related to his back injury resulting from the assault, namely, the back pain and the treatment for the pain with the neurostimulator and medication.

193. With regard to the urgency of micturition, I accept the evidence of Mr. Lanigan and find that the Applicant's urinary problems are likely due to what he described as an overactive bladder syndrome which was bound up closely with the chronic pain syndrome and psychological difficulties. Accordingly, any future improvement would be dependant on a resolution of what Mr. Lanigan described as the Applicant's personal and legal situations.

Conclusion; Prognosis
194. One of the reasons given in support of the recommendation that the Applicant should resign from the gardaí if he was not discharged or permitted to retire on health grounds was that the environment and circumstances in which he worked was accentuating his psychological sequelae. Dr. Dennehy, Dr. O'Leary and Dr Devitt were all in agreement that the resolution of the legal proceedings, retirement or resignation from the police force and the opportunity to start a new life together with appropriate psychological support would impact positively on the Applicant's ability to function. While I accept that evidence, it is also necessary to add that the Applicant's physicians were more pessimistic about the extent of the resulting benefits and prospects for a complete psychological recovery, even with long term professional help.

195. The physicians had slightly different views on the treatment modalities which were likely to afford the best psychological outcome for the Applicant. Dr. Dennehy had a preference for ongoing cognitive behavioural therapy whereas Dr Devitt was a firm believer in and recommended psychotherapy. Dr. O'Leary on the other hand favoured attendance under a psychiatrist such as herself.

196. Dr O'Leary had most recently treated the Applicant and explained that psychological intervention and support would be required long term because even with optimum control, on her understanding of the orthopaedic evidence the back pain was never going to resolve completely. Having regard to the period of time and the way in which what she described as a psychological illness had

developed the Applicant was at a 50% risk of experiencing further aggressive psychologically challenging episodes and would thus need long term ongoing psychiatric care. She considered attendance with a psychiatrist once every two months or so would be required for the foreseeable future notwithstanding the positive psychological impact which would flow from the conclusion of the litigation and retirement or resignation from the police force.

197. I am satisfied and the Court finds that chronic back pain, which is likely to be a permanent feature in the Applicant's daily life, will act to some extent as a counter balance to these positive benefits and will continue to have a negative psychological impact which will require ongoing treatment whether under a psychiatrist as advised by Dr O'Leary or in the form of cognitive behavioural therapy, as suggested by Dr. Dennehy, or psychotherapy as recommended by Dr Devitt to improve, maximise and maintain his psychological functioning.

198. I should add that both the Applicant and his wife expressed the hope and belief that when the work environment stressors which had reinforced his psychological illness had been removed the Applicant would be free to make a new life for himself. Considering his personality traits, I have little doubt but that he will take whatever steps are reasonably necessary to get on with every aspect of his life, physically, mentally and vocationally and in the achievement of that goal is in the fortunate position of having the support of a most caring and loving spouse.

Physical Injuries;
199. In the course of my term as the judge designated to hear and determine compensation claims under the Acts and in personal injury cases I have always found Dr. Pat O'Neill to be assiduous and conscious of his duty to assist the Court when giving expert medical evidence; the case in hand is no exception. The difference between the physicians in the approaches taken to giving their advice has been mentioned earlier and was well illustrated in the content of the respective reports.

200. At the assessment on the 25th February, 2014, Dr. O'Neill made notes of the complaints which the Applicant made to him. These included the sedation effects which the drugs he was taking to control his pain had on him which manifested in a tendency to fall asleep on social and sporting occasions, when driving and at work. Complaints of sleep disturbance, urinary frequency, difficulty with work tasks, poor memory, lapses in concentration and limitations on his capacity to participate in the domestic, sporting and social life of his family were also recorded.

201. Dr. O'Neill accepted that the complaints made were indicative, at least descriptively, of a very severe problem; a recurrent tendency to fall asleep in various situations was *'extraordinary'.* Nevertheless, none of these complaints appeared in the report which he prepared and sent to the CMO subsequently, an omission which he very fairly acknowledged but was unable to explain. The report was not in fact furnished to the CMO until the following year but even if it had been furnished shortly after the assessment it is clear that it did not contain what in the event turns out to be highly relevant medical information.

202. As has already been seen earlier in this judgment, Dr. O'Neill accepted that the assault was responsible for the acceleration in the progression and deterioration of the degenerative changes in the lumbar spine resulting in that condition becoming permanently symptomatic. All the more significant in my judgement was his evidence that even allowing for the progressive nature of the condition and advances in age, if it hadn't been for the assault it was unlikely that the underlying condition would have progressed or deteriorated to the unfortunate position in which the Applicant found himself.

203. On my view of Dr O'Neill's evidence, the practical effect of the assault on the underlying condition which he described sits uneasily and is hard to reconcile with his quantification in percentage terms of the contribution of the assault to the totality of the Applicant's back problems. However, it sits very well with the evidence given by Professor Molloy and Dr. Murphy that the assault was the predominant feature and cause of the ongoing symptomology.

204. Professor Molloy described the assault as the event which was responsible for "tipping" the Applicant into the place where he was left with an intractable and chronic pain syndrome; the physical and psychological consequences of which were in marked contrast to the professional, sporting and social life which had been enjoyed up until the assault. Having also examined and reported for the purposes of the RTA proceedings, Professor Molloy was ideally placed to assist the Court with regard to respective contributions which that and other events had made to the underlying back condition up to the time of the assault and subsequently.

205. His evidence is also of assistance with regard to the contribution to the overall symptomatic presentation fairly attributable to the degenerative changes which have developed in the Applicant's cervical spine which were unlikely to have been caused by the RTA but developed independently. He was aware of the treatment which the Applicant had had in 2010; indeed, he still found some restriction of neck movement on examination in 2012. However, his evidence as to the significance of the degenerative changes in the cervical spine was that even at that time the Applicant's main concern and what troubled him was his back not his neck problem.

206. Dr. Harney had described the Applicant as suffering from a failed back surgery syndrome, a categorisation or description with which Dr. Murphy took exception, describing it as a really bad and inappropriate term. Like Professor Molloy, he considered the assault to have resulted in a very dramatic change in the back condition when compared to the position prior to the assault. His view was not dissimilar to the opinion of Dr. O'Neill with regard to the effects of assault on the underlying condition; it had resulted in a much more rapid and marked deterioration than would have been expected had the assault not occurred.

207. In his opinion, the assault was "*a very substantial contributor*" to the Applicant's back problems for which there was no cure. He had developed neuropathic pain for which the most appropriate treatment was the neurocord stimulator, the beneficial effects of which had been experienced and confirmed by the Applicant. Dr Murphy explained how the device works to control neuropathic pain thus enabling a practical return to reasonable function. The stimulator battery would need to be replaced once in every eight years on average at an approximate cost of €26,000 including surgical and hospital fees.

208. I should add that in the event of lead migration in the future, an event which has already occurred when he was unfortunate enough to have been knocked over by his child, the Applicant would require revision treatment. However, Dr Murphy's evidence was that the risk of lead migration reduces over time due to the formation of the soft tissue scarring around the leads after implantation. From this evidence, I took it that the risk of future lead migration was low. With regard to prognosis otherwise, his evidence was that the Applicant will need to utilise pain killing medication in conjunction with the neuro stimulator to control pain and that this requirement is likely to remain for the rest of his life.

Conclusion; Physical Injuries; Causation
209. I accept as evidence the content of the Applicant's medical reports admitted by the Respondent together with the oral evidence of Dr McGarry, Professor Molloy and Dr. Murphy and find that as a result of the assault the Applicant sustained a moderately severe soft tissue injury superimposed on an intermittently symptomatic underlying degenerative back condition in respect of which

significant surgery had previously been performed, the cumulative effect of which rendered the lower back vulnerable to further injury.

210. In the event, I accept the Applicant's submissions in relation to causation and find that in addition to causing soft tissue injuries to an already venerable intermittently symptomatic back, the assault caused an exacerbation and aggravation of the extent and rate of progression of the underlying degenerative changes in the lower back with regard to both the extent of deterioration and rate of progression which resulted in the development of a permanently severe chronic pain syndrome and the psychological injuries as already found.

Pecuniary Loss Claim; Vocational Review and Assessment

211. As mentioned at the outset of this judgement, the Applicant has brought a very substantial claim for pecuniary losses which include claims for loss of earnings and pension benefits into the future from now until age 60, the compulsory retirement age for a serving Garda, and from then to age 70. Actuarial evidence was given by consultant actuaries, Mr. Nigel Tennant on behalf of the Applicant and Mr John Byrne on behalf of the Respondent; both actuaries also prepared reports for the assistance of the Court. They had the benefit of vocational consultant's reports which were admitted in evidence. By the conclusion of the hearing the actuaries had reached agreement in respect of all matters except the multiplier. Mr Tennant found 879 to be appropriate whereas Mr Byrne's figure was 819. It was submitted on behalf of the Respondent that the Applicant would not necessarily loose the carer's allowance which had been paid to his wife since 2012, when she gave up her job to care for the Applicant. Furthermore, he could mitigate his future medical losses by applying to the St Paul's Insurance medical scheme for the Gardaí.

212. I accept Mr Tennant's evidence that following the conclusion of this case it is likely the Applicant's spouse will lose the means tested carer's allowance. I am not satisfied that once he resigns as a member of the force the Applicant would continue to qualify for membership of the medical benefits scheme, there was no evidence led in relation to that. Accordingly, the Court finds that the appropriate multiplier is 879. The actuaries prepared their computations on the basis that the appropriate real rate of return was 1.5% in line with the decision of this Court in *Mullen*.

213. Susan Tolan, Occupational Therapist and Vocational Evaluator, assessed the Applicant and wrote a report dated the 16th December, 2014. A report was also prepared by Roger Leonard, Occupational Therapist, retained on behalf of the Respondent, following his assessment of the Applicant on the 13th November, 2015.

214. It is immediately apparent from their respective reports that both consultants formed the same impression of the Applicant; a well motivated, bright and intelligent man with a good work ethic. Having regard to his presentation and the medical information which had been made available to them, each of the consultants concluded that a worthwhile occupation in the future was in the Applicant's best interest and that having regard to the effects which his ongoing sequelae were having on him, self employment would be the most suitable vocational option.

215. Susan Tolan noted that the Applicant expressed an interest in doing an MBA. She thought, at least initially, that he would find it easier to cope with a Level 6/7 business course, particularly as he did not already hold a degree. This evidence further reinforces my impression that the Applicant is intent on equipping himself with qualifications which will allow him to pursue an alternative career, a course upon which he had already embarked in 2014.

216. In this regard Susan Tolan noted that the Applicant had completed the "*Start Your Own Business*" course in order to help develop his app and start a business. A fair amount of water has gone under the bridge since and I note that she expressed her opinion without having been furnished with copies of the Respondent's medical reports. The same observation can be made in relation to Roger Leonard save that he had a copy of Susan Tolan's report which contained a summary of the injuries; the only other difference is that his assessment was carried out more recently in November, 2015.

217. Had the vocational consultants been furnished with all of the medical reports prepared on each side of the case before carrying out their respective assessments, it is likely their evidence would have been of greater assistance. As it is the Court does not know to what extent, if at all, the views expressed by each consultant would have been affected, and if so to what extent, by access to all of the available medical reports; this is especially so in circumstances where, as here, the reports were admitted and the expert evidence contained in them is untested on cross examination.

218. I also note from their reports that while no mention was made by the Applicant about his hip or of any continuing problems in that department he did refer to ongoing neck pain radiating from the left side of his neck into the back of his head; a symptom which was stated to be present virtually all of the time. This is significant when one considers that he had had fairly extensive treatment for his neck problems under Dr. Harney in 2010. Professor Molloy's impression from medical reviews he carried out was that this complaint was not a significant feature as far as the Applicant was concerned; however, it is clear that that wasn't the case when he presented himself to the vocational consultants.

219. It appears that the Applicant also told Roger Leonard that his future plans were nobody else's business but his own and that he wasn't 100% sure what he was going to do in the future. Whatever the explanation for this quite extraordinary and unhelpful attitude, which was never satisfactorily explained, it does not alter my overall impression of the Applicant referred to earlier.

220. Roger Leonard's assessment was that he will be able for light or clerical duties and gave examples of pay rates that might be expected in such occupations. In his opinion, the vocational outcome will depend considerably on what training and up skilling is undertaken; retraining would undoubtedly improve his vocational opportunities. Both he and Susan Tolan were agreed self employment would be more suitable for his needs and provide greater flexibility. Referring to the Applicant's attendance on the "*Start Your Own Business*" course with a view to helping develop the App and get into business, Roger Leonard considered the Applicant's initiative and participation as a positive predictor for his future occupational potential.

221. Although he is likely to experience a controllable level of pain indefinitely, I note that the Applicant told Roger Leonard he had been able to reduce his level of medication to some extent. As observed earlier, having regard to his personality traits and express desire to get on with his life, I have little doubt but that he will undertake further vocational training with a view to pursuing an alternative career, most likely in business on a self-employed basis, although paid employment cannot be excluded, especially at a time when the economy is experiencing a period of sustained recovery and is approaching full employment.

222. Accordingly, I cannot accept the proposition advanced on the Applicant's behalf that from resignation until age 60, at which time he will receive his lump sum payment and his pension, the future loss of earnings claim falls to be determined on a total loss basis. In my judgment the evidence in this case falls far short of what is required to found such a claim.

223. Furthermore, when due consideration is given to the positive impact which the end of litigation, financial worry and resignation

from the Gardaí is likely to have on him and the level of pain control which is achieved through a combination of the neuro stimulator and medication taken together with his relatively young age, it is simply not tenable nor would the Court be warranted to conclude that the Applicant will remain incapable of undertaking any gainful employment in the future whether in a clerical, administrative or self employment setting; quite the contrary.

Conclusion: Future Employment
224. I accept the evidence of the vocational consultants that the Applicant needs a vocational dimension to his life, a goal shared by the Applicant which, as already found, he will do everything possible to realise, whether by engaging in further education, up skilling and retraining independently or in combination once this litigation is concluded.

'*Reddy v. Bates*' Contingencies
225. There was controversy between the parties with regard to the application of the decision in *Reddy v. Bates* [1983] IR 141 to the case of an individual who, like the Applicant, is employed in what has been described as permanent and secure State employment. It was submitted on his behalf that the decision of this Court in *Mullen v. The Minister for Public Expenditure and Reform* [2016] IEHC 295, where a 20% deduction was made for adverse contingencies, was wrongly decided and that there was no justification for making the same or a similar percentage deduction. Indeed, it was argued that no deduction fell to be made in the case of a Garda enjoying, as gardaí do, guaranteed employment. In support see *O'Sullivan v. Minister for Finance* [2004] IEHC 365.

226. Without prejudice to that submission, the Applicant argued that if any percentage deduction fell to be made it should be minimal, in the order of 5%. In support see *Boyne v. Bus Atha Cliath* [2003] 4 IR 47; *Curley v. Dublin Corporation* [2004] IESC 96. Furthermore, the security of employment as a member of An Garda Síochaná could not be equated with nor was it comparable to the security of employment available to a skilled labourer. The practical effect of the percentage deduction made in Mullen, was to do just that; at 20% the deduction was only 5 % less than the deduction which had been made in *Clancy v. The Commissioner of Public Works* [1992] 2 IR 449

227. Senior Counsel for the Applicant, Mr Woulfe, also contended that "*general contingencies*," which I took to mean *Reddy v. Bates* contingencies, had been taken into account by the actuaries when carrying out their calculations. However, there was no evidence that either of the actuaries had done so, on the contrary, I am satisfied that *Reddy v. Bates* contingencies were not considered by the actuaries in their reaching their conclusions.

228. The Respondent relied on the decision of this Court in *Mullen* and submitted that a substantial deduction for *Reddy v. Bates* contingencies fell to be made if the Court admitted a claim for future pecuniary loss, especially in circumstances where the Applicant had suffered from significant medical conditions unrelated to the assault which had already resulted in absences from work and were capable of affecting his capacity to work in the future.

229. Quite apart altogether from other adverse contingencies referred to in the *Reddy v. Bates* and *Mullen* decisions, it was contended that absences from work due to illness did not mean that there would not or could not be financial loss to a Garda, on the contrary, the benefits payable in such circumstances are time limited, equate to basic pay, don't allow for overtime or allowances, are halved on the expiry of the time limit and on expiry of that limit are subject to further reduction as had already been experienced by the Applicant.

230. Furthermore, it could not be assumed simply because one had had an accident outside work one would be compensated for any injuries and pecuniary loss that might arise; that proposition depended on a number of factors, not the least of which were matters of liability and the capacity of the wrongdoer to satisfy any judgement as might be secured, moreover, no compensation or less than full compensation would arise where the Garda was found to be wholly or partially responsible for the accident. Nor did it follow that injuries and loss suffered on duty would necessarily result in compensation under the Acts, unless caused maliciously.

231. I cannot accept as correct in law the proposition that simply because someone enjoys a secure State employment that a deduction for *Reddy v. Bates* contingencies does not arise or that if a deduction is to be made it must necessarily be very small. In the interest completeness, I should add there was no disagreement in relation to the application of *Reddy v. Bates* contingencies to the claim for future loss of earnings in respect of post retirement employments to age 70.

232. It is quite clear from the judgment in *Reddy v. Bates, Cooke v. Walsh* [1984] IR 710 and subsequent authorities that the contingencies to be taken into account when deciding claims for future pecuniary loss are not limited to the risks of unemployment or redundancy but extend, for example, to include other contingencies such as illness or accident or the consequences of economic recession leading to alteration in terms and conditions of employment, including reduction in working hours, overtime, benefits and salary to mention but some.

233. Whilst *Mullen* was decided on its own facts and circumstances and without the benefit of the argument addressed and authorities opened to the Court in this case, having considered the submissions made and the authorities relied upon I see no reason to depart from the views I expressed in *Mullen* concerning the applicability of *Reddy v. Bates* to compensation claims in appropriate cases under the Acts

234. Actuarial evidence is admissible to assist the court in reaching decisions on claims for future pecuniary loss. The actuarial evidence in this case does not take into account any risk of illness, accident or other contingencies, some which have already occurred since the time of the assault. In a progressively unstable world in which economic volatility and political uncertainty predominates national and international discourse it cannot be assumed that over the next decade or so it is unlikely there will be a return to recession in a State like Ireland with an open economy despite what is presently a sustained economic recovery.

235. The actuarial evidence in this case proceeds on certain assumptions one which is that but for the injuries the Applicant would have worked every day of his working life up to and including compulsory retirement at age 60. Expounding on the rationale for making allowance in respect of contingencies when considering a claim for future loss of earnings, Griffin J. commented on the correctness and constancy of mathematical calculations made by the actuaries in *Reddy v. Bates*, and observed at p. 147 that such "…*should be applied in the particular circumstances of every case with due regard to reality and common sense*" a view as valid today as it was when first pronounced. Suffice it to say that it is abundantly clear from that decision and subsequent case authority that the application and consideration of *Reddy v. Bates* contingencies to arterialised claims for pecuniary loss is case specific; this case is no different.

236. As has been seen, there are a considerable number of matters particular to the circumstances of this case which have to be taken into account when carrying out the assessment of general and special compensation in relation to the injuries and loss ascertained and found by the Court to have been caused by the assault. Of these the most significant are the pre-existing underlying

degenerative back condition, the consequences of previous accidents, including the necessity for back surgery, the subsequent development of degenerative changes in the neck, the longstanding groin pain and necessity for hip surgery, the pecuniary and non pecuniary consequences of each of these matters in the past and probable non pecuniary and pecuniary consequences into the future and the effect, if any, on any of these had by reason of the assault.

237. The cause and attribution of urgency of micturition, the depressive and adjustment disorders and chronic pain syndrome, the psychological injuries is relatively straightforward; the Court has found that these sequelae were a consequence of the assault and not otherwise.

238. The position is altogether different when it comes to considering the back injuries attributable to the assault. At the time of the assault the Applicant had an already established degenerative condition in his back which had already become intermittently symptomatic by the time and had necessitated major surgery and absences from work, moreover, the prognosis was that the condition would be aggravated by strenuous physical exercise, by sitting or standing for long periods and by physical confrontation. Significantly, certification and performance of full policing duties against this background was expected to lead to episodes of pain and discomfort which in turn would probably result in absences from work in the future; a medical prognosis made before the assault; probable consequences for which the Respondent bears no responsibility.

239. The Applicant also developed degenerative changes in his neck which have been symptomatic since in or about 2009-2010 and remain so. Having regard to the nature of these changes, which have remained refractory to invasive treatment, it seems reasonable to conclude that these changes will continue to progress resulting in further limitation of neck movement neck pain and discomfort. Although not relied upon as a specific ground of defence in the particulars pleaded as having a bearing on the matters which fall for consideration, the neck problems and the treatment for them were extensively canvassed with the Applicant and the medical witnesses during the course of the hearing.

240. While the neck problems are not compensatable, the probable consequences of these in the future have a potential bearing on the Applicant's capacity to work and the pecuniary loss claim since any future absences from work or inability to perform work duties arising from the neck condition which may result in financial loss must be discounted. In this regard, the Applicant has already had work absences and extensive treatments for his neck pain which is not causally related to the assault.

241. In addition, the Applicant also suffered from long standing problems with groin pain emanating from right hip pathology which required surgery, a problem also unrelated to the assault. However, it appears surgery has been successful in substantially relieving symptoms to date. There is no sufficient evidence to warrant a conclusion that the hip condition will deteriorate to the point where it would probably result in absences from work.

Conclusion: Application of *Reddy v. Bates* Contingencies
242. Together with other relevant contingencies, the potential impact of the consequences on the Applicant's capacity to work attributable to the degenerative changes in the cervical spine and, absent the assault, to the underlying degenerative back condition are contingencies or matters which the Court must take into account in reaching a decision on the claim for future pecuniary loss of earnings. Having regard to the findings made and the conclusions reached the Court considers, in the particular circumstances of this case, that a deduction of 15% should be made in respect of Reddy and Bates contingencies.

Conclusion; General Compensation
243. The submission made on behalf of the Applicant in relation to general compensation was that this should be assessed in or about the same level as that in *Mullen*, namely €400,000. For a number of reasons I cannot accept that submission. Firstly, on my view of the evidence, the injuries for which the Respondent is liable are entirely different from and not as catastrophic as the main injury suffered by *Mullen*. Secondly, that was a case in which there was no previous medical history of any significance which involved multiple serious injuries some of which had significant permanent life-threatening implications. Thirdly, even if the level of general compensation in Mullen was appropriate to the totality of the Applicants position overall it would be wholly unjust to make such an award without first discounting the consequences of the injuries and conditions not causally related to or affected by the assault.

Ruling
244. The Applicant is entitled to be compensated for the physical and psychological injuries, including loss of amenity, together with the pecuniary loss ascertained and found by the Court to have been caused by the assault. For all of the reasons given, the findings made, the conclusions reached and in light of the time which has elapsed since the occurrence of the assault, the Court considers that a fair and reasonable sum to compensate the Applicant for pain and suffering to date commensurate with his injuries is €100,000 and €75,000 for future pain and suffering, making in aggregate €175,000.

Conclusion; Pecuniary Loss Claims
245. The Court will make an order for the amount of the pecuniary losses already agreed together with past losses claimed insofar as these are attributable to and were caused by the assault. Insofar as any of the pecuniary losses claimed to date relate to other injuries or conditions not caused by the assault, such as any treatments or medications in respect the Applicant's hip or neck, such amounts, if any claimed, are disallowed. When ascertained, the Court will award Courts Act interest at the Court rate on the final sum for pecuniary losses to date.

246. With regard to the claim for all future medical and travel expenses, the Court will allow the amounts claimed to the extent that such are attributable to the injuries substantially caused by the assault; other amounts, if any, are disallowed.

247. Insofar as the claim for future loss of earnings to age 60 is concerned, the Court is very well aware from the many cases it has had to deal with under the Acts that the vast majority of Gardaí exercise their entitlement to retire on completing 30 years of service and that where that is reached in or about the age of 50, in his case the Applicant would have been 51, a small minority serve until in or about their mid 50s, a fact reflected in *O'Sullivan*.

248. The Applicant's evidence was that he intended to serve until he reached 60; he had a young family, one of whom had special needs. I do not doubt that that was his intention, however, having regard to the already symptomatic degenerative changes in his neck and the underlying degenerative back condition, already intermittently symptomatic at the time of the assault and the affect the consequences would probably have had on his capacity to work, it seems to me that while he would have continued to serve after completing 30 years service at 51 it is more likely than not he would have retired in or about his mid-50s. Accordingly, the Court considers it reasonable to allow the claim for future loss of earnings until age 55; the appropriate multiplier in respect of this claim is 879.

249. With regard to the claim for loss of earnings after retirement, although Mr. Tennant gave evidence in relation to loss of earnings

from age 60 to 70 on a certain assumption, the evidence advanced by the Applicant to support an actuarialised claim for loss of earnings in respect of employment after retirement from the force was vague, aspirational and, in my view, wholly insufficient to found such a claim, accordingly the Court disallows any arterialised claim for loss of earnings after retirement at age 55. Nevertheless, having regard to the conclusions reached the Court must also take into account the probable consequences of the injuries on the Applicant on reaching retirement. All things considered I am satisfied that his ability to take up employment following retirement would have been impacted negatively, accordingly, the Court will allow a further sum of €45,000 by way of enhanced general compensation in respect of the resulting diminution / loss of opportunity.

Ruling

250. I will discuss with Counsel the form of the final order to be made once the parties have had an opportunity to consider the terms of the judgment.