THE HIGH COURT

[2021] IEHC 248

[2010-5534 P]

BETWEEN

FELIX MOOREHOUSE

PLAINTIFF

AND

THE GOVERNOR OF WHEATFEILD PRISON, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Bernard Barton delivered on the 8th day of March, 2021.

1. This case was remitted back to the High Court by order of a majority of the Court of Appeal on foot of the Plaintiff's appeal against the order I made dismissing his claim to have the following issues determined:

   (1) Determination of the issue as to whether the Plaintiff was guilty of contributory negligence for the accident that befell him, as pleaded by Defendants;

   (2) Apportionment of liability as between the Plaintiff and the Defendants if there is a finding of contributory negligence against the Plaintiff;

   (3) Assessment of the Plaintiff's damages, taking account of any apportionment of liability consequent on a finding (if any) of contributory negligence on the part of the Plaintiff.

2. Written submissions were exchanged and filed on behalf of the parties in advance of the resumed hearing which took place on the 2nd February 2021. It is not proposed to repeat *in extenso* the findings of fact which I made in my judgment delivered the 15th August 2017 (see neutral citation [2017] IEHC 535); rather these will be referred to where necessary in relation to the first issue and, if appropriate, in relation to the determination of the second issue. This judgment should, therefore, be read in conjunction with the judgment of this Court following the trial of the action.

3. The Court is not concerned with the question of liability. This was determined in favour of the Plaintiff by a majority of the Court of Appeal, Costello J. dissenting. For the reasons set out in the judgments of Edwards J. and Donnelly J., the Court of Appeal concluded that I had erred in law by making an order dismissing the Plaintiff's claim in circumstances where the Plaintiff's account of how the accident occurred had been rejected. Although *obiter* I stated that *had* the Defendant been found liable, I would also have found the Plaintiff guilty of contributory negligence and would have apportioned fault to a high degree against him; remarks which are consequently non-binding.

4. It follows that notwithstanding the Plaintiff's failure to provide a cogent explanation for how his hand came to be in the path of the blades, the starting point for the resumption of the case is that absent evidence establishing that the Plaintiff had been subjectively reckless (of which there was no finding), his actions would have been no more than a *causa sine qua non* and not the *causa causans*. Having adduced adequate proof of the *causa causans* of the accident arising from the findings of negligence and breach of

statutory duty on the part of the Defendants the liability therefor followed, and the Plaintiff is entitled to succeed in his claim against them.

5. In a case where the transcript of the evidence exceeds 4 days it is the practice of the Court of Appeal that the parties agree extracts of the evidence from the transcript which are relevant to the issues on appeal. In this case, the transcripts ran to 29 days. The practice was followed and consequently the Court did not have sight of large tranches of the evidence. Whether or not this explains the reference at para 92 of the judgement by Edwards J. to the "absence of evidence" to establish a finding of "subjectively reckless" behaviour by the Plaintiff is plainly a matter of conjecture; however, the transcript is in fact replete with evidence on which findings have been made, which on the Defendant's submissions, if accepted, would warrant the Court coming to the conclusion that the Plaintiff was reckless and thus guilty of contributory negligence at common law as well as being in breach of statutory duty.

6. It follows in the circumstances of the case that the Court is concerned to determine whether, on the evidence, the actions or omissions alleged on the part of the Plaintiff were the result of factors such as an error of judgement, carelessness, heedlessness, inadvertence or inattention, or as a result of some positive or deliberate act involving the running of a subjective risk. In this regard it is pertinent to refer to the case pleaded by the Defendants at paras 3 and 4 of the amended defence delivered herein which reads as follows:

"3. The Defendants deny that they are guilty of the alleged contributory negligence or breach of duty or breach of statutory duty.

(a) The incident or accident was caused by the negligence or breach of duty and/or recklessness on the part of the Plaintiff.

(b) The Plaintiff was the author of his own misfortune.

(c) The Plaintiff acted contrary to warning signs in operating and/or purporting to operate the machine as alleged.

(d) The Plaintiff acted contrary to all instruction from the Defendants, their servants and/or agents in operating and/or purporting to operate the machine as alleged.

(e) The Plaintiff acted contrary to all warnings and/or instruction from fellow inmates in operating and/or purporting to operate the machine.

(f) The Plaintiff removed guarding from the machine in operating and/or purporting to operate same as alleged.

(g) The Defendants, their servants and/or agent had shut down the machine.

(h) The Defendants, their servants and/or agent had given instruction not to operate the machine.

(i) The Plaintiff was not authorised to operate the machine".

7. At paragraph 4 (1) of the defence the following plea appears:

"Further if the accident or incident occurred in the manner alleged or at all and/or if the Plaintiff suffered the alleged or any personal injuries, loss and damage then the Defendants will claim that they are not responsible and/or liable or not wholly responsible or liable to the Plaintiff by virtue of the fact that same arose and/or was caused wholly and/or partly by the negligence and/or contributing negligence on the part of the Plaintiff for the reasons set out above."

8. At the outset of the principal judgment delivered on the 15th August 2017 a number of issues, observations and findings were set out and discussed in greater detail later in the judgment. For the purposes of contextualising the first and second issues, it may be helpful to set out again the observations made which are relevant thereto as follows:

(i) The cutting/cropping and punch facilities constituted dangerous parts of the GEKA Minicrop which required guarding to minimise or avoid the risk of injury; the opening to the cropping facility was designed and fitted with an adjustable device known as a hold down guide which also served as a safety guard (the guide-guard);

(ii) At the time of the accident, the Plaintiff's left hand was in the pathway of the shear blades of the machine whose guide guard had been removed; the identity of the individual and responsibility for the removal of the guide guard was in question;

(iii) Both the Plaintiff and Jonathan Nicholson, the Industrial Training Instructor (ITI) with responsibility for supervision and training in the workshop, denied removing the guide-guard; (The identity of the person who removed the guide-guard was established, accordingly, no finding was made against the Plaintiff or ITI Nicholson)

(iv) If fitted and properly adjusted, the guide-guard would have prevented any part of the Plaintiff's hand entering the cropping compartment to the point where it would have been in the path of travel of the shear blades; the injuries could not have been sustained had the guide-guard been so positioned;

(v) The guide-guard was not a fixed guard; it was adjustable and removable without the use of a tool;

(vi) The cropping facility could be operated without the guide-guard in position; consequently, the cropping blades were exposed, accessible and clearly visible to the operator and anyone supervising the operation of the machine;

(vii) Shortly before the accident, a problem had arisen when two other prisoners were using the cropping facility as a result of which the steel flat or stock bar (steel bar) which they were trying to cut jammed between the cropper blades;

(viii) Following the report to him of the problem, ITI Nicholson removed the steel bar. Whether or not the machine had been completely switched off by him, it had not been locked out in a way which prevented it from being restarted;

(ix) The machine was supplied and fitted with a lock out facility in the form of a pad lockable device; in practice, this was not utilised prior to the accident by either the training staff or by those servicing the machine and was not fitted on the day of the accident;

(x) On the afternoon of the accident there were thirteen prisoners present in the welding workshop; whether the Plaintiff was actively participating in his course or whether he had been assigned to sweeping duties because the available welding booths were already occupied was in question; the Plaintiff claimed he was on his welding course, however ITI Nicholson gave evidence that because he had arrived late to the workshop the Plaintiff had been assigned sweeping duties. I was satisfied that regardless of whether or not the Plaintiff was assigned sweeping duties on the afternoon, he was entitled to use the GEKA cropping machine without obtaining permission to do so.

(xi) The instruction and supervision ratio of staff to prisoners considered appropriate by the IPS was eight to one; whether or not Prison Officer Vincent Maher was in the workshop with ITI Nicholson on the afternoon of the accident was in question; the Plaintiff claimed he did not see him there at any time before the accident; Officer Maher said he was present and gave instructions to the Plaintiff (The Court found that the Plaintiff did not receive any instructions from Officer Maher not to go near the machine.).

(xii) At the time of the accident, neither ITI Nicholson, Officer Maher nor any other member of the prison staff were present in the work and training area where the Plaintiff and the other prisoners were working; the period of absence was in question; The Plaintiff claimed that the area was unsupervised for 10 or 15 minutes at least whereas ITI Nicholson and Officer Maher claimed it was a matter of minutes. The Court found that ITI Nicholson and Officer Maher were both present in the workshop on the afternoon of the accident but that before the occurrence thereof and as a result of a problem which had developed with the GEKA cropping machine, ITI Nicholson had left the area to go to the office to get a lock out/out of order tag. He got delayed as a result of receiving a call from the governor which he took. In the meantime, Officer Maher left the vicinity of the machine and went into the storeroom. Neither Officer Maher nor ITI Nicholson were present in the workshop at the time when the accident occurred.

(xiii) Whether or not the Plaintiff had been instructed and trained in the safe use and operation of the GEKA, and whether or not shortly before the accident he and others in the vicinity of the machine had received instructions from ITI Nicholson and/or Officer Maher not to go near it was in issue; the Plaintiff claimed that he had received neither training nor instructions; ITI Nicholson and Officer Maher claimed he had received both. The Court found that the Plaintiff had received appropriate training and instructions on the use and operation of the machine and had demonstrated his competency in the use thereof to the point that he did not require permission in the workshop to use or operate it.

(xiv) Had such instructions been given not to go near the GEKA, they were confined to prisoners in the vicinity of the machine; those working elsewhere in the workshop would not have been aware that the machine was out of order and was not to be used; significantly, prisoners who had been trained and had demonstrated competence in the operation and safe use of the cropping facility could use the GEKA without seeking permission to do so; (In addition to findings that the Plaintiff had received appropriate instructions and training in the safe use and operation of the machine, he had demonstrated his proficiency in the use and operation thereof and did not require permission to use the machine for cutting steel flats. The court found that no express instruction was given to the Plaintiff not to go near or use the machine by either ITI Nicholson or Officer Maher and for the reasons set out in the judgment would not have been aware that such an instruction had been given to those who had been using or were working in the vicinity of the machine once a problem developed therein.).

(xv) At his request, the Plaintiff commenced a structured methadone programme on the 16th September 2008; he had been using illicit drugs before commencing the programme and had smoked heroin while on transfer to Wheatfield.

(xvi) As a matter of probability, he continued to use illicit drugs both before during and after the accident; details of the type, quantity and level of illicit drugs used were not canvassed with the Plaintiff;

(xvii) Whether the dose of methadone administered on the day alone or in conjunction with other illicit drugs would have had an effect on the Plaintiff's cognitive and psychomotor functioning material to the cause of the accident was in question; (the court found that the administration of methadone alone and/or in combination with other illicit substances which had likely been ingested by the Plaintiff played no material role in the cause of the accident.)

(xviii), (xix), (xx), (xxi), (xxii), (xxiii), (xxiv), (xxv) and (xxvi) involve a series of subsidiary observations in relation to the use of methadone and illicit drugs as well as the screening therefore.

(xxvii) When stabilised on methadone, it does not follow from a positive result for cannabis and or benzodiazepine that 24, 48 or 72 hours later that the concentration

of those drugs in the system is such as would produce a meaningful impact on the level of psychomotor functioning; with all such drugs assessment of the individual for effect by direct conversation, personal interaction and observation is clinically significant.

(xxviii) Any prisoner reporting being unwell or showing signs of intoxication or of being "strung out" is not permitted to enter the workshop but is returned to his cell and, if necessary, referred for medical attention;

(xxix) Cognitive and psychomotor function may be affected to a greater or lesser extent by the presence, quality, quantity, time and type of illicit drugs and/ or methadone in the system; whether the Plaintiff was stabilised on a methadone dose of 60 ml at the time of the accident was in issue; (the Court found that as the Plaintiff was admitted to the welding workshop following a conversation with ITI Nicholson it was highly unlikely that he was exhibiting any signs of being unwell or of being inebriated in any form and that had he been exhibiting any such signs, he would have been returned to his cell by a class officer. The Plaintiff took his dose of methadone most likely between 10 and 10.30 am on the morning of the accident. The Court found that there were no contra-indications apparent to the dispensary nurse when the Plaintiff presented himself for and was administered the prescribed dose of his medication. The Court accepted the evidence of Dr. Scully, who treated and assessed the Plaintiff from time to time before the accident that, had he any concerns about the Plaintiff's medical capacity to attend and participate in the welding workshop at any time he would have raised and acted upon those concerns; there was no such evidence.)

(xxx) The provisions of the Safety, Health and Welfare Work Act, 2005 (the 2005 Act) and the Safety, Health and Welfare at Work (General Application) Regulations 2007 S.I. No. 299/2007 (the 2007 Regulations) applied to the prisoners when working in the prison workshops.

(xxxi) The Safety Statement in force for the prison workshops at the time of the accident which contained a risk assessment relevant to machinery was drawn up in 2003 and a General Metal Workshop Standard (MS1) was issued in June 2007 but neither were machine specific. Whether the relevant statutory requirements had been complied with was in issue; (the Court found that there was a breach of statutory duty on the part of the first, second and third Defendants in failing to comply with the requirements of the 2005 Act and in particular, Regulations 33 and 34 of the 2007 Regulations.).

(xxxii) The focus of the workshops was on training and up-skilling rather than on production.

(xxxiii) The metal/ welding workshop is self-contained and incorporates an office, toilet facilities, store/ stock room, as well as a work and training area; prisoners, whose

names are recorded on a list, have to be admitted individually and are required to wear personal protective equipment at all times while in the welding workshop.

(xxxiv) Metalwork machines, including the GEKA, tools, welding equipment, ten ordinary and three auxiliary welding booths were located in the work and training area of the workshop.

(xxxv) The removal of or making adjustments to the guide-guard was restricted to ITI Nicholson and the servicing engineer; training on the safe use and operation of the machine included information about the purpose of the guide-guard together with an instruction that the machine was never to be used without the guide-guard in place; (the Court found that the Plaintiff had received instructions in training on the safe use and operation of the GEKA machine.)

(xxxvi), (xxviii) are concerned with the provision of PPE and the supervision of prisoners before leaving the workshop.

(xxix) Had there been supervision in the work and training area of the workshop at the time of the accident it is highly unlikely that the accident could or would have occurred;

(xxx) to (xxxi) were concerned with the timing of training sessions and with the issuance of disciplinary reports known as a P19;

(xxxii) Photographs of the GEKA taken by the ITM Austin Stack shortly after the accident show the work piece stop bar fitted in position to the back of the machine; whether the stop bar was missing at the time of the accident was in question; (the Court found that the backstop was in position and was not missing as suggested by the Plaintiff.)

(xxxiii) A Governor's parade takes place every morning between 9 and 10.30 am. Prisoners are entitled to attend and bring any complaints or other issues of concern which they may want addressed to the attention of the Governor.

(xxxiv) When prisoners have mastered horizontal welding, they progress to vertical welding; the Plaintiff was still engaged in horizontal welding at the time of his accident.

(xxxv) Certificates of competency in the different types of welding are issued once sufficient levels of competency have been reached and demonstrated in front of an external verifier. A training record is kept by ITI Nicholson, generally filled in on a Friday.

(xxxvi) The record for the Plaintiff shows that he attended the welding course over four weeks, commencing on week ending 42 and that he received an induction, a safety video, and safety training, including manual handling, as well as guillotine training;

(xxxvii) and (xxxviii) are concerned with the post-accident servicing of the blades in the GEKA cropping machine.

(xxxvii) to (xli) were concerned with post-accident investigation and will not therefore be repeated. Suffice is to say that for comprehensive overview this judgment should be read in conjunction with the principal judgment of the court delivered in this case.

9. The question of whether or not the Plaintiff was subjectively reckless in doing whatever he did when operating the machine at the time of the accident falls for consideration in the determination of the first issue herein. I did not address it or make a finding in relation to that matter since I did not accept the Plaintiff's account of the accident, and as a result concluded that he had failed to establish the case he had brought to Court and accordingly dismissed his claim. Given the circumstances in which the case has been remitted back to this Court for a resumption of the action and having regard to the first two issues which must be addressed, this is as convenient a place as any to set out the statutory provisions relevant thereto.

Contributory negligence and breach of statutory duty

10. Section 2 (1) of the Civil Liability Act, 1961 as amended provides for the interpretation of terms used in the Act. "Negligence" is defined as including "breach of statutory duty". The Act made express provision for the apportionment of liability in a case of contributory negligence in s. 34 which reads as follows:

"34.—(1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the Plaintiff was caused partly by the negligence or want of care of the Plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the Defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the Plaintiff and Defendant: provided that—

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

(b) this subsection shall not operate to defeat any defence arising under a contract or the defence that the Plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the Defendant might, apart from this subsection, have the defence of voluntary assumption of risk;

(c) …

(2) For the purpose of subsection (1) of this section—

(a) …

(b) …

(c) the Plaintiff's failure to exercise reasonable care for his own protection shall not amount to contributory negligence in respect of damage unless that damage results from the particular risk to which his conduct has exposed him, and the Plaintiff's breach of statutory duty shall not amount to contributory negligence unless the damage of which he complains is damage that the statute was designed to prevent."

11. A simple and classic example of a statutory duty designed to prevent a Plaintiff from injuring himself or herself is the Road Traffic (Construction Equipment and Use of Vehicles) Amendment No. 2) Regulations, 1978 S.I. 360/1978 requiring the use of seatbelts and crash helmets. Contributory negligence at common law has a different meaning in an action for negligence than for an action for breaches of statutory duty. See *Stewart v. Killeen Paper Mills Ltd* [1959] I.R. 436 at 441. Contributory negligence at the common law is founded on the principle that one owes a duty to take care for one's own safety in any given set of circumstances. The duty of care owed by a Plaintiff in an action for breach of statutory duty, such as an action under the provisions of the Safety Health and Welfare at Work Act, 2005 (the 2005 Act) has long been considered less extensive than in actions for common law negligence. See *Stewart* above and *Kennedy v. East Cork Foods* [1973] I.R. 244 at 249.

12. There is a long line of authority for the proposition that carelessness, inattention or inadvertence on the part of an employee in an action for damages brought for breach of the provisions of the Safety in Industry Acts and more recently the Safety, Health and Welfare at Work Act, 2005, would not warrant the Court in making a finding of contributory negligence against the employee. See also *Dunne v. Honeywell Control Systems* [1991] ILRM 595 and most recently *McWhinney v. Cork City Council* [2018] IEHC 472 at para. 49. This is as convenient a point as any at which to mention that although the accident involving the Plaintiff occurred in the workshop of Wheatfield Prison and that the Plaintiff was not an employee in the ordinary industrial sense of the word, it was accepted that the provisions of the 2005 Act and the 2007 Regulations made thereunder were applicable.

13. The Court raised with the parties the decision of the Supreme Court in *McSweeney v. McCarthy,* (Unreported), delivered on the 28th January 2000 which appeared to be particularly relevant to the first two issues under consideration and in respect of which submissions were made by the parties. That case was decided against the background of the statutory scheme that the health and safety of employees established by the Safety in Industry Acts 1955 to 1980 and the Safety, Health and Welfare at Work Act, 1989. The case involved a trained painter who was employed by the defendant in a chemical factory. Part of his work duties involved carrying out painting at heights with the use of a ladder. The plaintiff fell from the ladder in the course of carrying out his duties. The ladder was neither tied by the plaintiff nor did the plaintiff use anybody to stand or restrain it while he was using it. The case came on for hearing at the High Court in Cork. The plaintiff's

claim was dismissed on the basis that the plaintiff had failed to establish any negligence or breach of duty including breach of statutory duty on the part of the Defendant. The plaintiff appealed against the decision. The Supreme Court allowed his appeal. Delivering the judgment of the court, Murray J., as he then was, observed at the foot of p. 8:

> *"In these proceedings it is common case that it was foreseeable that the Plaintiff at some point in the course of his duties would require the assistance of someone else to secure the ladder at it's foot when he had to mount it. This is because the climbing of an unsecured ladder is inherently dangerous. It is also common case that, in the circumstances of this case, it would be placing too onerous a duty on the employer to contend that he should have provided the Plaintiff during entire his period of work with an assistant ready to hold the ladder, as the isolated need arose."*

And on p. 9 he continued:

> *"The reality of cases like the present is that both employer and employee had an opportunity to consider how the work should be carried out, whether it involved any dangers, and, if so, how they should be avoided. By denying liability because only the employee was present is in effect to seek to plead some sort of last opportunity rule. That, however, is not the basis of liability. Admittedly, the employee is more proximate to the events leading up to the circumstances in which the injury occurred. But this is not the test of liability. The test is dependent upon control of the work."*

The learned judge concluded at p. 17 of the judgment that:

> *"the Defendants were guilty of negligence and breach of duty, including statutory duty and the learned trial judge erred in law in not so holding."*

He then went on to make the following statement at the top of p. 18:

> *"Having found that it had not been established that there was negligence on the part of the Defendants, the learned trial judge did not consider the question whether the Plaintiff was guilty of contributory negligence. Again it is clear from the undisputed facts in this case that the Plaintiff himself was guilty of negligence and breach of statutory duty in failing to take reasonable care for his own safety. He fully appreciated the danger of ascending an unsecured ladder and the risk of injury attached thereto, but in spite of such knowledge, he knowingly took the risk of ascending a ladder which was not secured and when there was no person holding the ladder while he was ascending it. In so doing, he, as an experienced workman was not taking reasonable care for his own safety. In not so doing, he was not only in breach of the common law duty but statutory duties by then imposed, namely s. 125 (7) of the Factories Act, 1955 (as amended by Section 8 of the Safety in Industry Act, 1980)."*

In the circumstances of that case the court apportioned liability 40% to the plaintiff and 60% to the defendant.

14. Section 13 of the 2005 Act provides for the general duties of employee and persons in control of places of work. Section 13 (1) provides an employee shall, while at work –

"(a) comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work,

(b) ensure that he or she is not under the influence of an intoxicant to the extent that he or she is in such a state as to endanger his or her own safety, health or welfare at work or that of any other person,

(c) …

(d) co-operate with his or her employer or any other person so far as is necessary to enable his or her employer or the other person to comply with the relevant statutory provisions, as appropriate,

(e) not engage in improper conduct or other behaviour that is likely to endanger his or her own safety, health and welfare at work or that of any other person,

(f) attend such training and, as appropriate, undergo such assessment as may reasonably be required by his or her employer or as may be prescribed relating to safety, health and welfare at work or relating to the work carried out by the employee,

(g) having regard to his or her training and the instructions given by his or her employer, make correct use of any article or substance provided for use by the employee at work or for the protection of his or her safety, health and welfare at work, including protective clothing or equipment,

(h) report to his or her employer or to any other appropriate person, as soon as practicable—

(i) any work being carried on, or likely to be carried on, in a manner which may endanger the safety, health or welfare at work of the employee or that of any other person,

(ii) any defect in the place of work, the systems of work, any article or substance which might endanger the safety, health or welfare at work of the employee or that of any other person, or

(iii) any contravention of the relevant statutory provisions which may endanger the safety, health and welfare at work of the employee or that of any other person,

of which he or she is aware."

At para. 166 of the original judgment, I found that having regard to the reasons given and the findings made that there was a breach of statutory duty on the part of the first, second and third Defendants in failing to comply with the provisions of the 2005 Act with regard to requirements relating to the provision of a safety statement and risk assessment under the Act and with regard to the duties owed to the Plaintiff under the 2007 Regulations in particular Regulations 33 and 34. In terms of ordinary negligence there were express findings of negligence at paras. 143 and 144. For the purposes of the Civil Liability Act 1961, breaches of statutory duty on the part of the Defendants in this case constitute negligence on their part.

Submissions

15. The Defendants carry the onus of proof to establish, on the balance of probabilities, negligence and breach of statutory duty on the part of the Plaintiff in the sense described by Murray J. in *McSweeney v. McCarthy*, if there is to be a finding against him on the first issue. It is not intended to summarise the submissions made on behalf of the parties. Suffice it to say that on the evidence and the undisturbed findings of fact the contention advanced on behalf of the Defendant is that the only conclusion the Court could come to is that the several actions of the Plaintiff which resulted in him severing the fingers of his left hand were attributable to a series of deliberate actions which were grossly reckless and constituted a causa causans of the accident.

16. The suggestion advanced on behalf of the Plaintiff that, having rejected his account of the accident the Court could not now make a determination of contributory negligence in the absence of determining how the accident did occur, did not stand up to scrutiny and was without merit factually or at law. On the evidence and the findings made and left undisturbed on appeal there was not, as had been suggested on behalf of the Plaintiff, any element of the Court entering into the realm of speculation for the purposes of trying to establish the reasons for what the Plaintiff did, why he did it or what he was doing it for.

17. The plain facts of the matter were that he came to a machine the operation and purpose of which he was familiar. He had been instructed and trained in the safe use and operation of the machine. He knew the purpose of the machine was to cut metal flats. He knew that the production of flats from the introduction of a length of steel bar was dependent upon and involved a guillotine action about which he had been specifically made aware. He had used and operated the machine under supervision. He had established to Inspector Nicholson his proficiency and knowledge in the safe use and operation of the machine to the point that before using it to cut flats it was not necessary for him to seek the permission of Inspector Nicholson or for that matter any member of staff.

18. When the Plaintiff came to the machine on the afternoon of the accident it was immediately obvious to him, as it was to anyone else who approached it, that the guide-guard had been removed, revealing the blade opening and, in the process, the cropping blade. The Plaintiff knew that the function of the cropping blade was completely dependent upon the operator pressing a foot pedal, that releasing the foot pedal resulted in the cropping action stopping and the blade returning to its rest position. The Plaintiff's hand was not resting on a steel bar. The back stop was in position, thus avoiding any necessity for him to judge the positioning or distancing of a steel flat in the machine. The Plaintiff's left hand was palm upwards with the fingers in the path of travel of the cropper blade, a state of affairs visible to the Plaintiff when he pressed the foot pedal which he knew would immediately activate the shear blade.

19. These actions were all carried out in circumstances where he knew from the training and instructions he had received that the machine was only to be used for cutting steel flats. The sauce for the goose was good for the gander. Any alternative cogent explanation for what had happened acceptable to the court was not a *sine qua non* for a finding of contributory negligence, particularly when regard was had to the evidence before it and the facts as found. The Court was entitled to infer that whatever the Plaintiff was doing in using the machine, he knew that what he was doing was extremely dangerous and that it exposed him to a risk of serious injury which, in the event, is exactly what happened. Mr. O'Scanaill also addressed the Court at some length on the apportionment of liability and drew the Court's attention to a number of authorities on the approach to be taken by the Court in relation to that exercise. He submitted that in the particular circumstances of the case, the blameworthiness of the Plaintiff far outstripped any blameworthiness that could be attributable to the Defendant and that this was a case where an apportionment of 85 to 90% against the Plaintiff was warranted.

20. On behalf of the Plaintiff, Mr. Keane contended that having rejected the Plaintiff's account of the accident, it was not open to the Court to speculate on how else the accident may have occurred. This was not a case in which the Defendants had advanced an alternative version of the accident; rather, the case was one where the only explanation or version of the accident was the one advanced by the Plaintiff and that had been expressly rejected for the reasons set out in the judgment of the Court. To find contributory negligence in these circumstances would be to find contributory negligence *in abstracto*, a conclusion which was legally impermissible. The Court was, so to speak, hoisted on the petard of its own judgment, and could not resile from the consequences of the outcome when it came to address the issues. It had not been pleaded nor had it been put, at least in a full-frontal way to the Plaintiff, that what he was doing amounted, in effect, to a deliberate act of self-harm no doubt because the Defendants would not have been in a position to establish such a case. If pleaded but they were unsuccessful it would have exposed the Defendants to a claim for aggravated damages on the grounds that such a plea amounted to an allegation that the Plaintiff's claim was a fraud.

21. It was argued the Court of Appeal had found that it was the actions of the Defendants and not those of the Plaintiff which were the *causa causans* of the accident, in other words,

that it was the Defendants' negligence and breach of statutory duty and not that of the Plaintiff which was responsible for the occurrence of the accident. Mr. Keane drew the Court's attention to various extracts from the judgment of this Court concerning the findings of fact and the conclusion reached thereon that the Defendants were guilty of negligence and were in breach of statutory duty. The Court was also brought through the judgment of Edwards J. in relation to this aspect of the case.

22. Quite apart from these submissions it was argued on behalf of the Plaintiff that in approaching the issue of contributory negligence, particularly in the context of a breach of statutory duty, that the circumstances were to be viewed not from the perspective of the ordinary reasonable person; rather, what had to be borne in mind were the life circumstances in which the Plaintiff found himself, his circumstances at birth, his social circumstances, the fact that the Court had already acknowledged he was a highly disadvantaged member of society and had grown up and was involved in criminal activity, was a person who left school at an early age, lived in very deprived circumstances, was illiterate, and was innumerate. These were factors which had to be taken into the balance.

23. Referring the Court to *McWhinney v. Cork City Council* [2018] IEHC 472 and *McSweeney v. McCarthy*, which depended on its own facts, it was not enough to show an error of judgment or inadvertence on the part of the Plaintiff if contributory negligence was to be established in circumstances where a Defendant is found to be in breach of statutory duty. Mr. Keane distinguished the facts of *McSweeney v. McCarthy* from the facts in this case, drawing the Court's attention to the fact that in that case, the actions or omissions of the Plaintiff had been admitted having been negligent. In the absence of a satisfactory explanation as to how and why the accident occurred there was no evidence or finding of fact which would permit the Court to find the Plaintiff guilty of contributory negligence and breach of statutory duty.

24. Even if the Defendants could get over that barrier, they were faced with the difficulty of establishing that the injuries which befell the Plaintiff were other than as a result of an error of judgement or inadvertence absent which there could be no finding against him on the first issue. When regard was had to the majority judgements of the Court of Appeal a finding that the Plaintiff guilty of contributory negligence and an apportionment of fault to the extent of 85 to 90% against the Plaintiff would arguably be a perverse; the higher the apportionment the stronger the argument would be. The perversity of such a conclusion would arise from what in effect would amount to a reversal of the decision of the Court of Appeal that the causa causans of the accident lay with the Defendants.

25. In addressing these issues Mr. Keane urged the Court to have regard to the spirit as well as the letter of the majority judgments in the Court of Appeal. He submitted that it could be inferred from the judgment of Edwards J. in particular that if there were to be a finding of contributory negligence, such should be less than 50%. since in the absence of evidence to establish a finding that the Plaintiff was subjectively reckless any act or omission on his part was a *causa sine qua non* and not the *causa causans* of the accident.

I understood this submission to be that the only *causa causans* of the accident was the negligence and breach of statutory found against the Defendants. If the Court was against the Plaintiff on the submission in relation to a finding of contributory negligence, Mr. Keane argued that any apportionment on the second issue should be limited to a maximum of 20%. If, having regard to all the circumstances of the case it was not possible for the Court to establish different degrees of fault, s. 34 (1) (a) provided for the apportionment of liability equally.

26. Finally, Mr. Keane also advanced a claim for aggravated damages because of the conduct of the Defendants during the trial and what amounted to a continuation of that conduct by the Defendants in the submissions made on the first and second issue by Mr. O'Scanaill. I shall deal with that matter presently but returning to the present argument Mr. Keane drew the attention of the Court to the inescapable fact that it was the Defendants who were in control of the workshop, of the system of work therein and of the Geka cropping machine. It was they, who failed to make the Plaintiff aware that the machine had been taken out of use and had left it in a condition constituted a very serious danger to anyone who attempted to use it unawares.

Decision

27. I have adverted earlier to the practice in the Court of Appeal of limiting the transcripts in cases where oral evidence was given over more than four days to an agreed book of extracts of the transcript of the evidence relevant to the issues in the appeal. It is not apparent from any of the judgments delivered in the court precisely what extracts were before the judges who heard the appeal. However, and having had the benefit of the entire transcripts of the evidence at the time when the principal judgment was delivered and having reread these insofar as they are relevant to the first and second issues I am satisfied, with respect to the learned judge, that there is no factual basis to the reference of an absence of evidence to establish on the balance of probabilities that the Plaintiff was subjectively reckless.

28. Whatever the explanation, the transcripts of the Plaintiff's own evidence, not to mention the evidence of the engineers and the photographic evidence is replete with evidence to support the conclusion that the behaviour of the Plaintiff was itself a *causa causans* of the accident. This conclusion has very significant implications for the submissions advanced on behalf of the Plaintiff by Mr. Keane. While I accept the submission that it is not appropriate for the Court to venture into the realm of speculation in circumstances where it has rejected the only explanation advanced in the case for the accident, I do not accept for the reasons advanced by him that it follows there cannot be a finding of contributory negligence against the Plaintiff, quite the reverse.

29. In that regard I accept the submissions made on behalf of the Defendants by Mr. O'Scanaill, particularly in light of the observations made in relation to the evidence which, it would appear, was not part of the extracts from the transcript made available for the purposes of the appeal. I consider it pertinent to mention this because had the relevant transcripts been available to be read by my learned colleagues I have absolutely no doubt, having again had the benefit of reading the transcripts, that the reference to the

absence of such evidence would not have been made, especially by such a learned and experienced judge as Edwards J.

Conclusion; Contributory Negligence

30. In coming to the conclusion that there was contributory negligence on the part of the Plaintiff I am mindful of the submission made to the Court by Mr. Keane concerning the social and economic background and circumstances not to mention the disadvantages experienced by the Plaintiff in life which were, if I may be permitted to say so, appropriately recognised by the Court in its principal judgment. That being said, the Court has found that although this unfortunate individual's life was blighted on so many levels, including addiction to illicit drugs, he was able to hold down a job before he committed the crime which ultimately sent him to Wheatfield after conviction. He was able to drive a car and once in prison, apart from trying to get his life back on some sort of normal track, he volunteered for training under Mr. Nicholson so that he could acquire a marketable skill he could deploy once he had served his sentence and was released back out into society.

31. I had no impression that the Plaintiff took this course of action involuntarily. Similarly, although not entirely successful in weaning himself off all illicit substances, he showed a willingness and determination to try and rid himself of his affliction by going on the treatment programme offered to him and other prisoners at the prison. I was particularly impressed by the evidence of Dr. Scully, which I have re-read for the purposes of this judgment. He was aware of the training facilities and programmes offered and available to inmates in the prison workshop and that some of the tasks involved operating dangerous machinery and the use of potentially dangerous materials, such as welding torches. If he had had any concerns about the suitability or capacity of a prisoner to engage in any of these activities, particularly from a safety perspective, he would have intervened. He had no concerns for the suitability or safety of the Plaintiff throughout the time he was undergoing his training or subsequently up to the time of the accident.

32. It has to be remembered that a very considerable period of time elapsed between the occurrence of the accident and when the action ultimately first came on for hearing in December 2015 and trundled on into the following year. All other factors being considered, it would hardly be surprising that the Plaintiff exhibited memory difficulties by the time he came to give evidence. What is material, however, is the Plaintiff's condition on the day of the accident. The Court has already found that his methadone treatment or a combination thereof with illicit substances played no causative role in the occurrence of the accident and that had he been exhibiting any signs of being unwell or of being in any way affected by his medication and/or use of illegal substances he would not have been permitted to enter the workshop. Subjectively, therefore, the Plaintiff was considered fit to come into a workshop in which he was entitled to undertake unsupervised welding work and, whether or not he had been assigned to sweeping/cleaning duties on that afternoon, was entitled to use the GEKA cropping machine without permission or supervision.

33. Lest it should be necessary to do so, the Court confirms as findings of fact the several matters cited earlier herein and incorporated in the submissions made on behalf of the Defendants. Accordingly, upon those findings I am satisfied and the Court finds that the Plaintiff's actions in approaching a machine the safe use, operation and purpose of which he had been trained and instructed, that he knew involved a guillotining mechanism, that as a result of the removal of the safety guide guard the cropping blade was visible to him, that it operated by pressing a foot pedal and that he could see his hand upturned in the path of the cropping blade while not resting on a steel flat when he pressed the foot pedal, constituted subjective recklessness and disregard for his own safety; his actions were sheer folly. That he subjectively ran a risk of causing himself a very serious injury when he pressed the machine pedal in beyond question. In the circumstances the Court finds that the Plaintiff was guilty of contributory negligence and was in breach of statutory duty contrary to the provisions of s. 13 of the 2005 Act.

Apportionment of Fault

34. The next issue which falls for determination is the apportionment of fault. This arises in circumstances where it is proved that the damage suffered by the Plaintiff was caused partly by the Plaintiff's negligence or want of care and partly by the wrong of the defendant. Section 34 (1) of the 1961 Act provides that in those circumstances, damages recoverable in respect of the wrong shall be reduced by such amount as the Court thinks just and equitable having regard to the "…*degrees of fault of the plaintiff and the defendant"*, subject to the provisos set out in sub. paras. a, b and c of the subsection. Fault is not to be equated with the potency of the causative factors, whether they be acts or omissions, moving from the plaintiff and defendant; rather, fault in this context is equated to blameworthiness of the parties' respective contributions to the loss and damage. Particularly having regard to the submissions made on behalf of the Plaintiff the measurement of fault is not carried out by purely subjective standards but by objective standards. As observed by Walsh J. in *O'Sullivan v. Dwyer* (1971) I.R. 275 at 286

> *"The degree of incapacity or ignorance peculiar to a particular person is not to be the basis of measuring the blameworthiness of that person. Blameworthiness is to be measured against a degree of capacity or knowledge which such a person ought to have had if he were an ordinary reasonable person…Fault or blame is to be measured against the standard of conduct required of the ordinary reasonable man and the class or category to which the party whose fault is to be measured belongs…"*

This passage was quoted with approval by Kenny J. in *Carroll v. Clare County Council* [1975] I.R. 221 at 226-227. See also *McCord v. Electricity Supply Board* [1980] ILRM 153; *Iarnrod Eireann v. Ireland* [1996] 2 ILRM 500; *Hackett v. Calla Associates Ltd* [2004] IEHC 336; *Hussey v. Twomey* [2009] IESC 1; *Moran v. Fogarty* [2009] IESC 55; *Gallagher v. McGeady* [2013] IEHC 100; *Shaughnessy v. Nohilly & Anor* [2016] IEHC 767 at para. 135 and *Kelly v. Meegan* [2020] IEHC 698.

35. The percentage reduction of the damages achieved by this process must be just and equitable. The percentages of fault arrived at in the authorities cited on apportionment

are illustrative only since the result in was clearly grounded in the particular circumstances of the case to which the relevant principles have been applied. Approaching the task in the way mandated, I find myself unable to accept the submissions of either party with regard to the apportionment which is appropriate. While it is clear that the failure to lock out the machine, ensure the guard was in place and/or that officer Maher remained on station was undoubtedly blameworthy behaviour by omission, however it was also clear that the positive actions of the Plaintiff in operating machine at a time when he could see that his upturned hand was in the path of travel of the cropping blade was blameworthy by commission.

Conclusion; Apportionment of Fault

36. On my view of the evidence and the accident circumstances the Plaintiff's behaviour while to a significant degree more blameworthy than the blameworthiness of the Defendants was not so blameworthy as to warrant visiting upon him the degrees of fault suggested by the Defendants at 85 to 90%. In my judgment the justice of the case is fairly met by an apportionment of 70% against the Plaintiff and 30% against the Defendants. It follows that the damages to which the Plaintiff is entitled will be reduced accordingly.

Quantum

37. The Plaintiff suffered horrific injuries as a result of the accident injuries which he was primarily responsible for inflicting on himself. The parties were invited to and made submissions to the Court on the level or ranges of general damages in which they considered damages ought to be assessed. Mr. Keane suggested a range of €250,000 to €350,000. He considered a reasonable value in respect of the Plaintiff's physical injuries to be €275,000 and for the psychological/psychiatric injuries a sum of €50,000, making in aggregate a sum of €325,000. Mr. O'Scanaill, on the other hand, submitted that the appropriate range for general damages on full liability was €150,000 to €175,000. As a result of the accident the Plaintiff sustained amputations to the middle phalanges of the index, middle and ring fingers and through the distal phalanx of the little finger of his left non-dominant hand. By any stretch of the imagination these were very serious injuries.

38. The Plaintiff was brought by ambulance to Tallaght Hospital from where he was transferred to the plastic surgery unit at St. James' Hospital. He was taken to theatre under a general anaesthetic and underwent micro surgical re-implantation of the index, middle and ring fingers of the left hand. The distal amputated part of the little finger was not salvageable and he underwent a primary terminalisation of the left little finger. Unfortunately, the re-implanted fingers gradually lost their blood supply and died over a number of days. The Plaintiff was taken back to theatre on the 2nd December 2008 and had the failed re-implanted segments of index, middle and ring fingers removed and the amputation stumps formally terminalized. In March 2009 the amputation stumps had healed, although they were still tender and uncomfortable.

39. The Plaintiff was examined and medically reported on in relation to his physical injuries by Mr. J. A. Orr, Consultant Plastic Surgeon. He prepared reports dated the 12th May 2009, and 18th November 2013. He gave evidence. The severed parts of the fingers had been cleanly cut. The amputated digits had been recovered, packaged, and sent with the

Plaintiff to hospital. Medical assessment was that there was a possibility of saving the fingers, hence the initial surgery. The injuries suffered by the Plaintiff would have been extremely painful. Mr. Orr explained that any information coming back from the frayed ends of the nerves would be interpreted at a deep level within the brain and within the spinal cord as pain which was difficult to localise. He considered that this sensation would have been particularly distressing though the massaging as a therapy advised and undertaken by the Plaintiff helped to desensitise the area.

40. Mr. Orr described the Plaintiff as having received a severe irreparable mutilating injury to his left hand which in the long term would leave the Plaintiff with a permanently mutilated appearance together with a very considerable loss of function and the likelihood of chronic pain and discomfort in the amputation stumps. Because the Plaintiff was left with very short stumps of the fingers of the index, middle and ring fingers and with no joint beyond his little metacarpal knuckle he is left with a particular disability in terms of fine manipulation. Mr. Orr described what remained of his fingers as being functionally very limited, for example tying shoelaces, doing up buttons and things like that or any form of fine manipulation such as screwing, unscrewing, or putting on and tightening nuts and bolts would be very difficult. He thought that even when it came to more crude functions, such as gripping a handle on a brush or the handle of a shovel or something like that there would also be limitations because there is no capacity to curve fingers around the handle. Unskilled vocational work not to mention the work for which he had been trained would be problematic.

41. With regard to possible reconstructive surgery Mr. Orr referred the Plaintiff thought the Plaintiff might benefit from assessment by Dr. Eadie, a specialist in microsurgical reconstruction of the hand, with a view to a microsurgical transfer or part of a toe to the index and middle finger stumps. Mr. Orr explained that this kind of reconstruction requires a highly motivated patient who is able to completely give up smoking and to cooperate with all aspects of surgery and rehabilitation. As the Plaintiff was a smoker and would apparently have problems in complying with the regime required to prepare himself for such surgery as well as with the required rehabilitation programme, he considered that this option was at best a possibility. He explained that this surgery was generally offered to someone who had a very specific need for a particular finger. He gave as an example, a professional musician. This option also means giving up a toe. In the event he thought it was unlikely that reconstruction surgery of this type was a viable option for the Plaintiff.

42. Mr Orr had expressed a somewhat more optimistic opinion in his initial report; however, he rode back from that quite considerably when giving evidence. The Plaintiff was likely to experience a continuing clumsiness in the use of his left hand for the foreseeable future. The Plaintiff's many complaints were, in his opinion, entirely consistent with the injury and the physical findings on examination. The impression I formed of Mr Orr's evidence was that given his socio-economic background and circumstances the Plaintiff's injuries were going to result in a permanent functional disability that will have significant vocational implications for him. He expects the Plaintiff to have ongoing cold intolerance

and painful symptomology if, for example, he inadvertently knocked the stumps of his finger or the stump of a finger against something.

43. With regard to alternative treatment options, Mr. Orr did not think that prosthetics were a realistic option. Even with motivated patients, the majority of people with this kind of injury have a tendency to stop using the prosthetics. There are various problems associated with that kind of treatment. I took from this evidence that fitting the Plaintiff with prosthetic fingers was not a realistic option. Having had an opportunity to view the Plaintiff's left hand, it was abundantly clear that on return to society, all other things being equal, the Plaintiff was going to be left with a severe physical disability which would have vocational implications. His capacity to undertake vocational work in the field for which he was being trained in the prison workshops is significantly reduced if not altogether closed to him.

44. Evidence was also given by Dr. Sean O'Domhnaill, Consultant Psychiatrist and Psychotherapist. He prepared a report for the assistance of the Court and also gave evidence. In addition to the sequelae of his physical injuries, his opinion was that the Plaintiff had suffered what he described as psychological pain and suffering and that he would need treatment for what he described as the Plaintiff's *"traumatic psychological condition, meeting the criteria for a diagnosis of posttraumatic stress disorder*". He was at pains to explain, however, that this condition was masked to a considerable degree by the use of prescribed and elicit medication, an issue that would also need to be addressed.

Damages for 'Pain and Suffering'

45. The third issue which the Court must address is the assessment of general damages for what is generally referred to as 'pain and suffering' to date and into the future. O'Higgins CJ. commenting on the purpose of general damages in *Sinnott v. Quinnsworth* [1984] ILRM 523 stated at 531:

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

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

46. The meaning of "pain and suffering" in the context of general damages has been the subject of discussion in authoritative academic legal works on the law of tort and the law of damages as well as in jurisprudence on the subject. For my part, the most comprehensive and yet succinct definition is that offered by McCarthy J. in *Reddy v. Bates* [1983] ILRM 197 at p. 205 where he stated that general damages:

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

47. That the Plaintiff has suffered a serious and permanent injury to his left hand is not in issue. The Book of Quantum approaches the ranges of damages for arm or hand amputations by expressing a sum up to a certain limit for the loss of single digits. Where multiple digits are involved the book states:

> *"There are several factors that need to be considered when calculating the assessment for loss of multiple digits. Such factors would include, which digits and how many digits, dominant hand, appearance, impact on hand function, age, gender and occupation impacts."*

The different facets of life which may be affected as a result of a tortious act covered within this meaning of general damages for 'pain and suffering' appears to me to be particularly apposite in the Plaintiff's case.

48. He has been left with a lifelong cosmetic deformity and functional disability which can fairly be described as profound. It is a source of understandable psychological distress and upset not to mention a constant reminder of a truly horrific accident. I accept the medical evidence adduced in respect of the injuries on behalf of the Plaintiff and am satisfied, and the Court finds that the option of further surgery or fitting the Plaintiff with prosthetics is not a reality for him. Criticism for failing to mitigate his loss by giving up his addiction and submitting to the possibility of further surgery does not, in my judgment, withstand scrutiny. As I understood the evidence of Mr. Orr this option was in any event more of a possibility than a probability; what is more it would involve the Plaintiff giving up a toe which would also have to be taken into account in assessing damages. As it is, the Court has approached the task on the premise that such treatment and surgery is unlikely to be carried out.

49. In assessing damages the Court does not add up figures considered appropriate within the ranges in the Book of Quantum given for each digit. The cumulative effect of the loss of multiple digits to the extent suffered by the Plaintiff has a far greater significance and impact than, for example, the loss of one or two digits, leaving relatively good hand function and ability with adaptation to carry out fine manipulative tasks. Added to all of this, Mr. Orr expressed the opinion that if the Plaintiff accidentally clips his hand off something he will experience a very unpleasant electrical type of pain and that this is a sequela which he thought was likely to persist indefinitely.

Conclusion

50. Having regard to the Plaintiff's evidence as to how he feels about his injuries, his experience of pain, his description of the limitations of hand function and the medical evidence, in particular, the evidence of Mr. Orr, I am satisfied, and the Court finds that a

fair and reasonable sum to compensate the Plaintiff for past and future pain and suffering proportionate to and commensurate with his injuries is €275,000.

Claim for Aggravated Damages

51. An application was made on behalf of the Plaintiff for aggravated damages which was tied into an application made by the Defendant at the conclusion of the trial to have the Plaintiff's claim dismissed pursuant to the provisions of s. 26 of the Civil Liability and Courts Act, 2004 which Mr. Keane characterised as an accusation, in effect, that the Plaintiff had committed perjury. It was a dreadful accusation to make against the Plaintiff and, in Mr. Keane's submission, was utterly groundless, particularly in circumstances where the Court found the plaintiff to be an honest witness who had not intentionally set out to mislead the experts to whom he spoke or, for that matter, the Court. My attention was drawn to the transcript of the evidence relating to the application and to an interjection which I made in response to an observation that the Act made no provision for a penalty to be visited on a Defendant for making an inappropriate application under s. 26 in respect of which I "aggravated damages".

52. It was submitted that this was a remedy to which the Plaintiff should now be entitled, particularly having regard to the findings of fact which the Court made with regard to Inspector Nicholson and Officer Maher and the repetition in submissions on the resumed hearing that the Plaintiff had essentially made up evidence concerning the absence of the backstop to explain away how his hand came to be in the path of the cropping blades, this not to mention the inadequacy of the discovery which was made by the Defendants. The attention of the Court was drawn to the judgment of Cross J. in *Keating v. Mulligan* [2020] IEHC 47 where €10,000 was awarded for aggravated damages by the trial judge in circumstances where he found that the s. 26 application had been inappropriate.

53. I pause here to mention that in the course of submissions I had raised a query with counsel as to whether, if an award of aggravated damages was appropriate, any award would be affected by an apportionment of fault if made. I accept Mr. Keane's submission that having regard to the provisions of s. 34 (1) the apportionment envisaged by that provision in circumstances where liability has been found to rest with the Plaintiff and with the Defendant the apportionment was confined to damages recoverable in respect of the wrong and does not apply to aggravated damages.

54. Mr. O'Scanaill accepted that the s. 26 application did not, as he put it, find favour with me; however, he submitted that a significant number of important facts asserted by the Plaintiff had been shown to be incorrect as a result of the cross examination. The depiction in the principal judgment that the Defendant had adopted an approach to the defence of the action as a "circling of the wagons" had to be seen in the context of the statements made and the evidence given by officers Maher and Nicholson as opposed to how the whole case had been run.

55. The approach which had been taken to the evidence of officers Maher and Nicholson was one of caution and what weight was to be attached to the evidence. Mr. O'Scanaill submitted that there was no authority for the proposition that if a Defendant deployed the

provisions of s. 26 by making an unsuccessful application, aggravated damages must follow. That was a preposterous suggestion and was certainly not what the Oireachtas intended when the provision was enacted. Moreover, the submissions offered in the course of the costs application had to be seen in that context and not blurred in the way suggested by the Plaintiff.

56. I have read and considered the judgment of Cross J. in *Keating v. Mulligan* regarding the inappropriate use of s. 26 and dicta to similar effect made by him in *Lackey v. Kavanagh* [2013] IEHC 341. I find myself in complete agreement with his Lordship. Section 26 of the 2004 Act was not enacted to provide defendants with an additional weapon in the armoury which a Defendant was entitled to deploy in defence of a claim for tactical or other reasons not grounded in evidence or information available at the time sufficient to found the reasonable belief that the plaintiff had or had caused evidence /information to be given which he or she knew to be false and/or misleading in material respect.

57. While the Oireachtas made no provision for an award of aggravated damages to be made to a Plaintiff in circumstances where a Defendant had made an unjustified and inappropriate application pursuant to s. 26, I am satisfied that the Court enjoys an inherent jurisdiction to make such an award where in the circumstances of the case the interests of justice so require. I have reread the transcript in relation to the initial application, and the application regarding costs. I am also mindful that in the course of his submissions Mr. O'Scanaill offered an apology if anything he had said was construed or had been construed in his submissions on the subject issues as a charge against the plaintiff; none such was intended. Having reread his submissions I am satisfied his remarks should not be construed in a way and associated with other matters in respect of which the original application under s. 26 had been moved.

Conclusion

58. I can well understand why Mr. Keane considered it appropriate to make an application for aggravated damages; however, in all the circumstances I consider that at the time it was not unreasonable on the part of the Defendants to move such an application. Applying a subjective test, the onus of proof on a defendant to establish on the balance of probabilities that a plaintiff gave or caused to be given information and/or evidence which he or she knew to be false and/or misleading in any material respect is a heavy one, and not without good reason given the mandatory nature of the consequences which are to follow in the event that the bar is met; in this instance I am satisfied that it was not. The original application was essentially dismissed on the merits, accordingly, and for these reasons the application for aggravated damages is refused.

Ruling

59. There being no claim for special damages the Court will enter judgment in favour of the plaintiff for the amount assessed in respect of general damages less 70%. And the Court will so order.