Neutral Citation: [2014] IEHC 560

THE HIGH COURT

[2013 No. 1393 P]

BETWEEN

MARGUERITE DALY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered the 9th day of December 2014

Background Facts

1. The plaintiff is a married woman and resides at Grallaghbeg, Ballinure, Thurles, County Tipperary. She was born on the 21st September, 1981 and is now aged 33 years. She is married to Ronan and they have two children, James born in 2005 and Mairead in 2009. James suffers from autism. The plaintiff did well in school, having been awarded a Student of the Year prize, and she achieved 425 points in her Leaving Certificate. Thereafter, she studied for an Arts degree in University College Cork for one year intending ultimately to teach. However, after working as a nurse's assistant during her first summer at college, she decided that she would like to pursue a career in that area. In February 2001, the plaintiff obtained a job with the defendant as a multi task attendant at St. Patrick's Hospital in Cashel. A multi task attendant is broadly synonymous with a care assistant who assists the nursing and other staff in relation to the management of patients. Their duties include assisting patients transferring, mobilising, washing, and toileting, together with serving meals and removing and cleaning meal trays and crockery. There seems to be some general cleaning involved also.

2. In 2011, the plaintiff was attached to The Rehab Ward which has 21 beds and caters for mainly elderly patients who have had strokes, surgery such as hip replacements and so forth. This ward is served by a small domestic style kitchen measuring approximately 10' x 10'. Although it has cooking facilities, main meals such as lunch are brought in from elsewhere. Cleaning of crockery is carried out here and there is an industrial type dishwasher located in the corner with standard kitchen units including a sink, draining board and counter top alongside.

3. The patients' trays are brought in to the kitchen after meals where the plates, bowls, cups, saucers and the like are rinsed in the sink in soapy water and then placed in a dishwasher tray which is located at the end of the counter top beside the draining board and closest to the dishwasher. When the tray is full, it is transferred into the dishwasher and run through a cycle. When it is complete, the clean crockery is removed, sometimes onto a trolley nearby so that the fresh trays can be set in readiness for the next meal. The kitchen becomes extremely busy at meal times and the dishwasher cycle is repeated between 35-40 times in an average day.

4. On the 4th January, 2011 at about 1.30 pm the plaintiff walked into the kitchen carrying a dirty cup in her left hand. Her evidence is that as she approached the sink, her right foot slipped forward and she fell to the ground landing in a twisting fashion on her right hip. She says that as she was falling she grabbed onto a trolley which was on her right to try and break the fall. Somewhat surprisingly, she did not drop the cup in her left hand. The plaintiff says that the cause of her fall was that there was water on the floor which she saw and felt. The fall occurred broadly speaking opposite the sink tap in or about the centre of the room probably closer to the sink than the entrance door behind.

5. Two of the plaintiff's colleagues were present in the kitchen at the time, Breda O'Connor and Alice Ryan. Ms. O'Connor said in evidence that the trolley was on the plaintiff's left as she entered the room and positioned close to the dishwasher. The plaintiff conceded that there may have been a trolley on her left but was adamant that there was also one on the right and this was the one she grabbed onto. Ms. O'Connor was unable to say which hand the plaintiff was using to carry the cup.

6. The plaintiff alleges that as a result of the fall, she suffered a serious injury to her back.

The Pleadings

7. The plaintiff's case was pleaded on the basis that the dishwasher trays in use at the material time were slightly too large for the countertop and overhung it somewhat, resulting in drips from the rinsed crockery wetting the floor beneath. It was pleaded that this was a dangerous work practice and the defendant failed to mop up the spillage and erect appropriate signage which would have warned the plaintiff of the hazard. It was also alleged that there was a failure on the part of the defendant to place a mat on the floor in or around the draining board area.

8. The defendant's defence was a full traverse of the plaintiff's claim pleading contributory negligence and pleading specifically that the defendant would refer to the plaintiff's prior medical history in support of the denial that the plaintiff suffered injuries complained of as a result of the accident.

9. The defendant strongly contested the issue of causation regarding the plaintiff's injuries and in that regard, the particulars of injury in the personal injury summons stated:

> "With regard to the plaintiff's past history, approximately 7 years ago, the plaintiff was pregnant with her first child. She had a sciatica type of back pain. This was related to her pregnancy and disappeared once her child was delivered."

10. On the 25th March, 2013, the defendant served two documents on the plaintiff, the first a notice requiring further information pursuant to s. 11 of the Civil Liability and Courts Act 2004 and the second, a notice for particulars. At paragraph 3 of the notice requiring further information, the defendant sought particulars of any prior or subsequent injury that would have a bearing on the injuries the subject matter of the proceedings. The response given by the plaintiff on the 3rd May, 2013 was:

> "The plaintiff suffered from sciatica type back pain during the birth of her first child in 2005. The plaintiff's symptoms resolved after this and did not re-occur until the incident on the 4th January 2011."

11. The defendant's notice for particulars at paragraph 24 asked the following question:

> "It is noted that the plaintiff had sciatica type pain approximately 7 years ago when pregnant with her first child. Did the plaintiff suffer from back pain or hip pain on any occasion subsequent to her first pregnancy but prior to 4 January 2011? If your reply is in the affirmative please furnish full details."

12. The plaintiff's response was as follows:

> "24. The plaintiff did not suffer from sciatica type back pain subsequent to her first pregnancy in 2005 and prior to the incident on 4 January 2011. The plaintiff gave birth to her second child in 2009 and did not suffer from any sciatica back pain at that point. The plaintiff may have experienced minor back pain between 2005 and 2011, however this was not severe or in any way similar to the pains she has been suffering since the fall the subject matter of these proceedings."

The Liability Evidence

13. Counsel for the defendant, Mr. Patrick Treacy SC, put it to the plaintiff that Ms. O'Connor would say that the plaintiff went to put the cup down beside the sink and fell when turning back towards the door. However, Ms. O'Connor when called did not give this evidence but rather simply said that when the plaintiff entered the kitchen she heard a noise and saw the plaintiff fall and catch the trolly which moved a little. The trolley which the plaintiff grabbed was in front of the dishwasher.

14. In the course of his cross-examination of the plaintiff, Mr. Treacy put to the plaintiff that whilst it was accepted that there was water on the floor, the water was around the base of the dishwasher and remote from the locus of the plaintiff's accident. He specifically put to the plaintiff that Ms. O'Connor would say in evidence that after the plaintiff's accident, Ms. O'Connor mopped up water around the base of the dishwasher. In fact, Ms. O'Connor did not give that evidence. Rather, she said that after the plaintiff fell, Ms. O'Connor mopped up drops of water at the end of the trolley farthest from the dishwasher pretty much where the plaintiff says she fell. She said that you would expect water on the floor in the kitchen and she kept a mop around the sink for that reason.

15. The plaintiff said in evidence that there was a problem with drips falling from the overhanging dishwasher trays on the floor and she had reported that to Ms. Maire O'Brien, the clinical nurse manager and Ms. Sadler, the assistant manager. Ms. O'Brien in evidence denied that the plaintiff had made such a complaint. Ms. Sadler was not called to give evidence, though appeared on the defendant's SI 391 schedule. The plaintiff also said that she asked Ms. O'Brien to put down a mat and was told this was not possible for health and safety reasons. Ms. O'Brien could not recall if the plaintiff ever asked for a mat to be put down although agreed that there may have been mats in some of the kitchens in the past. However it would not now be permitted for hygiene reasons. The plaintiff also said that all staff had received training that if they became aware of a spillage or wet floor, the onus was on them to clean it up.

16. Evidence was given by Mr. Michael Fogarty, a chartered forensic engineer, on behalf of the plaintiff. He said that the floor surface would be moderately slippery in the presence of soapy water. He was critical of the system of work which allowed water from dishwasher trays to drip onto the floor and stated that if the floor became wet, a "yellow man" sign should be put up until the floor was properly dried. He specifically identified a number of statutory provisions that in his opinion had been breached including ss. 8 (1), (2) (a) (c) (e) (g) (h) of the Safety, Health and Welfare at Work Act 2005. It was put to him that none of this was relevant to where the plaintiff actually fell. He disagreed and said that the water could easily be tracked or transported by persons' feet across the kitchen floor. He conceded that he was not criticising the floor itself but said that mats could have been considered. It was again put to Mr. Fogarty that Ms. O'Connor would say that she dried up water on the floor immediately in front of dishwasher.

17. It was also suggested to Mr. Fogarty that a brown cafeteria type tray was put under the dishwasher tray to catch the drips. He doubted the effectiveness of this as the dishwasher tray was square whereas the brown tray was not. The defendants retained Mr. Tony O'Keeffe, consulting forensic engineer, who attended a joint engineering inspection and prepared a report. He was not called to give evidence.

18. Although the defendant pleaded contributory negligence in its defence, it was never put to the plaintiff that she caused or contributed to the accident in any way nor was any evidence lead by the defendant in this regard.

The Plaintiff's Injuries

19. Immediately after the accident, the plaintiff felt pain in her low back and shortly thereafter began to develop sciatic type pain down the front of her right leg. She reported the accident and left work early due to increasing pain in her back and leg. She attended her general practitioner, Dr. Edmond Fitzpatrick the next day. He prescribed medication and she remained off work for a period of about 10 weeks. She returned to work in March, 2011 and continued on until March, 2012, when the plaintiff says that due to increasing pain allied to a heavier workload, she felt no longer able to continue. She has remained out of work since that time.

20. In or about July, 2012, the plaintiff's solicitors referred her to another general practitioner, Dr. Sean McCarthy, a well-known local politician. Dr. McCarthy retired from general practice in 2006/2007 and now holds himself out as a specialist in general injuries, sports injuries and exercise medicine by virtue of having successfully completed a one-year part-time course under the auspices of the RCSI and RCPI. It is fair to say that a significant portion of Dr. McCarthy's practice is devoted to medico-legal work on behalf of plaintiffs. Dr. McCarthy saw the plaintiff on 12 occasions and prepared 6 medical reports. Given that Dr. McCarthy had evidently not administered any treatment to the plaintiff, he was pressed on cross-examination as to what was occurring during all of these consultations and he said that he was having conversations with the plaintiff.

21. Dr. McCarthy referred the plaintiff to a range of consultants including a rheumatologist, Professor Molloy who did not give evidence, a neurosurgeon, Mr. Kaar and a psychiatrist, Dr. Neville. The point was made by the defendant that the plaintiff's own GP, Dr. Fitzpatrick, had not found it necessary to refer her to anybody. Unusually, although Dr. Fitzpatrick was on the plaintiff's SI 391 schedule and provided a medical report to the plaintiff's solicitors, he was called to give evidence by the defendant. The plaintiff's solicitors also directly instructed a consultant radiologist, Dr. Murray and referred the plaintiff to a vocational rehabilitation consultant, Ms. Brenda Keenan.

22. The plaintiff was referred for an MRI scan of the lumbar spine by Dr. McCarthy and this was carried out on the 8th June, 2013. The key findings were that there was a quite marked right postero-lateral protrusion of the L2/L3 disc which was distorting the thecal sac and causing significant encroachment on the emerging right L3 nerve root. There was disc space narrowing with disc degeneration and moderate central posterior bulging of the L5/S1 disc, which was distorting the thecal sac and encroaching on the

emerging bilateral S1 nerve root. There was disc space narrowing with disc degeneration and mild broad-based posterior bulging of the L4/5 disc which was slightly distorting the thecal sac and causing mild encroachment on the emerging bilateral L5 nerve root. There was an annular tear in the posterior periphery of the L5/S1 disc.

23. In summary, Dr. McCarthy said that the plaintiff had a history since the accident of low back pain referred to her right buttock and right leg as far as her foot which was arising from compression of the sciatic nerve root. He felt that the L2/3 encroachment was responsible for the pain in the plaintiff's anterior right thigh and there was also back pain coming from the L5 distribution. He was aware of the nature of her duties as a multi task attendant and felt that she would be unfit for this work in the future. He also said that the plaintiff had begun to suffer from depression which came to his attention in September, 2014. This appeared to be associated with stress from financial pressure on the family.

24. In the course of the plaintiff's cross-examination, it emerged that since the accident and for some years thereafter, the plaintiff had been attending a local gym called Benefits Gym twice or three times a week where she engaged in an extensive programme of exercises under the guidance of a personal trainer. These included quite vigorous activities such as sit ups, "crunches", kettle bell weight lifting and "spinning" using a static exercise bicycle. The plaintiff's attendance stopped when the gym closed in September, 2013. This demanding exercise programme seems at least partly to have stemmed from the plaintiff's concern about her weight and she apparently lost about 5 stone in a two-year period. The plaintiff did not tell any of her doctors about this.

25. Dr. McCarthy was asked in cross-examination if he could reconcile this new information with his view that the plaintiff could not do her old job because, *inter alia*, she could not lift or bend, and his response was that he found it very difficult to do so.

26. Mr. Kaar was not called as a witness but his report of the 16th September, 2013 was admitted into evidence. He examined the plaintiff on one occasion on the 13th September, 2013. He felt it likely that the plaintiff suffered a twisting strain to the lower back in the accident. He reviewed the MRI scan and felt that it demonstrated underlying degenerative changes present in the lower lumbar spine prior to the accident. He found impaired sensation on examination in the L2/3 distribution in the lower anterior right thigh consistent with the MRI findings. His view was that the accident caused the symptomatic protrusion at L2/3 and may also have strained other discs, particularly at the L5/S1 level. Mr. Kaar commented that the plaintiff was asymptomatic for 8 years prior to the accident, clearly having been given this information by the plaintiff. This is a topic to which I shall return. He found the plaintiff's radicular symptoms to be mild. He went on to conclude:

> "Work as a Multitask Assistant would not be contraindicated provided she undertakes strict care of the low-back and there are the usual aides for lifting and manual handling.
>
> She is likely to experience some mechanical/referred symptoms for at least a short number of years. There may be some mild chronic symptoms longer-term.
>
> She will need to take increased care of the lower back and maintain fitness with regular aerobic exercise for the future.
>
> As there is no ongoing progressive nerve root compression, I would not recommend surgery."

28. Mr. Kaar's opinion on the plaintiff's ability to resume work was put to her and her response was that he did not really understand what her duties involved. Mr. Kaar has been a full time practicing consultant neurosurgeon since 1992 and I cannot accept the notion that he would be other than fully *au fait* with the duties undertaken by a person such as the plaintiff in a hospital setting.

29. Dr. Murray, whose evidence I found helpful, was of the opinion that the L2/3 disc prolapse did not pre-date the accident and the likely timing of that prolapse was within the approximate time frame of the accident, independently confirming Mr. Kaar's view, of which Dr. Murray was unaware. Dr. Murray also felt that the annular tear in the L5/S1 was of similar timing.

30. Dr. Fitzpatrick's evidence was particularly relevant in the context of the suggestion forcefully made to the plaintiff in cross-examination that the accident could not be responsible for her complaints of sciatica because it would be Dr. Fitzpatrick's evidence that the sciatica was unconnected to her fall. However when he was called to give evidence, he said that he could not say that the twisting or torsion involved in the fall did not cause the disc protrusion which led to the sciatica. Like the others before him he knew nothing of the plaintiff's gym regime which came as a revelation and he felt she could go back to work if she was careful about lifting and bending.

31. Dr. Neville, who saw the plaintiff once on the 4th November, 2014, three weeks before the trial, felt that the plaintiff was suffering from a chronic adjustment disorder and depression of recent onset within the previous six months.

32. The only medical witness called by the defendant was Mr. Michael O'Riordan, a retired consultant orthopaedic surgeon whose practice is largely confined to medico-legal work on behalf of insurance companies. He felt that the changes on the MRI were age related and in contrast to the other medical witnesses, that these changes were not unusual in a lady as young as the plaintiff. He also felt there was no evidence of a significant disc prolapse and again was alone in this view.

The Plaintiff's Prior Medical History

33. The plaintiff was robustly cross-examined by Mr. Treacy on a number of fronts in a direct challenge to her credibility. I have alluded to two of these fronts already in relation to how the accident happened and the cause of her injury. It was put to the plaintiff that her replies to particulars, quoted above, were not truthful and she was asked about the fact that Dr. Fitzpatrick had certified her as being unfit for work on the 26th April, 2007, for a week with the reason given being "sciatica". In a further medical certificate dated the 14th June, 2010, Dr. Fitzpatrick certified her unfit for a further week with a diagnosis of "spondylitis". She could not recall these events.

34. She was then asked about significant periods of absenteeism since the birth of James in 2005. She agreed that she had been absent from work on sick leave for 27.5 days in 2006 and 36 days in 2007. She was absent for 3 days in 2008, 51 days in 2009, although this was the year of Mairead's birth and thus not relied upon by the defendant, and 21 days in 2010. The plaintiff agreed that at least some portion of these absences related to back pain and that in the light of that, her replies to particulars were somewhat misleading. The defendant conducted a detailed analysis of these absences. However, the only absences during the years 2005-2011 that could be definitively linked to back complaints were those alluded to in the two certificates mentioned. It was explained that in many instances the certificates were blank as to the diagnosis and some were lost. Some clearly did not relate to a back issue. During the relevant years it was possible for employees of the defendant to self certify for up to two days and there were many of these.

35. The defendant's human resources officer, Ms. Joan Brosnan, agreed in evidence that many people at that time availed of this latitude to take extra days' leave although the system now is much stricter. The evidence also established that James was first diagnosed with autism in 2006 when there were a great number of specialist appointments for him to attend. Mr. Daly was working as a computer consultant at that stage but in 2008, he gave up his job to become a full time carer for James. I am satisfied therefore that a significant number of days' absence from work in 2006 and 2007 were attributable to the major demands on the family's resources in dealing with James's tragic diagnosis.

36. Ms. Keenan in her evidence offered the opinion that in the light of the plaintiff's reporting at the time she assessed her in October, 2013, it was unlikely that the plaintiff would be in a position to resume her employment as a multi task attendant. Ms. Keenan knew nothing of the plaintiff's rigorous gym program or indeed her significant history of absenteeism prior to the accident. When these matters were put to Ms. Keenan, she had to concede that her conclusions were no longer valid and she would have to reassess the plaintiff before coming to a view.

The Plaintiff's claim for Special Damages
37. On the 27th March, 2014, the plaintiff's solicitors furnished a schedule of special damages to the defendant's solicitors amounting to €46,597.10. This was comprised almost entirely of loss of earnings to date with some small amounts for medical and travel expenses. It was stated that the claim for loss of earnings was continuing. A revised schedule was served on the 24th June, 2014 claiming €69,353.70. The new element was a claim for future loss based on Ms. Keenan's report and stated that the plaintiff now wished to retrain in the area of social care and to that end to enrol in a BA level 8 social studies and social care degree course in Waterford Institute of Technology. The cost of this course was claimed at €6,600 and in addition, the cost of travelling from the plaintiff's home in Cashel to Waterford on a daily basis over the three years of the course was claimed at €12,960. It was further stated that the plaintiff's loss of earnings would continue until post qualification.

38. A further revised schedule was served on the 29th July, 2014, this time quantifying the plaintiff's loss of earnings until post qualification in the sum of €70,852.08, giving a total claim for special damages of €142,022.70. This was again revised on the 13th November, 2014 as a result of it being realised that the cost of the course which was originally claimed at €6,600 was in respect of one year only and thus the cost of three years amounted to €19,800 giving a new total of €163,907.94.

39. In the course of the plaintiff's cross-examination, she was asked if she would not in fact qualify for a grant in respect of this course which would substantially reduce the cost and she said that she had not checked this. It was also suggested to her that the same or a similar course was available in the Limerick Institute of Technology at Thurles, about 8 miles from the plaintiff's house.

40. The plaintiff commenced and concluded her evidence on the 25th November, 2014 and later the same day, a new schedule of special damages was prepared by her solicitors. In this schedule, it was now confirmed that the course in question was available in Thurles and that the plaintiff was eligible for a grant to the extent of the entire cost of the course. She was now claiming reduced travelling expenses in the sum of €6,912 to cover the cost of the 16 mile round trip to the college for the three years. However, as the plaintiff would not now be able to commence the course in Thurles until September 2015, she was claiming an additional 40 weeks loss of earnings in respect of this period amounting to €18,167.20. Thus her claim for special damages now stood at €180,752.86.

41. The compensatory principles of the law of tort are based on the maxim *restitutio in integrum* or in other words that an award of compensatory damages should be calculated to put a plaintiff into the position that he or she would have been in but for the injury complained of, in so far as money can achieve that objective. The claim advanced in this case appears to me to entirely ignore that fundamental principle irrespective of what view is taken of the plaintiff's injuries. It was common case that if the plaintiff pursues and achieves this qualification, she is likely to end up with a job that will pay at least twice if not considerably more than she was earning or capable of earning prior to the accident. Yet the plaintiff says that the defendant should have to pay for the cost of the plaintiff achieving this qualification together with continuing loss of earnings while she does so.

42. It also seems to me entirely improper that such a large claim for special damages should be advanced without even the most basic attempt at verifying its validity. In the extremely brief interlude between the conclusion of the plaintiff's evidence and the service of the new schedule of special damages, it was possible to establish first, that the course was free for the plaintiff and secondly was available on her doorstep. This means that a claim for some €26,000 was persisted in right up to the conclusion of the plaintiff's evidence which never had any basis and a simple phone call would have established that fact.

43. Solicitors are officers of the court and owe a duty to their clients and the court alike to ensure that patently exaggerated and unsustainable claims are not advanced in personal injuries litigation. It is of course true to say, as pointed out by the Supreme Court in *Vesey v. Bus Eireann* [2001] 4 I.R. 192 and *Shelley-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232 that plaintiffs cannot disavow their own particulars by suggesting that they were drafted by their solicitors without their knowledge or consent. That is not to ignore the fact that such particulars are invariably drafted by solicitors or sometimes counsel on the basis of the client's instructions. All lawyers, and particularly those involved in personal injuries litigation on a regular basis, are perfectly well aware of the potential risks for their clients of mounting exaggerated claims and the draconian sanctions available to the court under s. 26 of the Civil Liability and Courts Act 2004. Accordingly, it behoves them to exercise considerable care in the analysis of claims for special damage before advancing them.

Submissions
44. At the conclusion of the plaintiff's case, Mr. Treacy applied for a non-suit on the basis that if the application were unsuccessful, he would go into evidence. He relied on three grounds. First, he submitted that the plaintiff had failed to establish negligence. Secondly he said that causation had not been established and thirdly that the presentation of the plaintiff's case was so tainted by lack of credibility and profound non-disclosure that it should be dismissed. I refused this application. The case proceeded to conclusion when the defendant again submitted that on the basis of Shelley-Morris, the plaintiff's claim had become entangled by lies and it was not the duty of the court to disentangle it. Counsel expressly stated that he was not relying on s. 26 of the Act of 2004. He relied on the following passage in the judgment of Denham J. (as she then was) at p. 239:

> "The issue of exaggeration by a plaintiff in court proceedings is not new. It may arise in different ways in different cases. There are many possible circumstances. Three of these are as follows: -
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> First, there is the case with the whole claim is concocted. The accident did not happen or did not happen as claimed. This is a fraudulent claim and will be dismissed by the trial judge.
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> Secondly, there is the situation where there is a genuine claim but the effect of the injuries is exaggerated by the claimant because of a subjective belief that the injuries have had a worse effect that they have. This type of approach involves no conscious lying by a claimant. The trial judge will determine the value of the damage suffered in accordance

with the evidence, but would not condemn the evidence of the plaintiff.

A third scenario exists where there is a genuine case made establishing negligence but the plaintiff deliberately exaggerate the injuries, knowing that he or she is exaggerating the injuries and their effects. This may take on the appearance of a fraudulent claim. The lies of the plaintiff are apparent to the judge. It is at this stage that the trial judge (who has heard all the evidence and seen the witnesses) must exercise his or her judicial discretion. At issue is the credibility of the witness. If the credibility is so undermined that the burden of proving the claim has not been met then the trial judge will dismiss the claim. However, to achieve a fair result in all the circumstances, the trial judge may assess the credibility of the witness in light of the evidence of other witnesses. It may be that the negligence of the defendant is established but that the evidence of the plaintiff as to the injuries or some of the injuries may not be credible. This may arise in circumstances where injuries are not easily assessed objectively but great reliance has been placed on the evidence of the plaintiff, for example in soft tissue injuries. The evidence of a plaintiff is critical. In a situation where the plaintiff has told a mixture of the truth and lies, his or her credibility is completely undermined. It is for the plaintiff to prove his or her case on the balance of probabilities. It may be that the deliberate exaggeration is such that the credibility of the witness is called into doubt and the burden of proof is not carried. Consequently, the plaintiff will not succeed in proving the claim to which such deliberate exaggeration applies.

This principle has been stated recently in *Vesey v. Bus Eireann* [2001] 4 I.R. 192, where it was held that it was not the responsibility of the trial judge to disentangle the plaintiff's case where it had become entangled as a result of lies and misrepresentation systematically made by the plaintiff. For the trial judge to make, on behalf of the plaintiff, the best case he could, in such circumstances, would risk a perception of bias."

45. In delivering his judgment in the same case, Hardiman J. said (at p. 257):

"I wish to reiterate what was said by this Court in *Vesey v. Bus Eireann* [2001] 4 I.R. 192 that the onus of proof in these cases lies on the plaintiff who is, of course, obliged to discharge it in a truthful and straightforward manner. Where this has not been done "a court is not obliged, or entitled, to speculate in the absence of credible evidence" (*per* Hardiman J. at p. 199). To do so would be unfair to the defendant. Moreover, a plaintiff who engages in falsehoods may expose himself or herself to adverse orders on costs. Furthermore, as I observed in *Vesey v. Bus Eireann* at p. 202 "there is plainly a point where dishonesty in the prosecution of the claim can amount to an abuse of the judicial process as well as an attempt to impose on the other party".

This last proposition is well established but has been little considered in the context of personal injuries claims. It is, perhaps, appropriate to comment on the court's power to prevent, or remedy, abuse of process at greater length than was done in *Vesey v. Bus Eireann*.

46. In *Goldsmith v. Sperrings Ltd.* [1977] 1 W.L.R. 478, Lord Denning, at p. 489, had this to say: --

"In a civilised society, legal process is the machinery for keeping order in doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true cause so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

47. In *Arrow Nominees v. Blackledge* [2000] 2 B.C.L.C. 167, the English Court of Appeal said at p. 194: -

"It is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

48. I have no doubt that these principles are equally applicable in this jurisdiction. It must not be thought that a falsehood in respect of one aspect of the claim will, at worst, lead to that particular part of the claim being reduced or disallowed. The courts have a power and duty to protect their own processes from being made the vehicle of unjustified recovery. In a proper case, this would be done by staying or striking out the plaintiff's proceedings.

49. Quite properly, in the circumstances of the present case, the defendant has not sought this drastic relief. That is not to say that this relief would be inappropriate in a similar case in the future. But it appears to me that a plaintiff who is found to have engaged in deliberate falsehood must face the fact that a number of corollaries arise from such finding: -

(a) the plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree;

(b) in a case, or an aspect of the case, heavily dependent on the plaintiff's own account, the combined effects of the falsehoods and the consequent diminution in credibility mean that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case;

(c) if this occurs, it is not appropriate for the court to engage in speculation or benevolent guesswork in an attempt to rescue the claim, or a particular aspect of, from the unsatisfactory state in which the plaintiff's falsehoods have left it."

50. Mr. Treacy also referred to the judgment of O'Neill J. in *Smith v. Health Service Executive* [2013] IEHC 360.

51. In reply, counsel for the plaintiff, Mr. Aidan Doyle SC, submitted that the plaintiff had not been shown to be a systematic liar and accordingly the *Shelley-Morris* principles did not apply.

Conclusions

52. There is little or no dispute about the facts of the accident. The plaintiff fell on a wet floor. Despite what was put to the plaintiff, at the end of the day the defendant produced no evidence to contradict her account and on the contrary, the defendant's evidence confirmed it. I am satisfied that the probabilities are that the floor on which the plaintiff fell was wet from soapy dishwater which rendered it moderately slippery. I very much doubt that different sized or larger dishwasher trays were in use at the time of the plaintiff's accident because these trays obviously have to be of a standard sized to fit in the dishwasher. Therefore, I think the plaintiff is likely mistaken on this point although it is certainly possible that from time to time, a dishwasher tray placed carelessly on

the countertop may have overhung it slightly to a greater or lesser extent.

53. However it is clear that on a daily basis, there was a very significant movement of perforated trays containing large amounts of crockery recently rinsed with soapy water into the dishwasher. This occurred up to 40 times in an average day. It seems to me virtually inevitable that the floor in this area would become wet and slippery in the absence of constant vigilance by the kitchen staff responsible for loading the dishwasher. The fact that Ms. O'Connor kept a mop to hand in this area allied to the ready availability of a yellow man sign in the kitchen suggests that it was a constant feature of which the defendant was well aware. The place where the plaintiff fell was at best a few feet from the dishwasher and I do not think there is any reality in the suggestion that it was in some way remote or distant from the source of spillage. All staff were trained and directed that the onus was on them to mop up spillages when they occurred.

54. Whether or not the plaintiff complained about the situation is perhaps not of critical relevance in circumstances where I believe the defendant must have been well aware of it in any event. I do not accept the argument advanced by the defendant that to hold it responsible for the presence of water on the floor of a kitchen is to impose an unrealistic or "exorbitant" duty, as was said, on it. The extent of the movement of rinsed crockery around this quite small kitchen bears no comparison to a domestic scenario and was the cause of a potential hazard to employees of which the defendant was aware and obliged to guard against. It is trite to say that an employer owes his employees a duty to provide a safe place of work and a safe system of work but it is nonetheless true for that. I also accept the evidence of Mr. Fogarty, uncontradicted by any corresponding evidence lead by the defendant, that a number of breaches of statutory duty arose here and that there was a failure to put up the yellow man sign and dry the floor at all or in time.

55. In all the circumstances, it seems to me that a breach of duty occurred in this case and that no allegations of contributory negligence against the plaintiff have been made out.

56. That however does not dispose of the matter in the light of the submissions made by the defendant. The defendant says that the plaintiff's case is so entangled by lies that it should be dismissed in reliance on the authorities above cited. It is thus necessary to analyse the plaintiff's evidence to determine whether it has been established that she deliberately lied in evidence or otherwise. I think it is fair to say that all of the attacks on the plaintiff's credibility arose from her pleadings and her interactions with experts. In that connection it was not suggested that she told deliberate falsehoods to her experts but rather that she was somewhat economical with the truth and of course it must be said immediately that there is no appreciable difference in terms of culpability. The defendant's witnesses said that the plaintiff had been heard to complain from time to time about her back and in particular the difficulty of carrying James up and down the stairs as an infant and toddler. The plaintiff accepted that she had some degree of back pain before the accident and it has to be said that her replies to particulars owned up to this, but downplayed it as "minor back pain". It is certainly true to say that she denied in her particulars that she had suffered from sciatica between 2005 and 2011.

57. However, during that five to six year period, the defendant was only able to establish one occasion in 2007 when she had sciatica and one other occasion in 2010 when she had back pain described as "spondylitis" by Dr. Fitzpatrick meaning low back pain from inflamed facet joints and clearly quite different from sciatic leg pain. It is also true that on cross examination, the plaintiff agreed that she had more than minor back pain and her reply was somewhat misleading in that respect.

58. On the whole, my impression of the plaintiff in evidence was that she was a truthful witness. She readily conceded points against her and for example, volunteered in a frank manner evidence of her involvement in the gym when a dishonest plaintiff might not have done so safe in the knowledge that nobody was aware of it. I accept the plaintiff's evidence that she forgot about the single episode of sciatica in 2007 and I do not think therefore that she set out in her pleadings to deliberately deceive. I also do not believe that she exaggerated her injuries to the extent of it becoming fraudulent. Her complaints of sciatic pain down the front of her right thigh were made immediately after the accident to Dr. Fitzpatrick and are entirely consistent with the MRI scan which demonstrated an L2/3 prolapse of probable contemporaneous origin giving rise to pain in precisely that area.

59. It is important to note that the plaintiff in *Shelley-Morris* was found to have deliberately lied on oath at the trial in relation to her injuries. I do not think that the plaintiff in this case can in any sense be equated with that. At most it might be said that she had been less than frank about her gym activities with her doctors or perhaps downplayed her pre-accident back pain to a degree but I do not think it elevates the claim to the realm of a total fraud.

60. The only evidence of the plaintiff's inability to work came from Dr. McCarthy and Ms. Keenan and I have dealt with that. Mr. Kaar, Dr. Fitzpatrick and Mr. O'Riordan were all of the view that she was fit for her job subject to exercising care with lifting and bending as might be expected with a person suffering from significant degeneration of her lumbar spine. Allied to that is the fact that the plaintiff did in fact resume her job after the accident for a whole year before she gave it up. I would find it difficult to accept that a person capable of undertaking the level of physical exertion required by her gym programme would not be able to carry out the duties required of a multi task attendant. In my view therefore, the plaintiff has not discharged the onus of proving that she is unable to resume her pre-accident employment.

61. It is worthy of some note that despite the invitation to the court to dismiss the claim on the basis that it was so tainted by lies as to amount to an abuse of process, the defendant stopped short of reliance on s. 26. This might seem at first blush difficult to understand because if that level of dishonesty affected the plaintiff's case, it would seem to follow that a s. 26 application must lie. This section was introduced into law not long after the decision of the Supreme Court in *Shelley-Morris* and, as noted above, acts as a very major "nuclear" deterrent to the mounting of fraudulent and exaggerated claims. It undoubtedly confers litigation advantage on defendants and has long been complained of by plaintiffs' lawyers as violating the principle of "equality of arms" in personal injury litigation. However, the recent jurisprudence of this court reveals an emerging trend towards a more level playing field by the threat of sanctioning defendants who invoke the section without just cause by way of aggravated or punitive damages. In that regard, the comments of O'Neill J. in *Smith* are apposite:

> "92. I have no hesitation in dismissing the defendant's 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 the plaintiff of the award of compensation to which they are rightly entitled...
>
> It behoves defendants to use prudent discernment before taking the very serious step of making a s. 26 application."

62. I have little doubt that the defendants in this case were very conscious of the risk of making a s. 26 application were it to prove unsuccessful. Instead they chose to pursue an alternative course which they hoped may achieve the same result without incurring the risk identified. They declined to grasp the nettle.

63. It would be quite unjust to dismiss the plaintiff's claim on the grounds advanced by the defendant and I decline to do so. Whilst I have said that the claim for special damages is in my view improper, I do not think the court can dismiss the case on that ground alone particularly where the defendants have expressly declined to make a s. 26 application.

64. In the event, the plaintiff must succeed and is entitled to damages. I am satisfied on the evidence that the plaintiff suffered a significant injury to her back as a result of the accident. The evidence of Mr. Kaar and Dr. Murray which I accept is that the disc protrusion at L2/3 was caused by the accident and lead to quite serious pain in the plaintiff's right leg. The injury to the L5/S1 disc was separately the cause of further pain in the plaintiff's lower back. However, the pain had settled sufficiently to allow the plaintiff to return to work after 10 weeks absence. When seen by Mr. Kaar some 2 years and 8 months post accident, the plaintiff's leg pain was mild. She also suffered an annular tear to the L5/S1 disc.

65. He found on examination the majority of her pain was in the lower back. Extension and flexion were reduced as was straight leg raising bilaterally to 80 degrees. There was reduced sensation in the lower anterior right thigh. Mr. Kaar felt these symptoms would continue for a short number of years which I assume to be less than 5. He felt there might be some chronic mild symptoms in the longer term. Dr. Fitzpatrick also felt the L2/3 disc protrusion caused nerve entrapment leading to the leg pain which occurred in the immediate aftermath of the fall. However neither Mr. Kaar or Dr. Fitzpatrick were aware of the level of gym work being undertaken by the plaintiff or that she had at least some episodes of back pain as recently as 2010 sufficiently serious to warrant certification off work for a week.

66. In general, my impression is that the plaintiff had intermittent back pain before the accident which was significant but certainly not at the level of severity that post-dated the accident and probably not radiating to her leg except on rare occasions.

67. In terms of her psychiatric complaints, whilst I accept the evidence of Dr. Neville, her evaluation of the plaintiff was based on one consultation the best part of four years after the accident and shortly before the trial. Dr. McCarthy who had been seeing her regularly over a two and a half year period did not detect any psychological issues until November, 2014. It is evident from the plaintiff's evidence that there are many events in her life which may well be the source of depression and I am not satisfied that the plaintiff has established that these symptoms were caused by the accident.

68. I propose to assess the plaintiff's general damages to date in the sum of €50,000 and her general damages into the future in the sum of €25,000.

69. With regard to special damages, I will allow a sum of €400 being the cost of the MRI scan and a figure of €825 for travelling expenses. The treatment fees claimed by Dr. McCarthy have not been satisfactorily explained and are disallowed. Having regard to my findings regarding the plaintiff's capacity to work, it follows that the claims for loss of earnings and college tuition fail.

70. Accordingly there will be judgment in the sum of €76,225.