THE HIGH COURT

[2009 No. 7568 P]

BETWEEN

RICHARD STEER

PLAINTIFF

AND

ALLERGAN PHARMACEUTICALS IRELAND

DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered on the 13th day October, 2017.

1. The plaintiff claims damages for personal injury, loss and damage allegedly suffered by him in the course of his employment with the defendant which he claims has left him with chronic back pain.

The pleadings
2. The plaintiff's personal injury summons was issued on 17th August, 2009. At para. 3 of the summons, particulars of the acts of the defendant constituting wrong and the circumstances relating to the commission of the wrong are set out. They state:-

> "*On or about the 11th October 1999, the Plaintiff commenced work with the Defendants in his capacity as a janitor. The said work involved the Plaintiff having to engage in the daily use of buffer / scrubber machinery, in the process of heavy duty cleaning at the Defendant's premises. In or about mid 2007, the Plaintiff began to suffer from pain in his back, mainly on the right side, which deteriorated and in February 2008, the Plaintiff was unable to continue his duties with the Defendants*.
>
> *The Defendant required the Plaintiff to use buffer / scrubber machinery and to engage in heavy duty cleaning work with the said equipment, over a protracted period of time, without any training / instruction being afforded to the Plaintiff in the use of the said machinery or any monitoring of the Plaintiff while engaged in the said duties. The said use of the aforementioned machinery was repetitive and constant and resulted in the Plaintiff having to engage in this rotational work which involved heavy and awkward movement over a protracted period of time, resulting in the Plaintiff suffering a repetitive stress injury to his back and developing severe right sided posterior thoracic pain*."

Particulars of negligence
3. In addition to the normal particulars of negligence pleaded in cases of this sort, it was pleaded on the plaintiff's behalf that the defendant failed to provide any training and/or instruction to the plaintiff in the use of heavy duty cleaning equipment, particularly the said buffer/scrubber machinery; failed to provide adequate or any adequate assistance to the plaintiff while performing the said cleaning duties; failed to monitor the plaintiff and/or supervise the plaintiff while performing the said cleaning duties over a protracted period of time; caused, permitted or required the plaintiff to engage in heavy cleaning duties; required the use of the said buffer/scrubber machinery over a protracted period of time; required the plaintiff to engage in this constant rotational work, which involved heavy and awkward movement, when they knew or ought to have known that same would result in a repetitive stress injury to the plaintiff; failed to vary the plaintiff's duties, to avoid the plaintiff having to use the said machinery on a daily basis over a protracted period of time.

Particulars of injury
4. The plaintiff pleads that he developed pain in his back in mid 2007, which gradually worsened to the extent that the plaintiff was unable to continue with his duties in February, 2008. The plaintiff further pleads that he suffers from severe right-sided posterior thoracic pain and that the pain is now chronic and secondary to heavy rotational work. The plaintiff claimed the sum of €56,504.30 by way of special damages. On the final day of the hearing special damages were agreed at €19,000.

5. An appearance was entered on behalf of the defendant on 13th October, 2009, a detailed notice for particulars having been served earlier on 25th September, 2009. Asked at particular two in the notice for particulars what training the plaintiff had received, the plaintiff replied that he had received no specific training but did receive training in the general operation of the buffer and scrubbing machines which took less than 30 minutes and was a demonstration as to how to work the machines only. This was carried out by a fellow employee. Asked at particular three as to the circumstances in which the plaintiff developed the injury the subject matter of the proceedings the plaintiff replied as follows:-

> "*The Plaintiff suffered repetitive strain injury to the right hand side of his back, due to the continual movement of the buffer and scrubbing machines*."

Asked at particular four as to when the plaintiff first brought his alleged injury to the attention of the defendant the plaintiff replied:-

> *"In February 2008, it was brought to the attention of the company doctor by the Plaintiff".*

The plaintiff went on to identify a physiotherapist Ann McGreal, who had diagnosed his condition as repetitive stress injury. Asked at particular ten as to whether or not he had been detained as an in-patient as a result of the alleged injuries the plaintiff replied that:-

> *"The Plaintiff was detained in the Galway Clinic for 10 days from the 8th to 17th May 2008. While there, he attended several consultants, and underwent cervical spine x-ray, MRI Scan, CT scan for abdomen/pelvis, CT Scan for thoracic spine area, nerve block for pain control, upper GI endoscopy with/without biopsy, upper abdominal ultra sound."*

Asked to list the out-patient attendances the plaintiff listed his attendance at the Galway Clinic on approximately eleven occasions:-

"He also attended the following doctors, and had the following treatments, Dr David O'Flaherty (2), Dr Mackey (Galway Surgery – Quayside), Dr David O'Gorman – Nerve Block. MRI Scan. Portiuncula Hospital – Dr David O'Flaherty Botulinum Toxin Injection. Bon Secours Hospital Galway – 1 visit. Full pulmonary function studies – Consultant Dr. Michael McWeeney, Paul O'Grady 2 consultations Castlebar, Castlebar Hospital – Day Patient – 2 Epidural procedures."

Defence
6. A defence was delivered on 18th February, 2010 in which the statute of limitations was raised as a preliminary point but that claim was not pursued at the hearing. The defendant denied negligence, breach of duty and breach of statutory duty and specifically required proof of each of the particulars of negligence pleaded by the plaintiff. The defendant denied that the plaintiff had suffered the alleged personal injuries, loss or damage and that any injury loss or damage suffered by him was attributable to the defendant's negligence or in the alternative was contributed to by the plaintiff by his failure to exercise any or any adequate caution for his own safety; failing to have regard to his training and instruction when carrying out his work and failing to bring any difficulties experienced by him to the attention to the defendant, its servant or agent.

Further particulars of negligence
7. Almost a year following the delivery of the defence, and after a joint engineering inspection had taken place, the plaintiff's solicitor served further particulars of negligence and breach of duty. As well as pleading breach of various statutory provisions the additional particulars of negligence included at:-

"(m) Failing to monitor the intensity of the Plaintiff's workload and the length of his shifts, to ensure that the Plaintiff was not working at a rate which exposed him to the risk of personal injury.

(n) Failing to ensure that the Plaintiff had adequate breaks from the use of the said washing machines / scrubbing machines / buffer machines.

(o) Failing to provide a 'sit on' buffing machine to the Plaintiff which said machine, would have reduced the amount of physical effort required from the Plaintiff.

(p) Failing to heed prior complaints made by the Plaintiff.

(q) Requiring the Plaintiff to work long shifts, in an intense fashion, carrying out heavy, repetitive movements, in his duties washing, scrubbing and buffing floor areas and wall areas and window areas in a manner which exposed the Plaintiff to the risk of personal injury."

8. Six months later on 20th July, 2011 a further notice of particulars of negligence and breach of duty were served in which the particulars were itemised using letters already used. The additional particulars were as follows:-

"(k) Bringing pallets into the Unit Dose Packing area where the Plaintiff worked and causing the said pallets to leave stubborn blue marks on the said floor area which the Plaintiff was required to clean off using the said Nilfisk washing, scrubbing and buffer/burnishing machines, although the said machines were not designed to clean such marks, in a manner which was unsafe and dangerous.

(l) Failing to heed complaints made by the Plaintiff in relation to the bringing of pallets into this area and their consequent blue markings on the floor area and the difficulties which the Plaintiff was encountering removing same.

(m) Requiring the Plaintiff to work at such an intensity that he was required to push and pull the said Nilfisk washing, scrubbing and buffer/burnishing machines in order to keep up with the pace and amount of work that was required of him.

(n) Requiring the Plaintiff to clean an area which was unreasonably large for one man's shift.

(o) Requiring the Plaintiff to assist other employees in the Packaging Department and to then carry out all his own duties, in a manner which was unreasonable.

(p) Failing to comply with the Safety, Health and Welfare at Work Act, 2005 and the Safety, Health and Welfare at Work (General Application) Regulation 2007.

(q) Failing to carry out any Risk Assessment on the work being undertaken by the Plaintiff."

This was the first mention of "*blue marks*" and came almost two years after the proceedings were initiated.

9. Yet further particulars of negligence and breach of duty were served on 5th March, 2015, almost six years after the initiation of the proceedings. The particulars in this instance were expanding on the issue of the "*blue marks*" and were as follows:-

"(s) Failing to show / train the Plaintiff how to properly operate the Nilfisk machines and the workings of the said machines;

(t) Causing, permitting or requiring the Plaintiff to use the said Nilfisk 'scrubber' machine to clean away stubborn blue paint marks on the floor by pallets, requiring the Plaintiff to press down on the edge of the said machine to keep it concentrated on the stain/mark, in a repetitive manner, to attempt to properly clean these marks, in a manner which was unsafe and dangerous and for which the said machines were not designed for (sic);

(u) Failing to heed complaints made by the Plaintiff in relation to the bringing of pallets into this Unit Dose Packaging section of the workplace and the resulting marks made by the floor on the floor way from these pallets, which he encountered great difficulty removing with the said machinery;

(v) Requiring the Plaintiff in his cleaning shift duties to cover an area which was excessive for one person and which accordingly required the Plaintiff to have to push and pull the said machinery in a repetitive manner, in order to complete his floor cleaning within the time allotted, in a manner which was unsafe and dangerous;

(w) Failing to have any Safety Statement in place in the workplace".

10. It is clear from the repeated updating of the particulars of negligence that the plaintiff's claim was an evolving one which went from general complaint about the constant use of heavy machinery to very particular complaint about the occurrence of stubborn blue marks on the floor which the plaintiff was required to clean in an unorthodox manner. The particulars of negligence filed on 12th January, 2011, 20th July, 2011 and 5th March, 2015 all postdated the joint engineering inspection which had occurred in 2010. The defendant's solicitor raised no queries on the expanded particulars and no further inspection was invited by the defendant whose engineer was therefore at something of a disadvantage in addressing the plaintiff's claim. Particulars of injury were never updated in the seven years which elapsed between the initiation of the claim and the hearing of the action.

The hearing

11. The case was heard over 10 days between June and October, 2016. The length of the hearing was in the Court's view at least partly attributable to a failure by the parties to address the issues arising in the claim prior to the commencement of the hearing, leading in turn to a failure to agree anything in the case and to the emergence of new evidence during the course of the case.

12. The Court heard from fourteen witnesses. These included the plaintiff and his wife, five of his work colleagues, two engineers, four medics and one physiotherapist.

13. The picture which emerged is a confused one, particularly in respect of the nature of the injuries allegedly sustained by the plaintiff. The plaintiff's claim was launched as a claim for repetitive strain injury affecting his right thoracic spine due to heavy duty cleaning duties. The claim was largely based on a suggestion by a physiotherapist that muscular symptoms which she had identified were indicative of repetitive strain injury. Other than a brief letter, nothing further was heard from the physiotherapist until the hearing of the action by which time, through no fault of hers, her files had been destroyed, so that the history elicited from the plaintiff and details of the treatment afforded him were no longer available.

14. No other medic who examined the plaintiff diagnosed repetitive strain injury. His own orthopaedic specialist identified facet joint hypertrophy which may have been made symptomatic by repeat rotational movement due to his work. Mr. Gilmore, orthopaedic specialist on behalf of the defendant, saw him on four occasions and accepted in his reports that the plaintiff had difficulties in his spine with limitation of movement. He revised his view significantly on sight of videos taken in 2015 and 2016 which show the plaintiff moving freely and bending while installing garden furniture which he had made, and collecting items from a premises, placing them in the back of a van and climbing into the van.

15. No medic on either side had been asked to comment on the issue of the "*blue marks*" which became a major element of claimed negligence and in particular whether any part of the plaintiff's back condition might as a matter of probability be attributable to the unorthodox method employed by the plaintiff to remove those marks.

16. The state of the medical evidence is unsatisfactory. Of most assistance to the Court in attempting to put the pieces of the puzzle together were the notes of Dr. Oliver Whyte, the Allergan doctor, who while admitting some typographical errors in his notes, at least provided the Court with a chronological list of attendances, complaints and treatments made by and afforded to the plaintiff from 1999 when he commenced work with Allergan to 2009 when he retired.

17. Taking the totality of the evidence heard the following appears to be the chronology of events.

Chronology

18. Richard Steer is a 73 year old English man who has resided in Newport, County Mayo for the last twenty years or so. He was born on 11th October, 1944. He is a man with a strong work ethic. He left school at fifteen and joined the Royal Navy where he served for three years before being discharged due to a perforated eardrum. For the next four years he worked in a factory as a crane driver. He owned and operated a number of businesses in the United Kingdom. He had a waste paper business and a tiling business. In the late eighties/early nineties he invested in timber, buying a tract of timber to cut down and sell. During that period he personally cut down three to four hundred trees and cut them up for the purposes of sale. He has carpentry skills and up to the present time he makes garden furniture including benches, tables and bird tables. His output has diminished because of his back pain.

19. He moved with his wife to Ireland and bought a twenty acre farm in Glenhest. He rented out the land. He and his wife leased and ran a pub in Newport for approximately two and a half years. Mr. Steer sold the farm in or about 2000 and since then they have been living in Newport in a house built on a site which enjoys a garden of approximately an acre and a half in size. In the late 1990s he obtained security work on a film set for approximately three months and was then briefly employed by the defendant company Allergan to provide security in respect of Christmas hampers.

20. While working in Allergan on security he met Tony Tobias of T & T Contract Cleaners. Mr. Tobias had a cleaning contract with Allergan. He offered Mr. Steer a cleaning job which Mr. Steer accepted. The duties were janitorial duties involving cleaning of all types: cleaning the walls, floors, windows and all around the machines. The T & T Contract Cleaners contract was labour only and all equipment was supplied by the defendant. While employed by T & T Contract Cleaners, Mr. Steer received his directions from Mr. Tommy McDonnell, an employee of Allergan who was the line lead for janitorial services in the area in which Mr. Steer was working, which was known as the "*unit dose packaging area*". Mr. Steer was shown how to use the various machines, buffers, washers and scrubbers, by other employees. While working as a contract cleaner for T & T Contract Cleaners, his normal shift was 39 hours a week but he regularly did overtime. He told the Court that on occasions he worked up to 36 hours overtime for which he would be paid by Tony Tobias. By the Court's reckoning, 36 hours overtime on top of a 39 hour shift works out at in excess of 10 hours a day, 7 days a week. Mr. Steer worked as a contract cleaner for T & T Contract Cleaners for 20 months during which time he made no complaint either to his employer or to anyone else about work practices or conditions or indeed any other matter.

Employment with Allergan

21. While working as a contract cleaner with T & T Contract Cleaners, a full time janitorial position became available in Allergan. The plaintiff applied for the position and no doubt because of the company's experience of his strong work ethic and proficiency, he was successful. His work medical history, as maintained by Dr. Oliver Whyte, suggests that his start date as an employee of Allergan was 25th February, 1998. As an employee his duties were essentially the same as those he had performed previously as a contractor. He continued to be employed in the unit dose packaging area of the factory, working to his line lead, Tommy McDonnell. He performed janitorial duties in this area of the factory up until 2005 when he moved on to a different shift and was employed in what is known as the "*unit dose filling area*".

16. Not long after commencing his employment with the defendant company, the plaintiff was elected union shop steward by his fellow workers. This was a position which he occupied for a number of years. Having observed the plaintiff Mr. Steer for a number of

days in the witness box, the Court is not surprised that his fellow workers considered him to be "*shop steward material*". He is an assertive individual, quite definite in his views and the Court had the overall impression from the evidence that he is not a man to be told what to do.

17. Throughout his time working in the unit dose packaging area, the janitors there were required to deal with a repeated problem of blue paint marks being left on the floor from blue pallets. It is not disputed that management were aware of this problem nor is it disputed that Mr. Steer complained about it.

18. Various machines were supplied to the janitors for the purposes of floor cleaning. All of the machines were hand guided. There was a washing machine, a Nilfisk buffing machine and a floor scrubbing machine. The scrubbing machine was not always successful in entirely removing blue marks left on the floor by painted pallets.

19. The janitors were left to devise their own system for removing the more stubborn marks. A scotch pad was made available which could be applied to the most stubborn marks using either a handle or by using one's foot to apply it to the mark. Mr. Steer devised a system of keeping the scrubber concentrated over the stain so as to achieve more traction against the mark. This entailed lifting the machine on one side and holding it pressed down against the mark on the other side. The machine is not designed to operate in that way and this practice involved the operator holding the machine against its normal movement which according to Mr. Semple, the plaintiff's engineer, resulted in pressure being transferred to the operator's spine. The presence of blue marks on the floor was a very regular occurrence. The plaintiff's line lead, Tommy McDonnell, in cross-examination agreed that the plaintiff might use this scrubbing machine on the blue marks up to ten hours per week. Mr. McDonnell also confirmed that there was over the course of the period from 1999 to 2005 a request made for ride on machines but he explained that because of the structure of the plant and the nature of the production, ride on machines could not be used. Production continued while the janitors were engaged in floor cleaning and it would not have been possible to use a ride on machine working around the machines in production. Asked to comment on Mr. Steer's practice of lifting, tilting and holding the machine against the mark Mr. McDonnell remarked that he did not see anyone doing that sort of thing. Asked in cross-examination about such a practice he said:-

> *"Well it would be an informal practice to do that type of thing … there was no one actually illustrated or instructed to do that type of practice with the machine."*

20. On 7th September, 2004, the plaintiff attended Dr. Oliver Whyte, the company doctor, complaining of pain in the left side of his head extending down his left arm into his fingers. The pain was noted to be present for 42 days and to be recurring. Dr. Whyte's diagnosis was of a cervical disc prolapse with radiculopathy. Dr. Whyte explained that this was a clinical diagnosis and further that he considered that an MRI scan taken on 23rd May, 2008 in effect confirmed his clinical diagnosis. That scan showed narrowing of the cervical spine at C3/4/5 and 6. Dr. Whyte accepted that no actual prolapse was shown, but in his view the narrowing of the cervical spine revealed on the scan, demonstrated that that was the source of the problem with which the plaintiff had presented on 7th September, 2004. While none of the medics retained was given the opportunity to address the issue of potential damage to the cervical spine, as a matter of common sense it appears to the Court that the process described by the plaintiff for removing stubborn blue marks on the floor in the unit dose packaging area could well place strain on the cervical spine. The plaintiff described a process whereby he would lift one side and press down on the other side fighting the natural movement of the machine to hold it in place against the stain.

21. In any event the plaintiff left the unit dose packaging area in 2005 and moved to a new shift arrangement in the unit dose filling rooms. The area to be cleaned was physically smaller but included production rooms in which sterility had to be maintained. His duties there, the Court was told, included monitoring environmental conditions by placing plates on each of the machines; checking the "*scrubs*" area to ensure that there were adequate supplies of gowns and clothing for operators working in the area; making up a 50 litre drum of detergent ready for the day's work. If there was a "*line change*" during the course of a shift, the machine would have to be washed from top to bottom, inside and outside as well as all surrounding areas including the walls, floors, windows and stainless steel. The plaintiff was supplied with an extendable mop for cleaning the walls in these areas. It is worth noting at this juncture that the janitorial duties involved the maintenance of cleanliness rather than cleaning. The work also involved cleaning windows; cleaning stainless steel grills, benches and cupboards; cleaning offices and janitorial areas; emptying rubbish bins; cleaning down the lockers in the men's and women's changing rooms; collecting boots, gowns and scrubs from the warehouse for employees in the area when required; cleaning and sterilising drains outside all lines and janitors stores; and emptying dirty gowns out of the bins. There was no issue with blue marks in this area. The plaintiff was rostered on twelve hour shifts, three days a week. There were large amounts of overtime available which he willingly accepted. His uncontradicted evidence was that on one occasion he worked nineteen consecutive twelve hour shifts with no days off. Mr. Richard Conway, his line lead in the unit dose filling area, gave evidence that the plaintiff never refused overtime.

22. When the plaintiff became unfit for work in 2008 his shift was taken over by a female colleague Mary Gillen from whom the Court heard evidence and who in fact had been trained by the plaintiff. She explained that the unit dose filling area was a highly controlled area where all staff had to be gowned to maintain sterility. She described the job and the training which the plaintiff gave her and described what she called "*the environmentals*". This apparently involved putting down contact plates on the machines and leaving them for a number of hours to see if there were any bugs or other foreign matter in the area. The plaintiff taught her how to clean the machines, the hallways and the walls. When there was a changeover in production, the rooms would have to be cleaned with special disinfectant from top to bottom including the walls and the machines. This included crouching down to clean under the machines which had an eight inch clearance off the floor of the production room. She explained that when cleaning the machines the operative would have a knapsack, a sprayer and detergent. That would be used to spray down the room, spray the machine and then it would be wiped off. She explained when cleaning a room on a changeover you clean the machine first, then the walls, and then the floor. All the equipment used in the cleaning process had itself to be sterilised and that was referred to as a process of autoclaving. All of the equipment would have to be brought to what she described as a giant sized autoclave in a compound where everything was cleaned and sterilised. Other tasks included ordering stock. Everyone in the area was gowned up. Various sizes of boots, gloves, hoods and gowns were required. Another facet of the job was emptying the rubbish in all the rooms. She explained there was a lot of plastic because everything was wrapped in plastic. She described the job as having a lot of variety, with many different duties. She described cleaning the changing rooms outside the sterile area as well. They were cleaned and tidied and sprayed down with disinfectant every day including the mirrors. She described using IPA constantly. Each time she entered a room she would spray her hands even though they were doubled gloved. They were spraying and wiping constantly because it was a grade A area. Mr. Steer also showed her how to use the scrubbing machine to clean the hall area. While she stated that she was not mad about using the machine, she had no difficulty using it.

23. She confirmed that the roster was three twelve hour shifts, three days on, three days off, three nights on in rotation. She stated there were four breaks during the day; that the janitors were in the main allowed to structure the day themselves as long as all of the necessary work was done. She viewed the monitoring of environmental plates which took about two hours each shift, as being

the most significant job and the one that she did first each day. If there was a changeover to be done that too would have priority. They would try to clean the hall areas when people were on break so as to minimise disruption. There was a large variety of work and a lot of work to be done on each shift. The plaintiff when he was training her or working with her never complained about the nature of the work but all of the janitors, having regard to the volume of work to be accomplished on a shift, felt that they could do with some assistance. Ms. Gillen retired at retirement age and despite suffering from osteoporosis, had been able to perform the janitorial tasks without adverse effect.

24. It appears to the Court that there is no doubt that cleaning under the machines in the clean rooms presented something of a challenge. It is common case that the machines were eight inches off the floor and it was awkward to get the "*squeegee*" mop under them. This was identified in a risk assessment conducted in 2008. There was no evidence of any earlier risk assessment being carried out, though Ms. Gillen stated that they were constantly being audited.

25. Following his visit to the company doctor on 7th September, 2004, Mr. Steer's next visit to the company doctor is recorded as having occurred on 9th February, 2007. He complained of pain in his right chest. The pain was described in Dr. Oliver Whyte's notes as moderately severe and of recent onset. The plaintiff appears to have attended Mr. David Foley who is a cardiac specialist for MRI and CT scans of his chest.

26. Four months later on 13th June, 2007, Dr. Whyte records that the plaintiff attended him complaining of pain for the past fourteen days following a fall on his right chest. The pain is described in Dr. Whyte's notes as moderate and persistent. The evidence of this fall emerged for the first time on the second last day of the trial due to a failure by Dr. Whyte to produce a full set of notes when his notes were sought on discovery. Consequently none of the medics had a proper opportunity to assess or to comment on the potential significance of this event in the context of the plaintiff's complaints. Mr. Steer was recalled and gave evidence that he had never fallen at home prior to 2012. Dr. Whyte was robustly cross-examined as to the possibility that this note was an error, in the context of his acceptance that there were other errors in his notes. Dr. Whyte however was adamant that he recalled this attendance and that Mr. Steer had told him that he had fallen at home and as a consequence had pain in his right chest area. Dr. Whyte found nothing abnormal on examination and concluded that the plaintiff had suffered a contusion to his right chest area for which he prescribed an anti-inflammatory for ten days. While the Court accepts that Mr. Steer may not have a recollection of this event, the Court is satisfied on the evidence of Dr. Whyte that Mr. Steer did attend on that date complaining of pain in his right chest area following a fall. This is the same area in which Ms. Ann McGreal, physiotherapist, identified muscle problems approximately a year and half later.

27. By January, 2008 the plaintiff was a man with multiple health issues, any one of which might have precluded his attendance at work. He had persistent lung infections. He had cardiac issues. He had an inguinal hernia which has subsequently been operated on. There were concerns in relation to liver function and he had back pain.

28. He attended Dr. Whyte the Allergan doctor on 23rd January, 2008 complaining of pain in his right lumbar spine which had been ongoing for fourteen days and which was getting worse. The pain was extending into the left lumbar spine and up towards his chest. He had pronounced restricted range of movements and in Dr. Whyte's view the probable diagnosis was a lumbar disc prolapse with radiculopathy.

29. The plaintiff was back with Dr. Whyte on 4th February, 2008 complaining of a deterioration in his right lumbar spine. Dr. Whyte noted that he had already attended casualty, presumably in Mayo General Hospital, where he had been prescribed Zydol which apparently is a strong painkiller. The Court has no evidence of his attendance or treatment at Mayo General Hospital. Dr. Whyte found him to be tender on examination and administered an intra-articular cortisone injection.

30. Three days later on 7th February, 2008 he was back with Dr. Whyte complaining of pain in his right chest which had been ongoing for thirty days *i.e.* since 8th January, 2008. In respect of this complaint he had also been seen at Mayo General Hospital but the Court has no evidence as to what transpired there. Dr. Whyte considered that he had chest pain which required investigation. An MRI scan and a CT scan were carried out following this visit.

31. The plaintiff attended again on 22nd February, 2008 complaining of a pain in his right flank. Dr. Whyte noted that the MRI scan and the CT scan of the chest were clear and noted that his GP had referred him to Dr. Michael McWeeney, a respiratory specialist.

32. On 7th March, 2008 the plaintiff was again seen by Dr. Whyte who records his problem at that time as deterioration of his right chest. Clinical examination on that date noted "*pain* + + + +" and an intra-articular cortisone injection was again administered.

33. Two weeks later on 25th March, 2008, the plaintiff was again seen by Dr. Whyte. On this occasion his complaint related to his lung condition which had at that stage been ongoing for two months and which was evidenced by the production of purulent sputum. He was prescribed steroids and an antibiotic. The diagnosis made by Dr. Whyte was pneumonitis. Dr. Whyte explained that this was an inflammation or infection of the lung which is not pneumonia or bronchitis but appears to have features of both.

34. The plaintiff was seen again on 31st March, 2008 when it was noted that there was no change in his previous lung condition and a note was made to follow up back ache.

35. The plaintiff was seen again a week later by Dr. Whyte where his complaint was of deterioration in his right thorax. He was prescribed Tegretol.

36. The plaintiff was seen again by Mr. Whyte two weeks later when again his complaint was of pain in the right chest. He was noted to be "*Tender* + + +". He was given an intra-articular cortisone injection and the diagnosis was of costochondritis which Dr. Whyte described as "*inflammation of the joint, of the nerve, or the ribs and the breast bone probably*". The tenderness was in the area of the sternum and Dr. Whyte commented that the areas of pain moved around. Dr. Whyte gave evidence that the plaintiff had been attending hospitals and clinics and nobody had come up with a specific diagnosis of his problems.

37. The plaintiff was seen again the following day by Dr. McWeeney who considered that he should be investigated for haemochromatosis. In May, 2008 the plaintiff was admitted for approximately ten days to the Galway Clinic where he underwent a battery of tests which appear to have been directed primarily at his pulmonary, cardiac and liver function. There does not appear to have been any orthopaedic involvement during the investigations conducted in the Galway Clinic in May, 2008 though an MRI of his lumbar spine was included in the investigations.

38. Mr. Steer returned to work with Allergan in July, 2008. During this period he was also attending his GP who noted that he had been complaining of right side back pain in the mid/lower thoracic region for over two years but that it had worsened considerably in

the past six months. His GP Dr. Lennon referred him to Ms. Ann McGreal, physiotherapist. Ms. McGreal first saw him on 21st August, 2008. She identified the problem areas being treated by her as:-

> "1. (R) facet joints at T3/T4, T4/T5
>
> 2. Costovertebral joint mobilisation as above
>
> 3. Myofascial pain patterns reproduced at
>
> - multifidus level T3/T4/T5
>
> - iliocostalis bulk
>
> - longissimus area T3-T6"

She noted that he had been given a TENS for home use application to the problem areas with good effect. She noted that he was relatively pain free until about day two of his shift. This presumably relates to his return to work in July, 2008. She notes:-

> *"He uses heavy buffers in a rotation movement, mops repeatedly throughout the Allergan Plant and also repeatedly cleans large plate glass windows."*

The source of this information was presumably Mr. Steer. Ms. McGreal expressed the view that his symptoms appeared to be consistent with a repetitive stress injury and suggested that he be referred to Mr. Paul O'Grady, orthopaedic surgeon for further investigation and treatment. Ms. McGreal through no fault of her own was somewhat hampered in giving her evidence to the Court in that no one had contacted her since she had reported in September, 2008 to Mr. Paul O'Grady, orthopaedic surgeon as to her treatment of the plaintiff. Having heard nothing for a period of five years she had destroyed her files in 2014 and was therefore unable to say for how long she had treated the plaintiff. It does seem clear, however, that during the course of her treatment of him she was not told of the method devised by Mr. Steer for removing the stubborn blue marks in the unit dose packaging area nor had she been told of the fall suffered by Mr. Steer in June, 2007 resulting in pain to his right chest area. Certainly Ms. McGreal's view that Mr. Steer's symptoms appeared to be consistent with repetitive stress injury sowed a seed in Mr. Steer's mind because from then on with both medics and work colleagues he attributed all his many health issues and disabilities to a rotational back injury. Dr. Lennon, his GP and Ms. McGreal considered that a referral to an orthopaedic surgeon was appropriate. Dr. Lennon gave evidence that in his view the chronic right sided thoracic spine pain was probably secondary to rotational work and heavy lifting.

39. In any event Mr. Steer attended Mr. O'Grady orthopaedic consultant on 1st October, 2008. He noted his complaint as being of pain in his back which he described as being severe at times. He noted that he had had physiotherapy and anti-inflammatory medication; that he had been attending Ann McGreal, chartered physiotherapist and that he had already had a number of injections into his back by a pain specialist in Galway. He had had an MRI scan of his lumbar spine and an x-ray of his cervical spine on 12th May, 2008. On 13th May, 2008, he had had a CT scan of his thorax, abdomen and pelvis done at the Galway Clinic. The findings on the MRI scan of the lumbar spine showed that the plaintiff had some facet joint hypertrophy. These had developed an arthritic state which was causing some pinching of the nerves as they exited posteriorly from the spine causing spinal pain. Facet joint problems, according to Mr. O'Grady may cause non specific back pain which may radiate up and down. Facet joint hypertrophy can irritate the muscles that run in two columns along the spine. According to Mr. O'Grady Mr. Steer has multilevel facet degeneration.

40. As the Court understands it, facet joint hypertrophy can be rendered symptomatic by repetitive rotational work. In Mr. O'Grady's view the inappropriate use of buffers and polishers might well give rise to a facet joint problem. In Mr. O'Grady's view, the fact that Mr. Steer had no alleviation or response to an epidural to his back indicated that his problem did not derive from a disc and that that supported his conclusion that his problem was more likely to be facet joint hypertrophy.

41. When asked about the blue marks and the plaintiff's method of dealing with them, he pointed out that it was not his area of expertise but offered the view that any load applied to something that was moving would not be ideal but again he stressed this was not his area of expertise.

42. Having looked at his MRI scans and other investigations Mr. O'Grady determined that a surgical intervention would be of no use to Mr. Steer. He suggested to him that he continue with his conservative management and that he discuss his work situation with Dr. Whyte, the Allergan doctor. He recommended a cordal epidural which is a slightly different type of pain relieving injection and that was administered on 19th November, 2008, but according to the plaintiff, it had minimal effect.

43. Dr. O'Flaherty, an anaesthetist in the Galway Clinic, administered Botox injections to Mr. Steer. This is designed to minimise spasm of the two columns of muscles that run up the posterior aspect of the spinal column. These muscles can become inflamed particularly as they lie adjacent to or on top of the facet joints. So if a person has irritated facet joints they can experience a lot of spasm in their back. The hope was that Botox would reduce the spasm in these muscles.

44. Mr. O'Grady, according to his evidence, had the impression when he saw Mr. Steer, the plaintiff in October, 2008 that his complaint was a new complaint which had become symptomatic in or around 2008. Mr. O'Grady was not aware that four years earlier Mr. Steer had presented to Dr. Oliver Whyte with complaints of pain on the left side of his head extending down to his left arm and fingers for which he had been prescribed Mefan and for which Dr. Whyte had given a possible diagnosis of cervical disc prolapse. Nor was he aware that more than a year earlier the plaintiff had sustained a fall and sustained an injury to his right chest. Mr. O'Grady had no opportunity to comment on these matters as the latter incident only emerged after he had completed his evidence.

45. Mr. O'Grady concluded that the plaintiff's facet joint hypertrophy had been exacerbated by repetitive rotational work. When asked by the Court whether it would make any difference to his diagnosis and prognosis were it the case that the repetitive rotational work with buffer and scrubbing machines was a few hours a week rather than a few hours a day Mr. O'Grady stated that even short periods "*can exacerbate a bit of facet joint hypertrophy*". At that point Mr. O'Grady's view was that the plaintiff was likely to have ongoing chronic low back pain.

46. In cross-examination Mr. O'Grady agreed that the plaintiff had made no complaint to him about blue marks which had to be removed by pressing the scrubbing machine against the floor. He agreed that one would expect that if a person stopped doing the work that is aggravating him, the condition should settle down but added the rider that that does not always happen. Later in his cross-examination he stated:-

"Sometimes particularly with muscular or tenderness type of repetitive injuries they do resolve when you stop the aggravating factor. Unfortunately, doing something from a repetitive point of view from the lumbar spine can cause some chronic low grade damage to the facet joints that doesn't recover. So, I would think that it would be consistent in certain people to have chronic low back pain even after they stopped the repetitive [movement]".

He agreed that if a person was experiencing difficulties with back pain he would not recommend the level of overtime done by Mr. Steer. According to the evidence, Mr. Steer regularly did an additional ten hours on a Saturday and again Mr. O'Grady stated that he would not recommend it particularly if you are complaining of low back pain. Asked about the different areas of complaint being at times the mid thoracic area and at others the lumbar area he stated:-

"…if you were to have a disc prolapse, yes, the particular exact level is very specific but the erectaspinial muscle…really the whole cord and therefore it wouldn't be unusual for somebody to complain of pain up and down his spine".

47. The scans Mr. O'Grady had seen showed multilevel degenerative change particularly in the facet joints in Mr. Steer's back. Asked about his other activities, gardening for example, Mr. O'Grady agreed digging is certainly going to cause people to have low back problems. Heavy physical work is going to accelerate normal wear and tear. "*Working as a janitor will accelerate normal wear and tear above those maybe that somebody who has a clerical or office type job*". He gave the following example:-

"If I was to liken it and I don't mean to be frivolous, liken it to somebody driving a car. If you drive a car nice and quietly and gently the brake pads will last a long time. If you drive the car and towing a heavy load and you are stopping and starting you are going to wear out the brake pads quicker. Similarly, if you have a back which we all do and you do normal every day activities, then you are at low risk of having significant back pathology. But if you are bending under tables, collecting bins, mopping, sweeping, digging gardens, more likely to get increased low back pain or back pain in comparison to an individual who has an office job."

Asked about drivers and their risk of disc prolapse, and asked about painters and decorators with their risk of rotative cuff tears, he agreed that anyone who was working in a physical capacity, not in an office job, effectively is on risk of aging their back prematurely. Asked in re-examination whether bad work practices would increase the risk of deterioration Mr. O'Grady agreed that they would. Meanwhile Dr. Whyte noted in his records the fact of the plaintiff's visit to Mr. Paul O'Grady and his complaint of pain in the right thorax and the recommendation for no intervention. He gave in his medical notes as a possible diagnosis "*back ache due to rotation*".

48. The plaintiff was anxious to stay at work if at all possible but at this point the defendant was concerned and very properly referred him for orthopaedic opinion to Mr. Derek Bennett who appears to have examined him in December, 2008. Mr. Bennett reported back to Dr. Oliver Whyte the Allergan doctor on 9th December, 2008 stating:-

"Thanks very much for asking me to see Richard. Richard has a history going on for a year now of pain in his mid thoracic spine with radiation down around his right ribs. Level appears to be around T6/T7. He's been extensively investigated in the past for chest pain by Dr. McWeeney and Dr. Pate and fortunately everything turned up normal for him apart from fatty infiltration in his liver. He had an MRI scan of his lumbar spine while he was in the Galway Clinic, which shows a little bit of wear and tear in his lower lumbar spine but nothing higher up.

On examination he has no real tenderness in his spine but he does have pain on rotation of his thoracic spine. Interestingly and very significantly he has no pain on simulated rotation of his thoracic spine and I think this man is very genuine and probably indicates some facet joint arthritis around the mid point of his thoracic spine. He has had a number of pain relieving treatments including nerve blocks and an epidural injection which he said made absolutely no difference to him. This would again suggest that his problem is not nerve root compression but in fact facet joint arthritis.

I'm going to get an MRI scan of his thoracic spine this time specifically to look at his facet joints and if this confirms the diagnosis then I will refer him to Dr. David O'Gorman the pain specialist to inject his facet joints. I would hope this will improve his symptoms. I do accept that he's due to retire within the next few months anyway and that it may not be realistic at this stage to get him back to his physical work.

Clearly if his work involves polishing floors and a repetitive movement of this nature it would aggravate his facet joint arthritis but I've told him it's impossible to state whether it would actually cause it in the first place. I will let you know what turns up on his MRI scan."

49. The report on the MRI scan came back on 20th February, 2009 and while the full report has not been put before the Court, Dr. Whyte's note of it is that the scan:-

"…showed mild degeneration, not too bad on MRI. No simple solution. Cause uncertain, will be unable to work. Pension out at age".

Mr. Steer was again seen by Dr. Whyte on 22nd April, 2009. His note of that attendance is:-

"Says pain is getting worse. Taking up to eight Solpodol daily, Amitryptaline, Omacor, Dona."

The final note of Dr. Whyte is dated the same date. It is an email report to the relevant HR person in Allergan and states as follows:-

"I examined Richard just now.

He says his condition is gradually getting worse. He is on multiple medications including eight Solpadeine tablets which contain codeine. Codeine is an opiate derivative which can cause drowsiness and does in Richard's case. He has seen nine specialists including a pain specialist who is treating him at present. Some have recommended he stop work.

The cause of his problem has not been proven definitively but is most likely due to pressure on a nerve due to wear and tear of his spine called spondylosis. This is a common problem in those over fifty years of age. In most cases it causes no problem but can cause direct pain and/or irritation of nerves.

In view of the persistence of symptoms over the past year and the possible potential for aggravation of the symptoms in addition to the potential work risks involved due to medication it is my opinion that Richard is not fit to resume work

and is unlikely to return to work in Allergan."

50. Four months later on 17th August, 2009, the plaintiff's plenary summons was issued and the pleadings and proceedings evolved thereafter in the manner described at the beginning of this judgment.

51. The plaintiff formally retired from Allergan on 11th October, 2009.

52. In 2010, the defendant referred the plaintiff Mr. Steer to Mr. Gilmore, orthopaedic surgeon, for assessment. The Court has no explanation as to why Mr. Steer was not sent to Mr. Derek Bennett who had examined him on behalf of Allergan in December, 2008 and who had organised a MRI of his thoracic spine in early 2009. Dr. Bennett was also familiar with the examinations that had been carried out in the Galway Clinic in May, 2008. Mr. Gilmore by contrast had none of this information.

53. Furthermore, it appears that the findings of Mr. Bennett who had examined the plaintiff on behalf of Allergan were not forwarded to Mr. Gilmore for his consideration when examining and reporting on the plaintiff's condition. Had that simple step been taken, Mr. Gilmore would have been aware of the MRI of the lumbar spine taken in May, 2008 as well as the results of the MRI of the thoracic spine directed by Mr. Bennett and taken in February, 2009.

54. In any event Mr. Gilmore saw the plaintiff on four occasions over a period of six years between 2010 and 2016. On the first occasion that he saw him the plaintiff's complaints were of:-

1. Pain in his lower thoracic spine and around his right rib cage to the subchondral area, almost into the right upper quadrant of his abdomen.

2. That he was not able to do his work because of this and was very restricted in his carpentry and gardening. If he did any it would lead to an increase in his symptoms.

3. The plaintiff had an occasional tingling sensation in the right subcostal area.

4. He noted that the plaintiff had difficulty getting out of bed.

The history noted was that the plaintiff had no problem whatsoever until about mid 2007 when his symptoms started. The Court notes that this is precisely the time at which Dr. Oliver Whyte states the plaintiff attended him complaining of pain in the right chest area following a fall.

55. Examination by Mr. Gilmore on that first occasion showed a 60% range of motion in the cervical spine with no pain. There was no tenderness or any neurological deficit in either upper limb at the thoracolumbar spine. Forward flexion was to the mid shin with pain in the right mid back at the thoracolumbar level. Lateral flexion also caused soreness at this level. Rotation caused pain at the right mid back/thoracolumbar level. Straight leg raising was tight but negative on the left side, positive on the right side at 60º but no obvious neurological deficit was noted. There was no local tenderness on percussion, and quite firm pounding of his chest and rib cage on the right side did not lead to any pain. There was no altered sensation on the costal area.

56. The only x-rays made available to Mr. Gilmore were the MRI scan of the cervical and thoracic spine taken 4th February, 2009 which had been ordered by Mr. Derek Bennett when he had examined the plaintiff on behalf of Allergan. Those revealed some minor age related changes but no specific disc prolapses or nerve root compression.

57. Mr. Gilmore's opinion on that occasion was that the pain in the right lower rib cage and lower thoracic spine was probably associated with rotating movement involved in using the buffing and scrubbing machines which the plaintiff clearly had told him was his constant task. He did not consider it to be a repetitive strain injury because such injuries resolve when the activity causing them had ceased and a repetitive strain injury would be uncommon in this area and more likely to be found in upper limbs. Mr. Gilmore felt it was a minor soft tissue problem which would react to over activity which could be resolved by avoiding aggravating factors into the future.

58. Mr. Gilmore next saw the plaintiff a year later on 14th November, 2011. Mr. Gilmore noted that the plaintiff was being sent for an MRI scan by his GP. His complaints on the second occasion were of pain in his lower back rather than in his thoracic spine. He described the pain as a nagging toothache-like pain, at times worse than others.

59. On examination on that occasion the range of motion of the cervical spine was down by 10% to 50% range of motion and on this occasion it was accompanied by pain. Again there was no local tenderness and no neurological deficit in either upper limb. In respect of the lumbar spine Mr. Gilmore noted that forward flexion on that occasion was only to about mid thigh with pain in the right lower back. Lateral flexion and extension were both decreased and sore. Straight leg raising was sore on the right and left side at 60º but there was no obvious neurological deficit apart from the absent reflexes.

60. On that occasion Mr. Gilmore had the benefit of an MRI scan of the plaintiff's cervical and thoracic spine which had been carried out in Castlebar on 4th May, 2011. The thoracic spine showed minor degenerative change but the cervical spine showed degeneration and a disc bulge at C5/6. This is evidence of ongoing degeneration of the cervical spine which in 2008 had shown narrowing of the discs but no bulge.

61. Mr. Gilmore came to the conclusion on that occasion that a lot of the changes noted on the scans were age related but that the problems which the plaintiff noted before he retired from Allergan were probably due to the type of work in which he was involved, which led to repetitive twisting of his back. He concluded:-

"The only diagnosis one can put on this is that he has degenerative change, some of which are age related but some of which may have been aggravated by the particular activities involved in his job".

62. Mr. Gilmore next examined the plaintiff more than a year and a half later on 15th July, 2013. The plaintiff told Mr. Gilmore that he still had not had the MRI scan of his lumbar spine done, which apparently he had told Mr. Gilmore was being arranged by his GP. On that occasion his complaint was again of lower back pain this time radiating to the right ribcage which was relieved by morphine patches.

63. Examination of the cervical spine was unchanged indicating a 50% range of motion with pain. The lumbar spine was also unchanged, forward flexion being only to about mid thigh with pain in the right lower back. Lateral flexion and extension were again

decreased and sore. Straight leg raising was positive in the right more so than the left at 50º and 60º respectively. He claimed to have altered sensation in the right leg, all of the right leg except for his foot. Mr. Gilmore was unable to elicit any reflexes.

64. Mr. Gilmore's opinion at that point, being the third occasion on which he had examined the plaintiff, was that it was difficult to give a definitive opinion and prognosis in relation to the patient's ongoing issues. Mr. Gilmore did not have an MRI scan of the plaintiff's lumbar spine which he considered important in order to try to document a definitive diagnosis and therefore to recommend a suitable course of treatment. Clinical examination suggested that he had disc problem but without the benefit of an MRI scan Mr. Gilmore found it impossible to give a definitive opinion or prognosis. He referred to the fact that the plaintiff was on a waiting list to have the MRI scan carried out through his GP, but considered that it might take anything from two to three years to have the scan carried out in the public health system. He suggested that it might be worthwhile for the defendant to arrange an MRI scan to assist him in making a definitive diagnosis and he offered to arrange a scan if the defendant wished to take his advice. Despite this clear recommendation from Mr. Gilmore, the defendant did not request an MRI scan nor did it notify him that an MRI scan of the lumbar spine taken in May, 2008 was available.

65. Mr. Gilmore next examined the plaintiff on 7th March, 2016, three months before the hearing of the claim and two years and eight months since his previous examination. Mr. Gilmore noted that the plaintiff was still using Versatis or Butran's patches and painkillers. He also noted that Mr. Steer had had no further MRI scans in the two years and eights months since he had seen him. His complaints on that occasion reverted to the right side of his chest. He complained of a lot of pain on the front right side of the chest in the right axillary region and also the right scapular area. He complained of trouble in his right leg which caused him to lose his balance and fall. Despite the potentially serious consequences of this development, the plaintiff had not attended his GP in respect of the problem.

66. Mr. Gilmore noted that in the interval since he had last seen him he had had two myocardial infarcts as well as a bout of pneumonia and a hernia operation. He complained of an inability to sit or stand or lie for any length. He complained of great difficulty in sleeping. He told Mr. Gilmore that he could do very little gardening or carpentry now and indeed had little interest in it.

67. Examination revealed no change in the cervical spine. There was tenderness in the inner trapezius right and left and also in the right interscapular area and in the scapular and axillary region. This was a new complaint which had not been made previously. No neurological deficit was noted in either limb. Examination also revealed minimal pain in the anterior right chest. The lumbar spine was essentially the same as it had been two years and eight months earlier though lateral flexion to the right and to the left led to a pulling sensation in the right flank, but there was no particular tenderness in the right flank. Straight leg raising on the left side was tight but negative but on the right it was positive at 40º. On this occasion Mr. Gilmore was again unable to elicit any of his reflexes.

68. In giving his opinion Mr. Gilmore again bemoaned the absence of an MRI scan of the lumbar spine which despite his recommendation in 2013, had not been requisitioned by the defendant. In its absence Mr. Gilmore felt that he could only give a tentative or putative diagnosis in relation to what might be happening in the plaintiff's lower back. He noted that he continued to have ongoing difficulties with his lower back with pain radiating down to his right leg. He opined:-

> *"While there may be some suggestion of nerve root irritation, again without the benefit of an MRI it is impossible to give a definitive diagnosis".*

Given the length of time since the accident and the plaintiff's age Mr. Gilmore considered the likelihood to be that:-

> *"…he probably has some degenerative change which has become symptomatic and continues to bother him, and is likely at this stage to continue to give him ongoing difficulties".*

Mr. Gilmore was at a loss to explain the cause of the ongoing complaints in the plaintiff's right chest but he noted that it seemed to be persistent and given that it had persisted for five and half years, he considered the likelihood to be that he would probably continue to have difficulties in the area.

69. While Mr. Gilmore's analysis in his first two reports does not vary dramatically from the findings of Mr. O'Grady, namely that the plaintiff had degenerative changes rendered symptomatic by rotational work, his position at the hearing was considerably different. In evidence he told the Court that he considered that he had in effect been duped by the plaintiff. There were two reasons for his change of view. First, was the video evidence taken on 30th September, 2015 and on 31st May, 2016. In the first video the plaintiff is seen delivering garden furniture to a customer. He is seen bending far below the mid-shin level without any apparent problem and without any obvious pain. In the second video taken on 31st May, 2016, two months after his last examination by Mr. Gilmore, the plaintiff is seen moving freely while carrying what the Court is told were roof tiles to his van and bending freely while placing the items in his van.

70. Mr. Gilmore considered that the level of movement seen on the videos was totally at variance with the level of movement demonstrated during each of his four examinations of the plaintiff. It was suggested to him that people with back problems can have good days and bad days. Mr. Gilmore was sceptical, noting that on each of the four occasions he had examined him, the plaintiff's level of movement was significantly more restricted than the level of movement visible on video.

71. The second reason for Mr. Gilmore's change of view was, as he perceived it, the failure of the plaintiff to reveal during any of the four examinations conducted by Mr. Gilmore that he had had a prior lumbar scan in 2008 and his further failure to disclose that he had VHI cover which would have allowed him to avoid the potential three year wait for an MRI scan in the public system.

72. The Court is not inclined to be as critical of the plaintiff in these respects as is Mr. Gilmore. Videos taken on isolated occasions years apart showing freer movement than what was evident on medical examination does not in the Court's view establish that a plaintiff is a fraud. The Court considers that more extensive evidence of repeat instances of free movement would be required before the Court could come to that conclusion. What the videos do show however, is that the plaintiff is not in permanent pain and that he has good days and bad days as suggested by his counsel.

73. The criticisms made by Mr. Gilmore about the plaintiff's failure to disclose previous MRI scans of his lumbar spine and the fact that he had VHI cover were not put to Mr. Steer and he not having had an opportunity to deal with it, the Court is not prepared to conclude that he deliberately withheld information about the 2008 MRI of his lumbar spine. In the Court's view it is entirely possible that having regard to the multiplicity of investigations conducted on the plaintiff in 2008, that he simply forgot that it had included an MRI scan of his lumbar spine. Any failure to obtain an MRI scan of his lumbar spine under his VHI policy, a matter which again was not put to Mr. Steer, is not, in the Court's view, a matter on which the defendant is entitled to rely as establishing that the plaintiff is a fraud. There may be many reasons why a person with VHI cover would not use their cover and would rely instead on the public health system. The real failure in this respect lies at the door of the defendant. On his third examination of the plaintiff, Mr. Gilmore

recommended that the defendant requisition an MRI scan of the plaintiff. On his fourth examination he again bemoaned the absence of an MRI scan of the lumbar spine and the defendant still chose to do nothing. The Court is quite satisfied that had the defendant requested Mr. Steer to submit to an MRI scan, he would willingly have done so. For these reasons, the Court does not consider that Mr. Gilmore's impression of being misled is sufficient to displace the direct evidence of Mr. O'Grady, who gave evidence on behalf of the plaintiff, and of Mr. Bennett who examined the plaintiff on behalf of Allergan in 2008.

74. The Court considers that Mr. Steer is essentially an honest man, though one who in evidence displayed a tendency to be rather fixed in his views. He did tell Mr. Gilmore that he was still doing a bit of gardening and carpentry. His failure to disclose that he had had an MRI of his lumbar spine in 2008 is understandable in the context of the multiplicity of investigations he had undergone at that time. His failure to disclose to Mr. Gilmore that he had VHI cover is in the Court's view irrelevant. Had the defendant wished to have an MRI of the plaintiff's lumbar spine, as recommended by Mr. Gilmore, it should have arranged one.

Findings of Fact

75. The defendant company Allergan is undoubtedly in the Court's view a well run company cognisant of its obligations statutory and otherwise to its workforce. Throughout Mr. Steer's time in the defendant's employment there were persons employed specifically as health and safety officers to ensure compliance with legislative and regulatory requirements. Between 1996 and 1999 that position was held by Una Cox, now an occupational health nurse, and thereafter by Ruth Early who was not available to give evidence in this case. The Court is satisfied that there were regular safety committee meetings and training sessions for staff including the janitorial staff. It does however appear to be the case that no formal risk assessment of janitorial duties was carried out by the company prior to 2008.

76. The plaintiff has pleaded in his indorsement of claim that his work involved heavy duty cleaning of the defendant's premises. The Court is satisfied on the evidence that the cleaning tasks in Allergan were not heavy duty cleaning tasks. The role of the janitors was to maintain cleanliness rather than to achieve cleanliness. Janitorial duties in the clean room area where the plaintiff was employed from 2005 to 2008 primarily required maintenance of sterility rather than cleaning.

77. The Court rejects the plaintiff's plea at para. 3 of his indorsement of claim that he had to engage in heavy duty cleaning work with buffer/scrubber machinery over a protracted period of time. Similarly the Court rejects the plaintiff's plea that the use of the buffer/scrubber machinery was repetitive or constant and further rejects the plea that the plaintiff was obliged to engage in rotational work which involved heavy and awkward movement over a protracted period of time.

78. Each of the machines which the plaintiff used was and is designed to glide over the surface which is being either washed, scrubbed or polished. Movement of the machine is guided by the hands of the operator. It does not require heavy or awkward movement as described in the plaintiff's indorsement of claim.

79. The plaintiff complains that he received no adequate training in the use of these machines. The Court is satisfied that these are not complex machines and that a man of Mr. Steer's undoubted intelligence would have little difficulty in mastering the fundamentals of its use in a fifteen minute tutorial which is what he states he was given by Pat Fahey when working as a contract cleaner for T & T Contract Cleaners in 1997. The Court notes that Mr. Steer in turn trained others in the use of these machines. The Court agrees with the view of the defendant's engineer Mr. James Hassett that a worker is first shown how to use the machine and then learns by experience. Mr. Tommy McDonnell expressed the matter thus:-

> *"On the job instructions…[another janitor] just shows you how it is done. It doesn't take that length of time to use those machines. They are easy enough to use, they are not a rocket science machine to use… It is just a matter of getting used to actually handling them, manoeuvring them."*

80. While the Court is satisfied that the defendant is cognisant of its obligation to comply with its statutory and contractual obligations to its workforce, even in the best regulated environments problems can arise. The Court is satisfied on the evidence that the defendant in this case was negligent and in breach of duty in two respects. First, it was negligent in failing to deal appropriately with the problem posed by the blue marks left on the floor surface of the unit dose packaging area. Second, the Court finds that the defendant was negligent in allowing the plaintiff to work the level of overtime which he clearly worked throughout his employment with Allergan. Had a proper risk assessment of janitorial duties been carried out prior to 2008, it is likely that both of these issues would have been identified and remedied.

Blue marks problem

81. Throughout the period from 1998 to 2005 there was a significant problem with blue marks on the floor of the unit dose packaging area. The problem was simply left to the janitors to sort out and Mr. Steer using his ingenuity did so by misusing the scrubbing machine thereby putting additional pressure on his spine.

82. Coloured wooden pallets brought into the area were prone to leaving paint marks on the floor. Some days the marks would be extensive. The machinery supplied to the janitors and in particular the scrubbing machine was not sufficiently powerful to remove the blue marks entirely. According to Mr. McDonnell the plaintiff's line lead, the washer would remove approximately 80% of the marks. Even after using the scrubber, some stubborn marks could remain. The janitors would have to use a scotch pad either on the sole of the foot or at the end of a broom to remove the balance. Mr. McDonnell, who gave evidence for the defendant, accepted that the plaintiff may have used the scrubber on the area of the blue marks up to ten hours per week.

83. The Court is satisfied that management were aware of this problem but did nothing about it. The failure to act by the management may well have been due to the fact that despite their complaints and grumblings about the blue marks, the janitorial staff managed to remove them. The plaintiff Mr. Steer struck the Court as a man who would pride himself on finding solutions to problems. He and Mr. Fahy gave evidence and the Court accepts their evidence in this regard that they devised a system for dealing with the blue marks and in particular, the more stubborn ones of them. Their method involved lifting the scrubbing machine on one side and pressing it down with more force on the marks to be removed. This had the effect of stopping the machine in its normal gliding motion. Holding the machine against the marks in this way gave greater traction against the mark but involved the operator fighting against the movement of the machine to keep it in place on the mark. Clearly the machine was not designed to be used in this way which though successful in removing the marks, also put undue pressure on the spine of the operator.

84. The Court is satisfied that the defendant is responsible for the development of this inappropriate and potentially damaging method of removing blue marks from the floor. The janitorial staff had complained. Nothing had been done to alleviate the problem and the janitors were left to their own devices to come up with a solution to the problem. It seems to the Court that the problem could have been solved very simply either by putting some temporary surface under the blue pallets to ensure the paint did not become embedded in the floor or by providing a more powerful scrubbing machine to the janitors.

85. On 7th September, 2004, while still working in the unit dose packaging area the plaintiff attended Dr. Whyte. He complained of pain in the left side of his head which had been ongoing for 42 days. A note was taken which suggests that the pain extended from the head into the left arm and fingers. Mefen was prescribed. Dr. Whyte at the time gave a possible diagnosis of cervical disc prolapse with radiculopathy.

86. A cervical MRI scan taken almost four years later on 23rd May, 2008 showed narrowing of the C3/4/5 and 6. While a prolapse was not shown Dr. Whyte was of the view that this MRI confirmed that the problems manifest on 7th September, 2004 were emanating from the plaintiff's cervical spine.

87. None of the doctors apart from Dr.Whyte were aware of this history when formulating their views on this case. However the plaintiff's complaints as to the manner in which he felt obliged to use the scrubber machine on the blue marks by tilting it up and applying it with force to the marks, and his presentation in September, 2004 with symptoms in his left head and arms, which Dr. Whyte attributed to a problem in the cervical area seems more than a coincidence. The method employed by the plaintiff to remove the blue marks was not rotational but rather the application of additional force which might well over time have had an effect on the cervical spine.

Excessive working hours
88. The uncontroverted evidence is that the plaintiff throughout his time at Allergan, both as a contract worker and as an employee, worked as much overtime as was available. His line lead, Mr. Richard Conway gave evidence that the plaintiff never refused overtime. The plaintiff gave evidence that when he worked in the unit dose packaging area he might work as much as 36 hours overtime in a week. On one occasion between 2005 and 2008 he worked 19 twelve hour shifts in a row. He regularly worked a ten hour additional shift on Saturdays. While the Court is satisfied that the work was not heavy physical work, it was nonetheless physical and repetitive and the level of overtime being worked by Mr. Steer made his overall workload excessive.

89. The Court holds that there is a duty on an employer to ensure that those of its employees engaged in physical labour, do not have an excessive workload. On the evidence, Mr. Steer frequently worked excessive hours and sometimes grossly excessive hours. The availability of the volume of overtime which Mr. Steer accepted suggests that it would have been appropriate for the defendant Allergan to employ additional staff. Mr. Paul O'Grady's point that janitorial workers, or anybody engaged in physical labour is at greater risk of injury is well made. It is for the employer to ensure that its staff avails of appropriate rest periods so as to minimise the risk of injury. This Allergan failed to do.

90. A comparison between Mary Gillen and Richard Steer is instructive. They were both janitors in the unit dose filling area, doing the same work on the same shift system. Mary Gillen took her three days off after her three days on. Despite the fact that she suffers from osteoporosis, she worked successfully until retirement without adverse effects.

Causation
91. The Court having found that the defendant was in fact negligent in the two respects set out above, the next issue for the Court to resolve is the effect (if any) of that negligence on the plaintiff Mr. Steer. In his pleadings, Mr. Steer sought to attribute responsibility for the multiple health issues which he faced in January, 2008 to the negligence of the defendant. Such a claim is manifestly unsustainable. The repeated lung infections which he suffered in the early months of 2008 had nothing to do with his work in Allergan. The cardiac issues which were investigated and treated in May, 2008 were not attributable to Allergan. Nor were the concerns about his liver function in any way connected to his work in Allergan. The only complaints he was making at that time that might conceivably be linked to his work were his back complaints.

92. In August, 2008, no doubt frustrated by his many ailments, he attended Ann McGreal physiotherapist, who was the first person to identify repetitive strain injury as a possible cause of the ongoing pain in his right thoracic area. She was also the first medic to make a link between his symptoms and his work. Armed with this tentative diagnosis for which Ms. McGreal sought orthopaedic opinion, the plaintiff launched these proceedings in which he has sought to attribute all of his many ailments to a possible repetitive strain injury. It was as if Ms. McGreal had given him the golden formula which explained everything that had gone wrong for him in the previous eight months from January, 2008. It appears to the Court that the plaintiff latched on to this tentative diagnosis and launched proceedings. The Court does not find that in doing so the plaintiff was acting dishonestly but rather having received the tentative diagnosis from the physiotherapist he engaged in *ex post facto* analysis to fit the diagnosis. Having observed Mr. Steer over a number of days in the witness box, he struck the Court as a man who is liable to become fixed in his view of matters. The *ex post facto* analysis led to the repeated updating of particulars of negligence and breach of duty over a number of years as earlier set out. Unfortunately, the plaintiff's legal advisors never seem to have engaged with the particulars of injury in the same way. Those particulars were not updated once in the seven years between the issuing of the proceedings and the hearing of the action. Had proper focus been brought to bear on the question of injuries, the Court is certain that the claims in respect of the treatments received by the plaintiff in the Galway Clinic in May, 2008 for his multiple ailments would have been discontinued. Furthermore, proper focus on the issue of injury would have been of great assistance to the Court in determining the issue of causation.

Injuries sustained due to negligence of Allergan
93. Mr. Steer was 55 years old when he began his employment with Allergan. At that point, he had a 40 years work history which included far more physically demanding work than that which his work at Allergan entailed. He had been in the Royal Navy. He had worked as a crane driver. He had physically harvested timber. He was a tiler. He ran a waste business. For two and a half years before joining Allergan he had leased and run a pub. Lifting and moving kegs and crates of beer, stacking shelves and the cleaning involved in running a pub was undoubtedly more physically arduous than anything he was required to do in Allergan.

94. Throughout his time in Ireland and probably before, he has been engaged in carpentry (which he describes as his hobby). He has made and sold timber garden furniture. Had he not been employed in Allergan, the Court has no doubt that he would have continued to involve himself in other work of a physical nature.

95. Having regard to his history, it is fanciful to consider that the overall degeneration in his spine is attributable to his work in Allergan. The Court is satisfied however that it was while working in Allergan that the degenerative changes in his back became increasingly symptomatic. The medics on each side, Mr. O'Grady for the plaintiff and Mr. Bennett for Allergan, notwithstanding the deficient histories that they were given, are essentially of the same view, namely that Mr. Steer has facet joint hypertrophy exacerbated or rendered symptomatic by the nature of his work. Mr. Gilmore was originally of that view, but now considers that having given the plaintiff the benefit of the doubt, he had been duped for the reasons stated earlier. The Court rejects Mr. Gilmore's view for the reasons given earlier. The Court considers that the two aspects in which the Court has found Allergan to have been negligent, as a matter of probability, contributed to the plaintiff's incipient back problems becoming symptomatic. The Court therefore finds that the negligence of the defendants has caused an exacerbation or acceleration of symptoms which having regard to his history and his attitude were likely to become manifest in any event.

96. The Court has contradictory evidence as to when the problems became manifest. Mr. O'Grady, the plaintiff's orthopaedic consultant, had the impression when he saw the plaintiff in 2008 that the problems were of recent origin. Mr. Gilmore, the defendant's orthopaedic consultant was told by the plaintiff that he had pain since mid 2007. Dr Lennon, his GP reported that when he examined the plaintiff in mid 2008, the plaintiff told him that he had had pain for more than two years. In evidence the plaintiff dated the onset of back pain to 2006. Finally, the Court has the evidence of Dr. Whyte, that the plaintiff attended him on 7th September, 2004 complaining of recurring pain for 42 days on the left side of his head extending down his left arm to his fingers, which Dr Whyte attributed to a possible cervical disc prolapse.

97. The Court finds that for a considerable time prior to ceasing work the plaintiff was well aware that his back was giving him trouble. He knew from at least 2006 and probably earlier, that his back was becoming troublesome. He did not disclose this fact to his employer. Having regard to the esteem in which he was held as a proficient and conscientious worker, the Court has little doubt that there would have been a willingness on the part of his employer to accommodate him. Rather than discussing the matter with his employer or indeed availing of the three day rest periods which his shift allowed, he ploughed on and continued to accept all available overtime. In addition he continued to do other physical work such as gardening and carpentry during his limited time off. While a strong work ethic is admirable, the plaintiff's conduct in failing to heed the clear signals emanating from his own back was foolish. Repeatedly in his evidence he stated that "*I wouldn't let it beat me*". That attitude is unfortunately in the Court's view a significant factor in the level of discomfort which he now suffers. Had he worked the regular three days on, three days off shifts after the onset of pain in his back it is likely that he would not now be experiencing the level of pain and discomfort which the Court accepts he has. To that extent he must accept significant responsibility for the level of pain, discomfort and restriction which he now suffers. His co-worker Mary Gillen, notwithstanding the fact that she suffered from osteoporosis, managed the same workload successfully by taking her time off. Had Mr. Steer done so he too might have avoided exacerbating the degenerative changes in his back to the extent that they have become chronic.

Damages

98. The Court is satisfied that the negligence of the defendant in failing to remedy the obvious problem caused by the presence of stubborn blue marks on the floor of the unit dose packaging area and in permitting the plaintiff to work excessive hours accelerated and exacerbated pre-existing degenerative changes in the plaintiff's spine. The plaintiff was however contributorily negligent in failing to notify his employer of his increasing back problems and in failing to modify his own work regime such that it would be unfair to visit full responsibility for the current state of his back on Allergan. Had he heeded the warnings then the problem may not have become chronic. His failure to notify his employer or to modify his own work regime, in the Court's view, gave rise to further exacerbation which is likely to have caused the problem to become chronic, and for that the plaintiff must accept responsibility.

99. Having regard to the book of quantum published by the Personal Injuries Assessment Board in 2016, it appears to the Court that the category most apposite to Mr. Steer's situation is that of "*moderately severe*" in the section on back and spinal injuries:-

> *"These injuries involve the soft tissue or wrenching type injury of the more severe type resulting in serious limitation of movement, recurring pain, stiffness and discomfort and the possible need for surgery or increased vulnerability to further trauma.* ***This would also include injuries which may have accelerated and/or exacerbated a pre-existing condition over a prolonged period of time, usually more than five years resulting in ongoing pain and stiffness****."* [Emphasis added]

The range of damages suggested by the guidelines for such an injury is €32,100 to €55,700. The basis upon which these figures are arrived at and how the range is to be applied is not explained other than in the most general terms, and are therefore of limited assistance to a court when assessing the appropriate level of damages for the complex scenarios which with a court may be faced.

100. Mr. Steer has endured a number of years of pain and suffering, some of which as a matter of probability he would not have suffered but for the negligence of Allergan. Once the degenerative changes in his back became symptomatic they were unlikely to fully resolve and were likely to give rise to some ongoing pain and stiffness even if only intermittently. For that element of his back problems the Court proposes to award Mr. Steer €35,000 for pain and suffering to date, and €10,000 for pain and suffering into the future. The Court wishes to make it clear that it is not awarding any damages to the plaintiff for the chronic disability arising from the ongoing degeneration of his back. For the reasons set out in this judgment the Court is satisfied that such disability is not attributable to any negligence on the part of Allergan. Had the Court found otherwise, the level of general damages would be significantly higher.

101. Finally, at the conclusion of the hearing, the parties agreed the special damages to be in the sum of €19,000, subject to the Court's finding on liability. As the plaintiff has succeeded on liability, he is entitled to the said sum in addition to his award of general damages.