

THE HIGH COURT

No. 2001 17317 P

BETWEEN

PAULINE MULKERN

PLAINTIFF

AND

CAROLINE FLESK AND ANNETTE FLAHERTY

DEFENDANTS

Judgment of Mr. Justice Kelly delivered the 25th day of February, 2005**Introduction**

1. The defendants accept that as a result of their negligence the plaintiff suffered injuries in a road traffic accident which occurred on 15th February, 2000. Despite that they seek to have her claim for damages dismissed. They do so by reference to the provisions of s. 26 of the Civil Liability and Courts Act, 2004 (the Act).

Section 26

2. Section 26 of the Act reads as follows:-

"(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 –

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under s. 14 that –

(a) is false or misleading in any material respect, and

(b) that he or she knew to be false or misleading when swearing the affidavit,

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(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.

(4) This section applies to personal injuries –

(a) brought on or after the commencement of this section, and

(b) pending on the date of such commencement."

3. Statutory Instrument no. 544 of 2004, entitled the Civil Liability and Courts Act, 2004 (Commencement) Order, 2004, fixed 20th September, 2004, as the day on which *inter alia* s. 26 of the Act came into operation.

4. The application to dismiss the plaintiff's claim is made pursuant to sub-s. (1) of s. 26. That subsection requires the court to dismiss a personal injuries action if it is satisfied that the plaintiff has behaved in the manner described in the subsection. That is so regardless of any question of liability in the suit. It applies even when liability is not in issue as is the case here.

5. Once the court is satisfied that a plaintiff has behaved in the manner described it must dismiss the action except where to do so would result in injustice being done. In such a circumstance the court is obliged to give its reasons for so holding.

The Action

6. The plaintiff's action was commenced by the issue of a plenary summons on 27th November, 2001. The statement of claim was not delivered until 18th June, 2002.

7. The defendants were concerned that the claim being made by the plaintiff was at variance with the fact that subsequent to her accident she applied for and was successful in obtaining a post with a company called Boston Scientific. Before obtaining that position she had to undergo a medical examination and complete a detailed questionnaire concerning her health. In these circumstances they requested the plaintiff to make discovery of the records which she had in her power, possession or procurement concerning her job application, medical examination and questionnaire pertaining to her employment with Boston Scientific.

8. That request was made on 20th August, 2002. It was ignored despite a number of reminders sent to the plaintiff's solicitors. A motion was brought before the Master of the High Court seeking such discovery. An order was made requiring the plaintiff to make discovery on oath of the relevant documents within a period of eight weeks from the making of that order. The order was made on 13th February, 2003. It was not complied with. Reminders sent to the plaintiff's solicitors were ignored.

9. A motion seeking to dismiss the plaintiff's claim for failure to comply with the order for discovery was brought. That motion was made returnable for 16th October, 2003 and was adjourned on a number of occasions. Finally, on 3rd December, 2003 the plaintiff made discovery. The motion had been adjourned to the following day and on that occasion was struck out with an order for costs in

favour of the defendants.

10. On 9th December, 2003 the defendants' solicitors wrote to the plaintiff's solicitors as follows:

"We enclose herewith our defence. While the defence simply consists of a denial that the plaintiff sustained any injuries, you may take it that in the event of this matter going to trial, that the defendants will make the case that the complaints made by the plaintiff in relation to her alleged injuries are, at best, grossly exaggerated and, at worst, totally invented.

We note incidentally that, since drawing your attention to the obvious contradictions between the case made by the plaintiff in the pleadings and the contents of the documents which she has discovered, no explanation for the obvious contradictions has been offered by the plaintiff.

If the plaintiff wishes, at this stage, to discontinue her action, then we presume that our clients will not seek an order for costs against her. If the plaintiff intends to proceed with the action, you might be good enough to serve a notice of trial."

11. On 1st March, 2004 the defendants' solicitors wrote to the plaintiff's solicitors as follows:

"Dear Sirs,

We wrote to you on 23rd October, 2003 pointing out the major discrepancies and contradictions between the case that the plaintiff is making, the pleadings, the reports of her doctors, the complaints which she made to the doctors examining her on behalf of the defendant on the one hand and the contents of the documents which you made available to us by way of voluntary discovery on the other hand. We wrote again on 9th December and commented that no explanations for the obvious contradictions appeared to be forthcoming from the plaintiff. While there has been further correspondence between the respective offices in the intervening period no explanation has yet been forthcoming.

On the basis of the information available to us it is clearly the situation that the plaintiff's claim is entirely at odds with the contents of the discovered documents and the fact that the plaintiff was examined prior to her commencing her employment with Boston Scientific and apparently given a clean bill of health.

The purpose of this letter is to invite the plaintiff to withdraw her action as it would appear self-evident that the plaintiff has deliberately engaged in a course of misrepresentation and/or exaggeration of her complaints in such circumstances as to constitute an abuse of the court process. In the event that the plaintiff is prepared to withdraw her action at this time we would recommend to our clients that they would not seek an order for costs against her. In the event that the plaintiff is proceeding with her action then you may assume that at the conclusion of the plaintiff's case we will apply to the court to have the plaintiff's claim dismissed with an order for costs in favour of our clients. In the event that the application is successful and an order for costs made you might note that we have specific instructions to take whatever steps are necessary to recover any costs awarded to our clients.

Yours faithfully,"

12. That letter was responded to on 4th March, 2004 as follows:

"Dear Sirs,

Further to your letter of 1st inst.

The plaintiff accepts, that when being interviewed and medically examined for her job with Boston Scientific, she did not disclose that she was involved in an accident, or had sustained personal injury.

The plaintiff had been working as a shop assistant prior to the accident, and subsequently for some short period, and was finding it impossible to continue in the said line of work, due to the physical strain of constantly standing.

Her present employment with Boston Scientific does not involve standing, and thus does not put pressure on her back, and she is well aware of the fact that she has not disclosed this to Dr. Sugrue who carried out the pre-employment medical, but was conscious of the fact that if she did so disclose, she would possibly not have been employed.

The plaintiff was making every effort to minimise her losses, and thus keep her claim for compensation to a minimum.

It is quite apparent from the various medical reports which we have provided you with, and your own medical reports, that our client sustained a significant injury, and continues to suffer.

Our client never exaggerated her complaints, or misrepresented either her complaints or injuries, in any of the proceedings herein, and same were borne out by the medical evidence.

The case is listed to proceed at the forthcoming High Court Sessions in May in Galway."

13. In fact the case was adjourned further and did not come to hearing until the February, 2005 Sessions in Galway.

The Hearing

14. In opening the case the plaintiff's counsel accepted that when she sought employment with Boston Scientific in October, 2000 the plaintiff had not been truthful with her prospective employer or the doctor appointed by that company to carry out a pre-employment examination. She had not been truthful concerning the accident in suit or her medical history thereafter.

The Plaintiff's Evidence

15. The plaintiff was born in May, 1959 and is now 45 years of age. She is separated from her husband.

16. The accident occurred on 15th February, 2000. There is no dispute but that on that day the rear of the plaintiff's car was run into twice. One collision involved one of the defendant's cars hitting that of the plaintiff. The second collision occurred when the rear

of that defendant's car was in turn run into by the other defendant's vehicle.

17. At the scene of the accident the plaintiff felt a pain in her neck and shoulder. She was taken by ambulance to University College Hospital in Galway where she came under the care of Mr. Anthony Martin, the Accident and Emergency Consultant, and members of his team.

18. At the hospital she was examined. She had pain in her neck and shoulder and was also sore in her chest from the seat belt. X-Rays of her cervical spine, chest and sternum did not show any fracture or dislocation. She was given an injection of Voltarol for the pain and anti-inflammatory medication was prescribed.

19. She was reviewed at the hospital on 20th February, 2000 where she complained of pain in both neck and chest. She also had pain in her left shoulder. Examination showed that all her neck movements were painful and she was tender over her cervical spine. A further injection of Voltarol was given. She was reviewed five days later when she had severe pain in her neck, left shoulder and back. Her sleep pattern had become disrupted due to the pain.

20. She went to see her general practitioner on 6th March, 2000 because of the neck pain and was seen again by him on 17th April when she was in a distressed state. She was having severe neck pain and by then had had seven sessions of physiotherapy but with little or no improvement. When he examined her cervical spine he found her flexion was diminished as were her extension and rotation to both the right and the left. She had severe pain on all movements. He commenced treatment with an anti-inflammatory drug and a pain killer together with a muscle relaxant. He also prescribed an anti-depressant with pain-relieving attributes. The general practitioner saw her again in May, 2000 when she reported that she was in better form. She returned to her pre-accident employment on a part-time basis in May, 2000.

21. The plaintiff's general practitioner saw her again in September, 2000 when she still complained of neck pain, particularly after standing at work all day. He found that her neck movements had improved considerably and suspected that she would have ongoing symptoms from her cervical spine for at least the next eighteen months. He noted that she had been referred to a psychiatrist following a review in the Casualty Department.

22. The plaintiff had indeed been referred to Dr. O'Toole, a psychiatric consultant, by Mr. Martin and both of those doctors gave evidence before me.

23. The plaintiff's complaints of injury resolved themselves down to three. First, there was the bruising and pain to her chest caused by the seat belt. She accepted that that was the first to get better and cleared up within a relatively short time. The second complaint related to the pain in her neck and shoulder. She said that that took about nine months to clear up. Mr. Martin in his evidence thought it took somewhat longer, namely a year.

24. The third complaint related to back pain. She gave evidence of the pain there and is affected and said that this continues to trouble her. It is worse in the winter and it affects her about twice per week. In summertime this is less so. It has improved over the years. It is really in respect of this low back pain that the defendants have directed their fire and have sought to bring about the dismissal of the plaintiff's claim pursuant to the statutory provisions which I have already cited.

The Plaintiff's Employment Record

25. Prior to the accident the plaintiff worked in a firm called Standún. That firm closes for the winter season and was due to reopen in March, 2000. She was unable to return to work with that firm until May and consequently missed approximately ten weeks work. She looked after the coffee bar at that firm but found that she was unable to do so because of her back pain. As she could not do her work there she left and went to work in a firm called Clarke's in Bearna. That work involved stocking shelves and she was unable to do that. That was so even though her work in Clarke's was on a part-time basis.

26. She saw an advertisement for jobs with Boston Scientific and applied for one of them. She had to do an aptitude test, an interview and a medical examination in order to obtain the job.

27. Boston Scientific required her to fill out a detailed health screening questionnaire. In it she indicated that she last attended her doctor in 1999. This was not true. The questionnaire asked her if she suffered from, or ever had, (a) any back problems, (b) back pain/injury or leg pain/injury, (c) tingling or numbness in back/legs or sciatica (pain down the leg), (d) any joint/muscle pain, limb pain or arthritis, (e) treatment for back/muscular problems. To all of these questions she answered "No". That was untrue insofar as questions (a) (b) (d) and (e) were concerned.

28. At the conclusion of the form she signed the following declaration:

"I declare all the above answers to be correct and complete to the best of my knowledge and understand that a false statement will be considered cause for dismissal without notice."

29. The plaintiff was also examined by Dr. Deirdre Sugrue, an Occupational Physician retained by Boston Scientific. Amongst other things she carried out a locomotor examination of the plaintiff. She was satisfied that the plaintiff's arms, hands, legs, feet and back displayed a full range of movement and were normal. The plaintiff was able to sit up unaided from the supine position in a normal way and also to perform a femoral stretch. Her gait was normal as were her neck movements.

30. On the basis of all of this information the plaintiff was appointed to the position in Boston Scientific and continued to hold down her job there up to the date of the trial.

31. It is the defendants' contention that insofar as the complaints with her back are concerned, the plaintiff has given false or misleading evidence and that she knows it to be false or misleading and so falls within the ambit of s. 26(1) of the Act.

32. In support of this contention they point to the following:-

(a) the answers which she gave on the health screening questionnaire to her prospective employer;

(b) that the locomotor tests carried out on her by Dr. Sugrue were normal;

(c) that both in his medical report and in his testimony her general practitioner made no mention of any back complaint. He had no record of a complaint being made to him concerning the plaintiff's back.

33. If this were the totality of the evidence on the question I would be much inclined to the view that the plaintiff's complaint in respect of back pain was a fabrication. But it is not the totality of the evidence.

34. First, her general practitioner stated that he became aware of her suffering from back pain but could not say when. In his dealings with her he was, he said, concentrating upon the neck pain. He was aware of the fact that she was under the continuing care of Mr. Martin and his team in the hospital and therefore the low back pain was not of great concern to him.

35. In his evidence Mr. Martin accepted that initially there was no complaint of low back pain on the part of the plaintiff. That emerged some little time later. The plaintiff was seen some fourteen or fifteen times over one and a half years by him or members of his team. It was he who referred her to a psychiatrist for help. He regarded the onset of the low back pain and the way in which it had behaved thereafter as being entirely normal. In fact the plaintiff's symptoms and her complaint formed part of the normal pattern of injury which results from a collision of the type in suit. He regarded the complaint of low back pain as consistent with the history of the plaintiff's accident. Whilst he accepted that the plaintiff did not complain of back pain until 25th February, 2000, he regarded that as being normal. Not merely that, but when complaint of back pain was made to him he examined the plaintiff and found tenderness at the relevant site.

36. Before the court could apply the provisions of s. 26(1) of the Act it would have to be satisfied as a matter of probability that the evidence given by the plaintiff was false or misleading in a material respect and that the plaintiff knew her evidence to be false and misleading.

37. I do not accept that the plaintiff gave false or misleading evidence. It is not to her credit that she told untruths to her prospective employer. I am satisfied that she very much wanted and indeed needed to obtain employment with Boston Scientific. That may explain why she was untruthful in her dealings with that employer although it does not excuse such behaviour. But I do not accept that she gave false or misleading evidence to the court.

38. She was also able to satisfy Dr. Sugrue of her fitness when the locomotor tests were conducted. Mr. Martin was not surprised at her ability to do that. It was part and parcel of her efforts to obtain employment with Boston Scientific regardless of her state of health.

39. I am of opinion that once the plaintiff realised that the defendants had found her out in her untruths she decided to make a clean breast of it and admit to the court her wrongdoing in that regard. That wrongdoing was admitted at the outset. It was admitted in pre-trial correspondence, by her counsel in opening the case and in her own evidence in chief. She may well have given false and misleading information to her employer but I do not believe that she did so on oath before the court and consequently I am satisfied that the provisions of the section do not apply.

40. If I were of a different view I would be obliged to dismiss this action unless such dismissal would result in injustice being done.

Damages

41. The injury to the plaintiff's chest cleared up within about two months of the accident. The injury to her neck and shoulders, which was quite painful, had cleared up on her own evidence within a period of nine months and on Mr. Martin's evidence within twelve months. Thereafter the only remaining complaint concerned her lower back. I am satisfied that she did have pain there but it has improved over the years. Certainly the pain which she suffered did not preclude her from taking up her position with Boston Scientific and she has remained in that employment since. Her injuries involved her being out of work for approximately ten weeks. Thereafter she did part-time work until she obtained her employment with Boston Scientific in November, 2000.

42. I also accept that she suffered some depression and that it was triggered by the accident. However, her marriage broke up in the following year and it was at that time and later that the bulk of her psychiatric consultations took place. It was remarkable that at no stage did she mention to the consultant psychiatrist during the course of her consultations with him in 2001 and 2002 that her marriage had broken up.

43. I accept that during the course of the year 2000, she had 21 sessions of physiotherapy in order to deal mostly with her neck problem.

44. Insofar as the future is concerned the evidence satisfies me that she has made a recovery from the bulk of these injuries and that the most that might happen to her in the future is that she will have what Mr. Martin described as "little niggles from time to time". These will occur in her back.

45. In these circumstances I assess general damages for pain and suffering to date at €35,000.00. There will be a further €2,000.00 for pain and suffering in the future.

46. Insofar as special damages are concerned there are agreed special damages of €970.08 in respect of hospital expenses and €94.09 in respect of radiologist's fees.

47. I will allow a sum of €250.00 in respect of the psychiatrist's fees. I am of opinion that the break up of her marriage contributed significantly to her need for psychiatric help in 2001.

48. I will allow a sum of €150.00 in respect of her General Practitioner. Not all of her consultations with him could be related to the accident.

49. I will allow a sum of €586.00 in respect of physiotherapy.

50. I disallow the claim for car damage since no repairs were ever effected to the car.

51. Insofar as loss of earnings are concerned I accept that she was out of work for ten weeks and when she returned in May she was unable to work a full week giving rise to a loss on a weekly basis as outlined in evidence. She also lost one bonus whilst with Standún. Her work with Clark's was part-time giving rise to a loss whilst with them for the short period in question. Since she went to work with Boston Scientific she has suffered no loss of earnings. She was in receipt of disability benefit amounting to IR£882.00.

52. Insofar as loss of earnings are concerned I assess her entitlement at a sum of €4,000.00.

53. There will therefore be judgment for €43,050.17. .

