Neutral Citation: [2016] IEHC 194

THE HIGH COURT

[2014 No. 9577 P.]

BETWEEN

SLAVOMIR SPES

PLAINTIFF

AND

WINDCANTON IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 16th day of March, 2016

Introduction

1. At all material times, the plaintiff was employed by the defendant in the chill area of the defendant's distribution centre at Unit 16, Northwest Business Park, Blanchardstown, Dublin 15. This was a distribution centre for the Superquinn chain of supermarkets. Goods would be delivered to this distribution centre by various suppliers. The goods were delivered on pallets. The plaintiff was employed as a *"picker",* which involved lifting goods from the pallets and placing them on trolleys known as *"combi cages"*. These cages were then marked for onward transport to various Superquinn supermarkets. Sometimes, when goods were going to be delivered to the supermarket on a pallet, rather than in a cage, the plaintiff would move the goods from the pallet on which they had been delivered to other pallets.

2. On 29th October, 2012, while the plaintiff was engaged in lifting trays of yogurt from a pallet to a cage, he was caused to suffer an injury to his back in the following circumstances: the last five trays of yogurt were remaining on the pallet, the plaintiff walked over to the pallet and squatted down on his hunkers, he pulled the trays of yogurt towards him and then lifted the five trays. When he was turning to place the trays into the combi, which was approximately one meter away, he experienced a sharp pain in his back. When the pain did not subside, he told his supervisor that he had injured his back and he was allowed to go home early.

3. It is the plaintiff's case that the injury to his back was caused due to the negligence and breach of duty, including breach of statutory duty, on the part of the defendant. In particular, he states that the defendant was negligent in the following ways:-

> a) While he maintains that he was trained how to lift items from the floor, he was never trained as to the correct technique when twisting or turning while carrying a heavy load;
>
> (b) He alleges that the defendant imposed an unreasonably high *"pick rate"* of 1200 picks per seven and a half hour shift; and
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> (c) He was required to carry out an unreasonable amount of work in relation to lifting heavy items, rather than being rotated between heavy and light items.

4. It is the plaintiff's case that as a result of these factors, his back was weakened over the years that he worked with the defendant, such that he suffered the acute injury which he did on 29th October, 2012.

5. The defendant denies that it was negligent or in breach of duty. In particular, the defendant states that the plaintiff received training in safe manual handling techniques when he first joined the company. There were also a number of refresher courses given to the plaintiff during his employment with the defendant. The defendant has exhibited a number of records in this regard. Secondly, the defendant states that the pick rate of 1200, was not an unreasonable rate to set in all the circumstances. Finally, they deny that the plaintiff was treated, in any way, unfairly in relation to the allocation of heavy duties. The defendant also alleges that the plaintiff was guilty of contributory negligence, in particular, failing to comply with the manual handling training, which had been given to the plaintiff on the commencement of his employment with the defendant and on refresher courses on various dates thereafter. Finally, the defendant denies that the plaintiff has suffered the alleged or any injuries or has incurred the losses claimed by way of special damages.

The Liability Issues

Evidence of the plaintiff, Mr Slavomir Spes

6. The plaintiff is a Slovakian national and was born on 28th June, 1968. He came to Ireland in August 2004 and commenced working with the defendant at its distribution centre in Blanchardstown in February 2005. The plaintiff stated that at the commencement of his employment with the defendant company, he was given training in manual handling. He stated that this was very elementary training in safe manual handling techniques. The instructor gave a demonstration of the safe method of lifting items from the floor, by lifting an empty box which measured some 30 x 30cm from the floor onto a table. He then lifted the box from the table and placed it back on the floor. The lifting technique taught was that operatives should squat down on their hunkers and with the box fairly close to the body, they should lift while keeping their back straight at all times. The plaintiff stated that when the trainer had given his demonstration, each of the employees had to lift the cardboard box from the floor onto the table and vice versa. The plaintiff stated that he might have signed some documents either on the day of the training, or in the office on the following day.

7. He stated that there may have been a questionnaire issued at the end of the training. However, due to his limited English, he did not understand all the questions asked. When he was unable to understand the question, he simply looked at what a fellow employee had written on his questionnaire and he did likewise. While a number of training documents were put in evidence during the course of the trial, there were no documents concerning any training given to the plaintiff in 2005.

8. The plaintiff stated that when he received the training, there were approximately six or seven people in the group. The training was given by Mr. Geoffrey Fitzsimmons and Mr. Tommy Moran. The plaintiff was adamant that this training only concerned the correct

method to lift a box from the floor onto a table and how to lift the box from the table and place it on the floor. The plaintiff stated that he was not shown any techniques for safe turning while carrying a load. The plaintiff was challenged about this in cross examination, but he remained adamant that he had never received any training in relation to turning, nor as to the risks involved in twisting his trunk, without moving his feet.

9. The plaintiff further stated that he was required to work under considerable pressure in the distribution centre. The distribution centre supplied 24 Superquinn stores. Within the chill area, there were eight *"banks"* with each bank consisting of an array of 24 combis, one for each of the stores. Three of the banks catered for fruit and vegetables. The other banks catered for dairy, potatoes, juices, chicken and bacon and finally deli products. A member of the warehouse staff was assigned to a particular bank for the day. If a particular product was fully distributed earlier in the day, a team might be broken up and assigned to other banks. Each bank was U-shaped and it was the practice to bring a pallet of goods to the bank where the team distributed the product to the combis in the bank.

10. The plaintiff stated that he normally worked an eight hour day, five days a week. He was required to work at a rate of 1200 picks per shift. A tray of yogurts, would constitute one pick. If an operative lifted five trays at a time, and placed them onto a combi, this would constitute five picks. There was a two part sticker or tag on each of the trays. When the operative had lifted the trays from the pallet and placed them on the combi, the operative would tear off portion of each of the five tags and, at the end of the day, place them in a sheet, which would be handed up to the team leader. In this way, the defendant was able to ensure that each operative made at least 1200 picks in the course of the day.

11. It was not always the case that product was taken from a pallet and placed onto a combi. Sometimes the produce would be taken from one pallet and placed onto another pallet. This did not affect the number of picks that would be involved in removing the goods from one pallet to the other. A third alternative was that the goods would remain on the pallet and the picker would tear off the second part of the tag and leave the produce on the pallet. This would happen if, for example, a particular supermarket was to get a delivery of a full pallet load of potatoes. Thus, in these circumstances, a picker would get a number of picks, without having to lift any items at all.

12. The plaintiff accepted that he had been told in training that he should only lift the number of the items which he felt comfortable with. Thus, it was put to him that on the day of the accident, he could have decided to lift only three trays of yogurts instead of five trays. The plaintiff accepted that he was free to choose the number of items that he would lift at one go, but stated that they were under considerable pressure to achieve their target of 1200 picks per day. He stated that if he only lifted one item at a time, a team leader would give out to him for not achieving enough picks. The plaintiff stated that if he did not achieve the target number of picks in a day, he would be called into the office and warned about his failure to achieve the target. If he continued to fall down in this area, he would be threatened with being laid off.

13. The plaintiff stated that he had to work under considerable pressure in the distribution centre. He stated that he and other workers found it very difficult to achieve their target pick rate. He stated that he complained to the team leaders, Mr. Geoff Fitzsimmons and Mr. David Kennedy in relation to the pressure that they were required to work under. He stated that on occasions, the work area would be very cluttered with pallets and combis, such that it was difficult for them to adopt safe lifting techniques, when working under pressure in such confined spaces. The plaintiff stated that his complaints were not heeded by the team leaders. Indeed, he stated that if he made complaints, he was often assigned to even more onerous work.

14. The plaintiff also stated that he and some of the other foreign workers were treated unfairly, in that they were unfairly rostered to do heavy duties on a regular basis. He accepted that on occasions, he was rotated between heavy and light duties, but stated that sometimes he would be allocated to do heavier duties, three days in a row. Alternatively, if there was only a small amount of work to be done in the chill area, he would often be sent to work in the ambient area, if it was busier. In this way, he asserted that he and some of his fellow employees were treated unfairly and given an undue amount of heavy work.

15. The plaintiff further stated that in assigning him to a large amount of heavy duties, the defendant failed to take into account that he had suffered two previous back injuries. In 2009, the plaintiff had suffered an injury to his back when he was hit by a pallet truck driven by a fellow employee. He stated that he did a report of this incident for his team leader. There was no claim made in respect of that accident. The plaintiff had obtained a sick cert from his GP. He was out of work for one week. He then returned to doing the same duties as he had done prior to the accident. He had a second incident of back pain in May 2011, when there had been a very busy week at work and the plaintiff suffered back pain at the end of the week. He attended with his GP and got a sick cert for one week or ten days. When he returned to work, he did the same work as he had done prior to going out sick.

16. In relation to the circumstances of the accident which occurred on 29th October, 2012, the plaintiff said that he was working in the dairy area on the day in question. He was lifting trays of yogurt from a pallet and putting them onto combis. When he reached the last number of trays on the pallet, he pulled five trays over to the side of the pallet and squatted down on his hunkers. He then gripped the five trays and stood up, keeping his back straight. As he turned to place the trays onto the combi, he felt a severe pain in his back. He managed to place the trays on the combi. When the pain did not subside, he went to his team leader, Ms. Sharon Waters and told her that he had injured his back and asked for permission to go home early. She said that he could go home early.

17. In the course of cross examination, a number of training records were put to the plaintiff. The defendant maintained that these records established clearly that the plaintiff received manual handling training in the course of his employment with the defendant and that such training had been supplemented from time to time by way of refresher training. It is necessary to go through these documents in some detail.

18. The first document was a document headed Employee Training Declaration dated 16th September, 2008. The course was stated to be *"SHELA Briefing".* This document was signed by the plaintiff and also by a Mr. Bill McDermott, who apparently had given the briefing on 16th September, 2008. No evidence was called as to the meaning of the words *"SHELA Briefing"*, nor as to the content of this briefing.

19. The next document in chronological order was a document headed Manual Handling Course dated 30th September, 2009. This document had the following paragraph under the heading (part of the print was missing from the copy handed into court):-

> *"This course involves the practice of manual handling techniques and some simple stretching exercises. If you are receiving medical attention or for some other reason (i.e. pregnancy, back ache or medical conditions) do not feel fit to participate, please consult your trainer at the beginning of the course. Otherwise please [sign] your name confirming your willingness to participate. If at any time during the course you experience any back pain or other physical problems, you must inform the trainer immediately."*

20. This document was signed by the plaintiff. A few lines beneath his signature was an acknowledgment that he had received the pocket hand guide. In evidence, the plaintiff stated that he did recall receiving a small booklet at some stage. He stated that his English was not very good at that time and he did not understand all of the material in the book; however, he was able to follow the instructions therein as there were diagrams showing correct lifting techniques.

21. The next documentation was a series of documents dated 3rd February, 2011. The first of these was an Employee Training Declaration in respect of manual handling. Beneath the box indicating that the activity was manual handling, the following declarations appeared:-

> (1) I have been shown, trained and understand the safe system of work procedures for the above task/activity.
>
> (2) I agree to follow the safe system of work documented at all times.
>
> (3) I have been made aware and understand the risks associated with this task and the consequences if this SSOW is not adhered to.

22. This document was signed by the plaintiff. Also on the same sheet was a Trainer Declaration, which stated that the trainer had trained the particular person in the procedures as laid out in the safe systems of work. It further stated that the trainer was satisfied that the person had shown competency in the task/activity/equipment by way of verbal questioning. There was also a trainer sign off sheet which indicated that the activity was manual handling and the trainer was Mr. Geoffrey Fitzsimmons, who signed the sheet and dated it.

23. The third document dated 3rd February, 2011, was an Employee Training Declaration in respect of general operating of MHE. There was the usual declaration that the worker had been shown, trained and understood the safe system of work in respect of the designated activity. This document was signed and dated by the plaintiff.

24. The plaintiff stated that he did recall getting some training from Mr. Fitzsimmons. He stated that the training was just in the form of a question and answer session. The team leader would ask the questions and then fill in the form. The plaintiff stated that on occasions he was approached by a team leader while he was working on the warehouse floor and was asked whether he knew how to lift safely, or some other question, and he would just answer that he did know the correct techniques. The team leader would then just tick the requisite box and ask the plaintiff to sign the form.

25. The next document was a form headed *"Safe System of Work",* dated 7th September, 2011. This was stated to be the review date in respect of original instruction given on 14th November, 2008. It concerned using a pump up pallet truck. There was no indication on this document that it had been furnished to the plaintiff. The only reference that could refer to the plaintiff was the reference at the top being the safe system of work reference No. *"PT09"*. The plaintiff was not cross examined in relation to the content of this document.

26. The next document was part of a series of documents all dated 2nd November, 2011. The first of these was a form headed Employee Training Declaration in respect of the activity designated as: using pump up pallet truck. Again, there was the usual declaration that the plaintiff had been shown, trained and understood the safe system of work procedures of the above task and activity. He agreed to follow the safe system of work documented at all times. He stated that he had been made aware and understood the risks associated with the task and the consequences if the safe system of work was not adhered to. The document was signed by the plaintiff. In the Trainer Declaration portion of the form, the box marked verbal questioning was ticked. In evidence, the plaintiff did not recall being shown how to use a pumped up pallet truck. However, he knew how to operate one from his pervious work experience. He accepted that the document showed that the team leader did a question and answer session with him on the warehouse floor and that he then signed the document.

27. The next document was another Employee Training Declaration this time in respect of the activity of *"Picking 25kg bags of bakery".* It had the usual declaration and was signed by the plaintiff. The Trainer Declaration indicated that the training had been given by means of verbal questioning. In evidence, the plaintiff stated that he was simply asked if he knew how to lift bags weighing 25kg. He was asked did he have any experience of lifting such bags and he said that he did. He stated that nobody explained to him how to lift such bags. He just signed the form.

28. The third document dated 2nd November, 2011, was another Employee Training Declaration, this time in respect of *"changing order picker battery".* It had the same declarations as in other forms and was signed by the plaintiff. The Trainer Declaration part was ticked in the box marked verbal questioning. The plaintiff stated that he did sign this form, as he had received some training in how to change the picker battery.

29. The final form dated 2nd November, 2011, was another Employee Training Declaration, this time in respect of the activity of *"low level order picking".* It had the usual declarations and was signed by the plaintiff. The Trainer Declaration portion was ticked in the box marked verbal questioning. In evidence, the plaintiff stated that he just signed this form without receiving any training. He stated that nobody showed him how to do low level order picking. He accepted that he had been asked some questions by the team leader.

30. The next document was in respect of refresher training in manual handling which appeared to have been given on 15th November, 2011, and was a review of training which had originally been given on 20th November, 2008. The document stated that a description of the activity/task was *"any task requiring lifting, carrying, pushing, pulling, including with the use of MH aid".* The risks identified from the risk assessment were stated to be *"injury caused by incorrect handling techniques"*. This document was not signed by the plaintiff and he was not cross examined on it.

31. The final documents were two documents dated 18th January, 2012. The first of these was an Employee Training Declaration in respect of the activity of *"manual handling".* It contained the usual declarations and was signed by the plaintiff. The Trainer Declaration portion indicated that the operative had shown competency in the particular task/activity by way of practical demonstration, verbal questioning, theory test and other, although what the *"other"* was, was not indicated on the form.

32. The final document was another Employee Training Declaration in respect of manual handling. It contained a declaration that the operative had attended and understood the contents of the manual handling course, had been shown a video titled *"your back at work by IBEC"* and had been shown a video titled *"Role Cage Safety".* All the boxes for these three declarations were ticked. The name of the trainee was put in in print as the plaintiff's name. However, it was not signed by him. The Trainer Declaration portion indicated that the operative had shown competency in the activity by way of practical demonstration, verbal questioning and theory test. The three boxes in respect of these activities were all ticked. The Trainer Declaration was signed by Bill McDermott and dated

33. In his evidence, the plaintiff stated that he recalled receiving some training from Mr. Moran and Mr. Fitzsimmons; however, he did not know who Bill McDermott was. He accepted that he had received some refresher training in January 2012. He accepted that his English was reasonably good by that time and that he could understand the normal things about his work. He accepted that he attended and understood the manual handling training in 2012, but stated that it did not deal with turning or twisting. He reiterated that he had never been taught any techniques for turning. He stated that he did not see the videos entitled *"Your Back at Work"* or *"Role Cage Safety".* He stated that he had been shown one video, but that was eight years ago. He stated that in the second manual handling document dated 18th January, 2012, the one signed by Mr. McDermott, that was not his writing on that form and he did not fill it in.

34. In relation to the issue of the plaintiff being required to work under considerable pressure, it was common case between the parties that the pick rate had been increased from 1100 to 1200 in 2010. Ms. Waters stated that this increase was due to the fact that there had been a change of work system introduced into the warehouse, whereby the distance which an operative had to travel between a pallet and the combi, which he was working on at the time, was reduced. In such circumstances, it was alleged that the operatives were not being put under additional pressure in having to achieve the higher target of pick rates.

Evidence of Mr. Marian Grecko

35. Evidence was also given on behalf of the plaintiff by Mr. Marian Grecko, who had worked at the distribution centre from 2007 until its closure in 2014. He accepted that at the commencement of his employment with the defendant, he received training in manual handling, hygiene and was trained in the use of the cherry picker. In respect of the manual handling training, he was shown how to lift items correctly. He was shown how to lift an object from the floor to a table. In the demonstration, the trainers used an empty cardboard box.

36. Mr. Grecko stated that he was not shown any video in the course of the manual handling training. He was shown a video on hygiene.

37. In cross examination, the witness stated that he was shown how to lift an item from the floor, when he started with the company in 2007. He subsequently did a refresher course, where he was shown correct manual handling techniques again. He accepted that he understood the demonstrations which were given to him. He also understood what was involved in lifting correctly. However, he was very clear in his recollection that the manual handling training only concerned how to lift an item from the floor onto a table and vice versa. He stated that there was no training in relation to turning correctly or how to avoid twisting the body. He was adamant that the trainer did not show them how to turn correctly.

38. Mr. Grecko stated that on occasions he would have to turn or twist his body when the cages were very close to each other. When there was not much space between the pallet and the cages, he would have difficulty turning. However, he accepted that on the day of the accident, the space available to them was not too confined. He said that it was a busy day, but the pressure of work was normal.

39. Mr. Grecko accepted that he was trained just to lift whatever amount he was comfortable with. It was his choice as to how many trays he would lift at a time. However, he stated that if he only lifted one tray, he would be reprimanded by the supervisor. He accepted that they were working on the *"light dairy"* section, on the day in question. He stated that he would normally lift three trays of yogurt at a time. However, sometimes he would lift up to six trays. He stated that they were under pressure to work fast. There were several operatives doing the picking that day.

40. It was put to Mr. Grecko that there was a system for rotating the operatives between light and heavy duties. The witness did not agree that such system worked. He stated that if he had been lifting heavy items, such as fruit juices, he may be sent to another heavy area. He stated that while in general, the team leaders did rotate the heavy and light jobs, sometimes he would do three difficult days in a row.

41. Mr. Grecko accepted that some picks would only involve taking the docket from the items on the pallet, because those items were going to remain on the pallet. However, he stated that this happened very rarely.

42. In re-examination, the witness stated that they were trained only to lift what they were comfortable with. However, he stated that on occasion he would lift more items than he was comfortable with, due to the pressure to reach the target number of picks.

43. Mr. Grecko recalled the day when the plaintiff got injured. He had been working in the same area as the plaintiff and was working beside him. He was lifting yogurts but from a different pallet. He saw the plaintiff lift the trays of yogurts and put them onto the combi. Just after that the plaintiff was holding his back and he seemed to be in pain. The plaintiff left the area and went to the toilet. At lunchtime, the plaintiff told him that he had hurt his back. The plaintiff then spoke to Sharon Waters and was allowed home early.

Evidence of Mr. Alan Conlan, Consulting Engineer

44. Evidence was given by Mr. Alan Conlan, Consulting Engineer, on behalf of the plaintiff. He had attended at the defendant's former premises for the purpose of a joint inspection on 18th September, 2015. At that time, the premises were being used by Musgraves. They allowed the plaintiff and the two consulting engineers and an interpreter to have access to the premises for the purpose of carrying out the joint inspection.

45. Mr. Conlan noted that if the plaintiff lifted five trays of yogurt, this would have weighed 16kg. If he had lifted six trays of yogurt, this would have weighed 19.2kg.

46. Mr. Conlan stated that in 1992, the authorities in the UK had issued guideline weights which could be lifted by operatives in the course of their work. The area in front of the operative's body was divided into a number of zones. If in carrying out any lifting or lowering task, the hands should enter any zone, then the zone with the lowest weight should be considered the guideline weight for that task. The maximum guideline weight between knuckle and elbow height close to the body, is 25kg. This reduces as one moves the load closer to the ground, or further up from waist height and further away from the body. Close to ground level, close to the body, the guideline weight is 10kg. Guideline weights are not the maximum weight which can be lifted, however, lifting weights greater than the guideline weight has increased risk.

47. Guideline weights apply for 30 operations per hour. If the number of operations is once or twice per minute, the guideline figures should be reduced by 30%. If the operations are repeated five – eight times per minute, then the guideline figure should be reduced by 50%.

48. The risk was also increased if the operator twists/turns during the lifting process. If the handler twists to 45 degrees, the guideline figure should be reduced by 10%. If the handler twists through 90 degrees, the guideline should be reduced by 20%.

49. Mr. Conlan noted that the plaintiff had reported that the target pick rate in the chill area was around 1200 picks per shift, over a 7.5 hour period. Lifting five/six trays of yogurt would be considered as five/six picks. With a target of 1200 picks per shift, this would give a target of approximately 160 picks per hour. If the plaintiff was lifting heavy items, there might only be one pick per lift. However, if he was picking smaller or lighter items, the operative would be in a position to lift a number of items, thereby obtaining a number of picks per lift. Taking this into consideration, Mr. Conlan was of opinion that the guideline figures should be reduced by around 30%. This reduced the maximum guideline weight to 17.5kg. The guideline weight between the lower leg height and the ground close to the body would be reduced from 10kg to 7kg. Mr. Conlan stated that the lifting manoeuvre in this case was a complex manual handling activity as the plaintiff was lifting different products, from different heights and was lifting them to different levels. The guideline weights may also have to be reduced because there was a turning manoeuvre during the lifting operation. Mr. Conlan stated that there was particular risk where there was a turning component to the lifting action. If the operative is not trained to move his feet, this would increase the risk of back injury considerably.

50. Mr. Conlan came to the conclusion that there was considerable risk involved with this manual handling activity. The rate of work was a significant factor in relation to the risk. If the rate of work is too onerous, people will complain, or they will leave the job, or they will suffer injury. In this case, the plaintiff stated that he had made complaints to his team leaders about the pressure of work that was imposed upon him. Mr. Conlan noted that the pick rate had been increased from 1100 picks to 1200 picks per shift. This was an increase of almost 10%. In his opinion, increasing the target rate without assessing the workload on operatives was poor practice. He was of the view that the increase in the pick rate was a contributory factor in the plaintiff's injury. If the target rate was set at a high level, people would be inclined to take shortcuts e.g. adopt incorrect lifting techniques, in an effort to achieve the targets. This can lead to injury to the operatives.

51. Mr. Conlan was further of the opinion that the plaintiff's previous back injuries put him at additional risk of back injury. The employers were under a duty to take account of this fact when asking him to achieve a particular pick rate.

52. In relation to training, Mr. Conlan noted that the plaintiff had received some training in manual handling, when he first joined the company. Thereafter, there were periodic instances of refresher training. He accepted that this was good practice. However, he stated that in this case, there was a complex lifting operation involving lifting different products, from different heights and placing them at different heights in the cages; in such circumstances, the employee would need to be trained how to assess the task. Mr. Conlan stated that the training as described by the plaintiff was inadequate. Turning, without moving the feet, was very risky. The operative should be trained always to move their feet when carrying out a turning manoeuvre.

53. Mr. Conlan pointed out that there was a duty on the employer under s. 10 of the Safety, Health and Welfare and Work Act 2005, to ensure that the employee is provided with adequate training, in a language that he understands. Mr. Conlan pointed out that in some of the documents which had been put to the plaintiff, the trainer had just ticked the boxes, indicating that the refresher training had been given by means of a question and answer session. Mr. Conlan referred in this regard to the document dated 2nd November, 2011, headed *"Employee Training Declaration"* in respect of the activity of *"Picking 25kg bags of bakery".* The plaintiff had stated in his evidence that he was only asked if he knew what to do when lifting a 25kg bag. He had said that he did know what was involved in lifting such an item. He had signed the declaration form. Mr. Conlan stated that this was not adequate refresher training. The operative should have been given a demonstration as to how to lift such items, then the operative should be asked to demonstrate the correct technique himself and this should be followed by a question and answer session.

54. The engineer pointed out that in the Risk Assessment document dated 28th March, 2008, under the heading manual handling risk – the task, it had been stated that the risk for repetitive handling was *"trivial".* The witness stated that this was not correct. The operation was all about repetitive handling. It was a definite risk. The important thing was the technique used by the operative in carrying out such repetitive lifting tasks.

55. Mr. Conlan stated that there were a number of statutory duties which were imposed upon the defendant in the circumstances which arose in this case. In particular, s. 8(2) of the Safety, Health and Welfare at Work Act 2005 provided as follows:-

> *"(2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:*
>
> *(a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;…*
>
> *(e) providing systems of work that are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to health;…*
>
> *(g) providing the information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees;*
>
> *(h) determining and implementing the safety, health and welfare measures necessary for the protection of the safety, health and welfare of his or her employees when identifying hazards and carrying out a risk assessment under section 19 or when preparing a safety statement under section 20 and ensuring that the measures take account of changing circumstances and the general principles of prevention specified in Schedule 3."*

56. Mr. Conlan also referred to the provisions of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. 299/2007) and in particular to Regulation 69 thereof, which provides as follows:-

> *"An employer shall—*
>
> *(a) take appropriate organisational measures, or use the appropriate means, in particular mechanical equipment, to avoid the need for the manual handling of loads by the employer's employees,*
>
> *(b) where the need for the manual handling of loads by the employer's employees cannot be avoided, take appropriate organisational measures, use appropriate means or provide the employer's employees with such means in order to reduce the risk involved in the manual handling of such loads, having regard to the risk factors specified in Schedule 3,*
>
> *(c) wherever the need for manual handling of loads by the employer's employees cannot be avoided, organise*

workstations in such a way as to make such handling as safe and healthy as possible, and—

(i) taking account of the risk factors for the manual handling of loads specified in Schedule 3, assess the health and safety conditions of the type of work involved and take appropriate measures to avoid or reduce the risk particularly of back injury, to the employer's employees,

(ii) ensure that particularly sensitive risk groups of employees are protected against any dangers which specifically affect them in relation to the manual handling of loads and the individual risk factors, having regard to the risk factors set out in Schedule 3,

(iii) ensure that where tasks are entrusted to an employee, his or her capabilities in relation to safety and health are taken into account, including, in relation to the manual handling of loads by employees, the individual risk factors set out in Schedule 3, and

(iv) when carrying out health surveillance in relation to the manual handling of loads by employees, take account of the appropriate risk factors set out in Schedule 3."

57. Schedule 3 of the Regulations deals with the risk factors for manual handling of loads. In sub paragraph 2 thereof, the following is provided:-

"A physical effort may present a risk particularly of back injury if it is:…only achieved by a twisting movement of the trunk…"

58. Paragraph 4 of Schedule 3 states:-

"The activity may present a risk particularly of back injury if it entails one or more of the following requirements: over-frequent or over prolonged physical effort involving in particular the spine… a rate of work imposed by a process which cannot be altered by the employee."

59. Paragraph 5 of Schedule 3 provides:-

"Individual Risk Factors: The employee may be at risk if he or she:…does not have adequate or appropriate knowledge or training."

60. Mr. Conlan was of the view that the defendant in requiring the plaintiff to work under considerable pressure, and in increasing the pick rate without assessing the workload on the operatives and in failing to train the plaintiff adequately, had acted in breach of the statutory duties outlined above.

The defendant's case

Evidence of Ms. Sharon Waters

61. Evidence was given by Ms. Sharon Waters on behalf of the defendant. She had been employed with the defendant company since 2003. She started as a picker and remained in that position until 2007. She then became a team leader, where she was in charge of managing jobs on the depot floor. She stated that there was a daily team meeting held each morning, at which she would give out the various tasks to the team members for that day. The plaintiff was part of her team.

62. Ms. Waters outlined how the goods would arrive in on pallets and would be put into the yellow box areas, as shown in the engineer's photographs. Pickers were assigned to a particular box or area. The pallets were close to the combi cages. There were ten female employees in the distribution centre. They did the same work as the male pickers. All employees were told just to lift whatever they could manage comfortably.

63. In relation to training, Ms. Waters stated that she had been shown how to lift safely. She was shown a video in relation to manual handling and was given a booklet. After that she had been retested, when she had to show that she could lift a box carefully. She was trained by Mr. McDermott and Mr. Gallagher.

64. In relation to the work duties, she stated that these were rotated among the workers in relation to heavy and light duties. She always rotated staff as often as she could. She stated that she was always fair about assigning people to the heavier work. There was overtime available, usually every second weekend. She stated that the plaintiff was always interested in doing overtime whenever he could.

65. Ms. Waters stated that she used to help with the picking. The target rate was raised in 2010, but she felt that it was not too onerous. She stated that if the plaintiff had been assigned to heavy items for two days in a row, he would ask to be moved. She would try to move him to light duties, or if this was not possible, she would try to send assistance to him.

66. In relation to the day of the accident, Ms. Waters said that she had been the team leader on duty that day. She recalled that on coming back from a break, the plaintiff approached her circa 12:00hrs. He said that his back was sore and he asked to go home. She stated that she asked the plaintiff whether he had injured it at work, to which he replied no, that he had injured it while changing a wheel on his car. She stated that she allowed him to go home early. As the plaintiff did not allege that it was an accident at work, she did not fill out any of the forms, or go through any of the relevant protocol, which would have to be adopted if there had been an accident at work.

67. Ms. Waters stated that the protocol referred to provided that if an accident had happened at work, the team leader would take the injured workman to the first aid room, where he would be attended to. She would then take a statement from him and then carry out an examination of the locus of the accident. She would also arrange for such further medical treatment as was necessary. Ms. Waters stated that she did not do this in relation to the plaintiff's back complaint, as he did not allege that there had been any accident at work. She stated that she did not have any further discussion with the plaintiff about his back complaint. She just allowed him to go home early. Thereafter, he would have submitted a medical certificate to the HR department.

68. Ms. Waters stated that she was made redundant in the summer of 2014, when the company closed down. She was not aware that the plaintiff was making any case that he had been injured at work. In July 2014, she was contacted by Mr. David Condel, in relation to the matter, as she had been the team leader on duty on the day of the accident. She stated that on 11th July, 2014, she

made the following brief statement to the company:-

> *"On 29th October, 2012, Salvormir Spes came to me asking to go home that he hurt his back. I asked Salvomir 'did it happen in work'; he said 'no it happened when he was putting the wheel back on his car'."*

69. Ms. Waters stated that she had had a good working relationship with the plaintiff. She stated that there was a good atmosphere on the warehouse floor. If people were slow in relation to a number of picks they did, they were called in to the office for *"coaching"* to improve their pick rate. She stated that she called the plaintiff in for such coaching on approximately three occasions in ten years.

70. Ms. Waters stated that there were three types of pick: (i) where goods were moved from one pallet to another pallet; (ii) where goods were moved from a pallet and placed in a combi cage; and (iii) where the items were left on a pallet, but were designated as "picks". She stated that this third type of pick would apply where there was a full pallet of potatoes and if a supermarket needed a full pallet of potatoes, they would be left on the first pallet, but the operative would be able to get the number of picks that were applying to that pallet. She stated that this would happen approximately three times per week. She stated that the bags of potatoes were quite heavy and that the male employees would pick them. She sometimes lifted bags of potatoes, but no other female employees did so.

71. She stated that the plaintiff never complained to her in relation to the pick rate being too onerous. He might have complained if he had been doing heavy duties on the day before and, in such circumstances, she would try to rotate him as best she could.

72. In relation to the targets set, she thought that these were reasonable. She stated that she sometimes did up to 1600 picks per shift. She stated that the plaintiff did not report any earlier accident to her. She had heard his evidence that he had been hit with a pallet truck in 2009, but she was not aware of that; nor was she aware that he had had a back problem in 2011. She stated that he never told her of these problems and she was not aware that he had any history of back problems. She denied that the plaintiff had been singled out to do more heavy work than others. She stated that while she was in charge, the plaintiff would not have been allocated to heavy work over a number of days. She stated that if she had allocated the plaintiff to do heavy work one day, he might come to her and say that he had been assigned to that work yesterday when she was out. She would try to rotate him. She would not have been aware of the assignments for the previous day. In the circumstances, she accepted that it was possible that the plaintiff could have been assigned to heavy duties for two days in a row.

73. Ms. Waters stated that the increase in the pick rate had been brought about due to the fact that they changed the layout of the warehouse. Under the new system they had two rows of cages opposite each other. This had the effect of reducing the amount of walking involved. It was due to this fact that they decided to increase the pick rate. She thought that it was an achievable target.

74. Ms. Waters stated that she was not aware that the plaintiff had made any complaints to Jeff Fitzsimmons or David Kennedy. She stated that she was not present for the training which had been given to the plaintiff, so she could not say what training in manual handling he actually received. She stated that for refresher training, she had been shown a video, she had been given a booklet and she had to demonstrate how to lift a box. She stated that such training was usually four hours long. She stated that she was never asked to tick a box while out on the warehouse floor or in the office. She could not say whether if that had happened to the plaintiff.

75. In relation to the brief statement she had made on 11th July, 2014, she accepted that she had been asked to recall this brief conversation, almost two years after it had taken place.

Evidence of Mr. Cathal Maguire, Consulting Engineer

76. Finally, evidence was given by Mr. Cathal Maguire, Consulting Engineer, on behalf of the defendant. He stated that at the joint inspection held in September 2015, the plaintiff gave a demonstration of the lifting manoeuvre that he had done on the day of the accident. It was clear from this demonstration, that the plaintiff had been trained, because he had adopted a good lifting technique in the course of his determination.

77. Mr. Maguire noted that the plaintiff had complained in relation to the pace of the work. He noted that on the day of the accident, the plaintiff had been working in the *"light dairy"* section. In that section, he could lift several trays at one time. The target of 1200 picks a day, was normal for distribution warehouses. He stated that when the layout in the warehouse changed, such that the cages were moved closer to the pallets, it was appropriate to increase the pick rate. He noted that the workers had been told just to lift what they were comfortable with. This would vary from person to person. The plaintiff knew the weight of the trays, he had assessed the load and had carried out a number of previous lifts, prior to the one that caused him to suffer pain.

78. The plaintiff had accepted that he had received training when he started with the company and thereafter had been given refresher training, approximately every three years. Mr. Maguire stated that this was a reasonable training regime.

79. In relation to the guideline weights, Mr. Maguire noted that there were different weights for different heights and depending on closeness to the body of the item being lifted. At the bottom level, the guideline weight was 10kg. This could be to take account of tiredness during the day. So the guideline weight would be decreased to take account of increased risk. On the day of the accident, the accident occurred towards the beginning of the day after a couple of hours, so it was not necessary to factor in this reduction. A reduction of 30% in the guideline weight would only be appropriate when the lifting operation was being carried out over an entire day. If the plaintiff had lifted three trays, this would have been completely within the guidelines. At two hours into the shift, it would be reasonable for him to lift five trays; that was a decision for the picker himself.

80. The engineer noted that the plaintiff accepted that he had received some training, but stated that due to the fact that he was working under pressure, he was not able to adhere to good lifting techniques. He did not think this was an issue. The rate of 1200 picks per shift constituted a reasonable work rate. In his opinion, it was not undue pressure.

81. In cross examination, Mr. Maguire accepted that he had not been present at the time when the plaintiff received his training, so he could not say what actual training he had received. However, he understood from the documentation that had been produced, that the plaintiff had received adequate training in manual handling techniques. He noted that the plaintiff demonstrated a safe lifting technique, when he gave his demonstration at the joint engineering inspection. He was of opinion that the plaintiff hurt himself when he twisted, rather than turning, in the correct manner by moving the feet. Turning the feet was a basic part of a safe turning manoeuvre. The training should deal with turning rather than twisting. He noted that the plaintiff demonstrated safe turning technique, when he gave his demonstration at the joint inspection. He was of opinion that the plaintiff did not suffer his injury while doing the lifting part of the manoeuvre, but had suffered the injury while turning. This suggested that the plaintiff failed to turn his feet as he turned his body. A failure to turn correctly was a common cause of back injury.

82. Mr. Maguire stated that he had not spoken to Ms. Waters in advance of compiling his report. He had spoken to Mr. Condel, the health and safety manager. He was not aware that it was alleged that the plaintiff had said that he had hurt his back when changing the wheel of a car. That was never said to him. He was just aware that no accident at work had been reported. The joint engineering inspection had been carried out on 18th September, 2015 and his report was dated 28th September, 2015.

83. In relation to training, Mr. Maguire accepted that he could not state what training was actually given to the plaintiff. He accepted that in relation to some of the training documents, which had been produced to the plaintiff, there were some documents which suggested that it was just a box ticking exercise. In relation to the Employee Training Declaration dated 18th January, 2012, he accepted that the box at the bottom of the form, where the trainer was asked to give a narrative of the context of the training, had been left blank. This should have been filled in by the trainer. If this had been done, the court would know the extent of the training received.

84. In relation to the document dated 2nd November, 2011, concerning the task of *"Picking 25kg bags of bakery"*, the plaintiff had indicated that he was merely asked whether he knew how to lift a 25kg bag to which he had replied *"Yes."* Mr. Maguire accepted that that would not constitute adequate refresher training. The person should be given a demonstration of the lifting technique. Mr. Maguire stated that he would be critical of this as a box ticking exercise.

85. Similarly, in relation to the Employee Training Declaration in respect of *"Low level order picking"* dated 2nd November, 2011, Mr. Maguire stated that he would likewise be critical of this document, where only a box indicating verbal questioning had been ticked by the trainer.

86. In relation to the Risk Assessment dated 28th March, 2012, some tasks were indicated to be "tolerable", which would mean that it was a low risk activity. In relation to the heading marked *"Repetitive Handling",* which was entered as being *"trivial",* Mr. Maguire stated that there was repetitive handling in this case and therefore one could not say that the risk was not applicable. He thought that this may have been a risk assessment for a particular type of lift, being a 20kg load. On the following page, there was an entry reading *"Risk level is dependent on capability of employee"*, which was deemed to be *"trivial".* Mr. Maguire was not able to interpret this portion of the document. He noted that under the heading *"Risk to anyone untrained"* it was deemed to be "substantial". However, he did not think this was applicable to the plaintiff, as he had been trained in manual handling.

87. It was put to the witness that the plaintiff had stated that the only training he got in manual handling constituted a demonstration of lifting an empty box from the floor onto a table. Mr. Maguire said that this means of demonstrating a lifting technique was standard in the industry. It was put to him that the plaintiff had complained that he was not able to understand all the training due to his poor level of English. Mr. Maguire stated that he was not aware of that, but he accepted that it could be a problem for the plaintiff. He thought that the assistance of a work colleague, who did speak his language, would have been helpful.

88. It was put to Mr. Maguire that the plaintiff had stated that he could not adopt correct lifting techniques, due to the excessive pick rate which he was working under, the witness did not accept this. He stated that a pick rate of 1200 was not excessive. It was a standard pick rate, when the items are located close to each other. It was put to him that the plaintiff had said that the trainers knew that workers could not do that level of target, while adopting correct lifting techniques and that they had laughed when this was suggested to them. Mr. Maguire stated that he would be surprised if that had happened. In relation to not understanding the questionnaire that may have been given to him, Mr. Maguire stated that the plaintiff was an adult and that if he did not understand the questionnaire, he should have told his supervisor that he did not understand it. However, Mr. Maguire stated that he could not comment on the training given. He accepted that the records of the training could be more complete.

89. Mr. Maguire did not accept that if the plaintiff was working under pressure, this would lead to him taking shortcuts in the lifting manoeuvre. He stated that if the plaintiff had been under pressure, he should have complained to a team leader. It was put to him that the plaintiff had said that he had made complaints to his team leaders. Mr. Maguire stated that Ms. Waters said that he did not complain to her about the pick rate and this was because the pick rate was an industry average. It was not excessive. He did not accept that the plaintiff was working under pressure given the target rate and the weight of the items being lifted.

90. In relation to the plaintiff's previous back problems in 2008 and 2011, Mr. Maguire pointed out that when an employee is out sick, he can only return to work when he is certified by his doctor as being fit to return to work. So this would not be a problem a year later in 2012.

91. Mr. Maguire stated that there should never be a twisting movement, but there could be turning, which would involve changing direction by moving the feet. If the operative was doing manual handling in a relatively open space, there should be no twisting at all. He accepted that there was an increase in risk if an operative was twisting; it was for this reason that people were told not to twist, if it could be avoided.

92. Mr. Maguire reiterated that during the joint engineering inspection, the plaintiff had demonstrated correct lifting techniques. It was for this reason he drew the inference that the plaintiff had received adequate training in manual handling. He accepted that under s. 10 of the 2005 Act, there was a duty on the employer to provide training in a language that the operative could understand. However, Mr. Maguire stated that if the plaintiff got refresher training, at a later time when his English had improved, this would cover any defect in the initial training. He did not think that there was any necessity to give additional training when the pick rate was increased. He accepted that under the 2007 Regulations, there was an onus on the employer to take account of the fact that the plaintiff had a previous back injury. In this regard, the employee could not return to work, until he had been certified as fit to do so by his doctor. There was then a duty on the employer to monitor him for a short while after he returned to work. The employer would not need to continue monitoring the employee if he had returned to work more than a year previously.

93. Mr. Maguire accepted that under the provisions of Schedule 3 to the Regulations, if the work was strenuous and involved twisting of the trunk, this would increase the risk of injury to the operative. However, he stated that if the load was too heavy, that was a matter entirely for the plaintiff, as he could select the amount of goods that he would lift at any one time. If he needed to turn as part of the manoeuvre, he should have moved his feet. Mr. Maguire stated that he accepted the points set out at item 4 of Schedule 3, relating to the rate of work imposed on an employee. However, he said that the rate of work which was imposed in this case was reasonable.

94. Finally, in the course of re-examination, Mr. Maguire pointed out that the plaintiff did not complain of inadequate training at the joint engineering inspection. His complaint was that he was put working with the heavy items too frequently and that the pick rate was too high, so that he had to abandon his training in respect of manual handling. The plaintiff complained that he had been treated differently to the other workers in relation to the items that he had to lift and that there was an excessive pick rate.

Conclusions on Liability

95. The central issue in this case is as to whether the plaintiff received adequate training from his employer. Mr. Conlan, the plaintiff's engineer, has stated that in his opinion, if the plaintiff only received the training as described by him and Mr. Grecko, such training was deficient, as it did not cover how to turn safely while carrying a load.

96. Mr. Maguire, the defendant's engineer, has stated that in his opinion, the accident was probably caused by the plaintiff failing to move his feet in the course of turning from the pallet, while holding five trays of yogurt. Mr. Maguire stated that the plaintiff knew the correct lifting and turning technique, because he demonstrated the lifting and turning procedure correctly at the joint engineering inspection held on 18th September, 2015.

97. That inspection was carried out at the defendant's former premises, which is now used by Musgraves. From the photographs, it is clear that the area was un-congested at the time of the engineering inspection. When the plaintiff gave a demonstration of what he was doing at the time he experienced the back pain on the day of the accident, he did so slowly so that photographs could be taken of the various stages of the lifting manoeuvre. In such artificial circumstances, which were far removed from the actual conditions under which the plaintiff was working at the time of the accident, one cannot reach the conclusion that because correct lifting and turning technique was used at the time of the engineering inspection, that the plaintiff therefore had received adequate training in such techniques in 2005, when he started with the company, or in the course of subsequent refresher training on the job.

98. The clear evidence of the plaintiff and Mr. Grecko, was to the effect that they did not receive any training in how to turn safely, while carrying a load. The people who allegedly gave the training and refresher training to the plaintiff, being Mr. Fitzsimmons, Mr. Moran and Mr. McDermott, were not called to give evidence. The pocket book which was allegedly furnished to the plaintiff was not produced, nor were the videos which were allegedly shown to him as part of the training. This may be due to the fact that the company has since closed down. In such circumstances, the relevant witnesses, who gave the training to the plaintiff, may not have been available. Be that as it may, I cannot hold that the plaintiff received adequate training without some evidence in that regard.

99. No documentary evidence was produced in respect of the initial training given to the plaintiff when he joined the company in 2005. The forms which were produced in evidence, all related to training allegedly given to the plaintiff a considerable time after he had joined the company. The plaintiff has said that such refresher training was very brief, in that he was only asked a couple of questions and then told to sign the requisite form. No evidence was called as to the content of the refresher training given on the relevant dates. It does seem to have been somewhat of a box ticking exercise. In the absence of evidence from the trainers as to what training they gave in the refresher training sessions, I cannot hold that these sessions covered safe turning technique when carrying a load. I accept the evidence of the plaintiff that the refresher training only comprised a brief question and answer session. I note that evidence was given by Ms. Waters that such refresher sessions were fairly comprehensive and could last a number of hours. However, she accepted that she had never given any training to the plaintiff. In the circumstances, I prefer the plaintiff's account as to the rudimentary nature of the refresher training given to him.

100. I note also the evidence given by Mr. Peter Keogh, Consultant Surgeon, that the plaintiff's pain was due to annular tears in the discs in his lower back. Such tears are more likely to be due to repetitive bending, lifting and twisting rather than being due to just one incident. Annular tears could be due to wear and tear in the plaintiff's back, which may have been asymptomatic, but trauma could have rendered them symptomatic. Mr. Keogh is of the view that one episode of lifting was not likely to be the cause of the annular tears. It was more likely to be one lift of a number of lifts which caused this injury. This supports the conclusion that the plaintiff's back was damaged over time and that the episode on 29th October, 2012, was just the last in a series of lifting manoeuvres, which caused the plaintiff's injury.

101. I am satisfied that the plaintiff and Mr. Grecko have given truthful evidence in relation to the training that they received from the company. I accept their evidence that they did not get training in how to turn correctly while carrying a load. That being the case, the defendant was negligent in its failure to provide adequate training to the plaintiff.

102. I note the evidence of Ms. Waters that she recalled the plaintiff coming to her on the day of the accident and saying that he had hurt his back when he changed the wheel on his car. She stated that as this was not an accident at work, she did not make a note of it, or fill out any accident report form. She just let the plaintiff go home early. The defendants have stated that the first they knew of any alleged accident at work, was when they received the letter of claim from the plaintiff's solicitor in December 2013. It was some months later in July 2014, that Ms. Waters was approached by Mr. Condel, the defendant's health and safety officer, and was asked to make a statement. I find it difficult to believe that at that remove, some 21 months post-accident, Ms. Waters was able to recall so clearly the content of a brief discussion, which she had had with the plaintiff when, according to her evidence, there was nothing particularly memorable about the conversation.

103. The plaintiff denied telling Ms. Waters that he had hurt his back changing the wheel of his car. He stated that he just told her that he had back pain and wanted to go home. He stated that while he did own a car, he had never changed the wheel on it.

104. Insofar as there is a conflict between the plaintiff and Ms. Waters as to what was said on the day of the accident, I prefer the evidence of the plaintiff in this regard. Having observed his demeanour while giving evidence, I am satisfied that he is a truthful witness. I find that on the balance of probabilities, the plaintiff's version of this conversation is the correct one.

105. The plaintiff stated that while he did know correct lifting techniques as distinct from correct turning technique but that due to pressure of work in the distribution centre, he was not always able to adhere to correct lifting technique, particularly when working under pressure and in a confined space. In this regard, I note that photograph No. 4 of the defendant's engineer's book of photographs gives some idea of the number of combi cages on the premises at or around the time of the accident. It is clear from this photograph that the plaintiff could have been obliged to work in fairly confined spaces when unloading pallets.

106. I am satisfied that the plainitff's injury arose due to a combination of factors, being: the lack of adequate training in safe turning techniques; the imposition of a rate of work that was excessive; that the workers were forced to take shortcuts when lifting items in an effort to achieve their targets and working in confined spaces, which increased the likelihood of suffering a twisting injury.

107. I accept the evidence given by the plaintiff that he made complaint to Geoff Fitzsimmons and David Kennedy in relation to the pressure which he was working under, in an effort to reach his pick rate target. Nothing was done in relation to these complaints. This evidence was not contradicted by the defendant.

108. I do not accept that the plaintiff has established that he was singled out for more heavy duties, such that, if it was quiet in the chill area, he would be moved to the ambient area, if it was busy. While this may have happened, I am not satisfied that it established any discrimination against, or unfair treatment of, the plaintiff. The plaintiff also complained that he was not rotated in

the same way as other workers were, between light and heavy duties. Ms. Waters accepted that on occasion, the plaintiff had made complaint to her when he was assigned heavy duties, that he had been assigned to heavy duties on the previous day by another team leader. She stated that she would try to rotate him onto lighter duties if that was possible, and if it was not possible, she would try to send assistance to him. I accept Ms. Waters' evidence in this regard. I am not satisfied that the plaintiff was discriminated against in relation to the rotation of workers between heavy and light duties.

109. Having regard to my findings as to the inadequacy of the training given to the plaintiff, I find that the defendant was also guilty of a breach of statutory duty and, in particular, breached s. 8(2)(e) and (g), and s. 10 of the Safety Health and Welfare at Work Act 2005. The defendant was also in breach of Regulation 69 of the Safety, Health and Welfare at Work (General Applications) Regulations 2007, and Schedule 3 thereto and in particular paras. 4 and 5 thereof.

110. In all the circumstances, I am satisfied that the defendant was negligent and in breach of statutory duty in failing to train the plaintiff in relation to safe turning techniques. This lack of adequate training was exacerbated by the fact that the plaintiff was obliged to work under excessive pressure so as to reach his targets. The company did not heed his complaints when he complained about this state of affairs. In addition, I am satisfied that on occasion, the warehouse was very cluttered with pallets and combi cages, such that it was very difficult for the plaintiff to carry out a satisfactory lifting and turning manoeuvre, when putting items onto the combis. In the circumstances, the defendant is liable for the injury to the plaintiff's back which became apparent in October 2012.

111. There is no evidence that the plaintiff failed to take sufficient care in relation to the carrying out of his duties either on the day of the accident, or in the days and months leading up to it. Insofar as the plaintiff may have adopted an unsafe turning technique, I am satisfied that this was due to the fact that he had not been adequately trained in safe turning techniques. Accordingly, I decline to make any finding of contributory negligence against the plaintiff.

Quantum Issues

112. The plaintiff stated that after the accident, he had severe pain in his lower back. At first, he took painkillers. He tried to return to work after two days, but was not able for it. He went to his GP on 31st October, 2012, complaining of severe pain in the right side of his back. He could not move or bend. His GP referred him on to Mr. Keogh, Consultant Orthopaedic Surgeon.

113. The plaintiff stated that his back was very painful in the first few weeks after the accident. He had to take a large amount of painkillers. He could not sleep at night. He had constant pain.

114. He saw Mr. Keogh approximately six months after the accident in April 2013. He sent the plaintiff for an MRI scan, which was carried out in August 2013. The plaintiff stated that Mr. Keogh told him that he had damaged discs in his lower back and that he could not return to his pre-accident work. The plaintiff stated that at that time, he had a very stiff and painful back. He had difficulty bending to put on his socks. He was given the option by Mr. Keogh of having an epidural injection. The plaintiff stated that he refused this, as he was somewhat fearful of having an injection to this back. Instead, he returned to Slovakia and attended a spa, where he had massage and intensive physiotherapy over a period of ten days. He felt better for one month after receiving the treatment in the spa. However, the severe pain returned after approximately one month.

115. The plaintiff returned to see Mr. Keogh in April 2014. He told the doctor that he continued to have pain in his back. He was told that the problem was caused by his heavy workload. The plaintiff stated that on some days his back would be a little better, but that on other days it would be severely painful. In bad weather, the back was painful.

116. Towards the end of 2014, the plainitff's GP, Dr. Mansour, told the plaintiff that he would only be fit for light work. By this time, the plaintiff had been made redundant by the defendant company, on its closure. The plaintiff enrolled on a FÁS course in forklift driving. This lasted for one month and he passed the course.

117. The plaintiff stated that he was not in work at the present time. He had applied for a number of forklift driving jobs, but all of the employers wanted somebody with experience. He had also applied to work in a sandwich bar, but got no response from them. He had also applied to do a computer course, but had not yet heard back from them. The plaintiff stated that he had been offered a job as a general operative in a public house premises and was due to start on the following Saturday. The work was part time being approximately three/four days per week. It was paying the minimum wage, approximately €9.15 per hour.

118. In relation to his present condition, the plaintiff stated that his back was improved, but was still painful in the morning. When he moves around, the back is much better. It would be sore after sitting for any period. In the months following the accident, he had had disturbed sleep due to pain, which led to anxiety and tiredness. He stated that at present, his sleep was a little better. He did not require to take painkillers at the present time. He stated that he had had physiotherapy treatment in Connolly Hospital and also acupuncture treatment. This had gone on over a period of six months. He continues to do the exercises every day as he had been shown in the hospital. He also does yoga.

119. A medical report from Dr. Anas Mansour dated 26th February, 2014, was admitted in evidence. In the report, Dr. Mansour stated that he had first seen the plaintiff on 31st October, 2012. He had been seen on approximately ten occasions between that time and the date of the report on 26th February, 2014. At that time, the doctor was of opinion that the treatment required would consist of a rest, analgesia and physiotherapy. He hoped for a full recovery within 15 – 18 months, but stated that this would depend on the plaintiff's response to treatment organised by Mr. Keogh.

120. Evidence was given by Mr. Peter Keogh, Consultant Orthopaedic Surgeon at Connolly Hospital, Blanchardstown. He noted that the plaintiff had been referred to his clinic on 3rd April, 2013. He was seen at the triage clinic on 21st August, 2013, complaining of back pain and numbness in his left foot. He also mentioned increasing urinary frequency over the previous six months. Examination showed some restriction of lumbar spine movement. Neurological examination showed reduced power in the L4-S1 myotomes, with decreased sensation in this area. Straight leg raising was 45 degrees on the left. Mr. Keogh referred the plaintiff for an MRI scan.

121. The MRI scan was carried out on 27th August, 2013. This was reported as showing mild degenerative disc disease in the lumbar spine, with mild bulging at L3/4 and L4/5 with annular tears. At no level was there any significant thecal sac or nerve root compression. The plaintiff was reviewed again at the clinic on 22nd January, 2014, and further conservative treatment was advised.

122. When reviewed on 21st February, 2014, the plaintiff complained of ongoing lower back pain. He had constant pain in his back. He was taking painkillers. He complained of sleep disturbance and stated that he was stiff in the morning. He also had frequency of micturition, but this was not referable to the accident. He was awaiting physiotherapy treatment. He had been in Slovakia in November 2013 and had a programme of spa rehabilitation. He found that of benefit. The plaintiff stated that he felt down and

somewhat depressed. He was on medication for this complaint but was uncertain if it was of any benefit. He felt that it was impossible for him to go back to his original job. At that time, Mr. Keogh prescribed a lumbar support for the plaintiff and he re-requested physiotherapy treatment. Mr. Keogh was of opinion at that time that the annular tears at the L3/4 and L4/5 levels were a major cause of the plaintiff's ongoing lower back pain. The prognosis at that time was uncertain. It depended on how the plaintiff responded to conservative treatment which had been prescribed. Mr. Keogh was of opinion that he would not be fit to return to his pre-accident employment.

123. The plaintiff was reviewed by Mr. Keogh's team in Connolly Hospital in April 2014. At that time, the plaintiff reported ongoing back pain with left sided leg pain radiating to the knee. The plaintiff returned to his clinic on 1st October, 2014, complaining of persisting low back pain and right leg pain. Injection with interventional radiology was suggested and although the plaintiff got an appointment for that, he declined to have it done.

124. The plaintiff was reviewed by Mr. Keogh on 16th October, 2015. He had ongoing soreness in his lower back. He was stiff in the morning and had difficulty dressing. He had some upper limb symptoms as well. He remained out of work. He had been assessed by his GP at the end of 2014 and deemed fit for light duties. He was on job seekers benefit and reported that he had successfully completed a course in forklift driving. He had ongoing urology symptoms. He felt that he would be fit for sedentary duties if toilet access were available. He felt occasionally depressed and had some financial worries. He was living off his savings from the previous ten years work, due to his inability to work following the accident. On examination, straight leg raising was 80 degrees bilaterally, hip joint was mildly stiff on the left. There was no motor deficit in the lower limbs. X-rays of his hips were normal.

125. Mr Keogh noted that the situation was essentially unchanged since his previous report. He noted that the plaintiff had hurt his back in an incident at work in October 2012. At that time he had been employed as a general operative. He remained out of work. He complained of back pain and intermittently right or left sided leg pain. He also had morning stiffness. An MRI scan had shown degenerative disc disease in the lumbar spine, with mild bulging and annular tears the L3/4 and L4/5 levels. At no level was there significant neuro-compromise. Mr. Keogh stated that it was likely that the annular tears in the lumbar spine were the major cause of the plaintiff's ongoing lower back pain. These tears rarely occur as a result of one incident. They were more likely to be due to repetitive bending, lifting and twisting.

126. Mr. Keogh noted that he had ongoing urinary problems, but these were not thought to be related to the back injury.

127. The doctor noted that the plaintiff had responded to some degree to physiotherapy, he had declined spinal intervention. No surgery was planned for his back. Mr. Keogh was of the view that the plaintiff was going to have some ongoing lower back pain and would be unlikely to return to heavy manual work, but would be fit for sedentary or light duties. Mr. Keogh stated that the longer that the symptoms went on, the less likely the plaintiff was, to make a full recovery. He stated that he was not surprised that the plaintiff had ongoing back pain.

128. In cross examination, Mr. Keogh accepted that the findings on the plaintiff's MRI were not uncommon for a person of his age. He stated that annular tears could be caused by wear and tear, they do not have to be traumatic in origin. They could be asymptomatic, but if trauma is applied, this may render them symptomatic. That the plaintiff did have degenerative changes in his lower back. These were mild in nature; they were definite but mild. There was no nerve root compression.

129. Mr. Keogh stated that when he saw the plaintiff, he had been to the GP on one occasion and had been prescribed anti-inflammatory medication. He first saw the plaintiff at six months post accident. He recommended physiotherapy treatment. He thought that the plaintiff had had such treatment after his second request had been put in. He accepted that a patient would have to adopt the physiotherapy regime and follow the instructions given in relation to doing exercises.

130. He was a little surprised that the plaintiff had been out of work all the time that he had seen him. However, he believed that patients can judge for themselves if they can return to work. They stated that the plaintiff had been fit for light work all along. He was glad to see that the plaintiff had done a forklift driver's course.

131. He had suggested an epidural injection and discussed this with the plaintiff and an appointment had been obtained for such treatment, but the plaintiff had declined it. He stated that if a patient had unrelenting pain, he would give an epidural in an attempt to break the pain cycle. However, in this case, the plaintiff had declined the treatment; some people are frightened of needles going into their back. He did not push this treatment on patients. He stated that if that was him, he would not have the intervention unless he was in a very bad way. He would avoid surgery.

132. The plaintiff told him that he had injured his back while lifting cartons of yogurt. This was a repetitive activity. The plaintiff claimed there had been one incident, when he came to see him. However, one episode of lifting would not cause annular tears. Mr. Keogh stated that it was more likely to be one lift of a number of lifts which would cause the injury.

133. By agreement of the parties, two medical reports were handed in on behalf of the defendant. The first of these was a report from Mr. Brian J. Hurson, Consultant Orthopaedic Surgeon, from an examination carried out on 22nd January, 2015. He noted that the plaintiff complained of pain in the midline of his upper lumbar spine in the area of L2/3 and in the para-spinal muscles on both sides. He also experienced pain in the anterolateral aspect of his left buttock, left thigh, left leg and lateral foot. His symptoms could be aggravated by walking for 30 minutes. Thereafter, sitting helped. He noted that the plaintiff may have five to ten episodes of symptoms in a month. These used to be more frequent. The plaintiff complained of being stiff in the morning. He would loosen up with daily activities. Also he worked on a home exercise programme, which helped.

134. Examination of his back showed that it had a normal appearance with normal lordosis. The plaintiff could flex to touch his toes. Extension and lateral bending were normal. Straight leg raising was 80 degrees on the left. At this point, the plaintiff experienced mild pain in his left hip. He had a normal range of left hip movements. Neurological assessment of his lower limbs was normal. The doctor noted that the plaintiff used to experience pain in his lower back when working prior to the accident in October 2012. On one occasion, he took a week off work because of his back symptoms. That was two years before his accident.

135. In his summary, opinion and prognosis, Mr. Hurson noted that the plaintiff experienced pain in his back as he was lifting cartons of yogurt. This pain became progressively worse. He had been treated with anti-inflammatory medication and physiotherapy. This was against a background of having had aching pains in his lower back in the past. He currently complained of intermittent episodes of pain in his upper lumbar spine, which were associated with pain in his left leg. He also complained of stiffness in the morning time. The home exercise programme helped his symptoms. Examination showed that he had a normal range of back movements. Neurological assessment of his lower limbs was normal. He had no nerve tension signs. His MRI study showed mild degenerative changes. There was no evidence of nerve root compression. Mr. Hurson was of the view that essentially the plaintiff had suffered a soft tissue

injury/sprain of his lumbar spine, aggravating previously existing back complaints.

136. The second report was from Dr. J. A. O'Dwyer, Consultant Neuroradiologist, dated 20th January, 2016. He reviewed conventional imaging of the lumbar spine dated 1st November, 2012, which was approximately three days following the incident. He noted that there was disc degeneration evident at L3/4, L4/5 and L5/S1 levels. This was manifest by narrowing of the L3/4 and L4/5 discs with marginal osteophyte formation anteriorly at L3 and L4. Further degenerative change was evident at T12/L1 and L1/2. There was normal vertebral alignment and there was no evidence of bone injury.

137. Dr. O'Dwyer noted that the plaintiff had had an MRI scan of the lumbar spine on 27th August, 2013. However, that scan had not been made available to him.

138. Dr. O'Dwyer noted that there was degenerative change evident on the plain scan which he had reviewed. He noted that there was reference to annular tears. He noted that there was no disc protrusion or nerve root compression evident. He stated that annular disc tears, possibly better known as annular fissures, are part of the degenerative process and are not traumatic in etiology. He stated that in his opinion there were no changes on the MRI scan report that could be attributable to the incident.

139. Evidence was given by Ms. Patricia Coughlan, Vocational Rehabilitation Consultant. She assessed the plaintiff on 7th December, 2015. She noted that the plaintiff had received secondary school education, taking his final year examinations in 1985. He had intended to go on to college and had an interest in going on to study logistics and applied to a military college and was accepted on this course. However, he left after six months, as he felt that the course did not meet his expectations. He was also interested in studying sociology, but he did not pursue that interest any further.

140. In terms of his work history, he had secured employment in 1985 in a local hotel. Between 1990 and 1995, he was employed as a terrain researcher, working out in the field looking for uranium sites to drill. He left when the company went into bankruptcy. Between 1995 and 2000, he was employed as a shop assistant in an electrical retail shop. From 2001 to 2004, he worked as a landscape worker on a Kipputz in Israel. In 2004, he came to Ireland and secured a position with Smurfit in Tallaght working as a machine operative. He was employed in setting and calibrating printing machines. He would feed cardboard to semi- automatic printing machines and assembled promotional advertising displays. He left this job when his contract ran out. From February 2005 to July 2014, he worked full time as a general operative with the defendant company at its warehouse in Blanchardstown, Dublin. He remained with the company until he had his accident on 29th October, 2012. Thereafter, he was out sick and was finally made redundant upon the closure of the company in July 2014.

141. Ms. Coughlan noted that the plaintiff reported ongoing lower back pain, which was worse some days more than others. He could walk for up to two hours, but could not do lifting or carrying of heavy loads. He had difficulty bending. He could not do heavy housework. Going down stairs seemed to aggravate his low back pain. His sleep was disturbed by pain. Ms. Coughlan noted that the plaintiff reported ongoing bladder problems and he was on medication for that. She noted that the plaintiff continued to have unpredictable back pain, that radiated into his left leg sometimes and he would get pins and needles in his left leg. She noted that the plaintiff had worked on his rehabilitation and had gone swimming regularly. He also used heat treatment, went walking and did exercises. He did the exercises for about 40 minutes each morning to loosen up his spine.

142. Ms. Coughlan noted that the plaintiff had successfully completed a forklift driver's course. She noted that from a vocational point of view, he had been advised by his doctors not to return to heavy manual work. He was looking for light work at the time of her assessment.

143. Ms. Coughlan stated that as a result of the injury, the plaintiff had been left at a considerable employment disadvantage, given his lack of educational qualifications and his limited English. He was also at an employment disadvantage due to his ongoing back problems. If he is not fit for heavy work, he will have to look for light work. In trying to secure such employment, he will have to compete against younger people, who have no history of back problems and who have fluent English. In addition, his absence from the work market was also a disadvantage.

144. Ms. Coughlan advised that the plaintiff should see if there was any Community Employment Scheme in his area. He should also try to improve his English. She noted that he was anxious to get back to work and possibly he would be able to get light work as a car park attendant or a cinema usher, which would pay €9.15/€10 per hour. She recommended that he should also contact the National Learning Network.

145. Although he had obtained a qualification in forklift driving, nearly all forklift jobs require at least two years experience and good English. In addition, these jobs usually involve some lifting. She had advised the plaintiff to try some driving jobs, such as fast food delivery or flower delivery. She felt that he needed some retraining to break the pattern of unemployment. He realistically had two alternatives: (i) sedentary jobs; or (ii) light driving duties.

146. In cross examination, it was put to the witness that the plaintiff had been certified fit for light work since 2014, but had not done any work in 2015. Ms. Coughlan stated that this was not surprising, as he came from a labouring background, it was difficult for him to get light work. While there were jobs that he could do since 2015, not having fluent English would be a disadvantage. She accepted that according to his doctors, the plaintiff is fit for light duties. He would be fit for light duties that would involve some small physical elements, e.g. car park attendant, some factory jobs, cashier or switchboard operator, if his English was good enough.

147. It was put to the witness that the plaintiff had been certified for light work by his GP in December 2014. She stated that he had told her that he had been looking for work. He seemed to be trying to get back to work. He had done the forklift driving course but was not able to get a job because he did not have two years' experience. He could do a computer course and hopefully get a part time job. She stated that his marketability would improve if he got a job. She stated that the fact that he had recently got a part-time job in a bar will be helpful. He was capable of fulltime hours, in light work.

148. Finally, evidence was given in relation to the plaintiff's loss of earnings claim by Mr. Nigel Tennant, a Consulting Actuary. The parties had agreed that in respect of the period from the date of the accident to the date of closure of the company in July 2014, when the amount of the recoverable benefits and the sum paid by way of redundancy payment was subtracted from the relevant loss of earnings figure, there was a nil loss in this regard. The parties had further agreed that the figure for loss of earnings between the date of redundancy and the date of hearing of the action, was €33,150.

149. In respect of the plaintiff's pre-accident earnings, he earned €501 gross per week, which came to €430 net per week. Mr. Tennant noted that Ms. Coughlan had stated that if the plaintiff returned to light work, he would earn between €9.15 and €10 gross per hour. For the purposes of his calculations, Mr. Tennant had assumed that the plaintiff would therefore be able to earn an average

of €9.575 gross per hour. On these figures, if the plaintiff returned to full time light work, he could hope to earn €349 net per week. This would give rise to an ongoing loss of €81 per week.

150. Mr. Tennant calculated that on a real rate of return of 1% and based on a retirement age of 68 years, this would give a net weekly loss of €81 and the appropriate multiplier was €948, giving a capital value of the loss of €76,788. On a real rate of return of 2.5% and based on a retirement age of 68 years, the calculation was €81 x €858, giving a capital value of the loss of €69,498.

151. The multipliers and valuations furnished by Mr. Tennant did not take account of any contingency deduction along the lines of Reddy v. Bates. Mr. Tennant pointed out that under current government proposals, all employers in the State are to be obliged to make occupational pension schemes available to their employees in future years and to make contributions to those schemes on the employees behalf. This would mean that any future loss of earnings to the plaintiff will have *"knock on effects"* on these pension contributions, as the pension contributions will be a percentage of pay. The valuations given in the actuary's report were in respect of future loss of earnings only and did not allow for ancillary loss in respect of such pension contributions in future years. The author suggested that the non-inclusion of any additional claim in this regard should serve as a potential offset to any Reddy v. Bates type contingency deduction from the above future loss of earnings figures.

Conclusions on Quantum
152. The plaintiff is 47 years of age having been born on 28th June, 1968. At all material times, he was employed as a general operative at the defendant's warehouse premises in Northwest Business Park, Blanchardstown, Dublin. The plaintiff suffered injury to his back as a result of an accident which occurred on 29th October, 2012.

153. According to the evidence given by Mr. Peter Keogh, Consultant Orthopaedic Surgeon, it is likely that the plaintiff suffered injury to his back over a prolonged period of time, culminating in the pain which he experienced after carrying out a lifting and turning manoeuvre in the course of his work on 29th October, 2012. Mr. Keogh is of the view that the main cause of the plaintiff's back pain, was the annular tears to the discs in his lower back. He is of opinion that such tears are unlikely to be caused by one single incident, but are more likely to have been caused by repetitive lifting, bending and twisting to the plaintiff's spine in the course of his work. I am satisfied, on the basis of this evidence, that there is a causal link between the activities carried on by the plaintiff in the course of his work, and the onset of severe back pain in October 2012.

154. The plaintiff has received treatment in the form of physiotherapy and acupuncture which was carried out over six months in 2013. In addition, he also returned to his home country, Slovakia, and attended a spa there, where he received physiotherapy and massage treatments over a period of ten days. While this gave him considerable relief from his symptoms, this only lasted for approximately one month, before the back pain returned.

155. I am satisfied that the plaintiff has given a truthful account of his injuries and of their effect upon him. He states that at present, while there has been considerable improvement in the back pain, he continues to experience pain on a daily basis. He experiences pain on waking each morning, and has to do a series of exercises to loosen up his back. His back becomes sore after sitting for any appreciable period of time. He also has disturbed sleep, although it has to be noted that some disturbance of the sleep is due to unconnected urological problems. The plaintiff stated in evidence that at present, he does not require painkilling medication. The plaintiff stated that his back pain would be somewhat unpredictable and that on occasions it would radiate into his left leg and sometimes he would get pins and needles in the leg. The plaintiff goes swimming regularly, as this is helpful for his back. However, he is not able to play water polo or go cycling, as he had done prior to the accident.

156. Of some importance, is the fact that the plaintiff has been rendered unfit for his pre-accident employment as a result of his injuries. His doctors are of opinion that he is only fit for light duties and will be so disabled for the rest of his life. He has become somewhat depressed as a result of this disability and as a result of the financial hardship that it entails.

157. The plaintiff was offered the opportunity of having an epidural injection to ease his pain. However, due to fears that he had concerning the nature of this treatment, he declined to have this treatment. Mr. Keogh stated that it was reasonable for the plaintiff to have these concerns. He stated that he would not push this treatment onto his patients. He said that if that was him, he would not have the intervention unless he was in a very bad way. He stated that he would avoid surgery.

158. I am satisfied that the plaintiff has suffered a significant injury to his back, which has given rise to ongoing sequelae. Of more significance, it has rendered this relatively young man unfit for heavy work.

159. The defendant's doctor, Mr. Hurson, was of the view that the plaintiff had sustained a soft tissue injury/sprain of his lumbar spine aggravating previously existing back complaints. In this regard, it has to be noted that the plaintiff did have pre-existing degenerative changes in his back. Furthermore, he had suffered previous injuries to his back in 2009 and 2011, which had rendered him unfit for work for a short period on each occasion.

160. Taking all of the medical evidence into account, I am satisfied that the plaintiff has suffered a significant injury to his lower back, which has rendered him permanently disabled in the work aspects of his life. I accept the plaintiff's evidence that he continues to experience back pain on a frequent basis, particularly when he awakes in the morning. In the circumstances, I award the plaintiff €40,000.00 for general damages for pain and suffering to date.

161. In relation to the assessment of general damages into the future, while I note that the plaintiff has made considerable improvement, he has nevertheless been left with a significant disability into the future, in that he is now only fit for light work. In these circumstances, I award the plaintiff €30,000 for pain and suffering and disability into the future.

162. In relation to the plaintiff's loss of earnings claim, the parties have agreed that the sum of €33,150.00 should be allowed for loss of earnings between the date of redundancy and the hearing of the action.

163. The final area is the plaintiff's claim for future loss of earnings. I am satisfied, having regard to the evidence given by Mr. Keogh, that the plaintiff is capable of returning to light duties, on a full-time basis. Adopting the rates of pay as put forward by Ms. Coughlan and subtracting that from the plaintiff's pre-accident net earnings, gives rises to a weekly loss of €81. Based on a retirement age of 68 years and assuming a real rate of return on a 1% basis, gives rise to a capital value of the loss of €76,788.00. If a real rate of return of 2.5% is used, the capital value of the loss until a retirement age of 68 years is €69,498.00.

164. The figures given by the actuary do not take account of any reduction along the lines of the decision in *Reddy v. Bates.* Indeed, in this case, a contingency provided for in that case actually occurred, in that the defendant company closed down in July 2014. Thus, even if the plaintiff had not been injured, he would have been made redundant at that time. The essential difference being

that, but for the accident, he would have been put back into the labour market as a healthy man, capable of taking on heavy work. As a result of the accident, he finds himself in the labour market but only capable of doing light duties. This is a particular handicap to him, given that he has somewhat limited educational qualifications and does not speak fluent English. Thus, as postulated by Ms. Coughlan, his chances of securing full time light duties, when competing against younger and healthier candidates, who speak fluent English, must be seen as somewhat limited.

165. The picture is further complicated by the fact that just before the hearing, in or about January 2016, the plaintiff did, in fact, secure employment albeit on a part time basis, working in a public house. For the basis of this calculation, I am going to ignore the fact that the plaintiff has taken up part time light duties and I will assume that he would be able to find full time light duties if he wanted. This will give rise to an ongoing loss of €81 per week, which on a 2.5% basis until retirement at age 68, gives rise to a capital value of the loss of €69,498.00. As the plaintiff would have a further 21 years of working life ahead of him, it seems to me that there must be some reduction on the basis of the Reddy v. Bates decision. In the circumstances, I will allow the sum of €50,000 for future loss of earnings.

166. In the actuary's report, it was suggested that there should be no reduction along the lines of *Reddy v. Bates,* due to the fact that, under current government proposals, all employers would be obliged to make occupational pension schemes available to their employees and to make contributions to those schemes on behalf of their employees. It was submitted that as the contribution to such scheme would be based on the employee's earnings, the plaintiff would therefore suffer a loss due to the fact that, as he was only fit for light duties, his earnings would be less than would otherwise have been the case. In these circumstances, it was submitted that the loss of pension contribution should be set against the Reddy v. Bates deduction and that therefore no such deduction should be made from the figure given for the capital value for the loss of future earnings.

167. I do not propose to adopt this suggestion. There was no evidence before the court as to what the terms of this proposal might be, nor was it indicated when the particular scheme might be put in place. In these circumstances, it is not appropriate to take into account a particular scheme which has not yet been placed on a statutory footing, nor were any concrete figures given in relation to the scale of the contribution that might be made. For this reason, I think that it is appropriate to make the Reddy v. Bates deduction as outlined above.

168. Adding the component parts together, the plaintiff is entitled to judgment against the defendant in the sum of €153,150.00.