Neutral Citation Number [2012] IEHC 151

THE HIGH COURT

Record No: 2007/9146 P

BETWEEN

BILLY NOLAN

Plaintiff

AND

DANNY MITCHELL AND

First Named Defendant

PATRICK O'NEILL

Second Named Defendant

Judgment of Mr Justice Esmond Smyth delivered on the 20th of January 2012

1. The plaintiff is an alarm fitter and resides at Millview House, Graigcullen, Co. Carlow.

2. The plaintiff is claiming damages for personal injuries, loss and other damage, sustained by him as a result of a road traffic accident on the night of 17th November, 2005 at the public highway at Tollerton on the Kileeshin to Castlecomer Road in the County of Carlow. At the material time the plaintiff was riding a motorcycle, accompanied by a pillion passenger.

3. The first named defendant, a taxi driver, was driving a Ford Mondeo car owned by the second named defendant, when a collision occurred between the two vehicles. The incident happened almost directly outside or proximate to the entrance to the second named defendant's dwelling house, from which the defendants' vehicle had just emerged.

4. The plaintiff sustained serious injuries as a result of this accident, namely: injuries to his left hand, left knee and right foot; a fracture of the fifth metacarpal in his neck; lacerations to his left hand; a ruptured quadriceps tendon of his left knee, and; a fracture of the fifth metatarsal bone in his right foot.

5. The plaintiff was taken by ambulance to Portlaoise General Hospital, from where he was transferred to Tullamore Hospital. The plaintiff was operated on to repair the quadriceps tendon and was immobilised for approximately three months thereafter. The plaintiff has also been left with an inability to full extend the little finger of his left hand. Some months after the accident, a piece of plastic was discovered embedded in the plaintiffs hand which required surgical removal.

6. Prior to the accident, the plaintiff was an alarm fitter by trade. He said that he had to give up this type of work because of his injuries and will be unable to resume this occupation in the future. This is because the work of an alarm fitter involves, *inter alia*, working in confined spaces, climbing ladders, lifting weights, removing floorboards, drilling joists, putting in wires and doing external work on bell boxes, etc.

7. The plaintiff claims that because of his injuries he is no longer able to kneel or squat properly, work on rough surfaces or climb ladders. In light of continuing problems with his left hand, including a loss of power in that hand, he claims to have difficulty coping with tasks that require manual dexterity or lifting and carrying heavy loads. The plaintiff states that he has a lot of pain in his left knee, particularly when standing and sitting, and that he has continuing pain in his right foot. After the accident, he spent three months in a wheelchair; thereafter, he had to use crutches and under went a period of physiotherapy and prescribed exercises.

FINANCIAL CONSEQUENCES FOR THE PLAINTIFF

8. The plaintiff is making quite a substantial claim in these proceedings. The plaintiff states that before his accident, he had been taking home €500 per week. Based on the actuarial figures, his claim for loss of earnings to date amounts to the sum of €142,000. At its highest point, the figure for loss of earnings into the future is estimated by the plaintiffs actuary at almost €450,000.

9. I will return later to the findings and prognosis relating to the plaintiffs injuries which are set out in a number of agreed medical reports, and also to the more contentious issues arising from the loss of earnings claim, and other matters touching on the credibility and truthfulness of the plaintiffs evidence during the case, and arising from verifying affidavits sworn by the plaintiff in support of the claim. These are matters to be considered by the court in the light of an application by counsel on behalf of the defendants in this case, that the plaintiffs case for damages be dismissed under the provisions of Section 26 of the Civil Liability and Courts Act, 2004.

THE EVIDENCE IN RELATION TO LIABILITY

10. Liability is an issue in this case. Essentially the particulars and breach of duty, including breach of statutory duty, set out in the plaintiff's endorsement of claim can be encapsulated in the allegation that the defendant drove out on to the public highway from a private entrance without ensuring that it was safe to do so; when it was unsafe to do so, and; that the defendant driver failed to keep a proper look out, and/or to comply with the relevant provisions of the Road Traffic Act 1961.

11. The defendants, on the other hand, allege that the accident was wholly caused by the negligence of the plaintiff, or alternatively the plaintiff was guilty of contributory negligence. The defendants allege, inter alia, that the plaintiff drove at an excessive speed; drove on his incorrect side of the road, and drove in a dangerous manner.

Evidence of the Plaintiff

12. On Sunday evening on 13th November 2005, the plaintiff was bringing a friend home as a pillion passenger on the back of his motorbike. They were wearing helmets and motorcycle gear. At the time of the accident they were on the Carlow to Abbeyleix Road, travelling in the direction of Abbeyleix. That part of the road is otherwise known as the Kileeshin Road. The locus of the accident was about a mile and a half from the plaintiff's friend's house where they had been earlier. It is a largely rural area with intermittent dwellings and farms. It is clear from the evidence that the plaintiff is a person familiar with motorbikes. He was driving a Yamaha R1. The road was dry and in good condition at the time. It was dark and there was no public street lighting. His headlights were on and

he said that he was doing 50 m.p.h. The plaintiff said that the yellow lines (which are exhibited in photographs taken by the engineers) were not there at the time of the accident.

13. In essence, the plaintiff's case is that he was travelling on his correct side of the road towards the stretch of road where Mr. O'Neill lives, maybe a foot or two to the left-hand side of the centre of his own side of the road, when he saw the lights of a car shining across the road from Mr. O'Neill's entrance on his right-hand side. The defendant's car proceeded out making a wide arching turn until it was facing in his direction, and occupying the Jane that the plaintiff was travelling in. The lights of this car dazzled him so that he was not able to see either side of the car. He veered to the right to avoid a collision but struck the rear panel of the defendant's car. The next thing that he remembered was that he was in Tullamore Hospital.

14. The scenario outlined by counsel for the defendant and suggested to the plaintiff, was that Mr. Mitchell had a vision of approximately of 188 to 200 metres to his left, towards the direction the plaintiff was coming from, as he emerged from the entrance to Mr. 0'Neill's house. At the end of that stretch (and it is clear that that part of the road is straight), is a bend and dip in the road, where the road veers to the left, as shown in photograph 7 in the defendant's album of photographs. Beyond that dip and left turn is a long stretch of road of about 500 or 600 metres.

15. It was put to the plaintiff that when Mr. Mitchell, the first named defendant came to the mouth of the entrance to Mr. O'Neill's residence, he looked to his left, and he did not see any light (presumably because the plaintiff was in the dip of the road at that point), but as he edged further onto the roadway, turning slightly to his left, he became aware of the lights of the plaintiff's bike emerging close to the ditch on the plaintiff's incorrect side of the road. The bike was travelling fast, in the words of Counsel for the defendants, "like a bat out of hell".

In the circumstances, which I suppose could be described as "the agony of the moment", Mr. Mitchell had no option but to "dart across the road" at the angle he was travelling in so as to avoid the plaintiffs oncoming bike. The plaintiff denied that he was travelling too fast or that he was on the incorrect side of the road as alleged by the defendants.

Evidence of Mr. John Kelly, Independent Witness

16. An independent witness, Mr. John Kelly, was travelling the stretch of road leading up to the dip and bend at the same time and in the same direction as the plaintiff. Mr. Kelly gave evidence that he had been driving since he was 16 or 17 years of age and that he is now 52 years of age. Mr. Kelly stated that, as he came to the bend, a motorbike passed him at high speed on the right hand side of the road. Mr. Kelly said that he was travelling at about 65 mph at the time, with another car in front of him about 20 yards ahead. He said the position of the motorbike was between the ditch and his car on the right hand side. I understood Mr. Kelly to be saying that the motorbike was on its incorrect side of the road as it travelled around the bend. He noticed there were two men on the bike. It seems that Mr. Kelly then lost sight of the bike, as after it passed him out, it overtook the other car ahead of him.

17. Mr. Kelly said the bike was gone "out of sight in seconds" and was "definitely speeding". Having looked at his speedometer, he estimated the bike speed to have been 90 mph. Mr. Kelly said that he did not see the motorbike after that.

18. Mr. Kelly said there is a very short distance between the bend of the road and where the accident happened. He noticed that the car in front of him had slowed down. He slowed down also. He could see two white lights down facing down the road towards him and knew something was wrong. The car ahead of Mr. Kelly slowed down but did not stop at the scene.

The Defendants' Evidence

19. Mr. Mitchell is 48 years of age and works as a taxi driver. He had been working for Mr. O'Neill for 7 years, and on the night in question he was driving a Ford Mondeo owned by Mr. O'Neill. He was collecting Mr. O'Neill and his wife to bring them into town. In the course of his evidence, Mr. Mitchell was referred to the photo album prepared by Mr. O'Hara, the defendants' engineer.

20. Mr. Mitchell said that on the night in question he stopped at the yellow line outside Mr. O'Neill's house, because that "is where you get most of the view at that stage". He said that he did not observe anything on the road before he proceeded out.

21. Mr. Mitchell's case, supported by the evidence of Mr. O'Neill, is that he got to about half way across his own side of the carriageway, to a point where his driver's wheel was almost at the white line, when he heard Mr. O'Neill shout "the bike", and in the words of Mr. O'Neill, Mr. Mitchell "darted across the road" at an angle towards the ditch on the far side.

22. The evidence of Mr. Mitchell and Mr. O'Neill is that when they became aware of the bike it was in the middle of their side of the road, i.e., the incorrect side of the road for the bike, and, according to Mr. Mitchell, it was driving a lot faster that it should have been. Mr. O'Neill said that it all happened too quickly.

23. The case for Mr. Mitchell is really that he had no choice or alternative, if he was going to avoid the oncoming plaintiff, but to dart across the road as quickly as he could to get out of the way of the plaintiffs bike.

The Evidence of Garda Michael Hurley

24. Garda Hurley was stationed at the time at Ballylinan Garda Station in Co. Laois and he investigated this accident and came on the scene at about 10 p.m. that evening. There were ambulances there and the plaintiff and his companion were being attended to on the grass margin at the side of the road. Garda Hurley noted that there were skid marks where the bike had come off the road and onto the grass margin and impacted with a timber fence which it had knocked over.

25. Garda Hurley prepared a sketch of the scene as he found it. The sketch indicates a point of impact marked by "X", and the position of the defendants' Ford Mondeo car as found by Garda Hurley. Garda Hurley said he distinctly remembered the car was on that side of the road. He said it was probably a matter of inches, no more than a foot, inside the line. Garda Hurley identified the point of impact from where the car was stopped by the slight debris he found beneath it. He said that there were scrape marks on the road for 40 yards but they were not continuous. They originated from the plaintiff's correct side of the road to the ditch on the far side.

26. Garda Hurley said that to make a left turn towards Carlow and to maintain the position of the car on the Carlow bound carriageway is a straight forward manoeuvre. While he acknowledged in cross examination that trees and the dip in the road may inhibit the sight distance of cars turning towards Carlow, he maintained that there would be no difficulty in seeing down the entire length of the road as shown in photograph number 7. Garda Hurley did not agree that it is difficult to identify the speed of a vehicle on a dark night. He said if a bike is coming at a person at speed, that person will notice it a lot quicker than if it was taking its time.

27. Having completed his initial investigation, Garda Hurley took a statement from Mr. Mitchell. He also took steps to obtain a

statement from the plaintiff. He called twice to the plaintiffs house but the plaintiff was not at home. Garda Hurley said that he spoke to the plaintiffs father once or twice requesting him to tell the plaintiff to contact him to make a statement. He said that he also spoke to the plaintiff on the phone after Christmas, some two or three months after the accident, to no avail. Garda Hurley said that the second time he spoke to the plaintiff's father, he told him he would call again and he said that he was assured by Mr. Nolan Senior that he would arrange for his son to be there, however it seems that nothing transpired. Garda Hurley was not challenged on this evidence; nor was it put to Mr. Nolan Senior, in cross examination, that he had in fact such a conversation with Garda Hurley.

28. The plaintiff did not recall any phone call from Garda Hurley about a statement. He said that he was at home at all times, and that he had been in a wheelchair for three months after the accident. The plaintiff said that he knew nothing about any conversations that Garda Hurley may have had with his father. He recalled two Gardai calling in connection with an insurance issue; however they never said anything about statements.

29. The defence contend that the court should reject the plaintiffs denial that he knew, or had been aware, that Garda Hurley was trying to contact him about a statement. I am satisfied that Garda Hurley probably made some efforts to contact the plaintiff about a statement. The problem with Garda Hurley's evidence on this point, however, is that he did not recall the dates on which this happened. Recollection of dates is important in this context because the plaintiff was probably housebound, at least to an extent, for two or three months after his accident. That being the case, it is difficult to see why Garda Hurley could not have been able to track him down. Therefore, I do not propose to make an adverse finding against the plaintiff in this regard.

Evidence of the Defendants' Engineers

30. Mr. Edward Flahavan and Mr. Vincent O'Hara are consultant engineers with well established reputations in their field, including the investigation of circumstances of road traffic accidents. Mr. Flahavan was called on behalf of the plaintiff and Mr. O'Hara on behalf of the defendants. They prepared photo albums and took measurements at the scene.

Mr. Edward Flahavan

31. Mr. Flahavan was shown a Garda sketch and considered that the point of impact marked on the sketch shows the defendants' car on its incorrect side of the road. He interpreted the line on the sketch as indicating a slide from the point of impact to the point of rest of the motorbike. He said the slide marks could indicate the speed of the bike from the point of impact to the point of rest; however, they are not an indication of the pre-accident speed of the bike. Mr. Flahavan agreed in cross examination that the report on the damage to the rear of the car indicated a very severe impact and that such an impact would significantly slow down the bike.

32. Mr. Flahavan measured the metal surface of the road at 6.8 metres or 22 feet 4 inches. The plaintiff told Mr. Flahavan that at the time of the accident there were no hard shoulder markings on the road. Mr. Flahavan's evidence is that looking at photo 10 of his album, there is a view available at the entrance of Mr. O'Neill's property of 200 metres. He said it would take about four seconds for a driver exiting the entrance to complete a left hand turn in the direction of Carlow. He did not think it would be necessary for a person turning to the left onto the road to make a wide sweeping turn. He could make the turn and maintain his own side of the road. The entrance to Mr. O'Neill's premises is wide enough for him to do so.

33. Mr. Flahavan said that the plaintiffs motorbike had two side by side lamps, but that from a distance it looks as though there is only a single light. The range of the lights would be approximately 100 metres. Mr. Flahavan said that judging distances on rural roads at night is extremely difficult. In his opinion, a motorist should exercise caution if there is oncoming traffic and the speed of that traffic is uncertain. Mr. Flahavan said it is very difficult to get a motorbike to stop at the rate that you can stop a car. He agreed with counsel that the potential to dazzle an oncoming motorist would not arise until the car straightened up.

34. Mr. Flahavan agreed that the sight distances would be reduced if the vehicle moved in towards the ditch on the left hand side. The figures suggested by Mr. O'Hara for the reduced sight distance in those circumstances are 140 metres. Mr. Flahavan said that it would take about four and a half seconds to cover a distance of about 188 metres. He agreed that if the motorbike was doing 90 mph at 188 metres, the motorbike would be out of sight at the time when the car commenced its manoeuvre and that it would only come into view as that was occurring. Mr. Flahavan thought that the type of impact involved in this accident was a glancing blow, rather than a t-bone accident, where one vehicle intersects another at an angle of 90 degrees. The position of the Mondeo on the road was consistent with what the plaintiff had told him.

Mr. Vincent 0'Hara

35. Mr. O'Hara's evidence was that the sight distance for the motorist travelling towards Abbeyleix is 188 metres, assuming that the motorist was on the correct side of the carriageway. That is the distance one can see from Mr. O'Neill's house looking towards Carlow. Mr. O'Hara said the dip in the road is probably about 220 to 250 metres or so from Mr. O'Neill's entrance and therefore beyond the extent of sight distance. However, he agreed that the further out you go from the entrance the greater the distance you can see.

CONCLUSIONS ON LIABILITY

36. The first point I wish to deal with is the probable point of impact of the two vehicles. The only independent evidence on this point is the evidence of the garda sketch drawn up by Garda Hurley when he arrived at the scene. The garda sketch clearly puts the point of impact on the plaintiffs correct side of the road, albeit by a small margin. It also shows that the defendant's car was on its incorrect side of the road pointing in the general direction of Carlow. The skid marks that Garda Hurley found originate from the point of impact on the sketch to where the bike came to rest on the grass margin some 40 yards away. There was evidence that if the accident had occurred in the middle of the plaintiffs incorrect side of the road, then the damage to the defendant's vehicle is more likely to have been in the vicinity of the centre or passenger doors of the defendant's car. The evidence of the location of the damage to the defendant's vehicle puts it at the rear quarter of the passenger side of the vehicle. As noted above, Mr. Flahavan's evidence was that that is more consistent with a glancing blow than at-bone accident, where one vehicle intersects the other at a 90 degree angle.

37. If the position of the defendant's car after the accident was as shown in the garda sketch, then it would be pointing at a slight angle in the general direction of Carlow with its headlights facing down the road. The plaintiff said he was dazzled by lights pointing in his direction. The position of the car on the sketch is consistent with that account.

38. Accordingly, having considered the evidence on this point, I am satisfied as a matter of probability that the plaintiff was on his correct side of the road at the point of impact, and that the defendant's vehicle was on its incorrect side of the road as shown in the garda sketch.

39. However, that is not the end of the matter. There is the evidence of Mr. Kelly to consider. Mr. Kelly is an independent witness. He is an experienced driver with no axe to grind in this case.

40. I have already referred to the detail of Mr. Kelly's evidence. If his assessment of the speed of the bike, which of course can only be an approximation, is correct, then the plaintiff was indeed travelling very fast. This lends support to Mr. Mitchell's recollection, that when he became aware of the bike, it was driving a lot faster that it should have been.

41. Mr. Kelly impressed me as a good witness of fact, and I accept his evidence that when the bike passed him, it was probably on its incorrect side of the road and travelling at an excessive speed. However, as I have said, the bike was on its correct side of the road at the point of impact. Therefore, what probably happened is that, having executed its passing manoeuvre of the two cars, the bike corrected its position on the road before the impact.

42. The evidence is that the 188 metre sight line is a sight line which was taken at a point between the fence at Mr. O'Neill's house and the yellow line, and at that point, it is not possible to see a bike coming out of the dip in the road. However, on the evidence of Mr. O'Hara, when Mr. Mitchell got to the yellow line and beyond it, he would then have had a view to the dip in the road.

43. Both Mr. Mitchell and Mr. O'Neill said that they first became aware of the bike when they were in the middle of their own carriageway. I am satisfied that even if Mr. Mitchell could not see the bike at the yellow lines, then, if the evidence of Mr. O'Hara is correct, he should have had an unobstructed view of any approaching traffic while he was in the middle of his own carriageway. It seems to me to be probable that if a driver was keeping a proper look-out to his left leading up to that position in the middle of his own carriageway, then at that point, he should have been able to see the approach of the plaintiffs motorbike. Furthermore, it is not unreasonable to assume, that at least until Mr. Mitchell became aware of the plaintiffs bike, he was probably exiting from Mr. O'Neill's house at a normal speed. In that case, he should have been able to stop and wait until the bike had passed him safely by.

44. Mr. Flahavan's evidence was that it is difficult to determine where the single light of a motorcycle is in relation to the central line of the road and whether or not it is on its right or wrong side of the road. There was also expert evidence that estimating the speed of an approaching vehicle at night is very difficult, although Garda Hurley had a different point of view.

45. It seems to me that these factors, taken together with the excessive speed of the approaching bike, probably contributed to Mr. Mitchell's decision to dart across the road to avoid the bike, when Mr. O'Neill alerted him to its presence.

46. In addition to these factors, the respective engineers gave evidence about how long it would take a vehicle to travel different distances at different speeds. It is clear from their evidence that the events leading up to this accident must have happened very quickly.

47. However, there is no getting away from the indisputable fact, that Mr. O'Neill, who was not the driver at the time, was able to see the bike before the accident. Mr. Mitchell did not see the bike until Mr. O'Neill alerted him of its presence.

48. Therefore, I am satisfied, as a matter of probability, that Mr. Mitchell, the first named defendant, failed to keep any or sufficient or proper lookout at the time and that this was a major contributing factor to the accident. In the circumstances, he clearly failed to yield right of way to the plaintiff, in breach of the Road Traffic Act 1961 and regulations made thereunder. The first named defendant was coming out of a private entrance and was bound to yield right of way to traffic on the road.

49. Nevertheless, I am also satisfied that there was contributory negligence on the part of the plaintiff, in that on the occasion in question, he was probably driving at a very excessive speed, close to 90 mph if Mr. Kelly's estimate is correct.

50. It is also of note that, in the Rules of the Road (Road Safety Authority, 2007) motorcyclists are advised to slow down, and if necessary to stop, if they are dazzled by oncoming headlights. This, the plaintiff clearly failed to do, for the obvious reason that he was driving too fast.

51. However, the primary responsibility for this accident in law must rest with the defendant because of his failure to yield right of way. Accordingly, I propose to apportion liability respectively as against the defendant at 60% and as against the plaintiff at 40%.

THE PLAINTIFF'S INJURIES AND SEQUAELAE

52. I have already outlined the general nature of the plaintiffs injuries in this case. They are described in more detail in a number of agreed medical reports. It is clear from these reports that following the plaintiff's accident he was brought by ambulance to Portlaoise Hospital where his open wounds were briefly dealt with. From there, he was referred to Tullamore Hospital, where he had surgery on his foot and knee and ultimately came under the care of Mr. Michael O'Riordan, a Consultant Orthopaedic Surgeon. The plaintiff himself has no recollection of the immediate aftermath of his accident. He said that the next thing he knew after the impact was that he was in Tullamore Hospital. He did not recall having been in Portlaoise Hospital before that.

53. The plaintiff described the effect of his injuries to the court. He said he had to "more or less" learn how to walk again and needs ongoing physiotherapy to mobilise his muscles. The plaintiff said that his left knee still pains him, especially in winter and cold weather, and that his left finger does not move. He said he is left with a scar on his shoulder from contact with the road at the time of the accident, and that he lost all the skin off the top of his hand. Asked about how his knee, the plaintiff said that it does not bend as much as it did before; perhaps a little over a half of what it should. He said he cannot kneel on it. The plaintiff said his social life has been affected because he suffers pain if he stands for too long and that cold weather and walking distances can bring on soreness. The plaintiff agreed that his pain is intermittent, and I understood him to say that he has to squat and crouch down as a form of exercise to strengthen the muscles around his knee cap.

54. The plaintiff said that his injuries have prevented him from fulfilling his ambition to take over the family alarm business. He is precluded from taking over the business because he has been unable to get into attics since the time of the accident, despite attempting to do so on several occasions. He said that the "crouching down" involved in this work was just too painful and if he stands on ladders his right foot and his knee get really sore.

55. The plaintiff said that he had tried plumbing and panel beating but that he was unable to do this type of work because it caused him pain. He also tried working in his father's pub but was having difficulty standing for long periods. The plaintiff said that he did a FAS course, and that because of his anxiety to get back to work, he has taken on a driving job, described as a secured courier run. He drives a delivery van and also does phone work for his father's business. Apart from this, the plaintiff has been out of work since his accident.

Mr. Michael O'Riordan, Orthopaedic Surgeon
56. Mr. Michael O'Riordan is a Consultant Orthopaedic Surgeon who furnished three reports on behalf of the plaintiff, dated respectively the 14/06/2006, 30/10/2008 and 22/03/2010.

57. In Mr. O'Riordan's first report of June 2006, he states as follows:

> "On examination his range of motion is not - 80 degrees. There is a very large jagged scar over the anterior aspect of his left knee and the knee is very swollen by comparison with the right. He is able to carry out a straight leg raise, so that the quadriceps mechanism is functioning. He has a small discharging sinus over the fifth metacarpophalangeal joint and the prominence bone is visible in the base of the sinus. The left foot appears normal."

59. Mr. O'Riordan prognosis in June 2006 was a guarded one. He thought the injury to the plaintiffs right foot would not be a source of long term problems but he would require surgery on his left hand to excise the bone fragment. Mr. O'Riordan said the plaintiffs inability to fully extend the little finger of the left hand was likely to be permanent. He thought that the plaintiff could expect a little improvement in the knee, but that he was going to have permanent restriction of the range of motion of the knee, and it was unlikely that he would get beyond 100 degrees. Mr. O'Riordan considered that:

> "it is likely that the pains will diminish considerably but it is a serious injury and he is likely to have long term disability as a result of the injury. I cannot see him getting back to his work as an alarm fitter as it would be extremely dangerous for him to try and climb ladders or work on rough surfaces".

60. Mr. O'Riordan's next examination of the plaintiff took place at end of October 2008. At this stage, the plaintiff had had a large fragment of plastic removed from his left hand, which had not been visible on x-ray. Mr. O'Riordan examined the plaintiff and found a well healed scar over the fifth metacarpal on the volar surface of the hand. He records that:

> "the finger is not able to flex or extend the finger actively. Passively the finger can be fully flexed but once the pressure is taken off the finger it goes back into extension. The proximal and distal interphalangel joints will not stretch out passively. Examination of the right foot reveals no abnormality. He has a full range of motion with no tenderness. The left knee shows a very ragged scar on the medial aspect of the knee and just above the knee; his range of motion is from 0-110 degrees. There is significant crepitus within the knee."

61. Mr. O'Riordan's opinion was that, even with surgical treatment he doubted whether any improvement would occur to the plaintiffs finger, and that it is going to remain stiff. He stated:

> "this will obviously render his hands less dextrous and he will find it difficult in particular to work with objects that require a large grip. As regards the left knee, he is unable to squat so this will make his work as an alarm fitter very difficult as he needs to get into tight spaces such as attics and his knee may not permit him to do this. Likewise he finds it very difficult to kneel and again this will interfere with his work. He had crepitus in his knee which suggests he has done damage to the particular cartilage of his patella and this may proceed to become arthritic in time. This would be arthritis of the patella femoral joint which can be very difficult to deal with. Likewise all the scarring above the knee will render surgery very problematic in the future."

62. Mr. O'Riordan considers that the plaintiff would not be able to get back to his work as an alarm fitter.

63. In his latest report of March 2010, Mr. O'Riordan noted that the plaintiff was still not back to his work and his walking distance was limited to about one mile after which he experienced pain in his right foot. The plaintiff complained that his left finger had become quite rigid and that he could not fully extend it. It became very painful in cold weather and he was taking painkillers for it.

64. Mr. O'Riordan examined the plaintiff and again proffered a guarded prognosis. It was his opinion that the plaintiffs foot and hand injuries were relatively minor, and while he had no doubt that the abnormalities in the plaintiff's little finger would lead to some inconveniences, it would not interfere significantly with most every day or even industrial activities. Mr. O'Riordan identified the plaintiffs biggest problem as his left knee injury which continued to preclude him from getting into tight and cramped corners. In turn, this prevented him from working as an alarm fitter. He noted again the possibility of the plaintiff developing arthritis in the left knee and him requiring surgical intervention to his left knee in the future, perhaps in 20 years from now. He noted:

> "that it would be not be possible for Mr. Nolan to get back to his normal as an Alarm Fitter but there are many occupations which he could be gainfully employed in which would use the skills he already has."

65. Mr. O'Riordan considered that an opinion should be sought from an expert in hand surgery as to whether anything could be done surgically to improve the function in Mr. Nolan's left hand.

Mr. Joseph G. O'Beirne, Orthopaedic Surgeon
65. Mr. O'Beirne, Consultant Orthopaedic Surgeon, assessed the plaintiff in October 2010, specifically in relation to the injuries to his left hand. In his report, he notes that ever since the accident the plaintiff has not regained any proper function of his left little finger.

66. Mr. O'Beirne felt that it would be possible to restore function to the left little finger by means of a two-stage grafting procedure. However, Mr. O'Beirne was of the view that it would be prudent to get an MRI scan done before embarking on such a procedure and he said that the plaintiff agreed to take time to decide whether he wished to proceed with the operation.

67. The first stage would involve, *inter alia*, the excision of the scarred tendon and its replacement by silastic rob. After a three month interval, the second stage would consist of the removal of the silastic rob and replacing it by a tendon graft with a tendon taken from another part of the body. Mr. O'Beirne goes into some detail in the course of his report in setting out a fairly complicated sequence of events involved in these procedures, and opines that it is difficult to be categorical as to the likely outcome. He states:-

> "In practice we usually find that patients who undergo these series of procedures do experience benefit in that they regain active flexion of the involved finger, although the range of flexion is generally less than normal and the strength of finger flexion e.g. in making a fist would tend to be less than in the normal situation."

67. In simple terms, Mr. O'Beirne suggests that the plaintiff has to make a decision whether or not to undergo this series of procedures which hold out the likely prospect of improvement of finger function, but not restoration to normality.

68. In a further report of October 2011, Mr. O'Beirne notes that the plaintiff had decided not to proceed with the series of operations which are outlined above. Insofar as the likely long term prognosis is for the plaintiff, Mr. O'Beirne stated:

> "We are essentially now looking at the final outcome. My own view is that the lack of function of the little finger is related to post traumatic scarring of the FDB tendon and this is now likely to remain unaltered. I am not aware of any factors which would lead to me believe that any further sequaelae would be expected as a result of the injury over and above the situation as we not see it."

Mr. Francis M. Thompson, Orthopaedic Surgeon

69. There are three reports from Mr. Thompson, an Orthopaedic Surgeon who saw the plaintiff on behalf of the defendants. In his first report dated 11/07/2006, having examined the plaintiff and reviewed the medical notes from other orthopaedic surgeons, Mr. Thompson said that the plaintiff continued to have quite a degree of difficulty with regard to his left hand and did not appear to have any function at all in his left little finger. He found that there was a great deal of scarring over the anteromedial aspect just above the plaintiffs left knee. He also found a good deal of crepitus in the left knee on movement and noted that the plaintiff was unable to fully extend his left knee actively and without pain.

70. Mr. Thompson examined the plaintiffs right foot and found no obvious deformity or swelling. Indeed, there appeared to a full range of movement apart from a complaint of pain over the outer aspect of the right foot.

71. Mr. Thompson noted that the plaintiff was making some progress with his physiotherapist, but he was of the opinion, at the time, that the plaintiff would certainly not make a full recovery and would have a degree of disability as a result of the injury to the left quadriceps muscle.

72. Mr. Thompson reviewed the plaintiff again on 18/03/2008 when the plaintiff told him that there had not been any great improvement with regard to his left little finger, but he felt that his left leg had definitely improved. He complained about pain when standing for long periods or walking a distance and that he had soreness in his lower thigh area. The plaintiff said that he had no distinct pain his left knee but was aware of a definite noise in that knee. Again the plaintiff complained of pain in his right foot, mainly over the outer aspect, when he gets up in the morning, and in cold weather.

On examination, Mr. Thompson observed that the plaintiff walked with a normal gait. His report states that:

> "There was a perfect range of movement in the left knee. There was no pain on movement; [however] there was very obvious crepitus in the left patellofemoral joint on movement. There indeed appear to be quite a good deal of wasting of the left quadriceps muscle. There was however good control over the left knee on movement. There was no instability of the left knee."

73. Mr. Thompson again examined the plaintiff's right foot and found no obvious abnormality. He said that:

> "there did appear to be a perfect range of movement in all the joints with no pain on movement. There did also appear to be a perfect range of movement in the toes of the right foot without any obvious area of tenderness."

74. Mr. Thompson's view at the time was that the scarring would be permanent and unsightly and the plaintiff may never recover power in the left quadriceps muscle. He said the crepitus would suggest some possible wear and tear in the patellofemoral joint which may go on to develop a degree of arthritis. If this did happen, in the left patello-femoral joint, then this would cause the plaintiff a very definite disability and might well require further surgery in the future.

75. Mr. Thompson reviewed the plaintiff for a final time on the 16/1112009. The plaintiff told Mr. Thompson that his left leg had improved somewhat, but if he is in a car and his knee is bent up for a period he experiences pain and has to stretch his knee out. He continued to complain that standing for long periods on his left leg made it painful and he said he experienced noise and a clicking sensation in the left knee. The plaintiff said he had not been back to work and that the alarm business was very quiet at that time.

76. Mr. Thompson's examination found a full free range of movement in the plaintiffs left knee and no pain on movement. Again, he found definite crepitus in the patello-femoral joint on movement, and some definite muscle waste. The plaintiffs knee joint appeared stable. Examination of his right foot revealed no abnormality.

77. Mr. Thompson's opinion was that the plaintiff had made a good recovery to date. He thought that plaintiff's scarring may improve somewhat but will always remain unsightly. He envisaged that the crepitus in the left knee joint may improve but there was also the distinct possibility of disimprovement with time. Mr. Thompson did not rule out the possibility that the plaintiff will go on to develop arthritis, but stated that it would be impossible to put a percentage with regard to that risk.

PLAINTIFF'S EMPLOYMENT AND PRE & POST ACCIDENT HISTORY

78. The plaintiff is single with two young children who reside with their mother. He left school at 16 without doing any formal state exams and has no second level qualifications.

79. Before his accident the plaintiff was working as a full-time alarm fitter in an alarm fitting company owned by his father, who also owns a security company and a licensed premises. The security company incorporates a locksmith business which has two premises.

80. The plaintiff was interviewed by Ms. Susan Tolan, Occupational Therapist and Vocation Evaluator, and also by Ms. Paula Smith, Vocational Rehabilitation Consultant. In the course of the interviews, the plaintiff provided a history of pre and post accident employment record and personal circumstances, and how he had fared since the accident. It is clear from the evidence of both Ms. Tolan and Ms. Smith that there is a measure of agreement as to the impact of the plaintiffs injuries on his future work prospects and as to the type of work he will be able to do in the future.

Ms. Susan Tolan, Occupational Therapist and Vocation Evaluator

81. The plaintiff told Ms. Tolan that, prior to taking up work as an alarm fitter, he had been employed by his father as a static security guard on building sites and in factories and as a mobile security guard driving a security van. The plaintiff preferred working in his father's alarm fitting business and had completed a training course in this field. He also completed a locksmith course over a two week period in Spain. In addition, he had taken part in a "back to work" course under the auspices of FAS. Ms. Tolan was of the view that the plaintiff would be suited to working as a locksmith. In response, the plaintiff said that working as a locksmith was not presently an option for him as his brother in law and another person are working in it, and one of them would have to make way for

him if he were to take up that employment. He said he obtained the locksmith qualification in case a job became available for him in that area in the future.

82. The plaintiff told Ms. Tolan that alarm fitting post-accident exacerbated his knee pain and he was unable to get into attics, kneel, or work in awkward positions. Having regard to Mr. O'Riordan's medical assessment of the plaintiff's injuries, Ms. Tolan's view is that would be very difficult for someone with the plaintiffs type of knee injury to do that type of work. She did not feel it would be possible for him to work as an alarm fitter in the future, and indeed, she considered it would be dangerous for him to do so.

83. Ms. Tolan noted also that the plaintiff had a reduced grip in his left hand which would be a problem if he was heavy lifting or doing fine work in a confined space. In view of the plaintiffs complaints about standing for long periods, she considered it would be better for him to have a job where he is able to change his position, move about and sit for periods. Long distance driving might cause problems, but driving locally and doing the relatively light delivery work that he presently does for his father should be encouraged.

84. Ms. Tolan said that jobs involving crouching, squatting, bending or kneeling on a regular basis should be avoided if there is a risk of arthritis to the knee. In cross examination, Ms. Tolan recalled that the plaintiff said that he could not drive long distances without taking a break and she said that would be consistent with the medical evidence. Ms. Tolan agreed that a previous conviction (which the plaintiff admitted to in evidence) could work against a person in the labour market. Ms. Tolan said that the plaintiff had hoped to get back to his father's business. She encouraged him to undertake training courses and if he had difficulty identifying an alternative career, he should consider doing a Fresh Start Course, which is a career exploration course.

Ms. Paula Smith, Vocational Rehabilitation Consultant

85. Ms. Smith agreed that the plaintiff's injuries had compromised his ability to return to the work he was previously engaged on, and she did not doubt that the plaintiff had sustained serious injuries in the accident. Ms. Smith said that the plaintiff told her that he had been out of work for five years after his accident and that he returned to part-time work in November 2010, doing ten hours per week delivering items to customers and manning the phone for his father's company. The plaintiff told Ms. Smith that business was quiet at the moment.

86. Ms. Smith's opinion was that it would be difficult to suggest that the plaintiff was not capable of doing more hours, if work was available to him. Ms. Smith thought, as did Ms. Tolan, that the plaintiff would be well advised to consider a full training course. She agreed with the medical opinion that it would not be advisable for the plaintiff to return to the alarm installing business; however, she considered that there were many other areas of employment available to the plaintiff. In her view, he was best suited to occupational activities of a relatively light nature. Ms. Smith said that the plaintiff had told her that his earnings were in the region of €550 gross per week.

87. The more contentious aspect of Ms. Smith's evidence arises from her account of what the plaintiff told her, or failed to tell her, about his current hobbies and interests. This issue is significant in the context of the evidence given by the plaintiff in cross examination, wherein it was put to the plaintiff that he had travelled to a number of shows on the continent doing driving demonstrations. These demonstrations involve what is called "car drifting". This is a motor sport which entails driving a car through over-steering in a sideways position, and as the evidence shows, requires some agility and physical competence.

88. In the course of this part of her cross examination, counsel for the defendants asked Ms. Smith about the importance of keeping detailed notes. Ms. Smith replied that she keeps very detailed notes. The relevant part of her note dealing with this issue is as follows:

> "Mr. Nolan reported that at present he does not engage in any hobbies or interests. He stated however that in the past one of his primary interests was car drifting i.e. a particular motor sport which apparently entails driving a car through over-steering, driving in a sideways position. He stated however that he had to give this up due to his injuries and had not undertaken any of this car racing since his accident in 2005. He described himself however, preaccident, as having come sixth in the whole Irish Series, reporting that engaging in such an activity now would be too sore."

89. In her evidence to the court, Ms. Smith said that when she asked the plaintiff about his current hobbies and interests, Mr. Nolan told her that he had to give "car drifting" up because of his injuries and problems associated with steering, using the handbrake and the amount of foot work involved in the sport. He said he had been very involved in the sport in the past, but he was not able to do it anymore. When he was asked about this account, he said "I have not competed is what I told her."

90. The plaintiff maintained that he did not recall telling Ms. Smith that he had to give up his hobby since the accident. He denied telling Ms. Smith that engaging in that sort of activity would now be too sore.

91. It was also suggested to the plaintiff, in cross examination, that he told Ms. Smith that he was not able to lift or carry heavy items since the accident. He agreed that it was possible he had said that to her, but he did not remember saying it.

92. In fact, it became abundantly clear as the cross examination developed, that the plaintiff had indeed participated in a number of demonstrations of "car drifting" over a period of about 18 months, mainly during 2009, and that he had been to Budapest, Holland, Madrid, Malta, Belfast, Vienna and possibly to France, in furtherance of that interest.

93. The plaintiffs recent involvement in "car drifting" became apparent during cross examination when the court and the plaintiff were shown a number of photos and clips from videos. The photos had been taken from videos purporting to show the plaintiff engaged in his hobby and other activities and were taken from his BEBO site. The plaintiff said that BN86IRL (BN standing for Billy Nolan) was the number of the site he used to upload videos and that he has an account in his name for that purpose.

94. I do not propose to go through the full list of photos ands videos in detail because their contents speak for themselves and full details of them are in the note taken for the parties during the case. I will however refer to some of them.

95. Most of the clips bear the number BN86IRL and carry his name Billy Nolan or Billy Boy. One of these photographs, for example, is a photograph of someone wearing a helmet on and driving a motorbike. It is dated 9th June 2009 and a description under the photo, "Billy Boy up one with 929". The plaintiff denied that he is the person shown in the photograph on the bike. He said that sometimes people type in someone's name and the videos come up on the account. The plaintiff acknowledged that the video had been uploaded in June 2009 and he agreed that he had not changed the description on the photograph since then.

96. The plaintiff was also referred to a clip headed "Ronan Kearney you're up you're gone", which shows a man lifting another man and throwing him over the counter of a fish and chip shop. The plaintiff agreed that he was the person lifting the man over the counter

and that the description was his. The plaintiff also agreed that he had uploaded a video on the 22nd October 2007, entitled Billy Nolan doing a burnout in 4AGZE which is the name of a particular car model, and that he appears in a promotional video of a driving demonstration in Hungary in April 2009.

97. In relation to a video of a show in Vienna, the plaintiff said his sister had paid for the flight, that he received no money for that event and that he had just gone there to take a look. He agreed that he is the Billy Nolan doing a burnout in 4AGS, spinning the wheels and burning the tyres. There is another video in which he appears to be squatting or kneeling examining a wheel. The plaintiff himself said that he was kneeling on his right knee and that he was just changing a wheel nut.

98. In his evidence, the plaintiff was adamant that he was not paid for these shows; the person who owned the team paid the expenses, and he (the owner) was in turn paid by the show organisers. The plaintiff said he got to travel for free. He stated that sometimes the shows are sponsored but he was just brought along to drive. The plaintiff said he lived on social welfare payments.

Evidence of Ms. Joanne Holt
99. Ms. Joanne Holt is the plaintiffs sister. She said she was aware the plaintiff made trips abroad. She had funded one of his trips, possibly in 2009, and she referred to a credit card statement showing a payment to Ryanair in the sum of €86.98. Ms. Holt added that if she could afford to give her brother some money for away trips she would. She said that if she was not able to assist her brother that her father would help out. She said she was unaware of the turnover of the alarm business.

Evidence of Mr. William Nolan (Senior)
100. Mr. Nolan, the plaintiff's father, gave evidence that he owns a company called Lock Shop Limited and that he also has a country pub. His company is involved in security work, locksmith work and the alarm fitting business. He said there is no vacancy for his son in the business because he has a locksmith who has been with him for 22 years and his son-in-law is also involved in the business. He said that security patrol work would not be suitable for the plaintiff because it involves eight or nine hour shifts with constant driving, walking, checking buildings, and climbing stairs. Mr. Nolan said that he is presently trying to build up the delivery or courier side of his business, which he says would be suitable work for the plaintiff. He said this sort of work does not involve driving long distances.

Mr. Nolan said that he would expect the plaintiff would be on an average of about €400 per week. He said that he has already entered into future contracts for this type of work. Mr. Nolan expected that, if the accident had not happened, the plaintiffs future would be in running the alarm business, and that could earn him even more than €400 per week. Mr. Nolan speculated that, if the plaintiff worked at it, there would be the potential to earn €800 or €900 per week. He said that they are presently paying someone €600 per week for a 40 hour week.

101. Mr. Nolan described his own work as involving meetings clients, carrying out surveys of possible jobs, and occasionally answering alarm calls. Mr. Nolan said the plaintiff would not be able for this type of work. At the moment, Mr. Nolan said that he could not afford to pay the plaintiff a wage because of the downturn in his business.

Concluding Observations on the Plaintiff's Post-Accident History
102. My first observation about this portion of the evidence is that I am entirely satisfied that the note taken by Ms. Smith of her interview with the plaintiff on 25th January 2011 can be relied on by the court as an accurate and detailed note of what the plaintiff about his hobbies and his interests. I am satisfied that the videos clearly demonstrate that the plaintiff travelled to Europe on a number of occasions to compete in "car drifting", precisely what he told Ms. Smith he was unable to do because of his injuries. Ms. Smith was not challenged about the accuracy of her note in this regard.

103. The plaintiffs response to Ms. Smith's evidence was to say that he did not recall saying it to her that way; rather that he said "I had not competed." In the light of what I have said about the reliability of Ms. Smith's note and her evidence, I have no doubt that if that had been the plaintiff's response, Ms. Smith would have recorded it.

104. Furthermore, it seems to me quite clear from the videos that were shown in court, that "car drifting" is quite a physical and agile sport, requiring drivers to carry out very sharp and sudden twists and turns. The plaintiff himself acknowledged this when he said that he had problems associated with steering, using the handbrake and the amount of footwork involved in the sport.

105. I had the opportunity of observing the plaintiffs demeanour and attitude to this part of his cross examination. Frankly, I was unimpressed. The plaintiff struck as me as evasive in his attitude and his answers, and seemed reluctant to concede the level of his involvement in this sport after his accident. This is perhaps because he was acutely aware of what he had already told Ms. Smith in January 2011.

106. Accordingly, I am satisfied that the plaintiff did engage in his hobby and that he was physically well able for it, notwithstanding what he had told Ms. Smith. I also note that he was able to lift a man up and throw him over a counter, which is inconsistent with his claim that lifting weights was a problem for him as a result of his accident.

107. However, in relation to the clip which shows the plaintiff kneeling or squatting by a car wheel, I am not convinced that that of itself is sufficient to undermine the wider medical opinion that squatting or kneeling on a regular basis is a problem for the plaintiff. It was not clear from this clip whether the plaintiff was kneeling or squatting. The plaintiff said that while he is unable to kneel, he has done some squatting exercises.

108. Counsel for the defendants also submitted that the plaintiff must have had a source of income from his involvement in car drifting. As far as I am aware, discovery was not sought in these proceedings, either in respect of any accounts the plaintiff may have had, or in respect of relevant documentation in the possession of third parties, which may or may not have reflected payments to him by the team leader or organisers. Given the plaintiffs age, and the nature of the sport he was involved in, this may have been a worthless exercise.

109. There was mention of the plaintiff helping his children in some way, but the extent of this assistance or support was not raised with him in evidence *i.e*. whether he was making some sort of financial contribution to them on a regular basis. The plaintiff said that he was receiving social welfare in the sum of €170 and that he got occasional help from his sister. If she did, the only document she produced in court was evidence of a payment to Ryanair.

110. The plaintiffs sister said that if she was not able to help the plaintiff, her father would help out if he could. Unfortunately the plaintiffs father was not asked about this when he gave evidence. In fact he said in his evidence, that because of the state of his business he could not afford to pay his son a regular wage.

111. While I may have some reservations to the weight to be attached to the plaintiffs denials that he was paid for car demonstrations, nevertheless, the plaintiffs explanation that he was able to live on social welfare could reasonably be true, as could his assertion that he was not paid separately for the car driving demonstrations or the sponsorship events. In the absence of more concrete evidence on this point, I am not convinced, as a matter or probability that he was in fact so paid.

DAMAGES

112. As I have already indicated, there is no substantial disagreement as to the nature of the plaintiffs injuries in this case. The medics were in agreement and the plaintiff was not challenged about any possible inconsistencies between his account of his injuries and what is contained in those reports. Nor was the court's attention drawn to any significant differences of opinion as the impact on the plaintiff of his injuries, or the ultimate prognosis for him.

113. I am satisfied that the plaintiff suffered injuries to his left hand, left knee and right foot. He had a fracture of the neck of the fifth metacarpal and lacerations to his left hand. He had a ruptured quadriceps tendon of the left knee, lacerations and scarring to this knee and a fracture of the fifth metatarsal bone in his right foot. These injuries and their effects on the plaintiff are described in more detail in the reports to which I have already referred.

114. The overall picture I have gleaned from these reports is that the plaintiff is making a good recovery from his injuries, but that there are persisting sequalae.

1. The plaintiff is left with awkward dexterity in his left hand because of his stiff finger and has loss of power in that hand. This is probably a permanent condition.
2. The plaintiff will find it difficult to squat or kneel.
3. Although the plaintiffs left knee is now stable with full movement, and according to Mr. Thompson on movement of that leg, he is left with crepitus in that knee which suggests that the plaintiff has damaged the cartilage of his patella and this may become arthritic in time.
4. The permanent scarring above the plaintiff's knee will render future surgery problematic.
5. Any difficulties the plaintiff has with his right foot have cleared up.
6. This medical and vocational evidence suggests, and I am so finding, that it would not be possible for the plaintiff to return to work as an alarm fitter, but that there are many occupations or areas of employment which the plaintiff would be suitable for in the future.

115. Ms. Tolan identified locksmith work (for which the plaintiff is qualified), auto electrician, forklift truck driver and commercial photographer, as examples of the sort of work the plaintiff could do. Ms. Tolan agreed with Ms. Smith that he should undertake training courses. Also, as I referred to earlier, Ms. Smith said that the plaintiff was capable of doing more hours than he is presently doing, if the work is available to him.

116. While this hopefully is a fair summary of the medical and vocational evidence, it is clearly not a full picture of the plaintiffs actual physical capabilities and his true rate of recovery from his injuries. The video clips demonstrate that the plaintiff had recovered most of his physical abilities, strength and agility, at least as far as back as 2009 and possibly as far back as 2007. By July 2009, he was well able to lift a man over the counter of a chip shop.

117. On his own evidence, the plaintiff can drive distances with intermittent breaks to stretch his leg. He obviously has the capacity to lift some weights, and I am frankly surprised that he was not able to continue working in his father's pub where he could surely have taken occasional rest in between shifts if he became tired.

118. In all the circumstances, I propose to award general damages for pain and suffering to date in the sum of €75,000. Noting that there is a risk of arthritis in the future with a possible requirement for surgery when the plaintiff is in his fifties, I assess general damages for pain and suffering into the future in the sum of €50,000.

119. The position with regard to loss of earnings to date and into the future is somewhat unsatisfactory. The important issue in this context is to ascertain what the plaintiff's earnings would have been if he had not suffered his injuries and to ascertain his capacity to work and earn a living post-accident.

120. The difficulty in question arises from the conflict between what the plaintiff said his pre-accident earnings were, and what is actually revealed in his P60 for the year ending 2005. The plaintiff claims that immediately before the accident he was earning €500 per week. Ms. Nolan had a note that his earnings, at that time, were €550 net, and he told Ms. Smith that they were €550 gross per week. However, that is at variance with the figure in the plaintiff's P60, which equates, I am informed, with a gross weekly figure of €406.90 or net earnings of €356 per week.

121. No satisfactory explanation was forthcoming for this significant discrepancy. The plaintiff was not asked to clarify this matter; nor was the matter raised during the evidence of the plaintiff's father and sister, both of whom are directors of the company he worked for, and should, given that it is a family company, be familiar with its books.

122. This is an important issue, because the plaintiff's actuary based his projections on a schedule of progressive percentage wage increases that it is alleged the plaintiff would have earned if he had stayed in his employment as an alarm fitter.

123. Mr. Nigel Tennant, an actuary from the firm of Seagrave-Daly & Lynch Ltd., gave evidence on behalf of the plaintiff, and said that he prepared reports in May 2010 and April 2011. He said that the projections in the report of May 2010 were based on an estimated increase in the plaintiffs earnings since the date of his accident of around 30%, which would equate to a net weekly wage of €481.

124. This estimate of a 30% increase was contained in a letter dated 15th February 2010, from Mr. Paul Lynch, a certified public accountant of McDonnell Lynch & Co., provided accountancy services to Locksmith Limited for a number of years. This letter stated, *inter alia*, that:-

> "Billy Nolan, Jnr.'s pay is likely to have increased by the standard increase during the period in 2000- 2009 amounting in total to perhaps 30%.
>
> As the alarm business was and is part of the normal trade of the Lockshop Ltd., and as that company has recorded losses

in all years from 2005-2009, it would not have been possible to transfer the alarm business to Billy Nolan Jnr. and maintain the company's solvency."

125. When Mr. Lynch was re-examined by Mr. Counihan he was asked whether he knew if there had been any wage increases in the earnings between 2005 -2009 in the company, and Mr. Lynch replied that there would have been. However, in contrast to what Mr. Lynch said in the letter to which I have just referred, he said, in reply to Mr. Counihan, that he did not have any idea what the total percentage increase would have been in that period. When asked what the earnings of the company's employees might have been, he replied that he would not be able to answer that without reviewing the figures in more detail.

126. Mr. Nolan said that the plaintiff had been an employee of the company for part of the time since 2005 and that he was on the books of the company for the accounting year ending at the end of July 2011, and that the books of the company record a figure of approximately €3,000 in respect of the plaintiff for that year.

127. Mr. Lynch said that he had no idea how the plaintiff would have been receiving €200 a week above the figure of €356. He ventured to suggest the additional figure might be accounted for by motor expenses. Mr. Lynch said that he did not know if the plaintiff received cash from the company.

128. In fact, there was no evidence from any source during the hearing of the case that the difference might have come from motor expenses, or cash from the company. Indeed, it is notable that no clarification or explanation was forthcoming in that regard.

129. At the end of his evidence, I invited Mr. Lynch to examine the books of the company, and that if he wished to add anything to his earlier evidence, he could be recalled at a later stage. Mr. Lynch was not recalled.

130. Mr. Tennant said that his firm had been asked to compile a figure for past loss of earnings, and in this context he referred to his updated report of April 2011. He said the figures in this report were based on a handwritten schedule, and entitled "loss of earnings for Billy Nolan" which is contained in a letter dated 27th January 2011 from the plaintiff's solicitors Messrs PJ Byrne. That letter says:-

> "I am hoping to have this case set down for Waterford at the end of February, I am enclosing a copy of his P60 from 2005, which is the year of the accident, together with details from his sister who is the books person in the business of his earnings since the date of the accident. I wonder would you be in a position to let me have the net figures.
>
> Yours sincerely,
>
> PJ Byrne"

131. This schedule showed progressive increases in the plaintiffs loss of earnings going from a figure of €500 gross per week in 2006, to a figure of €650 gross per week in 2011. These figures ultimately became the basis of the plaintiff's claim for €447,000 for loss of earnings into the future and €142,000 for loss of earnings to date. The figures furnished by the plaintiff's sister in fact amounted to a 50% increase alone, between 2006 and 2008.

132. Mr. Tennant was obviously concerned at the sharp increase in the figures provided in the later schedule, compared with the earlier figure of a 30% increase identified by Mr. Lynch, because Mr. Tennant wrote to the plaintiffs solicitors pointing this out and "seeking confirmation as to which set of figures his report should be based on". Yet despite that obvious concern on the part of Mr. Tennant, it does not appear that there is any reply to that letter, and the claim for loss of earnings proceeded on the basis of the later schedule.

133. As a matter of observation, it is difficult to see how a company which was recording losses between 2005 and 2009 could have had the wherewithal to pay the plaintiff the level of increases projected for him and claimed by him during that period.

134. In fact, Ms. Tolan's evidence is that rates of pay may have gone down, rather than up, during the recession. She said the current minimum wage is €8.65; the rates for a locksmith would still be between €10 and €15 per hour, and security personnel earn the same amount of money as well. By comparison, Ms. Tolan said that the alarm installer type rate of pay has stayed the same at approximately €400 to €500 per week.

135. Ms. Smith thought that the figure of a 30% increase in the plaintiffs earnings during the relevant period was high and suggested 15% as a estimate. Apparently, national wages increased by 10% over that period.

136. Having considered this part of the case, I am satisfied that there is no evidence whatsoever to substantiate wage increases of either 30% or 50% during the relevant period. Therefore, I propose to address the question of loss of earnings to date on the basis of the plaintiffs earnings as set out in his P60 which was handed into court. The figures contained in the revised schedule of loss of earnings as per the P60 netted at €18,512 per annum since the date of the accident, which covering the period since the accident, amount, I am informed, to €98,612. However I do not consider that the plaintiff was significantly handicapped to the extent that was made out. He is able to work. I consider that he was probably well able to undertake a variety of employment of the type suggested by Ms. Smith and Ms. Tolan, at the very least as far as 2009. In the circumstances, I propose to allow a figure of €70,000, for loss of earnings to date from which the usual deductions are to be made, including any amounts received from his father since the accident. I understand that these deductions amount to the sum of €28,580.50 in respect of illness benefit received from 17th November 2005 to 8th April 2009 and €10,431.000 in respect of Jobseekers Allowance received from 1st October 2010 to date. The plaintiffs earnings from work carried out for his father from 15th October 2010 to 9th December 2011 amounts in total to the sum of €43,558.70, which deducted from the sum of €70,000, comes to the sum of €27,444.30.

137. Insofar as the claim for future loss of earnings is concerned, the reality of the situation is that I do not have a sufficient evidential basis to be in a position to apply a multiplier to any particular figure. Indeed, it is possible that the sort of employment that has been indicated for the plaintiff would pay him more than he would get as an alarm installer.

138. However, I acknowledge that as a result of his injury, the plaintiff may well suffer a loss of opportunity in the future, in the sense that the spectrum of his employment has been diminished. Doing the best that I can for the plaintiff, and noting that he has now recovered to the extent that he is sufficiently able bodied to undertake a variety of employment opportunities, more likely under the auspices of the family company, I will assess a figure under that heading in the sum of €40,000.

139. In summary, the figures for damages are as follows:-

1. **General Damages:** €125,000 being €75,000 for pain and suffering to date and €50,000 for pain and suffering into the future
2. **Loss of Earnings:** €27,444.30 to date
3. **Loss of Opportunity:** €40,000

140. I note that the court was furnished with a schedule of special damages, however it is unclear whether these have been agreed. This should be clarified so that the total sum for damages is properly ascertained, which sum is subject to apportionment for contributory negligence, to which I have already referred.

SECTION 26 OF THE CIVIL LIABILITY AND COURTS ACT, 2004

141. At the close of the case, counsel on behalf of the defendants made an application under section 26 of the Civil Liability and Courts Act, 2004 (the "2004 Act") which I have now to consider. As presented by counsel, this application raises questions about the truthfulness and credibility of the plaintiffs case and whether evidence given or adduced by the plaintiff was deliberately false or misleading in a material way.

142. Section 26 of the 2004 Act provides as follows:

"26-(1) If, after the commencement of this section, a plaintiff in a personal injuries gives or adduces, or dishonestly causes to be given or adduced, evidence that

(a) is false or misleading, in any material respect and

(b) he or she knows to be false or misleading,

(c) the court shall dismiss the plaintiffs action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done

(2) the court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under Section 14 that-

(a) is false or misleading in any material respect, and

(b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiffs action unless, for reasons that the court shall state in its decision the dismissal of the action would result in injustice being done."

(3) for the purpose of this action, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

Counsel for the defendant, in the course of his submissions, referred to a number of authorities which address issues arising in the application of the provisions of section 26, namely: *Carmello v Casey* [2008] 3 I.R. 524; *Gammell v Doyle and White* (unreported, High Court, Hanna J., 28th July 2009); *Farrell v Dublin Bus* (unreported, High Court, Quirke J., 30th July 2010); *Duffy v. Boylan* (unreported, High Court, O'Keeffe J., 8th October 2010); *Higgins v. Clarke* (unreported, High Court, Quirke J., 18th November 2010).

143. One of the principal issues dealt with in these authorities is the question of the onus of proof and the standard of proof to be applied in a section 26 application.

This is an important point because the provisions of the section are mandatory. In other words, once the court is satisfied that the plaintiff has given or adduced evidence which is false or misleading in any material respect, it is obliged to dismiss the plaintiffs claim unless the dismissal of the action would result in an injustice being done.

144. The purpose of section 26 and the standard of proof to be applied was referred to by Peart J. in *Carmello v. Casey* [2008] 3 I.R. 524 at pp. 539-540 as follows:

> "Section 26 was introduced by the Oireachtas for the very clear purpose of avoiding injustice to, *inter alios*, defendants against whom false or exaggerated claims are mounted in the hope of recovering damages to which such plaintiffs are not entitled. Such actions are also an abuse of the process of the court. It has always been a very serious criminal offence to knowingly give false evidence under oath. The proof of such an offence is required to be beyond reasonable doubt. The court is not so constrained, and makes its findings on the balance of probability. This Section is certainly of a draconian nature, but it is deliberately so in the public interest, and is mandatory in its terms, once the court is so satisfied on the balance of probability, unless to dismiss the action would result in injustice being done."

145. The matter was also addressed in a recent decision of the Supreme Court in *Ahern v. Bus Eireann* (unreported, Supreme Court, 2nd December 2011). Denham C.J. stated:

> "It is for a plaintiff in a civil action to prove their claim. Thus the respondent had the onus of proving her claim on the assessment of damages before the High Court. Such an onus is on the balance of probabilities. However, in this case the appellant raised section 26 of the Act of 2004. In such circumstance the appellant carries the onus of proof, which is also on the balance of probabilities. Thus I would uphold the findings of the learned High Court judge as to the standard of onus of proof".

146. I have not examined the detail of this case, but from what I can ascertain, it clearly turned on its own particular facts. However, it may be helpful to note that in the further course of this judgment, Denham CJ stated more generally that:

> "A claim under section 26(1) of the Act of 2004 requires that several elements be proved, including that if a plaintiff gives or adduces, or dishonestly causes to be given or adduced, evidence that is false or misleading in a material way and she knows it to be false or misleading, the court shall dismiss the plaintiffs action unless, for stated reason the dismissal of the action would result in injustice being done. In this case, there are no grounds for an appeal to succeed in relation to the appellant's personal evidence, the learned trial judge having held her to be an honest witness.

147. There is another element in section 26(1) - a situation where a plaintiff dishonestly causes someone else to give or adduce

evidence that is false or misleading and he or she knows it to be false or misleading. This does not arise in this appeal. The report of the actuary and the nurse were never put into evidence. Neither gave oral evidence. Further, the claim for care into the future was withdrawn at the conclusion of the respondents' case in the High Court. Thus the appellant's case, resting on the issue of care into the future, has no basis in the claim under Section 26(1)."

148. Further in the judgment Denham C.J. states that:-

> "I am satisfied that the learned trial judge approached this case correctly. He considered the overall evidence and found that the appellant was an honest woman and did not knowingly mislead the court. "Knowingly" is a matter to which the test is subjective."

149. In this case, I have considered the whole of the evidence before me. Quite clearly the plaintiff has proved his case on liability against a tortuous wrongdoer and has also established that he suffered injuries and loss for which compensation has been assessed. To that extent, the court accepted the plaintiffs evidence. However, the fact that the plaintiff has succeeded in this part of his claim is not of itself decisive of the issue.

150. In the course of his judgment in *Higgins*, Quirke J. stated that:

> "The imposition of the sanction has the effect of depriving the claimant of damages to which he or she would otherwise be entitled. The court must disallow both that part of the claim which has been based upon materially false and misleading averments, and also that part of the claim which would otherwise have been valid and would have resulted in an award of damages."

151. While I understand that at the time of the writing this judgment is under appeal, there are parallels with the finding of the Supreme Court in *Shelly Morris v. Bus Atha Cliath* [2003] I.R. 232 that the telling of deliberate falsehoods in respect of one aspect of a claim might have implications for the plaintiff's credibility in general and might mean the plaintiff failed to discharge the required burden of proof, generally, or with regard to an aspect of the claim. Where the credibility of the plaintiff has been so undermined that the burden of proof was not discharged, the case might be dismissed. *Shelly Morris* is a case which predated the coming into operation of section 26, and as such is not a specific authority on the point, but it seems to me that the principle outlined is a helpful one.

152. However, in considering the effect of section 26, I am not suggesting that the provisions of the section are so drastic that it is inevitable that once a finding of falsehood in respect of one aspect of a claim is made, it necessarily follows that it is fatal to the whole claim; that would be to ignore the proviso in the section, that if the dismissal of the action would result in justice being done the sanction is not mandatory. Whether an injustice has been done, would depend on the circumstances of a particular case. In the course of his judgment in *Higgins v. Caldark* (unreported, High Court, 18 November 2010), Quirke J. drew attention to two instances of a possible injustice:

> "for instance it may be unjust if the claim of a catastrophically injured claimant for the cost of ongoing care is dismissed because he or she has a knowingly adduced some (perhaps trivial) misleading evidence in respect of some other category of damages. Similarly the dismissal of a fatal injuries claim based upon misleading evidence knowingly adduced by an adult plaintiff, may unjustly penalise infants or incapacitated dependents."

Submissions of Counsel on the Section 26 Application

153. Counsel for the defendants contended that the part of the plaintiffs claim based on the schedule of progressive increases in the pay the plaintiff would have earned but for his accident is false and misleading within the terms of section 26. It is part of the claim that was verified on affidavit. Mr. Reidy said the figures furnished to the actuary, Mr. Tennant, setting out progressive increases in earnings were not based on fact. He argued that the total of the differential based on the figures is in the region of €175,000, both past and future, which, he urged, is a very significant sum of money.

154. These figures, which in effect amount to increases of 50% in the relevant period, were set out in the course of a letter from the plaintiffs solicitor to Mr. Tennant. That letter incorporated a schedule prepared by the plaintiff's sister, Joanne Holt, who has a bookkeeping role in her father's company. These percentage increases were part of the instructions to Mr. Tennant on foot of which he based his actuarial calculations which are contained in his report. They were the figures that were put into evidence as part of the plaintiffs claim in respect of loss of earnings. They were not withdrawn at any stage, thus distinguishing the situation in *Ahern v Bus Eireann*, where the report of the actuary was not put in evidence.

156. It cannot be said, nor indeed was it suggested by counsel for the plaintiff, that because the figures were not compiled or drafted by the plaintiff personally, they do not come within, or form part of, the plaintiff's claim for damages. I am satisfied that in this case, the figures are attributable to the plaintiff himself.

157. In the course of his judgment in *Shelly Morris*, Hardiman J. stated at p. 255: "The claiming of a very large sum of money from a defendant is a serious matter and most plaintiffs will know this quite well. It is, in any event, the responsibility of a solicitor to ensure that the plaintiff is fully aware of the significance and, indeed, solemnity of advancing a claim for hundreds of thousands pounds, or a lesser sum, before the claim is presented to the defendant, not to speak of the court".

158. In this case, it was clear from the sequence of events outlined earlier, that Mr. Tennant was obviously concerned that the figures he had received from the plaintiffs solicitor were "substantially ahead of the accountants estimate." The level of his concern is reflected in the fact that he requested further instructions seeking confirmation as to which set of figures his report should be based on. Despite these obvious concerns which were communicated to the plaintiff's solicitors and presumably to the plaintiff himself, the implications of which are obvious, no response was forthcoming.

159. In response to Mr. Reidy's submissions, Mr. McCarthy said that the plaintiff always maintained that he earned €500 into his hand and that the defendants were not prejudiced by this claim because they had been given the plaintiff's P60. Therefore, he submitted that the defendants could be under no misapprehension as to what the plaintiff's pre-accident earnings actually were.

160. The difficulty with this proposition is the unexplained conflict between the figure in the P60, which was originally furnished to the defendants in May 2008, and the plaintiffs claim that he was earning €500 or €550. It was always open to the plaintiff to explain this conflict, but he chose not to do so.

161. However the reality of the situation facing the defendants, is that they had to deal with a claim from the plaintiff seeking, *inter alia*, €447,000 for loss of earnings into the future and €142,000 for loss of earnings to date. This claim was based on figures supplied to the plaintiffs actuary; which figures, I am satisfied, have no evidential basis whatsoever.

162. Mr. McCarthy argued that in view of the overall evidence in the case, including the plaintiffs good work record, that the defendants had not satisfied the appropriate standard of proof, and accordingly their application under section 26 should not succeed, and that, in any event, this is a case which can be decided by resolving the normal anomalies and inconsistencies that typically arise in personal injury actions.

Conclusion on the Section 26 Application

163. Once a court has established primary facts then it is entitled to raise an inference from the facts which have been admitted or proved. I have referred to the sequence of events surrounding the making of the loss of earnings claim in this case. I am satisfied, as a matter of probability, that the plaintiff adduced or caused to be adduced misleading evidence in the form of the schedule incorporated in the plaintiffs letter of instructions to Mr. Tenant of Seagrave Daly & Lynch Ltd. No explanation or clarification or no evidential basis was made out for these figures, despite the obvious concerns in that regard expressed by Mr. Tenant. I am satisfied that the plaintiffs claim for loss of earnings has been deliberately exaggerated. I consider that it is not an unreasonable inference to draw from the circumstances surrounding this aspect of the case, that as a matter of probability, the plaintiff knew that the information provided in support of his claim for loss of earnings in the past, and forming part of his claim for loss of earnings into the future, was false and misleading in a material respect.

164. The defendants' counsel also submitted that the plaintiff must have had another source of income from the "car drifting" demonstrations and that he was probably paid for these, and that he was untruthful in response to Garda Hurley's evidence that he had arranged to take a statement from him, and that these are matters that come within the scope of section 26. I have dealt with these matters already, and it appears therefrom that I am not satisfied, as a matter of probability, that the plaintiff's evidence on these on these two discrete issues is false or misleading within the terms of section 26.

165. I am, however, satisfied that the plaintiff gave false and misleading evidence when he told Ms. Smith about having to give up his hobby of "car drifting" because of the limitations on his physical capacity brought about by his injuries. This evidence was clearly untruthful and the reasonable inference that I draw from it, as a matter of probability, is that he gave misleading evidence, which he knew to be misleading in a material respect.

166. Finally, may I say that it is part of the everyday function of judges in contested cases to resolve anomalies and inconsistencies, to accept or reject evidence, or to attach greater weight to some part of the evidence than other parts, and to interpret and apply the law.

167. This is a case where the plaintiff has been successful in part of his claim. However, in view of my findings as to the plaintiffs falsehoods, I am satisfied that this is not a case where the successful parts of the plaintiffs claim can be rescued from the provisions of section 26 and, as I am also satisfied that no injustice will result from a dismissal of the plaintiffs action, then this is the order that I must make.