THE HIGH COURT

[2012 No. 2543 P]

BETWEEN

GERARD KIRBY

PLAINTIFF

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 25th day of May, 2017.

1. These proceedings arise as a result of an accident which occurred on the 26th of July, 2010, when the parachute which the Plaintiff was using failed to open properly, a misfortune which occurred during his first parachute jump while participating in an Army parachute training course at the Curragh Camp, Co. Kildare.

Background

2. Born on the 19th of May, 1983, the Plaintiff is a serving member of the Defence Forces and resides in Cork with his wife and two children. He enlisted in 2002 for five years, was promoted to corporal (Cpl) in 2004 and re-enlisted in 2007 for a further four years. In late 2009 he succeeded in joining the Army Rangers Wing (the Rangers), a revered and respected Special Forces unit stationed at Plunkett Barracks on the Curragh. In 2013, having previously applied for a transfer from the Rangers, the Plaintiff succeeded in securing a posting to the 1st Brigade Ordnance Unit, Cork; a change in his career path which he attributed to the consequences of the accident but with which the Defendants took issue.

3. The Plaintiff's career goal was to become a ranger. The selection process for those who volunteer is physically gruelling and mentally exacting; soldiers who meet the necessary requirements, which involve acquiring a high degree of proficiency in military skills, are quite literally the chosen few. He considered membership of the Rangers to be an honour, a test of his personal abilities and source of personal pride, evidenced by re enlisting in 2011 for a further nine years although not as a front line soldier due to his injuries; at the time of the accident he had a front line posting as a member of an attack team unit.

Military static line parachute course

4. The Army Parachute Training School provides a three week long military static line parachute course to volunteer military personnel. The object of the course is to train, prepare and qualify participants to undertake parachute jumps in the performance of military duty. The Plaintiff enrolled in the course which commenced on the 21st of July, 2010. It comprised ground based instruction and training as well as practical ground and airborne exercises which included six jumps from 1,500 feet exiting a twin engine Augusta Westland 139 (AW139) helicopter; students who complete the course jumps are awarded their wings.

5. Static line jumps are so called because a line secured in the aircraft and attached to the parachute opens the chute automatically when it fully extends in the jump. Once out of the aircraft the parachutist counts to six slowly by counting *one thousand, two thousand, three thousand* and so forth up to *six thousand* by which stage the parachute canopy should have deployed and filled with air causing a rapid reduction in the speed of descent experienced as a jolt and an upwards lift sensation by the parachutist. A reserve chute, which requires to be operated manually, is also worn to provide against full or incomplete opening of the main chute.

6. Where the main chute deploys but fails to do so correctly, such as when the parachute lines become entangled - something which can and does occur - students are instructed to reach as high up as they can on the parachute risers and kick their legs in a bicycle like pedalling motion, an action which usually frees the tangled lines. However, where there is a severe twist high up in the lines, which is unusual but can happen, it is generally not possible to free them and use of the reserve chute becomes necessary, an event which renders ineffective all efforts to free the lines of the main chute.

The Accident.

7. The Plaintiff was most unfortunate to encounter this very problem on his first jump. He was the first of six soldiers, known as a 'stick', to jump from the helicopter. He was given a verbal command by the Jumpmaster, Sergeant (Sgt.) Daly, followed up by a confirmatory tap on his helmet. On the Plaintiff's evidence this was the last communication which he received or heard until after he had landed, evidence hotly disputed by the Defendants who suggested that as he descended he had been talked down by members of the safety team on the ground.

8. He made an uneventful exit from the aircraft, started to count and as expected felt a lift as the canopy began to deploy, however, on looking up he saw that it had failed to open fully; the parachute lines were twisted. Apart from a complete chute opening failure the situation could hardly have been more desperate, the speed of descent was far too fast and unless immediate action was taken the Plaintiff faced imminent death or extremely serious injuries.

9. Realising that immediate action was necessary, he started to kick his legs but when this failed to free the line he deployed his reserve chute. Although this significantly reduced his rate of descent the other consequences of doing so were not then known to the Plaintiff, who continued with his efforts to free the lines as he approached the ground.

10. Given the situation in which he found himself it was crucial to a safe landing that an almost perfect parachute landing roll (PLR) had to be executed if he was to avoid injury otherwise an injury of some sort was almost inevitable. In the event the Plaintiff suffered a very severe fracture dislocation of his right ankle the consequences of which are likely to remain with him for the rest of his life, more of which later.

11. Not surprisingly the Plaintiff was understandably concerned, and no doubt preoccupied, by these events he descended; his evidence was that he thought he had prepared himself as best he could but anticipated from the circumstances that he faced a hard landing. He covered his head with his hands to try and avoid a head injury as as the deployment of the reserve chute had somehow

dislodged his helmet; the Defendants led evidence that the Plaintiff was still wearing this when he landed.

12. There was also controversy between the parties as to (i) whether or not the Plaintiff had received lateral drift training, (ii) whether such training would have made any difference to the outcome, (iii) whether, in accordance with Army safety procedures, clear and repeated instructions to stop kicking and adopt the correct body position for a PLR had been given to him from the ground and (iv) whether or not he had prepared for and had attempted to perform a PLR.

Training and Instruction

13. The initial three days of the course entailed an introduction to course content, to drills, safety and equipment instruction as well as parachute jump training. An integral and important part of the course instruction and training concerned the preparation and execution of a PLR which had evolved from international military experience gained during World War 11. It was discovered that the prospects for a safe landing were enhanced by minimising the horizontal and vertical impacts involved when a parachutist makes contact with the ground.

14. The parties called experts in parachuting. Warrant Officer Douglas Peacock, a former parachute instructor with the RAF, was called on behalf of the Plaintiff and Mr Ian Marshall, a former parachute instructor with the Parachute Regiment, was called on behalf of the Defendants. Each have impressive parachute jump and instructors experience; it transpired that Warrant Officer Peacock had been one of Mr Marshall's first instructors.

15. His student learnt well and went on to break jump records and win a series of national and international parachuting titles; they prepared expert reports which were very helpfully admitted as aid memoires for the Court. Both experts were in agreement that the PLR is universally accepted by military and civilian training schools as the proper and safest means of landing by parachute and is an integral part of a parachute training course.

16. The PLR requires a body position to be adopted by the parachutist which involves slightly bending the legs, keeping the feet, knees and legs together, elbows in with the balls of the feet pointed towards the ground whilst maintaining moderate muscular tension, tucking in the chin and tensing the neck. By adopting this position the force of the impact on landing is distributed through five points of contact with the body thereby reducing to a minimum the risk of injury.

17. Students are continually assessed for their understanding and ability to perform techniques and drills in order to progress through the parachute jumping course. PLR drills, which included landing on the ground in different directions, are performed by jumping from a two foot high box onto a jump safety mat. As students progress with this training they perform the jump by running up onto the box from which they take off landing up to six feet away on the mat, again landing in different directions.

18. The Defence Forces have a long history of military parachuting and training with the military of other countries. The instructors of the Army Parachute Training School hold international parachuting qualifications and have international sky jump experience. When a military parachute training manual was being drawn up this knowledge was harnessed and after due consideration a decision was made to adapt the United States Army parachute training manual to local circumstances. Much of the Army static line parachuting course syllabus is based on the American training manual.

19. It was accepted that certain aspects of the US training manual, although incorporated into the modified manual used by the Army Parachute Training School, were not utilised in the parachute training course, one such being a lateral drift apparatus designed to simulate lateral drift landing. One explanation advanced for not utilising the apparatus was that it had been tried by the military in Germany but abandoned because of injuries resulting from its use.

20. Absent the use of this or some equivalent equipment, such as that used by the Royal Air Force (RAF) to give lateral drift training, the Plaintiff's case was that he did not receive appropriate training in lateral drift landing, something which was particularly pertinent to the circumstances of the accident and another matter with which the Defendants took issue.

21. Warrant Officer Peacock's evidence was that PLR training was progressive and that had the Plaintiff received lateral drift training he would have been much better equipped to perform the PLR, required as it was in circumstances which involved accentuated lateral drift. Mr Marshall's disagreed that the effect of the deployment of the reserve chute would have accentuated the speed of the lateral drift though he did agree that as two chutes had been deployed the distance travelled horizontally would have been greater; in his opinion the PLR training given to the Plaintiff was appropriate and had been carried out properly.

22. The significance of his evidence in this regard is twofold, firstly, lateral drift training, albeit using different techniques, is part of the British military parachute training course, accordingly, lateral drift training as described in the Irish training manual would not have come as a surprise to Mr Marshall, indeed, he was in all likelihood familiar with the American system from his vast international parachuting experience. Secondly, he confirmed, under cross examination, that his opinion in relation to the training received by the Plaintiff was founded on the premise that it had been carried out in accordance with the manual. However, it transpired that he had not been made aware that the American system utilising the lateral drift apparatus did not form part of the Plaintiff's training.

Lateral drift

23. Save in what maybe described as still air conditions, a parachutist does not descend vertically from the aircraft, rather lateral drift involves a movement by the descending parachutist lateral to the perpendicular relative to the ground, most usually attributable to movement of the air; the wind causes lateral drift which can be accentuated by the deployment of a reserve chute. The movement involved may be in any direction. The accentuation occurs in such conditions because the effect of the two chutes increases drag but decreases the rate of descent thus increasing the horizontal movement of the parachutist over the ground.

24. The term lateral drift does not signify and is not confined to sideways movement though may include such movement; it may best be understood as horizontal movement by the parachutist relative to the ground in any direction during descent. In the circumstances the Plaintiff would have drifted laterally further than the other members of the 'stick', though, he still landed in the designated drop zone.

25. The Plaintiff was one of approximately thirty students who commenced the course which included evening sessions of instruction and training in the correct way to pack a parachute, however, not all of the students on the course attended these sessions; some like the plaintiff were enrolled in a heavy machine gun course. Although complaint was made that the Plaintiff should not have been so engaged during the parachute training course, the Court is not satisfied that this was causatively material to the accident.

26. By the time the Plaintiff had completed the instructional phase of the course he had received information and instruction on the PLR and had completed 57 box jumps; he was graded as "no problems" on landing sessions and "go" on all subjects of his final

assessment; in short he was considered ready to take his first jump and this was duly scheduled for the morning of Monday July 26th.

27. An AW139 helicopter has the capacity to deploy six parachutists, three from each side of the aircraft. The compliment of the six parachutists is known as a "stick". The Plaintiff was in the first of the sticks due to jump on the day. The three parachutists who leave from each side of the helicopter do so alternately with one second intervals between each jump. On a training jump the time taken for the 'stick' to leave the aircraft varies between six and ten seconds. Each parachutist receives an order to jump from the Jumpmaster which is confirmed by a confirmation tap on the helmet.

28. The jump schedule for the morning was delayed until the afternoon because the wind speed upper safety limit of 7.5 to 9 knots had been exceeded with gusts recorded of between 10 and 15 knots; accordingly, the students were detailed to practise further PLRs; in the event the Plaintiff added a further twelve box jumps to the 57 he had already undertaken.

Safety Precautions and Considerations
29. A drop zone into which the parachutists were to land, known as Drop Zone Pegasus, was designated to the North of the Curragh Camp. The zone comprised an area of approximately 1 kilometre in length by 1.5 kilometres in width and incorporated a target landing area measuring 600 by 300 metres. The helicopter from which the parachutists were to jump was required to fly in an East to West direction above the drop zone.

30. Topographical features of potential relevance in relation to safety around the drop zone consisted of (i) a knoll comprising the highest elevated position located to the North East, on which members of the drop zone safety team were positioned, (ii)

> a line of trees to the South, where another member of the team was positioned, and (iii) to the West, power cables, heavy gorse and a road leading to the Curragh Camp which was supervised by mobile patrols. An elevated drop zone control stand was located approximately 600 metres south of the zone centre.

31. Apart from a helmet and reserve chute, the safety equipment supplied to the crew and members of the 'stick' included hearing protection against the noise generated by the helicopter engine and rotor blades, which is particularly noticeable when the doors of the craft are opened in preparation for the jump. Significantly, in the context of the controversy between the parties, the Plaintiff was wearing sonic ear defenders or muffs which excluded high decibel noise but permitted sound at lower decibels, such as that of the human voice, to be heard.

32. The Army safety procedures for training jumps involved the provision and the utilisation of a loud hailer by the drop zone controller to talk down parachutists during their descent. It was not in question that once the parachutes were deployed the parachutists would have been able to hear instructions shouted up to them from the ground. The significance of the sonic hearing protection being worn by the Plaintiff is that, if the loud hailer had been used to give instructions when it was noticed that he was in difficulty, he ought to have been able to hear them.

Decision

Were PLR instructions given; was a PLR attempted
33. Within days of the accident a safety management accident investigation was undertaken in the course of which military personal with knowledge or possible knowledge of the circumstances were debriefed and invited to make statements. An entry dated July 26th and made by Sgt. Maguire in his official Personal Record concerning the accident circumstances states "*…it was observed that the Cpl Kirby deployed his reserve parachute. It is believed that this was due to bad twist. As he came into land observed in poor PLR- legs apart and kicking, broke ankle and transported to Naas*".

34. The Safety Management Audit Investigation Report into the accident states that the Plaintiff adopted the wrong body position due to an error in drill execution. The Drop Zone Report records that jump operations were delayed until 16.50 hours, due to wind speed and that Stick 1 exited the aircraft at 16.55 hours. Referring to the Plaintiff's reaction to the situation "*…it was observed as he came into land he failed to adopt the correct prepare to land body position, leaving his legs long and feet apart (see attached witness report)*".

35. The attached witness report, submitted on the 30th July, was authored by Sgt. O'Brien and Pt. Hennessy. The report stated that they "*…noticed a student had twists and almost immediately deployed the reserve chute. He seemed to panic and not carry out the correct drills – landed with bout (sic) legs open and kicking feet on impact*".

36. Sgt. Daly was a trained paramedic and parachute instructor. He was the lead Jumpmaster in the helicopter from which the Plaintiff had jumped. When the helicopter landed he attended the Plaintiff at the scene, carried out a full body examination, removed the Plaintiff's boot from his right foot with a shears and called for an ambulance. He could not be of any assistance in relation to the accident circumstances though was satisfied that the Plaintiff had exited the helicopter appropriately.

37. Cpl. Lilley, who did not give evidence, made a statement, dated the 6th September, which was contained in the materials made available to the Court. He was a fellow participant in the course with the Plaintiff and was third to jump in the same 'stick'. He observed twists roughly two thirds of the way up the lines of the Plaintiff's chute, noted that the canopy did not appear to be fully inflated and that the reserve chute appeared to catch the wind and pull him horizontally. He did not see what happened to the Plaintiff thereafter because he was focused on his own landing. He made no mention of having heard PLR instructions as he descended though stated that when he last saw the Plaintiff he appeared to be preparing for a PLR.

38. Sgt. Maguire gave evidence that he was the Drop Zone Controller located at the Drop Zone Control Stand at which there was a hand held megaphone. As chief instructor he was responsible for the safe running of the exercise which included the safety of the 'stick' in the air as well as the assignment of duties to the safety team on the ground.

39. He could see that the Plaintiff was in trouble and had deployed his reserve parachute. His evidence was that as the 'stick' descended he used the megaphone to give a general direction to the parachutists to get their feet, knees and legs together in preparation for the landing, a direction which he repeated. He also gave the Plaintiff a specific direction to "stop kicking" and noted that his legs were spread and separated on impact with the ground.

40. Sgt. O'Brien, another instructor, was also present at the Drop Zone; he had been designated senior NCO of the safety team. He gave evidence that he could see twists in the Plaintiff's parachute and that as he approached the ground that he had shouted up at him to 'stop kicking', however, the Plaintiff did not respond and failed to adopt the proper body position for a PLR. His recollection of Sgt. Maguire's communication with the 'stick' was of a general direction to prepare for landing; he could not recall whether a specific

direction had been given to the Plaintiff by Sgt. Maguire.

41. Evidence was also given by Corp. Hennessy. He was parked in a Nissan Patrol with the engine running and was responsible for stopping traffic exiting the Curragh Camp in the event of a parachutist drifting out of the Drop Zone. He recalled seeing the 'stick' emerge from the aircraft that the Plaintiff was in difficulty, that a reserve chute was deployed and that the Plaintiff had his feet apart and was kicking all the way down to the ground; as there were no parachutists drifting towards the road he drove to where the Plaintiff landed.

42. Corp. Scanlon was a parachutist on the course with the Plaintiff waiting for his turn to jump. He was not in the same stick and it transpired that he did not jump on that day. He gave evidence that he saw the Plaintiff's reserve chute open and heard Sgt. Maguire's voice on a loud hailer giving instructions to the 'stick' to adopt the PLR. He was not involved in the accident investigation nor was he invited to make a statement at the time. His first involvement was a couple of months before the trial when he was asked to give evidence by Sgt Maguire.

43. The Plaintiff was emphatic that as he descended he heard no instruction from anybody on ground. His evidence was that his helmet was dislodged in some way by the deployment of the reserve chute and that as he neared the ground he put his hands up over his head to protect himself. He did the best he could to prepare for what he knew was going to be a hard landing. He could see the ground coming up but couldn't be sure about the positioning of his legs before he made contact.

44. The situation in which he found himself was quite different to anything he had encountered in PLR training. His belief was that had he received lateral drift training that it would have assisted him in some way to deal with the landing in the circumstances. He knew nothing about lateral drift training or the existence of a lateral drift apparatus until he saw the discovered training manual. It was suggested that the loss of the helmet had been introduced by him in an attempt to explain his failure to prepare for and perform a PLR.

Conclusion on whether PLR instructions were given and a PLR attempted.
45. Whether or not the Plaintiff received instructions to stop kicking and adopt the proper body position for a PLR is material to the issue of liability, a matter on which there was a complete conflict of evidence which now falls to be resolved.

46. Apart from the Plaintiff none of the other members of his 'stick' were called to give evidence, suffice it to say that they all landed safely. From the moment when he was first attended to on the ground it was clear that the Plaintiff had suffered a serious ankle injury. Considering Sgt. Maguire's evidence concerning the instructions which he had given during descent, it is not surprising that expected the Plaintiff to have been invited to make a statement in relation to the accident when he was well enough to do so, however, that did not happen.

47. As already stated, the provision and use of a loud hailer during trainee parachute jumps is part of the parachute training course safety procedures. The issue which arose was whether a loud hailer had been used to talk down the Plaintiff and the other members of the 'stick'. With the exception of Cpl. Lilley's statement, the other statements were prepared within days of the accident. Though limited in detail I think it pertinent to observe that they were prepared at a time when the facts referred to would have been fresh in the minds of those who made them.

48. When careful consideration is given to the detail of the evidence led by the Defendants concerning the instructions given to the members of the 'stick' as they descended, a striking omission which emerges from the investigation reports and statements is the absence of any reference to such instructions or to the reaction, if any, of the Plaintiff to them.

49. In my view it is hardly credible that had such instructions been given, and repeated, that no reference would have been made to these or, more importantly, to the failure of the Plaintiff to react to them, something which, on the face of it, could scarcely have been more crucial to the explanation for the accident. An oversight or a failure to appreciate the significance of the matter might explain an omission on the part of one witness or another but highly improbable on the part of all those involved in the investigation process.

50. In that regard no satisfactory explanation was offered to the Court by the witnesses concerned as to why, despite the detail of the evidence which they gave in relation to them, no reference to PLR instructions was made in the investigation statements and reports drawn up in the aftermath of the accident. Nor was any explanation offered as to why the Plaintiff was not subsequently debriefed concerning what had happened to him.

51. Considering the seriousness of the accident one would have expected, as did Sgt Maguire, that the Plaintiff would have been approached and invited to make a statement when he was well enough to do so. After all, there were questions which he was best placed to answer such as whether he had heard the instructions and, if so, why had he not complied or attempted to comply with them. Answers to such questions were material to an explanation for the accident and the safety of the exercise, something which was further highlighted by another accident on the same day involving a member of the second 'stick', Lt. Hegarty, who broke his pelvis on landing an accident also attributed to non performance of a PLR.

52. Having had an opportunity to observe the Plaintiff's demeanour as he gave evidence I am satisfied that he was a reliable witness who gave evidence in a straight forward manner. Although he thought that he had done the best he could to prepare himself for landing he accepted, very fairly I thought, that he was not sure about the positioning of his legs in the moments immediately before he landed. Having regard to the evidence of the parachuting experts and the medical evidence concerning the nature of his injuries, I am also satisfied and find that the injury he sustained is consistent with and most likely explained by a failure execute an appropriate PLR.

53. The Plaintiff's career leading up to the accident shows him to be a highly motivated and committed member of the Rangers, a soldier trained to take and execute military orders without question with a capacity to act on his own initiative and exemplified by his reaction to the incomplete deployment of his parachute. It was common case between the experts that he was most unfortunate to find in such a precarious position on his first jump let alone to be faced with the complication created by the location and severity of the twist in the lines.

52. Mr Marshall postulated a number of explanations as to why the Plaintiff did not hear or follow the instructions which he understood the Plaintiff had been given, such as distraction or a failure to hear, or to pay attention or to appreciate them for one reason or another. Whilst the possibility that PLR directions were given but not adhered to for whatever reason cannot be altogether excluded if given, as suggested, I am satisfied that the Plaintiff was wearing his sonic ear muffs and would have been able to hear them, moreover, I consider it highly likely that the Plaintiff would have obeyed instructions directed towards his safety and would have

attempted a PLR.

I accept the Plaintiff's evidence that following the instruction to jump and the confirmatory tap on his helmet the next communication which he heard was when he was being attended to on the ground.

54. When one considers the length of time which had elapsed before Cpl Scanlon was first approached by Sgt Maguire with an enquiry as to whether he had a memory of the day in circumstances where he had not made a statement and had not otherwise been involved in the post accident investigation, it highly unlikely that he would have been able remember what was said or done by anyone during the Plaintiff's descent. I was not impressed by him as a witness upon whose evidence the Court could rely in the absence of any reference to instructions in the post accident investigation reports and statements.

55. Consequently, I am driven to the conclusion that the witnesses for the Defence who gave evidence on that matter were mistaken when stating that PLR instructions had been given, moreover, I am satisfied, notwithstanding his training such as it was, that the absence of instructions in the circumstances was causative of the Plaintiff's failure to execute a PLR. From his perspective he had been in a life threatening situation; absent any assistance from the ground by way of instructions it was hardly surprising that he remained focused on trying to untangle his parachute lines instead of preparing for a PLR.

56. The purpose of the loudhailer or of any talk down system for trainee jumpers is to reassure, re-emphasise and, where necessary, to reinforce training, especially in circumstances where a parachutist is experiencing difficulty from which it is apparent that, as in this case, the Plaintiff was continuing with his efforts to untangle the lines instead of adopting the proper body position for a PLR.

57. Although there are some countries where such a system is not used for one reason or another, the loud hailer system or some variation of it is used in other countries. I accept the evidence of Warrant Officer Peacock concerning the utility and appropriateness of a talk down system in the context of safety as part of a training course for novice parachute jumpers.

58. I pause to observe that although the loud hailer version used in the United Kingdom was abandoned after forty years in use it was replaced by a talk down system which involves one instructor on the ground being allocated to give instructions, where necessary, to each jumper, an arrangement which, putting it at its kindest, did not find favour with Mr Marshall; he considered any talk down system to be a luxury, an opinion not shared by Warrant Officer Peacock.

59. Whatever about the rationale for the position in that regard which has been adopted by the military in other states, a talk down system is part of the training course provided by the Irish Army Parachute Training School and was thus required to be utilised on the occasion of the Plaintiff's first training jump.

Absence of training with a lateral drift apparatus or similar devices; would such training have made a difference to the outcome?
60. I accept the evidence of Warrant Officer Peacock that the Plaintiff should have received lateral drift training and that such training would ordinarily better prepare a student for the experience of a lateral drift landing (which usually occurs in Irish weather conditions) and that this would have been especially relevant in the circumstances such as those under consideration where an almost perfect PLR would have been required if injury of some sort was to be avoided.

61. However, in my judgment, it is unnecessary to determine the question since the Plaintiff did not adopt the proper body position preparatory to performing the PLR for which he had been trained; had he adopted the correct position and attempted to execute a PLR but had sustained the injury he did then the absence of lateral drift training might well have been material and other considerations would apply.

Liability
62. Oral submissions were made on behalf of the parties which have been considered by the Court; it is not intended to summarise these here. Suffice to say that the essence of the Defence case is that the parachute training course had been tried and tested by the Army; it was appropriate to the conditions likely to be encountered with the equipment utilised and was consistent with best international practice for military training in parachute jumping. The Plaintiff had been instructed, trained in and had practised the PLR. Once he left the plane it was his responsibility to put his training into practice. For whatever reason he failed to prepare himself to carry out a PLR notwithstanding instructions directed at him to do so. Had he performed a PLR the likelihood was that he would have landed safely just like the other members of the 'stick', accordingly, he was the author of his own misfortune.

62. The essence of the Plaintiff's case was that there had been an inexcusable failure to fully implement the provisions of the training manual and the safety procedures for a trainee parachute jump. There had been a failure to provide lateral drift training and a failure to utilise the talk down system, failures which had caused the accident and for which the Defendants were alone responsible.

Conclusion
63. Although breach of statutory duty had been pleaded and the parachute training manual may have been a response by the Defence Forces to the coming into force of the Safety, Health and Welfare at Work Act, 2005, that cause of action was not pursued rather the case proceeded as one brought in common law negligence and will be decided accordingly.

64. There is no rule at common law, at least in this State, that those responsible for a serving soldier, even in operations involving armed conflict or hostilities, do not owe him a duty of care or that they are immune from any action for negligence causing an injury. Those who volunteer to serve in the Defence Forces accept that in doing so they maybe exposed to the risk of death or personal injury, however, the law is well settled that this does not include the risk of being exposed to injury through negligence or breach of statutory duty. See *Ryan v. Ireland* [1989] ILRM 544.

65. The first Defendant, which includes all persons in authority over the Plaintiff, owed him a duty to take such care for his safety as was reasonable in the circumstances of their relationship and the activity upon which they were engaged. It is unquestionably the case that military service could involve an unavoidable risk of death or serious injury during armed combat or in combat zones even where soldiers are not themselves active participants such as when carrying out peace keeping duties with the United Nations.

66. It follows that in any given situation involving alleged negligence on the part of the military, the circumstances pertaining to that situation and the role of the soldier in relation to it are relevant to a determination of the duty of care owed and whether or not there has been a breach of that duty. An inevitable risk accompanies anyone who performs a parachute jump, however, the circumstances in which it is undertaken maybe markedly different; combat parachuting out of an aircraft in a war zone cannot be equated with the same exercise undertaken in peacetime conditions as part of a training course on the Curragh .

67. Notwithstanding that the Plaintiff had been warned about and had accepted the risks involved when he enrolled on the course, he was entitled to expect that he would be provided with such equipment, information, instructions and training as was reasonable and practicable so as to enable him to perform his first parachute jump safely. In my judgment, the failure to provide lateral drift training and an effective talk down system constituted a breach of that duty and thus negligence on the part of the Defendants.

Contributory Negligence
68. At law the Plaintiff's duty was to have regard and to take care for his own safety. Where it is proved that there was a want of such care on the part of the Plaintiff in respect of the wrong giving rise to the loss and damage suffered the Plaintiff is said to be guilty of contributory negligence with the consequence that the damages recoverable "… *shall be reduced by such amount as the Court thinks just and equitable having regard to the degrees of fault of the plaintiff and the defendant* …" See s. 34(1) of the Civil Liability Act 1961, as amended.

69. In general in may fairly be said that a failure to comply with information and training given as to the reasons for and the performance of a PLR which results in loss and damage would constitute contributory negligence on the part of a trainee parachutist, particularly so if the training was reinforced by instructions from the ground.

70. However, the question which arises in this case is whether the Court would be warranted on the evidence in reaching such a conclusion. As already stated, the Plaintiff was most unfortunate to find himself in a sudden emergency for which he was not responsible but from which he sought to extricate himself in accordance with the training he had received in that regard.

71. The standard of care exacted by the law is not measured *in vacuo*, rather that is to be done by reference to the nature of the legal relationship between the parties and the circumstances pertaining to the commission of the alleged wrong; it follows that a necessary distinction must be made between the standard required of a Plaintiff, forced to make a quick decision in an emergency, and the standard required of a Plaintiff whose decision is made in calm and unhurried circumstances. See *Ward v. Dawson*, unreported, H.C. delivered 26th July 1996, and *Connell v. McGing* [2000] IEHC 208.

72. The position of a parachutist involved an uneventful jump with sufficient time to contemplate what is required to prepare for landing by adopting the appropriate body position and by performing a PLR, such as that of the other members of the 'stick, cannot be equated with the position of a parachutist who, like the Plaintiff, is caught unexpectedly in a sudden emergency not of his making carrying the risk of very serious or even fatal injuries.

Conclusion on Contribuory Negligence
73. When the unfortunate, unusual and unexpected predicament in which the Plaintiff found himself through no fault of his own is considered it is hardly surprising and not at all unreasonable that without instructions from the ground to the contrary he continued to attempt to extricate himself from that in the way he did and notwithstanding his awareness that he was about to land. Such a conclusion is not to be diminished by the futility of his actions for reasons of which he was then unaware. In my judgment to find want of care on the part of the Plaintiff and thus guilty of contributory negligence in such circumstances by failing to prepare for and to perform a PLR would be an unduly harsh and unwarranted result.

Quantum

Nature and consequences of the injuries
74. As a result of the accident the Plaintiff suffered a high velocity injury which caused a fracture dislocation of the right ankle with disruption of the ligaments. The location and categorisation of ankle fractures are described in accordance the Weber classification of fractures known as Weber (a), (b) or (c). Weber (a) is a fracture located below the joint; (b) is a fracture at the level of the syndesmosis and (c) is higher up. In Weber (c) the fracture pattern goes through the ankle joint up through the syndesmosis (the connection which holds the tibia and fibula together) and then up and out through the fibula.

75. The Plaintiff was removed from the drop zone and taken to Naas General Hospital where he received emergency attention following which he was transferred to Tallaght Hospital where he came under the care of Professor McElwain. He carried out an open reduction and internal fixation of the fracture, classified in the hospital notes as a Weber (b) fracture. He carried out two further surgeries on the Plaintiff, one in November 2010 for the purposes of removing a syndesmosis screw inserted to stabilise the fracture at initial surgery and the other in 2011 to remove the remaining metalwork but as a result of which the Plaintiff did not make a full recovery in respect of his injuries.

76. The Plaintiff was subsequently referred to and came under the care of Ms. Paula Kelly, Consultant Orthopaedic Surgeon, for management of ongoing problems with his ankle. She had the benefit of the previous medical notes and records and carried out an arthroscopic debridement of the ankle joint on the 5th November, 2012. At surgery she found extensive soft tissue scarring in the ankle joint which was debrided; she also stabilised the peroneal tendons. In evidence she categorised the injury as a Weber (c) fracture.

77. No medical evidence was called on behalf of the Defence, however, it was suggested to Surgeon Kelly that the injury was a Weber (b) fracture, as noted by Professor McElwain, and that this was significant in relation to prognosis having regard to a fracture of the right malleolus sustained by the Plaintiff in 2003.

78. The Plaintiff's evidence was that following the ankle fracture in 2003 he had made a full functional and symptomatic recovery and had remained entirely asymptomatic until he refractured his ankle as a result of the index accident. No surgery was necessary for the 2003 fracture; Surgeon Kelly's understanding was that that fracture was undisplaced. The fracture sustained in this accident was of an altogether different type involving as it did not only a fracture dislocation of the ankle joint but a disruption of the ligaments and syndesmosis, injuries which required open reduction and fixation surgery. In her opinion it was not the location by reference to the Weber classification which was prognosticaly material rather the nature and type of the fracture sustained.

79. In her opinion it was highly likely that the Plaintiff's ongoing symptoms will progress to the point where he will require a further ankle arthroscopy and debridement. Having regard to the intra articular nature of the fracture it was also likely that he will develop osteoarthritis in the ankle joint between ten and twenty years post the date of the injury carrying with it a risk that he would subsequently require an ankle arthrodesis the effect of which would be to stiffen the joint but abolish the pain. Furthermore, that procedure could in time lead to an increased risk of arthritis developing in the subtalor joint due to the increase in pressure on that joint which as it compensates for the loss of movement in the ankle.

Conclusion on the nature of the Plaintiff's injury;Affects of the injuries and/or consequences for the Plaintiff
80. The Plaintiff was a career solider who considers the army to be his life. If he completes his current service of enlistment he will

have served 21 years. Provided he is physically able to do so it appears that he could serve for longer in the army though this would be dependent on appointment to the rank of Sergeant, a position for which he has applied since the accident and which required him to sit exams; out of a class of 60 he was awarded first place. He is hopeful that he will eventually secure promotion but that will be dependent on a number of factors including the availability of the vacancies for the position.

81. Part of his conditions of service require the Plaintiff, like every other solider, to achieve a minimum level of fitness. Other than the year of the accident in every year since then the Plaintiff has achieved an outstanding or excellent level of fitness. He has an interest in physical training and since the accident has also applied for enrolment on a physical training instructors course with a view to becoming a physical training instructor or supervisor. He is also a trained emergency medical technician.

82. It was suggested to the Plaintiff that his level of fitness in every year since the date of the accident other than the year of the accident itself and his capacity to undertake and complete exacting physical exercises required of a soldier seeking promotion to the rank of Sergeant and his applications to enrol in a physical training instructors course were indicative that his injuries were not having as significant an impact on his life as suggested, particularly in the discharge of his military duties.

83. The Plaintiff explained that his abilities to undertake training exercises, which included running with a pack result in negative consequences for him in the form of ankle pain and swelling. Although he was able to walk and run short distances, running longer distances or going up an incline were problematic and he continued to suffer from intermittent pain and discomfort which can be aggravated depending on the nature of the activity being undertaken.

84. Notwithstanding his injuries he felt he would be able to undertake the duties of a physical training instructor were he successful in applying for the course and obtaining that qualification. The categorisation of his physical fitness as being outstanding or excellent was attributable in part to his fitness record and membership of the Rangers up to the time of the accident and which had followed him to his present posting; he freely accepted that he was fit and that he liked to keep fit not withstanding which his injuries had placed considerable limitations on his physical abilities.

85. He had never become fully asymptomatic and had to do the best he could with a significant restriction in the range of movement of his ankle. I accept the Plaintiff's explanations and evidence in relation to his injuries and am fortified in doing so having regard to the medical evidence given by Surgeon Kelly.

86. The Plaintiff symptoms of pain, swelling and limitation of the range of movement of his ankle necessitated his return for further surgery under Professor McElwain in 2011; however, he continued to be symptomatic with a progressive subluxing of his peroneal tendons and, as already stated, had further surgery performed by Surgeon Kelly in November 2012.

87. Surgery did result in some improvement, however, the Plaintiff continued to experience problems and at the date of his last medical examination by Surgeon Kelly in September 2016 she noted a 40% reduction in the range of movement of the right ankle when compared to the left, a finding which she regarded as significant in the context of functional activities such as running.

88. Fortunately for the Plaintiff the remaining range of movement is quite sufficient for walking and regular activities of daily living but when functional activities are increased, such as by running, this produces swelling and thus pain in the ankle joint. Furthermore, he has a separate source of pain due to continuing instability in the peroneal tendons. In Surgeon Kelly's opinion the likelihood is that the Plaintiff will experience increased pain and swelling with activity as times goes on for which the surgical option will be a repeat arthroscopic debridement of the ankle joint. Thereafter there is a risk that he will ultimately require an arthodesis depending on the level on symptoms.

89. Surgeon Kelly was unable to express an opinion in relation to vocational implications for the Plaintiff long term but she was satisfied that he would be able to manage and was managing the duties involved in the role to which he was currently assigned; she expected him to be able to continue to do so for the foreseeable future.

90. Although the Plaintiff suffered a loss of certain allowances paid to Rangers after his transfer in 2013 and there were concerns that he might not be able to finish his military service because of his injuries, no claim is brought for loss of earnings or loss of allowances rather the case is one for general damages to incorporate a claim for loss of amenity.

91. While I have no doubt that the Plaintiff's first love was to serve as a front line soldier in the Rangers, it is also clear that, fit and all as he became, he was never certified fit to return to front line duties after the accident. I infer from the evidence that, notwithstanding his rehabilitation and return to fitness, the reason why he did not rejoin the attack team and was assigned to a logistical role in the Rangers supply store was entirely attributable to the affect which his injuries had on his front line abilities and will continue to have on his capacity in that regard in the future.

92. The loss of amenity which forms part of the Plaintiff's claim arising from his inability to pursue a front line role in and the reasons for his subsequent transfer from the Rangers was the subject matter of controversy between the parties. The Plaintiff and his wife now live in Cork with their young family; he serves in a logistical role with the 1st Brigade Ordinance Unit in Cork, a position which facilitates the Plaintiff in being able to continue to serve but also to reside at home and provide support to his wife and family.

93. So long as he remained a member of the Rangers the Plaintiff would have had to serve on the Curragh where the Rangers are based. After the accident the Plaintiff remained in the Rangers and so the family moved to Portlaoise for a trial period but that was unsuccessful and they returned to live in Cork. The Plaintiff's wife did not always enjoy the best of health and needed her husband's company and support. As already stated at the outset of this judgment the Plaintiff subsequently applied to transfer from the Rangers to other units in order to facilitate that need.

94. The Plaintiff fairly accepted that it was his family circumstances and not the consequences of his injuries which had been given in the transfer application forms as the reason for his request for a transfer and that those circumstances had nothing to do with the accident, accordingly, I consider it likely he would have responded to the family circumstances in the same way as he did had there been no accident.

95. Even if the Plaintiff had remained in the Rangers, if he was to maximise his prospects of achieving his ambition of promotion to the rank of sergeant he would in all likelihood have had to apply for vacant positions outside the Rangers, a course of action upon which he is currently embarked and which he feels will ultimately prove to be successful.

96. His own assessment is that he will be able for that role as well as for the position of a physical fitness training instructor or supervisor. Having returned to sit and complete his leaving certificate in 2015, and having regard to his ambitions, I have little doubt

about the Plaintiff's commitment and determination to continue his career in the military all be it not as a front line soldier. On my view of the medical evidence it is likely that the Plaintiff will be able to complete his military service.

97. The disappointment felt at being unable to serve as a front line soldier due to his injuries is a factor which may be properly taken into account by the Court when assessing general damages for pain and suffering, a catch all phrase which includes any interference with the enjoyment of the amenities of life caused by the accident. The Plaintiff suffered a very serious fracture of his right ankle in respect of which he has already had several surgeries and for which he faces further surgery; furthermore the injuries have left sequelae which are permanent and will have to be born by him for the rest of his life. To his credit he makes little or nothing of the operative scarring, though it is a consequence of the accident.

98. Having had regard to the revised Book of Quantum and the well settled principles of tort law applicable to the assessment of damages the Court considers that a fair and reasonable sum commensurate with the injuries to compensate the Plaintiff for past pain and suffering to date is €45,000 and in respect of future pain and suffering a sum of €35,000 making in aggregate the sum of €80,000. And the Court will so order.