

THE HIGH COURT

[2021] IEHC 239
[2017 No. 8894P]

BETWEEN

SEAN WARD

PLAINTIFF

AND

GERALDINE MCDONAGH

DEFENDANT

Judgment of Mr. Justice Bernard Barton delivered on the 5th day of March, 2021.

1. The Plaintiff is a satellite installer by occupation and resides at 18 Rivercrest, Tuam, County Galway. He was born on the 26th August 1975 and is married. This suit is brought in negligence to recover damages for injuries and loss suffered by the Plaintiff as a result of a single vehicle road traffic accident, which occurred on the 15th January 2016. The Plaintiff was travelling as a front seat passenger together with three nephews seated in the rear of a car driven by the Defendant when it went out of control on the public highway at or near Tubber, Moate, County Westmeath, and collided with a wall. On the 21st March 2018 a full defence was delivered to the Plaintiff's claim, however, the Defendant subsequently withdrew liability and the case proceeded as one for an assessment of damages only. At the conclusion of the hearing an application was made pursuant to s. 26 of the Civil Liability and Courts Act, 2004 to have the proceedings dismissed.

Background

2. The issues arising on the application are best understood and contextualised against the background from which they emerged. The accident occurred sometime between 8 and 9 pm on the evening of the 15th January 2016. There was a heavy frost and road conditions were treacherous; black ice had formed on the road surface. The Defendant lost control of the car while negotiating a bend. The impact with a wall on the side of the road caused the airbags to deploy; significant collision damage was to the car. The Plaintiff suffered injuries to his neck, right knee, and right ankle area as a result of the accident.
3. The Plaintiff has a relevant pre-accident medical history. He is obese, is a diabetic, and suffers from hypertension, asthma and depression. He was psychiatrically assessed in 2012 and 2015 and has ongoing psychiatric/psychological issues which are relevant to the subject application. In addition to his pre-accident medical history the Plaintiff has been involved in a number of accidents which may be summarised as follows:
 - (i.) A road traffic accident on the 25th October 2008 as a result of which he suffered injuries to his neck and back in respect of which he obtained compensation.
 - (ii.) A road traffic accident on an unspecified date in 2009 but as a result of which no injuries were suffered and no claim was brought.
 - (iii.) A road traffic accident in 2014 as a result of which he suffered injuries and for which he was compensated.

(iv.) A road traffic accident on the 28th October 2015 as a result of which no injuries were sustained and no claim was brought.

Apart from the foregoing and the accident the subject matter of these proceedings, the Plaintiff has not been involved in any further accident.

4. The Plaintiff's solicitors are Garrett J. Fortune & Co. solicitors, who also represented him in respect of the accident which occurred in 2014. The Personal Injury Summons herein was issued on the 8th October 2017 and the allegations and assertions pleaded therein were verified on affidavit by the Plaintiff sworn the 12th October 2017. On the 11th December 2017 the Defendant's solicitors requested further and better information pursuant to the provisions of s. 11 of the Civil Liability and Courts Act, 2004 (the 2004 Act) and the following day raised a notice for particulars of the allegations and assertions pleaded in the Summons. On the 5th January 2018 the Plaintiff attended his solicitors and consulted Mr Fortune for the purposes of enabling replies to be delivered to the respective notices.
5. Paragraph 13 of the notice for particulars sought details of any injuries in any accident suffered by the Plaintiff either prior to or subsequent to the accident. Paragraph 14 sought confirmation that the Plaintiff was willing to furnish the Defendant with all pleadings, documents, correspondence and medical reports relating to his previous accidents without the necessity for an order of discovery. These queries were variously answered "no" and "not applicable". The s. 11 notice sought:
 - (a) Particulars of any personal injuries action brought by the plaintiff in which a court made an award of damages;
 - (b) Particulars of any personal injuries action brought by the plaintiff which was withdrawn or settled;
 - (c) Particulars of any injuries sustained, or treatment administered to the plaintiff that would have a bearing on the personal injuries to which the personal injury action relates, and
 - (d) The name of any person from whom the plaintiff received such medical treatment.

This notice was replied to on the 25th January 2018 as follows:

- (a) "None";
- (b) "None";
- (c) "N/A" and
- (d) "N/A".

The replies to particulars were furnished on even date. The replies were verified on affidavit sworn by the Plaintiff on the 12th March 2018.

6. For reasons which will become apparent, it transpired that during the consultation on the 5th January, 2018 Mr. Fortune left the answer to question 13 of the notice for particulars blank but on the back of the s. 11 notice made handwritten notes concerning the two previous accidents in which the Plaintiff had been involved and as a result of which he had suffered soft tissue injuries, information provided to him by the Plaintiff. It is apparent from the face of the original replies to particulars and the reply to the s. 11 notice that this information was not incorporated therein. Mr. Fortune gave evidence during the trial. He accepted that the failure to incorporate the information in the replies to the notices and in the affidavits of verification was due to an omission on his part.
7. The explanation offered by Mr Fortune for failing to include the information written on the back of the s.11 notice was that when he came to draft the replies he failed to advert to this because, to use his words, "...he didn't twig it". In the mistaken belief that there was no pre-accident history of relevance he drafted the replies in the form sent and received by the Defendant. It transpired that this would not be the last time the Plaintiff's involvement in previous accidents would be discussed with his solicitors. On the 12th May 2018 Mr. Fortune sent a case to senior counsel to advise proofs to which he subsequently received advices which included references to the replies and failure to disclose the previous accident/injury history.
8. Mr. Fortune had yet to advert to the information previously provided when he wrote to the Plaintiff on the 18th June 2018 enquiring as to why the previous accidents had not been disclosed. The Plaintiff appears to have accepted what was in fact an incorrect assertion and responded to the letter by telephone the following day stating that he did not know why he had not disclosed the previous accidents but thought it might have been because he had probably had "...an off day" and that he was on 'anti-depressants'. It appears that the Plaintiff had forgotten he had provided the information at the consultation on the 5th January 2018. He undoubtedly suffered with memory problems. In any event, corrective replies to question 13 of the notice for particulars and the s. 11 notice regarding previous accidents were sent to the Defendant's solicitors on the 5th July 2018, though the information furnished was limited to the accident which occurred on the 17th February 2014.
9. The Plaintiff's solicitors arranged to have a corrective affidavit of verification in respect of those replies sworn on the 13th July 2018. This was followed on the 10th January 2019 by further letters of correction in which particulars were given of the road traffic accident which occurred on the 23rd October 2008. These replies were verified by a further affidavit sworn by the Plaintiff on the 14th January 2019 following which the Defendant's solicitors made a request for voluntary discovery that was complied with when the Plaintiff swore an affidavit of discovery on the 20th March 2019. Additional particulars of personal injury were furnished on the 24th May 2019 and these particulars were verified on affidavit sworn by the Plaintiff on the 28th May 2019.
10. As mentioned earlier the Plaintiff addressed the question of previous accidents with his solicitor on more than one occasion. It transpired from the evidence given by Mr. Fortune

and from his client file which he produced that when he followed up with the Plaintiff for the purposes of swearing a corrective affidavit of verification and sent him draft replies the Plaintiff's reply included a hand-written note in which he brought his solicitor's attention to the fact that the replies were incomplete and omitted reference to the earlier accident. Once again, however, the information in the note was not adverted to before the replies and a corrective affidavit sworn and sent to the Defendant's solicitors.

Cross-Examination

11. In the circumstances as they appeared to the Defendant's legal team when the case first came on for hearing, the Plaintiff was understandably subjected to a rigorous cross examination by Mr. McCarthy S.C., particularly in relation to the question as to why he had not disclosed his involvement in previous accidents and the injuries sustained as a result thereof. I have to say that the impression I formed of the Plaintiff's responses to these questions created questions in my mind about his credibility and the veracity of his evidence. At the same time, he appeared to me to be somewhat naïve, out of his depth and possibly confused though, in fairness to him, at no time did he deny his involvement in these accidents either in his evidence in chief or under cross examination.
12. In response to queries as to why he had sworn affidavits of verification which were incorrect on their face and had otherwise withheld information the Plaintiff variously answered, "I don't know why I was doing that" or "I can't remember". He explained to the Court that he suffered from depression and that one of the consequences is memory loss which he attributed to prescribed anti-depressant medication. In response to one question he answered "At that time like you know I am up and down the whole time with depression and anxiety, you know, like ... I'm confused." While it was quite understandable that the Plaintiff should have been cross examined in the way he was, having regard to the information known to the Defendant at the time the case came on for hearing, it transpired that the truth of the matter was that this unfortunate individual had forgotten that he had furnished the appropriate information to his solicitor and had done so on more than one occasion, taking the trouble on the second occasion to draw the solicitor's attention to an error in the replies as drafted.

Right Knee Injury; Causation

13. Apart altogether from the pleadings and affidavits of verification, another significant issue that arose related to the causation of the Plaintiff's right knee injury. The fact that the Plaintiff has a problem with his right knee and that this will require corrective surgery in due course is not in issue, however, the Defendant mounted a full-frontal assault on the Plaintiff's case that he sustained an injury to his right knee as a result of which a pre-existing but quiescent osteoarthritis therein was rendered symptomatic. It is clear from the medical evidence adduced that the Plaintiff has bilateral degenerative changes in both knees, however, the condition in the left knee remains asymptomatic.
14. The Plaintiff's evidence with regard to this aspect of his claim was that he struck his right knee off the dashboard as a result of the collision. There is no evidence to suggest otherwise, quite the contrary. The impact involved caused severe damage to the car and resulted in the airbags being deployed. Orthopaedic evidence in respect of this injury was

given on behalf of the Plaintiff by Mr. Derek Bennett, Consultant Orthopaedic Surgeon and on behalf of the Defendant by Mr. Brian Harrison, Consultant Orthopaedic Surgeon. The Plaintiff was cross examined at length about the absence in the hospital records of a complaint about any knee injury or in the Plaintiff's GP's notes of his first attendance with him. However, the Plaintiff sustained what transpired to be a significant soft tissue injury to his right foot which is noted and there were suspicions that he might have fractured his right ankle, though this transpired not to be so.

15. The Plaintiff described his right foot as being black and blue and of being very swollen. He had no injury to his left leg or left foot. The lower limb injuries were confined to the right lower limb. It is quite clear from the content of the Injuries Board medical report prepared by Dr. David Kelly, dated the 29th September 2016, that during the Plaintiff's presentation to his GP on the 22nd January 2016 he included a complaint of a right knee injury as a result of the accident. Thereafter an MRI of the Plaintiff's right knee was organised for the 23rd May 2016. This showed degenerative changes, maximal at the patellofemoral compartment. Significantly, the scan also showed soft tissue swelling over the right anterior knee consistent with mild patellar bursitis.
16. Under intense cross examination the Plaintiff insisted that his right knee had struck the dashboard of the car. He accepted that if he had not mentioned this to the doctors in hospital or when he first presented then he ought to have done so. He thought he had suffered a very serious injury to his right foot/ankle. The Plaintiff insisted that he had never had a problem with his right knee prior to the accident. He refuted the suggestion that the problem he was suffering from in his knee had been "coming on for years". I should add that the Plaintiff's belief was he had told the doctors about his knee injury and replied to a question in this regard with a rhetorical question of his own; "why wouldn't I?" The suggestion put to him was that he had not injured his knee at all, a suggestion which he totally refuted. After all "wasn't that what the doctors were treating me for?".
17. Mr. Bennett gave evidence of how an impact to a quiescent arthritic joint could cause that condition to become symptomatic over a period of weeks from the event. Mr. Hurson considered that an impact to the Plaintiff's right knee joint would have resulted in pain. Mr. Bennett explained that in the presence of pain from other injuries, especially what appeared at the time to be a more serious injury, the knee injury might not have been readily apparent. I am satisfied both physicians were doing their best to assist the Court, as is their obligation. Against the background of the Plaintiff's evidence that he struck his knee in the impact Mr Hurson and the presence of an entirely quiescent condition in both knees there were only two likely explanations for the condition in one knee to become symptomatic the first being that symptoms had come on coincidentally some weeks after the accident the second being trauma such as might be caused by the knee impacting with the dashboard of the car.

Decision; Plaintiff's Veracity as a Witness

18. I have already made some comments about the impression I formed when the Plaintiff was giving evidence, particularly when he was being cross examined. I am quite satisfied, and the Court finds that he made no attempt to give false evidence or mislead

the Court in any way, quite the contrary. He was doing his best in very trying circumstances, moreover, he was a witness with ongoing psychological problems for which he required medication. I was left wondering whether, if the information provided to his solicitor concerning his involvement and injuries sustained in previous accidents been known to Mr. McCarthy, whether the Plaintiff would have been subjected to the repeated questioning to which he was subjected on that issue.

19. In saying this I should add that I have no hesitation in accepting the evidence given to the Court by Mr. Fortune in this connection. I am satisfied, and the Court finds that the Plaintiff gave appropriate information about his involvement in previous accidents and the injuries caused as a result thereof to his solicitor, the purpose of which was to inform the solicitor, the Defendant, the Defendant's solicitors and the Court. It was suggested that liability had only been withdrawn because the Defendant refused to swear an affidavit of verification of the defence. I have grave doubts as to whether this proposition, which was put to the Plaintiff in cross examination, was correct particularly as the defence was a straight traverse of the Plaintiff's claim and did not contain any assertions or allegations which required verification by affidavit. I can understand why the Defendant, or should I say the Defendant's insurers and their legal team were suspicious about the claim and why they adopted the approach they did, initially putting the Plaintiff on full proof thereof and that notwithstanding the withdrawal of liability, the cross examination would proceed as it did.

Conclusion:

20. As it is, having had the opportunity to assess his demeanour in the course of the trial and armed as I am with the full picture of what happened, in particular the information given by the Plaintiff to his solicitor, I am satisfied that he did his best not only in providing appropriate and correct information to his solicitor but also in giving evidence. Accordingly, the Court finds that the Plaintiff did no more than prosecute a perfectly good claim for damages arising as a result of an unfortunate accident which occurred through no fault of his own and that the imputations raised in relation to his veracity as a witness are not established, on the contrary, I am satisfied and the Court finds that the Plaintiff is a witness on whose evidence the Court may rely.

Conclusion: Right Knee Injury

21. Although the Plaintiff suffered a multiplicity of soft tissue injuries his evidence and the medical evidence adduced focussed principally on what I am satisfied was an injury to the Plaintiff's right knee. The fact that he has pre-existing degenerative changes of almost equal extent in both knees, the fact that the left knee condition has remained quiescent and that the right knee has become significantly problematic for the Plaintiff is, as a matter of probability, more likely attributable to his right knee having impacted with the dash of the car than with a conclusion that the condition became symptomatic coincidentally some weeks following and unrelated to his involvement in the accident. I am fortified in reaching this conclusion by the extent of the damage done to the car, the deployment of the airbags, the absence of injury to the lower left limb and what appeared at the time to be significant soft tissue injuries to the right ankle area.

22. Mr. Hurson is a very well-known orthopaedic surgeon with a particular expertise in knee joint injuries. He does not think that the Plaintiff will require the surgical intervention prognosticated for him by Mr. Bennett. While he would have expected the Plaintiff to have experienced knee pain if his knee had impacted the dash of the car as described, to be fair to Mr. Hurson he agreed with the proposition, mentioned above, that there were only two probable explanations for the onset of symptomology, the first being that the Plaintiff did suffer a knee injury and the other being that his knee became symptomatic coincidentally in the week's post-accident. I accept the Plaintiff's evidence in relation to causation and the evidence of Mr. Bennett with regard to the injury and the consequences thereof to date and into the future. for the Plaintiff.

Section 26 Application

23. The parties made written and oral submissions. The Court was referred to the following case authorities *Carmello v. Casey* [2007] IEHC 362; *Meehan v. BKNS Curtain Walling Systems & Anor* [2012] IEHC 441; *Waliskewi v. McArthur & Co.* [2015] IEHC 264; *Platt v. OBH Luxury Accommodation & Anor* [2015] IEHC 793 and [2017] IECA 221.

Section 26 (1) of the Civil Liability in Courts Act, 2004 provides:

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

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

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

The court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) *The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—*

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

(b) that he or she knew to be false or misleading when swearing the affidavit,

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) *For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court."*

24. The onus of proof rests on the party making the application. The burden is to show that the Plaintiff gave evidence (and/or provided information) that was materially false or misleading, and that he or she knew that to be so at the time. The test to be applied is a subjective. Once the Defendant meets the bar the provisions of s. 26 are mandatory in nature; The court is required to dismiss the case unless satisfied, for reasons to be stated in its decision, that dismissal would result in injustice. There is no doubt but that the

dismissal of an action is a draconian consequence for any plaintiff, however, this was clearly the intention of the legislature, apparent from the wording thereof, when it enacted the provision. See the judgment of Peart J. in *Carmello v. Casey & Anor*.

25. It follows that the dismissal of a claim on the grounds that the Plaintiff has given or caused to be given evidence which is false, or misleading is not a ground for refusing to make the order on the basis that doing so would result in an injustice being done since this is the very outcome contemplated by the Oireachtas. There has to be something more to warrant the Court in exercising its discretion to refuse an application where the defendant has discharged the onus of proof required by law. See the judgment of this Court in *Platt*, supra, and the judgment of the Court of Appeal in the same case delivered by Irvine J. where this subject is discussed in some considerable detail.
26. On an application under s. 26 whether in respect of an affidavit of verification or evidence given to the court, the duty of a Plaintiff is clear, to give evidence in a truthful and straightforward manner. See the judgments in *Waliszewki v. McArthur & Co.* and *Platt v. OBH Luxury Accommodation & Anor*, supra. When approaching an application under s. 26 of the 2004 Act, the court is required to be satisfied that the plaintiff gave or caused to be given evidence in relation to a material aspect of his or her claim which he or she knew to be false and/or was misleading at the time when the information or evidence was given. As mentioned earlier, the test to be applied in determining this question is subjective. This test is mandated by the necessity to be satisfied, on the balance of probabilities, as to the state of the plaintiff's mind at the material time, namely when the information and/or the evidence was given. The fact that the when all the evidence has been given the court has not been misled is not the material determinant.

Conclusion on S.26 Application

27. For all of the reasons set out herein I am not satisfied, and the Court finds that the Defendant has failed to discharge the onus of proof to establish the case advanced and to warrant the making of the order sought. Accordingly, the Court will refuse the application for an order dismissing the Plaintiff's claim pursuant to the provisions of s. 26 of the Civil Liability and Courts Act, 2004 and will so order. In reaching the conclusions which it has I think it appropriate to mention in conclusion that when the Plaintiff was examined on behalf of the Defendant by Dr Declan Scanlon on the 17th January ,2018 and by Mr. Brian Hurson in 2019, the two previous road traffic accidents and the injuries suffered as a result thereof were disclosed and consistent with the information given by the Plaintiff to his solicitor, a circumstance which on my view of the evidence and the Plaintiff is inconsistent with any attempt to maximise or exaggerate his claim for compensation.

Purpose of Section 26 of the 2004 Act; Remedy for Misuse; Aggravated Damages

28. In the interests of completeness, I should repeat the dicta contained in the jurisprudence which has resulted from the enactment of s. 26 since in 2004 namely, that the Oireachtas did not intend this provision to be a weapon in the armoury of every defendant to be deployed as a tactic or in meeting claims about which there may be suspicion of veracity, rather the purpose is to discourage and prevent the prosecution of claims about which there is actual evidence of falsity, in other words to prevent fraudulent claims. While the

Act does not provide a remedy to a Plaintiff for the inappropriate use of the provision, the court certainly enjoys a jurisdiction to fix a defendant with an award of aggravated damages should it transpire that the provision has been inappropriately invoked in the pleadings or subsequently at trial.

29. By way of example, raising the section for tactical reasons or otherwise than for the purposes of defeating a claim in respect of which there are reasonable grounds to conclude on the basis of the evidence available at the time that the Plaintiff has given information or evidence or caused information or evidence to be given in any material respect which the Plaintiff knew to be false or misleading. In the circumstances of this case I am satisfied that it was not unreasonable for the Defendant to take the view that it did, encapsulated in the submissions made, to invoke the section and bring the application. Accordingly, I am satisfied that an award of aggravated damages would not be warranted.

Quantum

30. The case made by the Plaintiff in relation to his neck, lower back and foot injuries is that he recovered from these in a relatively short period of time. However, the knee injury and the consequences thereof were the central focus of the medical evidence. In addition to medication which the Plaintiff has to take for diabetes and depression he also had to take pain killing medication initially for all injuries and then subsequently for his right knee symptoms which developed and deteriorated. He was referred to the care of Mr. Bennett. His knee pain affected his vocational capacity; the duties involved in his work exacerbated the symptoms. Four intra-articular suplasyn (hyaluronic) injections were administered to the right knee. The Plaintiff did not derive any real benefit from this treatment. Mr. Bennett recommended that he should reduce his weight and measured the Plaintiff for a knee brace.
31. The Plaintiff found the brace uncomfortable to wear; some days wearing the brace hurt him, although it also helped his symptoms. He had some physiotherapy after the accident but did not derive much benefit therefrom either and so it was discontinued. He takes pain killers such as Vimovo and Difene prescribed by his GP. The Plaintiff has also been prescribed a pain-relieving cream, which he rubs into his knee. His neck injury cleared up within about two to three months of the accident and his back pain after six to nine months. As for his foot injury is concerned his evidence was that he had recovered from this approximately six weeks to two months' post-accident.
32. The Plaintiff was first seen by Mr. Bennett on the 31st August 2016. He arranged for him to have an MRI of his scan taken of his right knee. He also arranged to have a weight bearing x-ray of the knee carried out. Radiological results showed a loss of joint space in the right patellofemoral joints and medial compartments in both knees. The Plaintiff had had a previous MRI scan taken at UHG which had also disclosed bilateral degenerative arthritis in both knees. In Mr. Bennett's opinion the arthritis predated the accident. Mr. Bennett discussed treatment options with the Plaintiff which included weight loss, anti-inflammatory medication injection therapy and a knee replacement. He was unsuccessful

in losing weight and was referred by Mr. Bennett for bariatric surgery the purpose of which is to restrict the amount of food that a patient can consume.

33. Significant loss of weight was advisable before knee replacement surgery would be carried out. On Mr. Bennett's assessment, the Plaintiff's walking range was compromised and his response to a pain score questionnaire was indicative of severe arthritis. Apart altogether from the weight issues Mr. Bennett explained that results-based science suggested deferring knee replacement surgery as long as was possible, certainly in anyone under the age of 55. The cost of future knee replacement surgery was estimated by him at €6,590.76 and the cost of hospital bed for nine days following surgery at €6,570. He estimated follow up consultations at €1,000 and further revision surgery at €6,590. In the event, special damages to include a knee brace, MRI scan and travelling expenses were claimed at €22,575.76.
34. Mr. Bennett commented upon the injuries in the Plaintiff's GP's notes relating to the Plaintiff's "right knee pain" after which a question mark had been inserted. He considered this entry to be questioning whether this was possibly related to an abnormal foot gait. From his evaluation and examination of the Plaintiff he considered him to have an antalgic gait which he thought referred to limb pain. In essence this entry was an enquiry by the GP as to the cause of the knee pain. It was clear to Mr Bennett that a very short time following the accident the Plaintiff made a complaint to his GP about his knee pain without particularly ascribing a cause. He explained that anything that gives rise to pain in the limb will give an antalgic gait. A sore knee, sore hip, a pebble in a shoe would all have the same effect. The fact that the GP noted an abnormal gait suggested to Mr. Bennett that this was commensurate with knee pain being experienced within a few days of the accident. The relevant notes were taken by a locum GP and admitted in evidence.
35. With regard to prognosis Mr. Bennett felt that until such time as the Plaintiff achieved a significant weight reduction he would not be suitable for knee replacement surgery. The probability was, however, that he would need this in due course. As his attempts to lose weight on a diet had failed bariatric surgery would be necessary in order to achieve the desired result. The Plaintiff was taking eight paracetamols as well as Difene tablets every day together with using topical pain killing medication at least twice a day. The injury continued to have an effect on mobility and his mental wellbeing. Finally, Mr. Bennett expressed the opinion, contained in a letter admitted in evidence, dated 30th May, 2019 and sent to the Plaintiff's solicitors, that in the absence of the accident it was likely his knee would not have become symptomatic for many years. In his opinion the accident had accelerated the need for a knee replacement by at least ten years.
36. I should record that the Plaintiff's pre-accident medical notes and records as well as medical reports from Dr. David Kelly, Dr. Fionnuala Doyle, and Dr. Sean King were admitted in addition to the medical reports from Mr. Bennett and Mr. Hurson. The Plaintiff was cross-examined by Mr. McCarthy for making a claim in respect of the cost of knee replacement surgery in circumstances where according to the report of Dr. David Kelly dated the 29th September 2016 the surgery would be available to him free of charge

under the HSE as a public patient. The Plaintiff said he wanted to get the surgery as quickly as possible and that there was a substantial waiting list for public patients.

37. Mr. McCarthy contended that on Mr. Bennett's evidence the question of having the surgery carried out earlier than would otherwise arise under the public health list did not apply in this case. The argument advanced was that the Plaintiff would not be undergoing such surgery until he had achieved a significant weight reduction and that this was unlikely to occur until such time as he had bariatric surgery, for which there was also a delay and because of his relatively young age. Although the Plaintiff gave evidence that his knee pain impacted on his capacity to carry out his work duties the Plaintiff continued to work nevertheless. To his credit, however, he did not make nor was a claim made for loss of earnings or loss of opportunity.

Assessment of General Damages; Meaning of 'Pain and Suffering'; Principles

38. The Court is required to assess general damages for 'pain and suffering' to date and for pain and suffering into the future. The meaning of general damages for 'pain and suffering' has been the subject matter of comment in authoritative academic legal works on the law of tort and on the law of damages as well as in a vast body of jurisprudence. For my part the most succinct and comprehensive explanation is contained in the judgment of McCarthy J. at p 205 in *Reddy v. Bates* [1984] ILRM 197, where he stated that general damages:

"... are frequently stated to be for pain and suffering; they would be better described as compensation in money terms for the damage, past and future sustained to the plaintiff's amenity of life in all its aspects, actual pain and suffering, both physical and mental, both private to the plaintiff and in the plaintiff's relationships with family, with friends, in working and social life and in lost opportunity."

39. The object of general damages is to restore the Plaintiff to the position enjoyed at the time when the wrong was committed insofar as that objective can reasonably be achieved by a money award. In this regard O'Higgins C.J. observed in *Sinnott v. Quinnsworth* [1984] ILRM 523 at 531:

"General damages are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life which the injury has caused and will cause to the Plaintiff."

In carrying out an assessment of general damages the Court is required to apply well settled principles of law. The award must be reasonable and fair to both parties; the amount thereof must be proportionate to and commensurate with the injuries sustained or, where relevant, are likely to be sustained in the future. In addition, the Court is required by virtue of s. 22 of the Civil Liability and Courts Act, 2004 to have regard to the Book of Quantum.

40. The fact that the Plaintiff makes very little of the soft tissue injuries he sustained to his neck, back and right foot again goes to his credit. It is very difficult to disprove the effects of soft tissue injuries on anybody; had he wanted to maximise his claim he could have continued to complain but did not do so. Rather he has been truthful and freely admitted that the sequelae of these injuries resolved at various stages, depending on the injury, within a period of six months. It follows that these injuries may be classified as being relatively minor in nature. The same cannot be said of his knee injury. Lest it be necessary to do so I hasten to add that the Defendant is not responsible for the underlying bilateral arthritic condition in the Plaintiff's knees.
41. The law of tort, however, is clear as to the responsibility of the wrongdoer for the consequence on the victim of the wrong as found or as it is more often said, the wrongdoer has to take the victim as found, which in this case means a man who had quiescent arthritis in both knees. The condition in the right knee was rendered symptomatic as a result of an injury sustained to the knee during the accident, a development that was unlikely to have occurred for many years. I understood Mr Bennett's evidence to be that in the absence of trauma the onset of symptomology after many years have ultimately led to a knee replacement. I infer this to be the case from his opinion to the effect that the knee injury has brought forward the necessity for a knee replacement by ten years.

Conclusion; Book of Quantum; Severe and Permanent Range

42. In all the circumstances of the case I am satisfied, and the Court finds that an injury superimposed on a pre-existing quiescent arthritic knee with the consequences this has had and will likely have for the Plaintiff in the future constitutes a significant injury which can properly be positioned in the severe and permanent condition range set out in the Book of Quantum. Accordingly, applying the principles referred to above to the facts found the Court considers that a fair and reasonable sum to compensate the Plaintiff for pain and suffering to date and into the future proportionate to and commensurate with the injuries, to include the fact that he will have to undergo future knee replacement surgery involving a general anaesthetic and a period of recuperation and rehabilitation, is €75,000.
43. I should make it clear that in carrying out the assessment account has not been taken of the fact that the Plaintiff will have to undergo bariatric surgery before knee replacement surgery is carried out. It seems to me that this requirement does not arise as a result of the wrong and consequently the Defendant is not liable therefore. The fact that the Plaintiff has an option of having treatment carried out as a public patient in due course cannot be used to relieve the Defendant of its liability to compensate him for pecuniary loss causally related to the commission of the wrong, accordingly, the Court will allow the sum claimed for special damages, which will be added to the award of general damages. And the Court will so order.