Neutral Citation: [2017] IEHC 149

THE HIGH COURT

[2012 No. 12484 P.]

BETWEEN

MICHAEL DARDIS

PLAINTIFF

AND

SERGEJS POPLOVKA

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 1st day of March, 2017

Introduction

1. This action arises out of a road traffic accident which occurred on 21st October, 2009. The plaintiff's vehicle was stationary, when it received a high speed rear impact from the defendant's vehicle. The plaintiff's vehicle was written off as a result of the accident. Liability is not in issue.

2. The plaintiff is 44 years of age and is a qualified mechanical engineer. He alleges that he has suffered a very serious soft tissue injury to the muscles and ligaments throughout his spine. He complains of neck, mid-back and lower-back pain on a daily basis. He has received extensive physical therapy and physiotherapy treatment and has received a number of injections to his back from his G.P. More recently, in 2016, he was given nerve block injections by a pain specialist. The plaintiff did not call this doctor to give evidence. Instead, he called another pain specialist, who had seen him for the first time on 17th January, 2017, the day before the case started. He is of opinion that the plaintiff is suffering from myofascial pain syndrome and will never be fit for heavy manual work again.

3. At the time of the accident, the plaintiff ran his own one-man construction company, which had been set up in February, 2008. The plaintiff alleges, that as a result of the injuries sustained in the accident, he has been rendered totally unfit for any work since that time, with the exception of the period from September, 2010 to February, 2011 when he worked on the family farm minding cattle. He is claiming the sum of €141,763 for past loss of earnings.

4. The plaintiff further alleges that he will never be fit for any form of gainful employment in the future. He claims the sum of €478,279 for future loss of earnings. There are also sundry medical expenses of €4668.52.

5. The essence of the defendant's case is that, it is accepted that the plaintiff suffered a soft tissue injury to his neck and back in the accident. The defendant maintains that this was not a particularly severe soft tissue injury and that it had cleared up within eighteen to twenty-four months from the time of the accident. Any remaining aches and pains that he may have had after that time, down to the present, were due to age related degenerative changes in his back, rather than any injury sustained in the accident.

6. The defendant denies the sums claimed by the plaintiff by way of special damages. In particular, the defendant does not accept that the plaintiff has been rendered unfit for all forms of employment since the accident. They deny that he is so disabled at present, or will be so disabled into the future. Accordingly, they deny the loss of earnings claim in its entirety.

7. Given the extent of the conflict between the parties in relation to both the injuries suffered by the plaintiff and the very large loss of earnings claim put forward on his behalf, it is necessary to set out in some detail the history of the injury sustained by the plaintiff and the treatment furnished to him from the time of the accident down to the present.

The Accident, the Injuries and Treatment in the first two years

8. On 21st October, 2009, the plaintiff's vehicle was stationary on the highway at Kilmoona Cross, Navan, Co. Meath, waiting to make a right hand turn, when it was struck on the rear by the defendant's vehicle. The plaintiff was in the driver's seat and was wearing a seat belt. His car was damaged to such an extent that it was written off after the accident.

9. The gardaí were called to the scene of the accident. They took the usual details from the plaintiff and the defendant. The plaintiff was then driven home by his brother. He did not attend any hospital on the day of the accident.

10. On the following day, the plaintiff attended with his G.P., Dr. Sean McGrath, who had been his G.P. since in or about 2005. Dr. McGrath stated that the plaintiff never had any prior issues with his neck or lower back. When the plaintiff attended at his surgery, he complained of neck and lower back pain and pain in his right shoulder and right wrist. He had a bruise on his forehead where his head had struck against the windscreen. Dr. McGrath prescribed a course of non-steroidal anti-inflammatory drugs and arranged for the plaintiff to have an MRI scan. He advised the plaintiff to rest for seven to ten days and also advised that he should have physiotherapy treatment.

11. An MRI scan was taken on 24th October, 2009, of the plaintiff's cervical, thoracic and lumbar spine. Unfortunately, the images were somewhat degraded by virtue of the fact that the plaintiff moved during the scan. However, it was possible for the radiologist to furnish a report thereon. The scans confirmed that there was no fracture identified. There were degenerative changes seen in the inferior cervical intervertebral discs. There were degenerative changes and posterior disc bulging in several mid and upper thoracic intervertebral discs. There were degenerative changes and Schmorl's nodes throughout the lumbar intervertebral discs. Spinal alignment was normal. The neural exit foramina were patent at all levels. The spinal cord was normal in its entirety.

12. The plaintiff stated that after the accident, he experienced severe pain in his neck and back. At that time, he was engaged in the construction of a house for a client. The house had reached almost 75/80% completion at the time of the accident. The plaintiff stated that in the days after the accident, he took anti-inflammatory medication and stayed at home doing paperwork for approximately two weeks. He stated that he was unable to do any heavy work after the accident. He had to engage subcontractors to complete construction of the house. He supervised this work and the house was completed in December, 2009 with some extras being carried out in January, 2010.

13. On 19th November, 2009, the plaintiff returned to his G.P., due to the fact that while working up a ladder, he experienced a sharp pain in his mid and lower back. Dr. McCarthy gave the plaintiff an injection into his back to relieve the pain and advised that he should rest. Dr. McCarthy carried out an examination on that occasion. He found a reduced range of movement in the plaintiff's neck in all

planes. There was moderate tenderness to deep palpation. There was no neurological deficit affecting the upper limbs. The thoracic spine was normal in appearance. There was a reduced range of movement in flexion by 30 degrees. There was moderate tenderness to deep palpation. There were no neurological deficits affecting the relevant dermatomes. His lumbar spine was normal in appearance. There was a significantly reduced range of movement in all planes. There was severe tenderness to deep palpation. There were positive neurological deficits affecting the lower limbs, the right more so than the left. Straight leg raise test was reduced at 60 degrees. Examination of the plaintiff's knees and right hand and wrist, were all normal.

14. Dr. McGrath noted that the plaintiff had had six sessions of physical therapy and had been on a six week course of anti-inflammatories. He was of the opinion that the plaintiff's capacity for lifting and carrying, for bending, kneeling or squatting, for sitting, standing and climbing stairs, were all severely adversely affected. He noted that recovery had been very slow and painful, despite aggressive physiotherapy and chiropractic treatments and daily use of anti-inflammatory medication. He noted that the plaintiff had daily sciatic pain radiating predominantly to the right buttock and lower limb. He had low mood and depression. He experienced neck and shoulder pain and stiffness. He had referred pain to the dermatomes affected by the bulging of degenerated discs as seen from the MRI report.

15. Dr. McCarthy noted that the plaintiff worked in a job that required excellent strength and flexibility. His work capacity had been significantly reduced by his injury. He was aggressively following the treatment protocols set down by the G.P. and his physical therapist. Even still, his recovery had been slow and prolonged. He was unable to pursue his sporting hobbies, such as long distance running and gym work. He noted that the plaintiff was a keen amateur sportsman.

16. Dr. McCarthy was of the opinion that the MRI scans had shown much bulging of the spinal discs, that were causing pain and stiffness at several levels. He was of opinion that it would take eighteen to 24 months for the injuries to the discs, to settle to a satisfactory level to allow full resumption of all working and sporting activities. He intended to send the plaintiff for an updated MRI scan in March, 2010 for the purposes of monitoring his recovery.

17. Dr. McCarthy stated in evidence that at that time, some two months post-accident, the plaintiff remained quite symptomatic and disabled. He stated that prior to the accident the plaintiff's back had been asymptomatic. He had been able to walk or run the Camino with his wife in the year prior to the accident.

18. From the G.P. records which were made available to the Court, it appears that the plaintiff was seen by his G.P. on three occasions in 2009. During this time, he had six sessions of physical therapy.

19. In March, 2010 the plaintiff attended with his G.P. complaining of severe low back pain. Dr. McCarthy administered an injection and prescribed further medication. The plaintiff next attended with Dr. McCarthy on 13th May, 2010, some six months post-accident. Dr. McCarthy noted that the plaintiff had multiple soft tissue injuries to the neck and lower back, together with pain and tenderness in the chest and right shoulder. He also experienced headaches. Examination of the cervical spine again revealed a reduced range of movement in all planes. There was moderate tenderness to deep palpation. There was no neurological deficit affecting the upper limbs. The thoracic spine was normal in appearance. There was a reduced range of movement in flexion by 30 degrees. There was moderate tenderness to deep palpation. There were no neurological deficits affecting the relevant dermatomes. Examination of the lumbar spine revealed a significantly reduced range of movement in all planes. There was severe tenderness to deep palpation. There were positive neurological deficits affecting the lower limbs, the right more so than the left. Straight leg raise test was reduced at sixty degrees.

20. Dr. McCarthy noted that the plaintiff was making a very slow and painful recovery, despite aggressive physiotherapy and chiropractic treatments and daily use of anti-inflammatory medication. He complained of daily sciatic pain radiating predominantly to the right buttock and lower limb. He had low mood and depression. He had neck and shoulder pain and stiffness. He had referred pain to the dermatomes affected by the bulging of degenerated discs in his spine.

21. In his second medical report, Dr. McCarthy again noted that the plaintiff worked in a job that required excellent physical strength and flexibility. This had been significantly reduced by the injury. He was aggressively following the treatment protocols set down by him and his physical therapist. Even still, his recovery was slow and prolonged. He was unable to pursue his sporting hobbies, as before.

22. Dr. McCarthy referred the plaintiff for a second MRI scan which was carried out on 15th May, 2010. It revealed that there was a grade one spondylolisthesis at the L5-S1 disc level. There was bilateral spondylolysis. There was a right postero lateral disc bulge at this level, with narrowing of the right exit foramen. No thecal displacement was shown.

23. At L4-5 there was a mild right postero lateral disc bulge, with narrowing of the right lateral recesses. There was no root or thecal displacement and the exit foramina were adequate in size. At L3-4 there was a small central disc protrusion, with some thecal displacement, but no root displacement. The lateral recesses and exit foramina were normal. The L2-3 and higher disc levels were normal. There was a normal conus.

24. In light of the MRI findings on the second scan, he was of opinion that it was unlikely that the plaintiff's level of fitness would ever return to what it was pre-accident. Unless the plaintiff's pain and lower back discomfort settled to a bearable level, he would have to refer the plaintiff to an orthopaedic surgeon with a view to surgical intervention, or invasive pain management with epidural or nerve block injections. At the examination in May, 2010 Dr. McCarthy administered a further injection to the plaintiff's back and prescribed further medication. In his second medical report, Dr. McCarthy noted that the plaintiff had had eight visits to his surgery since the time of the accident. The plaintiff had also had a total of twelve sessions of physical therapy in the first six-month period post-accident.

25. It would appear that following the completion of the house construction job in January, 2010 the plaintiff did not engage in any further construction work, nor did he engage in any other paid employment. However, in August, 2010 the plaintiff's father died. In September, 2010 he commenced working two days per week on the family farm, for which he was paid €250 per week. He stated that this was not strenuous work and only involved counting the cattle, which were out in the fields. However, the plaintiff stated that the work became considerably more arduous, when the cattle were brought in for the winter months towards the end of November, 2010.

26. During 2010, it appears that the plaintiff only had one prescription for medication in the sum of €67.66 issued by a Dr. Cork on 28th March, 2010. He had eleven sessions of physical therapy during that year.

27. In the period April, 2010 to March, 2011 the plaintiff received Job Seeker's Allowance in the sum of €9,651. It was put to the plaintiff in cross-examination that he had been claiming this benefit at a time when he had also been in receipt of earnings from his

work on the farm. The plaintiff stated that he had informed the Social Welfare Authorities that he was working two days per week on the farm. He stated that he got approximately €100 per week from Social Welfare and €250 per week from his mother in respect of the work done on the farm. It was put to the plaintiff that in order to obtain such benefit by way of Social Welfare, he had to satisfy the criteria that he was capable of working and was actively seeking employment. The plaintiff stated that at that time, he thought that he would be fit for work in a number of months. He stated that he only received Job Seeker's Allowance until March, 2011.

28. In February, 2011 the plaintiff stopped working on the family farm. He stated that when the cattle had been brought indoors at the end of November, 2010 he found the work extremely difficult. He stated that there was a lot of extra work in looking after the cattle in the sheds and he also had great difficulty getting in and out of the tractor. He stated that this caused an increase in his neck and back pain and as a result, he informed his brother that he would not be able to continue working on the farm. This represents the last time on which the plaintiff was engaged in paid employment after the accident.

29. Also in February, 2011 the plaintiff closed his current account. Thereafter, all the family outgoings were paid out of his wife's account. The plaintiff stated that as she was earning a steady income as a PE teacher in a secondary school, and as he was not earning any money, it made sense to have all the family outgoings coming out of a single account.

30. For a number of years, the plaintiff had developed an interest in online share trading. In March/April, 2011 he looked into the possibility of setting up in business, coaching people in relation to trading and investment in various financial markets. He stated that in May, 2011 he made contact with a person who gave such training in the United States, but on learning that he would have to sit in front of a computer for eight/ten hours per day, he realised that due to his back condition, he would not be able for such activity. Accordingly, he abandoned the project and never set up as a coach in relation to online share trading.

31. On 31st May, 2011, a curious thing happened. A claim was submitted to the Personal Injuries Assessment Board (PIAB) in respect of the injuries suffered by the plaintiff. The curious thing is that this form was not signed by the plaintiff, but was signed by a firm of solicitors, Messrs. Hussey Fraser, who were purporting to sign on behalf of the plaintiff as their client. In the claim form, it was not indicated whether the plaintiff was claiming any loss of earnings since the accident. The section dealing with loss of earnings, was left blank, save for the insertion of the plaintiff's PPS number. The curious thing about the submission of this claim form, arises out of the fact that the plaintiff absolutely denied that Messrs. Hussey Fraser ever acted for him in relation to his personal injury claim. He stated that that firm of solicitors had been retained by his insurance company, to pursue the defendant's insurance company in respect of the loss of his vehicle, which had been paid out to the plaintiff under his contract of insurance. It was the plaintiff's firm evidence, that Messrs. Hussey Fraser had only ever acted for him in relation to the car damage claim, which was pursued by his insurers.

32. It would appear that that firm of solicitors had in fact taken some significant steps in relation to the plaintiff's personal injury claim. The plaintiff's G.P. issued three reports in total, the first of which was dated 22nd November, 2009, and was addressed to Messrs. Hussey Fraser. His second report dated 11th July, 2010, was issued to the plaintiff's current solicitors, Tom Casey, Solicitors. His third report dated 19th November, 2011, was also issued to Messrs. Hussey Fraser. In the following year, 2012, the plaintiff was seen by two consultants, Professor Thakore and Mr. Hemant Thakore and both of their medical reports were issued at the request of Messrs. Hussey Fraser.

33. It appears that in June and July, 2012 Messrs. Hussey Fraser wrote to the plaintiff. Following upon receipt of this correspondence, the plaintiff attended with Mr. Tom Casey and informed him that he had never given instructions to Messrs. Hussey Fraser to act on his behalf in relation to the personal injury claim. There followed an amount of correspondence passing between the solicitors in relation to whether or not Messrs. Hussey Fraser had ever been instructed to act on behalf of the plaintiff in relation to his personal injury claim. It is not necessary to go into the content of that correspondence, save to note to that it did not result in any amicable resolution of the situation. Indeed, on 7th September, 2012, the plaintiff issued a special summons against his former solicitor seeking production of their file in relation to his personal injury claim. Those proceedings were ultimately settled between the parties, with an agreement being reached that the plaintiff would discharge agreed fees owing to Messrs. Hussey Fraser, when his case concluded. While this dispute between the plaintiff and his former solicitors is not directly relevant to the injuries sustained by him, it is an oddity in the case and is relevant to a point made later in this judgment concerning the practice of solicitors directly engaging consultants on behalf of a plaintiff.

34. To return to the narrative concerning the plaintiff's injuries, he was examined again by his G.P. on 15th November, 2011, approximately two years' post-accident. Dr. McGrath's report stated that the plaintiff had consulted with him on eleven occasions. However, his notes only record eight visits in relation to the injuries. The plaintiff had had 25 sessions of physical therapy, which was on going. His complaints at that time were noted as being: pain when lifting, standing or prolonged driving, which would cause acute or chronic mid and low back pain and stiffness. He had low mood and depression due to chronic pain and limitation of physical activities.

35. Examination of his neck on that occasion revealed a reduced range of movement in all planes. There was moderate tenderness to deep palpation. His neck was normal in appearance and there was no neurological deficit affecting the upper limbs. Examination of the thoracic spine revealed that it was normal in appearance. There was a reduced range of movement in flexion by fifteen degrees. There was moderate tenderness to deep palpation. There was no neurological deficit affecting the relevant dermatomes. The lumbar spine was normal in appearance. There was a significantly reduced range of movement in all planes. There was severe tenderness to deep palpation. There were positive neurological deficits affecting the lower limbs, the right more so than the left. Straight leg raising was reduced at 60 degrees. Arising from the examination, Dr. McGrath's impression was that the neck and thoracic spine were healing from a soft tissue injury. The lumbar spine and coccyx were suffering with discogenic pain.

36. Dr. McGrath noted that the plaintiff's injuries were healing slowly, but were aggravated by movements such as lifting and prolonged sitting. He again noted that the plaintiff had worked in a job that required excellent physical strength and flexibility. He noted that the plaintiff was also a part-time farmer. These activities had been significantly reduced by his injury. He was aggressively following the treatment protocols set down by him and by his physical therapist. Even still, his recovery was slow and prolonged.

37. In the conclusion to his report, Dr. McGrath noted that on examination on 15th November, 2011, the plaintiff was still symptomatic, especially when engaging in sporting activities, lifting and prolonged sitting. These actions were all part of his work and recreational life. He also worked as a part-time farmer. He noted that the plaintiff was still attending for regular physical therapy and this seemed to be strengthening secondary muscle groups that were relieving the injured soft tissues. On this basis, the plaintiff was happy to continue with conservative physical therapy and to postpone orthopaedic surgery until a date far in the future.

38. In evidence, Dr. McGrath stated that he was disappointed that the plaintiff had not made further improvement. It was hoped that by increasing the muscle strength in the plaintiff's back, this could relieve the spinal pain. The plaintiff was doing exercises daily and

was well motivated towards his recovery. His work as a builder and farmer, would involve lifting and dragging heavy objects, which would have an adverse effect on his injuries. Accordingly, Dr. McGrath advised him to desist from these activities and to rest. At that time the plaintiff was happy to pursue conservative treatment in the form of physical therapy, rather than go down the surgery route.

39. It appears that either in 2010 or 2011, the plaintiff came under the care of Mr. Shariff, Consultant Orthopaedic Surgeon, on a referral from his physical therapist. The plaintiff's G.P., thought that the referral had been made by the physical therapist and he confirmed that he did not receive any correspondence from Mr. Shariff. In the plaintiff's statement of special damages, there was a claim for €150 payable to Mr. Shariff. When asked about his attendance with this doctor, the plaintiff stated that the name rang a bell with him, but he could not say who had referred him to Mr. Shariff. This doctor was not called as a witness, nor was any report from him furnished in evidence.

40. On 3rd December, 2011, the plaintiff was seen by Mr. J.K. Nasser, Consultant Orthopaedic Surgeon, who had been retained by PIAB to furnish a report. By agreement, this report was submitted in evidence. He noted that the plaintiff had missed seven days from work as a result of the accident. He had visited his G.P. on five occasions and had had 36 sessions of physical therapy.

41. Mr. Nasser noted that the plaintiff complained of neck pain, which radiated into the left shoulder blade. It could also radiate between the shoulder blades and to the upper thoracic spine. His neck symptoms were mostly intermittent and bearable. These symptoms could get worse if he did any farming work, including driving a tractor. He noted that the neck symptoms usually occurred about once a month and responded to medication in the form of Arcoxia tablets. There were no upper limb radicular symptoms. He was able to sleep well at night. He attended physical therapy once a week. The plaintiff told him that overall his neck symptoms had improved by more than 50% since the accident.

42. The plaintiff told him that his thoracic symptoms were located behind the shoulder blades. This bothered him most when sitting, turning and lying in bed. He had had deep massage physiotherapy and a home exercise programme, which along with gym work had helped his thoracic symptoms. The plaintiff also complained of low back symptoms, which radiated down to the right buttock region. It was a deep pain in his right buttock. It also radiated to the right thigh. The plaintiff stated that he would experience thigh pain four to five times a day. It lasted for about 20 seconds. Sitting or standing for long could make his low back symptoms worse. His thigh symptoms did not radiate below knee level. His lower back also bothered him when stooping and lifting. His walking capacity was about a mile. Subjectively he felt that he had seen very little improvement in his lower back symptoms, indeed he felt that his lower back symptoms had got worse.

43. Clinical examination of the plaintiff's neck revealed that flexion was 35 degrees and extension was 35 degrees, which were noted as being full range. Rotation to the right and left was 70 degrees, also full range. Lateral flexion to the right and left was 30 degrees, also full range. He had full range of motion of both shoulder joints. He had no localising neurological signs in his upper limbs. The plaintiff indicated that his thoracic pain was around the T 3/4 and T 4/5 levels. There was no scapular pain. He had full rotation of his thoracic spine to the right and left.

44. In relation to the lumbar spine, the plaintiff pointed to pain over the right ischial tuberosity. There was no obvious sciatic list. There was no lumbar paravertebral muscle spasm seen. Forward flexion was to the shins. Lateral flexion was to the knees and was 70% bilaterally. Straight leg raising was 90 degrees on the right and on the left. Knee and ankle reflexes were present bilaterally. Power in the L5/S1 segment was 5/5. There was no sacroiliac joint tenderness on stress. He walked without a limp. There were no localising neurological signs in his lower limbs.

45. Mr. Nasser was of opinion that the plaintiff had a mild limitation of activity in the areas of reaching, lifting/carrying, bending/kneeling/squatting, sitting, standing and climbing stairs.

46. He was of the view that the plaintiff had suffered a mild to moderate whiplash injury to his cervical spine. This was in keeping with a soft tissue injury. His neck symptoms had responded to pain killers and physiotherapy. He was more than 50% subjectively improved in relation to his neck symptoms at the time of that examination. Clinical examination revealed good functional arrange of motion in his cervical spine. There was some left trapezius muscle spasm. There was no upper limb localising neurological signs. His thoracic spine was tender around T 3/4 and T 4/5 levels. He had good functional range of motion of his thoracic and lumbar spine. He was locally tender over the right ischial tuberosity. He was having some degree of ischial bursitis. He noted that this was a difficult condition to treat. It tended to respond to deep massage and would usually take twelve to eighteen months to resolve.

47. In terms of a prognosis and future treatment, Mr. Nasser advised that the plaintiff needed to continue with his home exercise programme. He would also benefit from application of a local gel to his cervical spine, thoracic spine and lumbar sacral area. He thought that the plaintiff's spinal symptoms should resolve over the following twelve months and eventually resolve fully. The prognosis in relation to his neck, upper and lower back, remained positive.

48. From the particulars of fees paid for physical therapy in 2011, it would appear that he had six sessions of physical therapy during that year. It does not appear that any prescriptions for pain killers were issued during 2011. However, in this regard, both the plaintiff and his G.P., thought that the claim for prescriptions in the total sum of €260.94, were probably underestimated. The Court has difficulty with this, due to the fact that it would appear that receipts for various prescriptions were furnished in respect of the period 2009 to October, 2012. If it was the case that the plaintiff had mislaid some prescriptions, given the length of time since the accident, this would be understandable. However, in the absence of any explanation from the plaintiff, it is not logical that he would have all the earlier prescriptions i.e. those from the date of the accident until October, 2012 but would have no prescriptions after that date. If he was likely to lose some of the prescriptions, one would have thought that these might have been the earlier ones, rather than any prescriptions given later in time. The plaintiff did not have any evidence as to what may have happened to any prescriptions that were issued after October, 2012. He merely stated that he thought that the global claim was somewhat understated. In the absence of any explanation for the failure to have any prescriptions after 2012, the Court does not accept that there were any meaningful sums expended on prescription medication after that date.

49. A further factor worth noting at this stage, is that in the course of cross examination, counsel for the defendant put it to a number of witnesses that even within the sum claimed of €260.94, only approximately €100 worth of prescriptions related to pain relieving medication and that the balance related to medication which was prescribed to the plaintiff for other complaints, including a course of medication dealing with a fungal growth in his toenails. While this does not appear to have been put to the plaintiff himself, it was certainly put to other witnesses who testified on his behalf. No objection was taken to that assertion, nor was it corrected by way of re-examination. However, as the prescriptions themselves were not put in evidence, I do not propose to make any adverse finding against the plaintiff in relation to the number of prescriptions which actually related to medication for his symptoms arising out of the injuries sustained in the accident. However, I do find that there were no prescriptions for pain relieving medication after October, 2012.

The Period 2012 to 2017

50. On 18th January, 2012, the plaintiff was examined by Prof. Jogin Thakore, Consultant Psychiatrist. It appears that this examination was carried out on a referral from the plaintiff's former solicitors. By agreement, his medical report was admitted in evidence. The plaintiff told Prof. Thakore that he tended to ruminate about the accident, although not frequently. In addition, he had flashbacks to the accident. When driving he was very vigilant and anxious. The doctor noted that the plaintiff had not disclosed these symptoms to his G.P.

51. Prof. Thakore was of the opinion that the plaintiff had symptoms of an adjustment disorder. Since the accident, he was anxious when driving, particularly when stationary or when turning right. He was also hyper vigilant when driving. He had some flashbacks and rumination about the accident. As the symptoms had lasted more than six months, they were deemed chronic.

52. Prof. Thakore was of the opinion that the plaintiff fulfilled the criteria for an adjustment disorder, which was chronic and associated with anxiety symptoms. The most likely reason for his adjustment disorder was the fact that he was involved the road traffic accident. He recommended that the plaintiff should attend for counselling. He thought that the plaintiff would require six to twelve sessions of counselling. He felt that there was a good prognosis in respect of recovery from the adjustment disorder.

53. In his evidence, the plaintiff stated that he did not recall who had referred him to the psychiatrist. He did not know why he had been referred to this doctor, as he did not have any mental difficulties at the time. He did not have any counselling after that examination.

54. On 6th February, 2012, the plaintiff was seen for the first time by Mr. Hemant Thakore, consultant orthopaedic surgeon. It would appear from the medical report that it was prepared at the request of Messrs. Hussey Fraser. Mr. Thakore noted that after the accident, the plaintiff's G.P. had prescribed appropriate medication and had given him sick leave for seven days. He noted that the plaintiff was a self-employed construction engineer. He returned to the office after the accident and engaged subcontractors to complete the building work. He mainly did supervisory work, as he was not able to do any psychical work and only managed to work for two days per week. Mr. Thakore noted that the plaintiff had had two MRI scans on 24th October, 2009, and 15th June, 2010. He recommended that having regard to the fact that the two MRI scans had been taken with a gap of just a few months and as there were changes seen in the follow up scan of June, 2010 he recommended that it would be prudent that the two scans be reviewed by an independent radiologist for a second opinion. He recommended Dr. McInerney at the Charlemont Clinic. However, this was not done.

55. In terms of work, Mr. Thakore stated that the plaintiff was then working on a farm which was his full time job. His original job was available if he could return to work, but because he was not able to work, he was working one day per week. The plaintiff stated that this was an error in the medical report, as he was not working on the farm in February, 2012.

56. At the examination, the plaintiff complained of intermittent neck pain, on both sides of his neck every two to three weeks. He stated that in between the episodes of pain, he had no difficulty with the neck. The pain radiated into the upper arms to the elbow level, but he had no parathesia in the upper limbs. He complained of a constant ache and stiffness in his mid-back. There was no root pain around the ribs and the symptoms related to levels of inactivity. Regarding his lower back, he complained of stiffness at a constant level, mainly on the right, going to knee level. He was able to negotiate stairs, inclines and rough ground. He could kneel and squat but had to be careful. He had difficulty in lifting and carrying. Twisting and turning also caused pain. Impulse test was negative for any nerve root pain going down the legs. His sleep was still broken because of pain going into the right leg manifesting itself as a tingle. In the morning, he was usually stiff and sore. He confirmed to the doctor that he was not able to work more than one day per week, although he had a full time job available. He said that even if construction work came his way, he would not be able to do any physical work and that was why he had switched to farm work and that too, he could only do on a part time basis.

57. Examination of the neck revealed a full range of movements with some discomfort at the end range in the base of the neck. Movements of the shoulders were satisfactory. There was no focal deficit in the upper limbs. Examination of the dorsal spine, revealed no midline tenderness. Curvature was maintained. The site of pain was in the interscapular muscles. There was muscle tenderness, but no muscle spasm. He was tender over the D4/5 area. There was no loss of alignment. Examination of the lumbar spine indicated the site of pain as being in the lumbosacral junction. Curvature was maintained. The doctor noted there was probably a step felt in the lumbosacral area. Forward flexion was to upper tibial level with pain in the back. Extension was 75% with pain in the back. Lateral flexion and rotation were half the normal range with pain. Straight leg raising test was equal at 70 degrees with pain in the back. There was no focal deficit in the lower limbs.

58. Mr. Thakore was of opinion that the grade 1 spondylisthesis at L5/S1 and the bilateral spondylosis, were probably pre-existing congenital conditions. The degenerative changes and the lateral bulges seen on the MRI scan of the lumbar spine, were probably pre-existing at the time of the accident. However, they were asymptomatic at that time. Thus, the plaintiff had a pre-existing subnormal back, which was not causing problems at the time. The degenerative changes being of insidious and slow progression, would have probably remained asymptomatic until his late 40s. Mr. Thakore was of opinion that at that stage, the degenerative changes would probably have caused some symptoms of low grade pain, but the plaintiff would have been able to go through life without significant problems. The injury had probably activated these changes, which would revert to base level approximately one year to eighteen months from the injury, but would probably leave the injured areas vulnerable. The injuries had not caused the degenerative changes, but had made his back vulnerable and prone to recurrences of pain on levels of activity, levels of inactivity, adverse weather conditions and stress.

59. At that stage, Mr. Thakore recommended that the plaintiff have an x-ray of his lumbar spine in AP, lateral and oblique views and also flexion and extension views. He also recommended that the plaintiff have isokinetic evaluation. There was no indication for surgery or pain management at that time. He thought that the plaintiff required isokinetic evaluation followed by an appropriate treatment regime which would help strengthen the muscles in his back. This programme would last for approximately four to six months. Mr. Thakore also recommended that the plaintiff should receive treatment from a chartered physiotherapist.

60. In evidence, the plaintiff confirmed that he had not had the MRI scans reviewed by a radiologist, nor had he undergone the x-rays as recommend by Mr. Thakore, nor had he had any isokinetic evaluation of the muscles in his back. However, he had physiotherapy treatment at the Sports Med Clinic in Dublin. He had been given an aggressive rehabilitation programme. From the claim for physiotherapy fees, it would appear that he had four sessions of physiotherapy in 2012. The plaintiff stated that the rehabilitation programme involved doing extensive exercises in the gym for approximately one hour and ten minutes every second day. This involved stretching, lunging and after a time, the introduction of weights.

61. From the claim submitted, it would appear the plaintiff was issued with five prescriptions for medication during 2012, the last one being on 20th October, 2012. There are no further prescriptions after that date for prescribed medication. It would appear that the

plaintiff did not engage in any form of paid employment during 2012. In evidence, Dr. McGrath stated when the plaintiff attended with him in November, 2012 in relation to other medical matters, he had a recollection that he gave the plaintiff a prescription for medication on that occasion.

62. The records furnished by Dr. McCarthy, show that the plaintiff attended with him on four occasions in 2012 in relation to his ongoing complaints. However, he did not receive treatment on all of these visits. On 16th February, 2012, Dr. McCarthy merely noted that the plaintiff had attended Mr. Thakore for assessment and treatment of chronic symptoms. The next entry was in May, 2012 which noted that the plaintiff had attended a physiotherapy clinic called Sport Med in Kildare Street, Dublin and had had six sessions of physiotherapy treatment under the advice of Mr. Thakore. From the entry dated 17th September, 2012, it appeared that the plaintiff attended at the surgery complaining of left sided pleuritic chest pains. He was referred initially to Navan hospital, were a diagnosis was made of pericarditis, which is an inflammation of tissues around the heart. When the plaintiff's symptoms continued, he was referred by his G.P. to Professor Gavin Blake at the Mater Hospital. He carried out a number of tests and came to the conclusion that the plaintiff did not in fact have any infection of the tissue surrounding his heart. The plaintiff stated that he was reassured by Professor Blake that he had "the heart of a 30-year-old". On 4th October, 2012, the plaintiff attended at the surgery complaining of chest pains and the G.P. referred him for a chest x-ray. The plaintiff also had a number of unrelated attendances with his G.P. for other matters.

63. It does not appear that the plaintiff engaged in any work in 2013. However, in April, 2013 he commenced training to become a physical therapist. This involved attending for lectures and practical work on one weekend per month in the period April, 2013 to June, 2014. The plaintiff stated he paid the course fee of €3,700 from his wife's account. He stated that he took up this course for two reasons; firstly, to provide a source of income for him and his wife and secondly, to learn more about the nature of his injuries.

64. On 26th August, 2013, the plaintiff attended with his G.P. complaining of severe thoracic and lumbar pain, which was present on a daily basis. The doctor referred the plaintiff for a third MRI scan which was carried out on 29th August, 2013. Dr. McCarthy stated that this scan showed the plaintiff's back condition had deteriorated significantly since the previous scans. The discs now had annular tears in them and were deteriorating. The L5 disc was now pressing on the nerve root. The previous scans had shown the spinal cord to be normal, whereas now there was pressure on the spinal cord at L5 level. Dr. McCarthy was of the opinion that the plaintiff's condition was getting worse and had now moved from a moderate to severe injury. He did not recommend any further intervention, as he assumed that the plaintiff was being treated by the consultant, Mr. Thakore.

65. From the claim for special damages, it would appear the plaintiff had ten sessions of physiotherapy treatment during 2013. There were no prescriptions issued during this year.

66. From the claim for physiotherapist expenses, it would appear the plaintiff had two sessions of physiotherapy treatment during 2014. It would appear that the last such treatment was given on 25th April, 2014. There does not appear to have been any further physiotherapy treatment after that date. In total, the plaintiff had had approximately 39 sessions of physical therapy/physiotherapy since the accident. The total sum expended was €1,775

67. In June, 2014 the plaintiff obtained his qualification as a physical therapist. He stated that he purchased a treatment bed, some towels and some oils. He set up in practice in the front room of his house. At first, he treated people who were known to him, or others who had heard that he had obtained the qualification. He estimated that during the months of July and August 2014, he treated approximately one patient per day. He did not charge any fees, as he was trying to get his practice up and running. He stated that some of the ladies who came to him for treatment, would bring cakes in lieu of fees.

68. The plaintiff stated he had been told by a physical therapist at his local gym, that he had had to provide services free of charge to a soccer club in order to get his practice launched. With this in mind, the plaintiff agreed with Wolf Tones GAA Club that he would provide pitch side treatment for the senior team. He was paid approximately €55 per match. In total, he received, €175 from the club.

69. However, in October, 2014 while attending to an injured player on the pitch, he experienced a severe pain in his chest, which he thought was coming from his left arm. The plaintiff felt that as a result of that incident, he could no longer continue in practice as a physical therapist. He gave up the practice at that stage. It appears that the plaintiff did not consult his G.P. or any other doctor, before giving up his practice as a physical therapist.

70. From the G.P. records, it would appear that the plaintiff did not see Dr. McCarthy during 2014. However, in evidence, Dr. McCarthy said that he thought that the plaintiff had attended him twice in 2014 for painkillers. This is not reflected in his records, nor have any prescriptions been furnished in respect of 2014.

71. In 2015, the plaintiff did not engage in paid employment. However, in July, 2015 he did undertake the job of painting and cleaning the interior of a house owned by his brother. The plaintiff stated he owed his brother some money and that in lieu of repaying the money, he agreed to look after the painting and cleaning of the house. The plaintiff stated that he engaged a local man to assist with the painting and in particular, to paint the upper parts of the walls and the ceilings. He paid the man €80 per day, which was discharged by his brother. His brother also paid for the paint.

72. The plaintiff stated that within a few days of starting this work, he got severe pain in his neck, which radiated into his jaw and the side of his head. The plaintiff attended with his G.P. on 29th July, 2015, who noted that after he had completed a short period of work, he had experienced increased pain and spasm in his neck and in the tempero mandibular joint area. In his notes, the G.P. had advised the plaintiff to take Ibuprofen as required. The plaintiff also stated that he had spasm in his lower back at that time. After that incident, he left the remainder of the painting work to his helper. While he attended on site, he only did very light work, such as washing down doors and worktops.

73. The plaintiff returned to see his G.P. on 24th September, 2015. He told him that at the time of the onset of the neck and jaw pain in July, 2015 he had felt a "snap" in the lower back. Dr. McCarthy stated that he was somewhat alarmed by that description and feared that the plaintiff may have suffered a disc prolapse. For this reason, he referred the plaintiff for a fourth MRI scan. The plaintiff had MRI scans carried out of his cervical, thoracic and lumbar spine on 2nd October, 2015. These scans revealed that there was significant pressure on the spine at L5 and the discs continued to be torn. However, it confirmed that none of the discs had actually prolapsed. It does not appear that any further treatment or intervention was recommended as a result of these scans. In cross-examination, Dr. McCarthy accepted that the degenerative changes shown on the MRI scans, had probably been ongoing since the age of 25. However, he was of the view that the rate of acceleration of the degenerative changes was far greater for the plaintiff, than for a person who had not been subjected to trauma.

74. On 30th July, 2015, the plaintiff had been examined by Mr. Brian J. Hurson, Consultant Orthopaedic Surgeon, on behalf of the

defendant. Curiously, he had not told this doctor of feeling any "snap" in his back in the days preceding that examination. Mr. Hurson noted that he complained of intermittent episodes of "spasms" in his thoracic spine in bed at night. Changing position helped to relieve his symptoms. He also stated that working with his arms raised above his head, may be associated with a stretching sensation in his shoulders. He was aware of grinding in his neck when he rotated it from right to left. His back got tired from time to time – every two years.

75. On examination, Mr. Hurson found that the plaintiff had a full range of painless neck and back movements. Straight leg raising was 80 degrees bilaterally. There was no local tenderness. Neurological assessment of his upper and lower limbs was normal. Mr. Hurson noted his work status at that time as "currently a part time farmer and part time trader".

76. Mr. Hurson was of the view that the injuries were consistent with the accident. No further investigation was required. He thought that the plaintiff had made a full recovery from the injuries sustained in the accident. No late complications were expected. No further specialist reports were recommended.

77. In evidence, Mr. Hurson noted that after the accident, the plaintiff had complained of stiffness in his entire spine on the day following the accident for which he had been treated with anti-inflammatory medication and intermittent physiotherapy. He noted that the plaintiff took seven days off work. Since then he had been reviewed by his general practitioner and had had a number of MRI studies of his neck and back. These showed degenerative changes and a congenital abnormality in the lumbar spine which pre-dated the accident. His current symptoms were non-specific. Examination of the back and neck was normal. He was of opinion that the plaintiff had sustained a soft tissue injury to his spine. The symptoms related to that injury would have lasted several weeks to a number of months. He was of opinion that the plaintiff was not likely to suffer any adverse sequelea as a result of the accident.

78. It would not appear that the plaintiff received any physiotherapy treatment, nor received any prescriptions during 2015.

79. In evidence, Dr. McCarthy stated that the reason he had not referred the plaintiff for any orthopaedic evaluation, was due to the fact that he was aware that the plaintiff's physical therapist had already referred him to Mr. Sharif. He was subsequently aware that the plaintiff's solicitor had referred him to Mr. Thakore in 2012.

80. The plaintiff attended with his G.P. on 14th February, 2016, complaining of pain in the tempo mandibular joint, particularly on the left side. The G.P. note records that he was prescribed Difene and another medication to be taken at night. There was no reference to neck or back pain in this note.

81. The plaintiff was seen on 2nd June, 2016, by Mr. Thakore, on a referral from his present solicitor. He had the benefit of the MRI scan taken in October, 2015. The scan of the cervical spine confirmed normal vertebral alignment. There was reduced signal in the cervical discs, due to degeneration with minor loss of height in the C6/7 disc. There was a left postero lateral disc protrusion at C5/6 level, with associated osteophyte formation. There was considerable encroachment on the left exit canal and nerve root impingement. The right side was clear. There was a small para-central disc protrusion posteriorly at C6/7 level. There was minimal encroachment on both exit foramina, more severe on the left side, where there was associated disc bulging. The other cervical discs and exit foramina were unremarkable. Incidentally noted was the annular bulging posteriorly at T1/2 level. The cervical spinal cord was normal.

82. The scan of the thoracic spine also confirmed normal vertebral alignment. There was reduced signal throughout the thoracic discs due to dehydration, but no significant loss of disc height. There was annular bulging posteriorly at T1/2 level. There was very slight central annular bulging posteriorly at C5/6 level. No other disc protrusions were identified. The thoracic spinal canal appeared normal. There was degenerative change in the lower thoracic facet joints.

83. The scan of the lumbar spine confirmed loss of normal lumbar lordosis. The L1/2 disc appeared normal. There was slightly reduced signal without loss of height at L2/3 level. There was central annular bulging posteriorly with an associated annular tear. This extruded slightly down behind L3. There was slightly reduced signal without loss of height in the L3/4 disc. There was generalised annular bulging posteriorly. There was slightly reduced signal and height in the L4/5 disc with annular bulging posteriorly. There was generalised annular bulging posteriorly which impinged on the thecal sac and both descending and exiting nerve roots. There was slight reduction in height in the L5/S1 area. Grade 1 spondylosis was again identified at this level, which appeared due to bilateral pars intra-articularis defects. There was annular bulging posteriorly, which impinged on both exiting nerve roots. No other abnormality was identified. The lumbar spinal canal dimensions were reduced, developmentally. There was degenerative change in the lower lumbar facet joints, but the appearances had not changed significantly since the 2013 assessment.

84. Examination of movement of the left TMJ was full range, but caused pain in the left TMJ. In the neck, the site of pain was located in the left posterior cervical muscles from skull to the base of the cervical spine. Forward flexion, extension, rotation and lateral flexion bilaterally were 50% of the normal range, with pain felt in the neck, mainly on the left side and left shoulder girdle area in the local muscles, without muscle spasm or loss of curvature. Examination of the left shoulder confirmed pain with end range restriction, particularly on internal rotation. Pain was felt mainly in the left shoulder girdle area and left scapular area in the local muscles. There was no focal deficit noted in the upper limbs. Examination of the dorsal spine showed that the plaintiff was tender over the mid dorsal area, mainly in the para-vertebral muscles, but there was no muscle spasm and no muscle wasting. Movements were restricted and painful on rotation and lateral flexion in either direction.

85. Examination of the lumbar spine revealed that gait, stance and curvature were normal. There was no step felt in the lumbosacral area. The plaintiff could tip toe, heel stand and heel walk. The site of the ache was located in the lumbosacral area and in the left gluteal region, with mild muscle tenderness, but no muscle spasm. Examination of the range of movement of the lumbar spine revealed that forward flexion was available to the mid tibial level. Extension was limited to 50% normal and lateral flexion and rotation bilaterally were similarly restricted. These movements caused mild pain, predominantly on the right side of the lumbosacral area and sacroiliac region at the end range, without muscle spasm or loss of curvature. Straight leg raise was to 40 degrees bilaterally, causing pain in the lower back. There was no muscle spasm and no loss of curvature on these movements. Pain was predominantly felt in the right side of the lower back. Examination of the pelvis and the SI joints was unremarkable. There was no focal deficit noted in the lower limbs.

86. X-rays carried out on 2nd June, 2016, at the Cappagh National Orthopaedic Hospital confirmed established degenerative changes in the cervical and lumbar spine. The x-rays of the lumbar spine confirmed bilateral pars defect without shift.

87. Mr. Thakore was of opinion that the plaintiff had suffered a soft tissue injury to his neck, mid back and lower back as a result of the accident. His complaints were ongoing since the accident. He had tried to return to work by changing his profession, but he was not able for the demands of this work. He has remained symptomatic since the accident. His main difficulty appeared to be in his neck and mid back area.

88. Mr. Thakore was of opinion that his complaints were consistent. His work was fairly physical in the construction industry and he was of opinion that at that time the plaintiff would not be able to return to any heavy physical work due to his ongoing pain in the neck and mid back since the accident.

89. It was clear from the x-rays and MRI scans, that the plaintiff had age related changes in these areas. He had disc bulges and protrusions in the cervical, dorsal and lumbar spine. These were probably pre-existent and were probably related to his age, but they were not causing difficulties in his lifestyle including his work, which was physical. Mr. Thakore was of the opinion that the accident had probably activated these changes and probably caused further damage to the discs and if the protrusions were present, they were probably activated. If they were not present, a single episode of trauma could cause such changes of protrusion and bulging in subnormal discs, which the plaintiff had.

90. Mr. Thakore stated that in his opinion, the accident either caused the protrusions and bulges seen in his spine, or the accident activated these changes in the discs, thus, one way or the other, the changes in the cervical spine, dorsal spine and lumbar spine were probably due to the accident. The accident had also made these areas further subnormal and prone to recurrences of pain on levels of activity, levels of inactivity, adverse weather conditions and stress. He noted that the injury had occurred seven and a half years prior to the examination and the plaintiff remained symptomatic. He had tried to return to work and had tried to change his job, but he was not able to continue with his work and he had ongoing difficulties in this regard.

91. Mr. Thakore was of the opinion that the plaintiff would benefit from a pain management programme, whereby injections would be used to block the pain in the injured areas and he should then return to Dr. Grant or any suitable clinic for isokinetic evaluation of his spinal musculature, as these muscles would probably have gone into imbalance, weakness and core instability, due to lack of proper use because of pain and stiffness caused by the accident. With his pain at its current level, Mr. Thakore did not think the plaintiff would be able to comply with the necessary limits of the isokinetic evaluation, for this reason he would recommend that the plaintiff block the pain through a pain management specialist. Following this, he could undergo a rehabilitation programme under the guidance of a chartered physiotherapist. She would arrange isokinetic evaluation which would confirm the suspected muscle deficit, which could then be corrected by an appropriate rehabilitation programme and proper use of his neck, mid back and lower back, on which there would be further improvement and he would probably be able to return to work. However, this remained to be assessed at the conclusion of the rehabilitation programme.

92. Mr. Thakore was of opinion that the overall prognosis remained guarded, as the plaintiff had not improved much since the accident. He had tried to return to different types of work. He was not able to do any kind of work of a physical nature, because of ongoing pain in his neck, mid back and lower back, which he did not have before the accident. To assist him, he required pain management, isokinetic evaluation and appropriate rehabilitation. At the conclusion of that programme, he could be referred to a vocational assessor to advise regarding his further employment status.

93. In relation to the degenerative changes seen on the MRI scans, Mr. Thakore was of the opinion that these probably pre-dated the accident. However, in the absence of trauma, such changes would probably have progressed slowly and would probably only have given rise to symptoms in the plaintiff's late 40s, or early 50s. Such symptoms would in all probability have been low key and would not have materially interfered with his lifestyle.

94. In cross examination, it was put to the witness that as a result of his examination of the plaintiff in 2012, he had recommended that the plaintiff should have an isokinetic assessment of the muscles in his back and should undergo a rehabilitation programme. It was put to the witness that the plaintiff did neither of these things, simply because there was no need for him to do so. Mr. Thakore stated that his clinic does not arrange such matters, either the solicitors, or the general practitioner, does so. He stated that he did not treat patients, he only reported on them. In this case, there was no reference from the G.P., it had been made by the plaintiff's solicitor, so it was up to them to arrange for the isokinetic assessment.

95. In terms of the plaintiff's capacity for work, the witness stated that he thought that the plaintiff's current complaints were genuine. If the question was, can he return to his original job, the answer was no, presently. The plaintiff needed to have pain management, followed by isokinetic assessment and a rehabilitation programme and when that had been completed, it would be possible to see what work the plaintiff could do in the future.

96. It was put to the witness that the defendant's expert, Mr. Hurson, would say that there was no need for any injection therapy. Mr. Thakore stated that he did not share that opinion. It was put to him that Mr. Hurson was of opinion that the plaintiff's symptoms lasted weeks or perhaps months from the date of the accident. Mr. Thakore stated that that may be Mr. Hurson's opinion, but in his opinion, the plaintiff's complaints were consistent with the injuries sustained in the accident. When asked as to whether he was aware that the plaintiff had injections administered by Dr. McCrory in 2016, he stated that he understood that the plaintiff had recently gone on a pain management programme. He did not have any contact with Dr. McCrory or with Dr. Hearty.

97. Following receipt of the medical report from Mr. Thakore, the plaintiff's G.P. referred the plaintiff to Dr. Connail McCrory, Consultant Pain Specialist. The plaintiff attended with this doctor on 19th July, 2016, 11th and 25th August, 2016, 8th September, 2016, and 13th October, 2016. The plaintiff stated that during this time, he received one injection to the mid back area and two injections to the lower back. The plaintiff thought that this doctor had furnished a report to his solicitors in October, 2016. The plaintiff's G.P. confirmed that Dr. McCrory had written two letters to him. In October, 2016 he had not recommended any further treatment for the plaintiff and had discharged him back to the care of his G.P. Dr. McCrory was not called to give evidence on behalf of the plaintiff, nor was any medical report from him submitted in evidence.

98. The plaintiff was reviewed by Mr. Hurson on 15th December, 2016. At that examination, his main complaint was of cramping in both his calf muscles, particularly in bed at night. He felt that forcibly dorsiflexing his ankles would trigger the cramps. He sometimes experienced cramps during the day. The cramps had limited his walking. He told Mr. Hurson that he used to walk 6km at a time. However, he had to break that down to walking two sets of 3km every day. He stated that the cramps started around 2010/2011. He had been treated by a physical therapist on 40 to 50 occasions.

99. In relation to his back, the plaintiff complained of pain in his upper lumbar spine and in the thoracic spine. He had had targeted injections into his thoracic and lumbar spine in August and September, 2016 which had been performed by Dr. McCrory. This had provided considerable initial relief of his thoracic spine symptoms and complete relief of his lumbar spine symptoms.

100. On examination, it was noted that he was able to sit, get out of the chair and walk without discomfort. Mr. Hurson noted that there was "a lot of sighing" as he was taking his socks on and off. In relation to his back, he could flex to touch his upper shins, extension and lateral bending were normal. Straight leg raising was 70 degrees bilaterally. Neurological assessment showed that he had no obvious loss of power. He had no obvious loss of sensation. Examination of his lower limbs was normal. In relation to his work

status, he indicated that he had stopped working as a farmer in February, 2011.

101. Mr. Hurson noted that neck x-rays taken in June, 2016 showed mild degenerative changes at the C5/6 level. These changes were confirmed on the MRI study of October, 2015. His lumbar spine x-rays showed bilateral spondylolysis with some mild narrowing of the L5/S1 disc space. An MRI study of the lumbar spine in October, 2015 showed mild degenerative changes in that area.

102. Mr. Hurson noted that when he saw the plaintiff on 30th July, 2015, he complained of spasms in his thoracic spine in bed at night, which were relieved by changing position. Reaching upwards was associated with aching in his shoulders. He was aware of grinding in his neck. Examination of his back, shoulders and neck was normal. Mr. Hurson's impression at that time, was that the plaintiff had sustained a soft tissue injury to his spine and that he would not suffer with any adverse sequela as a result of same. He went on to state that considering the nature of the accident and the fact that he had intermittent spasms in his thoracic spine when seen in July, 2015 it was difficult to explain why he suffered with lumbar spine and thoracic spine pain sufficiently severe to warrant targeted injections.

103. Mr. Hurson noted that the plaintiff's main complaints at the time of the examination in December, 2016 were of calf spasms. These were not caused by the accident. He had no obvious nerve root tension signs. There were mild degenerative changes in his spine. His current symptoms would be best treated with a diligent home exercise programme targeted to strengthen his spinal muscles and to continue his 6km walks per day. He stated that there was no indication that the plaintiff would suffer any adverse sequelea as a result of the accident.

104. Mr. Hurson stated that following his examination of the plaintiff in July, 2015 he had expected him to make a full recovery. He described his complaints at that time as "non-specific" meaning it was not clear where the pain was coming from, or the cause of it. He stated that when he saw the plaintiff in December, 2016 the plaintiff was walking 3km twice daily. He had come under the care of Dr. McCrory. Mr. Hurson stated that he was surprised that the plaintiff needed injections having regard to the level of his complaints to him in December, 2016. He stated that if the plaintiff had severe pain, it might be worthwhile to consider targeted injections. However, it was possible for a person to have back pain, without an injury to his spine. However, in this case, the plaintiff looked fit and healthy. His reported symptoms could be due to wear and tear in his back. In July, 2015 his main complaint had been of spasm in the mid back area. In December, 2016 his main complaint was spasm and cramps in his legs. It was significant that the plaintiff was on no medication at that time. He was of opinion that the plaintiff had had pain after the accident which was consistent with a soft tissue injury to his spine. This could vary in relation to the time in which it would resolve, it could last several months. He noted that the other doctors had thought that a recovery would be made within eighteen to 24 months of the accident. He agreed with that prognosis.

105. In cross examination, Mr. Hurson stated that the degenerative changes evident on the scan of 24th October, 2009, were mild in nature. The second scan taken on 15th June, 2010, showed that the plaintiff had a grade 1 spondylolisthesis. The plaintiff did not have a traumatic spondylolisthesis. The third scan taken on 29th August, 2013, referred to annular tears in the discs. This was not seen in the previous scans. The tears that were evident at L2-3 and L3-4 were part of the degenerative changes in the plaintiff's spine. As he was then 40 years of age, these findings would be normal. Mr. Hurson accepted that there was reference on this scan to impingement of the nerves and spinal cord. The fourth set of scans taken in October, 2015 referred to an extrusion, which was somewhat unusual. He was not sure if this referred to the tear in the disc, he thought that it did so. This could be normal for a 42-year-old man. There was impingement on the spinal cord.

106. He stated that the reference in the report on the thoracic spine to desiccation of the disc, referred to a drying out of the disc and was age related. The scan of the cervical spine showed considerable encroachment on the left exit canal. There was some nerve root impingent.

107. Mr. Hurson stated that he agreed with the statement made by Mr. Thakore in his second report, that the plaintiff had age related degenerative changes in his spine. He did not agree that the accident probably caused further damage to the discs. Nor did he agree with Mr. Thakore's opinion that the accident either caused the protrusions and bulges in the plaintiff's spine, or that the accident activated these changes further, such that, one way or the other, the changes in the cervical, dorsal and lumbar spine were probably due to the accident. He did not agree that the accident had made these areas further subnormal and prone to recurrences of pain on levels of activity, levels of inactivity, adverse weather conditions or stress.

108. In relation to the opinion expressed by Dr. Connor Hearty, Consultant Pain Specialist, that the plaintiff was suffering from a myofascial pain syndrome, Mr. Hurson stated that he did not know on what Mr. Hearty based his opinion. He said that myofascial pain is non-specific pain, the origin of which is unknown. He stated that when he saw the plaintiff in December, 2016 he did not think that the plaintiff needed injections. He was not on any medication at that time.

109. In his evidence, Dr. McCarthy stated that the plaintiff had obtained considerable relief from the injections administered by Dr. McCrory. However, he had a flair up of acute pain in December, 2016 when his daughter fell onto his lap. The plaintiff said that he had felt something going in his lower back. Dr. McCarthy administered an injection to the plaintiff's lower back and buttock area. The plaintiff stated that the acute pain lasted for two weeks.

110. It does not appear that the plaintiff engaged in any paid employment in 2016. He did not receive any physiotherapy treatment during that year. He saw his G.P. on five occasions, on one such visit he was given an intra-muscular injection. He also received three injections from Dr. Connail McCrory in August and September, 2016. There do not appear to have been any prescriptions for pain relieving medication during 2016.

111. Finally, on 17th January, 2017, the plaintiff was examined by Dr. Connor Hearty, consultant pain specialist attached to the Mater Hospital, Dublin. He stated that the plaintiff's solicitor had asked him to provide a report. To this end, he had had a 45-minute consultation with the plaintiff on the day of the examination. He stated that he was informed by the plaintiff that he had experienced acute pain in his neck and back after the accident and that he had persistent pain in the neck and back for the previous eight years. The plaintiff rated the pain at 5/10 to 10/10. He described it as a "constant pressure sensation" in his back, which was aggravated by activity and by certain postures. Relieving factors were activity, stretching and exercising. Dr. Hearty noted that the plaintiff was not on any medication. He had been treated with various forms of medication in the past, which were appropriate to the reported injuries. The plaintiff told him that he had received injections to the lower back from Dr. McCrory. Dr. Hearty did not have precise details of this treatment.

112. Examination revealed a good range of movement in the back with no clear neurology. They applied a stimulus test whereby an objective stimulus was applied to various part of the body and this produced abnormal pain results. Based on this, he was of opinion that the plaintiff suffered from hyperalgesia which is a heightened response to stimulus and increased intensity in the thoracic and

lumbar region. Dr. Hearty stated that the test worked in a way such that, if a pin prick was applied, if a person had hyperalgesia and temporal summation, this produced a heightened response to the stimulus. Dr. Hearty stated that the plaintiff did not exhibit any evidence of fear avoidance, which means that he was not refusing to do certain movements for fear of pain. The muscle spasm on the left side of the back was consistent with asymmetry.

113. Dr. Hearty stated that on clinical examination tone, power, reflexes and sensation were intact throughout. His range of motion was restricted. His cervical range of motion was restricted, with neck flexion of 30 degrees, extension at 10 degrees, rotation 45 degrees, bilaterally. In terms of his lumbar spine, flexion was to 45 degrees, extension was 15 degrees, with lateral flexion right and left at 10 degrees. Straight leg raise was negative for radicular pain, but positive for back pain at 30 degrees bilaterally. He demonstrated hyperalgesia in the thoracic and lumbar regions with temporal summation. Palpation revealed hyperalgesia with temporal summation. There was mechanical allodynia in the lumbar and intrascapular region.

114. Dr. Hearty was of opinion that the plaintiff had suffered back and neck pain following a motor vehicle collision in 2009. Investigations revealed a cervical disc protrusion with nerve root encroachment on the left and a pars defect in the lumbar spine. This accounted for part of the plaintiff's pain, however, globally, his widespread pain was likely myofascial in nature. This was consistent with the mechanism of injury and resultant reconditioning. The management plan would revolve around self-management, with a strong focus on exercise. He noted that the plaintiff had proven himself to be exceptional in this regard. In terms of medication, the addition of medication such as tricyclic antidepressants and/or baclofen may have a role. It would be reasonable to undergo radio frequency ablation of the lumbar region on a second occasion. Occasionally, options such as botulinum toxin can be very effective.

115. Dr. Hearty noted that the plaintiff had suffered a high speed injury and acutely developed widespread pain following that. In addition, this had an occupational, personal and physical effect on him. He had a definitive pain diagnosis of myofascial pain. He had responded to some degree to physical medication and interventional strategies. However, given that it was seven years since the accident, he felt that the plaintiff's condition had plateaued. He felt that his condition was probably related to the accident. It was unlikely that he would make significant progress, or return to his previous occupation at this stage. He recommended that the plaintiff should consider a pain management programme in the future, with a strong emphasis on unified clinical psychology and physiotherapy.

116. In terms of the future, Dr. Hearty stated that if the plaintiff had a successful radio frequency ablation, he would typically get a recurrence of pain in approximately two years from such treatment. In relation to the issue of his ability to return to work, he stated that where a person suffers chronic pain and has been out of work for approximately seven years, they are unlikely to return to their previous employment. The object of treatment would be to try to relieve pain and then increase function and following that, see what work the person would be able to manage. However, he was of opinion that the plaintiff was unlikely to ever to be able to return to his pre-accident employment as a builder.

117. Dr. Hearty stated that a pain management programme had been shown to improve a patients' quality of life. On the programme, they do an education programme together with psychological treatment in respect of coping with the injury and extensive physiotherapy treatment. He stated that in general 10% of patients are able to return to work. A lot depends on their diagnosis. It is also partly due to the patient's attitude, age, psychosocial situation, etc. The plaintiff's negative prognosticator in terms of work, was the length of time since the accident. Dr. Hearty was of opinion that the plaintiff had probably plateaued in respect of his recovery. He did not think that any further intervention would make the pain go away. A patient may wish to be pain free, but the pain management team was not always able to provide that; it was necessary sometimes to teach patients to cope with chronic pain.

118. Dr. Hearty was asked about the role of medication in the plaintiff's situation. He stated that the role of medication was a complex question. Firstly, he noted that the plaintiff had been prescribed appropriate medication in the past. Secondly, in relation to the use of medication, in recent years, evidence had emerged that a patient should not be prescribed medication for myofascial pain. A Norwegian study had shown that in cases of chronic pain, two thirds of the participants had stopped taking medication after three months, due to lack of efficacy and the side effects of the medication.

119. In cross examination, Dr. Hearty confirmed that he had seen the plaintiff on one occasion only, on 17th January, 2017, at a consultation which lasted 45 minutes. He had had no contact with the plaintiff's G.P. He was aware that the plaintiff had received treatment from Dr. McCrory, but there had not been any communication with him. This was because he was not providing treatment to the plaintiff, his function was to provide an expert opinion in the case. In forming his opinion, he took a history from the plaintiff, he carried out the examination as outlined in his evidence in chief and also had copies of various medical reports and MRI scans. He agreed that the first scan showed no bony injury and was essentially a normal scan. It was put to him that the scan taken on 2nd June, 2016, merely reflected normal wear and tear. Dr. Hearty stated that that was correct, there was no structural defect.

120. He stated that in reaching a diagnosis of myofascial pain syndrome or chronic pain syndrome, the medical team relied on the plaintiff's account of his day to day activities. Dr. Hearty stated that he was not aware that the plaintiff had been out sick for seven days' post-accident. He was aware that the plaintiff had worked on a farm and that he had done a physical therapy course, which would include some manual handling. He was not aware that the plaintiff had ever worked as a part-time share trader. He thought that the plaintiff's work record post-accident was consistent with chronic pain syndrome.

121. It was put to the witness that of the sum claimed for medical prescriptions of €260, much of that was for unrelated conditions. The witness stated that he was not aware of that. It was put to the witness that the plaintiff had been seen by Dr. McCrory on five occasions in 2016 and had been discharged from his care in October, 2016. The witness stated that he had been told about the treatment which had been given, but was not furnished with the report in respect of such treatment. He thought that the injection treatment administered by Dr. McCrory was warranted. He disagreed with the opinion of Mr. Hurson, that such treatment was unnecessary. It was put to the witness that the plaintiff first saw Dr. McCrory on 19th July, 2016, which was almost seven years post-accident and that this was an extremely long time for a person to present with a soft tissue injury. Dr. Hearty stated that patients often try other forms of treatment before coming to a pain specialist. He accepted that the earlier treatment is given, the better the outcome, but people would present to them at different times.

122. It was put to the witness that the plaintiff had been attending the gym daily since 2011 and had been able to do some weight training. Dr. Hearty stated that they would always encourage patients with chronic pain to take exercise. Pain can arise even without structural damage. The term "chronic pain" is used for pain which lasts longer than three months. He accepted that they relied a great deal on what the patients tell them. He accepted that his diagnosis of myofascial pain syndrome was very much dependent on the plaintiff's reporting.

123. In relation to the issue of his ability to return to work, it was put to the witness that the plaintiff's vocational assessor, Mr. O'Loinsigh stated in his report that the plaintiff had a good skill set and should be able to return to work after treatment. The witness stated that a pain management programme looks at pain and at the question of acceptance of pain and the management of it.

Retraining would be part of the process. He could not say if the plaintiff will return to employment after the pain management programme had been completed.

124. In re-examination, Dr. Hearty stated that his diagnosis was based on what the plaintiff reported and also on other clinical tests carried out by him. He stated that they try to validate the patient's pain and try to see how they can resolve it. There was no objective test for pain.

125. In relation to his present condition, the plaintiff stated that he continued to experience nerve pain in the left forearm, together with a dull ache between the shoulder blades and pain in his lower back. He stated that he would walk for 40-minutes per day. He would also do a lot of foam rolling, stretching and self-massage. He stated that he would be sore after walking, but that stretching helped. He would take paracetamol or painkillers if he had a flair up of pain. Some days the plaintiff does not require medication, but some days he does. He stated that he had taken such medication seldom in the last few months. In relation of the question of returning to work, he stated he would be guided by the advice of the vocational assessor, when he had completed the pain management programme. He stated that if he did not have back pain and returned to work as a builder, he thought that he would have no problem getting work. He stated there was work available in his local area.

The Special Damages Claim – Past Loss of Earnings

126. In a notice of further particulars of special damage dated 18th January, 2017, the plaintiff claimed the sum of €139,139 as past loss of earnings. This was slightly increased to €143,763 when the plaintiff's accountant gave evidence. This figure was based on the assumption that, but for the accident in 2009, the plaintiff would have earned €30,000 gross per year from his construction business, from the date of the accident to the date of trial. In order to assess the viability of this claim, it is necessary to have regard to the plaintiff's pre-accident employment history and earnings record.

127. The plaintiff attended secondary school in Gormanstown College, where he sat the leaving certificate examination in 1990. He studied mechanical engineering at the University of Limerick, graduating in 1994. He then completed a masters degree in manufacturing technology in 1997.

128. From 1997 until 1999, he worked as an engineer with Senator Windows, earning approximately €22,000 per year. From 1999 until 2004, he was the managing director of his own company known as Dardis Windows. The plaintiff stated that his average earnings were circa €40,000 per year.

129. The plaintiff stated that in 2004, a friend of his asked him whether he would like to come to work in his building company known as Farm Hill Construction Ltd. The plaintiff was financial controller of that company from 2004 to 2008. He stated that his earnings there were €45,600 per year. In February, 2008 the plaintiff set up his own construction company, known as Carne Wood Construction Limited. The plaintiff stated that as well as being the controlling shareholder and director of the company, he also did all the pricing of the work, and did much of the general labouring work. In the year prior to the accident, he had obtained a contract to construct a dwelling house for approximately €450,000. The plaintiff stated that his earnings from this company were €30,000 gross per annum.

130. In cross examination, it was put to the plaintiff that he had had an involvement with a number of companies, which had subsequently been dissolved. He confirmed that his company, Dardis Windows, had been in existence from 1999 until it was dissolved in 2004. He stated that he had been approached by a friend, Michael Hughes, who asked him to come and work with him in his construction company. He could not recall if Dardis Windows was insolvent at any stage. He stated that he would have to check his records in that regard. He accepted that he had been a director of a company called Continental Bathrooms and Tiles Limited, which had been incorporated on 18th May, 2000, and was dissolved in February, 2004. He stated that that company had had to be put into liquidation following a creditors' meeting. He could not recall how much was owed by the company to its creditors, nor whether the company was insolvent.

131. The plaintiff also accepted that he had been a director of a company called Pad Property Management Limited, which had been incorporated on 21st June, 2005, and was dissolved on 11th May, 2007. He was also a 50% shareholder in that company. The plaintiff stated that he passed his shareholding to another company. He could not say if the company had been dissolved in 2007, as he was not involved in it at that stage. The plaintiff also confirmed that he had done some work for a business called "Call Eddy", which was engaged in the installation of flooring. The owner of the business had cash flow problems and had asked the plaintiff to give him assistance. The plaintiff worked for him for eighteen weeks, for which he was paid €15,000.

132. Turning to the past loss of earnings claim, evidence was given on behalf of the plaintiff by Mr. Malachi Stevens, who has practised as an accountant for 30 years, specialising in corporate finance, insolvency and taxation. He had set out a table showing the plaintiff's earnings for the years 2005 – 2009 at p. 4 of the appendix to his report. This showed that in 2005, the plaintiff received €11,612 from his employment with Farm Hill Construction Limited. In 2006, this rose to €40,256. In 2007, he earned €35,904. In 2008, he earned €22,257, from Farm Hill Construction Limited and €5,577 from Carne Wood Construction Limited. In 2009, his earnings from Farm Hill Construction Limited had ceased. He earned a salary of €16,456 from Carne Wood Construction Limited. He also had the benefit of a second hand car, which has been purchased by the company, which gave rise to a benefit in kind notional income of €10,800. He also received a director's loan from the company of €4,917. Adding these figures together, gave total earnings of €32,173 from Carne Wood Construction Limited for 2009.

133. Mr. Stevens stated that the figure of €16,456 as his earnings from the company, had been returned to the Revenue and had been accepted by them. The figure for the BIK in respect of the use of the car, was achieved by calculating 24% of the original market value of the car of €45,000. Mr. Stevens stated that this was the figure which Revenue would deem to be "notional income", in respect of which tax would have to be paid by the plaintiff as the recipient of the benefit in kind. Lastly, the director's loan in the sum of €4,917 would be treated by Revenue as being income received by a person who was connected to the company. Revenue treats such loans as taxable income in the hands of a director. For these reasons, Mr. Stevens submitted that it was appropriate to add the three figures together to ascertain the plaintiff's earnings from Carne Wood Construction Limited for 2009.

134. Mr. Stevens stated that an alternative way of approaching the calculation was to take an average of the plaintiff's earnings over the period 2005 to 2009. Leaving out the figure for the one off construction which he had carried out while being employed by Farm Hill Construction Limited (the plaintiff and his lawyers accepted that his figure should not form part of the calculation), gave an average annual gross income of €30,575 per annum. Thus, Mr. Stevens submitted that whether one looked at the earnings for 2009, or took an average of the plaintiff's earnings for that year and the preceding four years, one came out with a figure that was in or about €30,000. On this basis, he felt that it was a fair figure to take as the plaintiff's pre-accident earnings.

135. If that figure was adopted, this would equate to a gross weekly wage of €577 and a net weekly wage of €455. It was this net

figure which had been used to calculate the past loss of earnings. This had been done by multiplying €455 by the number of weeks that had elapsed between the date of the accident and 21st January, 2017, giving allowance for the weeks that he had worked on the farm and received job seekers allowance. No claim had been made in respect of those weeks. The total figure for loss of earnings during this period came out at €141,763.

136. In cross examination, it was put to the witness that his calculations had ignored the fact that the plaintiff did not receive any wages from the company in the five months preceding the accident, i.e. since 27th May, 2009. Mr. Stevens stated he was not aware of that fact. The witness accepted that the plaintiff's bank statements for 2009 showed the last wages from the company were paid on that date. It was put to the witness that a sum of €10,000 which was noted at p. 57 of the bank statements, was not wages from the company, but was confirmed by the plaintiff to be a loan from his aunt Rita.

137. Mr. Stevens further accepted that a payment made on 4th September, 2009, in the sum of €4,019 had been identified as a VAT refund to the company, which should have gone into the company's account. He stated that the company may have allowed the plaintiff to keep it in lieu of wages. He said he was unable to explain why the plaintiff's wages had ceased in May, 2009. He accepted that the company did show a small loss for the year 2009. It was put to the witness that the payment of wages had ceased in May, 2009 because the company was not able to pay him. The witness accepted that that may have been the case, he could not say why that had happened. It was put to the witness that in the months from June to October, 2009 the plaintiff had not received any salary because the company had trading losses and a lack of cash flow. The witness stated that that may have been the position, as the company returns showed a loss of circa €3,000 for that year.

138. In relation to the director's loan of €4,917, it was recorded in the company's accounts that he owed this sum as of 31st October, 2009. The witness accepted that the director's remuneration did not include the loan of €4,917. It was put to the witness that if the figure of €4,917 had been included in the company's accounts as income for the plaintiff, this would have increased the company's trading loss to approximately €8,000. The witness accepted that if the loan was treated as income for the plaintiff, which he did not have to repay to the company, this would have increased the company's losses for the year in question.

139. It was put to the witness that he had not taken account of the very deep recession in the building industry in the years subsequent to 2008. He stated that he had taken account of this factor, by taking average earnings over a longer period of five years from 2005 to 2009. In 2006, the plaintiff had an income of €40,526 from Farm Hill Construction Limited. That company subsequently went into liquidation, but the witness did not know why. It was put to him that the liquidator of the company had stated in March, 2009 that the accounts showed that the company was insolvent as of July, 2005 and that as of July, 2006 its liabilities exceeded its assets by €161,000. The witness stated that he was not aware of that. He stated that the fact that Farm Hill Construction Limited was dissolved in 2006, was irrelevant, as the plaintiff was only an employee of that company and account had been taken of the earnings actually earned by him from the company. He had taken the plaintiff's actual earnings for the years in question to arrive at the average annual salary. He stated that he had looked at the earnings actually earned and did not take account of the decline in the industry generally. It was put to the witness that the plaintiff's gross income for 2009 showed a significant decrease due to the recession. The witness stated that he did not particularly disagree with that assertion. However, the plaintiff was engaged on a contract which was 75% completed at the time of the accident. He may not have been drawing salary until the end of the contract. He stated that he worked off the figures actually earned. He stated that within the construction industry generally, there were 125,000 people still working in 2009. There was no evidence that their income declined drastically. While the number of houses being built had declined from 93,000 in 2006 to 14,000 in 2010, the plaintiff was only a small builder, building one house at a time. He could have continued to build one or two houses per year during the recession.

140. Evidence was given on behalf of the defendant, by Mr. Liam Grant, of Grant Sugrue & Co., Forensic Accountants. His comment on the figures put forward by Mr. Stevens was that in assessing loss of earnings it was necessary to look at trends in the plaintiff's earnings. Here, the plaintiff's income decreased between 2007 and 2009. This was due to the fact that he lost his job with Farm Hill Construction Limited in 2008, when that company ceased trading. The plaintiff set up his own one-man construction company. In 2007/2008, the country was immersed in a deep recession, when it was impossible to sell a house. So the business subsequent to 2008 was wholly different to what had been before. The plaintiff's earnings from his company in 2009 was €16,456. He last received a payment from the company on 27th May, 2009; he received no income from the company after that. The company had one contract in 2008. He had received a salary of €2,500 per month down to May, 2009 but no salary after that time, because the company had no cash flow. This fact had been ignored by Mr. Stevens in his projection of the plaintiff's earnings post-accident. Mr. Grant further stated that taking an average of the previous five years' income, ignored the complete downturn in the industry after 2008 and the fact that he had lost his job with the previous construction company and had no salary from his own company after May, 2009.

141. Mr. Grant stated that the figure of €16,456 for his earnings from the company for 2009, was shown in his P. 60 and was also in his tax return. He had no great issue with this figure. The court could not find a copy of the P. 60 for 2009 in its papers.

142. Mr. Grant did not agree that the figure for BIK in respect of the company car of €10,800 should be included in the calculation of the plaintiff's earnings for that year. In 2008, the company had bought a car second hand for approximately €11,000. The depreciation on this would be approximately €2,200 per year. The figure of €10,800 was based on the method of calculation used by Revenue. Mr. Grant stated that they adopted an artificial way of calculating the tax due, by basing it on the original market value of the car and then applying a figure of 24% of that figure as the notional income for tax purposes. Tax would be assessed on this notional figure, resulting in the recipient having to pay approximately €2,100 in tax. Mr. Grant stated this was a wholly artificial method of calculating the value of the car for tax purposes and had been designed by the Revenue to discourage companies from providing cars to their senior employees. He said that if the car was new, then the level of tax payable might still make economic sense in the hands of the employee. However, where the vehicle was second hand, it made no sense, as the tax was calculated by reference to the original market value of the vehicle. In the circumstances, it was completely artificial to suggest that the plaintiff had additional earnings of €10,800 from the company in 2009.

143. In relation to the sum of €4,917, which had been included by the plaintiff's accountant in his calculation of the plaintiff's annual earnings for 2009, Mr. Grant stated that he had never seen such a loan described as a dividend, nor was it income. It was a sum that had to be repaid by the plaintiff to the company. Accordingly, his actual income for 2009 was €16,456.

144. Mr. Grant further pointed out that the company had a trading loss of €3,705 for 2009. In drawing a salary of €16,456, the plaintiff was effectively drawing €3,705 more than the company had. If he had only taken profit from the company, his earnings would have been €16,456 less €3,705, giving him a gross salary of circa €13,000.

145. One of Mr. Grant's main criticisms of the plaintiff's figures, was that they had completely ignored the collapse of the construction industry as a result of the recession in Ireland in the years subsequent to 2008. In this regard, he stated that the figures produced by the Central Statistics Office showed that the number of persons engaged in the construction industry in June 2007 was 269,600

which declined to 241,400 in June 2008, it was 155,400 in 2009 and 125,300 in June 2010. The number of persons unemployed in Ireland in June 2007 was circa 103,000, compared with 435,000 in April 2008.

146. The number of houses completed in 2006 was 93,099, which reduced to 77,627 in 2007, 51,324 in 2008, 26,420 in 2009 and 14,602 in 2010.

147. The average prices of houses declined by more than 50% between 2007 and 2010 and continued to decline thereafter.

148. Mr. Grant stated that arising from the reduced construction work available, and increased competition, with a large number of people competing for a very small volume of work, meant that many construction companies went into liquidation and receivership. Many construction businesses had been forced to cease trading, arising from trading losses and their business not being viable. Gross margins on construction projects had fallen dramatically, as reduced work was available and this forced major price reductions/reduced margins and in many cases this caused businesses to be unviable.

149. Mr. Grant was of the opinion that in assessing the plaintiff's likely post accident earnings at €30,000 per annum after 2009 and up to the present time, completely ignored the extent of the recession and its effect on the construction industry in particular.

150. In cross examination, Mr. Grant accepted that there had been an up turn in the construction industry in the last twelve to eighteen months. While there had been improvement in the construction sector, earnings were still not close to those achieved during the boom years. He accepted that house prices had come back to circa 50/60% of 2007 values. He accepted that things had improved in the construction sector, but stated that they were still a long way from pre-recession levels.

151. Mr. Grant was asked what might have happened if the accident had not occurred, he stated that the plaintiff's income had been decreasing pre-accident and with the onset of the recession, he would probably not have been able to earn much in the construction business. Mr. Grant accepted that in assessing the plaintiff's loss of earnings claim, he had not taken potential farm income into account, as the plaintiff had based his claim for loss of earnings solely on his construction earnings.

152. Mr. Grant was pressed in relation to the issue of the BIK in the calculation of the 2009 earnings. He stated that he remained of the view that the figure of €10,800, while treated as notional earnings for tax purposes by the Revenue, should not be seen as the equivalent of income actually earned by the employee. It was purely deemed by Revenue as being "notional pay" as a means of calculating the tax due in respect of use of the car. The figure itself was ascertained by reference to the original market value of the vehicle, rather than the actual cost of the vehicle to the company. There was no reality to treating the figure of €10,800 as actual income earned by the plaintiff from his company.

153. The witness was pressed in relation to the designation of the "dividend" of €4,917, which had been paid to the plaintiff in 2009. Mr. Grant stated that this was, in fact, a loan from the company to one of its directors. He stated that if a company lends a person €5,000 and they have to pay that money back, then the net gain to the individual is nil, it is not treated as income. He stated that the loan would not be classed as a "dividend". He stated that he was of opinion that this payment was in fact in violation of company law. If a company wishes to make a loan to a director, it is required by the Revenue authorities to remit 25% of the loan to the Revenue authorities, which the plaintiff's company did not do. It is also obliged to charge interest on the loan at the rate of 13.5%. Due to the interest charge, it would not make commercial sense for the director to accept such a loan, when they could obtain an equivalent loan at a much lesser rate of interest from the bank. Mr. Grant further pointed out that if the loan of €4,917 was treated as the payment of wages to the plaintiff, then the company's losses would have increased to circa €8,700 for that year. If this sum is a loan, then it is not treated as salary. If it was treated as salary, then the company's loss would have increased to the level indicated above.

The Claim for Future Loss of Earnings

154. The plaintiff has claimed the sum of €478,279 as the capital value of his future loss of earnings, based on a loss of €30,000 gross per annum. According to Mr. Tennant's report this gave rise to a net weekly loss of €463, from 7th June, 2016, until his retirement at age 68.

155. The plaintiff's case is that as a result of the injuries sustained in the accident, he will never work again in any capacity and accordingly will suffer the full loss of €478,279. The report from Mr. Nigel Tennant, Consulting Actuary, in relation to the method of calculation of this figure was admitted in evidence.

Conclusions

156. I would like to make two preliminary observations before coming to the assessment of damages in this case. The first observation concerns medical referrals being made by solicitors. The court is of the view that it is inappropriate for solicitors to refer clients for specialist examination. There are two reasons for this. Firstly, normally, a plaintiff's G.P. plays a central role in relation to his rehabilitation. Often, the G.P. is the person who is first consulted by the plaintiff in relation to his injuries. He or she deals with the plaintiff on an ongoing basis. His primary aim is to make the plaintiff better. Accordingly, it is the G.P., who should decide when and to what specialist a patient should be referred. A plaintiff's case is much stronger if the decision to refer him to a specialist is made by the G.P., rather than by the plaintiff's solicitor.

157. The second reason why this is preferable, is that if the plaintiff is referred by his G.P. to a specialist, that consultant becomes a treating doctor. This means that he assumes the responsibility of advising the plaintiff as to what treatment is best suited to make him better. He will decide what treatment is appropriate for the plaintiff and will oversee its implementation. If a given course of treatment is not successful in relieving the plaintiff's symptoms, he will advise what further treatment should be undertaken, or he will refer the plaintiff on to another specialist in a different field. As a treating doctor, he will also liaise with the plaintiff's G.P. and keep him updated as to the progress of treatment. In this way, there is continuity and communication between the various medical professionals, who are treating the plaintiff at any given time.

158. When a plaintiff is referred to a specialist by his solicitor, he does not become a treating doctor, but remains merely a reporting doctor. He will give an opinion as to the plaintiff's injuries and may recommend a possible line of treatment in respect of these. However, he will not communicate with the plaintiff's G.P., but merely furnish a report to the solicitor. This can lead to a situation, such as happened in this case, where the G.P. was aware that the plaintiff had been referred to a number of specialists, but because the referral came from the solicitor, he was not aware as to what treatment was recommended by them. The plaintiff's G.P. only became aware of the treatment that had been recommended by Mr. Thakore in 2016, when the plaintiff came to him after that examination and told him that Mr. Thakore had recommended that he should be sent to a pain specialist. This was not a satisfactory state of affairs.

159. The second observation concerns what inference, if any, should be made by the court in view of the decision made by the plaintiff and his legal advisors not to call Dr. McCrory. The plaintiff was referred to Dr. McCrory by his G.P. in 2016. He gave treatment to the plaintiff between July and October, 2016. This was significant invasive treatment received by the plaintiff. It appears that he furnished a medical report in October, 2016. A decision was made not to call him and instead the plaintiff was sent by his solicitor to another pain specialist, who saw the plaintiff for the first time on 17th January, 2017, the day before the case was due to start.

160. The question whether the court can draw any inference from the fact that a party has elected not to call a potentially relevant witness, is a difficult one. There is authority for the proposition that the court can draw an adverse inference where a relevant witness is not called, particularly where the witness has drawn up a document, the content of which was relevant to the proceedings.

161. In *Doran v. Cosgrove & Ors* [1999] IESC 74, Keane J. cited with approval the following dicta of Lowry L.J. in *Reg v. IRC, exp Coombs & Go* [1991] 2 A.C. 283 at p. 300: -

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

162. Keane J. went on to deal with the facts of the case before him in which the plaintiff, a passenger in the first named defendant's car, which was being driven by the second named defendant, suffered serious injury when the second named defendant was attempting to overtake a right-turning van at high speed. The second named defendant was not called to give evidence. Keane J., having referred to the dictum of Lowry L.J. supra, stated as follows: -

> "Applying that statement of the law to the facts of the present case, it is clear that, even apart from the fact that the first and second named defendants have not sought to contest the finding in the High Court that the driver of the motor car was negligent, no other inference could have been drawn by the trial judge from the evidence actually adduced in the case, in the light of the failure of the second named defendant to give evidence and the absence of any credible explanation for that failure."

163. The decision in *Doran v. Cosgrove* was applied by Hanna J. in *H. v. St. Vincent's Hospital Trustees Limited & Ors* [2006] IEHC 443, where the defendant had admitted in evidence without formal proof, a note that had been made by a Dr. Christie, but then proceeded to make the case that the note was wrong. Hanna J. had the following to say in relation to the decision not to call the doctor as a witness: -

> "In this case, the failure to call Dr Christie is highly unsatisfactory and in my view has not properly been justified. I am not satisfied that a credible explanation for not calling her has been proffered. Nonetheless, this has led to an unfortunate situation, as I have said, where a party, who has agreed without formal proof medical records, seeks then to invite me to disregard the note as being wrong. It is difficult in the extreme to understand why Dr Christie's views were not, at the very least, sought if such were the case. The alternative possibility, of course, is that such views were sought and that they were averse to the interest of the defendants. In the absence of any evidence of this, I will not make any such assumption. I can only infer therefore that a tactical decision was made by the defendants to agree Dr Christie's note and then proceed to rubbish it."

164. In *Dunne (an infant) v. Coombe Women and Infants University Hospital* [2013] IEHC 58, Irvine J. stated as follows in relation to the failure of the defendants to call a nurse who had made a note of certain timings in a chart which were highly relevant to the proceedings: -

> "In coming to my conclusions as to the validity of the times which appear on the drugs chart, I did not find it necessary to engage to any great extent with the principles of law which emerge from decisions such as *Herrington v. British Railways Board* [1972] AC 877 and *Hawkes v. St. Vincent's Hospital & Ors*. [2006] IEHC 443. However, from those decisions, it is clear that in certain circumstances, a court is entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on a particular issue. This principle is of relevance to the defendant's failure to call Nurse O'Connor as a witness in the present case.
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> From as early as the fourth day in these proceedings which were at hearing for some forty-three days, the centrality of the drug chart to the dispute between the parties as to the time at which Dr. Ramesh arrived to the resuscitation was blatantly obvious. That dispute is core to the liability issue in the proceedings. No other witness was able to give evidence as to whether the drug chart or any less formal record was kept noting the time at which the various steps were taken during the resuscitation. Nurse O'Connor's testimony, had she been called, was clearly material to the court's decision as to the weight it could attach to the timings on the drug chart and would also have been key to its conclusion as to the reason why the sodium bicarbonate and sodium chloride appeared in the incorrect order on the drug chart, a matter that the defendant sought to rely upon to undermine the timings on the chart. Of even more significance is the fact that while the defendant or one of its servants or agents authored the timings on the drug chart, it pursued its defence of these proceedings based on a timeline which was strongly in the teeth of those timings and in circumstances where it had admitted this document into evidence without the necessity for formal proof. It is further relevant to note that no evidence was led to explain Nurse O'Connor's absence as a witness, notwithstanding the fact that the defendant challenged each and every one of the plaintiff's expert witnesses on the basis that the timings she had recorded in the drug chart were incorrect.
>
> In the aforementioned circumstances, it seems to me that it is likely that the defendant made a tactical decision not to call Nurse O'Connor and I think the only logical inference to be drawn is that her evidence was not going to sit comfortably with the case which it was advancing. However, even without drawing any adverse inferences from the defendant's failure to call Nurse O'Connor, I am satisfied on the balance of probabilities that the timings on the drug chart are accurate in respect of each of the actions therein mentioned, with the exception of the sodium bicarbonate and sodium chloride to which I have already referred."

165. In *McNicholas v. Herman* [2015] IEHC 435, this Court was invited to draw an adverse inference in a medical negligence action, due to the decision by the defendant's legal team not to call a nurse, who had been present at the pre-operative consultation and

had assisted at the operation itself. Having reviewed the authorities cited above, the Court came to the conclusion that where the witness was a witness as to fact, it would be wrong to speculate as to what her evidence might have been, simply due to the fact that she was not called by the defendant. Accordingly, the Court did not draw any adverse inference from the failure to call that witness.

166. The Court is of opinion that while it cannot draw a specific inference from the failure to call Dr. McCrory, the failure to call him cannot just be ignored as if he had been airbrushed out of the story. Where a plaintiff elects not to call one of his treating doctors, who administered significant invasive treatment in the months leading up to the trial, this places a question mark over this aspect of the plaintiff's case. The Court cannot speculate as to the nature of the evidence that might have been given by Dr. McCrory. However, the Court can make the finding that this treating doctor was of the opinion, having completed the course of treatment in October, 2016 that the plaintiff did not require any further treatment from him and so he was discharged back to the care of his G.P. This finding arises, not from the failure to call Dr. McCrory, but from the evidence given by the plaintiff's G.P. and from the entry in his records to this effect which was made on 14th October, 2016.

167. Turning to the assessment of general damages, I accept the evidence of Dr. McCarthy and of Mr. Thakore that in the two years post accident, the plaintiff experienced significant pain and disablement as a result of the injuries sustained in the accident. By the end of 2011, he had had 23 sessions of physical therapy. He had spent approximately €131 on prescription medication. He had seen his G.P. on eight occasions and had received three injections from him.

168. At the end of 2011, Dr. McCarthy was of the opinion that the plaintiff's injuries were healing slowly. He was satisfied that the plaintiff was aggressively following the treatment protocols laid down by him and by the plaintiff's physical therapist. The plaintiff was happy to continue with conservative treatment and postpone any decision on surgery until a date far into the future. Dr. McCarthy was clearly in agreement with that course of action being taken, as he did not refer the plaintiff to an orthopaedic specialist at that stage.

169. In terms of work, the plaintiff had been unfit for work for seven days after the accident. He then supervised the completion of the house that he was building and had to hire subcontractors to finish the job. That job ended in January, 2010. The plaintiff was unemployed until the beginning of September, 2010 when he worked on the family farm for two days per week. He said that he had to stop that work in February, 2011 as he could not cope with the demands of the job.

170. He toyed with the idea of becoming a teacher for people interested in online trading on various financial markets. However, as he thought that he would not be able for sitting for prolonged periods at a computer, he did not go ahead with that project.

171. In December, 2011 the plaintiff was examined by Mr. Nasser, Consultant Orthopaedic Surgeon, on behalf of PIAB. He was of opinion that the plaintiff had suffered a mild to moderate whiplash injury to his neck, mid back and lower back. He expected that a recovery would be made within approximately twelve months.

172. At some stage in 2010, or 2011, the plaintiff was referred by his physical therapist to Mr. Sharif, Consultant Orthopaedic Surgeon. This doctor was not called as a witness, nor was any report from him submitted in evidence.

173. The plaintiff's former solicitors sent him for examination by Prof. Jogin Thakore, Consultant Psychiatrist, on 18th January, 2012. While this doctor diagnosed the plaintiff as suffering from an adjustment disorder with anxiety, the plaintiff said that he did not have any mental health issues. He did not attend any counselling as recommended by Prof. Thakore. There was no further psychiatric evaluation of the plaintiff.

174. In February, 2012 the plaintiff's former solicitors sent him to Mr. Hemant Thakore, consultant orthopaedic surgeon. He was of opinion that the plaintiff had pre-existing degenerative changes in his spine, which were activated by the soft tissue injury which was superimposed upon them due to the accident. The doctor was of opinion that if the accident had not happened, the degenerative changes would probably have progressed slowly, giving rise to low grade symptoms in the plaintiff's late 40s, or early 50s. He was of opinion that the accident activated these degenerative changes and that they would revert back to a base level within approximately a year to eighteen months from the accident. However, the plaintiff's back would be rendered more vulnerable and prone to recurrences of pain due to the injuries sustained in the accident.

175. Mr. Thakore recommended that a series of x-rays be taken of the plaintiff's spine. He also recommended that the plaintiff undergo isokinetic evaluation of the muscles in his spine and that a rehabilitation programme be designed based upon the results of that evaluation. He thought the rehabilitation programme would take approximately six months. The plaintiff did not do any of these things. He did have four sessions of physiotherapy from a chartered physiotherapist. During the year, he received five prescriptions for medication, the last of which was issued on 20th October, 2012. This is the last prescription produced by the plaintiff, although his G.P. thought that he had issued a prescription to the plaintiff in November, 2012 but this was not recorded in his records. The plaintiff had no paid employment during 2012.

176. In 2013, the plaintiff commenced a course to become a physical therapist. He had ten sessions of physiotherapy during 2013. He had one visit to his G.P. arising out of which he had the third MRI scan. The G.P. thought that the plaintiff's condition was getting worse, but he did not advise any treatment, as he assumed that this was being taken care of by Mr. Thakore. There were no prescriptions produced for 2013.

177. There were no recorded visits to the G.P. in connection with his injuries in 2014, although he did attend for other matters. Dr. McCarthy thought that there may have been two visits for prescriptions for painkillers. This was not recorded in his notes, nor was the cost of any prescriptions claimed or produced by the plaintiff for this period. He had two sessions of physiotherapy; the last being on 25th April, 2014. It does not appear that the plaintiff received any further physiotherapy treatment after that date.

178. In June, 2014 the plaintiff completed his course to become a physical therapist. He set up in practice in July and during that month and the following month, he treated one patient per day. He did not charge these patients, as he was trying to get his practice up and running. He also took on a job acting as physical therapist for Wolf Tones GAA Club and provided pitch side assistance for them. However, in October, 2014 while treating a player on the pitch, he had an episode of pain in his chest, which he thought was referred from his left arm. As a result of this, he gave up his practice as a physical therapist. However, he did not consult any doctor in the wake of this episode, or before deciding to give up his physical therapy practice.

179. In July, 2015 the plaintiff did a painting job on a house owned by his brother. While carrying out this work he had an episode of neck and jaw pain for which he attended his G.P. He left the remainder of the painting work to his helper, who had originally been contracted to paint the upper parts of the walls and the ceilings. In September, the plaintiff returned to his G.P. and reported that he

had felt a "snap" in his back at the time of the episode in July. His G.P. feared that he may have suffered a disc prolapse. He arranged for the plaintiff to have his fourth MRI scan. No prolapsed disc was demonstrated on the scan. Dr. McCarthy stated that he did not refer the plaintiff to an orthopaedic surgeon, as he was aware that the plaintiff had been referred to Mr. Sharif by his physical therapist and had seen Mr. Thakore in 2012.

180. The plaintiff waited four years before returning to see Mr. Thakore and that was only done on a referral by his present solicitor. The Court finds it hard to believe that the plaintiff had significant pain and disablement in the period 2012 – 2016, when neither the plaintiff, nor his G.P., thought that he should be referred back to see the specialist. The court is of opinion that if the plaintiff did in fact have severe ongoing pain and was unable for paid employment of any kind, he would not have waited four years to return to see the consultant.

181. When the plaintiff was seen by Mr. Thakore in June, 2016 he recommended referral to a pain specialist. The plaintiff was referred to Mr. McCrory by his G.P. This doctor saw the plaintiff on five occasions between July and October, 2016. According to the plaintiff, he administered three injections to his mid and lower back. We do not know what type of injections these were, nor whether they have produced a full recovery, nor whether any further treatment is anticipated. The deficit is due to the fact that the plaintiff has elected not to call this treating doctor. The implications of which election have been set out earlier in this judgment. All that is known is that following the last examination in October, 2016 the plaintiff was discharged by Mr. McCrory back to the care of his G.P. The plaintiff stated that that treatment did afford him considerable relief, until an incident in December, 2016 when his daughter fell into his lap, causing "something to go" in his back. He received an intramuscular injection from his G.P. The pain eased after approximately two weeks.

182. Finally, the plaintiff was seen by Dr. Hearty, Consultant Pain Specialist, on 17th January, 2017. He is of opinion that the plaintiff is suffering from myofacial pain syndrome, which will require treatment on a pain management programme, comprising treatment from a pain specialist (although the need for a further radio frequency ablation, may not arise for two years), there will also be treatment from a psychologist and a physiotherapist. Both Mr. Thakore and Dr. Hearty are of the opinion that it will only be after completion of this programme, that a decision can be made as to what work the plaintiff will be capable of undertaking. They do not think that he will be fit for heavy physical work.

183. None of the doctors have said that the plaintiff has been, or will be, unfit for light non-physical work. The plaintiff has made no effort to obtain light work. The court does not accept that he was incapable of the demands of working as a physical therapist due to the single incident of left arm and chest pain experienced when treating a player on the pitch in October, 2014. The court rejects the assertion that the plaintiff had to give up this work due to his physical injuries. He had managed the fifteen-month part-time course, which involved practice massages on other students. He had also had no difficulty treating one patient per day during July and August, 2014. His decision to abandon his physical therapy practice was made without reference to any of his doctors. The court does not accept that the plaintiff was incapable of working as a physical therapist due to his injuries.

184. As this Court noted in *Svajlenin v. Kerry Group Services Ltd* [2016] IEHC 439, a plaintiff is always free to set up a new business after an accident. What a plaintiff cannot do, is set up a business and run it for a while, and subsequently decide to abandon the business venture and then charge the defendant for his loss of earnings for the period while he was operating the business venture. The defendant is not an underwriter of the success of any new business venture set up by the plaintiff after the accident.

185. The court has had regard to the fact that there were no prescriptions for medication produced after October, 2012. According to the claim for special damages, the plaintiff had approximately 39 sessions of physical therapy and physiotherapy, the last of which was on 25th April, 2014.

186. The court must also have regard to the evidence given by Mr. Brian Hurson, Consultant Orthopaedic Surgeon, who examined the plaintiff on 30th July, 2015. He noted that the plaintiff had pre-existing degenerative changes in his spine. He stated that the plaintiff's symptoms at that time were non-specific. Examination of the back and neck was normal. He was of opinion that the plaintiff had suffered a soft tissue injury to his spine. The symptoms related to this would have lasted several weeks, to a number of months. He did not expect any adverse sequelea as a result of the accident.

187. He reviewed the plaintiff on 15th December, 2016. He found it difficult to explain why the plaintiff suffered with thoracic and lumbar pain sufficient to warrant targeted injections in 2016. He stated that the plaintiff's main complaint at that time, concerned calf muscle spasms. These were not caused by the accident. He noted that there were mild degenerative changes in the plaintiff's spine. He was of opinion that the plaintiff's current symptoms would be best treated with a diligent home exercise programme, targeted to strengthen his spinal muscles and to continue his 6km walks per day. He was of opinion that there was no indication that the plaintiff would suffer any adverse sequelea as a result of the accident.

188. Having regard to the medical treatment sought by the plaintiff in the years since 2012, the court is not satisfied that his injuries were such as to prevent him in engaging in any paid activity at all. A plaintiff is under a duty to try to mitigate his loss. This means that if he is not able for his pre-accident employment, he must try to obtain alternative suitable employment which he can manage, such as light work or part time work. The plaintiff did not do this. From the time he ceased work in February, 2011 he effectively sat back and simply accepted that he could not work as a builder and, therefore, the defendant would have to compensate him for his loss of earnings when the action eventually came on for hearing. The fact that his alleged period of disablement coincided with a deep recession in the Irish economy and in the building industry in particular, leads the court to the view that the plaintiff probably would not have had work as a builder anyway and was content to remain unemployed in the expectation that the defendant would have to compensate him for his loss of earnings during this period. The simple fact is that the plaintiff did not try to obtain suitable work in this period.

189. Often a plaintiff will have difficulty in sourcing suitable alternative employment, due to his lack of education or other qualifications, such that unskilled labouring work may be the only option open to him. In this case, the plaintiff is a highly qualified mechanical engineer. Such positions do not involve excessive physical labour. I am not convinced that the plaintiff's injuries were such as to prevent him working as an engineer either in the past, or at present. The plaintiff has made no effort to obtain such work.

190. Finally, the court has had regard to the fact that during the eight-day hearing in January, 2017 the plaintiff had the appearance of being an extremely fit man. He looked strong and healthy. Having witnessed him coming in and going out of the court over a number of days, I am satisfied that, with the exception of some stiffness in neck rotation, he did not appear restricted in his movements.

191. Taking all of these matters into account, I am satisfied that the fact that the plaintiff only had treatment in 2016, was because he had not returned to see Mr. Thakore, or any other specialist since 2012. I find that had he done so in 2013 or 2014, pain

management treatment would probably have been recommended then and he probably would have gone on to make a reasonable recovery, within approximately six months of receiving that treatment. The fact that such treatment was only begun in 2016, was due to the fact that the plaintiff delayed for four years in returning to see Mr. Thakore.

192. As already noted, I do not accept that the plaintiff was rendered totally unfit for work as a result of his injuries. That he decided not to attempt to return to work in some capacity, does not imply that the defendant has to compensate him for his loss of wages during his period of inactivity. I do not accept that he had to abandon his physical therapy practice due to his injuries. While the painting job in July, 2015 did give rise to some symptoms, it did not render him incapable of all forms of employment.

193. Turning to the specific awards of damages, I prefer the evidence of Mr. Thakore and Dr. Hearty to that given by Mr. Hurson. I am satisfied that the plaintiff suffered a soft tissue injury to the muscles and ligaments of his neck, mid back and lower back as result of the road traffic accident on 21st October, 2009. Those soft tissue injuries were superimposed upon a subnormal spine, due to the fact that the plaintiff had congenital abnormalities in the form of a grade 1 spondylolisthesis and spondylosis in his spine. He also had degenerative changes in his spine. These conditions had been asymptomatic prior to the accident. The plaintiff had led a very fit and active lifestyle up to 2009.

194. I accept Mr. Thakore's evidence that as a result of the accident, the degenerative changes in the plaintiff's spine have been activated. I accept Dr. Hearty's evidence that the plaintiff has generalised pain in the form of a myofascial pain syndrome. These opinions are supported by the evidence of the progression of the degenerative changes in the plaintiff's spine, as shown in the MRI scans. In addition, the Court has had regard to the fact that prior to the accident the plaintiff was asymptomatic in terms of his neck and back. He was able to lead a very fit and healthy lifestyle. This supports the opinion reached by Mr. Thakore, that the accident rendered the degenerative changes symptomatic. For the reasons stated above, I do not think that the plaintiff's symptoms were particularly severe in the years 2012 to 2016. I am satisfied that with the completion of the pain management programme, the plaintiff will go on to make a reasonably good recovery from his injuries.

195. In the circumstances, I award the plaintiff general damages for pain and suffering to date of €45,000. I accept that he has some ongoing pain, which has been addressed by the injections administered by Dr. McCrory in 2016 and will be further addressed if he undertakes the rest of the pain management programme, as advised by Dr. Hearty. In these circumstances, I award the plaintiff €15,000 for pain and suffering into the future.

196. In relation to his claim for past loss of earnings, I accept that the plaintiff was rendered unfit for work as a builder after the accident. There is medical evidence to support this contention. However, the doctors have not said that he was unfit for light work, or for jobs that did not involve heavy physical labour. In particular, they have not said that he was rendered unfit for employment as a mechanical engineer. This is fatal to a large portion of his past loss of earnings claim. I am satisfied that the plaintiff has effectively been unemployed for the guts of seven years, simply because he did not try to get alternative employment.

197. In looking at what sum should be used for pre-accident earnings and his losses to date, I do not accept the assertion put forward by the plaintiff and his accountant that his pre-accident earnings were €30,000 gross per annum. Mr. Stevens argued that if one looked at the plaintiff's earnings for 2009, they came out at €32,173. He further argued that if one looked at the plaintiff's average earnings for the period 2005 to 2009, these came out at approximately €30,575 per annum. He submitted that in these circumstances, a figure of €30,000 per annum was fair and should be used to calculate the plaintiff's loss of earnings from the date of the accident to the date of trial.

198. I prefer the evidence of the defendant's accountant, Mr. Grant, in relation to these calculations. To take the earnings for 2009, the figure used by Mr. Stevens ignored the fact that the plaintiff had in fact received no salary from May, 2009 to the date of the accident. His calculation of the plaintiff's earnings for that year noted that the plaintiff's actual salary from the company was €16,456. I do not think it is appropriate to add to that the sum of €10,800, in respect of the benefit in kind, due to the fact that the plaintiff had been provided with a company car. As explained by Mr. Grant, the Revenue adopt a particular method for assessing tax due in respect of benefit in kind. They would ignore the fact that the company had bought the car second hand for €11,000, but would base their calculation at 24% of the original market value of the car. This would give rise to a notional figure of €10,800 in respect of which the employee would have to pay tax at the appropriate rate. However, this is an artificial means of calculating the value of the BIK in the hands of the employee. Such an employee never receives income from the company to the value of €10,800. Accordingly, I agree with Mr. Grant that it is inappropriate when calculating the plaintiff's pre-accident earnings, to add this sum to the earnings which he actually received from the company.

199. Similar objections arise in relation to the figure of €4,917 which is included in Mr. Steven's calculation as a dividend from the company. I accept the evidence given by Mr. Grant that this figure actually represents a director's loan from the company and would never be treated as part of his income. Accordingly, I am of the view that for the purposes of assessing the plaintiff's true pre-accident earnings, the court should only have regard to the figure of €16,456 which the plaintiff received from the company. This is the figure shown in his tax returns for 2009.

200. In relation to the alleged average earnings, these too take account of the BIK and the director's loan and do not take account of the fact that the plaintiff's earnings had been declining over the years. If one strips out the BIK figure and the director's loan amount, the average income is considerably less than €30,000 per annum.

201. The plaintiff has claimed a loss of €30,000 per annum from the date of the accident to the date of the hearing of this action. I accept the evidence of Mr. Grant that this completely ignores the fact that there was a deep recession in the Irish economy during the years 2008, until approximately 2015. I accept his evidence that this impacted on the construction industry in a fundamental way. When considering what the plaintiff would have earned but for the accident, one cannot ignore the likely effect of the recession on his earnings as a builder.

202. The Court is of the opinion that having regard to the plaintiff's prior work history and the financial state of his company in 2009, that if the accident had not happened, in all probability, he would not have obtained any significant building work after he completed the single house build in January, 2010.

203. The Court is satisfied that on the balance of probability, his company would have ceased trading. He would have been put back onto the labour market to seek whatever work he could find. As a result of the accident, he was rendered unfit for heavy physical work. This would have placed him at a competitive disadvantage as against other people on the labour market. However, as already noted, he had the considerable advantage of being a highly qualified engineer. The Court is not satisfied that his injuries would have prevented him working in such capacity. In these circumstances, I propose to award a relatively modest sum for loss of opportunity on the job market. I award the sum of €20,000 under this heading.

204. In relation to the claim for future loss of earnings in the sum of €478,279, this claim is totally unrealistic. To succeed with such a claim, the plaintiff would have to provide cogent medical evidence that at the age of 44, he has been injured to such an extent that he will never work again in any capacity. To say that the medical evidence in this case falls far short of that mark, is an understatement. The furthest that Mr. Thakore and Dr. Hearty go, is to say that it will only be following completion of the pain management programme, that it will be possible to determine what work the plaintiff will be capable of doing. As already noted, the plaintiff is in the fortunate position of holding a valuable and sought after degree. He has not called any medical evidence that he will not be able to work as an engineer in the future. Mr. O'Loinsigh, the plaintiff's vocational assessor has given the opinion that, as the plaintiff has a high level of educational attainment and with the easing of the economic crisis in the country, he should be in a good position to source employment. He also states that if the plaintiff secured a position as a production manager, he could earn a salary in the region of €50,000. In these circumstances, I reject the plaintiff's claim for loss of earnings into the future. In addition, for the reasons set out above in relation to the past loss of earnings claim, I do not think it is appropriate to use the figure of €30,000 as the basis of the calculation of the figure for future loss of earnings.

205. To the amounts already awarded must be added the figure for special damages in the sum of €4,688.52, giving an overall award of €84,688.52.