Neutral Citation Number: [2009] IEHC 2

THE HIGH COURT

2001 No. 14715 P

BETWEEN

JOHN O'BRIEN

PLAINTIFF

AND

FRANCIS DERWIN AND (BY ORDER) RONAN O'HARE (ADMINISTRATOR AD LITEM FOR THE ESTATE OF THE LATE FRANCIS DERWIN, SENIOR)

DEFENDANTS

JUDGMENT of Mr. Justice Charleton delivered on the 14th day of January, 2009

1. The plaintiff John O'Brien is a carpenter. On the 21st October, 1998, he drove in his van from his home, midway between Athlone and Moate, to Athlone. There, he picked up his son Dominic from his work at the MSL factory and drove back on the N6 roadway in the direction of Moate. The evening was damp, though it was not pouring rain. Nothing is to be inferred in this case from the timings, but it is as well to record that since his son left the factory after a shift that ended at 8.00pm, that they were probably in the vicinity of the landfill site operated by Westmeath County Council beside the N6 somewhat around 8.15pm. The evening was then particularly dark. John O'Brien had no memory of the accident that then happened. His son Dominic, however, described it. He remembers a very dark night and that both he and his father were wearing seatbelts. As this is a good straight road, now less used because of the opening of the M6 motorway, they were travelling quite fast, though not excessively. They were about 7 kilometres from Athlone. Suddenly, he saw horses pass by on his father's side of the road. He said "horses". Before there was any time to react there was a bang. The windscreen came in, a huge impact. There was an awful smell. There was another impact and their vehicle halted by colliding with a concrete fence post. Both he and his father were covered in blood. He tried to take his father's hand, but it came away. As it turned out, this was a lump of horse flesh. There was an injured horse beside the road and a dead one in the middle of it. The plaintiff's son called an ambulance for his father. He was brought to Portiuncula hospital. He was seriously injured having suffered brain damage in the collision.

2. The first named defendant is the owner of lands adjoining the N6 which are situated a little under 1.5 kilometres from the scene of the accident. The second named defendant, now deceased, is his father. At all material times they were both involved in horse buying and selling. About 20 to 40 horses were kept by them on the land of the first named defendant beside the N6, and in other places other members of the family had further land and kept further horses. The second named defendant also owned land in nearby places, where horses were kept. He is now dead and is represented in this action, pursuant to a court order, by a solicitor. The second named defendant played no part in defending these proceedings. Among the land that he owned or used was a property within about two kilometres of the accident site on the N6 off that roadway and down a side road in an area called Glen Wood.

Issue

3. Both defendants deny that they had anything to do with the collision between the plaintiff and the horses on the N6 roadway. The issue in this case is whether the plaintiff has proved as a probability that the horses were owned and controlled by one, or other, or both of them and that the manner of the keeping of the horses by the defendants was negligent so that they escaped onto the highway, thereby causing the accident.

4. This case is to be decided on the balance of probabilities. Various cases have been cited by counsel. From these, I am satisfied that there are only two standards of proof that are applicable in judicial determinations. The beyond reasonable doubt standard is that which the prosecution is required to meet in criminal cases. The probability standard is that which applies in civil cases. I note, as well, from the judgments that have been cited, that is important for this Court not to glibly reach a conclusion that may involve a determination of serious wrongdoing against a defendant. To this end, during the hearing of this case, I visited and walked all of the locations that are relevant to this judgment.

5. In *Miller v. Minister of Pensions* [1947] 2 All E.R. 372, Denning J. said this about the standard of proof in civil cases:-

> "…[T]he degree of cogency…required to discharge a burden in a civil case…is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: 'we think it is more probable than not' the burden is discharged, but, if the probabilities are equal, it is not."

6. Where the circumstances of the case are such that the available evidence is so scanty as to render it impossible to reach a definite conclusion one way or the other, the party to suffer from this state of affairs must be the one on whom the general burden of proof lies, namely the plaintiff; *Wakelin v. London and South Western Railway* (1886) 12 App. CAS. 41 and see *Jones v. Great Western Railway* (1930) 144 L.T. 194.

7. Section 2 of the Animals Act 1985, reversed the rule in Searle v. Wallbank [1947] A.C. 341. This gave immunity from negligence principles where damage is caused by animals that strayed onto the highway. The 1985 Act provides at s. 2(1):-

> "So much of the rules of the common law relating to liability for negligence as excludes or restricts the duty with

> which a person might owe to others to take such care as is reasonable to see that damage is not caused by an animal straying on the public road is hereby abolished."

8. An exception arises where a roadway runs through an area where fencing is not customary, as in commonage. It does not apply here. In *O'Shea v. Anhold and Horse Holiday Farm Limited* (Unreported, Supreme Court, 23rd October, 1996) it was held to be self evident that a horse will not normally escape from its pasture and onto the public highway if the gates are closed and the fencing is maintained in an adequate condition. In *O'Reilly v. Lavelle* [1990] 2 I.R. 372, Johnson J. held that where cattle trespass on the roadway a plaintiff is entitled to rely on the doctrine of *res ipsa loquitur*, meaning that the facts themselves imply negligence, stating:-

> "Cattle properly managed should not wander on the road and therefore the burden of proof in this case shifts to the defendant to show that he took reasonable care of his animals. I believe that there is no matter more appropriate for the application of the doctrine of *res ipsa loquitur* than cattle wandering on the highway."

9. I take judicial notice of the fact that cattle are required by law to wear ear tags and that the identification of their ownership is thereby rendered easy. Horses are not so easily identifiable. They are individuals and unlike most cattle are usually given names. Some of them have a microchip inserted in their flank which gives an identification number so their breeding and jumping record, together with ownership details, can be checked against data held by the Show Jumping Association of Ireland. I will return to this point.

10. Had it been the case that the issue for determination here was the adequacy of the fencing of horses, the case could be easily resolved. Instead, the ownership of the wandering horses was strongly contested. No one claimed the injured horse, which was a fine animal, and ownership of the dead horse was specifically rejected at the time of the accident by the second named defendant, probably in the company of one of his sons, either the first named defendant or his brother.

11. I am satisfied from the treatment of this issue in McMahon and Binchy *Law of Torts* (3rd Ed. Dublin, 2000) at paras. 27.42 – 27.66, that to succeed the plaintiff is required to prove that one or other of the defendants, or both of them, had responsibility for these horses, in that they kept them under their control on their lands, and that they were negligent in allowing them to stray on the public highway.

Circumstantial Evidence

12. The law in relation to circumstantial evidence as it applies in criminal cases is well known. Circumstantial evidence can be the best that the nature of a case admits, but it is no less than evidence from the direct assertion of a witness; it can be more reliable. The duty of the court or the jury in a criminal trial is to examine that evidence piece by piece and to see whether each piece of evidence is proved beyond reasonable doubt. The evidence of an accomplice must be examined in the light of corroborating evidence. Independent evidence tending to show the accused committed the crime is examined before looking at what the accomplice asserts in the light of such corroboration, or bearing in mind the special warning on the dangers of relying on the evidence of an accomplice when it is not corroborated, in its absence. Such pieces of evidence as have been proven are then to be analysed together and the question is to be asked as to whether that evidence proves the guilt of the accused to the requisite standard and is inconsistent with any other rational hypothesis that may be based on the same set of circumstances. In every case, criminal or civil, the court of fact looks at every piece of evidence in the light of what other testimony supports it or undermines it or qualifies it and considers it with shrewdness and common sense. In applying circumstantial evidence in a civil case, the duty of the court is to look at each particular piece of evidence in isolation first of all. The court must ask itself the question as to whether that evidence has been proven as being probable. For instance, I have to decide on an individual basis whether a fence post was probably missing from the first named defendant's field by the N6 on the day after this accident. I am then obliged to take all of these pieces of evidence that have been proven as a probability, and to put them together and to judge the issue as to whether the horses came from under the possession and control of one or other of the defendants, or both of them, by considering each piece of evidence in the light of every other piece of evidence that I find proved. If at the end of that analysis it is probable that the horses which caused this accident are the responsibility of the defendants, and there is no other probable scenario that is based on the same set of circumstances, which would thereby nullify that finding, the plaintiff succeeds.

13. I, therefore, turn to these circumstances.

Evidence

14. The plaintiff's son Dominic was clearly in a state of shock on the day of the accident. He gave evidence that on the next day he went out with his brother to look at the first named defendant's field beside the N6. This is a large field, with access to other fields. He was cross examined on this evidence and conceded that he could remember little after ten years and as to whether he had visited the field that day, or within a few days. I am satisfied on the balance of probabilities that Dominic O'Brien went the day after the accident to the field owned by the first named defendant on the N6. It is named after its previous owner, the Allen family, and for convenience I will call it Allen's field. The reason I am so satisfied is that rumours were circulating at the scene of the accident that the horses which had caused it were owned by the Derwins. Although he was shocked, given that his father was now in hospital with serious injury, he and his family were under an imperative to attempt to ascribe responsibility. I regard it as highly unlikely that he would have spent the next day, or the next few days, simply sitting around. He did not impress me as that kind of person. He took photographs at this field. Separating it from the N6, there was a concrete post and palling fence and then a grass verge, less than 2 meters wide. One palling was down. He measured the height of the fence on the inside and outside, and took photographs. Two days later he revisited the field and the fence was still down. On the evidence, this field was a place where horses were always kept but on these two days on which he visited, there were no horses to be seen. On the 7th November, he visited the place again, together with his mother and took further photographs. The fence had been put back up and horses were visible. He could not recall if there were hoof prints in the vicinity of the broken fence the day after the accident, though he conceded that if there were obvious hoof prints he probably would have photographed them. Some few individual hoof prints were photographed on the 7th November, but there is nothing to say that these were referable to any escape of horses on the 21st October. Curiously, four hoof prints never appear in those images, just one two, not a continuity of prints along a line that a horse might have walked. That was one of the reasons making it prudent to inspect the scene.

15. John Watson is an equestrian expert. I prefer his evidence to that of Patrick Maguire, who is also an equestrian expert, and who was called on behalf of the defendants. One crucial issue leads me to prefer the evidence of Mr. Watson to that of Mr. Maguire. Mr. Maguire said that if ten to fifteen horses had escaped across the grass margin beside the N6

near Allen's field that the effect would be like horses crossing a garden lawn. This is incorrect. Mr. Watson told me that the expectation of hoof prints on the grass margin if the horses walked out depended upon a number of variables, as to whether they were walking or galloping or jumping and the ground conditions. Marks could appear, he said, though there might not be marks because this depended upon the weather and the ground; if there were marks then nature would replace them over time, but over what time Mr. Watson could not say. On the issue of hoof prints, I cannot say as a probability whether these would be bound to be present had the horses escaped over the broken palling at some short time prior to the accident. I have walked this area and inspected it as to its firmness and its vegetation. The area of Allen's field inside the fence is a bit lower than the grass margin beside the N6. At some places, however, the ground rises up close to the fencing. The drainage is different on both areas. Beside the N6, because of the elevated nature of the ground, the drainage is extremely good at that grass margin. I note that 12.5mm of rain fell on the previous day to this accident with only 3.6mm on the 19th October and 3.3mm on the day of the accident. The ground here obviously drains extremely easily, something apparent from visiting the scene. On the photographs presented, it is also covered with thick grass. This vegetation becomes obvious on walking it. The first named defendant made a mark in the grass by way of a test. I am satisfied that this required considerable force. I am not satisfied that hoof prints would have been obvious on the grass margin on the escape of several horses from this land. Inside the fence, the ground is soggy when there is heavy rain. There the ground marks very easily. That is not so on the outside and when I visited it was a very wet day.

16. I am further satisfied, on the evidence of Mr. Watson, that the fencing, when up, was inadequate and, I am satisfied, that the fencing was down on the day of the accident in at least one significant place beside the N6 allowing the horses to escape. When the fencing was up, the height inside was three feet and ten inches as a maximum. When the top fence paling is down, it is about a foot lower. I accept the evidence of Mr. Watson that in that broken position the fencing was woefully inadequate and that horses can simply walk out of the field. Some of the plaintiff's later photographs showing a horse beside this defective fence make that obvious. I cannot accept the evidence of Jim Derwin, for the defendants, that a horse would not come out over that broken down palling "even if you put a horse collar on him". To leave the pasture over this broken down fence a horse does not need to jump. As of the time of the trial, the fence, while still broken, is supplanted with strands of barbed wire. A year after the accident, I am satisfied, it was supplemented by what looks like an electric tape which, from the photographs, given that it passed around wooden, as opposed to plastic, posts did not seem to have a current passed through it. The time of the accident is also significant. As Mr. O'Brien was travelling into Athlone to collect his son, it was around dusk. Perhaps the clouds then quickly closed in, but when he was returning, and when the accident happened, it had become very dark. Mr. Watson told me, and I accept, that horses like to gallop and to wander about at dusk. If one horse were to leave this field, then the herd instinct would tend to bring several others, or certainly those within its group, with it. The position of dominance within the herd of a single wandering horse can also be important.

17. There is a large variability in the evidence as to the number of horses that were seen on the road immediately before and after the accident. In this respect neither the plaintiff nor his son could assist. Coleman Walsh, an experienced bus driver, described ten to fifteen horses galloping up the road. Martin Duffy, in the aftermath of the accident, saw four agitated horses on the roadway and about five others on the grass verge. Kathleen Seary, who got a lift home from the same factory in Athlone as Dominic O'Brien, described seeing two to three horses racing and similar evidence was given by David Nolan, who drove her. Michael Young, a resident of Moate, described four to five horses "flying up" the roadway. In this accident, one horse was killed and one horse was injured. It seems probable, therefore, that a figure of up to ten horses is correct. Two are now accounted for and the other seven or eight simply disappeared. I am satisfied that little can be learned from the times and places these horses were seen. The places ranged from beside Allen's field to well beyond the county dump. As to where the horses were going, that was purposeless, towards Athlone according to some witnesses and in the direction of Moate according to others. The times of shocking events as testified to by witnesses can be unreliable and are vague here.

18. I am next concerned with the issue as to whether it should be inferred that these horses came from Allen's field. I am satisfied that the first named defendant owned the relevant land, and that it is registered to him. As owner, his responsibility was to fence it correctly if he wanted to keep horses there. I am satisfied that he, together with his brother and his father kept horses there and that they jointly had responsibility for ensuring that they were properly kept in and fenced in an appropriate manner. Much evidence was presented to the court as to other people in the area who may have had horses. Significantly, the most powerful evidence, in that regard, was that of Gerry Tone. This witness works for Westmeath County Council since 1983, and is a supervisor since 1984. His job includes being called out by the gardaí when animals, meaning horses or cattle, are found wandering on the roadway. This can happen, on his evidence, at a very variable frequency of between once a month and ten times a month. Over the course of the last 25 years or so he could remember only about three accidents where horses were killed. He agreed that different people keep horses in or around Athlone. Having been called to the scene of the accident, a matter to which I will shortly turn, he was interested in ascribing responsibility. The next day he went down the Glen Road about two kilometres from the accident site. Down there, at a location which is now obliterated by the new M6, he found a field with lots of horses in it and which were held in by only one wire. He returned later and he saw two new gates tied across that wire, clearly with a view to keeping in the horses. He could not say if these were the strayed horses. Evidence was given by the first named defendant Francis Derwin, by his brother Jim Derwin and by Patrick Maguire of other people who may have kept horses within a three or four mile radius of this accident. I am satisfied that there were a number of people keeping horses in this area at the time of this accident. I am also satisfied that very few of them, and none that have been positively identified, would have been keeping at least ten horses in one field which might have escaped in one herd. It is also important to consider the quality of the horses.

19. I regard it as impossible, having driven the road, that the horses came from a halting site for Irish Travelling Community members beyond the first roundabout in Athlone. I am satisfied on the entirety of the evidence that the business of the defendants involved buying and selling good quality horses. Whereas the evidence was that over the years they had dealt in every kind of horse, I am satisfied that the predominance of their business was in dealing with good quality horses which were capable of jumping and hunting, whether ponies or larger, and which are generally called sport horses. At the time of the incident the defendants would have kept many horses in that field. I regard it as significant that on two occasions in the immediate aftermath of the accident horses were not present while the fence palling was down. The only evidence as to possession of the land viewed by Mr. Tone, on which there were horses on the day after the accident, is that the second named defendant used that field, but that does not determine the matter one way or another.

20. One horse was killed in this accident. The evidence has been that it was split in two and that its innards were all over the public highway. Mr. Tone had the task of getting a JCB digger, of putting the dead horse in it and of going to the

landfill dump nearby to dispose of it. He, more than anyone, had a good look at the remains of this horse. I regard his evidence as being inherently reliable. He described the dead animal as "a fine big horse". He said that it filled the loader of the JCB. This horse, he said, was "not a piebald, it was one of these nice bay horses". I am also satisfied that Mr. Tone would have noticed if this horse had the characteristics of a working horse, such as having large hoofs or being thick set and that his description, in that regard, is of assistance.

21. The second horse involved in the accident, but surviving it with multiple cuts, was one called "Knockfune Dasher". There was much debate as to the identification of this horse but I am satisfied to so identify it. This is also a fine horse, standing just short of 15 hands high. In its flank it carries a microchip which has an identification number 116569125A. The letter refers to the registering authority. At the scene of the accident, Gerry Tone arranged for this horse to be taken for temporary stabling to the premises of Seán Duffy, who lives about three miles from Athlone. It has been there ever since. Since it has not been claimed, Mr. Duffy and his son have bred a number of good foals from it. At the time of the accident they would have had very few horses. Garda P. J. Hoey of Ballinahowen Garda Station, gave evidence that in January, 2004 he went to Duffy's farm with Olive Manning, a horse warden. Seán Duffy was there and pointed out a horse. Seán Duffy does not remember this. This was scanned for a microchip and, I am satisfied, this identification number was discovered and read and was given by Olive Manning Conroy, an experienced horse and dog warden, to Garda Hoey and thence to Sergeant Michael Shaughnessey who was investigating this incident. All of these are competent people. The relevant number is stored in the Show Jumping Association of Ireland records. I am satisfied on the evidence of Ronan Corrigan, the Chairman, that he personally imputed this number into his computer. His evidence was objected to on the basis he had never done this personally. I am satisfied of his honesty. I am satisfied from the evidence of Ronan Corrigan that there is a system of recording numbers and storing these for the business purposes of horse owners like the first and second named defendants. Anyone seeking information of a registered horse can inspect these through enquiry. I am satisfied that this horse was owned by a man called Eddie O'Connell, and that it was given a points record of success in jumping competition between the 14th February, 1998, and the 17th May, 1998. I am using this evidence only for identity purposes. Significantly, on the 6th June, 1998, a sale took place at Goresbridge horse sales. Eddie O'Connell sold a horse there for the sum of £2,205. Mr. Corrigan valued a horse of this kind at around to €3,000 to €10,000, but indicated that this was a very rough estimate from the information about it, as he had never seen the animal. Only three people in the purchaser's ledger, out of 23 buyers, spent that amount or more. Among them was the second named defendant. The purchaser's ledger records the total amount of sales and therefore any purchase could be based on buying a multiple of two or more horses. However, of the other two buyers who were potential purchasers, one is dead and lived at a very considerable distance from the scene of this accident and the other gave evidence to positively state that he had not bought Knockfune Dasher.

22. I have also had the benefit of the evidence of Eddie O'Connell. Regrettably, I find his evidence to be completely unreliable. He claimed that the horse which had been sold at the Goresbridge sales to the Derwins was one called "Queen of Manney". He claimed this on the basis of something that the manager of the sales had said to him, but I am not satisfied that any such thing was ever said. He claims that Knockfune Dasher had been sold later at Ballinasloe Horse Fair in the first week of October immediately prior to this accident. He said this on the basis of his family having recently told him this. I do not accept this. On the 23rd January, 2004, Sergeant Shaughnessey rang Mr. O'Connell and asked him about Knockfune Dasher. I am satisfied that Edward O'Connell told him that he remembered the horse well, that she was the best that he ever had, that she was "a great pony" and that she once "won the league". He told Sergeant Shaughnessey that he sold her in Goresbridge for over £2,000 and that Francey Derwin, who is the second named defendant, bought her and that he then got rid of her because she was involved in an accident. He told Sergeant Shaughnessey that he had inquired of the second named defendant "how the pony was getting on", I am satisfied he did so because he was very fond of this animal, and that the second named defendant revealed to him that he had got rid of the pony because of "an accident". Later, when Sergeant Shaughnessey attempted to take a statement from Mr. O'Connell, he said that he did not want to get the Derwins in bother as he did business with them. I am not satisfied that Sergeant Shaughnessey treated Mr. O'Connell in any improper way, as he alleged. It is beyond doubt that I am not entitled to have regard to what I am satisfied Mr. O'Connell told Sergeant Shaughnessey. Nor am I entitled to have regard to Sergeant Shaughnessey's account of it. I am only entitled to have regard to evidence on oath, not prior statements by people who are not plaintiffs or defendants or their agents not on oath. These are not admissions but merely prior inconsistent statements that can be had regard to solely on the issue of credibility. This problem was recently the subject of reform in the Criminal Justice Act 2006, in respect of statements taken by the gardaí in the course of criminal enquiries which are later disavowed under oath. No such reform, however, has been made for non criminal cases.

23. I am therefore satisfied that I am only entitled to have regard to the fact that Edward O'Connell owned a horse called Knockfune Dasher; that on his evidence his son jumped it up to May of 1998; that he entered a horse for sale in Goresbridge sales the following June; and that the second named defendant there purchased a number of horses. I am satisfied that among the horses that he purchased was Knockfune Dasher. I regard it as a coincidence beyond comprehension, having looked at every reasonable possibility to otherwise explain this fact, that Knockfune Dasher should appear on this roadway as the injured horse. It could not reasonably have come from anywhere else other than the first named defendant's field, Allen's field, and its owner could not be reasonably thought to be anyone's other than the second named defendant. It was under the first named defendants control as was the dead horse.

Conclusion

24. I am satisfied that the possession and control of these horses was in the first and second named defendants. I am satisfied that each of them was involved in enterprise involving the purchasing and selling of horses and that the main focus of this involved keeping the horses at Allen's field. The horses that were involved in this accident were probably owned by the second named defendant. There were kept at the lands of the first named defendant who was in possession and control of them. These horses were inadequately fenced and left the land at around dusk on the 21st October 1998, and caused the serious accident whereby the plaintiff was badly injured. In reaching that conclusion I am not taking into account any evidence concerning the conviction of the first named defendant in respect of a wandering horse at this location about one year later, nor other wanderings of horses allegedly associated with the Derwin family at other places; I am not relying on the prior inconsistent statements of Eddie O'Connell, as these are inadmissible in evidence; I am not relying on any garda opinion as to liability; and, finally, I regard the search by Garda Robert McConnell around the area after the accident as being cursory and it told me little. These horses disappeared shortly after the accident, apart from the two mentioned. The gardaí never found them. They did not look very hard. So, where did they go, and how? It is clear that the owners of these horses spirited them away quickly after the accident as they were neither seen again that night, nor found wandering the next day.

25. I note, in addition to the evidence already analysed, that the second named defendant turned up at the county dump

and spoke to Mr. Tone while the dead horse was in the loader of the JCB. I am satisfied that what occurred is evidence against him alone. At around 10.00pm on the day of the accident the dead horse was being put into the landfill site, which is a short distance off the road by the N6 roadway and very proximate to the scene of the accident. You would need a reason, however, having visited this dump, to go there. Francis Derwin Snr, the late second named defendant, drove up in a jeep. He had a young man with him. I regard it as probable that this young man was one or other of his sons, though they both have denied ever being there. Francis Derwin Snr looked out of the window of the jeep, but did not leave the vehicle. Gerry Tone asked him "is this your horse?" The late Mr. Derwin replied "No". Gerry Tone then said "Well" and he replied "I am just here to make sure it is not one of our horses". I do not accept the second named defendant, who had many horses, could have made this assertion as a matter of truth without getting out and examining the horse's head and feet. I cannot accept, in addition, the evidence of Jim Derwin, brother of the first named defendant, that on the day after the accident he checked all of the horses belonging to the defendants; that he knew that horses "never came out" of Allen's field; and that every fence was in order. Since this testimony for the defence conflicts with the evidence of Dominic O'Brien, I prefer that evidence in favour of the plaintiff. I also discount the evidence of Francis Derwin, the first named defendant, that the grass verge near Allen's Field is easy to mark. It is not. Nor, is it any way like a garden lawn. I cannot accept his evidence that he did not know why there was a white electric-type tape put up as a kind of supplemental barrier when the plaintiff's wife took a photograph of the fence on the 10th October, 1999. I cannot accept the evidence of any of the defendants' witnesses that they never kept a list for horses and did not keep any reliable or proper records. I cannot accept their evidence that they never owned Knockfune Dasher, though I do accept their evidence that they knew nothing about a horse called Queen of Manney. Of itself that establishes by a different route, with Mr. O'Connell's evidence as to sale and the Goresbridge records, that the injured horse was Knockfune Dasher.

26. Given the condition of the fencing there is no doubt that a group of horses could easily stride away from their captivity in Allen's Field. This is what happened and that is how the accident occurred. As to there being no horses visible on the next day after the accident, I am satisfied that what occurred was probably that the horses were rounded up that night and put hurriedly away from Allen's field and probably on the second named defendant's land near Glen Wood, as seen by Mr. Tone, later fenced in with loose gates, and that they were returned, and therefore were visible, some days later and were seen by the plaintiff's son on the 7th November. As to negligence, the evidence convinces me that the fencing was inadequate. It was broken down. This happened because of horses leaning over it and eating the luxuriant grass verge while putting their weight against it and cracking the concrete of which it is made and weakening it. I am satisfied that horses were fed over that fence from the roadway with hay from a vehicle that was quite often parked there. This encouraged the horses to eat that way. In any event, the growth of long grass in the road margin is also a food source that no horse would fail to attempt to stretch over the concrete fencing for.

Damages

27. A number of helpful medical reports have been submitted to the court and, in addition to that, I had the benefit of hearing Dr. Simone Carter and Dr. Mark Delargey. The plaintiffs own evidence on this issue impresses me. Some days after this accident the plaintiff regained his sense of orientation and realised that he was in hospital. He was only in Portiuncula hospital for a week and he felt that, perhaps, nothing too bad had happened. He had snapped his collar bone and had chest and head injuries and he thought he would be fine. Working three months after the accident in his carpentry workshop, he lost concentration and cut off the top of one of his fingers. It was then he realised that he had a brain injury. This accident is too remote for me to ascribe responsibility to the defendants for it. For the first few years after the crash, the plaintiff describes information as disappearing out of his head. He had given himself only six weeks to recover and the realisation that he was now permanently affected was one that he has spent a great deal of time attempting to come to terms with. He now has difficulty concentrating on watching the television or reading more than a paragraph or so of a newspaper. He never got back to work. I am satisfied that even though his earnings were small prior to this accident, the plaintiff was a skilled carpenter from which he got the kind of satisfaction that men and women do out of usefully using their hands. After the accident, he got a supervisior job with a local business man, whom I infer was a friend. This job just involved opening and shutting a premises and being there as a kind of caretaker. He was unable even for this, however. He put a sun room on to his home, as a project. This would have taken him perhaps a month or less prior to his accident but it has taken him five or six years to bring it to completion. He says that he has now come to terms with the fact that he cannot work. Sometimes, even his ability to talk goes "a bit haywire". He has become obsessive and unable to do more than one task at a time or to think about more than one issue at a time. He has suffered from anxiety and negative thought. Random headaches occur from time to time. He does not get chest pain but he does get back pain. His wife has had difficulty coping with him but has been tremendously supportive and decent.

28. I have had the benefit of a vocational assessment report done by the national rehabilitation hospital's Catherine Logan. She says that he will not be able to seek and maintain secure open employment in the future. He may try to assist his wife, who had to abandon a small stained glass craft project to help him, but even the ability to do any kind of light employment is speculative. Dr. Mark Delargey, after reviewing the plaintiff, gave the following opinon:-

> "Mr. O'Brien sustained a traumatic brain injury as a result of a road traffic accident on the 21st October, 1998 . While the reported Glasgow Coma Score was normal on initial assessment in Portiuncula hospital, the case for a significant traumatic brain injury is made through the extent of Mr. O'Brien's facial trauma and the report of the CT brain scan reports involving multiple skull fractures, facial fractures, a depressed fracture of the right temporal bone, they comminuted fracture of the right orbit and the report of generalised brain swelling."

29. The report on review from Dr. Simone Carter, dated 1st December, 2005, confirms the plaintiff's view of himself. She gave the following summary of her views:-

> "Mr. John O'Brien is now a fifty-eight year old gentlemen who sustained what would be classified as a very severe traumatic brain injury just approaching ten years prior to undertaking this latest review and assessment. The severity of the injuries indicated by the fact that he lost consciousness, his brain scan was positive and that he had a post traumatic amnesia of at least three days. Mr. O'Brien's clinical course has changed over the last ten years, as would be expected. The initial signs of high levels of irritability, poor memory and concentration have reduced and infrequency and intensity, though they continue as residual cognitive and behavioural changes that were not reported features of his pre-morbid personality. Mr. O'Brien is fortunate that, prior to the accident, he was a bright gentlemen, whose pre-morbid intellectual ability was estimated to have been within the superior range of ability and he has been able to use some of these well-preserved cognitive strengths to compensate for his current difficulties.

On formal cognitive assessment, overall he performed very well with scores between the average to the superior range of abilities. It is significant however, that he demonstrated specific cognitive deficits with switching attention, attention and concentration, working memory and speed of information processing. Indeed, it is these persisting deficits that have interfered with Mr. O'Brien's ability to resume his level of functioning as it was prior to the accident. In addition he has consistently reported a decline in his confidence and ability to undertake tasks that would be considered to be well within his ability. He also has the commonly reported physical problems of sensitivity to fatigue and headache that can also

While Mr. O'Brien has performed well on cognitive assessment, it must be borne in mind that these assessments are usually performed under ideal circumstances where there is minimal noise and distraction, instructions are clearly and carefully explained and patients are usually very motivated to perform to the very best of their ability. Unfortunately, in the "real world" there are often greater levels of distraction and not always the same opportunities for clarification and some of these factors interfere with Mr. O'Brien's level of functioning and the day to day problems he experiences. He is fortunate that his family have been very protective towards him, especially to keep stress to a minimum and their attention to the clinical recommendations made has been a great benefit to him.

In relation to prognosis, given that he is now approaching ten years since he sustained these injuries, it is highly unlikely that his current status will improve sufficiently at this stage, that would allow him to resume his life as it was, prior to the accident. My opinion is that he is currently at his highest level of functioning and that the current strategies (cognitive and behavioural) he uses should continue for the foreseeable future."

Special damages

30. The amounts that have been presented as to loss of earnings were entirely reasonable. There is also something that I must to take into account that over the course of the last ten years the plaintiff could have expected, as a skilled craftsman, to have been well employed for good money at a time when construction was a mainstay of the economy. Mr. Peter Beirne, who gave evidence, said that he could now expect to earn based on his previous income, at least a sum of €14,950 as a skilled operative. I would regard that as modest. If the plaintiff does not get a job from now until age 65, his loss is €83,700 based on his previous average. His loss of earning to date is in the sum of €82,570. These figures have been arrived at reasonably in my opinion. In addition the case has been made that his wife is entitled to a sum in respect of damages for home care and I am not satisfied that on the authorities I am entitled to make such an allowance. My sympathy goes very much in favour of the plaintiff's wife and the tremendous work that she has done. It was apparent even as they were sitting in court that the plaintiff depends upon her and their mutual affection is obvious. It was argued that the alternative to making such an award was to make an allowance in respect of home care. I simply feel that there is no legal warrant for me to do so since the precedents opened to me concern the use of nursing skills to a badly injured plaintiff.

31. In addition, the following special damages are agreed:-

(1) Travelling €10,000;

(2) Subsistence €2,000;

(3) Doctor's bills €932;

(4) Pharmacy €128.27;

(5) Physiotherapy €533.75;

(6) Miscellaneous €400;

(7) Destruction of motor vehicle €3,000;

(8) Destruction of equipment €2,500.

Adding all those figures together, the amount of special damages comes to €177,394.02 when the future earnings are reduced by 10% due to ordinary risks such as underemployment and redundancy.

Quantum of General Damages

32. Under the relative legislation, I am bound to have regard to the quantum of damages as worked out by the Personal Injuries Assessment Board. These figures are set out in its Book of Quantum. While some scepticism was expressed by counsel in relation to this exercise, I wish to record that I am grateful for the work done by the Personal Injuries Assessment Board on the issue of general damages. It provides a touchstone against which the cases can be assessed and it is a useful expert view which can help the court in coming to a conclusion on this difficult issue.

33. There is maximum level to the award of general damages that can be made in a personal injuries case. Counsel made some interesting observations on the contrast between that maximum amount and the kind of damages that juries can award in defamation actions and the amounts that have been secured by persons who have been wrongly convicted of crimes and who may have actually been innocent. With respect to the diligent submissions of counsel, these observations are beside the point. I am obliged to apply the law as it is and if the Supreme Court wishes to look at the question of the maximum amount of general damages as regards all cases in the future, I will, of course, regard myself as bound by that observation if it happens. In *N.N. v. S.N.,* [2005] 4 I.R. 461 Denham J. indicated that the cap on general damages, previously set at £150,000, is now €300,000. I cannot see the condition of the plaintiff as attracting that maximum amount. The plaintiff is still able to drive and is coping better as the years have passed with the devoted assistance of his family.

34. In addition to the plaintiff's main brain injury, there are other smaller bone injuries, a small degree of scarring and what would normally be highly significant in terms of an injury, the loss of his sense of taste and smell, which would otherwise attract an award of serious compensation. At p. 4 of the Book of Quantum the following passage appears, which seems to

me to be correct:-

> "If, in addition to the most significant injury as outlined above, there are other injuries, it is not appropriate to add up values for all the different injuries to determine the amount of compensation. Where additional injuries arise there is likely to be minor adjustment within the value range.

35. It is clear that the plaintiff has a serious and permanent condition. The Book of Quantum classifies skull fractures and brain injuries under three headings. The first, attracting the least significant amount of damages involves a skull fracture with no loss of consciousness. The second, leading to more significant damage, involves a skull fracture with a brain injury but with no loss of consciousness. Finally, the most serious category involves a skull fracture with intracranial injury and loss of consciousness. For a serious and permanent condition, the maximum amount set is €129,000. An argument was presented that this Book of Quantum was formulated in 2004. That does not mean that the values are out of date, especially at a time when property values are slipping rapidly and when the economy is in serious challenge. It could be that the deflation since that time makes the sums questionable in the other direction, but they seem to me to be a good guide. I think it is correct to award the plaintiff the sum of €120,000 under that heading, and it could be divided as pain and suffering to date in the sum of €80,000 and pain and suffering into the future in the sum of €40,000. As to his fractures, and as his scarring, I propose to add on the sum of €20,000, divided as €10,000 to date and €10,000 into the future. For his loss of his sense and taste and smell I will add the same figure.

36. Under the decision in *Reddy v. Bates,* [1983] I.R. 141, any award of loss of earnings into the future should take into account the uncertainties of the labour market and the fact that permanent and pensionable employment is no longer the norm. The amount of money awarded to the plaintiff in respect of loss of earnings into the future should therefore diminished by 10%.

Result

37. The defendants were each and jointly and separately liable in respect of the plaintiff's injuries. The plaintiff is entitled to general damages in the sum of €160,000. His special damages as previously calculated should be reduced on the Reddy v. Bates principle, so the final decree for damages to the plaintiff is €160,000 plus €177,394.02 special damages making a total of €337,394.02.