

THE HIGH COURT

[2010 No. 9115 P.]

BETWEEN

AMY LACKEY

PLAINTIFF

AND

PATRICK KAVANAGH

DEFENDANT

JUDGMENT of Mr. Justice Kevin Cross delivered the 17th day of July, 2013

1. The plaintiff in these proceedings is a single mother of two who was born on 27th September, 1988 and resides in Ballyfermot.
2. On 16th April, 2008, the plaintiff was travelling as a passenger in the upstairs compartment of a bus which was stopped on Ballyfermot Road, Dublin, when a motor vehicle, the property of and being driven by the defendant drove into the rear of the bus causing the plaintiff allegedly to be injured.
3. The defence delivered by the defendants admits, *inter alia*, that the collision the subject matter of the proceedings was caused by reason of the defendant's negligence but deny any personal injuries or loss or damage on the grounds, *inter alia*, as set out at para. 3(i) of the defence that:-

"The collision and impact between the two vehicles was so minor and slight that the plaintiff did not nor could not have suffered the alleged or any personal injury loss or damage."
4. By way of special reply to the above paragraph the plaintiff claims that as the said defence is "oppressive and untrue" in circumstances "where the defendants at all material times knew this assertion was and could only have been untrue", the plaintiff claims an entitlement to aggravated and/or exemplary damages.
5. The defendant's vehicle was damaged to the extent as being a write off and I have seen photographs of the damage and indeed it was extensive and this is indicative of travelling at some speed, but how fast is not clear, into the rear of the bus in which the plaintiff was a passenger.
6. The plaintiff in her description of the incident said that she was sitting on the bus and was chatting to a fellow passenger who she did not know to the effect that she was pregnant and had returned from a visit to the Coombe Hospital for a scan. She said she felt a bang and that she was caused to jump up and described that she remembered going forward, being lifted out of her seat and jumping back.
7. The court and the plaintiff were shown a film recording taken by Bus Atha Cliath in one of the cameras at the top of the bus. These films are taken on a two to three frames per second basis and accordingly do not give a continuous but somewhat "jumpy" effect. There was no evidence in the film of the plaintiff being "thrown forward" or being lifted out of her seat.
8. As the plaintiff's engineer and indeed her principal medical witness, Mr. Bruce Bough, indicated the film did show some movement of the plaintiff's head and that it was at an angle at the time of the accident and impact. Subsequent film of the passengers on the ground floor of the bus also indicated that passengers there had some head movement at the same time.
9. The plaintiff in cross examination indicated that certainly she felt it as if she was knocked forward and backwards.
10. I find as a fact, allowing for any breaks in the film, that the impact did cause some but not very significant movement of the plaintiff's head and neck. This is not, however, the end of the matter. The plaintiff's case is that as well as the classic whiplash movements, her body was also subjected to forces from below caused by the impact of the car to the ground floor of the bus. The plaintiff claims that after the accident she walked down the stairs, was confused and shaken and somewhat distressed. Eventually she went home and told her mother who advised that she should go for medical help but slept on the couch and did not do so until the following day when she went to her general practitioner.
11. Subsequent viewing by the court of the camera taken on the ground floor indicates that as the plaintiff descended and appeared about to be getting out of the bus she then goes back into the bus looking confused and distressed and indeed is seen from time to time holding her back and sits down and stands up again a number of times. Some officials of Bus Atha Cliath came to her and the film ends before she leaves the bus.
12. Her general practitioner, Dr. O'Reilly gave evidence of the fact that she works in a large practice and that the plaintiff had been seen on two occasions by colleagues and a further occasion by herself that the plaintiff gave an account of being thrown forward and that she thought she may have hit her chest slightly on the seat in front. She complained of soreness and stiffness in her neck and shoulders and pain in her lower back. As the plaintiff was fifteen weeks pregnant, her doctors were unable to prescribe the appropriate medication but rather advised rest, analgesics and physiotherapy if the injuries were not settling.
13. The plaintiff in her evidence was supported by Mr. Bruce Bough, Orthopaedic Surgeon, who examined her in April 2010, some two years after the accident. The plaintiff stated in evidence that after the first 24 hours of the accident, she suffered an onset of progressively worsening central and bilateral low back pain and stiffness with paraesthesia down to both legs and that on examination in April 2010, Mr. Bough felt tenderness on palpation, crepitus on neck movements. Movements of her cervical spine had some limitation of movements and while movements of her shoulder joint were full in abduction and external rotation there was some limitation of internal rotation with pain at extremes. There was tenderness on palpation over the muscles of her lower back.

14. On Mr. Bough's second examination in January 2011, he felt that Assisted Mobilisation had not been possible due to her pregnancy. Shoulder Adhesions had formed following the trauma and had been established and Assisted Mobilisation was required. This resulted in her being admitted to Clane General Hospital on 6th January, 2011 and under general anaesthetic examination he confirmed the presence of bilateral adhesions which were restricting neck movements to 80% of the normal range. These adhesions were mobilised and released by bilaterally restoring a full passive range of movement at the end of the procedure.

15. After the procedure, Mr. Bough reported essentially that her neck and shoulder movements were full with only some discomfort at extremes and there has been some improvement in her lower back, however, she has not had full remission of pains.

16. Mr. Bough was of the view that the lower lumbar spine was vulnerable due to her pregnancy and the symptoms persisted despite some moderation since the accident and it is likely that some intermittent moderate pain will continue.

17. The plaintiff in her own evidence made somewhat more extensive complaints of ongoing pain and indicated that sometimes she could not get out of bed due to pain.

18. The plaintiff and indeed Mr. Bough were intensively cross examined on the basis that the injury could not have been sustained in the accident that was shown on the video or further that the plaintiff was guilty of extreme exaggeration and in effect as was submitted at the end of the defendant's case that the plaintiff was giving false or misleading evidence which she knew to be false or misleading and that an order under s. 26 of the 2004 Civil Liability Act should be made.

19. Mr. Bough was also cross examined on the basis that he was virtually the only orthopaedic surgeon who practiced the technique of manipulation of these injuries under anaesthetic and in essence that he was doing this for financial gain. Mr. Bough vigorously defended his practice and indeed gave evidence as to the various physical forces that were present at the time of the collision indicating the injury to the back would have been caused by forces coming from below the plaintiff from the rear of the bus where the impact occurred.

20. Mr. McQuillan, Consultant in Emergency Medicine, gave evidence on behalf of the defendant and he also gave evidence as to the various forces involved in the whiplash injury and as to the speed of impact necessary to create a whiplash injury. It is fair to say that Mr. McQuillan estimated that the speed necessary for injury in whiplash were even greater than the evidence of the defendant's engineer, Mr. Danton, in this regard.

21. Mr. McQuillan in his evidence stated that the movement shown on the video of the plaintiff's neck was quite minimal and said it was totally impossible for injury to have been sustained in the accident that he saw on the video. He thought that given the size of the bus, the car would have to be travelling some 80mph before there was likely to have been a whiplash injury.

22. Mr. McQuillan was asked to explain the fact that on examination under anaesthetic Mr. Bough did discover signs of adhesions and a significant reduction in internal rotation. It was suggested to Mr. McQuillan that these were objective findings which could not be fabricated as they emerged from an examination of the plaintiff under anaesthetic. Mr. McQuillan did not demur from that but suggested that the only explanation was that these injuries were caused by some other traumatic event.

23. The defendant's engineer, Mr. Danton, also gave evidence indicating that in his view from studies of various crashes greater force would be required to cause a whiplash injury.

Decision

24. The first issue for the court to decide is whether or not the plaintiff suffered injuries of a soft tissue nature to her neck and shoulder and back in the accident.

25. As I have previously stated, the nature of the movement of the plaintiff's neck seemed indeed to be quite small. The nature of the movement, however, was not negligible and I accept that in any soft tissue injuries many factors will determine whether one person is injured and another is not. One of these factors is the size of the person injured and the position at the time of the impact whether they were anticipating the impact and the angle of their body at the time. All of these factors mitigated against the plaintiff. The fact that the plaintiff was pregnant also mitigated against her making a reasonable or speedy recovery as the appropriate medication could not be taken. Indeed, I note Mr. McQuillan stated that on two occasions he has been involved in an accident and he has not been injured but his wife was. It is interesting in this case that both the orthopaedic experts were able to give expert engineering evidence relating to the causation of soft tissue injuries.

26. Were I to hold that the plaintiff did not suffer the injuries I would be holding that the plaintiff was attempting to commit a fraud. The circumstances of the video and indeed the nature of the plaintiff's own testimony are indeed reasons to raise question marks on behalf of the defendant.

27. However, in order to conclude that the plaintiff was guilty of a fraud, I would have to be of the view that the plaintiff between her leaving the top floor of the bus in which she appeared to be relatively relaxed and arriving down to the ground floor had decided to embark upon a fraudulent claim in that she appeared confused, as she stated, and indeed was holding onto her lower back in some distress or discomfort and pain when in the lower floor of the bus. This is clear from the video.

28. I would then have to hold if I were to believe that the plaintiff was guilty of a fraud that she went home and decided also to deceive her mother because she made little of her complaints and told her mother that she was distressed and would not go to a doctor and then cunningly went to a medical centre the next day with a concocted story.

29. All these are indeed possible and there would still be a doubt in my mind as to whether the plaintiff was genuine until the examination by Mr. Bough of the plaintiff which disclosed that the plaintiff who had decided in 2008, allegedly to defraud the defendants had developed objective symptoms in the precise area which she claimed from the start to be painful and which symptoms were discernable by Mr. Bough objectively on examination and were only, if the defendant's contentions are correct, a coincidence of an entirely unrelated trauma to the plaintiff in the same place.

30. It should be noted, of course, that it was never suggested by way of cross examination to the plaintiff that she did suffer an unrelated trauma to the same place but leaving that aside, I cannot conclude that the plaintiff was involved in such an unlikely fraud which then was confirmed by a coincidental trauma which was revealed on examination.

31. I must, therefore, conclude that the plaintiff did indeed suffer an injury of a soft tissue nature when she was sitting on the top floor of the bus.

32. Noting the minor nature of her neck movements, I must conclude that her body was indeed subject to the forces from below referred to by Mr. Bough in his testimony. These forces were probably the most significant ones and caused the majority of her injuries.

33. I do conclude that the plaintiff did also suffer injuries to her shoulder and neck for the reasons as set out above.

34. I must, therefore, reject the plea of the defendants that the accident did not and could not have happened. The impact to the defendant's vehicle was quite significant though the damage to the bus may not have been so.

35. The next issue to consider is whether the plaintiff has been guilty of exaggeration to the extent provided by s. 26 of the 2004 Act. Section 26 of the 2004 Act states as follows:-

"(1) If... 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.

...

(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."

36. As the Supreme Court stated in *R. v. Bus Éireann* [2011] IESC 44, it was for the plaintiff in a civil action to prove his or her claim on the balance of probabilities, however, "in this case (the defendant) raised s. 26 of the Act 2004. In such circumstances the appellant carries the onus of proof which is also on the balance of probabilities".

37. In this case, the plaintiff complained to Mr. Bough two years after the accident of symptoms not complained of to her general practitioner e.g. headaches, pain and parathesia down her left arms and both legs.

38. It is also true that the plaintiff in cross examination made ongoing complaints in relation to her neck and shoulder which were not made or supported by Mr. Bough.

39. The issue before the court is whether the plaintiff when giving her evidence was giving a false or misleading evidence which she knew to be false or misleading which is in effect an alternative allegation of fraud.

40. I accept the evidence of Mr. Bough to the effect that somebody who was an injured party and who has suffered an actual trauma, as is the case of the plaintiff, is likely to credit every pain and ache that she has experienced since that date to the accident. This is especially, in my view, where an accident is of long term duration without resolution of legal proceedings. The plaintiff is obliged to recount her symptoms on a number of occasions both her own and the defendant's doctors and it is a fairly natural thing that any ache or pain that she experiences is going to be related to the accident.

41. I have examined the plaintiff's evidence and what she has told the doctors and I do not find that her evidence could be described as being false or misleading evidence which she knew to be false or misleading.

42. The plaintiff's evidence was corroborated by Mr. Bough who stated that at her attendances with him after the mobilisation, she had referred to some neck symptoms but in Mr. Bough's opinions such symptoms did not relate to the accident. The court is of the view that the plaintiff's demeanour at the ground floor of the bus is supportive of injuries of the type that she has complained of as indeed is her mother's evidence after the accident. In the circumstances, the court rejects the submissions on behalf of the defendant that the provisions of s. 26 of the Civil Liability Act should apply.

Aggravated or Exemplary Damages

43. The plaintiff claims an entitlement to aggravated total exemplary damages.

44. Aggravated damages are compensatory damages to compensate the plaintiff by reason of the manner in which the wrong was committed or the conduct of the wrongdoer after the commission of the wrong such as a refusal to apologise or the conduct of the wrongdoer in the defence of the action. Aggravated damages may be awarded in tort actions for negligence – *Phillip v. Ryan* [2005] 4 I.R. 241.

45. The plaintiff also claimed exemplary damages to mark the court's disapproval of the defendant's conduct and to punish the defendant for such conduct.

46. The plaintiff complains that the defendant expressly and vigorously asserted in the pleadings and at the hearing of the action that the plaintiff was making a fraudulent claim which brought an additional element of stress in the plaintiff. The plaintiff complains that the defendant disputed the *bona fides* plaintiff's consultant, Mr. Bough's treatment of the plaintiff referring to the contrary of opinion of other specialists who were not called to give evidence and that when the defendant's consultant gave evidence, he did not criticise the procedure but merely stated he did not perform the procedure himself.

47. I am of the view that since the introduction of the 2004 Act which clearly impacts upon a plaintiff disproportionately more than on a defendant, the issue of aggravated/exemplary damages must always be in the mind of a court where it is alleged that the plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invokes the provisions of s. 26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent to an irresponsible or indeed an overenthusiastic invocation of such a plea. I believe the courts should be at least as rigorous as they were of old when such a defence is maintained.

48. In *Phillip v. Ryan* where the Supreme Court held aggravated damages were to be awarded due to the behaviour of the defendants in the preparation and presentation of their case, direct blame was found against the defendant and their legal advisers for improper

behaviour in effect hiding information from the plaintiff.

49. As was submitted on behalf of the defendant there is no such case to be made against the defendant here. Be that as it may, I believe the court must be vigilant in not allowing an unwarranted allegation of fraud or any unwarranted invocation of the provisions of the s. 26 of the 2004 Act to go unpunished if the circumstances allow.

50. In this case, the complaint is made on behalf of the plaintiff of the attitude of the defence both to the plaintiff herself and secondly to her principal medical witness.

51. In relation to the plaintiff and in the circumstances of the accident, I hold that whereas I have found against the defendant, I do not believe that their defence was necessarily entirely unreasonable. I am advised that the initial plea was prior to the defendants seeing the video. The initial plea was based upon the alleged minimal nature of the impact. Once, however, the defendants and their advisers had sight of the video it was not unreasonable to raise the issue as to whether the plaintiff was guilty of the fraud or the exaggeration complained of.

52. I have little doubt but that the raising of the plea did probably increase the plaintiff's upset but I am not sure whether this upset was increased by any significant amount and in any event I hold that it was not unreasonable for the defendant to question the plaintiff and to raise the issues that they have raised.

53. In relation to the attack upon Mr. Bough, the plaintiff's medical adviser, it is clear to say that the attack on him might certainly to a sensitive soul, appear to be on the rough side of robust when dealing with a professional witness.

54. I observed Mr. Bough and, this is no reflection on him, he did not appear to be a sensitive soul. Undoubtedly he gave as good as he got.

55. I am not a medical person and have no expertise in that regard. Mr. Bough's surgical technique was attacked in order to suggest his evidence was not to be believed and he was engaged in a money making exercise. That indeed is a very serious attack to make against any professional person and it is, I accept, compounded by the fact that the defendant had no evidence to support the contentions put to Mr. Bough.

56. The fact of the matter is that Mr. Bough's technique whether followed by other specialists or not served two important functions in this case. First of all as I have previously held, Mr. Bough's technique uncovered objective evidence to support the plaintiff's complaints. The second function that was performed by Mr. Bough is that his technique actually achieved the result it was intended to do in that the plaintiff is now, as Mr. Bough has said, "cured" in relation to her shoulder and indeed her neck problems. In many years of practice, I have witnessed many eminent medical witnesses dealing with soft tissue injuries who were unquestioned as to their professionalism by all sides and the vast majority of the medical experts I have seen would have been delighted to have achieved the result achieved by Mr. Bough in relation to this plaintiff.

57. While the attack on Mr. Bough was a significant one, the court must look at the nature of this both in the light of the not unreasonable view that the defendants were taking as to the nature of the plaintiff's injuries and also the fact that Mr. Bough did not seem at all affected by the attack on him, I do not see the basis for this attack to be used to justify the awarding the plaintiff aggravated or exemplary damages.

58. In the circumstances, the plaintiff is entitled therefore to compensatory damages for the pain and suffering and loss and damage she has sustained.

Special Damages

59. The plaintiff's special damages are agreed in the amount of €1,950.

General Damages

60. The plaintiff suffered distressing injuries which are of a soft tissue nature to her neck, shoulder and back. Her injuries were worsened by her pregnancy and persisted. On manipulation by Mr. Bough two years after the accident, her shoulder and neck symptoms have, in my view, resolved. The plaintiff was somewhat disabled by her neck and shoulder injuries and is still suffering some though quite minor injuries to her lower back.

61. The fact that the plaintiff suffered some of the injuries and the injuries are continuing is not to in any event be made light of. I believe that the plaintiff should be entitled to a figure of €40,000 damages to date and €5,000 into the future make a total of general damages of €45,000 to which the sum of €1,950 special damages should be added totalling in the sum of €46,950.