Neutral Citation [2012] IEHC 443

THE HIGH COURT

[2009 No. 2969 P]

BETWEEN

STACEY MONTGOMERY

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE AND EUGENE MCCARTHY

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 23rd day of October, 2012

1. Ms. Montgomery was born on 23rd August 1989.

2. On 4th August 2007, she was involved in a road traffic accident when she was a front seat passenger in her mother's Jeep. That vehicle was in collision with a garda car. Liability in respect of that accident is admitted by the defendants. This case proceeds as an assessment of damages.

3. The defendants, at the conclusion of the case, made an application under s. 26 of the Civil Liability Act 2004, to dismiss the plaintiff's case on the grounds that the plaintiff gave false and misleading evidence of a material kind and had sworn an affidavit of verification of pleadings that was untrue.

4. In the action, the plaintiff claims that she suffered injuries to her neck, right shoulder and lower back and that as result of these injuries, since that accident, she says, she continued to suffer pain and discomfort on a daily basis. Her evidence was that her competitive dancing career came to an end and she was denied the opportunity to pursue a career as a dancing teacher; that her injuries interfered with her sleeping; caused her pain and discomfort at work as a hairdresser, and limited the social activities normally enjoyed by a person of her age.

5. The defendants say that the plaintiff, in her evidence, grossly exaggerated her complaints and engaged in material non-disclosure to all of the doctors who examined her; that she also engaged in material non-disclosure in the pleadings, in that she did not disclose an incident that occurred in May or June 2006, when, as she was dancing, she experienced an adverse event in her back, which she described as a "click", which caused her to seek medical attention and attend a clinic on six occasions thereafter.

6. Further, the defendants say she failed to disclose to any of the doctors who examined her, with the exception of Dr. Geary in May 2008, and also in pleadings, that she had been involved in a serious road traffic accident on 21st June 2010, in which her car and the car that collided with her were written off. The defendants make the case that these non-disclosures had the effect of causing the doctors who examined her to be misled and consequently their medical reports, which were admitted in evidence by agreement, contained evidence, which is essentially misleading, caused by the non-disclosure of the plaintiff.

7. In addition, the defendants call in question the swearing of an affidavit by the plaintiff on 13th June 2011, which purported to verify a reply to a notice for particulars dated 7th July 2009, in which she deposed to an untruth, namely, that she had not been involved in any other accidents. The defendants contend that the plaintiff's claim for in excess of €800,000, either for loss of earnings or as loss of opportunity arising out from her claimed inability to pursue a career as a dancing teacher, is grossly exaggerated.

8. Finally, the defendants point to the plaintiff's evidence in chief to the effect that in her work as a hairdresser, she was only able to do half the work which her co-workers did and therefore was vulnerable in terms of her capacity to obtain another job in hairdressing if she lost her current employment, evidence which the defendants say was untrue, a fact acknowledged by the plaintiff when cross-examined and also proven to be untrue by the evidence of Ms. Michelle Nolan, the plaintiff's employer.

9. The defendants make the case that all of this evidence was given by the plaintiff, knowingly, to mislead the court.

10. The relevant provisions, s. 26, sub-sections (1) and (2) of the Civil Liability Act 2004, are as follows:

> "26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—
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> (a) is false or misleading, in any material respect, and
>
> (b) he or she knows to be false or misleading, the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—
>
> (a) is false or misleading in any material respect, and
>
> (b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done."

11. The defendants' case for dismissal is under both sub-sections (1) and (2).

12. Firstly, there is the material non-disclosure allegation. In that respect, I want to first deal with what has been described as the "clicking" incident. In my opinion, the clicking incident should have been disclosed. It was a significant incident relating to the area of

the plaintiff's body which the plaintiff claimed had been injured in the road traffic accident on 4th August 2007.

13. Failure to have disclosed this incident deprived all the doctors who examined the plaintiff of an opportunity to consider it and either exclude it as a relevant factor or, alternatively, assess its significance in terms of the injuries alleged to have been suffered by the plaintiff in the accident on 4th August 2007.

14. The plaintiff decided to not mention this because she decided it was not relevant, that she had made a complete recovery from whatever happened to her at the time which she did not consider to be an injury in the first place.

15. In due course, this clicking incident was eventually disclosed to Dr. Geary in May 2012, and to Mr. Poynton when he met with the plaintiff and her mother on 5th July 2012. Mr. Poynton conducted a detailed questioning of the plaintiff and eliminated the clicking incident as a relevant factor on the basis that she had gone on to normal activities and dancing for a period of about fifteen months between this incident and the road traffic accident in August 2007. He therefore came to the conclusion that it was not relevant to injuries arising in the accident on 4th August 2007.

16. I would agree with Mr. Poynton's conclusion in that regard. It would seem to me that if Mr. Poynton is correct, and I think he is, the clicking incident can be ruled out as being relevant to the injury which the plaintiff subsequently suffered in August 2008. As such, it is not material to the assessment of damages and hence not a ground for applying section 26 of the Act.

17. Whilst it is clear that the affidavit of verification which verified the reply to the notice for particulars, did manifestly aver to an untruth, namely, that the plaintiff had not been involved in another accident, I am not satisfied that when the plaintiff swore the affidavit, she knew it to be false and misleading. I think it is more likely that when she swore the affidavit at that stage, it was more of an oversight than anything else. I would not dismiss her claim on that ground.

18. The failure of the plaintiff to disclose the accident of 21st June 2010 must be treated on a different basis. The plaintiff consciously decided not to disclose this accident to anybody until she met Dr. Geary in May 2012. Dr. Geary's report led to the defendants being alerted to it in late June 2012. The reason the plaintiff did not disclose it was because she was of the view that this accident had not affected her pre-existing back and neck condition. Therefore, in her view, it was not relevant. She was completely wrong in this and I am satisfied from the evidence that she well knew that the second road traffic accident did have a direct bearing on the progress of her complaints and that she suppressed all disclosure of this accident to protect and enhance the value of her claim for damages in these proceedings.

19. It is clear from medical evidence that the plaintiff received no medical attention for her complaint during 2009. When she saw Dr. McCrory early in 2010, she had more or less recovered from the injuries she suffered in the road traffic accident on 4th August 2007.

20. After the road traffic accident on 21st June 2010, she had seven attendances a the Swift Clinic up to mid-2012 in which she complained of back pain, including pain shooting down her leg, an entirely new complaint.

21. From March 2008 to June 2010, the plaintiff had not attended at the Swift Clinic at all. On 24th March 2008, when she did attend, the primary reason for her attendance was for an entirely unrelated matter.

22. As a result of a reference by me to the absence of medical attention sought by the plaintiff before 21st June 2010, and the frequency and content of the medical attention sought from the Swift Clinic thereafter, Mr. Hogan for the plaintiff sought to introduce evidence of attendance by the plaintiff at a chiropractor and a physiotherapist in the period leading up to June 2010. In due course, records of attendance at a chiropractor were admitted by agreement. The chiropractor, Dr. Woods, was to come from the USA to give evidence, but for reasons that were not explained, he changed his mind at the last minute and did not come.

23. The records admitted show that the plaintiff had received, from July to December 2009, intensive treatment from a chiropractor, having in total 28 sessions in that period. Two further treatments were given in February 2010. Although another 12 sessions were paid for in advance, the plaintiff did not avail of these and obtained a credit of €540 for these.

24. In the records admitted in evidence, there is a document signed by the plaintiff which describes the treatment given in the following terms:

> "*Adjustment.*
>
> *An adjustment is a specific application of forces to facilitate the body's correction of vertebral subluxation. Our chiropractic method of correction is by specific adjustments of the spine.*
>
> *Health.*
>
> *A state of optimum physical, mental and social wellbeing, not merely the absence of disease or infirmity.*
>
> *Vertebral Sublocation.*
>
> *A misalignment of one or more of the 24 vertebraes in the spinal column which causes alteration of nerve function and interference to the transmission of mental impulses resulting in the lessening of the body's innate ability to express its maximum health potential.*
>
> *We do not offer to diagnose or treat any pain, symptom, disease or condition other than vertebral subluxation."*

It goes on to say:

> *"However, if during the course of a chiropractic spinal examination we encounter non-chiropractic or unusual findings, we will advise you. If you desire advice, diagnosis or treatment of these findings, we will recommend that you seek the services of another healthcare provider."*

This document is signed by the plaintiff.

25. In the course of filling out this document, the plaintiff describes the reason why she is there as "back problems, was in an accident" and underneath, against a variety of various physical stresses, she ticks "work injuries". She mentions that her exercise

was "good".

26. In her evidence, the plaintiff mentioned attending a chiropractor but dismisses this as follows. In this, I am quoting from the transcripts of Day 1, page 11, Questions 88 onwards:

> *"Q. Did you have much physiotherapy?*
>
> *A. Yeah, I went for a few months and then she told me one day there wasn't much.*
>
> *Q. 89 (O'Neill J): Was that soon after the accident or when?*
>
> *A. Yeah, probably a few months. I was referred to by my doctor. I went for a few months to physiotherapy and she told me that there wasn't really much she could do for me so I then went to a chiropractor for a while, that was in Citywest. He pretty much said the same thing, wasn't really much he could do for me."*

That was the plaintiff's only reference in her evidence to a chiropractor.

27. I find it difficult to comprehend her complete failure to disclose the intensive nature of the engagement which she had during the second half of 2009 with a chiropractor. Apart from not disclosing this in any adequate way to the court, the plaintiff also did not disclose this to her doctors.

28. I find it surprising that the plaintiff was engaging in such a treatment as is described in the document which she signed. All of the MRIs and scans and X-rays done on the plaintiff demonstrate no significant abnormality of her spine, as one would expect in a young, fit, healthy person of her age. One CT scan did disclose a congenital abnormality. That was, as explained by Mr. Poyonton, of no significance.

29. I find the plaintiff's failure to disclose the full extent and nature of her involvement with the chiropractor as an extraordinary omission in the context of no other treatments apart from a very limited amount of physiotherapy early on and one occasion when she was injected into her neck by Dr. McCrory.

30. In the absence of Dr. Woods' evidence, I can only infer that the plaintiff did not consider all of this chiropractic treatment as relevant to the injuries in the road traffic accident, which begs the question why the cost of it was claimed in these proceedings.

31. It is clear that the plaintiff did not avail of any further treatment after February 2010, which, in conjunction with the outcome of her consultation with Dr. McCrory in early 2010, persuades me that she had recovered from the injuries suffered in the road traffic accident on 4th August 2007, well in advance of the accident which occurred on 21st June 2010.

32. As a result of her non-disclosure of that road traffic accident, she deprived all of the doctors who examined her subsequently, except Dr. Geary in May 2012, of an opportunity to assess the effect the road traffic accident of 21st June 2010, had on the injuries sustained in the previous accident. She did this knowingly, and I am quite satisfied with a view to manipulating the evidence of the doctors on this topic thereafter.

33. When the plaintiff and her mother attended Mr. Poynton on 5th July 2012, they still did not disclose this second road traffic accident to him. As a result, he was unable to carry out a proper assessment of the relevance of the second accident. In cross-examination, Mr. Poynton was challenged for changing his evidence from the conclusion expressed in his report of 13th July 2012, a report given before he had any meaningful opportunity to consider the real state of the post-21st June 2010 complaints as revealed in the Swift Clinic records and other records.

34. This material non-disclosure had the effect of placing almost insurmountable obstacles in the path of this court in getting a reliable picture based on medical evidence of the true state of the plaintiff's condition post-21st June 2010.

35. The plaintiff, by her material non-disclosure of this later road traffic accident, has caused the medical evidence in the case to be misleading on a material aspect of the case, namely, the true state of the plaintiff's condition post-21st June 2010. As such, I am satisfied that her conduct in this regard, on its own, warrants the dismissal of her case.

36. I am satisfied that the plaintiff had recovered from the first road traffic accident by the time she had the second road traffic accident. In this regard, I accept the evidence of Mr. Poynton. It necessarily follows that the plaintiff's attempt in her evidence to attribute ongoing symptoms, if any, in her neck, lower back and shoulder to her road traffic accident on 4th August 2007, is in itself untruthful and materially misleading evidence which in itself would merit dismissal of her case.

37. I do not believe the plaintiff's evidence as to her ongoing complaints of pain and discomfort. I am satisfied that she does not have any significant ongoing complaints with respect to the original accident.

38. Since early 2008, all of the plaintiff's technical examinations have indicated that the condition of her spine is normal with the exception of the single CT scan which demonstrated an irrelevant congenital abnormality. In all of her medical examinations, the only abnormality detected was some tenderness on palpitation. At all times, she was capable of a full range of movement with minimal discomfort, if any. A perusal of the Swift Clinic notes for an attendance on 11th September 2007, five weeks after the accident, clearly demonstrates that at a time when her soft tissue injuries would have been at their worst, there appeared to be very little amiss. Complaints with regard to her neck were "intermittent". With regard to her lower back, it was described as increasing on movement and decreasing on rest. She was not on any analgesic medication. On examination, she had a full range of movement of her upper and lower spine, and apart from tenderness of the right sternomastoid muscle or movement on movement of the neck, no other abnormality was found.

39. In November 2007, the plaintiff started training as a hairdresser with Toni & Guy. She has completed her training course and is now a qualified hairdresser and is currently employed by Toni & Guy but spending one day a week on an advanced hairdressing course. Apart from two days after 21st June 2010, she has been constantly present at work.

40. The evidence of her employer, Ms. Michelle Nolan, is illuminating. On Day 2, from Questions 303 to 306, the following evidence was given:

> *"Q. Now were you aware of any problem that she had with her back?*

A. Yeah, casually aware that she had a back problem.

Q. How did you discover it?

A. I think I may have found out around the time that she had a car crash, through the staffroom. It was never a sit down chat.

Q. You heard it on the grapevine, so to speak?

A. I guess.

Q. Of course, that means she never mentioned it to yourself?

A. No."

Then we go on to Questions 308 onwards:

"Q. What difference did you notice in Ms. Montgomery's work performance before and after June 2010?

A. I haven't noticed any difference.

Q. Did she fail to turn up for work the following day?

A. I don't recall that date.

Q. She has said herself in evidence that she missed no time at work. Would that be your recollection?

A. Stacey doesn't miss time in work. She is a great employee.

Q. Personality wise, how would you describe her?

A. She's great. Great to have in the salon, bubbly, confident, popular. She's on time, she's a great employee."

41. The picture Ms. Nolan paints of the plaintiff is hard to reconcile with that which the plaintiff sought to portray, namely, of a person struggling to cope and having to sit down during the course of the day's work.

42. I do not think the plaintiff had any significant back, shoulder or neck pain from mid-2008 onwards. Ms. Nolan refers to hearing on the grapevine of one road traffic accident. The context of her evidence, namely, during the currency of her employment, suggests she was referring to the June 2010 road traffic accident.

43. It is obvious from Ms. Nolan's evidence that the plaintiff did not display at any stage the slightest signs of injury, pain or discomfort associated with any accident while at work from the outset of the plaintiff's employment in November 2007.

44. In the course of her direct evidence, the plaintiff gave evidence of only being able to do half the work of her colleagues. This was a blatant untruth. In fairness to the plaintiff, she acknowledged that, when challenged on it. However, she clearly set out to mislead the court in this regard in order to make a claim for general damages in respect of her alleged vulnerability in the labour market if her employment with Toni & Guy terminated.

45. This attempt by her, although unsuccessful, demonstrated what was typical of her approach to her case, and in particular, to the giving of her evidence, namely, a determination to maximise her damages by manipulating the evidence, as by non-disclosure, and when appropriate, by deliberate lying, as when she told the court she could only do half the work of her colleagues and her attempt to convey a picture of a person who was struggling to cope with the physical demands of her work.

46. These additional factors add to the grounds for dismissing the case under section 26 of the Act. This brings me to her claim for damages for loss of opportunity in respect of not being able to pursue a career as a dance teacher.

47. This claim is supported by an actuarial report prepared by Messrs. Segrave-Daly, well-known and eminent actuaries. The report is based on information supplied by the plaintiff which is recited in the report. Insofar as this information is concerned, it was not false or misleading. There was one omission which was significant. That was the remuneration that would have to be paid to the second teacher who would have had to assist the plaintiff if she had set out on a career as a dance teacher. The plaintiff's ultimate remuneration would have to be reduced so as to accommodate that. Other than that factor, I am satisfied that the information supplied to the plaintiff's actuary could not be condemned or false or misleading.

48. The large capital sum that was calculated which undoubtedly outraged the defendants as painting a picture of gross exaggeration was simply the result of a high multiplier which was based on the plaintiff's age and the assumed retirement age of 68. Thus, the only aspect of the calculation of this claim that could be challenged by the defendants as leading to a conclusion that the claim was grossly exaggerated was the information supplied by the plaintiff which led to a net figure in respect of income lost, to which the multiplier was applied, leading to the capital sums as calculated.

49. I do not think that the information supplied was misleading. I am not prepared to hold that the omission in respect of the remuneration of a second teacher was deliberately done to mislead.

50. I am, however, satisfied that this claim was a false claim for the following reasons.

51. The plaintiff had had a very successful career as a competitive dancer. She was undoubtedly a candidate for moving on to a career in teaching dance. It is quite clear that at the end of 2007, her career as a competitive dancer was coming to an end and probably would have ended in the autumn of that year with the Dancer of the Year Competition in Bundoran.

52. I would accept that in the period after the accident in 2007 and up to the middle of 2008, her injuries would have prevented her from participating in competitive dancing or in dancing, generally.

53. I am satisfied, however, that thereafter, there was little or nothing in the way of complaints that hindered her from normal physical activity. I find it impossible to accept that if she seriously wanted a career as a dance teacher that she could not have pursued that late in 2008 or thereafter.

54. In her evidence, the plaintiff claims that she could not pursue such a career because she could not demonstrate the dance moves involved because of her injuries. I do not accept that. I am quite satisfied that she had ample physical capacity to do this from 2008 onwards. I am quite satisfied that if Ms. McKittrick could demonstrate these moves, the plaintiff, likewise, could have done so.

55. It is quite clear to me from the evidence that the plaintiff did not know what was it was necessary to do to qualify as a dance teacher for the simple reason that she had not bothered to find out. I infer that this was because she did not intend to embark on such a course.

56. I am satisfied that, post-2007 and into 2008, that the plaintiff did not have any serious intention of becoming a dance teacher. If she did, there is no doubt that her background in dance equipped her for such a career. As of 2008, her injuries would not have prevented her from pursuing a career in teaching dance.

57. By 2008, the plaintiff had moved on in her life. She had commenced her career in hairdressing, a career which she obviously enjoyed. She had a boyfriend and perhaps the rigours of evening classes and training may not have been as appealing to her as they were when she was a schoolgirl.

58. I am satisfied that she had no serious intention of pursuing a career as a dance teacher. Her only interest in that regard was for the purpose of inflating her claim for damages in these proceedings, as such, a false claim.

59. For all of these reasons, I would dismiss the plaintiff's claim under the provisions of section 26, sub-section (1) of the Civil Liability Act 2004.