



**THE HIGH COURT
LIMERICK**

[2025] IEHC 101

[Record No. 2022/5990P]

BETWEEN:

JOHN BUCKLEY

PLAINTIFF

AND

PAUL LENIHAN

DEFENDANT

JUDGMENT of Ms. Justice Emily Egan delivered on the 20th day of February, 2025

Introduction

1. The plaintiff, who is now 48 years of age lives in Duagh, Kerry, and works as a heavy machine driver. He seeks damages for personal injuries arising out of an accident on 4th December 2020. On that date, the plaintiff was approaching a crossroads and had reduced his speed with the intention of turning left, when his vehicle was hit from the rear by the defendant's vehicle. The force of the collision was fairly significant, as it shunted the plaintiff's car down the road and spun it around.

2. The action is proceeding as an assessment of damages only, liability is not in issue.

3. The principal injury sustained by the plaintiff in this accident was to his lower back and left leg. The plaintiff estimates that his symptoms have improved by 60% to 65% since the accident. However, it does not appear to be disputed that he continues to suffer from back pain and left leg sciatica which is likely to continue for the foreseeable future. The contested part of the case relates to the following issues:

1. Whether the plaintiff's past, current and future symptoms are attributable to the accident of 4th December 2020 or to pre-existing degenerative changes in his lumbar spine;
2. Whether the award of general damages for pain and suffering ought to be reduced by reason of the plaintiff's failure to mitigate his loss in deciding not to undergo an epidural injection which had been advised by Dr. Aideen Henry, orthopaedic and sports medicine physician;
3. The appropriate award of general damages;
4. Whether the plaintiff ought to recover damages for loss of opportunity and if so in what amount.

The plaintiff's evidence

4. The plaintiff and his partner have two children, aged 14 and 17. The plaintiff was not educated past primary school and has not completed any formal state examinations. It is common case that the plaintiff experiences significant literacy and numeracy issues.

5. For the entirety of his thirty-year career prior to this injury, the plaintiff has worked in manual occupations, primarily as a heavy machine driver and, at times, as a labourer in the construction and agricultural sectors. About ten or fifteen years ago, the plaintiff obtained "tickets" to operate an excavator and teleporter. He has also completed the one-day mandatory safety programme for construction workers required for a Safe Pass. The plaintiff has received

no other formal qualifications or training. Despite this, he has a knack for mechanical repairs and, prior to the accident, regularly carried out repairs and maintenance on his employer's vehicles. In this regard, the plaintiff had commenced employment in 2015 with Nautic Building Contractors ("Nautic"), for whom he worked on a permanent full-time basis at the time of his accident.

6. In the immediate aftermath of the accident, the plaintiff thought he had avoided significant injury. However, he woke the following day with significant lower back pain radiating into his left leg, which he experienced (and indeed continues to experience), as a pulsing type leg pain. He attended his general practitioner for this pain on 30th December 2020. Due to the severity of his symptoms, the plaintiff was referred to the Accident and Emergency Department of University Hospital Kerry ("UHK") to rule out a deep venous thrombosis (DVT). DVT was ruled out and the plaintiff was diagnosed with a torn ligament in his left leg and discharged on painkillers.

7. Unfortunately, the plaintiff's pain did not improve and he reattended his general practitioner in January 2021, who certified him as medically unfit for work. This remained the position for almost six months until the end of May 2021. The plaintiff suffered with severe pain which interfered with his sleep during this entire six-month period. He initially mobilised with the aid of two crutches, then with one crutch and finally with the occasional use of a crutch. Due to back pain and stiffness, the plaintiff struggled to get out of bed quickly and therefore suffered from occasional urinary incontinence.

8. The plaintiff attended fifteen sessions of physiotherapy ending in around November 2022. On 21st January 2021, he underwent an MRI scan of the lumbar spine which revealed multi-level degenerative changes throughout the lumbar disc spaces, significant central and left sided disc protrusion at L4/ L5 and likely compromise of the L5 nerve root.

9. The plaintiff's evidence is that he experiences daily pain in his back, the outer aspect of his left calf and occasionally in the left buttock area. This pain is worse when he is stiff, stressed or agitated. When he coughs or sneezes, he experiences sharp darts of pain from his back down the left leg. On an average day, the plaintiff's back and leg are stiff and sore when he wakes in the morning. He has to flex his leg for a while before he can get out of bed and is unable to get up suddenly. After rising from bed, the plaintiff needs to take fifteen to thirty minutes to limber up before he can go about his day. The plaintiff takes over the counter painkillers virtually every day. Despite this, driving for more than 30 or 40 minutes, prolonged standing, bending and carrying all exacerbate the plaintiff's back and left leg symptoms.

10. The plaintiff, who was extremely fit prior to the accident can now only walk relatively short distances. Pre-accident the plaintiff weighed twelve stone; he now weighs closer to sixteen stone. In terms of his leisure activities, prior to the accident, the plaintiff went for a walk every evening with his young daughter and their dog. He rather poignantly stated that his biggest problem is that he was now unable to do this as he cannot walk more than a kilometre or two, and finds walking on hills or unsteady ground difficult.

11. When asked, both in direct and cross-examination why he had not attended for an epidural to assist him with his sciatica as recommended by Dr. Henry, the plaintiff's response was that he had a morbid fear of needles. Indeed, it was clear from the plaintiff's demeanour during this sequence of questions that he was truly frightened by the prospect of an epidural. Although the plaintiff said that he might consider going for an epidural in the future, I am satisfied that it is most unlikely that he will choose to undergo such a procedure.

The plaintiff's evidence as to the vocational implications of his injury

12. At the end of his period of certified sick leave in May 2021, the plaintiff returned to work with Nautic. Nautic facilitated the plaintiff's return to work in a number of ways. For

example, prior to the accident, the plaintiff drove to and from various work sites in a van provided to him for that purpose by Nautic. After the accident, the plaintiff found long periods of restricted sitting painful. As such, the combination of driving to work and then sitting in a digger all day caused him excessive pain. Nautic therefore arranged for another employee to collect the plaintiff and drive him to and from work sites. In addition, pre-accident the plaintiff routinely got out of the digger to help with pipe laying, setting levels, etc. Now the plaintiff is restricted to driving duties only. He cannot assist in such tasks because bending, stooping and getting down on his hands and knees is too painful. The plaintiff is also unable to lie flat under vehicles in order to perform repair and maintenance work, as he fears this will worsen his back pain. In all these respects, Nautic was understanding. It tolerated the plaintiff's need to cut down on the range of tasks which he could perform and permitted him to leave work early or take time off as necessary.

13. Unfortunately, Nautic went into liquidation in January 2024, after which the plaintiff had a period of unemployment. In May 2024, the plaintiff obtained work with Walsh Agricultural Contracting, where he currently works as a machine driver.

14. Taking matters up to the present time, the plaintiff remains vocationally compromised in all of these respects. The plaintiff's evidence is that prior to the accident he worked long hours, five, six, or even seven days per week and undertook significant overtime. However, although he still occasionally attempts to do so, this is now extremely difficult because sitting for long periods causes high levels of pain. For the same reason, the plaintiff experiences significant difficulty driving himself long distances to work sites in the confined space of a car. The plaintiff finds it easier to drive an excavator digger than a car because he is able to stand up in the cab to relieve his left leg pain. However, he still finds that if he drives for long periods, his lower back sends a pulse of pain down his leg, particularly around the calf. In order to manage this, the plaintiff has to stretch himself regularly, which involves getting out of the

digger and walking around or leaning his leg out of the digger and flexing it to ease out the pain and pulsing in his leg. The plaintiff also continues to avoid bending and lifting which restricts the range of tasks he can perform.

Medical evidence

15. The medical reports of both the plaintiff and defendant were agreed and no medical practitioner therefore gave evidence to the court. Rather than presenting these reports in chronological order, I will attempt to summarise them by medical speciality.

General practitioner and emergency medicine consultant reports

16. The plaintiff has submitted two reports from his general practitioner Dr. Tony O'Dowd. Dr. O'Dowd confirms that the plaintiff attended him half a dozen times in the first three months after the accident, complaining of severe lower back pain radiating to his left leg. The plaintiff was tender on examination with a very limited range of movement. Dr. O'Dowd prescribed Vivomo, Solpadol and Lyrica and referred the plaintiff for an MRI of the lumbar sacral spine. When reviewed on 3rd March 2021, the plaintiff's symptoms had definitely improved although he still had considerable pain, stiffness and discomfort, with poor overall range of movement. Dr. O'Dowd therefore referred the plaintiff for physiotherapy. Dr. O'Dowd saw the plaintiff again in April and May 2021 and more recently in May 2024. On each occasion, he reported ongoing lower back and/ or left leg pain.

17. Dr. Martin Boyd, consultant in emergency medicine, examined the plaintiff on behalf of the Personal Injuries Assessment Board in November 2021, approximately one year after the accident. Clinical examination of the plaintiff's back revealed tenderness and straight leg raising on the left was reduced. Dr. Boyd assessed the plaintiff's ability to sit, climb stairs and walk as affected to a minor degree and his ability to carry, lift, bend and stoop as moderately

impacted. In Dr. Boyd's opinion the plaintiff's previously asymptomatic underlying degenerative changes in his spine had been exacerbated by the accident resulting in pain down his left leg. Dr. Boyd's assessment was that more than 75% of the plaintiff's disability was caused by the accident. Dr. Boyd expected that the plaintiff would make a good recovery between two and three years after the accident and advised further physiotherapy sessions.

Radiology reports

18. Dr. Alexander Stafford, consultant radiologist, reviewed the MRI of the plaintiff's spine on behalf of the plaintiff. This MRI scan, carried out seven weeks post-accident, showed no acute bony injury but demonstrated multilevel degenerative change to the lumbar discs, disc protrusion and likely compromise of the L5 nerve root on the left side. Dr. Stafford opined that the degenerative changes likely ante-dated the accident. However, in light of the lack of pre-existing disability and given the timing of the onset of symptoms after the accident, one could conclude that the plaintiff's lumbar pain and left leg pain were attributable to a worsening of the pre-existing relatively asymptomatic underlying degenerative condition of the lumbar spine. Dr. Stafford's opinion is also that the disc protrusion at the L4/ L5 level was almost certainly worsened as a consequence of the accident.

19. The plaintiff's radiology was also reviewed by Prof. Peter MacMahon, clinical professor in radiology, on behalf of the defendant. Prof. MacMahon's view is that the MRI scan reveals no objective evidence of recent traumatic injury of the lumbar spine. In Prof. MacMahon's view the predominant disc changes are long standing in appearance.

20. On the other hand, Prof. MacMahon concedes that it is possible that a significant traumatic injury could exacerbate these pre-existing findings in the lumbar spine leading to the initiation, or exacerbation, of left leg symptoms. In terms of prognosis, Prof. MacMahon states that it is hoped that the plaintiff's back symptoms related to his degenerative disc disease would

settle with conservative measures, given the lack of any pronounced stenotic change on the MRI study.

Orthopaedic reports

21. The plaintiff was examined by Dr. Aideen Henry on two occasions in September 2022 and April 2024. In her first report, Dr. Henry noted that the plaintiff's left leg is sore most days of the week on an intermittent basis. His leg is very sore in the morning and the pain is exacerbated by sitting, lifting, walking, sneezing, coughing or straining. The plaintiff was taking Difene four times a day and Nurofen, as needed, together with Solpadol four times a day.

22. Clinical examination of the plaintiff's lumbar spine was positive for sciatica; straight leg raising on the left was significantly limited and caused left lateral shin pain. Dr. Henry diagnosed sciatic type leg pain likely due to intervertebral disc prolapse with nerve root impingement.

23. Dr. Henry recommended that the plaintiff attend for an epidural injection which, she felt, would have a dramatic effect on his symptoms. She noted however that as the plaintiff had a phobia of needles, he would need gas and air before he could go ahead with this procedure.

24. In her more recent report, Dr. Henry noted that at over three years post-accident, the plaintiff continued to complain of daily left leg sciatic type pain which often woke him at night with cramping. He has left leg pain daily, exacerbated by sitting, sneezing or coughing, as before.

25. On examination, the plaintiff's lumbar spine remained positive for sciatica, lumbar flexion produced calf pain and straight leg raising was reduced on the left, with associated pain and discomfort between the left knee and ankle.

26. Dr. Henry's report concludes that the plaintiff continues to suffer from persistent sciatic left leg pain due to intervertebral disc prolapse with nerve root impingement. She again advised him to undergo epidural injection, which she believed would be of benefit to him. The plaintiff's prognosis depended on his response to the injection.

27. The plaintiff was examined on behalf of the defendant by Mr. Ghulam Gardezi, consultant orthopaedic surgeon, on two occasions in April 2023 and August 2024. In his first report, Mr. Gardezi notes that the plaintiff reported being 60 to 65% improved but continued to get on and off pulse like pain in the outer aspect of his left calf and, to a lesser extent, his left buttock.

28. Clinical examination of the lumbar spine revealed restriction of movement, whilst straight leg raising was within normal limits. Neurological examination was otherwise normal.

29. Mr. Gardezi noted that the MRI of the lumbar spine had revealed degenerative changes, focal disc protrusion and foraminal stenosis. In Mr. Gardezi's view the degenerative disc changes, disc bulges and foraminal stenosis, predated the accident. On the other hand, Mr. Gardezi accepts that the accident caused nerve root irritability leading to the plaintiffs' initial complaints of sciatica. Further, although the plaintiff's symptoms had improved his residual complaints were likely to persist for some time.

30. In his follow up report of August 2024, Mr. Gardezi notes that the plaintiff had had no further investigations or treatment. The plaintiff's clinical examination and complaints were more or less static as compared to the previous examination. As it is now four years since the accident, Mr. Gardezi states that the plaintiff's residual complaints are likely to persist for the foreseeable future.

Whether the plaintiff's past, current and future symptomology are attributable to the accident of 4th December 2020 or to pre-existing degenerative changes in his lumbar spine?

31. All clinical examinations have either been positive for sciatica or have revealed restriction of movement in the lumbar spine. It appears to be common case as between the general practitioner, Dr. O'Dowd, the emergency medicine consultant, Dr. Boyd and the orthopaedic surgeons Dr. Henry and Dr. Gardezi, that the plaintiff continues to experience left leg sciatica.

32. There is some divergence of views on the interpretation of the imaging. Dr. Stafford's view is that, whilst the plaintiff had pre-existing asymptomatic degenerative changes in his lumbar spine, the overlay of the accident almost certainly worsened the protrusion at the L4/L5 level and caused his current symptoms. Prof. MacMahon and Mr. Gardezi on the other hand, do not attribute the disc herniations to the accident.

33. No doctor or radiologist has given evidence on this matter. It is not possible to discern from the reports alone which of these opinions is more cogent. As the plaintiff bears the onus of proof, I cannot therefore find that the disc protrusion at the L4/L5 level was necessarily caused or worsened by the accident.

34. On the other hand, there is no suggestion that the plaintiff had symptoms of either lumbar pain or sciatica prior to the accident. I have no difficulty in accepting that a collision as significant as this impacted the pre-existing degenerative findings in the plaintiff's lumbar spine, leading to the initiation of back pain and left leg sciatica in a previously asymptomatic individual. There is in reality little dispute about this.

Whether the award of general damages for pain and suffering ought be reduced by reason of the plaintiff's failure to mitigate his loss in deciding not to undergo an epidural injection?

35. Section. 34(2)(b) of the Civil Liability Act 1961, provides that a negligent or careless failure to mitigate damage shall be treated as contributory negligence on the part of the plaintiff, reducing their award in proportion to their failure to prevent or reduce the losses suffered. A plaintiff's duty to mitigate their loss is thus limited to taking all reasonable steps to minimise their loss. What is reasonable is a question of fact to be determined on a case-by-case basis.

36. Dr. Henry's initial report stated that "*on the basis of his clinical findings and MRI, I recommend that [the plaintiff] has an epidural injection as these will normally give a dramatic benefit.*" Despite this, and for the following reasons, I am not satisfied that the plaintiff can be considered as having acted unreasonably in failing to undergo an epidural.

37. First, the extent to which a particular individual might receive benefit from an epidural injection will vary from patient to patient. Some patients will receive total relief for a period of time. Others will receive minimal relief. Any relief from an epidural injection is usually transient rather than permanent. In order to obtain permanent effects, a party will have to continue undergoing epidural injections on a periodic basis. The defendant has put no evidence before the court as to what precise benefit the plaintiff would obtain from an epidural injection.

38. Second, there are certain complications associated with epidural injections. For example, there is a risk of nerve damage, usually on a transient basis but occasionally on a permanent basis. Although such side effects and complications are rare, I am not satisfied that a plaintiff who is reluctant to undergo an invasive procedure such as an epidural is acting unreasonably. This is all the more so in the case of a plaintiff, who it is undisputed, has a morbid fear of needles.

39. Third, a finding that the plaintiff's failure to undergo an epidural should impact the quantum of damages to a particular degree, requires an understanding of the likely risks and benefits to the particular plaintiff of such a procedure. At present, I have no evidential basis upon which to make such finding, save that Dr. Henry recommended such an injection and thought that it would "*normally*" give a dramatic benefit.

40. Fourth, it is apparent from Dr. Henry's report that as soon as she recommended an epidural to the plaintiff, he immediately informed her of his morbid fear of needles. This was not therefore an *ex post facto* justification but a genuine fear.

41. Finally, epidural injections are of course associated with a financial cost which has not been quantified.

42. In summary, this court would be very slow to penalise a plaintiff's fear of undergoing a series of invasive medical procedures without a full and thorough risk benefit analysis of the procedure recommended, its long term anticipated implications and its likely cost.

43. Accordingly, I do not find the plaintiff has been guilty of a failure to mitigate his loss or that any contributory negligence arises.

The appropriate award of general damages

44. This is a case to which the Personal Injury Guidelines ("the Guidelines") apply. Section 7.B of the Guidelines divides back injuries into four categories: **Category 7.B (a)** "most severe back injuries", **Category 7.B (b)** "severe and serious back injuries", **Category 7.B (c)** "moderate back injuries" and **Category 7.B (d)** "minor back injuries".

45. It is common case that the plaintiff's injury does not fall within either **Category 7.B (a)** (most severe back injury) **or Category 7.B (d)** (minor back injury).

46. The plaintiff maintains that he falls within **Category 7.B (b)** "severe and serious back injuries" (which are in turn divided between type (i) and type (ii)). The defendant maintains

that this is a moderate back injury within **Category 7.B (c)** (which are also divided between type (i) and type (ii)).

47. Category 7.B (b) (i) “severe and serious back injuries” covers cases less severe than **Category 7.B (a)** but which nonetheless have special features, taking them outside any lower bracket of back injury. Such features include nerve root damage with associated loss of sensation, impaired mobility, impaired bladder and bowel function, impaired sexual function, depression, personality change, addiction issues, impact on work and possible unsightly scarring. It is not contended that the plaintiff suffers from most of the functional impairments listed, save perhaps for impaired mobility. However, the plaintiff does argue that he has suffered nerve root damage which justifies an award within **Category 7. B (b) (i)**. For the reasons explained at para. 33, I cannot conclude that the plaintiff suffered nerve root damage as result of the accident. Rather, I take the view that the plaintiff suffered from a pre-existing degenerative spine and disc bulge which was asymptomatic, but rendered symptomatic by the accident.

48. I am also satisfied that **Category 7.B (c) (ii)**, the lower bracket of moderate back injuries, does not capture the plaintiff’s injury. The plaintiff’s injury goes beyond the injury types listed in this category which include: disturbance of the ligaments and muscles causing pain and discomfort, or a soft tissue injury resulting in a prolonged acceleration and/or exacerbation of a pre-existing back condition, usually by five years or more. Medical professionals frequently encounter patients who are highly symptomatic with no evidence of degenerative change. Conversely, they also encounter patients with high levels of degenerative change who do not experience symptoms. Whilst I accept that the plaintiff had pre-existing degenerative conditions, he previously had no appreciable back pain. Further, there is no compelling medical evidence that the plaintiff’s underlying degenerative condition would have become symptomatic in the foreseeable future, were it not for this accident. This is therefore

not a case of acceleration or exacerbation of a pre-existing condition of back pain or sciatica. It is a case of the initiation of such pain in a person who was previously pain free.

49. The contest, therefore, is between **Category 7.B (b) (ii)** and **Category 7.B (c) (i)**. **Category 7 B (b) (ii)** lists: disc lesions, fractures of the discs or vertebral bodies or soft tissue injuries leading to chronic conditions where, despite treatment (usually involving surgery), there remain disabilities such as continuing severe pain and discomfort, impaired agility and the risk of arthritis. The plaintiff maintains that, at a minimum the injury ought be thus classified and that damages in the order of €50,000 to €90,000 ought be awarded.

50. The defendant, on the other hand, contends that this is a case of moderate back injury within **Category 7.B (c) (i)**. This category encompasses a wide variety of injuries where the claimant will have a residual disability albeit of less severity than in the higher brackets. Examples include: compression/crush fractures of the lumbar vertebrae with a substantial risk of osteoarthritis and a significant level of ongoing pain and discomfort; prolapsed intervertebral discs requiring surgery and damage to an intervertebral disc with nerve root irritation and reduced mobility. The range of damages indicated for such moderate back injuries is in the order of €35,000 to €55,000.

51. Essentially, therefore counsel for the plaintiff contends for either **Category 7. B (b) (i)** or **Category 7. B (b) (ii)** attracting damages in the order of €90,000 to €140,000 or €50,000 to €90,000 respectively. In its submissions, the defendant, appeared to accept that the plaintiff's injury is more serious than a **Category 7. B (c) (ii)** injury. I understand that the defendant's position is that the appropriate compensation in this case straddles **Category 7.B (c) (i)** which attracts damages of €35,000 to €55,000 and **Category 7. B (c) (ii)** which attracts damages of €20,000 to €35,000.

52. This case does not sit comfortably within the categories in contest. Thus, **Category 7. B (b) (ii)** appears to contemplate injuries requiring surgery and where further, there is a risk of

arthritis. On the other hand, **Category 7. B (c) (i) and (ii)** would not appear apt to cover continuing severe pain and discomfort and impaired agility.

53. However, I find that from a symptomatic and functional standpoint, **Category 7. B (b) (ii)** more accurately captures the plaintiff's injury and that it therefore falls into the €50,000 to €90,000 band, albeit at the lower part of that scale. On the whole, bearing in mind the nature and extent of the plaintiff's injury, his evidence to the court and the medical evidence presented, I take the view that €60,000 is a fair and proportionate amount to award. I assess this as €35,000 damages for past pain and suffering and €25,000 for future pain and suffering.

Claim for loss of opportunity

54. The plaintiff's claim concerning the vocational impact of his injury shifted quite significantly in the lead up to trial. In a recent schedule of special damages, dated 5th November 2024, the plaintiff advanced a relatively substantial claim to past and future loss of earnings of €7,480 and €83,400 respectively. The rationale for this claim was set out in the accompanying report of Byrne Actuaries. Essentially, the contention was that the plaintiff was paid €750 net per week by Nautic prior to the accident but now earns only €650 net per week in his current employment. The differential between these weekly figures is capitalised from the present time up to the age of 66 at €83,400.

55. However, in opening the case, counsel for the plaintiff abandoned this formal loss of earnings claim. This was a wise decision in light of two particular factors. First, the plaintiff's contention that he had sustained this specified loss of earnings was not borne out by the pre- and post-accident payslips. Rather, the Nautic payslips appear to show that the plaintiff's average weekly net pay was in the order of €616 to €650 prior to the accident and that his average weekly net pay post-accident as derived from four Nautic payslips (dated from March 2022 to October 2023) was higher, in the order of €782. Further, as the plaintiff conceded under

cross examination, these post-accident payslips show that Nautic continued to pay him for a substantial number of overtime hours: 8, 10 and sometimes 12 hours per week.

56. It is clear therefore, that up to the time that Nautic went into liquidation in January 2024, the plaintiff's net earnings were not in fact reduced by the accident. Likewise, the plaintiff's current average net weekly pay from Walsh Agricultural Contracting is €650 per week, roughly the same as it was with Nautic prior to the accident in December 2020.

57. The plaintiff now accepts that a formal claim to loss of earnings cannot be advanced but advances a claim for loss of opportunity. Nautic was evidently an extremely supportive employer, who facilitated the plaintiff's return to work as outlined at para. 12 above. The plaintiff's case is that it was not until Nautic went into liquidation, and he entered the open employment market, that the full extent of his deficits became clear.

58. Although the plaintiff is still working in construction on a full time basis, he is engaged in contract work. He does not have job security or the benefit of a pension. He is not paid for holidays or sick days. The plaintiff's evidence-which I have no reason to doubt- is that there is plenty work for digger drivers and that if he were in full health he could easily drive one hour each way to Limerick and obtain well paid employment. He also asserts, not unreasonably that one cannot compare 2021 and 2024 wage levels. He states that wages have risen significantly in the last few years and that, were he able to compete in the open labour market, he would expect to be earning significantly more than he is now, on more secure terms.

59. The defendant maintains that as the plaintiff's earnings have not diminished, no claim for either loss of earnings or loss of opportunity can be made out.

Legal principles

60. It is clear that the damages recommended under the Guidelines do not include damages for loss of opportunity as they expressly state: "*Where the phrase "impact on work" appears*

in these Guidelines it does not include such damages for loss of job opportunity/loss of earning capacity which may be recoverable in accordance with established legal principles.”

61. Damages for loss of opportunity are well established as a matter of Irish law. In *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 IR 578, the Supreme Court held that it was appropriate to award the plaintiff, who had suffered severe personal injuries to his right eye, a sum for loss of opportunity even where it had not been clearly established that his future income would be adversely affected, but where the range of jobs open to him would be reduced. A moderately incapacitating physical injury can be a more significant factor for some people more than others.

62. A plaintiff with capacity to develop a career based on, for example, high academic achievement, will have a wide range of choices in the first instance. Disability might simply reduce that range. However, for a plaintiff who may be dependent to a considerable extent on physical capacity, which would lead to more limited employment options in the first instance, the repercussions of disability can be greater. The courts are willing to award compensation for this narrowing of options, or as Barr J. put it in *Feeney v. John Sisk & Sons Ltd* (Unreported, High Court, Hilary & Easter Term 1993), for “*reduction in the spectrum of employment which would have been ope[n] to him if uninjured.*”

63. In *Meehan v. Shawcove* [2022] IECA 208, Noonan J. noted that damages for loss of employment opportunity, are just that, namely compensation to the plaintiff for the loss of a chance to pursue their desired career in the way they wished to pursue it. These are damages for not just the disappointment arising, but also for the fact that the plaintiff is likely to lose some earnings, albeit that it is impossible to quantify that loss in precise figures.

64. In *Leidig v. O’Neill* [2020] IECA 296, the plaintiff had sustained an undisplaced fracture of his non-dominant left wrist, requiring surgery. Although the plaintiff had commenced other sedentary work, Noonan J. awarded him damages for loss of opportunity as

he had been prevented at least initially from pursuing his career of choice in motor sport. Noonan J. held that the appropriate figure for general damages for pain and suffering was €65,000 to which he added an amount of €25,000 for loss of opportunity. Notably, however this particular level of damages for loss of opportunity appeared to be based upon the defendant's concession that it was open to the court to award damages for loss of opportunity, not exceeding one third of the overall general damages award.

Analysing the vocational reports and the conclusion on loss of opportunity

65. The plaintiff's claim to loss of opportunity is based on a report from Ms. Fiona Haughey, registered occupational therapist. The defendant relies upon the report of Ms. Siobhan Kelly, vocational assessor.

66. Having reviewed both reports, the following is common case. The plaintiff has always worked in manual labour, primarily working as a heavy machine driver, and his vocational alternatives outside of such roles are restricted by his challenges with reading and writing, his minimal formal education and qualifications and his limited work experience outside of that particular area. After the accident, the subject matter of these proceedings, the plaintiff's employer, Nautic, was extremely supportive assisting his return to full time employment with the accommodations outlined at para. 12 above. However, I am also satisfied that irrespective entirely of this support, the plaintiff has been and remains, physically capable of maintaining full time work as a digger driver, albeit with a new employer.

67. On the other hand, the following is also clear from the vocational reports: The plaintiff is at a competitive disadvantage compared to other similarly qualified persons. He is not able to drive long distances for work and he is restricted to driving a digger and is unable to help with other tasks which might make him more attractive to other employers. These factors impede the plaintiff's ability to seek and source alternative, more lucrative, and secure

employment. As a result, the plaintiff is now reliant on *ad hoc* opportunities for local work from contractors to whom he is known. I further accept that such work is not guaranteed and that same is less secure and in all likelihood less well paid than that which he could have secured but for the injuries sustained in the accident.

68. Whilst it is undoubtedly positive that the plaintiff has to date been able to maintain full time work, I find as a fact that the accident nonetheless inhibits, and will continue to inhibit, his earning potential. Therefore, whilst the plaintiff has not yet sustained an identifiable loss of earnings it is entirely inevitable that in the future, he will. Indeed, I find as a fact that even at the present time, the plaintiff's job is not as favourable as it would be, but for the accident. It is a matter of common knowledge, that wages in the construction sector have significantly increased in recent times and I find as a fact that the plaintiff's injury and his ensuing back pain and sciatica have prevented him from taking advantage of opportunities which would otherwise have been available to him.

69. On the other hand, given the degenerative changes in the plaintiff's spine and the pre-existing disc bulge it is possible the plaintiff would not have been able to continue working full-time until retirement age, in any event. This is something that I must take into account

70. On balance, whilst the plaintiff's pre-existing degenerative changes could at some stage have become symptomatic even without this accident, I am satisfied that the plaintiff's injuries currently impact upon his wages and employment conditions and that this impact will continue for some years to come. In all the circumstances, an uplift of 25% of the plaintiff's general damages is, in my view, entirely reasonable.

71. Therefore, noting that I assess general damages at €60,000, I will award the plaintiff an amount of €15,000 for loss of opportunity. Accordingly, total damages are in the order of €75,000.

72. Special damages are agreed at €8,563.97. The total award is therefore €83,563.97.

73. I will list this matter for costs and final orders in two weeks.