

THE HIGH COURT

[2022] IEHC 53
RECORD NO. 2019/4843P

BETWEEN

WALDEMAR SZCZYPIOR

PLAINTIFF

-AND-

DALY TRANSPORT LIMITED

DEFENDANT

Judgment of Mr Justice Cian Ferriter delivered this 2nd day of February 2022

Introduction

1. In these proceedings, the plaintiff claims for damages for personal injuries sustained in the course of his duties as a general operative at the warehouse of the defendant, Daly Transport Ltd, in Castleisland, Co Kerry.

Background

2. The plaintiff was employed as a part-time general operative, working up to 3 days per week, in the defendant's warehouse premises in Castleisland. The defendant's business involved the sourcing and distribution of cheese and other dairy products. Consignments were delivered to the warehouse, stored in the cold room if necessary, labelled for onward distribution and loaded onto trucks for transport to customers.
3. The plaintiff received €225 for his three-day working week, with a social welfare top up under a Casual Workers Job scheme. He had been employed by the defendant for some five months when the accident in issue in these proceedings happened.
4. The plaintiff gave evidence that his duties were those allocated to him on any given day by his employer (the defendant's business being run by Mr Mike Daly and his son Sean Daly). These duties involved cleaning, unpacking deliveries, labelling boxes which were typically delivered on pallets and other related duties. While he was not a qualified forklift driver and did not have a "ticket" (i.e. permit) to drive same, he would occasionally be called upon to do some forklift duties.
5. The plaintiff gave evidence that he never received any training in manual handling or in respect of any other aspect of the duties he was asked to carry out. He said that he was not provided with any safety clothing or other protective equipment by the defendant.

The accident

6. The accident in question happened on 10 January 2017. The plaintiff gave evidence that on that day, it was extremely busy in the section of the warehouse that he was working in (being the section near the cold room) - "chaotic" as he described it. He said there were some 70 to 90 pallets in the area at the time. He said that he was asked to label boxes of cheese which had just been delivered to the warehouse on pallets containing some 50 boxes per pallet, each box weighing 20.5 KG and each pallet therefore containing over 1 tonne in weight. This task involves removing the foil wrapping around the pallet and sticking a label on each of the boxes which would have information as to its place of destination. The boxes were piled in 5 layers on the pallet, with 10 boxes in each layer. In

order to label boxes on the inner part of the pallet, it was necessary to remove some of the outer boxes to get the necessary access.

7. The plaintiff said that he was under pressure from his boss to label as quickly as possible for that particular consignment. He said that the foreman, Philip, had instructed him to get the boxes on these pallets ready to move as soon as possible as there was another batch coming in for the next day.
8. The plaintiff said that there were three rows of pallets in the relevant section of the warehouse at the time with very little space to move between the pallets. He was seeking to apply labels to boxes in respect of one particular pallet which involved working his way through the boxes on the pallet. He was working on the second last layer of boxes and moving them with a view to getting in at the inner row of boxes. He said there was a pallet immediately behind him which was at an angle to the pallet he was working on, such that the space between the pallets progressively narrowed. The relevant dimensions were estimated to be 400mm at the narrow end and 800mm at the widest end. He gave evidence that the space between the panels was not sufficiently wide for him to be able to kneel down in the ordinary way to get access to the boxes. Accordingly, he put the tip of his left shoe inside one of the two openings at the base of the wooden pallet in order to stabilise himself, and put his right shoe at an angle. He then bent down to move a box. His back was pressed against the pallet behind him. He was seeking to slide a box out (the boxes been tightly packed together on a pallet) and was grabbing the box at the bottom. Having lifted the box to chest height, he then fell over to his right-hand side, with his left foot getting trapped under the pallet. He went over badly on his right hand and wrist when he fell to the concrete floor. He fell to the side as there was not sufficient room to fall forwards.
9. The plaintiff gave evidence that there was, in his view, definitely less space available for manoeuvring with the boxes than there normally was given the configuration of the pallets on the day in question. The plaintiff said that ordinarily if there was insufficient space between pallets for him to safely access the boxes on them, he would get assistance from one of the other workers who operated the forklifts. While he had said in his replies to particulars that he did not seek assistance on the day in question, he said in his oral evidence that he did go looking for assistance that day but the forklift drivers were all busy and that the warehouse was so busy there was nobody else available. He also said that he sought to get a manual electric pallet lift but they were charging at the time and none was available. He was nearing the end of his work shift at the time.
10. In response to questioning under cross-examination to the effect that he ought to have waited until someone was available to help him to move the pallets to a safer position before attempting the labelling of the pallet in question with insufficient space, the plaintiff said that he sought to get on with the job as he was under pressure from his boss to label as quickly as possible for that particular consignment.
11. The plaintiff gave evidence that there were no marks on the floor of the warehouse to identify where pallets were to be placed to ensure that there would be a safe and

sufficient distance between them. He said that pallets were dropped randomly and that there was a culture of pressure being put on operatives as there was on the day in question where they were being told regularly to hurry up with the work. The plaintiff said he remembered very clearly that at the time in question there was barely enough space for the forklift to drive through to the cold-room given the number of pallets that were there.

12. The plaintiff gave evidence, under cross-examination, that while he always tried to be careful in the way he approached work, there were no health and safety rules in the company and that no training had been provided to him. In addition, no protective equipment was provided by the defendant so that the workers had to provide their own safety shoes and clothes.

Events post-accident

13. Immediately after the incident, the plaintiff's hand became swollen and one of his fingernails was slightly damaged. As he was near end of a shift, he did not tell anybody of the incident at that time. His immediate reaction was that it was likely to be a minor injury. The plaintiff went to the pharmacy the evening of the accident and got painkillers and a gel for swelling.
14. The plaintiff claims that he came into work the next day and showed his hand to his boss, Mike Daly, in the canteen at 10am. The plaintiff says that Mike Daly asked whether he could move his fingers and when the plaintiff said he could, he was told to go back to work. Mike Daly denies that this conversation took place. The plaintiff further says that Mike Daly's son, Sean Daly, later that morning told him not to report the accident to anywhere as it would involve a lot of paperwork and hassle for him. The plaintiff says that Sean Daly acknowledged that space was tight in the warehouse setup as it then was but that he was in the process of purchasing an extra hall which would mean that there will be more space available. The plaintiff says that Sean Daly also promised him in this conversation that they would give him full-time hours soon. Sean Daly denies that this conversation took place.
15. After 6 days of taking painkillers, his hand remained sore and swollen so the plaintiff went back to his pharmacist who advised him to go to the doctor. He then attended with Dr Pat Daly, his GP in Tralee. A report furnished by Dr Daly for these proceedings confirms that the plaintiff first attended him in relation to the matter on 17 January 2017. Dr Daly referred him to Tralee hospital where was x-rayed, prescribed stronger painkillers and recommended to undertake physiotherapy. He attended for physiotherapy initially in Castleisland. His GP subsequently referred him to Tony Higgins an orthopaedic specialist in Tralee hospital who organised further physiotherapy treatment in Tralee hospital which the plaintiff found helpful.
16. The plaintiff said that if a physiotherapy session fell on one of his working days (Monday to Wednesday) he would be given the time off by the defendant to attend the session. Mike Daly's son, Sean Daly, was the person to whom the plaintiff reported. Sean Daly accepts that the plaintiff was let out of work to go to medical appointments at various

stages in the 14 months following the accident but that he was unaware that he was receiving treatment for an accident related to his work with the defendant and that he never inquired as to the purpose of the medical visits. When asked if he had noticed that the plaintiff was slowing up at his duties, Sean Daly said that while he had noticed that the plaintiff was taking more bathroom breaks, he had not noticed any appreciable change in the plaintiff's performance of his duties. The plaintiff for his part says that his employer must have known that he was receiving treatment for his workplace injuries.

17. Apart from a few days in the early period after the accident, the plaintiff continued to work with the defendant following the accident. He gave evidence that because of the ongoing swelling and pain in his right hand and wrist, he adapted his work method to minimise the pressure on his right hand e.g. if he had to move boxes he said he would place them on his forearm so that he would not be putting pressure on his right hand. He says that there were times when he refused to carry out heavier duties because of his injuries, and that he was frequently but not always accommodated in that regard by his employer.

Claim letter and aftermath

18. On 20 February 2018, the defendant received a letter of claim relating to the accident from the plaintiff's solicitors. The plaintiff says that Mike Daly, on receipt of the letter, addressed him in derogatory terms and told him that he would not win as he was too small, and that Mr Daly also said that he would ensure that the plaintiff would not get work in Kerry again. Mr Daly, while accepting that he was not happy to receive the letter, vehemently denied that this exchange took place.
19. The defendant put to the plaintiff in cross examination the contents of a text from the plaintiff to Mike Daly dated 10 March 2018. This text read as follows:

"hi Mike, I didn't understand everything from our conversation, and I'm not sure if I'm working on Monday, or do you need the document from the doctor first. I don't fully understand this situation and am not too familiar with the insurance system in Ireland. I don't know why would I not work now if I'm about to get diagnosed and I will probably be directed for surgery after which my hand should return to fitness, maybe not fully but it will definitely be better. Especially that for the last 14 months after the accident I was working with a hurt and swollen hand, I was taking painkillers and no one was bothered by it or interested in it. I know that some of the manual work I might have been doing slower than before the accident, but I have to work, I have a family to support, that's why I never mentioned it and didn't take sick leaves because of that. Accidents at work or in life happen, it's normal and you won't have any problems because of that. Could you please let me know how about work on Monday? I also need to remind you that on 13th of the 21st of this month I have visits in the hospital. Regards, Waldemar"

20. The defendant maintains that this proves that the plaintiff had not had a conversation with Mike Daly about the accident the morning after the accident as alleged by the plaintiff as the text contains the line "that's why I never mentioned it". However, I do not

see any necessary inconsistency between the text of this message and the plaintiff's account of having told Mr Daly about his hand the morning after the accident. It needs to be borne in mind that immediately after the accident, the plaintiff did not believe it was very serious. When his symptoms did not ameliorate in the week or so after the accident, he first attended his GP on 17 January 2017, one week later. The plaintiff's evidence was that he got on with matters as best he could in the workplace because he needed to be at work and this text is consistent with that. The reference to "never mentioning it" is as consistent with a formal complaint or claim never been mentioned previously as to a reference to the incident itself never having been mentioned. The claim was first intimated by a letter from the plaintiff's solicitor of 28 February 2018, which clearly precipitated the conversation between the plaintiff and Mike Daly referenced in the text.

21. It strikes me as implausible that the defendants had no knowledge whatsoever of the nature of the plaintiff's injuries given that they had to give him permission on multiple occasions over the previous 14 months to leave work to attend medical and physiotherapy appointments. Sean Daly did fairly accept that the plaintiff had been taking more bathroom breaks which is consistent with the plaintiff's account of being affected by the injuries at his workplace while doing his best to get on with his work.
22. The plaintiff gave evidence that he was not given any hours by the defendant in the three months following this exchange with Mike Daly. This led to him losing his entitlement to the casual workers job scheme benefit. He went to Mr Daly in June 2018 looking for him to sign a letter which is required by social welfare from his employer. He said that Mr Daly was very angry with him when he did this. The plaintiff asked for a P45. He was given this in June but the termination date was backdated to 20 April 2018. Under cross-examination, Mr Daly was not in a position to explain why the termination date was 20 April 2018. He did say that the defendant was not in a position to give lighter duties to the plaintiff and that this is why he was let go.
23. In relation to the defendant's recollection of events, it is of course the case that recollections can be infirm. In my view on the balance of probabilities it was likely that Mike Daly did have a heated discussion with the plaintiff in early March 2018 following receipt of the claim letter from the plaintiff's solicitors. I do not believe that the defendants adequately refuted in evidence the plaintiff's account of him being unfairly excluded from any hours in the period from early March 2018 to June 2018 and then discovering on receipt of his P45 that he had been dismissed on 20 April 2018. This seems to me to be a state of affairs consistent with the plaintiff's account of how he was treated by the defendant after his solicitor had sent a letter of claim on his behalf.

Post-dismissal from Defendant

24. The plaintiff then went seeking alternative work. He gave evidence that he has worked since he was 14 years of age, that he loved to work and that he became depressed when he was at home not working. His GP advised that it was important to look for work to help address his depression. (The plaintiff was prescribed anti-depressant medication after losing his job, which he was still on at the time of the hearing).

25. The plaintiff registered with the local job centre in Castleisland and reported there every Friday when new employment offers were published. He applied to a variety of places for work but was not successful. Amongst the places he applied to were Kerry airport (for catering work), builders providers, Apache pizza, an electrical shop, and other outlets in Castleisland.
26. The plaintiff registered for a course with the job centre and did a security work course from September 2018 to February 2019 and received a certificate for that. He continued to look for work. He ultimately got a job with a recycling outfit in March 2020. This job involved in sorting out pieces of paper and cardboard waste from a conveyor belt.
27. The plaintiff left Ireland and returned to live in Poland with his wife and two adult sons (who had both been in 3rd level education in Ireland) in September 2020.
28. Having carefully observed the demeanour of the plaintiff as he gave his evidence over the course of 3 separate days in the witness box, I accept his account of events in relation to the accident and its aftermath as credible.

Liability

29. I heard evidence from Mr Lloyd Semple, forensic engineer, on behalf of the plaintiff. Mr Semple conducted a joint engineering inspection with William O'Keeffe of Tony O'Keeffe and partners on behalf of the defendant on 15 April 2019. Mr Semple prepared a written report dated 15 May 2019 which he spoke to as part of his evidence to the court.
30. Mr Semple gave evidence that the lifting of boxes weighing 20.5 KG from the fourth layer of the five layers of boxes on the pallets was just about within the recommended guidance of the relevant HSA guidance on manual handling weight limits. He did note the section of the relevant guidelines which emphasises that stress on the lower back is increased significantly if twisted trunk postures are adapted or if a person twists while supporting the load.
31. Mr Semple expressed the view that the spaces between the pallets of cheese were too tight in the instance in question. He expressed the view that the plaintiff had been presented with a trap situation. In his evidence, he expressed the view that it was important in order to have a safe system of work for manoeuvring boxes from a pallet that there be sufficient space for the worker to place his feet squarely on the ground and also to have sufficient extra space to step back in the event that a box might fall. He expressed the view that a distance of 1 m to 1.5 m would have been appropriate as a safe distance between the pallets.
32. Mr Semple further noted that it was compulsory under the relevant health and safety regulations to provide manual handling training and that no such training had been provided to the plaintiff.
33. Mr Pat O'Connell, forensic engineer in the firm of Tony O'Keeffe and partners, consulting engineers, gave oral evidence on behalf of the defendant. He was not present at the joint

engineering inspection but sought to address a number of aspects of the evidence given by Mr Semple.

34. Mr O'Connell expressed the view in his evidence that 1.5 m would be in excess of what would be required as a safe space between pallets for unloading purposes, and said that in his view 0.8 m to 1 m would not be unusual. (It will be recalled that it was estimated that there was only 0.4m to 0.8m available between the relevant pallets at the time of the incident). Mr O'Connell fairly accepted that the defendant's warehouse was spacious and that there was sufficient space within the warehouse to position pallets in such a way as to ensure there was a safe space between them.
35. Mr Semple suggested that the plaintiff contributed to the risk of the accident by placing his feet as he did, with his left foot wedged in one of the apertures at the base of the pallet. However, I accept the plaintiff's evidence that he positioned his feet the way he did in order to balance himself in circumstances where there was insufficient space between the pallets for him to position himself in the normal fashion.
36. Both Mike Daly and Sean Daly on behalf of the defendants accepted that the plaintiff had not been provided with formal manual handling training. Mike Daly's view was that the plaintiff should have known as a matter of common sense that if there was insufficient space between the pallets to carry out the unpacking and labelling safely, the plaintiff should not have attempted the task. However, in my view, the onus was clearly on the defendant as the plaintiff's employer to ensure that a safe system of work was in place and that the plaintiff was properly trained in relation to that system and I accept the plaintiff's evidence that he was under pressure on the day in question to complete the labelling of boxes on the pallets in question.
37. In my view, Mr Semple is correct in the opinion that he expresses that the plaintiff was presented with a trap situation here. There was not a proper, safe system of work in place in the defendant's warehouse which would have ensured that there was sufficient space between pallets to allow an operative to safely move and label boxes while leaving sufficient room in the event that the operative needed to jump back from a dropped box or otherwise needed to position himself safely to perform his assigned tasks.
38. Accordingly, in my view, the defendant acted in breach of its obligations under the Health and Safety legislation, and in breach of duty, in failing to provide a safe system of work and this led to the plaintiff's accident.

Contributory Negligence?

39. I do not believe that the plaintiff can be said to have been guilty of contributory negligence in the circumstances. I accept his evidence that there was not assistance available to re-position the pallets on the day and that he felt under pressure to finish the labelling job which he had been assigned. If he had been trained properly in appropriate procedures, and a proper system was in place to ensure that he was not asked to label boxes on pallets which were not sufficiently far apart, the accident could have been avoided. The accident occurred as a result of a risk generated by the absence of a safe

system of work. It is not an answer to that failure on the defendant's part to say that the plaintiff himself should have refused to complete his duties under this unsafe system.

Evidence as to the Plaintiff's Injuries

40. The plaintiff gave evidence that since his accident, he has had pain in his right hand on an ongoing basis. He expressed gratitude to the physiotherapists who have helped him improve the mobility in his hand. He says that his grip in his right hand (which is his dominant hand) though much improved is still weak, particularly for holding small things. He said that he sought to use his right hand as much as possible, in accordance with his medical advice, though it can be intermittently painful to do so. He still occasionally wears a wrist support on his right hand and forearm although he has been advised by his GP and his other medical advisers to seek to reduce the amount of time he wears this. He finds this protects him from the sensitivity of the scarring from the carpal tunnel operation (performed on him in April 2018), particularly in cold weather. He has a separate brace which he wears at night with a metal bar which keep his hand fixed. He still has occasional numbness, pins and needles and pain particularly in the morning and in the evening. He "shakes out" his hand when painful which he finds helpful. His right hand still occasionally swells. He is on a waiting list in Poland to undergo a second operation on his wrist (the first one performed in April 2018 only having given him 30-40% relief).
41. I was furnished with an agreed set of medical reports. Some six reports were furnished on behalf of the plaintiff. The defendant tendered two reports from Mr Michael O'Shaughnessy, consultant plastic and hand surgeon. Mr O'Shaughnessy also gave oral evidence and I will return to his oral evidence further below.
42. The plaintiff furnished a report from Mr Conor Hurson dated 11 October 2017. Mr Hurson is a consultant orthopaedic surgeon based in St Vincent's private hospital in Dublin. Mr Hurson examined the plaintiff on 11 October 2017, some 10 months after the accident. At that time, the plaintiff complained of pain and numbness in his right hand and wrist, had difficulty making a fist, had a burning pain in his hand and was regularly dropping things due to lack of strength in his right hand. The plaintiff also complained that he had difficulty driving as he was unable to properly hold the steering wheel and that he used his wrist instead of his hand to control the steering wheel. He said that he had previously worked as a chef but that he had difficulty since the accident with even preparing a sandwich. He complained of worse symptoms at night when the numbness could be very severe.
43. The plaintiff was examined by Eimear Conroy, consultant orthopaedic surgeon at University Hospital Kerry in Tralee, on 8 January 2019 (2 years after the accident) at the behest of PIAB. At that time, he continued to report that driving was a problem because of the difficulty in holding the steering wheel and that he had difficulty with gardening activities such as digging holes and with writing. He reported that his wife had to do his buttons on his trousers and to tie the laces of the runners he was wearing. The plaintiff continued to be on painkillers and was also taking antidepressant medication. She recommended a review by a pain specialist given the suggestion that he may have had

complex regional pain syndrome. She also recommended an assessment report from an occupational therapist.

44. The plaintiff attended Dr John Browne a consultant pain specialist in Cork. He furnished a report dated 26 June 2020. In addition to the carpal tunnel relief operation performed in April 2018, this report also noted that the plaintiff had a median nerve block performed on 7 October 2019 but that he did not report much relief on this.
45. The plaintiff also furnished a report from Dr Pat Daly, his GP, dated 18 October 2020. He examined the plaintiff on 21 September 2020 for the purposes of that report. In reciting the plaintiff's treatment since the date of first presentation to him on 17 January 2017, it was noted that a decompression operation was performed on the plaintiff's right wrist on 4 April 2018 (i.e. to treat his carpal tunnel syndrome symptoms) and that there were further orthopaedic reviews on 12 April 2018, 21 June 2018, 23 August 2018 and 20 December 2018. It was noted that the plaintiff had developed hypersensitivity of his surgical scar. This report noted that the plaintiff continued to experience swelling of his right hand in the morning after completion of his work shifts, which reduced in the evening. It notes that the plaintiff reports experiencing numbness of holding an object for longer than 1 minute and that he can often drop objects of his hand. It notes that he finds that vibration can cause pain.
46. The report also stated as follows:

"[the plaintiff] describes having to unscrew a bottle top with his left non-dominant hand, being unable to do the task with his right hand. He also has to hold a pen in a different way to previously, and is much slower writing now. He occasionally drops his mobile phone. He holds his razor in his left hand. He finds tying his belt and shoes difficult as is using zips. He says that he is a trained cook but is unable to use a knife effectively now. He hoovers with his left hand. He puts bins out for collection with his left hand. He drives by holding the steering wheel using the ring and little fingers of his left of his right hand. He writes by holding the pen in a different grip".
47. This report also notes that he described getting temporary relief by shaking out his hand and that he uses a soft wrist support while working and when driving. The report noted, as the plaintiff confirmed in his oral evidence, that the plaintiff was happy with the work of his physiotherapist as a result of which he regained some movement of his hand and fingers.
48. The plaintiff also furnished two short medical reports from Polish medics and gave evidence that he is due to undergo a second procedure in Poland for relief of his ongoing carpal tunnel symptoms.
49. Mr O'Shaughnessy first examined the plaintiff on 18 December 2019, on behalf of the defendant. He noted in his report of that examination that the plaintiff:

"would appear to have sustained a significant soft tissue injury to his right hand as a result of an accident at work on 10 January 2017. It would appear that he then went on to develop a right carpal tunnel syndrome i.e. developed pain, pins and needles and numbness affecting the tongue/index/middle fingers of the right hand. It is certainly possible that his fall could have precipitated carpal tunnel syndrome. Subsequent to his carpal tunnel surgery, he described an improvement of approximately 40% in his symptoms. However, his post-operative course appears that been complicated by marked scar sensitivity-as a result of which he appears that have become overprotective of the hand-such that he now does very little with the hand.

However, the swelling has settled and he does have a very active range of movement of the hand - though it is stiff and awkward. I have advised the plaintiff that he needs to remove his protective wrist support that he uses during the day and make a deliberate effort to use the right hand in particular for gripping activities. I have also advised him that what he is trying to re-engage his brain with his right hand that he might need to look at what he is doing with his right hand so that the visual input will reinforce what he is trying to do with his right hand. I would be of the opinion that if he were able to access a good hand therapist, this would be of benefit to the plaintiff. He is very accepting and understanding of this advice."

50. Mr O'Shaughnessy also expressed the view in this report that it would be worthwhile arranging for the plaintiff to have repeat nerve conduction studies in light of his persistent carpal tunnel symptoms. In relation to the possibility of the plaintiff having developed a complex regional pain syndrome, Mr O'Shaughnessy said it was possible he may have developed an element of same but at that point in time his problem appeared to be persisting carpal tunnel symptoms as well as scar sensitivity that he had become overprotective of the hand as a result.
51. Mr O'Shaughnessy examined the plaintiff again on 17 September 2020. In his report of that examination, he noted that the plaintiff advised him that he was wearing the soft wrist support much less than before but that he "did wear it today as he would find that the back of his right hand would swell after driving". The report noted that the plaintiff was much less protective of the right hand than before with him quite happy to shake hands with his right hand "although a little awkward doing same". Mr O'Shaughnessy noted that the plaintiff's tendency to keep the ring and little fingers of his right hand in a flexed position was also much improved from the last review. He noted mild residual swelling of the back of the plaintiff's right hand with reduced sensation to the tongue/index/middle/adjacent side of right finger of right hand. He noted an improvement in the tenderness of the scarring from the carpal tunnel surgery.
52. Mr O'Shaughnessy then gave the following opinion:

"Since the time of my original report the plaintiff is clearly using the right hand much better and the scar sensitivity has clearly improved. That would indicate that

he has taken on board much of the instruction that I gave previously. The focus of management has been on scar desensitisation measures and increasing the use of the right-hand and not being afraid to use it. Although the hand does appear to have a persistent tendency to swell at the end of a day's work and, occasionally, the swelling can be such that he might have to take a week off work to allow the swelling to recover; this, apparently, has happened just twice in the last 6 months.

In relation to his complaint of reduced power grip, although one can have a complaint of reduced power grip after carpal tunnel surgery, this usually settles after approximately 6 months or so. This persistent complaint is probably due to a combination of persistent scar sensitivity (which does appear to be improving) and persistent carpal tunnel's symptoms. As indicated in my original report, I do think it would be worthwhile repeating the nerve conduction studies that he had done by Dr Brian McNamara at Cork University Hospital prior to his surgery with Mr Higgins in April 2018. It is possible that the plaintiff might have to consider further decompression of the right carpal tunnel for his persistent carpal tunnel symptoms which do seem very typical and quite significant.

In relation to the swelling of the back of his right hand after use, although this is a complaint that should improve with time, it is possible that the plaintiff will have at least some degree of this particular complaint indefinitely”.

Video footage

53. The defendant commissioned surveillance footage of the plaintiff which was taken on 16 September 2020 and 18 September 2020 and which was shown to the plaintiff (and the Court) during cross-examination. The defendant submitted that this footage supported the proposition that the plaintiff had grossly exaggerated his injuries and symptoms. The footage variously showed the plaintiff driving his car, reversing, overtaking and parking. It showed the plaintiff with his right hand on the steering wheel which the defendant maintained was contrary to what the plaintiff had told his medical advisers including the defendant's medical adviser Mr O'Shaughnessy who the plaintiff in fact attended on 16 September 2020. The footage showed the plaintiff pushing a supermarket trolley and retrieving items on the shelves. It also showed him, at one point, carrying a bag with his right hand (although it should be said that a heavy bank of shopping from the supermarket was seen to be carried by him with his left hand as he brought that shopping to his car). The footage showed that the plaintiff was not wearing his soft wrist support, in the main, although he did put it on his way into his medical appointment with Mr O'Shaughnessy. The footage also showed the plaintiff assisting his son in moving a washing machine into the back of his car and using his right hand in the course of doing so. It also showed him squeezing a ketchup container at one point, touching the sat nav screen in his car and taking a ticket from a car park machine, all using his right hand.
54. The plaintiff for his part maintained under cross examination that there was nothing inconsistent between the contents of the footage and the symptoms which he described to his medical advisers. He made the point that he was repeatedly advised by his medics to use his right hand as much as possible. He said that he was on constant painkillers

which blocked the pain and allowed him to use his right hand more than he otherwise would. He pointed out that his complaint, as is supported by his medical advisers reports, is that he has had reduced grip and difficulty with managing small objects, none of which was undermined by the footage. He also said that the pain varies depending on whether he had been working, the weather at the time and so on. He -correctly- pointed out that he can be seen at certain points in the footage ringing his hand wringing his right hand which is what he did when it was painful. (This is confirmed by the contents of his medical reports). The plaintiff stated in relation to his driving that his point had been that he could use his right hand for driving short distances, even though it might be sore afterwards, but that for longer distances he needed to use his wrist on the steering wheel.

55. As discussed below, Mr O'Shaughnessy was also shown some (but not all) of the footage which led him to qualify his views as the true nature of the likely range of movement of the plaintiff's right hand (although not his views as to the plaintiff's carpal tunnel symptoms) expressing the view in his oral evidence that the footage demonstrated a range of movement and functionality of the right hand "totally at odds" with what the plaintiff had presented to him, in September 2020 showing, in his view, a normal range of hand movement, good workable grip and not demonstrating hand preference.

Section 26 application

The application

56. At the conclusion of the evidence, the defendant made an application pursuant to s.26 Civil Liability and Courts Act 2004 as amended ("s.26") seeking to have the plaintiff's action dismissed on the basis that the plaintiff had given or adduced, or dishonestly caused to be given or adduced, evidence that was false in a material respect and which the plaintiff knew to be false.
57. Specifically, it was contended that the account of the severity of his ongoing injuries to Mr O'Shaughnessy, as recorded in Mr O'Shaughnessy's second report completed following his examination of the plaintiff on 16 September 2020, caused Mr O'Shaughnessy to be misled in turn leading him to come to an erroneous view in his written report evidence. The basis upon which it was contended that the plaintiff's account of his injuries to Mr O'Shaughnessy was false was the contents of the video surveillance footage of the plaintiff of 16 September 2020 (the day of that examination) and 18 September 2020 and the views expressed by Mr O'Shaughnessy in the witness box that based on the footage which he had been shown he believed that the plaintiff's actual ability to use his right hand was "totally at odds" with the picture which the plaintiff had presented to him during the consultation of 16 September 2020.
58. It emerged during the cross-examination of Mr O'Shaughnessy that in fact Mr O'Shaughnessy had only been shown edited highlights from the defendant's perspective of that footage. Whereas the total footage shown in court during the plaintiff's cross-examination ran to some 17 or so minutes, it transpired that Mr O'Shaughnessy had only been shown a total of less than 3 minutes of that footage. This emerged when Mr O'Shaughnessy was asked in cross-examination about the fact that the plaintiff at various points in the footage could be seen wringing his right hand which, it was suggested to

him, was consistent with the plaintiff's carpal tunnel syndrome symptoms and the general pain he was experiencing in that hand. It then became clear that Mr O'Shaughnessy had not been shown that part of the footage.

59. Objection was immediately, and understandably, taken by counsel for the plaintiff to the fact that Mr O'Shaughnessy had not been shown all of the footage before giving his evidence. It was submitted that this served to render inadmissible Mr O'Shaughnessy's oral evidence or at least to considerably diminish the weight of the evidence sought to be led from Mr O'Shaughnessy on the matter.
60. Mr O'Shaughnessy did accept, in cross-examination, that the plaintiff wringing his right hand was consistent with the symptoms he had complained of, particularly in relation to persistent carpal tunnel syndrome. He also accepted that the plaintiff had been frank with him in telling him at the consultation that he had just put on his wrist support as he tended to do after driving for a lengthy period. (The consultation was in Cork and the plaintiff had driven across to it from Castleisland). Mr O'Shaughnessy nonetheless maintained that the range of movement of the plaintiff's right hand on display was at odds with how the plaintiff sought to present it to him at the consultation.
61. Counsel for the defendant quite properly apologised for the fact that neither the plaintiff nor the court had been informed at the outset of Mr O'Shaughnessy's evidence that he had only been shown a portion of the relevant footage and accepted that Mr O'Shaughnessy ought to have been shown the full footage. It was submitted nonetheless that the Court could see for itself that there was a clear disparity between the range of hand movement and functionality visible in the entire of the footage and that recorded in Mr O'Shaughnessy's second report.

The applicable legal principles

62. Section 26 provides as follows:

"(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.*

(4) *This section applies to personal injuries actions—*

(a) brought on or after the commencement of this section, and

(b) pending on the date of such commencement.”

63. The principles governing an application under s.26 were comprehensively summarised in the Court of Appeal decision of Irvine J in *Platt v OBH Luxury Accommodation Ltd* [2017] IECA 221 (“*Platt*”). The more salient aspects of those principles can be summarised as follows:

- (a) the section was intended to operate as a significant deterrent to claimants who might be minded to achieve an unjust result by misleading the court and/or their opponent concerning the truth of their claim in some material respect (paragraph 62)
- (b) the onus of proof in a s.26 application lies on the defendant (paragraph 64)
- (c) while the civil standard of probability applies, regard must be had to the seriousness of the matter being alleged, the gravity of the issue and the consequences in considering the evidence necessary to discharge the onus of proof (paragraph 64)
- (d) when s. 26 is invoked, it has draconian consequences for the plaintiff (paragraph 61); the authorities caution against any rush to judgment in favour of a defendant who seeks to invoke s.26 having regard to the draconian consequences of the provision (paragraph 65)
- (e) s.26 should not be seen as an opportunity “*to prey on the frailty of human recollection, the accidental mishaps that so often occur in the process of litigation or to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive the plaintiff of an award of compensation to which they are rightly entitled*” (paragraph 65)
- (f) false or misleading evidence, even if intentionally advanced, cannot justify invocation of the section if it is not material to the claim (paragraph 68)
- (g) for false or misleading evidence to come within the provision, it must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent (paragraph 68)

- (h) However, this does not mean that the defendant must establish that the entirety of the plaintiff's claim is false and misleading in order to succeed in such an application (paragraph 68)
 - (i) the court faced with a s.26 application must adjudicate on the plaintiff's knowledge of their actions by reference to a subjective test (paragraph 70)
64. The principles set out in *Platt* have been applied in a number of subsequent cases including *Keating v Mulligan* [2020] IEHC 47 and *Browne v Van Geene & Another* [2020] IECA 253, both of which were also opened to me on the application.

The parties' submissions on the s.26 application

65. The defendant submits that the false information it alleges was given by the plaintiff to Mr O'Shaughnessy and also to his own GP Dr Pat Daly on 21 September 2020 (a few days after the video footage) satisfies the requirements of s.26 necessary to have the action dismissed as those requirements have been interpreted in the relevant case law and that I should dismiss the plaintiff's action in the circumstances.
66. In respect of the information given by the plaintiff to Mr O'Shaughnessy, the defendant relies on the fact that in Mr O'Shaughnessy's report of the examination of the plaintiff on 16 September 2020 he noted that while the plaintiff was "*much less protective of the right hand than before - quite happy to shake hands with his right hand*", he was "*a little awkward doing same*" and "*tendency to keep the ring and little fingers of his right hand in a flexed position - making it a little more difficult for him to e.g. shake hands. However, this was also much improved from the time of my last review.*"
67. The defendant relies on the oral evidence of Mr O'Shaughnessy where he expressed the view that what he saw in the footage was at odds with what had been presented to him and where he expressed the view that the video footage demonstrated that the plaintiff had a normal range of movement with his right hand.
68. The defendant also contended that the video footage demonstrated that the paragraph of Dr Daly's report of his examination of the plaintiff on 21 September 2020 (set out in full at paragraph 46 of this judgment above) in which the plaintiff described a series of real limitations on the use of his right hand was completely undermined by the video footage which showed there were no such limitations in fact. The defendants instanced in this regard those parts of the footage which showed the plaintiff squeezing a ketchup container, handling a washing machine, operating a steering wheel normally, taking a ticket from a ticket machine normally and operating a sat nav screen.
69. Counsel for the plaintiff submitted that there was no material inconsistency between the contents of the video footage and the account of his ongoing symptoms related by the plaintiff to Mr O'Shaughnessy or Dr Daly. He submitted that the plaintiff was seen to be doing precisely what Mr O'Shaughnessy and his other doctors had advised i.e. use his right hand as much as possible. He submitted that the handwringing evident in the footage was entirely consistent with the carpal tunnel syndrome symptoms and general pain in that

hand. He submitted that the account given to Dr Daly and Mr O'Shaugnessy could not on any objective view be said to be materially misleading within the meaning of s.26. It was pointed out that the video footage did not show the plaintiff unscrewing a bottle top, holding a pen, owning an electric razor, tying his belter shoes, using a knife, (being the matters referenced in Dr Daly's report) and that the footage was consistent with the plaintiff's evidence that he would use his right hand for shorter car journeys but not longer ones. It was submitted that the plaintiff had been consistent in his oral evidence to the effect that the swelling and pain were intermittent, that he was constantly on painkillers to block the pain, and that he sought to get on with matters as best he could since immediately after the accident. He submitted that the accounts to the medics were simply consistent with the overall limitations which he had experienced as a result of the accident. He also submitted that Mr O'Shaugnessy had also not qualified his opinion in relation to the plaintiff's ongoing carpal tunnel symptoms in light of the footage.

Decision on the s.26 application

70. As noted by Irvine J at paragraph 43 of her judgement in *Nolan v O'Neill* [2016] IECA 298, as set out at paragraph 65 of her judgement in *Platt*, "*any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent.*" In my view, it cannot objectively be said that the plaintiff gave such false or misleading accounts to Mr O'Shaugnessy or to Dr Daly, in September 2020, as to be so sufficiently substantial or significant in the context of the claim as to render the claim itself fraudulent. It is in the nature of things that a plaintiff such as the plaintiff who was suffering from ongoing symptoms would seek to emphasise the worst aspects of those symptoms when getting the opportunity to explain his position to medical experts. I found the plaintiff to be generally truthful and credible in his presentation of his evidence and found his explanation for the alleged disparity between his range of movement in the video footage and the accounts given in the medical reports to be plausible. The plaintiff emphasised that he had sought to use his right hand as much as normal, and was certainly doing so by September 2020, in light of the advice given to him by the medical advisers he attended, including Mr O'Shaugnessy. Indeed, Mr O'Shaugnessy notes this to the plaintiff's credit in his report of the examination of 20 September 2020. That report also notes that the plaintiff had full flexion in his right hand.
71. The functionality of the plaintiff's right hand use had improved by September 2020 as recorded in Mr O'Shaugnessy's report from that time and as evidenced by the video footage. The plaintiff correctly told Mr O'Shaugnessy he had put on his wrist support after the drive and just before his consultation on 16 September which is borne out by the footage. The Plaintiff gave evidence that he tended to use his right wrist or only some of that hand when driving longer distances; that was not undermined materially by the contents of the footage which showed use of the right hand on the steering wheel in built-up areas (such as the supermarket car park).
72. I do not see that the footage materially addressed "close grip" scenarios to the extent contended for by the defendant e.g. the squeezing of the ketchup bottle did not appear to

me to be particularly forceful and the tapping of the sat nav screen was not a gripping motion.

73. It is also relevant to my assessment of this application that the relevant video footage does show actions by the plaintiff consistent with his complained-of symptomology including wringing out his hand (which Mr O'Shaughnessy accepted was consistent with ongoing carpal tunnel symptoms) and carrying a heavy bag of shopping out to his car with his left hand and not his dominant right hand.
74. While respecting Mr O'Shaughnessy's expertise, he was put in the invidious position where he was not able to express his views in oral evidence with the benefit of having seen the full video footage aspects of which may have led him to express more nuanced views. I do feel the need to place somewhat less weight on the views expressed by him in oral evidence in the circumstances.
75. I did not understand Mr O'Shaughnessy in his oral evidence to resile from his examination conclusions that there was mild residual swelling on the back of the plaintiff's right hand at this examination, that there was reduced sensation in certain of the fingers of the right hand and that the scar from the carpal tunnel surgery was still somewhat tender (but much improved since the time of his first examination). I note also that the examination section of Mr O'Shaughnessy's report noted "full extension and full flexion of the fingers and good movement of the fingers away and towards the midline as well as good thumb opposition."
76. In my view, in all the circumstances, the plaintiff's account of the intermittent limitations of the functionality of his right hand (particularly in grip situations) to the medical experts in September 2020, in the context of his evidence as to his injuries as a whole was not so materially undermined by the contents of the video footage as to constitute fraud on his behalf within the compass of s.26(1)(a).
77. If I am wrong in my view in relation to the application of s.26(1)(a) to the facts of this case, having had an opportunity to carefully consider the demeanour of the plaintiff as he gave his evidence, both in direct examination and when under cross-examination on the alleged exaggeration of his claims, insofar as it might be said that he may have misled Mr O'Shaughnessy or Dr Daly in any material respect in September 2020, in my view the plaintiff did not do so in a way which he knew to be false or misleading within the meaning of s.26(1)(b). It is clear from the evidence that the plaintiff has been significantly affected by his injuries, including having been treated for depression arising from same. I found him an honest witness and in so far as he was emphasising issues relating to manual dexterity and the extent of his limitations at his consultations in September 2020, I believe he did not do so in any intentionally dishonest or fraudulent way.
78. Accordingly, I do not believe that the defendant has discharged the onus of proof on it of demonstrate that the requirements of s. 26 (1) are met on the facts of this case.

Aggravated damages?

79. The plaintiff invited me to award aggravated damages in the event that I rejected the defendant's s.26 application. In my view, it would not be appropriate to award aggravated damages in the circumstances. I believe that this case can be properly regarded as in the category of cases (such as that addressed by Noonan J in *Browne v Van Geene* [2020] IECA 253 at paragraph 108) where it was not inappropriate for the defendant to bring the application.

Damages

General Damages

80. In my view, an appropriate level of general damages for pain and suffering to date (i.e. in the five years since the date of the accident to the date of this judgment) is €37,500.

81. I base this figure on fact that the plaintiff has been suffering ongoing pain and swelling in his right hand for some 5 years now, albeit more intermittently in the last couple of years. He has undergone carpal tunnel relief operation under general anaesthetic, which lead to scarring which has been particularly sensitive. He has had reduced functionality with his right hand, which is his dominant hand, for much of that 5 year period. He has followed the advice given to him by his treating doctors. He attended physiotherapy over a lengthy period in a disciplined fashion and gave fair evidence that this has been helpful to him. His injuries were such that as a person dependent largely on physical labour for his source of income, he was unable to get work despite reasonable efforts in that regard which led to him suffering from depression for which he has been taking antidepressant medication. The accident has had a significant impact on the quality of his home and working life.

82. In arriving at this figure, I have taken into account the how the plaintiff presented in the video footage from September 2020 where he was able to perform many regular activities with his right hand without undue difficulty, although I accept that he continued at that time and since to experience intermittent swelling in his right hand, intermittent pain and ongoing carpal tunnel symptoms such as numbness.

83. It is more difficult to assess an appropriate level of general damages for pain and suffering into the future in this case, in circumstances where the plaintiff continues to suffer from some degree of carpal tunnel syndrome symptoms and is due to undergo another procedure in relation to same, as has been advised by his Polish medical advisers, and where it cannot be known at this point whether that procedure will give the plaintiff complete relief from his residual symptoms. I also note the view of Mr O'Shaughnessy (not qualified after viewing the video footage) that it is possible that the plaintiff may have some degree of swelling indefinitely. In my view, in all the circumstances, an appropriate level of general damages for pain and suffering into the future is €7,500.

Special Damages

84. I accept the figures for loss of earnings (€24,525) and other vouched special damages (just under €1,600) advanced on behalf of the plaintiff. I hold that his level of special damages is accordingly €26,000.

Award

85. Accordingly, I award the plaintiff total damages in the sum of €71,000.