THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 298

Finlay Geoghegan J.
Peart J.
Irvine J.

Record No. 2014/377/COA

Between /

Bill Nolan

Plaintiff/Appellant

- and -

Patrick O'Neill and Danny Mitchell

Defendants/Respondents

Judgment of Ms. Justice Irvine delivered on the 21st day of October 2016

1. This is an appeal against the judgment of the High Court (Smith J.) delivered on 20th January 2016 in a claim brought by the plaintiff ("Mr. Nolan") arising out of injuries sustained by him in a road traffic accident on 13th November 2015. The High Court judge found that the second named defendant ("Mr. Mitchell") had driven a motor vehicle owned by the first named defendant, ("Mr. O'Neill") in a negligent manner such that it had collided with Mr. Nolan's motor cycle causing him significant injuries.

2. Concerning the liability issue the trial judge found Mr. Mitchell principally to blame for the collision but made a finding of contributory negligence to the extent of 40% against Mr. Nolan.

3. There was no real dispute as to the extent of Mr. Nolan's injuries. He sustained a fracture to the neck of the fifth metacarpal bone in his right foot, a fracture of the fifth metacarpal bone as well as serious lacerations to his left hand and a ruptured quadriceps tendon of his left knee requiring surgical repair. Mr. Nolan was immobilised for three months in a wheelchair, thereafter spent a significant period on crutches and underwent extensive physiotherapy. It was agreed that he would have some permanent disability arising from the injuries to his left knee and left little finger.

4. As to quantum, the trial judge valued Mr. Nolan's claim for pain and suffering to the date of trial in the sum of €75,000 and for pain and suffering into the future at €50,000. With respect to his claim for loss of earnings to the date of trial, having made certain allowances for income earned post accident and deductable social welfare payments, he considered Mr. Nolan entitled to an award of €27,440. As to future loss of earnings, having concluded that, regardless of his injuries, Mr. Nolan was capable of engaging in a wide variety of employment opportunities, he was satisfied that an award of €40,000 in respect of loss of opportunity would be appropriate.

5. Notwithstanding the aforementioned findings the High Court judge proceeded to dismiss Mr. Nolan's claim pursuant to s. 26 of the Civil Liability and Courts Acts 2004 ("the Act") having expressed himself satisfied that he had sought to exaggerate his claim by introducing evidence which he knew to be false or misleading and that in the circumstances of the case the dismissal of the action would perpetrate no injustice.

Issues

6. Two principal issues arise for the court's consideration on this appeal and they are as follows:-

> (i) Having regard to the facts found, did the trial judge err in law in finding Mr. Nolan guilty of contributory negligence to the extent of 40%, and
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> (ii) did the trial judge err in law when he dismissed Mr. Nolan's claim pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004?

The finding of contributory negligence: relevant background facts.

7. On the night of 17th November 2005 Mr. Nolan, accompanied by a pillion passenger, was riding his motorcycle on the Carlow to Abbeyleix road travelling in the direction of Abbeyleix. It was dark, there was no on street lighting and the weather was fine. In the moments prior to the collision Mr. Mitchell, accompanied by a front seat passenger, Mr. O'Neill, was preparing to exit from his driveway onto the same roadway. His house was on the opposite side of the roadway to that upon which Mr. Nolan was travelling and he intended to make a left-hand turn to travel in the direction of Carlow.

8. Mr. Nolan maintained that in the moments leading up to the collision he had been riding his motorcycle on his correct side of the roadway, a few feet in from the centre white line. He was suddenly dazzled by the oncoming lights from Mr. Mitchell's motor car on his carriageway and was unable to avoid the impact. Mr. Mitchell, on the other hand, claimed that Mr. Nolan had been travelling on his incorrect side of the roadway close to the ditch on his side of the road with the result that, instead of making an immediate left hand turn onto his own carriageway, he was forced to dart across the roadway onto his incorrect side of the road in his efforts to avoid the oncoming motorcycle.

9. Gda. Hurley, the investigating garda, produced a sketch map depicting the locus in quo post accident. From what he had found at the scene he was satisfied that the impact had occurred on Mr. Nolan's side of the roadway. He further stated that the manoeuvre which Mr. Mitchell was performing at the time the impact took place was a straightforward one and was capable of being executed within the confines of the carriageway onto which he was turning. He also stated that a motorist intending to make that left hand turn had a sight line of 200 metres in the Carlow direction. The court also heard independent testimony from a motorist who was overtaken by Mr. Nolan a couple of hundred metres prior to the scene of the accident. He told the Court that he was travelling at

approximately 65mph when overtaken. That being so, he thought that Mr. Nolan could have been travelling as fast as 90mph.

10. The trial judge in the course of his judgment made the following findings of fact, namely that:

(i) Mr. Nolan had been riding his motorcycle on his correct side of the roadway in the moments prior to impact.

(ii) Mr. Nolan had been driving at a very excessive speed, close to 90 mph in advance of the collision.

(iii) Mr. Nolan had failed to slow or stop his motorcycle when dazzled by the lights from Mr. Mitchell's oncoming car.

(iv) Mr. Mitchell's proposed turn did not require him to travel beyond the centre white line.

(v) Mr. Mitchell had failed to yield right of way to Mr. Nolan's vehicle.

(vi) Mr. Mitchell had failed to keep a proper lookout and had only become aware of Mr. Nolan's oncoming motorcycle when alerted to its presence by his passanger, Mr. O'Neill.

(vii) Had Mr. Mitchell been keeping a proper lookout as he emerged he would have been able to see the approach of Mr. Nolan's motorcycle and would, if necessary, have have been able to stop and wait until he had passed him by.

Decision on the issue of contributory negligence

11. It is well established law that an appellate court should not interfere with an apportionment of liability made by a judge or jury unless satisfied that such apportionment was grossly disproportionate having regard to the evidence. (See *Snell v. Haughton* [1971] I.R. 305). Accordingly, it is on this premise that I consider the finding of the High Court judge.

12. The task of the High Court judge was to assess contributory negligence by reference to the moral blameworthiness of the parties for their respective causative contributions to the plaintiff's injuries. That being so, having regard to the findings of fact made by the High Court judge and to which I have referred above, I am quite satisfied that his finding of 40% contributory negligence on the part of Mr. Nolan was grossly disproportionate in all the circumstances.

13. Although Mr. Nolan was found to be travelling at a speed significantly beyond the speed limit of 80 kilometres per hour, he was driving on his own side of the roadway such that had Mr. Mitchell not driven onto his side of the roadway no collision would have occurred. Mr. Mitchell was performing a straightforward left hand turn, a manoeuvre which Gda. Hurley had stated did not require him to cross the centre line of the carriageway. Worse still he commenced his turn without looking to his left and as found by the trial judge, had he done so he would have noted the plaintiff's approach and could, if he considered it necessary, have postponed his manoeuvre. The result of his failure to look to his left was that when Mr. O'Neill alerted him to Mr. Nolan's approach, he then panicked and in his frantic effort to avoid an apprehended collision darted onto his incorrect side of the roadway where he obstructed the motorcyclist's path of travel.

14. Two criticisms were made by the trial judge concerning Mr. Nolan's driving. The first was speed and to that extent, the trial judge was quite entitled to find fault on the part of the motorcyclist. However, it is to be noted that the only evidence as to speed was that which was given by a motorist who assessed Mr. Nolan's speed several hundred metres prior to the impact and at a time when the motorcyclist was performing an overtaking manoeuvre. However, even assuming that there was evidence to support the trial judge's finding that Mr. Nolan was travelling at 90 mph immediately prior to the collision, there was no effort made by the defendants in the course of the evidence to establish the causative consequences of that excessive speed. For example, no evidence was led to suggest that if Mr. Nolan had been travelling within the speed limit that that he would, on the balance of probabilities, have retained control of his motorcycle and have avoided the collision. Neither was there any effort to establish that Mr. Nolan's injuries would have been less significant had he been travelling within the speed limit.

15. The second criticism of Mr. Nolan was his failure to slow down or stop when dazzled by the lights of the oncoming car. However, having accepted that Mr. Mitchell had darted onto his incorrect side of the roadway when Mr. Nolan's presence was belatedly drawn to his attention, it is difficult to see how the trial judge could reasonably have ascribed any significant blame to the motorcyclist for his inability to stop or slow down when suddenly faced by the lights of a car turned into his path of travel with the consequences that he could see nothing but the lights of the car heading in his direction. Further, no evidence was led to establish how far away Mr. Nolan was from Mr. Mitchell's car when its lights were turned in his direction or as to the distance or time Mr. Nolan would have required, if driving within the speed limit, to take the type of evasive action advised by the trial judge.

16. For these reasons I am satisfied that the apportionment of 40% liability to Mr. Nolan was grossly disproportionate having regard to the moral blameworthiness of the parties for their causative contributions to the injuries sustained and must be set aside. For my part I would favour a finding of contributory negligence of no more than 20% to reflect the fact that, while there was no specific evidence on the matter it would have been open to the trial judge to infer that Mr. Nolan's injuries would probably have been somewhat less severe had the impact occurred while he was travelling within the speed limit.

Section 26 of the 2004 Act: Relevant background facts.

17. The trial judge ultimately dismissed Mr. Nolan's claim based upon his conclusion that he had knowingly given or caused to be adduced false and misleading evidence concerning two matters. The first of these was in relation to the income he claimed he would likely have enjoyed but for his injuries and the second concerning his involvement in the sport of "car drifting" post accident. Accordingly, I will briefly summarise the evidence and the findings of the trial judge in relation to these issues.

Future Earnings.

18. At the time of his accident, Mr. Nolan was working as an alarm fitter in an alarm installation company owned and operated by his father. In his personal injury summons he indicated he would be claiming loss of earnings based on pre-accident earnings of €500 net per week together with €100 overtime. By letter dated 12th May 2008, in response to a letter seeking particulars, Mr. Nolan's P.60 which showed total gross pay of €21,159 for the year ending 31st December 2005 was furnished to the defendants' solicitors. That annual figure reflected an average gross weekly wage of €407 or €365 net. When assessed by Ms. Paula Smith, the defendants' vocational assessor, Mr. Nolan told her he had been earning €550 gross per week at the time of his accident. In his oral evidence, he stated that he had been "taking home" €500 per week at the time of his accident.

19. Mr. Nigel Tennant, Mr. Nolan's actuary, prepared two reports. In his first report dated 31st May 2010 he calculated Mr. Nolan's

loss of earnings claim based on the earnings referred to in his P. 60 and what he had been advised by the company's accountant, Mr. Paul Lynch, concerning likely increases in his earnings for the years 2006 - 2010. Mr Lynch had advised that Mr. Nolan's gross salary would have increased from €21,159 in 2005 to €27,500 in 2010 or a gross weekly wage of €528 reflective of an uplift of 30% on the P.60 figures over a five year period. In his second report of the 7th April 2011, Mr. Tennant advanced an increased claim for loss of earnings. He did so based upon greater potential earnings figures for the years 2006 – 2010 which, it transpired in the course of evidence, had been furnished to him in a handwritten schedule prepared by the company's bookkeeper, Ms. Joanne Holt. Ms. Holt also happens to be Mr. Nolan's older sister. That schedule advised that Mr. Nolan would likely have earned €500 gross per week for the years 2006 and 2007, €600 per week for 2008 and 2009 and €650 gross per week for 2010 and 2011. All of these figures are set out in a table at p. 4 of Mr. Tennant's report. At several points in his report he refers to Mr. Nolan potentially having a gross earnings figure of €650 in 2010 and 2011 with a nett weekly equivalent of €562, that figure being somewhat bigger than the gross figure of €528 per week which he had relied upon in his first report.

20. It is important in the context of the s.26 application to note that these two actuarial reports were forwarded to the defendants as part of Mr. Nolan's disclosure under SI 391 1998 as early as November 2011. They were also were listed in his Schedule of Special Damages and as such were verified by him as true and accurate when he swore his Affidavit of Verification on 10th November 2011.

21. It should be said that in the course of Mr. Tennant's evidence it emerged that on receipt of Ms. Holt's schedule he had drawn Mr. Nolan's solicitor's attention to the fact that the earnings which she had projected were significantly above those which had earlier been advised by the company's accountant and those contained in the P. 60. He stated that in light of these discrepancies he had sought specific instructions as to which set of figures he was to rely upon for the purposes of preparing his updated report and that he had been instructed to prepare the claim based upon Ms. Holt's schedule.

22. Finally, also relevant to this issue is the fact that Mr. Nolan senior gave evidence that, had it not been for his son's injuries, he would have expected him, as of the date of the trial, to have taken over the running of the alarm business. In such circumstances he told the court that, having regard to his ability to work long hours, his son would have had the potential to earn as much as €800 or €900 per week. He also stated that as of the date of trial, the company was paying somebody €600 a week for a forty hour week.

Car drifting
23. As to the issue in relation to "car drifting", the following is what Ms. Smith noted in her expert report as to what she had been told by Mr. Nolan concerning car drifting in the course of his interview:-

> "Mr. Nolan reported that at present he does not engage in any hobbies or interests. He stated, however, that in the past one of his primary interests was car drifting *i.e.* a particular motorsport which apparently entails driving a car through over steering, driving in a sideways position. He stated, however, that he had to give this up due to his injuries and had not undertaken any of this car racing since his accident in 2005. He described himself however, pre-accident, as having come sixth in the whole Irish series, reporting that engaging in such activity would now be too sore."

24. In the course of his own evidence, Mr. Nolan readily admitted that he partcipated in a significant number of car drifting demonstrations post accident but stated that he had not been in a position to compete in the sport because of lack of funds. He did not accept that he had denied participating in the sport post accident and remained convinced that what he had told Ms. Smith was that he had not driven competatively since his accident.

Section 26 Application
25. Mr. Reidy SC, in applying to have the claim dismissed pursuant to s. 26 of the Act, made the case, *inter alia*, that Mr. Nolan's claim for loss of earnings which was based upon the schedule of progressive wage increases advised by Ms. Holt, was false and misleading with the effect that he had exaggerated his claim for loss of earnings to the extent of €175,000. That claim had been verified as truthful by Mr. Nolan in his Affidavit of Verification sworn on 10th November 2011. He also relied upon what Mr. Nolan had said to Ms. Smith concerning his inability to return to car drifting because of his injuries, as a further effort to deliberately exaggerate his claim knowing that evidence to be false.

Judgment of the High Court on the s.26 issue
26. In his judgment the High Court judge stated that he had been given a considerable amount of conflicting evidence as to precisely what Mr. Nolan's earnings had been prior to the accident and that the important issue was "to ascertain what the plaintiff's earnings would have been if he had not suffered his injuries and to ascertain his capacity to work and earn a living post accident". The figures in the P. 60, he said, were to be contrasted with the earnings which Mr. Nolan stated he was receiving at the time of his accident and he referred to his exchange with Mr Lynch, with whom he had canvassed the possibility that the difference might be accounted for by some additional cash payment he might have received from the company.

27. The trial judge referred to the first actuarial report which was based upon the earnings advised by Mr Lynch and which proposed, in respect of the years 2006 - 2010 an uplift of 30% in the gross wage figure advised in Mr. Nolan's P.60. He expressed himself perturbed by Ms. Smith's evidence that a 15% increase would have been more appropriate and that national wages had only increased by 10% over that five year period.

28. Concerning the differing evidence advanced as to Mr. Nolan's earnings at the time of his accident and his expected earnings for 2006-2010, the trial judge at paras. 121 and 122 of his judgment stated as follows:-

> "121. No satisfactory explanation was forthcoming for this significant discrepancy. The plaintiff was not asked to clarify this matter; nor was the matter raised during the evidence of the plaintiff's father and sister, both of whom are directors of the company he worked for, and should, given that it is a family company, be familiar with its books.
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> 122. This is an important issue, because the plaintiffs actuary based his projections on a schedule of progressive percentage wage increases that it is alleged the plaintiff would have earned if he had stayed in his employment as an alarm fitter."

29. Relevant also to his judgment is the reference by the trial judge to the opportunity which he afforded to Mr Lynch to come back to court, if he so wished, with evidence to support a 30% increase in wages within the company over the relevant five-year period, an opportunity which was not availed of.

30. The trial judge at para. 154 of his judgment addressed his additional concerns regarding the loss of earnings figures set out in Mr. Tennant's second actuarial report which he stated represented an increase of 50% on Mr. Nolan's wages for the period 2005 - 2010. Those earnings were based upon Ms. Holt's schedule and were figures which he emphasised had not been withdrawn at any stage. As

to Mr. Nolan's knowledge concerning those figures this is what the trial judge said at para. 156 of his judgment:-

> "156. It cannot be said, nor indeed was it suggested by counsel for the plaintiff, that because the figures were not compiled or drafted by the plaintiff personally, they do not come within, or form part of, the plaintiff's claim for damages. I am satisfied that in this case, the figures were attributable to the plaintiff himself."

Further, at para. 158 the trial judge referred to the concerns that Mr. Tennant had communicated to Mr. Nolan's solicitor concerning the figures in Ms. Holts schedule stating as follows:-

> "Despite these obvious concerns which were communicated to the plaintiff's solicitors and presumably to the plaintiff himself, the implications of which are obvious, no response was forthcoming."

31. Having expressed all of these concerns the trial judge proceeded to state that he was entitled to infer from the facts which had been admitted or proved, that as a matter of probability Mr. Nolan had adduced or caused to be adduced misleading evidence in the form of the schedule which had been incorporated into the letter of instructions sent to Mr. Tennant for the purposes of the preparation by him of his second report. In circumstances where no explanation or clarification or evidential basis had been made out for those figures, he was entitled to conclude that the loss of earnings claim had been deliberately exaggerated. It was, he held, a reasonable inference to draw from the circumstances that Mr. Nolan probably knew that the information provided in support of that claim was false and misleading in a material respect.

32. In deciding to invoke s.26 the trial judge also relied upon his finding of fact that Mr. Nolan had participated in a number of "car drifting" demonstrations in European cities post accident whereas he had advised Ms. Smith that he had not participated in his former hobby as a result of his injuries. Whilst not specifically so stated by the trial judge in his judgment, it is to be inferred from his judgment that he must have concluded that Mr. Nolan had pursued such a course of action for the purposes of seeking to mislead Ms Smith as to the extent of his injuries.

Discussion

33. Section 26 of the Act provides 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
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> (b) he or she knows to be false or misleading,
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> 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.
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> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that:-
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> (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.
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> (3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.
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> (4) This section applies to personal injuries actions:-
>
> (a) brought on or after the commencement of this section, and
>
> (b) pending on the date of such commencement.

In what circumstances should s.26 be invoked?

34. For the purposes of considering the validity of the approach of the trial judge to the defendants' application it is perhaps relevant to reflect upon what the Oireachtas set out to achieve when it enacted the 2004 Act.

35. It is clear from a reading of the Act itself and the authorities relied upon by counsel in the course of their submissions that it was designed to change the manner in which parties would conduct personal injuries litigation. What has often been described as the "cloak and dagger approach" was to be abandoned in favour of an approach which was open, transparent and honest and a statutory scheme within which false or misleading assertions, allegations or information would not lightly be tolerated. That this is so is obvious from provisions such as s.14 which requires the parties to such litigation to verify by affidavit the truth of the assertions or allegations made by them in the proceedings and renders it an offence for a person to make a statement in such an affidavit, knowing it to be false or misleading in any material respect. In similar vein, s. 25 provides that it is a criminal offence for any person to knowingly give evidence that is false, dishonest or misleading in any material respect. Further, s. 26, makes available to the rial judge a draconian civil penalty, namely the right to dismiss a personal injuries claim if satisfied that the plaintiff gave evidence which he/she knew to be false or misleading in any material respect or dishonestly caused such evidence to be given on their behalf unless satisfied that such a dismissal would result in an injustice being done.

36. What the legislation was not designed to do was aptly described by O'Neill J. in his decision in *Smith v. Health Service Executive* [2013] IEHC 360. In that case the plaintiff in her replies to particulars had denied the existence of any prior medical history. She later made discovery of her general practitioner's records which contained an extensive pre-accident medical history. In the course of the trial the plaintiff was rigorously cross examined and asked to explain how she had failed to disclose the various medical complaints and treatments referred to in her GP's records. The following extracts from the judgment of O'Neill J. provide helpful guidance for a court

considering a dismissal application under s.26 of the Act:-

> "89. In light of all of the information disclosed to the defendants in the plaintiff's medical records and bearing in mind that there is little or no dispute concerning the injuries suffered by the plaintiff in this accident, save to the relatively minimal extent revealed in the defendants' medical experts reports, the forensic assault on the plaintiff to set up an application under s. 26 of the Act of 2004, can only be seen as wholly unjustified and an opportunist attempt to evade their liability to the plaintiff by a misconceived invocation of s. 26.
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> 90. It is obvious that reply number 16 to the request for particulars is inaccurate, but I am quite satisfied that this was the result of the plaintiff having completely forgotten about the minor hip and neck complaints she had in 2004 and 2005, and believing, in my view, rightly, that her right hip problem and her fibroids problem had no relevance to the claim she was making.
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> 91. I am absolutely satisfied that when this reply to particulars was made, the plaintiff had no intention whatsoever of misleading anybody. I have had the opportunity of listening and observing the plaintiff giving her evidence in the course of a lengthy examination and cross-examination and in the course of the latter, having to endure a searching examination, which clearly impugned her integrity. I am quite satisfied that she gave her evidence, so far as accuracy was concerned, to the best of her ability and recollection and at all times, honestly. I reject the submission or suggestion that she was attempting to mislead the court.
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> 92. I have no hesitation in dismissing the defendants' application under s. 26 of the Act of 2004. I would like to add that this section is there to deter and disallow fraudulent claims. It should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled. There is a world of a difference between this plaintiff's case and the fraudulent claims that have been exposed in the cases that were opened to this court in dealing with this s. 26 application namely:-
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> (i) Folan v. Ó'Corraoin & Ors. [2011] IEHC 487, Murphy J.
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> (ii) Rahman v. Craigfort Taverns Ltd. [2012] IEHC 478, O'Neill J.
>
> (iii) Montgomery v. Minister for Justice, Equality and Defence & Anor.[2012] IEHC 443, O'Neill J.
>
> (iv) De Cataldo v. Petro Gas Group Ltd. & Anor. [2012] IEHC 495, O'Neill J.
>
> (v) Salako v. O'Carroll [2013] IEHC 17, Peart J.
>
> (vi) Ludlow v. Unsworth & Anor. [2013] IEHC 153, Ryan J.
>
> It behoves defendants to use prudent discernment before taking the very serious step of making a s. 26 application."

The Burden of Proof

37. The authorities concerning s. 26 of the Act make clear that the burden of proof which rests on a defendant who seeks to invoke that section is the civil standard of proof *i.e.* on the balance of probabilities, as is correctly stated by the trial judge at para 144 of his judgment where he refers to the decision of my colleague, Peart J., in *Carmello v. Casey* [2008] 3 I.R. 524.

38. The implications for a plaintiff against whom the section is deployed are very grave indeed and are well demonstrated by reference to the circumstances of the present case. Here we have a plaintiff who unquestionably sustained very serious injuries, some of which will be permanent. It is also beyond doubt that his injuries significantly affected his income generating capacity in the five years post accident and were considered by the judge likely to continue to impact on his ability to perform certain types of work in future years. Thus, having regard to the conclusions of the trial judge, Mr. Nolan, but for the s. 26 application, would have left court with an award of €192,440 whereas he left with nothing and an adverse costs order because the trial judge was satisfied that he had knowingly sought to perpetrate what might be considered a civil fraud on the defendants by exaggerating his claim for loss of earnings.

39. Because the implications of s. 26 are so significant, a court when it comes to consider whether a defendant has discharged the onus of proof should, I believe, approach its consideration of any such application with significant caution. Apart for the penalty of having their damages confiscated, so to speak, a finding of civil fraud is one likely to have grave reputational consequences for a plaintiff. Accordingly, the trial judge should be satisfied that the plaintiff against whom the section is sought to be invoked, and whose integrity it is sought to impugn, is afforded the opportunity of countering such evidence or charges as are sought to be relied upon by a defendant in support of such an application. After all, the sanction if imposed has the effect of denying a plaintiff his/her constitutional right to bodily integrity as protected by Art. 40.3 of the Constitution, a right protected and vindicated by their entitlement to recover damages for injuries negligently inflicted.

40. In *Farrell v. Dublin Bus* [2010] IEHC327, a case in which the defendants sought to invoke s. 26 on the grounds that the plaintiff, when replying to particulars, had denied any pre-accident medical history, Quirke J. reflected upon the observations of Hamilton C.J. in *Georgopoulos v. Beaumont Hospital* [1998] 3 I.R. (at pp.149-155) concerning the burden of proof in cases of civil fraud:-

> "The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature. It is true that the complaints against the plaintiff involved charges of great seriousness and had serious implications for the plaintiff's reputation. This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on "the balance of probabilities", bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

41. Bearing in mind the draconian consequences for the plaintiff of an adverse finding under s. 26, Quirke J. cautioned against any rush to judgment based on inferences that might be drawn from facts admitted or proved against a plaintiff. With this in mind he

referred to the following statement of Henchy J. in *In Banco Ambrosiano Spa and Ors. v. Ansbacher and Company Limited and Ors.* [1987] ILRM 669 concerning the standard of proof in cases involving civil fraud:-

> "Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty.

42. It follows that in a case such as this, where there is no doubt as to the validity of the plaintiff's claim for compensation for serious injury negligently inflicted or as to the grave financial and reputational consequences that would follow should it be dismissed, that the trial judge, particularly when intending to rely on inferences when determining a s.26 application, should be absolutely satisfied in his or her own mind that the defendant has discharged the requisite burden of proof.

What proof is required for a successful application?
43. What is clear from the wording of the section is that the defendant must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect. Thus false or misleading evidence even if intentionally advanced if not material to the claim made cannot justify invocation of the section. Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent. That this is so would appear to be supported by the following short passage from the decision of Fennelly J. in *Goodwin v. Bus Eireann* [2012] IESC9 concerning s. 26 and where at para. 62 he stated as follows:-

> "62. For this section to apply, the defendant must discharge the burden of showing that some material evidence has been given which is *false or misleading* and that the plaintiff knew that it was *false or misleading*. (See the judgment of Denham C.J. of 2nd December 2011in *Ahern v Bus Eireann* [2011] IESC 44). Counsel for the defendant correctly accepted that this amounted to an allegation that the claim was fraudulent."

44. However, this does not mean that a defendant must establish that the entirety of a plaintiff's claim is false or misleading in order to suceed on such an application. It is clear that proof that a plaintiff's claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim.

45. It is with these principles in mind that I will know consider the decision of the trial judge.

Was there evidence on which the trial judge was entitled to conclude that the defendants had discharged the burden of proof?
46. Having considered the transcript of the hearing in the High Court, I am not satisfied that there was evidence upon which the trial judge was entitled lawfully to conclude that Mr. Nolan had given or caused to be adduced on his behalf evidence that was to his knowledge, false or misleading in the material sense required by the section.

47. The starting point for the conclusion of the trial judge had to be a finding by him as to what Mr. Nolan's pre-accident earnings had been. Without that finding he could not properly assess the extent to which Mr. Nolan's claim for loss of earnings could be considered exaggerated or false. If his pre-accident earnings were €500 net per week as stated by him in his evidence, the percentage increases in his wages for the years 2006 - 2010 as valued by Mr Tennant in either of his reports were relatively modest and bore no resemblance to the percentage figures of 30% and 50% relied upon by the trial judge in his judgment.

48. While the trial judge did not state in the course of his judgment that he found as a fact that Mr. Nolan's income as of the date of the accident was as disclosed in his P. 60, it is to be inferred from his dismissal of the claim on the percentages to which I have just referred that this was the conclusion which he reached.

49. The difficulty for the defendants in seeking to have this court uphold the decision of the trial judge based on such a conclusion is that Mr. Nolan gave oral evidence that he had pre-accident net earnings of €500 a week, and this was evidence that they did not challenge. They did not put to him that his earnings were as per his P. 60 *i.e.* €365 net per week as opposed to the €500 "into his hand" as he had claimed in evidence. Neither was it put to him that he had sought to mislead Ms. Smith at interview when he told her he had gross earnings of €550 a week.

50. Of even greater significance is the fact that it was never suggested to Mr. Nolan that in telling the court he had pre-accident net earnings of €500 per week it was his intention to mislead the court or that he had caused inflated figures to be furnished to Mr. Tennant so that he might promulgate a false claim on his behalf. Who knows what Mr.. Nolan would have said in his defence had such questions been put to him? He might, for example, have stated that he regularly did overtime and that he was paid cash for this additional work. He might equally plausibly have stated that he had no knowledge of the earnings figures proposed on his behalf for the years 2006 - 2010 and was unaware of the figures which had been given to Mr. Tennant so that he might prepare his reports.

51. The defendants' failure to challenge Mr. Nolan's evidence as to his net pre-accident earnings and his proposed earnings for 2006 - 2010 to my mind sounded the death knell for the prospects of any application that the defendants might have hoped to pursue based on the difference between his P. 60 earnings and those in Mr Tennant's reports. Contrary to what was asserted by Mr. Buckley S.C., this was not a case in which material emerged after Mr. Nolan's evidence was concluded with the result that the defendants might be excused their failure to challenge him concerning his allegedly inflated or misleading loss of earnings claim. They had his personal injuries summons claiming pre-accident earnings of €500 net per week. They had his P. 60 showing an average weekly net wage of €365 since May 2008. They also were in possession of Mr. Tennant's two reports since November 2011 when disclosure was made. These, as we know, set out differing figures in respect of Mr. Nolan's likely earnings for the years 2006 – 2010. Yet, it was never suggested to Mr. Nolan that he could never have expected to achieve earnings of that level had he not been injured and that those earnings constituted an attempt on his part to put misleading evidence before the Court.

52. What is quite remarkable about Mr. Nolan's evidence is the fact that his credibility was only challenged on one occasion and that was in respect of his account as how the accident had occurred. At Q. 248 on Day 1 it was put to him that he was telling lies about how the accident had happened, an accusation properly rejected by the High Court judge. However, no like accusation was made in relation to his claim for loss of earnings.

53. Of further significance, having regard to the burden of proof, was the defendants' failure to seek support for their contention that Mr. Nolan intended to mislead the court concerning his loss of earnings claim by cross examining witnesses called on his behalf who clearly would have had knowledge material to his actual and potential earnings. While it is true that the defendants only became aware in the course of Mr. Tennant's evidence that he had prepared his second report based on figures provided by Ms. Holt, she, as

the company's bookkeeper, could have been examined as to what Mr. Nolan's actual earnings were at the date of his accident and could also have been cross examined as to the validity of the level of earnings proposed in Mr. Tennant's reports for the years 2006 - 2010. However, no such line of cross examination was pursued. Similarly, when Mr. Nolan senior was called to give evidence, he was not challenged as to his son's actual pre-accident earnings or his anticipated earnings for 2006 - 2010. It was never suggested to him that the figures in Mr. Tennant's reports were false or misleading and that his son would have to have known that the figures he was putting forward in respect of losses over those years were misleading. Indeed, Mr. Nolan senior had given evidence that, as of the date of the trial, had his son not been injured and had he worked long hours he could have expected to earn as much as €800 or €900 "handy enough". This evidence was not contested.

54. The failure on the part of the defendants to challenge Mr. Nolan as to his pre-accident or estimated earnings for 2006 - 2010 and their failure to establish facts from which it might be inferred that he intended to mislead the court to a material extent should have led to the dismissal of the s. 26 application. There was no evidence from which the trial judge could reasonably have inferred that Mr. Nolan had knowingly advanced a false and misleading claim in respect of future loss of earnings. Simply put the defendants had not laid the evidential basis for the application which they made.

55. I regret to say that I view the application made by the defendants as a somewhat opportunistic one, and one which was made in a manner that was fundamentally unfair. The defendants did not take the risk of challenging Mr. Nolan as someone intent on perpetrating a fraud. Such a challenge might have exposed them to a risk of an award of aggravated damages depending on the manner in which such an application was pursued. Rather they sought to impugn his character, and succeeded in doing so in circumstances where he was given no opportunity to protect his reputation. In this regard it is to be remembered that the section provides that even if the proofs are met by a defendant, the court nonetheless retains the right not to dismiss the action, if satisfied that injustice would be perpetrated upon a plaintiff. I have already stated that I am satisfied that on the facts of the present case, the defendants did not discharge the relevant onus of proof. That being so, I will do no more than state that I am satisfied that the dismissal of Mr. Nolan's claim in circumstances where he was afforded no opportunity to defend his credibility concerning his loss of earnings claim resulted in a grave injustice being done. I should also say that I find it difficult to imagine circumstances in which a defendant might succeed in a s. 26 application without first having engaged in a rigorous forensic cross-examination of a plaintiff who by reason of such an approach would be afforded the opportunity to answer the allegations made against them.

56. I find myself in significant agreement with the submission made by Mr. Counihan S.C. on the plaintiff's behalf that claims for loss of earnings post dating any particular accident are always a matter of some speculation and that this is why actuaries, when they prepare their reports, often offer a range of options to a court as to the level of earnings which a plaintiff might have expected to earn had they not been injured. I am quite satisfied that s. 26 was never intended to be used to deny a plaintiff their lawful entitlement to compensation because they had taken an overly optimistic view as to the earnings they might have enjoyed but for their injuries. While it might be relatively easy for the injured civil servant to anticipate what they might have earned but for injuries which they received, the same cannot be said for those employees whose wages may vary for a whole range of reasons. Thus, the fact that Mr. Nolan swore an affidavit verifying the truth of the schedule of loss of earnings, which included Mr. Tennant's reports, should not be the subject of an adverse finding against him for the purposes of s. 26 of the Act.

57. I fear that the trial judge in the present case fell into error in failing to draw a distinction between the onus of proof that rests on a plaintiff to prove their claim for loss of earnings on the balance of probabilities, and the onus that is on a defendant who seeks to have the entire claim dismissed under s. 26. A trial judge who receives inconsistent evidence as to a plaintiff's pre-accident or likely post-accident earnings is perfectly entitled to reject the claim advanced where, as in the present case, the plaintiff did not seek to resolve discrepancies in the figures advanced in support of such claim. Alternatively, the trial judge might calculate the plaintiff's loss of earnings claim based upon whatever earnings figures they consider most accords with the evidence. What they are not entitled to do is to dismiss the otherwise meritorious claim for damages on the basis that the plaintiff failed to resolve the conflicts in his own evidence. It is for the defendant to establish that the plaintiff intentionally sought to materially mislead the court.

Car drifting

58. In dismissing the plaintiff's claim under s. 26 the trial judge also relied upon what he considered to be a false and misleading statement that he was satisfied Mr. Nolan had given to Ms. Smith concerning the sport of 'car drifting' in which he had participated as a hobby for many years. The trial judge found as a fact that he had told Ms. Smith that he had not participated in this hobby since his accident even though in this own evidence he stated that he thought he told her that he had not participated in competitive car drifting post his accident. That was a finding that the trial judge was entitled to make even though there was conflicting evidence on the issue.

59. Nonetheless, to justify dismissing a plaintiff's claim based upon false or misleading evidence the judge must be satisfied that that evidence is material to the claim advanced such that the claim itself should, having regard to that evidence, be considered fraudulent. After all, the sanction if imposed not only denies the plaintiff the damages to which they would otherwise lawfully be entitled but benefits the negligent defendant by relieving them of any financial responsibility for the injuries that they inflicted on the plaintiff.

60. Mr. Nolan did not advance a claim for general or special damages based on his inability to participate in the sport of car drifting. This is not a case, for example, in which Mr. Nolan had claimed loss of earnings based upon his inability to participate in competitive car drifting, had denied participation in such activity post-accident when interviewed by Ms. Smith but was later found to have engaged competitively in the sport, notwithstanding his injuries. If that were so it is easy to see how s. 26 might be material. But no such considerations arise in this case. It is difficult to see how, in the context of the claim for damages advanced by Mr. Nolan, the High Court judge could have considered what he said to Ms. Smith concerning car drifting sufficiently material to his claim that his claim should be considered fraudulent and be dismissed on that account.

Conclusion

61. For the reasons already referred to in this judgment I am satisfied that the finding of contributory negligence of 40% on the part of Mr. Nolan was excessive to the point that such finding must be set aside. For myself, having regard to the evidence to which I have earlier referred I would favour a finding of 20% contributory negligence.

62. As to the decision of the trial judge to dismiss Mr. Nolan's claim based upon the provisions of s. 26 of the Act, for the reasons earlier stated in this judgement, I am satisfied that the trial judge erred in law when he concluded that the defendants had discharged the burden of proof required to succeed in their application to dismiss the claim under that section.

63. The trial judge in the course of his judgment helpfully indicated the damages that he would have awarded to Mr. Nolan had he not dismissed his claim under s. 26 of the Act. There has been no Appeal or Cross Appeal in relation to those damages which I consider were entirely appropriate having regard to the evidence subject to the discount that must be afforded to the defendants by reason of

Mr. Nolan's contributory negligence. The damages assessed by the trial judge were as follows:-

- General damages to the date of trial: € 75,000

- Damages for pain and suffering into the future: € 50,000

- Loss of earnings to the date of trial: € 27,440

- Loss of opportunity € 40,000

Total: €192,440

64. Having regard to my conclusions on the issue of contributory negligence the said sum must be reduced by 20%. That being so I would propose an award in favour of Mr Nolan in the sum of €153,952.