Neutral Citation: [2015] IEHC 613

THE HIGH COURT

[2012 No. 5887P]

BETWEEN

PETER BOWELL

PLAINTIFF

AND

DUNNES STORES

DEFENDANTS

JUDGEMENT of Mr. Justice Bernard J. Barton delivered the 9th day of October 2015

1. The plaintiff was born on the 26th June, 1987 and resides at 1 Triog Manor, Green Mill Lane, Portlaoise, Co. Laois. He brings these proceedings for damages for personal injuries and loss arising as a result of an accident which occurred in the course of his employment by the defendant in its supermarket premises located at Green Mill Lane, Portlaoise.

2. Save for an admission that the plaintiff was an employee and lawful visitor on the premises within the meaning of the Occupiers Liability Act 1995, a full defence has been delivered to the proceedings incorporating a plea of negligence and/or a contributory negligence on the part of the plaintiff.

3. It had initially been pleaded that the accident occurred on the 6th March, 2010, however, it was always the plaintiff's belief and, indeed, it was his evidence, that the accident occurred on the first Friday in March, accordingly, at the commencement of the trial an amendment was sought and an order made enabling the plaintiff to plead the date of the accident as Friday the 5th of March, 2010.

4. This became significant because not only was there was a controversy between the parties as to the nature and date of the accident in respect of which the Plaintiff brings these proceedings but also because of the legal consequences which the defendant submitted flowed from any failure on the part of the plaintiff to prove the date as now pleaded.

5. The Plaintiff's case was that the accident occurred on the evening of the 5th March when he tripped over a packet of bottles which had been left on the stock room floor whereas the Defendant's case was that the plaintiff was mistaken about both the date and circumstances of the accident he being absent from work on the 5th and having made a report that he had hurt his back whilst lifting at work a week earlier on the 26th of February 2010.

6. At the close of the evidence it was submitted on behalf of the defendant that the plaintiff was required to establish that the accident occurred on the 5th March, 2010 and that this was one of the essential proofs which had to be satisfied by the Plaintiff if he was to succeed in the cause of action as pleaded. Even if all other proofs were satisfied it was submitted that the plaintiff could not succeed in law if an accident was proved to have occurred on some date other than the 5th of March.

7. The defendant contended that to prove that the accident had occurred on the 5th of March was a near impossible task; on the preponderance of the evidence it was submitted that the court was bound to find that an accident had occurred on a date other than the 5th and that any such finding was fatal to the plaintiff's claim.

8. On behalf of the Plaintiff it was submitted that, in the circumstances of this case, proof that an accident occurred on the 5th of March 2010 was not material to the plaintiff's cause of action against the defendant. On any view of the evidence the only question regarding the date on which the accident occurred was whether that was the last Friday in February or the first Friday in March; either way both dates were within the statutory period, accordingly, there could not be a limitation issue. It was further submitted that there was no substantive legal relevance attaching to the date in the sense of establishing a cause of action; it was not germane to the cause of action nor was it required to be known by the defendant in its defence of the proceedings. In the event that the court found that the plaintiff was mistaken as to the date and rejected the submissions made on his behalf, an amendment of the indorsement of claim to insert the date found to be correct was sought.

9. Given the potential consequences arising from these submissions I consider it appropriate that the court decide this matter by way of preliminary issue.

10. Turning firstly to the jurisdiction of the court to allow the amendment of pleadings Order 28, rule 1 of the Rules of the Superior Courts 1986, as amended, provides:

> *"The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purposes of determining the real questions in controversy between the parties."*

There is ample authority for the proposition that under this rule the Court has power to order the amendment of proceedings prior to, during, and even after trial in certain circumstances. See *Wildgust v. Bank of Ireland and Norwich Union* [2001] 1 ILRM 24; *W(F) v. BBC High Court* (Barr J.) 25th March 1999; FL v. CL [2007] 2 IR 630; *Mooreview Developments Ltd v. First Active Plc* [2011] 1 IR 117; and *Flynn v. DPP* [1986] ILRM 290.

11. Having regard to the admissions made in the defence it is not necessary for the plaintiff to prove his contract of employment with the defendant nor that he was a visitor on the premises within the meaning of the Occupier's Liability Act 1995. Consequently, the common law and statutory duties arising and owed by the defendant to the plaintiff are not in question; however, the alleged breaches of those legal duties are very much in issue. In essence the plaintiff's cause of action against the defendant is in respect of a wrong arising in the course of the employer-employee or what used to be referred to as the master-servant relationship.

12. The contents which are required to be set out in an indorsement of claim on a Personal Injuries Summons are provided for by Order 1A and appendix CC of the rules of the Superior Courts. These specify that full and detailed particulars comprising the claim be pleaded. In this regard Appendix CC provides a format in which the indorsement ought to be presented , namely,

(a) the description of the parties,

(b) the nature of the claim,

(c) the acts of the defendant alleged to constitute the wrong,

(d) the instances of negligence together with all other relevant circumstances in relation to the commission of the wrong and

(e) any other assertion or plea concerning the same together with particulars of the plaintiff's injuries alleged to have been occasioned by the wrong of the defendant,

(f) the relief sought and, where appropriate, any particulars required by Order 4 Rule 3(a).

In my view it is notable in the context of the question under consideration here that the date of accident or occurrence alleged to have caused the injuries and loss is not a specified particular.

13. The core of the question which is at issue here is concerned with the material requirements necessary to constitute a cause of action in negligence and for breach of statutory duty. As to that "Cause of action" was described by Lord Esher M.R. in *Read v. Brown* (1888) 22 QBD 128 at 131 as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court". See also the decisions of our Supreme Court in *Hegarty v. O'Loughran* [1990] 1 IR 148 and *Fletcher v. Commissioners of Public Works* [2003] 1 IR 465.

14. There are four accepted elements to the tort of negligence. These have been described by McMahon and Binchy 4th Ed, on The Law of Torts as

> *1. "A duty of care, that is, the existence of a legally recognised obligation requiring the defendant to conform to a certain standard of behaviour for the protection of others against unreasonable risks;*
>
> *2. a failure to conform to the required standard*
>
> *3. actual loss or damage to recognised interests of the plaintiff; and*
>
> *4. a sufficiently close causal connection between the conduct and the resulting injury to the plaintiff."*

In a negligence action for damages for personal injuries the law requires that the plaintiff must plead and prove *"… the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged"* See *Gautret v. Egerton* (1867) L.R. 2 C.P. 371 and *West Rand Central Mining Co. v R* [1905] 2 KB 391 at pp. 406-8. In addition the consequences of the breach of duty must be pleaded and in this regard particulars of the breach of the duty on the part of the defendant as well as particulars of the injuries and loss caused thereby must also be given. See Order 1A of the rules and also Odgers on Civil Court Actions 24th ed.p.181.

15. Not all causes of action require the pleading and proof of a date but by their nature certain causes of action do such as, for example, those for the enforcement of breach of a contract, or on any negotiable instrument, or for goods sold and delivered, or for possession of demised premises based for non payment of rent, or for misrepresentation inducing a contract, or where the defence raises a limitation statute or a defence of waiver by laches. See Odgers on Civil Court Actions 24th ed. p 172 for an informative discussion on this topic.

16. However, whilst the principal reason for the practice of pleading a date or a series of dates in a negligence action is to show in the overwhelming majority of cases that the proceedings have been brought within the limitation period, the pleading of a date is not a material constituent of nor is it necessary in order to establish or disclose a cause of action in a negligence. Indeed, under the Workman's Compensation Acts a mistake as to the correct date of the accident was a ground on which the court was entitled to relieve a claimant of the consequences of having failed to bring an application within the time limited by the Acts. See *Nolan v. Duigan S.C.* (1946) 80 ILTR 49.

17. Whilst a mistake in relation to a date may be relevant in the context of the credibility of a witness or where the reliability of a witness's recollection is in question, absent any issue on a limitations statute or in deceit, a mistaken recollection in relation to the date of an accident would not of itself entitle or warrant the court in making an order dismissing a personal injury action brought in negligence and / or for breach of statutory duty where all other proofs required by the law have been satisfied.

Decision on the cause of action issue.

18. Whether or not the paucity of case authority on the point is attributable to the practice of pleading a date or dates of an accident or circumstances or other occurrences or, in the absence of doing so, because the date or dates were furnished by way of particulars or, if the date was incorrect or otherwise mistaken, was corrected by amendment, or because the law has long since been settled, it seems to me that if a mistake as to the date of an accident was fatal to a cause of action in negligence and /or for breach of statutory duty ,other than in cases involving deceit or an issue on a limitations statute, it is a controversy which would have regularly featured in litigation long before now . Whatever the explanation maybe, for the reasons already given I cannot accept the defendant's submissions as being sound in law on this issue. Neither deceit as to the date of the accident nor a limitation issue arises in these proceedings. Absent such questions or issues, it is the opinion of the court that if all other proofs necessary to constitute a cause of action in negligence and or /for breach of statutory duty, and I dare say other torts such as nuisance, are satisfied, a genuine mistake as to the date or dates of the occurrence of the event or circumstances giving rise to such proceedings or failure to plead such in the indorsement of claim is not in law fatal to such causes of action.

Decision on the date of accident .

19. That the Plaintiff was not recorded as being on duty at work on the 5th of March 2010 is of significance with regard to the determination of the issue as to the correct date of the accident. The Plaintiff fairly accepted that he could not be sure as to the date. However, he was certain that it occurred on a Friday evening which he thought was the 5th of March. On the other hand the defendant's Miss Farrell recalled that the accident had occurred on the evening of 26th of February, also a Friday, though in this

regard she agreed under cross examination that she was relying on her memory rather than on any contemporaneous note or record.

20. The law requires that the determination of this question is to be made on the balance of probabilities. There was no evidence of an investigation in relation to the accident circumstances having been carried out by the defendant in accordance with its own procedures. Miss Farrell did make a statement on the day following but it was not sought to introduce that into evidence nor any statutory record of the accident nor was there any evidence that the defendant wrote in response at any time dealing with the allegations contained in the plaintiff's intimating letter of the 22nd of March 2011 nor was the plaintiff asked to make a statement in respect of the accident as part of any investigation.

21. Although the plaintiff gave evidence of attending the emergency department of Portlaoise Hospital shortly after the accident there was no hospital note of that attendance introduced in evidence. However, notes in that regard are referred to in the report of Dr. Sinead Murphy, consultant neurologist, dated the 18th December 2013. These notes were reported as showing that the plaintiff was advised that he had pulled a muscle and that he had been discharged on non steroidal anti-inflammatory drugs "after some weeks". Dr. Robert Lawlor's notes, the plaintiff's GP, confirmed that the plaintiff had also attended his surgery in respect of his injuries. The accident and emergency notes of the hospital for the 19th of March 2010 refer to the plaintiff as having sustained injuries on a Friday exactly three weeks to the day before his attendance there being a date which would coincide with the 26th of February, also a Friday and being the same date on which Miss Farrell said the plaintiff was on duty and had reported having hurt himself.

22. Although Miss Farrell accepted that she was relying on her recollection rather than on any written record as to the date of the accident, the hospital record corroborates her evidence as to the date. Whilst the physicians reporting in this case on both sides had variously understood the date of the accident to be the 5th or 6th of March 2010, the plaintiff freely acknowledges uncertainty as to whether the accident occurred on the 26th of February or the 5th of March and that he would likely have referred to the accident as having occurred on the first Friday in March.

23. It seems to me in deciding this question not unreasonable to rely on a medical record made by a triage nurse at the Midland Hospital, Portlaoise, on the 19th of March, which clearly records the accident as having occurred on a date which also happens to coincide with the evidence of Miss Farrell, accordingly, I find as a matter of probability that the accident occurred on the 26th of February and not on the 5th of March 2010

Conclusion
24. Having already accepted the submissions made by senior counsel for the plaintiff, Mr. Counihan, in relation to the pleading and proof of date of the accident and the relevance or otherwise of that to the plaintiff's cause of action, and there being no suggestion of deceit or possible limitation issue, the court will vacate the order made at the commencement of the trial and will substitute therefore an order pursuant to Order 28 rule (1) of the rules amending the date of the accident on the indorsement of claim to read the 26th of February 2010.

Background to liability.
25. The plaintiff was born in England on the 29th of June 1987 and came to Ireland to work after leaving school. He enrolled in a computing and drafting course which he undertook for two years and then commenced an architectural technician's course in 2007/2008 at honours level.

26. To supplement his income the plaintiff started working for the defendant in 2004. He was employed as a general operative. His duties included working on checkouts and stacking products for sale on the supermarket shelves. He was a part-time employee working for 15 and 25 hours per week outside college hours which meant that he worked evenings and weekends. He identified his supervisor on the day as Ann Marie Farrell.

27. His recollection was that the accident occurred on a Friday evening which the court has found was the 26th of February 2010. The accident occurred in the defendant's stockroom. The plaintiff was working alone; the accident was not witnessed but the plaintiff reported on the evening to his supervisor that he had hurt himself.

28. Both parties retained engineers who carried out an on site inspection, took photographs and prepared reports for the assistance of the court.

29. On the evening of the accident there was a requirement for the stacking of shelves with products in the retail section of the supermarket. The plaintiff was tasked with identifying the stock required; locate that in the storeroom, and thereafter to stack the shelves. This necessitated the identification and stacking of stock onto a pallet which was located in an aisle of the stockroom which when loaded would be brought into the retail section of the supermarket by way of a hand operated pallet truck. The plaintiff received his instructions that evening from his supervisor, Miss Farrell.

30. The engineer's photographs introduced into evidence show the shelving on which products are stacked. It was his evidence that the quantity of product in the stockroom was such that it could not all be accommodated on the shelving. The excess product had been stacked on pallets which had been lined up along the rear wall of the stockroom and other pallets which had been placed at the end of the shelving racks. The pallet on which the plaintiff was stacking goods was located in an aisle between two rows of shelving racks at a position immediately beside a stack of pink coloured boxes shown in the plaintiff's engineer's photograph number 4. Whilst all the engineer's photographs showed the stockroom to be adequately lit, the plaintiff's evidence was that on the evening of the accident the product had been packed on the pallets located along the rear wall of the stockroom and at the end of the shelving to such a height that this interfered with and reduced the level of lighting.

31. With regard to the circulation areas where the pallets at the back wall of the stock room and at the end of the racking had been placed, it was the plaintiff's case that this resulted in the creation of a very restricted circulation corridor or aisle within which to walk.

32. At the time when an engineering inspection carried out by the defendant's engineer, Mr Terry, a yellow demarcation line had been painted on the floor of the stockroom and which is clearly seen in his photographs 3, 4, 5 and 6. It was common case that these lines had been painted some time after the accident. These photographs show one pallet located at the end of the shelving in an area now intended and designated as a circulation area or aisle and another pallet placed adjacent to the rear wall inside the yellow line. There was a controversy between the parties as to the location, number and stacking of pallets at the time of the accident.

33. The plaintiff's evidence was that there were two or possibly three pallets at the end of the shelving racks best seen in photographs 4 and 6 taken by the defendant's engineer and photographs 5, 6 and 7 taken by the plaintiff's engineer and that these

pallets were stacked with stock nearly reaching up to the ceiling. The defendant's Miss Farrell doubted that there would have been any pallets placed at the end of the racking or that they would have been stacked to such a height as suggested by the plaintiff..

34. The plaintiff made his own list of what product was required to resupply the instore retail shelving. As can be seen from the photographs most of the product is shrink-wrapped. A pack of two litre bottles of 7up contains nine bottles weighing approximately eighteen kilograms. When the plaintiff came to that item on his list he went looking for it and walked down the aisle towards the camera shown in photograph number 4 taken by his engineer. He checked along the shelving as he walked. When he got to end of the shelving he turned to his left and walked down the other side of the racking shown in the defendant's photographs 1 and 2. On reaching the end of that aisle he found a pack of 7up bottles which had been placed on a pallet located at the end of the shelving seen in the defendant's photograph 3. He took up the pack and, given the proximity of the pallet onto which he was stacking product in the adjoining aisle, rather than retracing his steps, he decided to walk down the narrow passageway created by the opposing pallets located at the end of the racking and the back wall.

35. Whilst walking down the narrow passageway, the plaintiff tripped over another pack of 7up bottles which had been left on the floor. This caused the plaintiff to trip and fall. As he did so he kept hold of the pack of 7up. He fell awkwardly and in evidence demonstrated a twisting motion. In the process himself he became wedged between the stock on the opposing pallets. He eventually managed to wriggle himself free, ultimately coming in contact with the floor.

36. Although the plaintiff had been working in the stockroom for about twenty minutes before the accident he denied, when it was put to him, that he had been responsible for putting the 7up pack over which he had tripped in the narrow passageway, moreover, his evidence was that he hadn't been in the narrow passageway before the accident.

37. There was some controversy as to whether or not the plaintiff had actually struck the floor when he tripped. His recollection was that initially he had simply become wedged between the stock and that he had had to wriggle himself free. There was also some controversy as to the level of lighting, though that had not been pleaded. It was the defendant's contention in any event that that had really nothing to do with the accident since the lighting was more than adequate for the plaintiff to see where he was going even if the pallets were stacked in the manner as suggested by the plaintiff. When he reported the accident to his supervisor, Miss Farrell, he had not mentioned anything about an inadequacy in the lighting, nor was the plaintiff's account of tripping over a pack of 7up mentioned by him. Her recollection was that the applicant simply said that he had hurt his back whilst lifting , an account which is also consistent with the record made by the triage nurse of the Midland Regional Hospital when the plaintiff attended there on the 19th of March 2010.

38. The plaintiff insisted that he had sustained his injuries when he tripped whilst carrying a pack of 7up bottles and not otherwise. He acknowledged the account as recorded in the notes but insisted that the evidence of the circumstances of the accident which he gave was the truth. By way of explanation for the account which he had given to his supervisor and at the hospital, he said this was because he thought there would be a full investigation by his employers into the accident in accordance with its accident reporting procedures and that he thought he would get more immediate attention at the hospital which was his main concern because he was in so much pain. His concentration was on his injuries rather than on the accident circumstances.

39. Subsequently, the plaintiff wrote a letter to the defendant on the 22nd of March 2011 in which he specifically stated that he had tripped over stock that was left on the stockroom floor that he had fallen on his side and had become wedged in between the stock. This account also appears in the medical notes of the Adelaide and Meath Hospital dated the 13th of September 2011. The notes of his GP Dr. Lawlor, which were admitted, also referred to the plaintiff "tripping".

40. The plaintiff's recollection was that when he reported the accident on the evening of its occurrence to his supervisor she did not make any written record of what he had said nor was he subsequently asked to make a statement in accordance with the defendant's accident reporting procedures.

41. With regard to health and safety, his evidence was that he had attended a training course on the 17th of August 2004 and that as part of that course he had completed a questionnaire in relation to manual handling. That questionnaire sought to assess the plaintiff's understanding in relation to a number of health and safety issues including the assessment of the work environment. In response to that question the plaintiff answered *"assess the area make sure that nothing is in the way to were (sic) you need to go".*

42. It was suggested to the plaintiff that had he gone back the way he had come that that would have been a safer route. He agreed with that suggestion. The plaintiff also agreed that he had not assessed the narrow passageway before walking into it. He had not seen the pack on the floor and he accepted that he had not made a complaint about that on the evening when informing his supervisor that he had hurt himself.

43. Engineering evidence was given on behalf of the plaintiff by Mr. Vincent O'Hara, consulting engineer. His report and photographs were introduced into evidence. That report recorded an account given by the plaintiff that he had fallen to the floor sustaining injuries in the process, however, Mr. O'Hara gave evidence that that account had been an error on his part and his recollection was that the plaintiff did not actually say that but rather he had made an assumption to that effect . He had carried out an inspection of the *locus in quo* and recorded measurements of the racking, of the distance between the end of the racking and the back wall as well as the dimensions of the pallets and the packet of bottles. It was his evidence that depending on the positioning of the pallets and whether these had been placed lengthways or widthways relative to one another the space through which the plaintiff walked was between 300 millimetres and 500 millimetres. In either case it was his opinion that the available space was simply too restrictive, especially if carrying a nine bottle pack of 7up. In his opinion a gap of 800 millimetres would have been necessary in order to allow for the safe passage by the plaintiff whilst carrying a load of such dimensions.

44. As to the location of stacked pallets along the back wall of the store and at the end of the racking, it was his opinion that whilst there could be no objection to the pallets being located and stacked along the back wall of the storeroom, however, pallets should not have been placed at the end of the racking in what was, in effect, an aisle for circulation by employees and equipment and that that should have been kept clear.

45. Whilst here would have been some restriction of lighting caused by the level of stock in the stock room as described by the plaintiff , Mr O' Hara accepted if the plaintiff was able to read his stock list then the lighting would have been sufficient to enable the plaintiff see the pack of bottles on the floor, however, in the circumstances of this case the plaintiff was carrying a load through a narrow passageway and was doing so having just come around a corner, accordingly, there was an increased risk that the pack would not be noticed and that in the particular circumstances it was less likely that the plaintiff would have seen the bottles on the floor.

46. Mr. O'Hara had sight of the defendant's relevant Safety Statement. Under the section dealing with safety in the product storage and racking section of the premises, the defendant had identified a health and safety risk in relation to the aisles and had directed that the aisles between the racking were to kept free of product at all times.

47. It was Mr. O'Hara's evidence that the plaintiff's lack of familiarity would have been an additional risk factor and that the plaintiff's vision of the floor or an object on the floor in the restrictive passageway would itself be further restricted depending on the height at which the load in question was being carried by him. From the plaintiff's perspective at the time of the accident the presence of an obstruction, in this instance a pack of bottles, in the passageway would have been unexpected.

48. With regard to the controversy over the number of pallets present at the time of the accident, Mr. O'Hara confirmed that at the joint engineering inspection the plaintiff had given an account of tripping and twisting and of being wedged between stock on a number of pallets. At no point did Mr O'Hara understand there to be only one pallet against the back wall and at the end of the racking at the time of the accident.

49. Whilst Mr. O'Hara accepted that the usual width of an ordinary doorway was 700 millimetres and that in the ordinary way that would ensure a safe passage for a pedestrian, in this case the plaintiff was carrying a large pack of bottles hence the need for an 800 millimetre passageway width. Either way, it was his opinion that had the defendant's own Safety Statement been complied with the area would have been perfectly safe and that there would not have been a problem for the plaintiff.

50. Ann Marie Farrell's evidence was that whilst there would have been nobody in charge of the storeroom at the time of the accident she doubted that it was as congested as described by the plaintiff and in this regard she said that deliveries would have been quiet in the month of February. According to the defendant's records there were ten members of staff on duty on the Friday and as far as she was concerned that was a normal staff compliment. She confirmed that the accident was reported to her on the same evening by the plaintiff. The reason she was surprised by the plaintiff's evidence that there would be pallets at the end of the racking was because the cold storeroom would have had to have been accessed and that that would not have been possible if the pallets were placed where the plaintiff says that they were. However, she accepted that she did not go into the stockroom that evening so she could not give any evidence of its actual state from her own knowledge.

51. In relation to the plaintiff's report of the accident circumstances, it was her evidence that the plaintiff told her that he had hurt his back whilst lifting. Her recollection was that the plaintiff came to her at the checkout and told her that he had hurt himself. Her recollection was that the plaintiff seemed fine but that he did say that his back was sore. She ultimately sent him home. She didn't remember a meeting on the following day but made a note the next morning instead of that evening because she was on her own and it was late.

52. With regard to completing an accident report form, she said that an official accident report form as such was not completed, however, she wrote out a statement. Other than that she confirmed that there had been no official investigation of the accident in accordance with the defendant's accident reporting procedures. She did not check the details of the accident with the plaintiff before making her statement. Under the defendant's accident reporting procedures the person who should have filled out an accident report did not do so but she did not know why such a report had not been completed. She agreed that under the defendant's accident reporting procedures there ought to have been an investigation and a report made.

53. Engineering evidence was given on behalf of the defendant by Mr. Terry. It was his evidence that the yellow lines present at the time when he took his photographs were intended to be demarcation lines between stock and circulation areas.

54. In his opinion the probability, on the plaintiff's evidence, was that the width of the narrow passageway was approximately 500 millimetres and that at that width it would have been possible for the plaintiff to have been jammed between the stock on the opposing pallets in the passageway as described. With regard to the question as to whether 500 millimetres was a sufficiently safe width for the plaintiff to pass whilst carrying a pack of 7up bottles, it was his view that the width of the passageway would have been dependant on the way in which the pallets had been located on the floor relative to one another. The width could have been more or less depending on orientation of the pallets, however, it was also his evidence that the proper access to the pallet which the plaintiff says he was stacking was along the aisles between the racking and not the area at the end of the racking because that was not a designated passageway for use by employees.

55. In Mr. Terry's opinion the instructions and training given to the plaintiff were sufficient and appropriate. That much was accepted by the plaintiff as was the fact that he did not follow those instructions. If the plaintiff had accessed the area in accordance with his training he should, in Mr. Terry's view, have seen the packet on the floor. The packet was large and plainly visible. On the stacking, placing and orientation of the pallets he didn't think lighting was an issue and no complaint had been made about it either at the time or on the day of the inspection.

56. Under cross examination Mr. Terry accepted that the area between the yellow lines and the stock room wall now painted on the floor was designated for storage so that to the left of the lines the area was designated for the movement of employees and stock pallet trucks. If there were pallets of stock located as suggested by the plaintiff then that would have resulted in restriction of access and movement. Mr. Terry also accepted that the narrow passageway between the pallets would only have been visible when looking down the passageway especially if there were stacked pallets on both sides. He accepted that if pallets were placed with stock on them in the position where indicated by the plaintiff then that would have constituted an obstruction. A person turning a corner and going into a restrictive passageway would certainly need to keep a proper lookout and an object placed on the floor in the passageway could be problematical. Mr. Terry accepted that pedestrian aisles should be kept clear and that if there was packet of 7up on the floor in the passageway then that too constituted an obstruction. It was his view, however, that carrying a packet of 7up was unlikely to have obstructed the plaintiff's vision otherwise than the view immediately around his feet.

Decision on liability and causation.

57. I have had an opportunity in the course of the trial to observe the demeanour of the plaintiff as he gave his evidence. His credibility was called into question on a number of fronts but also with particular regard to the circumstances and facts of the accident. The answers he gave to certain questions in the course of cross examination are, in my view, telling. He accepted that he may only have said when he reported the accident that he had injured his back when lifting and that a similar account had likely been given as noted in the emergency department record of the Midland Regional Hospital, Portlaoise, of the 19th of March 2010. He also accepted that he had received induction training on commencement of his employment and that on the occasion of his accident he had been non-complicit with that.

58. The initial injuries complained of by the plaintiff involved his back and chest. The chest x ray was reported as showing a hairline fracture of the left third rib. The plaintiff made complaints of and gave evidence in relation to his chest pain. Whilst there is a

causation issue between the parties in relation to the plaintiff's current injuries and sequelae, the fact that the plaintiff was medically assessed and objectively reported upon as having sustained a chest injury, which included a fracture of the left third rib is, in my view, significant with regard to a determination in relation to the circumstances of the accident as contended for and given in the evidence by and on behalf of the plaintiff.

59. Quite apart from the difference of opinion as to causation in relation to the plaintiff's current medical presentation in terms of causation, both Professor Molloy, who gave evidence on behalf of the plaintiff, and Professor Phillips, who gave evidence on behalf of the defendant, accepted that the plaintiff was an entirely genuine individual. They had both examined the plaintiff and gave evidence that his reactions in the course of medical examination were neither medically inconsistent nor exaggerated. Professor Molloy gave evidence that the rib injury sustained by the plaintiff would have been particularly painful and would be consistent with a significant impact to the chest. Professor Phillips understood that the circumstances of the accident involved the plaintiff being wedged as part of a twisting motion. There was no suggestion by Professor Phillips or Professor Molloy that the plaintiff's initial injuries were in any way inconsistent with the accident as described. In fact the contrary was the case.

60. It is not in dispute that no investigation was carried out by the defendant in accordance with its own accident reporting procedures. Insofar as there was some correspondence passing between the plaintiff and the defendant commencing with the plaintiff's letter of 22nd March 2011, no issue appears to have been taken by the defendant with the plaintiff in relation to the accident circumstances themselves. No evidence was led by the defendant as to what investigation if any was undertaken other than the evidence given by Miss Farrell. She had not gone into the stock room on the evening and could give no direct evidence as to the layout, location, and stacking of pallets.

61. On the issue as to whether the plaintiff had simply hurt his back when lifting or had injured himself when he became wedged between the stock on opposing pallets, accepting ,as I do, the medical evidence in relation to the plaintiff's initial injuries, I find as a fact that this evidence is consistent with an accident as described by the plaintiff rather than with an accident causing a simple back injury whilst lifting a pack of bottles since on that version the chest injuries which were medically noted and radiologically confirmed at the time are neither consistent nor medically explained.

62. Returning to the plaintiff's demeanour as observed by me in the course of the trial and having regard to the foregoing findings, I am satisfied that the plaintiff gave truthful evidence in relation to the accident and I find as a fact that it occurred in the way , manner and circumstances described by the plaintiff .

63. It follows from his account and the evidence of the plaintiff's engineer, which I accept, that the passageway through which he was walking was too narrow and was unsafe. There is no evidence that the pack of 7up bottles over which he tripped in the passageway was put there by him or that he had any responsibility for the state of affairs with which he was confronted. He was an employee going about his employer's business. His employer owed him a duty of care both at Common Law and under Statute, particularly pursuant to the provisions of the Safety Health and Welfare at Work Act 2005, to provide him with a safe place and system of work.

64. The defendant's Safety Statement Risk Assessment, which was operative at the time, assessed the risks in the area and contains a direction that the store room aisles should be kept clear. I am satisfied on the evidence that the stock room was congested in the way described by the plaintiff. It follows that on the evening of the accident the defendant had failed to comply with its own Health and Safety Statement. The placing and packing of any pallet at the end of the racking in close proximity to other stacked pallets lined against the back wall of the storeroom was an obstruction on what should otherwise have been a clear circulation area for use by the plaintiff and other employees of the defendant.

65. There was no supervisor or manager on duty in charge of the store room at the time when the plaintiff was assigned his duties. The plaintiff's supervisor never entered the storeroom on the evening and could give no evidence as to its actual condition at the time she assigned the plaintiff. The manager for the area on the occasion had gone off duty before the plaintiff went into the storeroom. That person had a responsibility to see to it that the defendant's Health and Safety Statement was complied with. It was reasonably foreseeable that a pack of 7up bottles left in a narrow passageway constituted a danger to an employee such as the plaintiff who might well be detailed, as the plaintiff was, to obtain product from the storeroom for stacking on the supermarket shelves.

66. The fact that the plaintiff owed both a common law and statutory duty of care to himself, in particular to comply with the training and instructions which he freely accepts that he received but failed to comply with, does not absolve the defendant from complying with the common law and statutory duty of care which was placed on it for the safety of its employees, including the plaintiff.

67. I am satisfied on the evidence and find that the defendant was in breach of both its common law and statutory duty of care to provide the plaintiff with a safe place and system of work and that its failure to do so was the principle cause of the accident for which it must be held responsible.

Decision on contributory negligence.

68. The essence of the defendant's submissions in relation to negligence but in particular in relation to negligence on the part of the plaintiff, was that the accident could never have occurred had the plaintiff followed the training and instructions which had been given to him, which he had accepted that he had received but with which he had failed to comply. Moreover, it was no part of the plaintiff's case that he ought to have been provided with a refresher course. He had not made the case that he had forgotten the instructions and training given to him at the time of his induction. On the contrary he knew what he ought to have done, namely to assess the work environment, but freely admitted that he had failed to do that, consequently, he was the author of his own misfortune.

69. On behalf of the plaintiff it was submitted that there was a clear breach of statutory duty on its part under the Act of 2005 with particular emphasis being laid on the fact that it had failed to comply with its own safety statement and risk assessment insofar as that applied to the *locus in quo*. Had it done so the likelihood was that there would have been no accident at all. At worse the plaintiff was guilty of inattention or inadvertence. He had in no way contributed to the state of affairs with which he was presented and in which he found himself.

70. The many decisions of the Superior Courts reaching back to *Stewart v. Killeen Paper Mills Ltd* (1959) IR 436 establish that in respect of a breach of statutory duty on the part of a workman an error of judgment, heedlessness or inadvertence does not amount to contributory negligence where the injury could not have occurred but for the breach of statutory duty on the part of the employer. However,a deliberate act on the part of an employee in the knowledge of the risk of injury attendant upon it will attract liability on the part of the employee. See *McSweeney v. McCarthy* unreported S.C. January 28th 2000 (Murray J.) where on the facts of that

case a 40% deduction was made in respect of the employees own negligence and breach of statutory duty.

71. In respect of common law negligence the position was that an act of inadvertence, even momentary inadvertence, was capable of attracting a finding of contributory negligence if it constituted an act which a reasonably careful workman would not do.

72. These and other authorities to like affect must be viewed with caution in light of the provisions of the Safety Health and Welfare at Work Act 2005 (the Act of 2005) and the subsequent decisions made concerning them.

Section 13 of the Act of 2005 provides, *inter alia*,

> *"(1) An employee shall, while at work—*
>
> *(a) comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work…"*

This provision has potentially significant legal consequences for employees constituting as it does a statutory general duty of care which they owe in the course of their employment.

73. The legislative history leading up to the Act of 2005 is usefully reviewed in the decision of O'Neill J. in the case of *Smith v. The Health Service Executive* [2013] IEHC 360. Referring to the case authorities decided in respect of the statutory duty of care owed by an employee and culminating in the provisions of the Safety Health and Welfare at Work Act 2005 O'Neill J. observed at para. 58 of his judgment:-

> *"58. The above authorities reveal that the benign treatment of contributory negligence on the part of an employee in the face of a primary breach of statutory duty by the employer was to ensure that the policy underpinning the statutory provision would not be diluted by reliance upon the doctrine of contributory negligence. If, however, the duty of an employee to take reasonable care for their own safety is elevated to the status of a statutory duty, it would seem to me that the exculpation of inadvertence and inattention from the ambit of contributory negligence must be reconsidered given that both employer and employee are now bound by statutory duties to take reasonable care.."*

Commenting on the effect S.13 of the Act of 2005 and having referred to the decisions of the Supreme Court in *Coffee v. Kavanagh* [2012] IESC 19 and *Quinn v. Bradbury and Bradbury* [2012] IEHC 106 O'Neill J. stated at para. 61 of his judgment:-

> *"In short, therefore, it must be said that in light of the statutory duty as imposed on employees, inattention, inadvertence, heedlessness or carelessness on the part of an employee can no longer be regarded as outside the ambit of contributory negligence, in circumstances where it is established that there was a primary breach of statutory duty on the part of the employer, assuming causative links between the breach of statutory duty by the employer, in the first instance, and contributory negligence of the employee, to the injuries actually suffered.*
>
> *62. It is fair to say that the duty imposed on employers under s. 8(1) of the Act is undoubtedly of a more onerous order being expressed as being "shall ensure so far as is reasonable practicable the safety, health and welfare at work of his or her employees", whereas the statutory duty imposed on employees under s. 13(1) of the Act is to "comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety and health and welfare . . ."*

74. Adopting this statement of the law as it now stands, the plaintiff cannot, on my view of the evidence, have been but aware of the congestion in the stockroom and in particular the narrowness of the passageway into which he decided to proceed especially carrying as he was a large pack of 7up bottles weighing some eighteen kilos. He fairly accepts that he did not stop to assess the situation with which he was confronted and never saw the pack of bottles which were lying in the narrow passageway and over which he tripped. It is clear from the evidence that in order to get a proper view of the passageway and anything that might have been on the floor that the plaintiff would only have been able to see that whilst directly looking along the passageway and that that was so because of the height of the stock on the opposing pallets.

75. It was suggested that having picked up his pack of 7up bottles off the first of the pallets located at the end of the rack that he had simply gone around a corner and had only taken one or two feet when he came in contact with the pack on the floor, however, on his evidence there were 2 or 3 stacked pallets located one beside the other at the end of the shelving and that having tripped he had become wedged amongst the stock between the first and the second pallets. On that evidence it seems reasonable to infer that the packet of bottles on the floor was somewhat further down the passageway than suggested.

76. Whilst the carrying of such a large packet would have obscured the plaintiff's vision to some extent I am satisfied ,on the evidence, that any restriction would have been confined to an area just in front of his feet, there being no evidence that the plaintiff was carrying the pack of bottles otherwise than normally. On these findings had the plaintiff been keeping a proper lookout and especially if, immediately before he started to walk into the passageway, he had assessed, in the words of his training, "the environment" which confronted him, he ought to have been able to see the pack of bottles on the floor. In my view his failure to do so constitutes both contributory negligence and a breach of the statutory duty of care which he owed to himself.

Decision on the apportionment of fault.

77. As to the apportionment of fault between the parties this is not to be assessed on the basis of the causative contribution of each to the accident but rather on the respective blameworthiness of both. Whilst the court has found that the principal cause of the accident was due to the negligence and breach of statutory duty on the part of the defendant, having due regard to the principals upon which fault is to be apportioned the court considers that, in the circumstances of this case, the appropriate apportionment of liability between the parties is 70% against the defendant and 30% against the plaintiff.

The injuries

78. As a result of the accident the plaintiff described how he had become wedged between the stock on the opposing pallets in the stock room and had had to wriggle himself free. He was aware of some soreness in his back and chest after the accident and reported to his supervisor that had hurt himself. On the next day he noticed that his symptoms were getting worse and went to the local hospital where his back was x-rayed. At this time his main symptomology related to his back. The plaintiff also attended his GP Dr. Robert Lawlor. It appears from his notes that the plaintiff was complaining of pain in the thoracic spine and in the intra scapular region mainly to the left. He was prescribed some anti-inflammatory medication. The plaintiff became aware of increasing chest pain. X-rays

showed a fracture involving the third rib on the left hand side. The plaintiff was referred to Mr. David Cogney orthopaedic surgeon in Tullamore Hospital. He continued to be symptomatic both in respect of his chest and his back. Due to continuing symptomology the plaintiff was prescribed Difene and Lyrica by his G.P. He also underwent a course of physiotherapy.

79. The plaintiff went on to develop other symptomology including pain and restriction of neck movement and what was described as "shooting pain" throughout his body associated with some clumsiness. His G.P. referred him to the neurology department in Tallaght Hospital as his symptoms had now become quite widespread and which suggested a neurological involvement.

80. The plaintiff subsequently came under the care of consultant neurologists Dr. Sinead Murphy and Dr. Donal Costigan. An M.R.I. scan was arranged for him. In his past medical history it was also noted that the plaintiff had a post viral myositis in the year 2006/2007.

81. As a result of investigations which were carried out under the care of Dr. Murphy in 2012, the plaintiff was diagnosed as a type 1 diabetic and consistent with that condition the plaintiff had developed a peripheral neuropathy.

82. In the course of his evidence the plaintiff described how his neck became very stiff and he felt he was unable to turn his head to any significant degree. He described altered sensations in his hands and fingertips. However, once he commenced treatment for diabetes his diabetic symptoms improved to some extent. He continued to experience symptoms of pain and stiffness in his neck and back, however, these naturally improved to a point where, in the Spring of 2013, he felt able to return to work for the defendant. Initially he was assigned light duties. He remained in employment with the defendant for about five months until December of that year. He was able to manage his work duties up until December when he was assigned duties which required him to work in the cold store of the defendant's premises. He felt physically unable to work in a cold environment and would not accept duties that required him to do so. The defendant was unable to accommodate him, accordingly he went on sick leave.

83. With regard to his architectural technician course which he was taking at honours level, it appears that he went back to that for a number of weeks shortly after the accident but was unable to continue because he was unable to bend over a manual drawing table due to his back symptomology and as a result of which he eventually dropped out of the course. Subsequently, in or about September 2014, he commenced a FETAC level 5 IT course which he was able to manage. Between 2011 and 2013 the plaintiff occupied himself with research on computers and since January 2015 has obtained some part time IT work in a small company. His present intention is to undertake a degree in computing.

84. The plaintiff gave evidence that he has continued to suffer from pain in his shoulders, upper back, and lower back as far as he is concerned his physical symptomology is such as would prevent him from returning to any form of heavy manual work such as that undertaken by him when employed by the defendant. His case was that he was now only fit for light work such as IT and computing.

85. Although the plaintiff gave evidence that he had no knowledge of his diabetic condition prior to the accident it appears from medical notes and records, which were admitted in evidence, that he had attended Dr. Lawlor in February 2008 with concerns in this regard. Unfortunately that was not followed up at the time and it was not until 2012 that he was actually diagnosed with type 1 diabetes.

86. It also appears that Dr. Murphy had concluded that the plaintiff was suffering from fibromyalgia. Under cross examination the plaintiff denied that he had suffered from this condition prior to the accident but medical notes from 2006 show that the plaintiff was investigated for that condition and myositis at that time. Having been reminded of this, the plaintiff recalled that he was out of work for a few weeks but gave evidence that symptoms in this regard had resolved without recurrence up until the time of the accident. I accept the plaintiff's explanation that he had actually forgotten about this particular episode and that in the subsequent years he felt fit and well and was a regular attendee at his local gym.

87. Medical evidence on behalf of the plaintiff was given by Professor Molloy whose report, prepared for the assistance of the court, was admitted. Medical evidence on behalf of the defence was given by Professor Phillips. He too prepared a report for the assistance of the court which was also admitted.

88. Professor Molloy carried out one physical examination on the 7th of April 2015. He had access to certain notes and records including a report from Dr. Murphy. He noted that an MRI scan of the plaintiff's cervical and lumbar spine had showed some bulging at the C3/4 level but without cord involvement. An EMG was carried out subsequently by Dr. Costigan on the 5th of March 2012 which showed some neurological abnormalities consistent with the neuropathy. The plaintiff complained to Professor Molloy of cramps in his lower back and legs and sometimes in the shoulder blades. These symptoms could be quite significant at times and could lead to a feeling of the plaintiff's legs giving way.

89. A physical examination was carried out by Professor Molloy which showed that the plaintiff's cervical spine movements were reduced by 30 to 40% in all directions with tenderness in the neck and shoulder muscles but no neurological deficit in the upper limbs.

90. With regard to the plaintiff's back ,Professor Molloy noted that movements were good on forward and lateral flexion and that the plaintiff's straight leg raising was 80 degrees bilaterally, moreover, the plaintiff could heal and toe walk without difficulty and reflexes were grade two, with down going planters. There was no sensory or motor loss.

91. Professor Molloy' opinion was that the plaintiff was suffering from chronic pain syndrome with a neuropathy most likely diabetic in nature which was contributing to the plaintiff's symptoms.

92. Vocationally Professor Molloy thought that the plaintiff would be well able to undertake his chosen career path in IT and computing. He was satisfied that the probable cause of the plaintiff's neuropathy was his diabetic condition and was not related to the trauma arising from the accident. In his opinion the plaintiff suffered a significant soft tissue injury which was then complicated by the effects of his untreated diabetes. The diagnosis of diabetes was a shock for the plaintiff and there were also domestic problems which resulted in his partner leaving him and which required the plaintiff to look after their two year old daughter.

93. With regard to the myositis which was diagnosed in 2006, Professor Molloy's evidence was that that condition caused muscle weakness; however, it appeared that in the plaintiff's case it was relatively mild and settled very quickly. Professor Molloy examined the plaintiff in connection with fibromyalgia but formed the opinion that the plaintiff did not satisfy the criteria for a diagnosis of that condition. The plaintiff's injuries referable to the accident were of a soft tissue nature. There was no underlying pathology. He didn't think that the diabetes would have had any significant impact on the course of the plaintiff's physical symptomology such as slowing expected course of recovery. It did not aggravate nor was it otherwise connected to the symptoms referable to the soft tissue injury.

94. The soft tissue injuries, whilst diffuse, were typical of trauma rather than diabetes though the symptoms of peripheral neuropathy complained of by the plaintiff were solely attributed to the diabetes and not to the trauma.

95. Professor Phillips examined the plaintiff on the 11th of July 2012. At that time the plaintiff was complaining of pains in his arms, his back and his legs and that he was unable to hold a two litre bottle of milk in his hand. He described pains "all over". He noted that the plaintiff had been advised that he had had arthritis involving both of his feet.Clinical examination of the plaintiff's neck was satisfactory; there was mild global weakness of the upper and lower limbs of undetermined aetiology.

96. He thought that most of the plaintiff's current symptoms were referable to neurological conditions not connected to the trauma. His expectation,insofar as the physical injuries were concerned, was that these ought to have resolved over a relatively short period of time. He didn't accept that the plaintiff has organic symptoms at this point caused by the original injury. He thought that the explanation for the persistence of physical symptomology referable to the trauma was a failure on the part of the plaintiff to rehabilitate. He didn't think that that was referable to the plaintiff's diabetes. He agreed that the plaintiff was not suffering from fibromylgia. He did not agree, however, that tender points noted by Professor Molloy on physical examinations signified an ongoing pathological process involving a fall occurring some five years previously. The plaintiff's chronic pain syndrome was subjective in nature. There was no underlying organic or pathological explanation for its continuation at such a remove from the accident. The plaintiff's presentation was either an entirely subjective neurotic condition or it was the result of a pathological process such as diabetes. Either way it was not caused by the accident.

97. Professor Molloy was recalled to give evidence arising out of the evidence of Professor Phillips which had not been directly put to him in the course of cross examination. He expressed the opinion that the symptom complex from which the plaintiff is now complaining ,insofar as is referable to the accident, was acceptable in what he described as soft tissue criteria. He agreed with Professor Phillips that in the ordinary way one would have expected the plaintiff to recover in a relatively short period of time but in the plaintiff's case he did not do so. He felt that there was also a psychological component present in the plaintiff's presentation.. He agreed that there was no underlying pathology referable to the accident, however, a small percentage of a patients who sustain soft tissue injuries which one might expect to recover relatively quick go on to develop chronic symptomology and that that was medically accepted.

Decision on the injuries .
98. As a result of the accident the plaintiff sustained soft tissue injuries to his chest and a rib fracture; he also suffered soft tissue injuries effecting his shoulders and thoracic spine. The plaintiff was extensively investigated in respect of symptoms including altered sensation in his extremities, muscle weakness, and deterioration in motor power. There is no doubt but that the medical notes and records establish quite clearly that in a period of some eighteen months subsequent to the accident the plaintiff continued to complain of these symptoms as well as of symptoms of back pain including pain radiating into his neck with restricted ranges of motion of his neck. He was prescribed medication and also underwent courses of physiotherapy which were of little benefit to him. In 2012 he was diagnosed with type 1 diabetes for which he was treated and which is now under control. Apart from symptoms referable to his neck, back, shoulders and chest I am satisfied that the neurological symptoms of which the plaintiff complained were, as a matter of probability, referable to his diabetes and are not causally related to the accident. Moreover, these symptoms would not delay or otherwise interfere with the ordinary process of rehabilitation. There is no doubt, however, that the process of rehabilitation in the plaintiff's case was slow, however, it is also clear that to the extent that the plaintiff continued to be symptomatic in relation to his back and neck, that had reached a level where the plaintiff himself felt able to return to work for the defendant in May 2013 and, indeed, the plaintiff was able for the work duties assigned to him from the time of his return to work in May until December 2013 when his own assessment was that he would be unable to work in a cold store .

99. Although the plaintiff had some restriction of neck movement when examined by Professor Molloy his neck movement was normal when examined by Professor Phillips. His bilateral leg raising test was normal, as was the MRI scan of the plaintiff's neck and back. I accept the evidence of Professor Molloy that a psychological component is generally involved with a patient suffering from chronic pain syndrome. The plaintiff may have believed that to attempt to work in a cold store would have had an adverse affect on him, however, it appears that on treatment for his diabetes and working for the defendant as a general operative undertaking the same tasks as he had prior to the accident, that the plaintiff had reached a level of recovery which enabled him to undertake such duties. He did not, however, seek out alternative employment of a similar type after he ceased work in December but has taken an altogether different career path which, on the evidence, is also desirable having regard to the plaintiff's diabetic condition.

100. The plaintiff is more optimistic about the future now and has returned to exercise, walking as much as he can. No doubt his neuropathy still affects him to some extent. His symptoms, insofar as they are referable to the physical injuries, whilst not having any objectively assessable organic or pathological cause referable to the accident are now, it seems to me, at a relatively low level. I accept the evidence of Professor Molloy that in a small number of individuals who have sustained trauma of the type experienced by the plaintiff that some symptomology is seen and accepted in medical practice. The consequence of his untreated type 1 diabetes was a peripheral neuropathy but for which the defendant has no responsibility in law.

Given the period of time which has elapsed since the accident and that his condition insofar as it relates to the accident is medically said to be chronic, it seems reasonable to conclude that the plaintiff is likely to experience some ongoing albeit low level of physical symptoms for sometime to come.

100. Having due regard to foregoing and the complexity arising as a result of symptomology referable to different causes, principally though not exclusively the plaintiff's diabetes, and applying the well settled principals of law as to the assessment of compensation for personal injuries caused by reason of negligence and /or breach of statutory duty, it is the view of the court that a fair and reasonable sum for general damages on full liability is €65,000.

Decision on Special Damages.
101. The plaintiff has made a claim for loss of earnings to date of trial in the amount of €48,937.77 less deductible social welfare benefits giving a net figure of €23,967.64. Other special damages have been agreed between the parties in the sum of €3,803.

102. Having regard to the findings of the court in relation to the plaintiff's physical disabilities referable to the injuries sustained as a result of the accident and which had resolved to a point which enabled the plaintiff to return to work for the defendant in May 2013 and to continue thereafter until December 2013, when he himself decided that he would not work in a cold store, I am satisfied ,on the balance of probabilities, that the plaintiff possessed an ability to seek , carry out and engage in similar work duties of the type undertaken by him between May and December, had he chosen so to do . Accordingly, the court finds that his claim for loss of earnings should be limited to a period from the date when, after the accident he ceased to receive income from his employment with the defendant until the date of his return to work in May 2013. I will discuss with counsel the apportionment of the sum of €23,967.64 appropriate to that period; added to which will be the agreed sum in respect of other special damages.

103. There will then be judgment for the net amount of the general and special damages having regard to the apportionment of 70/30 in the plaintiff's favour and the court will so order.