

APPROVED

[2022] IEHC 263



THE HIGH COURT

2019 No. 2793 P

BETWEEN

JAMES MOLLOY

PLAINTIFF

AND

TIPPERARY GLASS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 May 2022

INTRODUCTION

1. This judgment is delivered in respect of a personal injuries action. The Defendant has conceded liability and the matter came before the court for the assessment of damages.
2. The action arises out of a workplace accident on 16 March 2018. The Plaintiff had been employed by the Defendant as a general operative at its glass manufacturing factory in Tipperary. The accident occurred as the result of a fellow employee failing to properly secure sheets of glass which had been stacked on an A-frame trolley. The sheets of glass fell from the trolley and impacted the Plaintiff's lower limbs. The Plaintiff estimates that the trolley had been carrying between ten to twenty sheets of glass and that the aggregate weight

NO REDACTION REQUIRED

of same was in excess of 100 kgs. The Plaintiff describes being pushed to the ground by the force of the glass sheets. The Plaintiff suffered lacerations and compression injuries to his lower limbs. He also suffered an injury to his lower back. The Plaintiff had largely been confined to bed for four to six weeks following the accident. During this period, he had to attend an outpatient clinic on a weekly basis to have his dressings changed.

3. The Plaintiff was born in April 1963 and had been 54 years of age as of the date of the accident.
4. The proceedings came on for hearing for two days commencing on 27 April 2022. The court heard oral evidence from the Plaintiff himself and his general practitioner. The Defendant called no witnesses.

MEDICAL EVIDENCE

5. A bundle of medical reports was furnished to the court on the basis that the content of same had been “*agreed*” between the parties. In answer to a direct question from the court, counsel on both sides confirmed that the content of the medical reports had been agreed; it is not simply a case of the documents being admitted without formal proof. This question had been prompted by the Supreme Court judgment in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63 which reiterates the importance of a trial judge being explicitly told the basis upon which documents are being handed in.
6. The first in time of the “*agreed*” medical reports is a report from a general practitioner instructed on behalf of the Defendant’s insurers. This report is dated

24 July 2018 and had been prepared by Dr. Jim Fehily on the basis of a medical examination of the Plaintiff carried out on the same date.

7. Dr. Fehily offered the following opinion in his report:

“Opinion & prognosis

This man sustained soft tissue injuries and lacerations to his right knee/calf and to his left calf as a result of an accident at work on 16th March, 2018. The wounds were cleaned and dressed at Nenagh minor injuries unit and he required regular home dressing after that. The wound over his left calf became ulcerated and is still healing, almost fully healed now.

Mr. Molloy sustained injury to the cutaneous nerves in both legs and as a result he has an area of anaesthesia (*sic*) over both calves as outlined above. It will take 12 to 18 months for full resolution of these injuries and re-examination will be required.

He sustained considerable bruising to both calves and is still quite tender. I think he would benefit from physiotherapy and his calf pain should gradually settle over the next six months or so. He will be left with permanent scars as a result of the injuries.”

8. The report records the Plaintiff as having stated that “*his back pain settled after two weeks*”. The Plaintiff confirmed in cross-examination that this record is “*correct*” and then elaborated, in re-examination by his own counsel, that he had told Dr. Fehily that his back was not “*as bad as it was at that time after six-week period*”. This seems to be a reference to the initial six-week period following the accident when the Plaintiff had been largely confined to bed and walking with the aid of crutches. (See Day 2 Transcript, pages 13 to 16).
9. The next “*agreed*” medical report is that of a consultant plastic and reconstructive surgeon, Mr. S. T. O’Sullivan. The Plaintiff had been referred to Mr. O’Sullivan by the Personal Injuries Assessment Board (PIAB). This report is dated 10 January 2019 and had been prepared on the basis of a medical

examination of the Plaintiff carried out on the same date. The report concludes as follows:

“Opinion and prognosis:

James Molloy sustained a laceration to both calves as well as subcutaneous soft tissue bruising following an occupational accident. The injury is consistent with the stated cause. [...] As a result of his injury and subsequent treatment he has been left with areas of scarring on the left calf and soft tissue induration and swelling in both calves. The scar will be permanent but the redness in the area should slowly improve over the next 12-24 months. The soft tissue induration again should slowly improve over a number of months.

I do not think that the injuries sustained should prevent him from carrying out his normal occupation or any normal activities of everyday living. I do not think that he would benefit from any surgical intervention following this injury, but would probably benefit from use of compression stocking to reduce the swelling and he would also benefit from regular massage to both legs and ankles to try and soften the areas of subcutaneous induration. A course of ultrasound massage therapy administered by a Physiotherapist would probably be useful.

I expect that the area of numbness will slowly reduce, and probably resolve in the medium-term. I do not think that any specific treatment will be required for management of this.”

10. As apparent from the extracts from these two medical reports, the concern within the first twelve months post-accident had been in respect of the injuries inflicted to the Plaintiff’s lower limbs. There is no specific reference in the reports to an injury to the Plaintiff’s back. The reports also offer a guardedly optimistic prognosis, albeit subject in one instance to the caveat that a re-examination would be required in twelve to eighteen months’ time.
11. It is only in the medical reports prepared subsequent to the first twelve months post-accident that there is any reference to a back injury. As discussed further at paragraph 26 below, counsel on behalf of the Defendant has sought to query whether any damages are properly recoverable in respect of a back injury.

12. The Plaintiff's general practitioner, Dr. Muiris O'Keeffe, confirmed in his oral evidence that the Plaintiff had attended him within the week following the accident and had reported lower back pain. Dr. O'Keeffe explained that as time went on the "*predominating symptoms*" which affect the Plaintiff the most are related to his back pain, rather than the cutaneous sensory discomfort that he has in his lower legs.
13. The general practitioner referred the Plaintiff to Dr. Andy Franklin-Miller at the Santry Sport Surgery Clinic in May 2019. The general practitioner explained in evidence that he had recommended Dr. Franklin-Miller because he has a speciality in Achilles tendon injuries, and the general practitioner was seeking assistance with the neuropathic compression injuries in the Plaintiff's lower limbs.
14. Dr. Franklin-Miller offered the following prognosis in his report of 6 August 2019:

“In summary I believe that your client sustained a lumbar disc injury at both the L4/5 and L5/S1 Levels secondary to his accident which has given an ongoing leg symptoms which have been misrepresenting as a local calf injury.

It is of course possible that the disc protrusions were present prior to the accident however one would have expected him to have presented with similar symptoms which are quite profound prior to. [...]”.
15. Dr. Franklin-Miller had recommended a CT guided nerve root injection to alleviate the symptoms.
16. The following year, the Plaintiff had been examined by a consultant neurologist, Dr. David Moorhouse, in May 2020. Dr. Moorhouse advised at that stage that it was too early to say whether or not the Plaintiff's muscle aches and pains would fully resolve. Dr. Moorhouse suggested that there be a follow-up examination

in a year's time. The Plaintiff duly attended for a further examination the following year. Dr. Moorhouse offered a more pessimistic prognosis in his subsequent report of 19 May 2021:

“Impression:

This patient has on-going symptomatology involving both lower extremities below the knee regions as a result of the crush injuries to these regions sustained when heavy plates of glass struck him on the back of both legs below the knees.

These symptoms are permanent and stationary. They continue despite time since his last report and also physiotherapy.

This patient's symptomatology is permanent and stationary.

In view of this he will not be able to return to his previous occupation.”

17. The Plaintiff was reviewed by Mr. Matt McHugh, plastic surgeon, on 21 February 2021. Mr. McHugh offered the following opinion:

“This man sustained lacerations to the back of both legs. Unfortunately, he seems to have damaged the subcutaneous nerves here at the time of the accident. These are small nerves which are too minute to be repaired and unfortunately they haven't recovered. This would account for the numbness stretching from the scars down towards the ankle. As well as that, while the scar on the right leg has improved and is well healed. The scar on the left leg lacks subcutaneous tissue or padding, it is very tight and tethered, and it would breakdown more easily and would be very slow to heal. At this stage neither of these scars are going to improve and neither is the numbness.

Unfortunately, from a plastic surgery point of view there is nothing that can be done about it.

As regards returning to work, I don't feel that this man would be able to return to the type of work that he did prior to the accident and indeed heavy manual work would be difficult for him.

With regards to his back, I understand that this is being dealt with by a neurosurgeon and an orthopaedic surgeon and I

think it would be better to leave this aspect of the case to their expert opinion.”

18. The Plaintiff had been examined by a consultant orthopaedic surgeon, Professor Brian Lenehan, on 3 December 2021. Professor Lenehan offers the following opinion in his report of the same date:

“OPINION ON PROGRESS:

Mr. Molloy sustained an occupational injury when glass panes fell off a trolley landing on the back of his calves resulting in significant soft tissue injuries which has resulted in permanent cutaneous nerve/sensory disturbance in his calves. He is also complaining of back pain in the aftermath of the accident which is persistent, this likely represents an exacerbation of pre-existing asymptomatic degenerative change. It is difficult to see Mr. Molloy returning to employment in the manual/industrial sector given his current complaints and the duration of symptoms which indicate chronicity.”

19. The most up-to-date medical report furnished to the court is that of Dr. Muiris O’Keefe, the Plaintiff’s general practitioner and is dated 17 April 2022. Dr. O’Keefe also provided oral evidence to the court. The following summary is provided in his written report:

“As we know [the Plaintiff] suffered an injury at work when a number of sheets of glass fell from an A-frame and impacted the back of his legs. He fell forward onto his knees and into the crawling position due to the impact. He suffered injuries to the back of his legs and the anterior tibial area. He attended the Injuries Unit in Nenagh Hospital and had x-rays of his lower limbs and his lumbo-sacral spine. He attended me the following week and as well as having the local injuries he was unable to elevate his legs due to back pain. I reviewed him in early April and his overall pain levels had improved. He attended again in September and complained of back spasm ongoing for weeks. This persisted into early 2019 and he was unable to kneel, squat or bend. I reviewed him again in March 2019, one year following the accident. As well as having the lower limb symptoms he was finding it difficult to stand in the same position due to back pain. He went on to have an epidural in September 2019 and improved over the following four weeks where he was able to walk

continuously for 30 minutes. This improvement was short-lived and his symptoms became pronounced again.

[...]

It is now four years since Jim's accident. He has obvious bilateral lower limb injuries which have caused some muscle tightness, local burning and paraesthesia and stiffness. He also suffered back pain following the accident. This pain has persisted and has affected nearly every activity that Jim does, standing, sitting, dressing, driving, walking, carrying out his household duties, attempting to enjoy his hobbies and contributing to low self-esteem and irritability. It is unlikely to improve significantly over the coming years."

20. The principal medical report submitted on behalf of the Defendant is that of an orthopaedic surgeon, namely the late Mr. Frank McManus. This report is dated 12 November 2019 and is based on an examination of the Plaintiff on 4 November 2019. Mr. McManus offered the opinion that the Plaintiff had sustained superficial injuries and probably also muscle injuries to the calves of both his lower limbs. Mr. McManus acknowledged that the Plaintiff may have suffered a sensory deficit in his lower limbs, but offered the opinion that this should not affect the power of the lower limbs in terms of the normal activities of daily living and work. Mr. McManus anticipated that the sensation in the lower limbs would improve.
21. This report is subject to a significant caveat. Mr. McManus had expressly stated that it would be appropriate that he be given an opportunity to review the MRI scan carried out on the Plaintiff, and that he be given an opportunity to assess the Plaintiff again in mid-2020. In the event, however, the Plaintiff's case was not referred back to Mr. McManus for review nor was the MRI scan provided to him. His report must, therefore, be regarded as provisional in nature. Sadly, Mr. McManus has since passed away.

FINDINGS OF COURT ON MEDICAL EVIDENCE

22. Whereas there is, as counsel for the Plaintiff put it, some differences of emphasis, the broad consensus of the “*agreed*” medical reports is that the Plaintiff suffered two principal injuries as a result of the accident on 16 March 2018 as follows.
23. First, significant soft tissue injuries and lacerations were inflicted to the Plaintiff’s lower limbs. This has resulted in permanent cutaneous nerve/sensory disturbance in his calves. These lower limb injuries have caused some muscle tightness, local burning, paraesthesia and stiffness. These symptoms are exacerbated by even mild exertion by the Plaintiff, such as a short walk, light gardening or a one-hour round of pitch-and-putt.
24. Secondly, the Plaintiff sustained a lumbar disc injury. It had been suggested that this lower back injury might represent an exacerbation of pre-existing asymptomatic degenerative change. However, Dr. Franklin-Miller’s view is that had the disc protrusions been present prior to the accident one would have expected the Plaintiff to have presented with similar symptoms prior to the accident. The evidence from the Plaintiff’s general practitioner is to the effect that whereas the Plaintiff had occasionally attended his predecessor in respect of lower back pain during the period 1996 to 2004, there was no visit with regard to back pain in the fourteen years prior to the accident in 2018. I am satisfied, therefore, that the chronic back pain currently endured by the Plaintiff has been caused by the accident.
25. The consensus of the medical evidence is to the effect that the Plaintiff is, as a result of the injuries received in the accident, medically unfit for manual labour of the type for which he had previously been employed.

26. As flagged earlier, counsel on behalf of the Defendant had sought to query whether any damages are properly recoverable in respect of a back injury. The point was made that there had been no reference to a back injury in the personal injuries summons. It is, however, addressed in the updated particulars of injury furnished in August 2019. Counsel also highlighted the medical report prepared by the orthopaedic surgeon retained by the Defendant, namely the late Mr. Frank McManus.
27. With respect, it is not open to the Defendant to deny the existence of a back injury having regard to the following factors. First, the Defendant has explicitly accepted and agreed the content of the medical reports. The consensus in the medical reports is that the Plaintiff has suffered an injury to his back as a result of the workplace accident. This is especially clear from the reports of Dr. O’Keeffe and Dr. Franklin-Miller. None of this is contradicted by the report of the late Mr. McManus: for the reasons explained at paragraphs 20 and 21 above, this report was at best provisional.
28. Secondly, it was not put to the Plaintiff in cross-examination that his back injury had not been caused by the accident. If a party to litigation wishes to advance a case which fundamentally contradicts that of the other side, then basic fairness of procedures requires that this case be put to the relevant witnesses and that they be afforded an opportunity to respond. It is not necessary that each and every detail of the opposing case be put to a witness. In the present case, it would have been sufficient to put to the Plaintiff that he had not suffered a back injury at the time of the accident; that he had not reported any back symptoms to medical practitioners in the months after the accident; and that there would be medical evidence from the Defendant’s side which indicated the absence of a back injury.

29. In the event, however, this issue was not addressed to any meaningful extent in cross-examination. The Plaintiff confirmed that his back had been x-rayed on the day of the accident because he had been complaining of a back pain. The Defendant's side did not put any questions to the Plaintiff's general practitioner in respect of the back injury.

DAMAGES FOR PAIN AND SUFFERING

30. These proceedings commenced prior to the adoption in March 2021, pursuant to the Judicial Council Act 2019, of the Personal Injuries Guidelines. Therefore, in accordance with the transitional arrangements under the amended Section 22 of the Civil Liability and Courts Act 2004, this court is to have regard to the Book of Quantum in assessing damages.
31. The importance of the Book of Quantum has recently been explained as follows by the Court of Appeal in *McKeown v. Crosby* [2020] IECA 242 (at paragraphs 23 to 25):

“[...] The subjective element of an injury is inherently difficult to assess. A court has no objective way of knowing what pain a plaintiff feels. Regrettably, exaggeration is not uncommon. Different plaintiffs may have different pain tolerances, if such a thing truly exists, but because of the subjectivity of such matters, the court has to look to the objective medical evidence in particular to arrive at fair compensation in any given case.

The Book of Quantum acts as an aid to that exercise. It is perhaps to be viewed as a guide and in many cases, its value may be limited for a wide variety of reasons. However, it does at least recognise that there are different categories of severity of injury, each of which has an approximate band of values. This does little more than reflect the reality of personal injuries litigation which lawyers in that sphere understand very well, namely that there is a ‘going rate’ for particular injuries, especially those that are common. This is demonstrated by the fact that the overwhelming majority of personal injury cases, probably more than in any other area

of litigation, are settled by the emergence of a consensus as to the value of the case. Indeed, even where cases proceed to trial, that is not necessarily because lawyers on opposite sides cannot reach a consensus as to its value, but more often than not because the particular plaintiff does not share in the consensus.

The successful operation of any personal injuries litigation system is highly dependent on predictability. The Book of Quantum seeks to introduce a measure of predictability, at least where it can be said that the injury in question is capable of categorisation and is one that has affected the plaintiff in a way that it might be expected to affect most people. There will of course always be points of departure from the norm and a relatively minor finger injury for example, may affect a concert violinist very differently from, say, a clerical worker. This is something that the range of damages for a particular injury is designed to accommodate.”

32. The Court of Appeal emphasised (at paragraph 31 of the judgment) that a trial judge must explain how particular figures for damages have been arrived at. In those cases where the Book of Quantum has been of assistance, the trial judge should record their findings in respect of the categorisation and severity of the injury. If, on the other hand, the trial judge considers that the Book of Quantum has no role to play in the particular circumstances of the case, then it should be explained why this is so.
33. Turning to apply these principles to the present case, both sides are agreed that the Book of Quantum is of little assistance in respect of the injuries inflicted to the Plaintiff’s lower limbs. These injuries to the muscles and nerves are not readily aligned to any of the categories of injury described in the Book of Quantum.
34. The Book of Quantum does, however, address back injuries. The two brackets of most immediate relevance to the nature and extent of the injuries suffered in the present case are as follows:

Moderately Severe €32,100 to €55,700

These injuries involve the soft tissue or wrenching type injury of the more severe type resulting in serious limitation of movement, recurring pain, stiffness and discomfort and the possible need for surgery or increased vulnerability to further trauma. This would also include injuries which may have accelerated and/or exacerbated a pre-existing condition over a prolonged period of time, usually more than five years resulting in ongoing pain and stiffness.

Severe and permanent €52,300 to €92,000

The most severe category. These injuries will have also affected the structure of the back and the discs, resulting in serious limitation of movement and the requirement for surgery. Little or no movement regained on a permanent basis resulting in ongoing pain and stiffness with the necessity to wear a back brace / support for long periods in the day.

35. I have concluded that the Plaintiff's injuries are properly characterised as "*moderately severe*". The "*agreed*" evidence of his general practitioner is that the back pain following the accident has persisted and has affected day-to-day activities such as standing, sitting, dressing, driving, walking and carrying out household duties. The Plaintiff suffers recurring pain, stiffness and discomfort following even mild exertion. The Plaintiff explained in evidence that if he engages in light activities, such as walking, cutting the grass, gardening or a bit of painting, he feels pressure in his lower back and would be extremely stiff and painful for the next two to three days following the activity. He no longer uses his bicycle as it is too sore on his lower back. He is also unable to drive for long periods of time.
36. The Plaintiff's injuries do not meet the higher threshold of "*severe and permanent*". In particular, the injuries do not fulfil the criteria in terms of serious

limitation of movement and the requirement for surgery. Nor is the Plaintiff required to wear a back brace / support.

37. Given the relatively short period of time since the accident, four years, and the prognosis that the injuries are unlikely to improve significantly, it does not seem that a meaningful distinction can be made between pain and suffering to date and into the future. I propose, therefore, to award an omnibus figure which reflects both past and future pain and suffering. Damages for the back injuries are assessed in an amount of €50,000. This represents the higher end of the scale for a “*moderately severe*” injury. This reflects the long-term nature of the injuries.
38. A further €25,000 will be awarded in respect of the injuries to his lower limbs. This is intended to reflect the additional discomfort and disability caused by these injuries.
39. This results in an aggregate amount of €75,000 in respect of general damages for pain and suffering. The figure takes into account the fact that whereas the Plaintiff’s ability to work has been severely affected (to be compensated by way of *special damages*), he has retained a limited ability to engage in amenity activities for short periods of time.

DAMAGES FOR LOSS OF EARNINGS

40. The principal purpose of awarding special damages for personal injuries is to attempt to compensate the injured party for the financial loss incurred by them as a result of the wrongdoing on the part of a defendant. The award of special damages is in addition to, and separate from, the general damages awarded in respect of pain and suffering.

41. In many personal injuries actions, the largest head of special damages will be in respect of loss of earnings. This is a capital sum which is intended to compensate the injured party for the shortfall between (i) the amount which they might have been expected to have earned “*but for*” the injuries suffered, and (ii) the reduced amount which they are now likely to earn. In some instances, the calculation of this capital sum will be a relatively straightforward exercise. As of the date of trial, the injured party may already have made a full recovery from their injuries and returned to their original employment full-time. In such a scenario, the loss of earnings will be confined to the period of time for which they were medically unfit for work, with any necessary adjustments for sick pay or social welfare payments received: see *Hynes v. Kilkenny County Council (No. 2)* [2022] IEHC 227.
42. The calculation of the loss of earnings will be much more complex in circumstances where the injuries suffered are chronic and the court is required to estimate the loss of future earnings. The range of factors which potentially arise for consideration have been accurately summarised as follows in T. Dorgan and P. McKenna, *Damages* (Round Hall, 2nd ed., 2021 at §5-120):

“The assessment of loss of income may involve the likelihood of the plaintiff’s condition improving so that he or she may later work. If an improvement is likely, would the plaintiff be capable of obtaining work at their age or, in light of their medical history, get back into the ‘jobs market’? If so, could the plaintiff expect a role with equivalent pay to the role performed before the accident, or are the injuries such that a lesser role with poorer remuneration is likely? To what extent, if at all, do the injuries impact upon the pension or other entitlements which the plaintiff would have received if not for the accident? Do the injuries curtail any prospect of employment? The answer to these questions will contain a degree of conjecture, as the plaintiff might not yet be working at the time of the injury. For example, loss of future income may be assessed on the basis that it would have risen in line with pay rises or promotion. That income may no

longer be recoverable past a certain age when compulsory retirement may have ended the plaintiff's working life. The courts often use a comparator when considering what the plaintiff would be earning or entitled to after a number of years of employment, had he or she not had to cease employment on account of his or her injuries. Clearly, the comparator must be in a similar role or position to the plaintiff. In *O'Neill v ESB*, the comparators had similar qualifications, thus it was more likely that damages would be paid to the plaintiff."

*Footnotes omitted.

43. In some instances, the parties and the court will have to engage in two layers of speculation: first, as to what the course of employment would have been without the disruption caused by the personal injuries, and, secondly, as to what the future course of employment will now be.
44. Of course, there are legal limits to the extent of a defendant's liability to pay damages. Relevantly, a defendant is not obliged to compensate an injured party in respect of losses which could have been avoided by the injured party taking reasonable steps post-accident. This principle is often described by saying that an injured party is under a duty to mitigate their loss. This description is not entirely accurate however: the injured party does not owe a duty, as such, to the defendant. Rather, the principle is that an injured party who does not take reasonable steps to mitigate his loss will not be entitled to recover from the wrongdoer that part of the loss which would have been avoidable. The logic being that the chain of causation between the wrongful act of the defendant and the overall loss suffered may be broken if the injured party acts unreasonably.
45. If, for example, an injured party fails to take up suitable alternative employment where same is reasonably available, then this will be reflected in the damages recoverable from the wrongdoer in respect of loss of earnings. Similarly, if an injured party hinders their recovery by failing to avail of proper medical

treatment, then this too will be reflected in the damages recoverable. In neither scenario is the injured party under an enforceable “*duty*” to act in a particular way, but their conduct may affect the amount of damages recoverable as against the wrongdoer.

46. The onus of proof lies with a defendant, as wrongdoer, to establish that the injured party has not taken reasonable steps to mitigate their loss. See T. Dorgan and P. McKenna, *Damages* (Round Hall, 2nd ed., 2021 at §4-119). Whereas the injured party bears the onus of proof in establishing loss, the burden of demonstrating that there were reasonable steps which the injured party could have taken to reduce their loss shifts to the defendant.
47. A defendant who seeks to resist a claim for damages on the grounds that the injured party has failed to mitigate their loss should include an express plea to that effect in their defence and provide particulars. At the very least, the intention to rely on an alleged failure to mitigate should be raised in correspondence prior to the trial of the action.
48. I turn next to apply these principles to the circumstances of the present case. The Plaintiff has not returned to gainful employment since the date of the accident on 16 March 2018. The claim initially advanced at trial on behalf of the Plaintiff had been for a sum of €81,320 in respect of loss of earnings to date and an additional sum of €172,000 in respect of *future* loss of earnings. This latter sum had been calculated on the following two assumptions. The first is that “*but for*” the accident the Plaintiff would have remained in full-time employment until he had reached the age of 68 years; and the second that he will not now be able to return to full-time employment because he is medically unfit to perform manual labour.

49. There are a number of responses which a defendant to a personal injuries action could potentially make to a claim for loss of earnings of this type. First, the defendant could challenge the assertion that the injured party is medically unfit to return to their previous line of employment. There are procedural mechanisms in place which would allow a defendant to establish this. An injured party can be compelled to disclose their medical records to the defendant's legal representatives: see generally *McCorry v. McCorry* [2021] IEHC 104. If requested to do so, an injured party is expected to attend for an independent examination by a medical practitioner nominated by the defendant.
50. Secondly, the defendant could demonstrate that there is suitable alternative employment available to the injured party. This could be done by, for example, adducing evidence from a vocational assessor. The nature and extent of the evidence required will depend on factors such as the age and educational profile of the injured party. Little by way of evidence may be required to demonstrate that a well-qualified young person is likely to secure suitable alternative employment.
51. Thirdly, even if there is no suitable alternative employment immediately available, the defendant could demonstrate that there are reasonable steps which the injured party could take to retrain with a view to qualifying for other employment.
52. Fourthly, the defendant could challenge the assumption that the injured party is likely to have remained in the same type of employment until the age of 68 years. It might be demonstrated that—even if they had never been injured—it would be unlikely that the injured party would have been fit for manual labour throughout their mid to late sixties.

53. The Defendant in the present case failed to do any of these things. Indeed, the Defendant chose not to make any meaningful response to the claim for loss of earnings. The Defendant did not adduce any evidence on this issue. All that was done was to cross-examine the Plaintiff, very briefly, on the efforts that he had made to secure alternative employment. (The Plaintiff's evidence in this regard is summarised at paragraphs 63 to 65 and paragraph 70 below).
54. The consensus of the medical evidence in the present case is to the effect that the Plaintiff is, as a result of the injuries received in the accident, medically unfit for manual labour of the type for which he had previously been employed. Whereas certain of the earlier medical reports, i.e. those prepared within approximately twelve to eighteen months of the accident, had offered a more benign prognosis, those reports were conditional in nature. In particular, Dr. Moorhouse has since offered a more pessimistic prognosis in his second report dated 19 May 2021.
55. The Plaintiff's side has, helpfully, arranged for a vocational assessment to be carried out. The report of this vocational assessment has been furnished to the court on the basis that it has been "*agreed*" by the Defendant's side. The report is dated 10 September 2019.
56. The principal conclusion of the vocational assessment is that the Plaintiff will have "*major problems*" in securing employment even as a supervisor or team leader in a factory setting given that such a role would involve fulfilling a wide variety of roles of the workers being supervised, which could involve tasks and physical demands which are beyond the Plaintiff's vocational ability. The report states that it is reasonable to predict that his current vocational restrictions would

be regarded as a deterrent in employing the Plaintiff in a supervisory capacity in a competitive recruitment situation.

57. The report also states that the Plaintiff's basic level of education militates against future employment and reduces the scope of work available, and suggests that given the Plaintiff's proximity to retirement age, it may very well be the case that by the time he has upskilled and achieved post-qualification experience, he may be too old to capitalise on same.
58. The report notes that the Department of Social Protection do not "*activate*" persons over 62 years of age, in that it is not compulsory to engage with the Department in terms of seeking employment or further education.
59. The report provides the following summary of the disadvantages which the Plaintiff has in the labour market:

"In applying for alternative posts, in a competitive interview and recruitment process, [the Plaintiff] will also labour under the following disadvantages:

- Proximity to retirement age.
- Diminished access to work opportunities.
- Employer bias in hiring and advancement, with perception of possible/actual diminished 'work life' expectancy.
- Possible difficulties with pre-entry medicals / relevant medical history (particularly the complaints outlined herein).
- Absence from the labour force for a protracted period of time.
- Absence of significant level of educational qualifications.
- Lack of transferrable skills.
- High levels of competition for available employment, in particular competition from younger and more qualified and/or experienced candidates."

60. The report concludes by stating that the Plaintiff's vocational choices have been greatly limited by his personal injuries and that he is no longer capable of working within many posts (previously) open to him pre-accident.
61. The evidence, as agreed, therefore establishes that the Plaintiff is medically unfit to perform the type of manual labour in factories in respect of which he had previously been employed. The evidence also indicates that the Plaintiff would have difficulty in obtaining a more sedentary role in such an employment setting. This is because even a supervisory or leadership role in a factory would entail a certain amount of manual labour.
62. In principle, the Plaintiff would appear to be capable of carrying out certain sedentary occupations. The Plaintiff himself, in his oral evidence, indicated a willingness to take on a "*desk job*" or a "*sitting job*". There is no direct evidence before the court as to the likely availability, within a reasonable distance of his home, of sedentary employment to a person with the age and educational profile of the Plaintiff.
63. The Plaintiff confirmed that he had resigned from his employment with the Defendant four or five weeks after the accident, and that he has not applied for any other employment. The Plaintiff stated that his legs are incapable of doing continuous week-to-week, day-to-day work. The Plaintiff offered the view that he would not pass the "*manual handling course*" required in certain jobs because he cannot crouch down to the bottom of the floor and pick a box up; move it from A to B; and pick it up again.
64. As to potential employment in the pharmaceutical industry, the Plaintiff explained that he would not be able to comply with the procedures and protocols governing entry into special equipment rooms and clean rooms. A worker must,

seemingly, be able to put on and remove shoe covers without sitting down and touching the floor with their clothes.

65. The Plaintiff stated that he “*supposed*” he could do a job which involved sitting at a desk, and that he intended “*to get back to work as soon as*” he is able to work full-time. In response to his own counsel on re-examination, the Plaintiff confirmed that he does not know of any employer that would take him on for a “*sitting job*” given his current skills and qualifications.
66. Counsel on behalf of the Defendant was very critical of the failure of the Plaintiff to have applied for any jobs in the four years post-accident, describing it as “*unprecedented*” for an injured party, who had done nothing to seek alternative employment, to advance a claim for future loss of earnings to retirement age.
67. With respect, the onus of proof lies with the Defendant’s side to demonstrate that the Plaintiff has failed to mitigate his loss. The Defendant’s side adduced no evidence in respect of the Plaintiff’s employment prospects. As noted earlier, the only evidence in this regard was the vocational assessment carried out on behalf of the Plaintiff. This report had concluded that the Plaintiff’s vocational choices have been greatly limited by his personal injuries. The Defendant’s side did not challenge this report. The Defendant’s side did not, for example, say that they would have been able to offer the Plaintiff employment in their own business, with appropriate accommodations for his current health condition. Nor did they adduce any evidence as to the state of the labour market in the town of Nenagh where the Plaintiff resides.
68. The current system for the determination of claims for personal injuries is adversarial in nature. This court does not have an inquisitorial role and can only act on the evidence that is adduced before it, whether by way of oral testimony

or expert reports which have been agreed between the parties. The onus of proof lies with the Defendant to demonstrate that the Plaintiff has not mitigated his loss. I am satisfied that, having regard to the absence of any evidence on behalf of the Defendant, the Defendant has not demonstrated, on the balance of probabilities, that there is suitable alternative employment available to the Plaintiff given his age and educational profile. The Defendant has not, therefore, established that the Plaintiff has failed to mitigate his loss of earnings.

69. The next matter to be considered is the appropriate amount of damages to be awarded in respect of loss of *future* earnings. As flagged earlier, the Plaintiff had initially advanced a claim for loss of earnings up to the date of his anticipated retirement at the age of 68 years. The actuarial report prepared on behalf of the Plaintiff had suggested a figure of €172,000. This figure had been calculated gross, i.e. on the assumption that no tax would be payable. It has been explained that use of a gross multiplier tends to be more appropriate to the valuation of any loss of earnings where the injured party is unlikely to work again in any capacity.
70. The Plaintiff's position, as refined at trial, is that he is confining his claim for loss of *future* earnings to a period of four years. Four years is the period of time required to allow him to obtain a Level 7 qualification, i.e. an undergraduate degree, in mechanical engineering. The Plaintiff explained in evidence that he did not have the finances to pursue this course before now and that there is no public funding available to him. The Plaintiff's hope is that, once qualified, he will then be able to secure employment in a pharmaceutical factory in a position that, as he colourfully put it, requires more brains than brawn.
71. Again, the Defendant's side did not engage with this issue at all. It was not suggested, for example, that the Plaintiff did not require to retrain nor that the

course proposed was unreasonable having regard to the risk, identified in the vocational assessor's report, that the Plaintiff may be too old to capitalise on any qualification achieved.

72. I propose to award an amount equivalent to four years' earnings as damages in respect of loss of future earnings. This award will be made on the basis that "*but for*" the accident the Plaintiff would have continued to earn €380 per week. I will hear counsel further on the appropriate adjustments necessary to arrive at a capital value for this, e.g. in terms of the discount rate to be applied etc. The actuary's report furnished to the court has been prepared on the basis that the loss of future earnings would be for a period of six or nine years, i.e. to reflect a notional retirement age of 65 or 68 years, and does not provide a figure in respect of a four year horizon. I will also hear counsel on the question of the extent, if any, to which the rules in respect of the recoverability of social welfare payments apply to a claim for a loss of *future* earnings, having regard, in particular, to the definition of "*specified period*" under Part 11B of the Social Welfare Consolidation Act 2005 (as inserted).
73. The rationale underpinning the award in respect of the loss of future earnings is that the Plaintiff has established, on the balance of probabilities, that he is medically unfit to perform the type of manual labour in respect of which he has been employed for most of his working life, and that the Defendant has failed to establish the existence of suitable alternative employment which the Plaintiff might reasonably be expected to take up. An award of damages in respect of loss of future earnings is necessary to reflect the fact that, as a result of the admitted wrongdoing of the Defendant, the Plaintiff is no longer able to earn a

wage. The award is intended to restore the Plaintiff to the position he would have been in “*but for*” the personal injuries suffered.

74. The Plaintiff has confined his claim for future loss of earnings to a period of four years post-trial. This would bring him to the age of 63 years. The Plaintiff is not now pursuing a claim in respect of the following five years, i.e. to a notional retirement age of 68. It is thus not necessary for this court to address the question of the likelihood of his having been able to pursue manual labour to this age (assuming that the accident had not occurred).
75. It should be emphasised that this is not a classic retraining or requalification case. The reference in this judgment to the intention of the Plaintiff to pursue an undergraduate course is merely by way of explanation of the logic of his not pursuing a claim for loss of future earnings for a longer period of time than the four years. This judgment does not stand as authority for a general proposition to the effect that a manual worker, nearing retirement, is entitled to recover damages for loss of future earnings on the basis that they intend to embark upon an undergraduate degree programme. This judgment is very much confined to the peculiar facts of this case and the paucity of evidence adduced by the Defendant.
76. Here, the Plaintiff has chosen to confine his claim for loss of future earnings to a period of four years. The evidence supports this claim. Thereafter, the Plaintiff is undertaking the risk that—for the reasons flagged in the vocational assessment report—he might not ultimately secure employment notwithstanding his additional qualifications. The Plaintiff will have no further recourse against the Defendant. The current system for the adjudication of personal injuries claims

envisages a once-off payment of damages (save in certain types of medical negligence actions).

77. Turning next to the award for loss of earnings to the date of the trial, i.e. the loss of earnings for the four year period between March 2018 and April 2022, a sum of €81,320 will be awarded. The actual payment to be made directly to the Plaintiff in this regard is reduced by a sum of €43,314 in accordance with the provisions of sections 343R and 343S of Part 11B of the Social Welfare Consolidation Act 2005 (as inserted). This reduction reflects the amount of the social welfare payments received by the Plaintiff. The Defendant will be required to pay an equivalent amount to the Minister for Social Protection in respect of recoverable benefits.
78. Put otherwise, the damages which are directly recoverable by the Plaintiff against the Defendant for the four years post-accident are confined to the difference between the amount which the Plaintiff would have earned had he continued to be employed in manual labour (estimated at €380 per week) and the amount actually received by way of disability benefit or injury benefit (estimated at €203 per week). The Defendant will be required to reimburse the Minister for Social Protection in respect of the social welfare payments made.

SUMMARY OF CONCLUSIONS AND PROPOSED FORM OF ORDER

79. This matter came before the High Court by way of an assessment of damages only, the Defendant having conceded liability. The “*agreed*” medical evidence establishes that the Plaintiff suffered debilitating injuries as the result of a workplace accident on 16 March 2018. The injuries affect the Plaintiff’s lower limbs and his lower back.

80. For the reasons explained at paragraphs 30 to 39 above, an aggregate amount of €75,000 is awarded in respect of general damages for pain and suffering. This figure is intended to reflect both the historic pain and suffering endured for the four years to date and future pain and suffering.
81. The Plaintiff has established, on the balance of probabilities, that he is medically unfit to perform the type of manual labour in respect of which he has been employed for most of his working life, and the Defendant has failed to establish the existence of suitable alternative employment which the Plaintiff might reasonably be expected to take up. An award of damages in respect of loss of future earnings is necessary to reflect the fact that, as a result of the admitted wrongdoing of the Defendant, the Plaintiff is no longer able to earn a wage. The award is intended to restore the Plaintiff to the position he would have been in “*but for*” the personal injuries suffered.
82. A sum of €81,320 will be awarded in respect of loss of earnings to the date of the trial. The actual payment to be made to the Plaintiff in this regard is reduced by a sum of €43,314 in accordance with the provisions of sections 343R and 343S of Part 11B of the Social Welfare Consolidation Act 2005 (as inserted). This reduction reflects the amount of the social welfare payments received by the Plaintiff. The Defendant will be required to pay an equivalent amount to the Minister for Social Protection in respect of recoverable benefits.
83. A sum equivalent to four years’ earnings will be awarded as damages in respect of loss of *future* earnings. This award will be made on the basis that “*but for*” the accident the Plaintiff would have continued to earn €380 per week. I will hear counsel further on the appropriate adjustments necessary to arrive at a capital value for this sum, e.g. in terms of the discount rate to be applied etc.

84. The parties have agreed that a sum of €7,000 should be allowed in respect of other heads of special damages.
85. Finally, it should be reiterated that the findings in this judgment have been reached in circumstances where the Defendant chose to contest the case on a very narrow basis. In particular, the Defendant called no witnesses at the hearing; did not challenge any of the Plaintiff's medical evidence but instead agreed the content of his medical reports; did not engage meaningfully with the issue of suitable alternative employment; and conducted only a limited cross-examination of the Plaintiff.
86. These proceedings will be listed before me on Friday 27 May 2022 at 10.30 am for submissions on the form of the final order. The parties are requested, in particular, to address the capital value of four years' future earnings and the appropriate order in respect of costs. The parties should also address the rate of interest, if any, payable in respect of the damages.
87. A copy of the formal offer of settlement, if any, served pursuant to section 17 of the Civil Liability and Courts Act 2004 should be furnished to the court in advance of the adjourned date.

Appearances

Michael Counihan, SC and Elaine Morgan, SC (with them William O'Brien) for the Plaintiff instructed by John M. Spencer Solicitors
Joseph McGettigan, SC (with him Kevin Callan) for the Defendant instructed by BLM Solicitors

Approved
Gareth S. Mans