Neutral Citation Number: [2006] IEHC 364

THE HIGH COURT

[2002 No. 2996 P]

BETWEEN

NOEL KERR

PLAINTIFF

AND
MOLLOY AND SHERRY (LOUGH EGLISH) LIMITED
AND
ONALIS LIMITED

DEFENDANTS

Judgment of Mr. Justice Herbert delivered on the 16th November 2006.

1. The onus lies on the Plaintiff to prove his case on the balance of probabilities. The only account of the alleged incident is that given by the Plaintiff himself. The Plaintiff gave evidence that Mr. Peter O'Donoghue, formerly Assistant Operations Manager of the first named Defendant, participated in the activity which the Plaintiff claims led to his injury and, witnessed the injury occurring. Mr. O'Donoghue, who impressed me as a truthful and careful witness, stated in evidence that he was not denying that the alleged incident had occurred but was surprised that he had no recollection of an incident involving twelve to fifteen heavy boxes falling at the same time, something which he considered to be most unusual.

2. Mr. O'Donoghue told the court that these twenty to thirty kg. cardboard boxes of beef were blast frozen until they were as hard as wood. However, he said, that in the course of being moved from the cold stores at the first named Defendant's Plant to the transport containers they often became wet and slippery because of the change in temperature and it was not uncommon for individual boxes to slip and fall. Mr. O'Donoghue agreed with the expert opinion of Mr. Frank Abbott the well known Consulting Engineer who gave evidence in the Plaintiff's case, that these boxes would have fallen, - if in fact they fell, - vertically from a height of five and a half to six feet, with an impact force of sixty kg. Mr. O'Donoghue gave evidence that his principal and, very important duty, was to check in and out of the Plant the hundreds of loads of Intervention Beef processed by the Plant each week.

3. Mr. Damien Hannaway, a fork-lift driver, formerly employed by the first named Defendant, told the court that the Plant had eight loading bays. He corroborated the evidence of the Plaintiff that pallet loads of boxes were transferred from the cold stores to these loading bays by employees of the first named Defendant and, thereafter were moved by the employees of the second named Defendant, including the Plaintiff, from the loading bay into the containers. Mr. Peter O'Donoghue accepted that on many occasions he had assisted the Plaintiff in stacking these individual boxes in containers.

4. There was no dispute that the dimensions of these boxes were on average twenty four inches long by sixteen inches wide by eight inches high. Mr. O'Donoghue confirmed the evidence of the Plaintiff that these boxes were stacked five flat and one on edge up to a height of about five and a half to six feet in the containers. He agreed with the evidence given by the Plaintiff that the correct method of stacking these boxes was to alternate the side at which the single box was placed on edge so as to provide cohesion and stability by ensuring that the vertical spaces between the individual boxes were staggered and not in line. Mr. O'Donoghue accepted in cross examination that he had not received any instruction from the first named Defendant in carrying out this task, but he said that he had learned the proper method of stacking the boxes through working with experienced packers.

5. Mr. O'Donoghue told the court that while he felt that he would have always adhered to this method of stacking the boxes in a container, he was not insisting that the Plaintiff was wrong, when he said that on 18th March 1999, the last three rows of boxes to be stacked had been stacked without the vertical spaces between the individual boxes being staggered. The Plaintiff gave evidence that when he noticed that this was not happening he had warned Mr. O'Donoghue of the danger involved. He said that as Mr. O'Donoghue, whom he regarded as the person in charge in the absence of his own supervisor from the second named Defendant, - Mr. Denis Daly, - did not change the order of stacking, he felt that he had no option but to continue on with the work. The court was told that Mr. Denis Daly had left the employment of the second named Defendant and was not available to give evidence.

6. By order of this court (Mr. Justice Peart) made the 2nd day of December 2002, Judgment in default of Appearance was entered against the second named Defendant.

7. The Plaintiff told the court that he was standing with Mr. O'Donoghue between the pallet of boxes and the row of boxes which they were stacking in the back of the container. He said that the pallet of boxes was positioned about four feet away from this row. They had already filled about thirty feet of a container, forty feet in length, with rows of boxes. He said that Mr. O'Donoghue was lifting a box onto the top of the row which was at a level of about five and a half to six feet. He himself was bending down to lift one of the last boxes remaining on the pallet. He said that his knees were bent and his upper body was turned away from the row of stacked boxes. Mr. O'Donoghue suddenly shouted, "get out, get out". However, before he could react boxes came tumbling down from the last three rows they had built and one of the boxes struck him on the area of his right big toe. Mr. O'Donoghue told the court that he always wore steel-capped work boots and, that the first named Defendant insisted that all of its employees wore protective foot wear. The Plaintiff was not asked in evidence about what footwear he was wearing. In Replies to Particulars, he had initially stated the he was wearing steel-capped boots, but this was subsequently amended to state that he was wearing ordinary boots or work shoes. Mr. O'Donoghue told the court that he had no recollection of any such incident, or of the Plaintiff suffering an injury to his right foot, but he was not prepared to state emphatically that the events described by the Plaintiff did not occur, even though he was surprised that listening to the Plaintiff's evidence had not jogged his memory in any way.

8. In cross examination Mr. O'Donoghue told the court that he had left the employment of the first named Defendant about five years ago. He agreed with Mr. Abbott that the boxes in falling could have brushed past the Plaintiff without injuring him but that the Plaintiff's feet would be particularly exposed to being struck by the falling boxes.

9. The medical reports, admitted into evidence disclose that the Plaintiff suffered a crack fracture of the neck of the proximal phalanx of his right big toe without displacement. I find that this injury is consistent with the sort of incident described as having occurred by the Plaintiff. It was put to the Plaintiff in cross examination by Senior Counsel for the first named Defendant that he had dropped the box which he was lifting from the pallet on his toe. The Plaintiff denied this and, no evidence of any sort was led in support of this suggestion. Mr. Francis Bannigan, the then and present Operations Manager of the first named Defendant gave evidence that the first named Defendant in compliance with Law maintained an Accident Report Book. This Accident Report Book was not produced in evidence, but Mr. Bannigan told the court that there was no entry in that Book of an incident such as that described by the Plaintiff or, of any injury having occurred to the Plaintiff, thought it was company policy, in order to comply with the Law, that either he or Mr. O'Donoghue should enter any such incidents in the Book, whether or not they resulted in an injury to someone. He told the court

the first time he became aware of the Plaintiff having suffered an injury on 18th March 1999, was when the first named Defendant received a letter dated 22nd January, 2002, from a firm of Solicitors making a claim on behalf of the Plaintiff.

10. The Plaintiff told the court that after the impact he had gone to a coldwater tap in the yard of the Plant and soaked his foot for a considerable time because it was very sore and starting to swell. When his Supervisor with the second named Defendant – Mr. Denis Daly,- arrived in the yard of the first named Defendant's Plant at about 3.30 pm, he had told him about the incident and the injury to his foot. The Plaintiff told the court that he had continued to work that afternoon driving a fork-lift truck. The Plaintiff was subjected to a very comprehensive, though scrupulously fair cross examination by Senior Counsel for the first named Defendant. So far as his account of the events which he states occurred on 18th March 1999, is concerned, I find that he did not deviate in any way from the account given in examination in chief, nor was his evidence inconsistent, improbable or exaggerated. I find, on the balance of probabilities, that the events described by the Plaintiff as having occurred on 18th March 1999, did occur. Senior Counsel for the first named Defendant very correctly accepted that if the events described by the Plaintiff had occurred, that was sufficient to establish a breach of the duty of care owed by the first named Defendant to him and, also a breach of statutory duty on the part of the first named Defendant.

11. In its defence, the first named Defendant pleads that the Plaintiff was guilty of negligence and additionally or alternatively of contributory negligence in that he:-

> "(a) Failed to take any or any adequate care for his own safety.
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> (b) Caused or permitted the box of meat to fall on his foot.
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> (c) Failed to wear protective foot wear.
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> (d) Failed to pay any or any adequate attention to the task being performed.
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> (e) Failed to bring the skill, care and experience which could reasonably be expected of him to bear on his work."

12. At the hearing of this action, the claim of contributory negligence on the part of the Plaintiff was advanced on a single ground, that the Plaintiff had more experience in stacking these boxes in containers than Mr. O'Donoghue, so that, even though Mr. O'Donoghue was Assistant Operations Manager of the first named Defendant and, the Plaintiff a contract packer provided by the second named Defendant, the Plaintiff ought to have refused to continue with the work when Mr. O'Donoghue, for whatever reason, continued to build up the row of boxes without staggering the vertical spaces between the individual boxes. I find that the evidence did not support the contention that Mr. O'Donoghue had less experience in this work than the Plaintiff, so that he should be regarded as the helper and the Plaintiff found to be the person in charge of the operation. Mr. O'Donoghue's own evidence clearly demonstrated that he had ample knowledge and very considerable experience of stacking these boxes in containers. In cross examination Mr. O'Donoghue accepted that he would not expect the Plaintiff to challenge him on any aspect of the job. The Plaintiff protested that having pointed out to Mr. O'Donoghue the possible danger involved in stacking the boxes in the manner in which he was doing it, he could hardly be expected to leave the job and go across to the office and complain to Mr. Bannigan, the Operations Manager. I find that it would be wholly unreasonable to expect the Plaintiff to do this. His own supervisor from the second named Defendant, Mr. Denis Daly, did not come to the Plant until an hour or more after the incident had occurred.

13. I find, applying the principles stated by Ó Dálaigh C.J., in *Kennedy v. East Cork Foods* [1973] I.R. 244 at 249, that his continuing with the work in the circumstances did not, "enter into the realm of downright carelessness". In the Plenary Summons and in the Statement of Claim, the Plaintiff pleads his case both in negligence at common law and for breach of statutory duty pursuant to the provisions of the Safety, Health and Welfare at Work Act, 1989 and, in particular s. 6 and the Fifth Schedule of that Act. I find that the Plaintiff was not guilty of contributory negligence in relation to his claim based upon breach of statutory duty and is therefore entitled to succeed in full against the first named Defendant. It is unnecessary for the court in these circumstances to go on to consider the position in relation to his alternative claim based upon negligence at common law.

14. In the course of his cross examination of the Plaintiff, I find that Senior Counsel for the first named Defendant established the following facts:-

> "That the Plaintiff despite the incident had completed his days work on 18th March 1999 by driving a fork-lift truck and had worked at packing every day thereafter on which work was available to him at the Plant, - by its nature the work is not continuous, - up and including 30th April 1999.
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> On the evening of 30th April 1999, the Plaintiff was asked by Mr. Bannigan to do some extra packing. The Plaintiff refused and was very abusive to Mr. Bannigan. The following day Mr. Bannigan informed the Plaintiff's supervisor from the second named Defendant, - Mr. Denis Daly, - that the Plaintiff would not be allowed to work again at the first named Defendant's Plant.
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> The Plaintiff had not sought to be reconciled with Mr. Bannigan, was drawing unemployment assistance but was not receiving Disability Benefit, and there was no evidence of any attempts on the part of the Plaintiff to obtain alternative employment since 30th April 1999. The Plaintiff was aged forty one years of age on the date of the incident and his normal working life would be to age sixty or sixty five.
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> The first letter from his Solicitors making this claim on his behalf was dated 22nd January 2002, - just three days inside the Statutory time limit.
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> Apart from three visits to Dr. Michael O'Gorman, on 24th March 1999, 13th November 2001, and 4th December 2001, and his attendance at Monaghan General Hospital for x-rays on referral by Dr. O'Gorman, the Plaintiff had not attended any Physician or Surgeon in relation to the injury to his right foot, other than Mr. Michael A. Moloney, who examined him on behalf of the first named Defendant on 25th May 2002.
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> Other than a course of Difene 50 mg. anti-inflammatory capsules prescribed by Dr. O'Gorman on 24th March 1999, the Plaintiff was otherwise self medicated using ordinary non-prescription analgesics on occasions."

15. In cross examination, the Plaintiff told the court that he had, "battled on even though he was in awful pain", up to 30th April 1999. Mr. Bannigan was putting pressure on him to do more work and he was not able for it, because of pain and swelling in his right foot. His evidence was not at all clear that he had explained this to Mr Bannigan. Mr Bannigan told the court and I accept his

evidence, that he had only became aware of the Plaintiff's claim that he had hurt his foot on 18th March, 1999 when the Solicitor's letter of 22nd January 2002, was received by the first named Defendant. His recollection of the incident on 30th April 1999, was that he had asked the Plaintiff at about 5.00 pm in the evening to pallet some additional boxes. The Plaintiff responded that he had done enough for that day. Mr. Bannigan insisted that he carry out the work, at which point the Plaintiff became very agitated, had verbally abused him and had refused to do the work. Senior Counsel for the first named Defendant put it to the Plaintiff that it was the fact that he felt he was being pressurised by Mr. Bannigan which had led to this incident. The Plaintiff replied that it had been a very long day and his foot was terribly sore and he simply could do no more work. I find it impossible to accept, that if the Plaintiff had told Mr. Bannigan that a box had fallen on his foot earlier that afternoon and his foot was very sore and swollen, that Mr. Bannigan would have insisted that he continue to work. Even if not moved by humanitarian considerations, he would have had to be extremely conscious of the possibility of further injury to the Plaintiff or caused by the Plaintiff and the likelihood of consequent legal claims.

16. In a Medical Report, dated 1st June 2002, admitted into evidence, Mr. Michael A. Moloney, M.Ch., F.R.C.S., who examined the Plaintiff on behalf of the first named Defendant on 25th May 2002, makes the following observations:-

> "It proved a very difficult matter to extract reliable information from him", - (as to the Plaintiff's pervious medical history).
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> "He states that his Right Big Toe becomes swollen and sore when he walks on it or stands for a long time. He refuses to state how far he could walk, or whether he could run or not."

17. When this observation was put to the Plaintiff in cross examination he insisted that he had told Mr. Moloney that he could walk, but with some pain, a mile and a half to a local shop. As Mr. Moloney did not give evidence, I propose to give the benefit of the doubt on this matter to the Plaintiff, as I found it difficult at times during the course of the hearing to fully grasp on a single narration all that the Plaintiff was saying. Also, in his Medical Report dated 2nd December 2005, Dr. O'Gorman reports that the Plaintiff had told him that his right big toe continued to pain him when walking over one mile.

> "I attempted to find out whether he could stand on tiptoe, or squat, with his heels of the ground and he refused to co-operate in this."

18. When this was put to the Plaintiff in cross examination he insisted that he had done all that Mr. Moloney had asked of him. I am unable to accept this recollection of the Plaintiff. These were important physical tests, which the surgeon, very correctly wished to carry out in order to enable him to assess the extent and possible impact of the injury indicated by the x-ray plates. No issue can possibly arise here of Mr. Moloney perhaps not picking up all that the Plaintiff said to him, - however remote that might be. Senior Counsel for the first named Defendant put to the Plaintiff that he had refused to co-operate in this matter because he wished to disguise from Mr. Moloney the fact that he had made a full and complete recovery and there was no medical reason why he should not be back at work. The Plaintiff replied that he was not fit for work. Senior Counsel for the first named Defendant put to the Plaintiff that all the Medical Reports demonstrated that this was not so. The Plaintiff, however, insisted that he was not fit for work since the incident.

19. Senior Counsel for the first named Defendant, then very carefully read the provisions of s. 26 of the Civil Liability and Courts Act, 2004, to the Plaintiff. I then adjourned the court for some time to enable Senior Counsel for the Plaintiff to explain to him the meaning and effect of this section in plain ordinary terms. When the court resumed, Senior Counsel for the first named Defendant asked the Plaintiff if there was any evidence which he wished to change and the Plaintiff replied in the negative. Senior Counsel for the first named Defendant then asked the Plaintiff if he had made a full recovery and again the Plaintiff responded in the negative. Senior Counsel for the first named Defendant then put to the Plaintiff that he was fit to work and had in fact returned to work on 25th March 1999. The Plaintiff again stated that he was not fit for work.

20. Four Medical Reports were, by agreement of the parties, admitted into evidence: those from Dr. O'Gorman dated 6th March 2002, 3rd November 2005, and 2nd December 2005, and, one from Mr. Moloney dated 1st June 2002.

21. In his report dated 6th March 2002, Dr. O'Gorman reports that he first saw the Plaintiff on 24th March 1999, (six days after the incident). On examination on that occasion the Plaintiff's right foot was swollen and inflamed, - worse over the right big toe and metatarsal arch. He prescribed anti-inflammatory capsules, - Difene 50mg. An x-ray report of 30th March 1999, showed a fracture at the neck of the proximal phalanx of the right big toe. Dr. O'Gorman records that he next saw the Plaintiff on 13th November 2001, when he complained of swelling of the metatarsal phalangeal joint of the right big toe. He records that the Plaintiff had told him that he had intermittent pain and swelling since the incident. Dr. O'Gorman records that the Plaintiff was not seen by him in the interval. Senior Counsel for the first named Defendant put to the Plaintiff what Dr. O'Gorman records, but the Plaintiff insisted that he had told Dr. O'Gorman that he had constant pain in his right big toe area since 18th March 1999. As Dr. O'Gorman was the Plaintiff's own treating physician and his reports were proffered in evidence as the sole medical evidence on behalf of the Plaintiff, I must decline to accept this recollection of the Plaintiff.

22. Dr. O'Gorman in his Medical Report of 6th March 2002, goes on to record that he had sent the Plaintiff for further x-rays which showed that the fracture had healed in a good position. However a slight irregularity of the head of the proximal phalanx suggested the possibility of early arthritis. Uric acid levels were shown by blood tests to be at normal levels. Dr. O'Gorman reported that he had again seen the Plaintiff on 4th December 2001. The swelling of the Plaintiff's right big toe had cleared but there was very slight diminution in flexion of the interphalangeal joint of the right big toe. Dr. O'Gorman considered that the fracture had united in a good position and within the expected period of six to eight weeks. He felt at this time that there was a possibility that arthritic changes could progress resulting in stiffness and pain in the Plaintiff's right big toe.

23. In his Medical Report dated 3rd November 2005, Dr. O'Gorman noted that the Plaintiff complained of pain in his right big toe on walking long distances. No change was observed on clinical examination and Dr. O'Gorman's opinion was the same as of 6th March 2005. In his Medical Report dated 2nd December 2005, Dr. O'Gorman reports that the Plaintiff was still complaining of pain in his right big toe on walking long distances. Dr. O'Gorman then gives his opinion as follows:-

> "In my opinion this man suffered a fracture of the proximal phalanx of his right big toe as a result of his accident at work. The fracture united in good position, this usually takes six to eight weeks. X-ray in November 2001, suggests slight arthritic changes. However the recent x-ray on 1st November 2005, does not confirm this. He continues to date to have diminution of flexion of his right big toe. There is slight swelling of his metarso-phalangeal joint of his right big toe which, continues to cause him pain when walking over one mile. This type of swelling can occur following a crush type injury and can remain as a permanent feature and can cause pain after walking a long distance. The possibility to arthritic changes in this joint is very slight in the light of the recent x-ray."

24. The Plaintiff was seen on behalf of the first named Defendant by Mr. Michael A. Moloney, M.Ch., F.R.C.S., on 25th May 2002. Mr. Moloney states his findings on clinical examination and his opinion in the following terms:-

> "Examination:
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> 1. Movements of the Right Ankle and Right Sub Talar Joints were normal. Movements of the Right Big Toe were identical to those present in the case of the Left Foot.
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> 2. There was no evidence of the Hallux Valgus or of Calcaneal Spur. The Arterial Pulses in both Feet were normal and there was no evidence of Varicose Veins in his Legs.
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> 3. X-rays of Right Big Toe were carried out on 14th November 2001. I have seen theses films and the fracture of the Proximal Phalanx of the Right Hallux is solidly united by bone, in excellent position. There is no abnormality in the Interphalangeal Joint or Metatarso Phalangeal Joint of the Right Hallux.
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> 4. I attempted to find out whether he could stand on tiptoe or squat, with his Heels off the ground. He refused to co-operate in this.
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> Opinion:
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> I feel that this man has made a full recovery from the injury which he sustained on 18th March 1999. Permanent Disability is not expected to arise from the fracture of his Right Big Toe. I would regard it as reasonable to consider him to have been unfit for work for three – six months after the accident, but I can find no reason whatever why he should claim to be unfit for work for three years, due the accident concerned."

25. In the course of cross examination of the Plaintiff, Senior Counsel for the first named Defendant, on a number of occasions asked the Plaintiff to name the medical advisor or advisors who had advised him that he was not fit for work. The Plaintiff's reply, expressed in different ways, was that he could not work because of the pain and swelling in his right big toe area. At the request of Senior Counsel for the Plaintiff and with the agreement of Senior Counsel for the first named Defendant I examined the Plaintiff's feet. I noted that the Plaintiff's right big toe and the underside of his right foot in the area of the ball of the foot are considerably enlarged by comparison with the same areas of his left foot, but are not otherwise discoloured or deformed.

26. I am driven by the evidence to the conclusion that this Plaintiff is seriously exaggerating his injuries and that his evidence with regard to his inability to work and his suffering constant pain in the area of his right big toe is false in a material respect. I am satisfied on the evidence that the Plaintiff knows that this evidence is false. I must therefore ask myself whether to dismiss his action would result in an injustice being done.

27. No claim was made in the course of this action for damages for loss of earnings. I asked Senior Counsel for the Plaintiff if it was being contended that as a result of his injury the Plaintiff was disadvantaged in the labour market for general operatives. I was assured by Senior Counsel for the Plaintiff that no such claim was being advanced. In the Statement of Claim at para. 6 under the heading "Loss of Earnings (Estimated)" a sum of €2,000 is claimed as special damage. However Senior Counsel for the Plaintiff told the court at the start of the hearing that this claim was not being pursued.

28. On the medical evidence, on the balance of probabilities, I am prepared to accept that up to December 2002, the Plaintiff probably suffered pain in the area of the metatarso-phalangeal joint of his right big toe if he walked for more than one mile. Though the Plaintiff told the court that he had limited education, (Primary level and two years at a Vocational College but without obtaining any certificates), he did not strike me, observing him in giving evidence, as an intellectually challenged or naïve person. However, I do feel that despite his own physician's Report that the Plaintiff had told him that he suffered pain intermittently, the Plaintiff's response, each time he was asked about the matter, that he had constant pain, had a certain formulaic quality about it rather than appearing to be a consciously considered reply. Given the clear medical reports from Dr. O'Gorman, - in this context I do not consider it appropriate to have regard to the medical report from Mr. Moloney, - the court was not at any stage mislead by these replies. In these circumstances, I believe that it would be altogether disproportionate and therefore unjust to dismiss this Plaintiff's action, though I would have done so had he made a claim for loss of earnings or loss of ability to compete in the labour market.

29. As I am required to do by Law, I have had regard to p. 27 of the Personal Injuries Assessment Board Book of Quantum, where the suggested parameters for general damages for fractures of the big toe which have substantially recovered are given as €11,800 to €16,700. There can be no doubt but that the injury suffered by this Plaintiff must have been very painful at the time it occurred. On the medical evidence I accept that it must have been consistently painful for up to one year from the date of the incident but at a constantly diminishing level. Thereafter, I find that up to December 2005, the Plaintiff probably did suffer intermittent pain in the area of his right big toe if he walked for distances of over one mile. There was no evidence before the court as to how often he walked such distances but it must have happened on occasions. I find on the medical evidence, that there is no measurable risk of the Plaintiff developing osteo-arterthric changes in the metatarso-phalangeal joint of his right big toe. I find on the medical evidence also, that the loss of flexion in the Plaintiff's right big toe is minimal.

30. The court will therefore award this Plaintiff general damages for pain, suffering and inconvenience to date, in the sum of €12,500. On the evidence, I find that the Plaintiff will not suffer any significant pain or inconvenience in the future by reason of the injury sustained on 18th March 1999. I will hear the parties on the issue of costs.