THE HIGH COURT

[2024] IEHC 587

[Record No. 2019/4941P]

BETWEEN

KEVIN LYNCH

PLAINTIFF

AND

MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANT

JUDGMENT of Mr Justice Liam Kennedy delivered on the 30th day of October 2024.

1. These proceedings arise from a road traffic incident in which the Plaintiff claims to have sustained personal injuries due to an unidentified driver's negligence. Liability was not vigorously contested. Apart from quantum, the key issue arises from the Defendant's application to dismiss the proceedings on the basis that the Plaintiff allegedly gave or adduced false or misleading evidence (or caused it to be given or adduced). That application relies on, firstly, the Plaintiff's delivery (and subsequent withdrawal) of a substantial loss of earnings claim and, secondly, issues with information supplied by the Plaintiff to medical experts.

2. In short, the Plaintiff has established on the balance of probabilities that he sustained personal injuries in the incident, but he has not satisfied me that the injuries due to the incident (as opposed to pre-existing or independent issues) are as severe as claimed. However, while I do not accept certain evidence tendered on the Plaintiff's behalf, the Defendant has not satisfied me that the Plaintiff deliberately misled the Court. While those matters do not provide a basis

to dismiss the claim, they do influence my assessment as to the weight to be accorded to certain evidence, including expert evidence, particularly as to quantum. I have awarded the Plaintiff €45,000 by way of general damages for past and future pain and suffering.

Background

3. On 5 July 2015, the Plaintiff and his son were driving in an area of Co. Clare inauspiciously known as Gallows Hill, its name apparently attributable to its use as the site of Cromwellian executions in less enlightened times. It is now a more peaceful scenic hill in a woodland area. The Plaintiff and his son are keen hunters. They had driven up the hill (in a car belonging to the Plaintiff's partner) in search of deer to be stalked on future expeditions. The Plaintiff says that, as they ascended the hill approaching a blind bend at a moderate speed (circa 30 – 40 kph), a white car rounded the bend at speed, occupying most of the road and forcing him to take evasive action. This led him to collide with a stone pier or ditch by the side of the road. The white car sailed by without stopping. Neither it nor its occupants were ever identified. The Plaintiff and his son were understandably shaken, and the car was undriveable. The Plaintiff called his partner, who collected his son while he waited for a tow truck. The following day he made a report to the Gardaí. In the circumstances, the Plaintiff and his son were the only available witnesses to the incident.

4. Photographic evidence confirmed extensive damage to the left front corner of the car. The motor assessors report noted that the vehicle had sustained:

> "*a moderate impact onto the left front corner in a direction from front to rear and at a slight angle. Main parts damaged include the front bumper, bumper bar, both headlights, bonnet, front panel, radiator, cooling fan and cowling, air cond condenser, air filter housing, left hand wing, left hand wing guard, left hand flitch panel, left hand front door, left hand front wheel rim and tyre, left hand front suspension assembly, left hand drive shaft, steering rack etc.*"

(I have disregarded a comment raised in the assessor's report as to whether the damage was consistent with the Plaintiff's account in view of the Plaintiff's testimony on that point).

5. The Plaintiff's son, who, being in the front passenger seat, was closest to the point of impact, issued proceedings against the car's insurer which settled for approximately €15,000 plus costs. These proceedings were issued four years after the 2015 incident and the hearing took place on 20-21 June 2024.

The Plenary Personal Injury Summons ("PIS")

6. The PIS alleged injuries to the Plaintiff's lower back, left hip and right shoulder (while acknowledging pre-existing issues with his right shoulder in particular), and referenced the Plaintiff's "*anxiety and stress*" following the incident, without details.

The Plaintiff's 18 September 2020 Replies to Particulars

7. On 18 September 2020, the Plaintiff responded to a notice for particulars confirming, *inter alia,* the Plaintiff's ongoing loss of earnings, with details to follow.

Affidavit of Verification dated 24 September 2020

8. The Plaintiff swore an affidavit verifying the PIS and his Replies to Particulars on 24 September 2020, apparently the only such affidavit of verification. He described his occupation as a "*Stone Mason*".

Affidavit of Discovery sworn 3 February 2023

9. The Plaintiff's affidavit of discovery dated 3 February 2023 described his occupation as "*Seasonal Operator*".

The 21 April 2023 Schedule of Special Damages ("the April 2023 Schedule")

10. On 21 April 2023, the Plaintiff's solicitors served particulars entitled "*Schedule of Special Damages to Date and Continuing*", claiming special damages of €621,388. Other than uncontroversial medical and travel expenses, the crucial claims were €210,249 for loss of earnings to 3 April 2023, and €410,139 for loss of future earnings. Accordingly, the aggregate value of the loss of earnings claim was €620,388**.** The April 2023 Schedule was accompanied by a report from Peter Byrne, actuary, instructed by the Plaintiff's solicitor. The report records instructions that: (a) the Plaintiff was born on 20 April 1966 and worked as a stonemason before the incident; (b) his current and future earning capacity had been reduced due to his injuries; and (c) but for his injuries, he could have earned approximately €45,500 gross per annum. It noted the Plaintiff's earnings since 2016 and assumed a future loss of income. The report assumes that the difference between the Plaintiff's actual earnings from 2016 to 2020 and a notional stonemason's income was wholly attributable to his injuries and that, but for the incident, the Plaintiff would have continued to work as a stonemason, earning €45,500 per annum. Those assumptions underpinned his loss of earnings calculations.

Supplemental Affidavit of Discovery dated 12 April 2023

11. The Plaintiff's supplemental affidavit of discovery exhibited the actuary's report and a letter from his accountant, confirming the Plaintiff's income as appearing from his 2016 to 2021 tax returns. Once again, his occupation was recorded as being a seasonal operator.

The 19 June 2024 Particulars

12. In the afternoon of 19 June 2024 - the day before the hearing of these proceedings - the Plaintiff served detailed updated particulars of injury and an amended schedule of special damages. The 21 April 2023 €620,388 loss of earnings claim was jettisoned without

explanation. No loss of earnings claim was advanced at trial. The Plaintiff's counsel confirmed that loss of earnings was no longer part of the case.

Admission of Medical Reports

13. The parties agreed to the admission (without formal proof) of all medical reports, but not their contents, with the reports to stand as the evidence the doctors would have given if they appeared in court.

The Evidence

14. The Plaintiff was 49 years old at the time of the incident. He had started work as an apprentice stonemason in England at the age of 16, returning to Ireland in 1996 and setting up his own business as a stonemason in 1997. His business was successful and substantial until, like others in the industry, it succumbed to the then prevailing global economic crisis. From 2012 and until the incident on 5 July 2015 (and, indeed, in the years thereafter), the Plaintiff worked in a community employment scheme maintaining greenways and pedestrian ways. The actuary's report (and comments in various medical reports) conveyed the respective authors' perception that the Plaintiff was working as a stonemason until prevented from doing so by the injuries sustained in the incident. This was not correct, as was acknowledged by the Plaintiff's counsel at the outset of the hearing. I consider this in the context of the S. 26 application.

15. Notwithstanding the abandonment of the loss of earnings claim, the Plaintiff maintains that he has suffered from serious ongoing physical and psychological injuries since the incident and that his ability to work has been significantly restricted by his injuries. No loss of opportunity claim was advanced nor were alternative particulars furnished in lieu of the April 2023 Schedule. Happily, and apparently contrary to the premise of his actuary's report, the Plaintiff and his son have launched an innovative business in recent years, bringing foreign

tourists on hunting trips. After a slow start, the business appears to be prospering, although the Plaintiff says that his involvement has been constrained by his injuries.

16. As he and his counsel acknowledged, having laboured all his life, the Plaintiff was not in peak condition even before the incident. His medical history for at least four years pre-incident included intermittent shoulder problems. He also suffered from cardiac issues and required successive replacements for each hip (due to arthritis and, again, unrelated to the incident). The Plaintiff maintained that such pre-existing conditions were bearable, unlike his subsequent complaints. However, as detailed below, it appeared from his medical notes that the pre-existing complaints were significant.

17. The extent of the injuries sustained by the Plaintiff is in dispute (both in the context of the s. 26 application and the quantum claim). The Plaintiff claimed to have sustained significant physical and psychological injuries. Seven medical reports were furnished on his behalf. In particular, eight years after the incident, his solicitor instructed a clinical psychologist who examined the Plaintiff twice, opining that he was experiencing symptoms of post-traumatic stress as a result of the 2015 incident.

The Plaintiff's Account

18. In his evidence, the Plaintiff described the events of 5 July 2015 as outlined above. His son also testified but had little to add. The Plaintiff testified that he was travelling at 30-40 kph. The oncoming white car was in the middle of the road, forcing him to take immediate evasive action. This caused his car to collide with a concrete pier. The airbags did not inflate. At the time, he was shaken. It did not occur to him to contact the Gardai, but he did so the next day. All that he could tell them was the colour of the white car, explaining in cross-examination that further details occurred to him in "*flashbacks*" in the months and years that followed. The Gardai's enquiries were inconclusive, unsurprisingly in view of the limited information.

19. The Plaintiff's testimony was that he had a sore neck at the time, but started to feel his injuries a couple of days later. He first visited his general practitioner eleven days after the incident, after consulting a solicitor. He complained about his neck, shoulder, and back. The GP prescribed painkillers and sent him for x-rays. The Plaintiff suggests that the incident has had a major impact on his health and lifestyle. Whereas he previously drove all over the country every Sunday, he now found it intolerable being in a car for long periods and was "*hypervigilant*" when driving. He referred to ongoing pain which he attributes to the incident and which, he says, makes it impossible for him to work as a stonemason.

20. The Plaintiff acknowledged shoulder issues experienced before the incident (and a bicycle accident in 1990, in which he had injured his shoulder, going over the handlebars at speed). He was referred to a Consultant Rheumatologist on 12 January 2015 – 6 months before the incident – because of his shoulder pain. The latter's 13 October 2015 response noted that the Plaintiff had had right shoulder pain for about four years which kept him awake at night: "*he can't really use it and he hasn't been able to work for a few months now.*"

21. Under cross-examination, the Plaintiff was challenged about additional details of the incident shared with the clinical psychologist to whom his solicitor referred him in September 2023, eight years after the event, which went beyond the information furnished to the Gardaí in 2015. He was also asked why he had not raised his alleged psychological problems with his GP over the years. However, the cross-examination concentrated on the Plaintiff's accounts to the doctors of his injuries and their impact on his ability to work and on whether he had exaggerated his injuries in his testimony or in the consultations with the experts. He said that, prior to the incident, despite his pre-existing injuries, he could work freely, doing his job, "*working through a pain barrier*", which he seemed to regard as part and parcel of life as a stonemason. However, he was "*in trouble*" after the incident and periodic injections "got him through" but involved a different level of pain. Responding to suggestions that his symptoms

predated the incident by four years, and he had been referred to the rheumatologist 6 months before it occurred, he said that the pain had been manageable before the incident:

> "*... I had worked through it for them four years in pain. The pain got so bad then that I eventually went to my GP who referred me to Dr. Fraser, a bit in keeping with what I'm saying about not going to a psychiatrist, it was last minute. I toughed it out for as long as I could. I grinned and I beared it and that's what I done*" [*sic*].

22. The Plaintiff was asked about his updated particulars – served the previous afternoon at the same time as the particulars of loss of earnings were abandoned – which stated that:

> "*Medical opinion is that the Plaintiff suffered an injury to his right shoulder in the incident… which has continued to be a problem causing pain and restricted movement. As a result, he has not been able to work and it has affected his quality of life.*"

He said that he was not able to continue making a living with his tools and had "reinvented" himself with his new business. It was put to him that he falsely reported that he was not at work when he was examined by the Defendant's expert, Mr Tansey, a Consultant Trauma and Orthopaedic Surgeon, on 24 July 2020. Video footage showed him working on 14 September 2020, two months later. He emphasised that he was not in *paid employment* and was unable to work *with his tools.* Similar issues arose in respect of his communications with other experts, and he offered similar explanations. His oral testimony involved a more nuanced position than the accounts of symptoms attributed to him in the various reports. He did not assert a complete inability to do physical work so much as an inability to do it without painkillers (or without suffering serious pain following such physical activity, particularly if he did it without medication). However, statements attributed to him in the various reports generally did not record such qualifications and appeared to imply an inability to do any physical work, paid or unpaid. Also, some reports seemed to refer to his inability to do household or domestic tasks.

23. In fairness, there are exceptions. For example, the 24 July 2018 report from Mr Gilmore, a Consultant Orthopaedic Surgeon instructed by the Plaintiff, records the Plaintiff as

saying that he had been doing some work every day, *despite a lot of pain*. Likewise, the March 2022 report from Mr O'Farrell, a Consultant Orthopaedic Surgeon instructed by the Plaintiff, referred to the Plaintiff saying that he was unable to work *as a stonemason.* Such comments appear more consistent with the Plaintiff's oral testimony than the position reflected in some later medical reports, although the Defendant would question the accuracy of the reference to work as a stonemason. The Plaintiff's career as a stonemason seems to have effectively ended with the collapse of his business six or seven years before the incident.

24. The Plaintiff was cross-examined at length about video footage showing him working at his home with his son. It was suggested that such evidence contradicted his repeated statements to the medical experts that he couldn't work. He said that he could only manage the exertions shown on the video with the help of anti-inflammatories, and that he would suffer for them later, but he was pushing through in a "*labour of love*" as he worked on his family home. He also maintained that he was embarrassed that the footage showed his inability to operate at the level expected of a professional stonemason. In his view, he couldn't earn a living in the industry operating at the pace shown on the video:

"*Q. Mr Lynch, you told Mr Tansey in 2020 that you couldn't work. You told Mr Fraser in 2021 you couldn't work. You told Mr O'Farrell in 2024 you couldn't work.*

A. And I can't work.

Q. And you told –

A. I can't earn, I can't go out any day, any week and earn a living with my tools.

Q. Okay, well I'm going show another video after lunch.

A. And I can't go out to potter about and do a bit without being on my anti inflammatories.

Q. Well I'm going to show two videos… the second one dated 2nd April '24 where you are lifting planks off the back of a pickup and then you go on to build a garden fence at a house in Kilkishen in Co. Clare that afternoon.

A. Yes, my own house.

Q. Your own house?

A. Yeah.

Q. Your Airbnb?

A. Yes.

Q. Yeah, and this is from a man who has made the case all along: 'I cannot work, I deserve a big pot of money because I cannot work' and I will have you working, lifting buckets of water, lifting planks in September 2020 –

A. The point I'm making… is, I am not in a position where I can go out and make a living with my tools that I have held in my hands since 1982.

Q. That is completely different telling the doctors "I cannot work", telling the vocational assessor "I can't do DIY or household chores around the house. I cannot lift heavy weights". I will show you lifting an enormous bucket of water and throwing it off the wall of a house, Mr Lynch. You are well able beyond you are letting on here.

A. I will tell you what, I did and you will show it, and there's no doubt that I will stand here and tell you that if I wasn't throwing that bucket of water off the side of that house I would most likely being throwing myself off the side of a bank of a river. I will add that the personal pride and pleasure that I take out of bringing that house back from the dead. I don't believe anyone else here could appreciate it, but be aware, I have no financial remuneration in my lifetime to ever have out of that and that is whilst grinning and bearing the pain."

25. The first CCTV footage was approximately 11 minutes long and showed the Plaintiff doing pointing work, but the Plaintiff's response was in similar vein:

"*Q. Yeah, pointing, yeah. You are lifting buckets of water, cans of water. You are seen lifting a large plank. You are brushing the wall at a height. You jump down off the plank. You are bending, stooping, moving without restriction. At one point we see you stretching up working on your toes. No restriction of movement whatsoever and it completely contradicts you telling Mr Tansey on the 24th September 2020, some weeks earlier, that he is, "not at work".*

A. Again I'll go back, that's my own property I'm working on there. I'm not earning money. If you look at the speed that I'm moving in that video, would any man in his right mind pay a bloke to be walking around, looking at it, taking a break, by what I mean leaving my arms down by my side, going back, doing a bit and that type of thing. That's me working through a pain barrier, bringing back to life something that I love."

26. The Plaintiff rejected the suggestion that the exertions shown on video showed that he had misled the defence expert by saying that he was not at work in the summer of 2020. He attached considerable importance to the fact that he was working on his own property and insisted that he was not operating at the level that would be expected if he were being paid for his work. The cross-examination continued in similar vein:

> "*Q. What we saw on that 11 minutes of video is consistent with the description given by your Orthopaedic Surgeon Mr Cian Kennedy. "He is completely pain free and has returned work, which is a stonemason", on the 11th August 2020 and we see you on 14th September 2020 so doing.*
>
> *A. Again, again, I'll go back that, yes, I did jump up on what I would refer to as a hop up, okay. I wouldn't say I jumped up, I got up on a hop up with pain because anyone who could possibly think that that wouldn't hurt my hip to do what I'm doing at the speed that I'm doing it, which, to me, looking at it is an embarrassment because if I came on a guy who I was paying to do that, working at that pace, I wouldn't think I was getting value for money. In fact I know I wouldn't be getting value for money.*
>
> *Q. Mr Lynch, the camera doesn't lie.*
>
> *A. The camera is there, there's no doubt, I'm working on my own property. I'm working through a pain barrier on the use of my anti-inflammatories. I've had an injection, I'm sure, sometime in that year to keep me going and that's what I'm doing.*
>
> *Q. According to Mr Fraser the last injection you had was the 8th July 2019.*
>
> *A. So we're just over a year. At that stage, he was probably at the stage where he wasn't wanting to give me one every six months, he was giving me one probably every 12 months…*"

27. The Plaintiff was also challenged on the basis that further footage, from 2 April 2024, showed him working, lifting planks, moving materials from the back of the pickup, participating in works, erecting a fence, assisting in the cutting of planks, moving without restriction, lifting, bending, and stooping – "*working perfectly normally*". His response was on similar lines, describing himself in the video as moving "*like the slow boat to China"*. It was also put to the Plaintiff that on 3 April 2024, the day after the activities shown on video, he

visited his Consultant Orthopaedic Surgeon, Prof. Dermot O'Farrell, for the purpose of getting a report to advance this claim and had told him that:

"*The pain in his lower back, right shoulder and right hip are exacerbated by activities of daily living and have prevented him from returning to work as a stonemason. He is also involved in guiding hunters and he has been less able to do this activity due to his pain and symptoms. The pain is also worse at nighttime and prevents him from doing normal jobs around his house and garden, including painting, for example.*"

The Plaintiff responded that:

"*... I'd actually told him that I had been – I had been painting the fence ... and I actually forgot to take my meds on two days running. I've actually forgotten to take 'em today is, but the point I'm making is I paid for that the next week after with pain, it's as simple as that. Pain is part of my life and that's why I came in here because I wanted to get that message across.*"

28. The Plaintiff rejected suggestions that it was misleading for him to tell Mr O'Farrell that pain prevented him from doing normal jobs around the house and garden, including painting, when the video shows him lifting, using tools and materials, and building a garden fence on the previous day:

"*A…Sometimes you have to work through a barrier to achieve your dream, your goal, and that's what I'm doing there. I'm not getting financially remunerated for it. I couldn't possibly go onto a building site or any form of work and genuinely ask somebody to pay me to move at that pace because for me, to look at that video it's an embarrassment. It makes me look like I am 83 or 84 years of age and that's the facts of it…*

A. On a personal level we're talking about two different types of embarrassment because my embarrassment is not that I'm trying to finish a labour of love, my embarrassment is that people are watching me walking around like a man ready for the grave, that's my, that's my place of embarrassment."

29. The Plaintiff responded to the suggestion that he had told his doctor, Prof. O'Farrell that his pain and disability prevented him from doing normal jobs around the house, including painting and, yet, here he was building a fence:

"*A. I told Prof. O'Farrell that for me to do that off my meds, off my anti-inflammatories, was a cause of great distress for me. To do it with my anti-inflammatories I would get it done and then I would go and I would pay the price, that's what I told him.*

Q. Well it's not in his report. You told him you couldn't do it.

A. It's not, it's not – but listen, I can't legislate for what gets lost or doesn't get lost in translation and I am not going to try."

30. In evidence in chief, the Plaintiff summarised the position:

"*A. Yeah, so the hobbies end of it were parked, okay. I kept guiding hunts under – whilst using my anti-inflammatories, taking injections, and I wasn't in a position where I could go every day, out every day with my tools on the offseason and earn a living. I couldn't earn a living doing the trade that I had learned all those years ago, that's the point I was trying to make to him. That I could potter around, and, you know, I'm not sitting here an invalid. I can do stuff, I'll do it through a pain barrier, I'll use my anti-inflammatories as I need to because I've been warned by my cardiologist and my GP that they're not a good idea. But Mr Fraser and myself had a grown-up conversation some years ago, I'm not going to give a date, and he says, "Kevin, are you going to choose to just sit around or are you going to choose to try and do something?" He says, "If the anti-inflammatories are a gateway to you having a bit of a life, surely that's the way to go. It's an adult decision." It was music to my ears, I took it.*"

31. The Plaintiff was also asked about his meeting with a Vocational Assessor a week before the hearing. Although the Vocational Assessor's report was not itself put in evidence, the Plaintiff accepted that the Vocational Assessor reported that:

"*He would now struggle to engage in household activities and DIY around his home, particularly tasks that involve stooping and bending. Interest in hobbies, he has no current exercise programme. If he was given a programme, he would get up a level of function...*"

32. The Plaintiff was challenged on perceived inconsistencies between the account attributed to him by the Vocational Assessor and the video evidence. He emphasised that the work (on his own property) shown on the video required him to use anti-inflammatories. He

denied telling the Vocational Assessor that he was unable to lift weights and expressed surprise that the latter did not mention his anti-inflammatories and said that he told him that:

"*once I had had my anti-inflammatories I could potter around and do little bits and pieces, which for my mental health I'm going to continue to do*".

Loss of Earnings Claim

33. The Plaintiff confirmed to his counsel that, although substantial figures had been put forward for loss of earnings "*on certain assumptions*", they had been withdrawn and he was not pursuing any such loss of earnings claim. He said that he had not understood the numbers advanced on his behalf. Under cross-examination, he was challenged for having advanced a loss of earnings claim based on a false premise (that he had had been out of work as a stonemason due to the incident). He said that he would never have claimed that he was out of work, but rather that he was missing part of his work. He accepted that – after the defence brought a motion to compel him to furnish particulars of his loss of earnings – particulars of the €620,388 loss of earnings claim were furnished on his behalf, that the claim was "*wrong*", and that an actuarial report was furnished, based on detail from his accountant, suggesting that, but for the incident, he would have earned €45,500 per annum as a stonemason. He responded:

"*A. So straightaway that couldn't be correct.*

Q. Couldn't be?

A. Because from 1st September, depending on how the bookings had gone through for the hunting, I wouldn't be available to do stonework.

Q. This is the claim that you promoted that we had to check out.

"If the Plaintiff had worked continuously and earned €45,500 gross per annum his net loss of earnings from 5th July 2015 to 3rd April 2023, the date of the report, would have come to €210,249."

And then here is a calculation that based on these figures the future loss would be €410,139, total €620,388. You promoted that claim as part of this case on the 21st April 2023.

A. Those numbers would have been done on how much I was able to earn with my tools for a week once I was in work".

34. However, the Plaintiff acknowledged that he had not been working such hours as a stonemason or earning such a salary before the incident. He was working on the CE scheme. He said that he had asked his solicitor to explain the loss of earnings claim:

"*A…She said, "Disregard that number", she says, "you are probably looking at something like 10 or 15% of that number". Then I thought that might be a small bit low, but I said at least it's not pie-in-the-sky, as I described it as earlier on.*

Q. Pie-in-the-sky?

A. Yeah.

Q. *Absolutely, that's one expression.*

A. Yeah, so we are finally in agreeance of something, yeah.

Q. Yeah. I could also call it bogus.

A. Ehm, bogus, yeah, if you wanted to be harsh about it you could call it bogus, but to my mind it was always pie-in-the-sky".

35. The Plaintiff acknowledged swearing the affidavit of discovery on 12 April 2023, exhibiting his accountant's report and the actuarial report claiming more than €620,388 for loss of earnings, but continued to assert a lack of comprehension of the figure:

"*A. I remember asking on several occasions – because I didn't know how to ask the proper question – what the quantum of the case was. I could never get an answer. I could never get an answer as to what the loss of earnings was because my understanding of it from my previous conversation with Sarah Falvey was that it was pie-in-the-sky, there was a percentage of that. There was a percentage of this… I can talk, sure I can talk, when it comes to reading and writing I'm not the best. I'm not using it as an excuse, I have to get on with life, but the actual fact of the matter is I would never in my – that money, it's a ridiculous amount of money*".

36. The Plaintiff explained the late withdrawal of the loss of earnings claim:

"*A. I spoke with senior counsel yesterday morning, okay, they said to me this was for earnings and I thought to myself, no, that can't be for earnings because he turned around to me and said "You have a business running?" Yes, I have, I have the business running.*

Now the business, you must understand, was on its knees, that business has turned itself around in the space of ten months and the ten months would be not ten months of, you know what I mean, we had a return done and then the business started to fly, you know. Like, we were basically in a place where the business was nonviable and now we know that the business is viable.

Q. So you withdrew the claim yesterday; is that right?

A. I withdrew the claim yesterday gladly.

Q. Thank you.

A. Yes. As I said earlier on, the whole thing to me, to my mind, not having any experience of it, was all pie-in-the-sky".

The Plaintiff's 2023 account of the 2015 incident

37. The Plaintiff was challenged about the fact that, in 2023, he volunteered detail of the incident (contained in the alleged flashbacks) to the psychologist instructed by his solicitor, which he had not furnished at the time to the Gardaí or the motor assessor:

"*Q. You were unable to give this description to the guard the following day that there was two people in the car, one of them female, blonde, and front passenger seat and you were unable to give that helpful information to Mr Graham on behalf of the MIBI. Did they take the trouble to interview you?*

A. Yeah, so I would imagine – again, I'd imagine that there was as a result of shock, you know what I mean? We were after being in an accident that the more we think about it, I think about it, I don't want to think about it, but the fact of the matter is there was shock involved.

Q. Well the shock would have subsided when you met Mr Graham in January of 2016 at the offices of your solicitor. You weren't in shock that day –

A. No, I wasn't.

Q. – Mr Lynch?

A. No, I wasn't, you're right.

Q. Yeah, you weren't. So why couldn't you tell Mr Graham this graphic description?

A. Because the flashback hadn't come back to me at that stage".

The Plaintiff's testimony as to initial consultation with his GP

38. Under cross-examination, the Plaintiff disputed the statement at the opening of the report of his GP, Dr. Fitzgerald, that the Plaintiff had first attended the GP on 16 July 2020, nearly two weeks after the accident, at the suggestion of his solicitor:

"*A. No, that is definitely not correct. I went to him and the last thing I said to him was my solicitor, Mr Murphy, will be wanting a report from you clearly.*
Q. Well this is the first report we received in connection with this case and that is the opening line "accident had happened two weeks previously and he attended me at the suggestion of his solicitor." Fact, Mr Lynch.
A. That's what he wrote".

The Plaintiff's evidence as to psychological injuries

39. The Plaintiff was also cross-examined about the genesis of psychological reports furnished on his behalf, on his solicitor's referral, eight years after the incident – there had been no reference to significant issues in that regard in his many visits to doctors over the years. When he replied that he would not have seen the relevance of raising such issues with the orthopaedic surgeons, he was asked about his failure to raise the issue in his visits to his GP:

"*Q. No doctor received any complaint from you of any flashbacks or psychological upset in this case whatsoever, not one of your treating doctors.*
A. So my GP –
Q. Your GP, Dr. Fitzgerald, yeah?
A. – is not a psychiatrist.
Q. No, no, he's your GP.
A. So I wouldn't be talking to him about matters of anything between my ears to be honest with you. I wouldn't feel that there was a need to.
Q. I see. Well, you see, the doctors in this case examine you to get a handle on how has this man been affected by this accident?
A. Yes.
Q. And you didn't tell any of them, any of them that you had psychological upset?

A. The psychological upset was coming.

Q. You didn't tell any doctor since 2015 until 2023 when your solicitor sent you to Dr. Aherne when preparing this case for court, so eight years –

A. So if I need a tyre fixing I go to get my tyre fixed, I don't go to a mechanic who's going to a diesel fitter, I go to a tyre centre and that's the way I would deal with everything, I mean –

Q. Really?

A. Yes, it would be –

Q. Really?

A. For want of a better word, is it compartmentalising?

Q. Let's get real here, Mr Lynch, you were bringing a court case since 2019, you issued a personal injury summons; isn't that correct?

A. Yes.

Q. Your personal injury summons does not plead on your behalf that you suffered psychological upset.

A. Was I aware of the psychological upset?

Q. Well it's 2019, it was four years, nearly four years post-accident.

A. I think the easiest way maybe for me to answer that was how I answered when he asked me when I went to Mr Aherne, he made me aware.

Q. He made you aware because you went to Mr Aherne because your solicitor sent you.

A. Sorry?

Q. Your solicitor sent you to Dr. Aherne; isn't that correct?

A. Yes.

Q. Yes.

A. Yes.

Q. Eight years after an accident just before this case was due to come in to court. Fact.

A. Fact it is."

40. The Plaintiff said that he found it difficult to discuss his psychological problems:

"*A. ... I'm here today talking about my psychological complaints and it's not really part of what I want to do because it's difficult, I hope you appreciate that*".

41. The Plaintiff was challenged about the absence of references to psychological issues in the notes of his medical examinations over the years:

"*Q… your medical records show every medical type of doctor you have been to over the years, from cardiologist to urologist, to rheumatologist to your GP, you name it, they are all here and nobody gets a mention of "this has had a psychological impact on me as well, it's not just my neck, it's not just my shoulder", not once?*

A. Was there any one of them a psychiatrist?

Q. Tell me, your GP is your family doctor, isn't he?

A. Yes, he is.

Q. And usually the GP would be the first port of call for anyone.

A. Yes.

Q. So you're saying that you wouldn't discuss your mental health with your GP?

A. On one occasion my GP suggested that I go on antidepressants and I considered it, totally out of question. That's not the right answer, but I didn't countenance that I would go on antidepressants. I felt that when he mentioned the antidepressants to me he was trying to compartmentalise all of my problems as being head issues. He may have been right, but I walked away from it.

Q. Well I find it absolutely staggering that you can be referred by your solicitor to a psychologist in September 2023, just before this case is due to come into court, and you've all these psychological issues and problems, nightmares and flashbacks, blonde passenger looking at you. Coincidental, isn't it? Purely coincidental, getting ready for the court case.

A. I wouldn't say that."

Examination by Mr Cian Kennedy, Orthopaedic Surgeon

42. Mr Kennedy, the orthopaedic surgeon who performed both hip replacement surgeries for the Plaintiff, did not testify in person or furnish an expert report. However, the Plaintiff was cross-examined in relation to the surgeon's report to his GP following the first hip replacement, a report which the Plaintiff considered unduly optimistic. Mr Kennedy had stated that the Plaintiff was doing very well in relation to his left hip replacement:

"*He is completely pain-free and has returned to his work which is a stonemason. He has no problems with his activities of daily living, but he does find that this level of physical work is a strain on him.*"

43. The Plaintiff expressed surprise that Mr Kennedy could have made this statement when he knew that he was waiting on his right hip replacement, deferred so as not to impact on his hunting business. He had been concerned to have time to recover from the operation "*and get out guiding with my clients*" in time for the new season. Accordingly, he postponed the right hip replacement until the following year, after the end of season.

The Medical Evidence

Report dated 28 February 2016 from Dr Fitzgerald, the Plaintiff's GP

44. The opening words of the GP's report state that the attendance (eleven days after the incident) was at the Plaintiff's solicitor's suggestion. The Plaintiff's then complaints were "*soreness at back of Neck*", "*pain in lower Back*" and "*pain in right Shoulder*". Dr Fitzgerald noted that the Plaintiff had full range of movement of cervical and lumbar spine but also noted discomfort at a range of movement, prescribed painkillers and referred him for an x-ray of the cervical and lumbar spine and right shoulder. Although the report says that the Plaintiff was referred for physiotherapy, this did not occur in practice. The Plaintiff says that he had found it too painful in the past. The report also noted the Plaintiff's pre-incident medical history, including intermittent pain in his right shoulder for four years, concluding that the injuries were musculo-ligamentous, and that the prognosis should be favourable in the absence of any bony injuries, but that the recovery period could be prolonged due to the previous problem with the Plaintiff's right shoulder. The Plaintiff had attended Dr Fraser, a Consultant Rheumatologist, on 12 October 2015, 23 November 2015 and again on 25 January 2016, receiving local steroid/local anaesthetic injections into his right shoulder on the two earlier appointments. By 2023, the Plaintiff seems to have made approximately 13 GP visits in the 8 years which had elapsed since the incident.

Report of Mr Gilmore, Consultant Orthopaedic Surgeon, dated 24 July 2018

45. Mr Gilmore was not involved in the Plaintiff's treatment but prepared a report on his solicitors' instructions. It describes the Plaintiff's complaints as being to his right shoulder, lower back and "*Generalised aching afterwards*", adding that:

> "*At the time his right shoulder and lower back were the areas giving rise to issues for him. He was able to get out of the car himself, feeling somewhat shaken, but he wasn't taken to hospital.*"

46. Accordingly, by the time of his examination by Mr Gilmore, three years after the incident, the Plaintiff's then complaints were described as follows:

- He was working through with a lot of pain, and he did work every day. He lost work from the incident until March 2018, doing "*bits and pieces*" in between.
- He complained of "*unbelievably sore*" pain in his lower back and hips.
- He was doing his own icing and heat for his shoulder – he was looking forward to the injection which would give him three to four months relief.
- The lower back pain radiated to both buttocks and down to his hips to his knees.
- He had positive pins and needles down both legs as far as his toes.
- He had weakness in the leg but no bladder or bowel symptoms.
- The description of his past history stated that the Plaintiff:

  "*admits to having had occasional sporting/hurling lower back trouble but no real trouble in recent years and no further injury since this accident.*
  He had no trouble with his hips before this accident."

47. The report does not reference the referral to the consultant rheumatologist before the incident. It is not clear whether this was disclosed. Mr Gilmore's clinical examination of the cervical spine found no local tenderness and almost a full range of movement, with some pain at the end of the range on lateral flexion. He noted that the right shoulder:

"*shows a painful arc with positive Hawkin's and scarf test indicating impingement. Lateral flexion is decreased – very poor indeed.*
Extension likewise.
He is also sore on coming up from a flexed position".

48. The report noted that the Plaintiff was on a waiting list for (unrelated) arthritis/total hip replacement. The clinical results for lumbar spine, forward flexion and straight leg raising on the right side were normal. There was no local tenderness. The report also notes the receipt of the x-rays three months after the examination and concludes that the x-rays:

"*show evidence of quite significant longstanding degenerative change throughout the lumbar spine.*
A plain x-ray of his right shoulder shows evidence of degenerative change at the acromioclavicular joint but that apart no significant abnormality is noted."

49. The report confirmed that the x-rays showed degenerative change at C6/7 level which was more advanced on later x-rays, but the contour and lordosis of the neck was normal. The consultant concluded that the patient sustained "*soft tissue injuries to his right shoulder, neck and back*" three years previously, noting that:

"*He continues to have a lot of ongoing pain, particularly in his lower back and hips, but unfortunately the hip arthritis is one of the significant aggravating factors here and is putting a lot of stress and strain on his lower back.*
He will certainly I feel require to have hip replacement surgery carried out and he should be seen as soon as possible regarding this in Croom.
In relation to the lumbar spine on its own, he has restricted range of motion but there is no evidence of neurological deficit and the expectation would be that the lower back pain should improve following bilateral total hip replacement which I feel he will require.
Finally in relation to his neck and right shoulder – he has very definitely positive Hawkin's test in the right shoulder, indicating impingement, and he would certainly benefit from another injection into the shoulder…
Overall I feel he will probably have continued ongoing issues with both his shoulder and his lower back but hopefully his lower back will be improved with the carrying out of bilateral hip replacement in due course."

50. The report notes that the Plaintiff had had no treatment after the incident, other than the painkillers and an injection from Dr Fraser, and that he hoped to receive a further injection. The report notes the Plaintiff's:

> "*history of having had previous trouble with his right shoulder for which he had seen Dr Fraser and he had been recommended physiotherapy by him.*"

However, the Plaintiff did not wish to avail of the physiotherapy–having found a session with a physiotherapist *before* the incident painful "*and lasted only five minutes with him*".

51. The report noted that the Plaintiff had given up on anti-inflammatories because of his gastrointestinal upset and that he had not taken up prescribed analgesic medication either. Instead, he was taking remedies such as Devils Claw or turmeric.

Report by Professor Fraser, Consultant Rheumatologist, dated 29 May 2021

52. The Plaintiff had been referred to Dr Fraser by his GP prior to the accident and continued to treat the Plaintiff He prepared a report six years after the incident for the Plaintiff's solicitors. It appears (from other reports) that the Plaintiff attended Dr Fraser on 6 or 7 occasions over the years, often receiving pain relief injections. Dr Fraser's report contains some detail about the incident six years earlier. The Plaintiff had informed him that:

> "*He was very shaken after the accident and very sore and states that his lower back "ceased up". His right shoulder pain didn't improve after the accident and he went to his GP who organised an X-ray and gave him pain killers but he said his shoulder never improved*".

53. The report notes the Plaintiff's problems with anti-inflammatories and that he had not continued physiotherapy as he found it painful. It notes that a December 2015 MRI scan:

> "*demonstrated prominent degenerative change or wear and tear on the acromioclavicular joint of the right shoulder. Following this we injected his shoulder and he got some significant pain relief following that.*

His shoulder continued to be a problem however, and currently he continues to have significant severe shoulder pain keeping him awake at night. He also has some rib pain but he feels that is settling. He used to work as a Stonemason but he finds he can't work since the accident apart from an occasional small amount of work as it exacerbates his shoulder pain. He finds in the last six months his energy levels have deteriorated greatly and he is very tired and he feels emotionally anxious and depressed."

54. The report notes the Plaintiff's past sporting injuries and back trouble and his difficulties with his hips before the incident (and an unrelated left hip replacement in 2020). Dr Fraser notes that, on 8 July 2019, he reinjected the Plaintiff's shoulder and that he had responded well to two of three previous injections. The report also noted a March 2018 MRI which again demonstrated degeneration of the AC joint, inflammation in the shoulder and damage to the shoulder tendon. The examination noted "*tenderness of the right Supraspinatus Tendon on palpitation and Hawkin's test was positive*", concluding "*This is in keeping with Rotator Cuff Impingement Syndrome which is what Mr Lynch has been suffering from*".

55. Dr Fraser summarised his conclusions as follows:

"[The plaintiff] *suffered an injury to his right shoulder which has continued to be a problem causing pain and restricted movement. As a result he has not been able to work and it has affected his quality of life. He did have a shoulder problem prior to the accident but it has been exacerbated by approximately 80% by the accident.*"

Professor Fraser stated (without a detailed analysis or explanation) that:

"*On the balance of probabilities this gentleman's ongoing right shoulder pain since 2015 is primarily due to the Road Traffic Accident that occurred in 2015. I would further add that at this stage having had numerous shoulder injections which tend to be only temporarily effective, he is likely to require a Decompression surgery of the right shoulder.*"

No such decompression surgery has been undertaken, nine years after the accident. Nor was it suggested at trial that such surgery was anticipated.

Reports from Professor O'Farrell, Orthopaedic Surgeon

56. Professor O'Farrell was not involved in the Plaintiff's ongoing treatment but prepared two reports on his solicitors' instructions. His 10 March 2022 report notes that the Plaintiff:

> "*…was out of work for around two – three years following the accident. He tried to return to work as a stone mason but was unable to do this as it involved very physical work. He had no other particular treatment for his injuries. He has gradually been attempting to recover from his injuries since that time*".

57. The Plaintiff's account of his then current condition (as of April 2024) was that:

> "*He now complains mainly of right shoulder pain with activities of daily living. The pain is constant but is exacerbated by any type of heavy activity. He is unable to work as a stone mason. His sleep is disturbed in that he can go to sleep but once the pain wakes him he is unable to return to sleep afterwards. He previously enjoyed coaching hurling and hunting deer but has been unable to pursue these activities since the accident.*"

58. Professor O'Farrell's clinical examination records a good range of motion in forward flexion, hyperextension and rotation movements in the cervical spine, but the range of motion on examination of the shoulder is diminished by around 10-20% of normal, and he has a painful arc consistent with subacromial impingement. A review of a radiograph of the right shoulder and cervical spine notes the age-related degenerative changes in both areas and references the July 2018 MRI scan of the right shoulder as also identifying age-related degeneration in the acromioclavicular joint and subacromial bursitis. The scan also evidences rotator cuff tendonosis and partial tears. Professor O'Farrell's treatment plan states that:

> "*This condition is usually treated with a combination of anti-inflammatory and pain-relieving medication, as well as a regular daily home exercise programme. Sometimes injection therapy is required for relief of symptoms. Occasional arthroscopic (keyhole) surgery is required on the shoulder.*"

59. In summary, it states:

> "*This patient was involved in a road traffic accident which resulted in injuries as documented above. He remains symptomatic and is unable to work as a stone mason as*

a result. He is also unable to pursue his hobbies of hunting and coaching hurling due to pain".

60. Professor O'Farrell's prognosis was that:

"*This patient will require ongoing treatment for his symptoms but the treatment is usually successful. There is no evidence of any condition which could lead to permanent disability in his case. However, as it now almost seven years since the accident occurred and he is still having pain it is reasonable to say that this pain will continue in the future if he does not have relevant treatment.*

He is not specifically at risk of developing arthritis in his neck or shoulder due to this condition.

The injuries which this patient suffered can be attributed mainly to the incident which occurred in July 2015 but he also has age-related degenerative change which is contributing partially to his symptoms."

61. Professor O'Farrell's supplemental report, dated 3 April 2024, notes the Plaintiff's ongoing complaint of discomfort in his lower back, right hip and right shoulder, and his recent injection therapy in September 2023, including injections to his right hip and lower back. It notes that much of the hip pain is due to osteoarthritis which is of natural causes "*but the pain from this source was probably exacerbated by the car accident.*"

62. The report also states that:

"*The pain in his lower back, right shoulder and right hip are exacerbated by activities of daily living and have prevented him from returning to work as a stone mason. He is also involved in guiding hunters and he has been less able to do this activity due to his pain and symptoms. The pain is also worse at a night time and prevents him from doing normal jobs around his house and garden including painting for example.*"

63. The report references the Plaintiff as not having been able to return to work as a stonemason and states that examination of the lumbosacral spine and right shoulder confirm that his range of motion is diminished by around 20%. The rotator calf is clinically intact and there is no evidence of any neurological deficit. His right sided hip pain was due to arthritis. The report noted that the Plaintiff required a right total hip replacement for osteoarthritis

(having already had the left hip replacement in 2019). The report notes the Plaintiff's acceptance that the arthritis was not caused by the accident "*but symptoms from this source could have been exacerbated by the accident.*" It notes that the Plaintiff "*does not require any further treatment for his shoulder or lower back at present, although he could require some injection treatment in the future.*" It concludes "*This patient is suffering from pain in his lower back, right shoulder and right hip since an accident in 2015. He also has some unrelated degenerative Osteoarthritis*".

64. Dr. O'Farrell's prognosis was that:

> "*In the long term, this patient's low back and shoulder pain should improve. There is no evidence of any pathology caused by the accident which would lead to permanent disability in his case. He should be able to return to most types of light and moderate work duties in the future. He would have difficulty in returning to work as a stone mason in the future in my opinion.*
> *He will be able to continue guiding hunters, but may be limited in his ability to do this for prolonged periods or on terrain which required a good deal of exertion.*"

Reports by clinical psychologist, Dr Aherne

65. Dr Aherne's report followed an assessment on 5 September 2023, at the Plaintiff's solicitor's request. The incident description was more detailed than the previous medical reports (which could be due to the Plaintiff belatedly recollecting further details or such details being captured in greater detail by the psychologist because they were more relevant to his discipline). The report records that, as the Plaintiff and his son:

> "*came to a blind bend and as they were going round the bend they were met with a car that seemed to take up both sides of the road. Mr Lynch had nowhere to drive and was left with no choice but to suddenly turn his car into the ditch in an attempt to avoid a head-on collision. Mr Lynch managed to completely avoid the other car, preventing the car from hitting him. The other car kept driving and Mr Lynch never saw them again. Mr Lynch nor his son were knocked unconscious but his son was in extreme shock. They got*

out of the car unassisted. Mr Lynch was shaking. He didn't feel any injuries at this point. He felt very relieved that both of them were alive. He tried to get the car out of the ditch. The front left hand side of the car was collapsed. They failed to get the car out of the ditch. He called his friend who has a recovery truck. He came after about an hour. Mr Lynch felt embarrassment at the time of the accident. Mr Lynch's wife came and collected their son and Mr Lynch went with his friend in the recovery truck with the car. The following morning, Mr Lynch went to the garda station and told them what had happened."

66. The report (wrongly) states that Mr Lynch went to the doctor the day after the crash "*due to extreme pain in his back and his right shoulder*" and was sent for an x-ray, and that he had no broken bones but was prescribed anti-inflammatory medication and painkillers. It says that the Plaintiff:

"*had issues with his shoulder prior to the accident. His back has progressively got worse over the past eight years.*"

The explanation for the Plaintiff's failure to continue the physiotherapy – the cost – differs from his explanation on other occasions (that it was too painful). The report notes that Mr Lynch suffered from hip pain. He had a left hip replacement and was to have a right hip replacement. The report did not record the fact that the hip issues were unrelated to the incident. The report said that the Plaintiff "*had been on anti-inflammatorys since the crash on and off*" but that, due to his heart condition, he had not been able to take them since May 2022 and the pain had increased since then. It noted the Plaintiff's statement that there had not been a day when he had been pain-free and that:

"*on average he would rate his pain a 7. Prior to the accident the pain in his shoulder would have been a 2*".

67. There is a detailed description of psychological *sequalae*, including indicators of possible post-traumatic stress:

"*Mr Lynch continues to experience regular flashbacks of the incident. He can picture the image of a white car coming towards him and a blonde girl in the passenger seat. He*

experiences these flashbacks from time to time during his dreams. He was back driving within two days of accident. He is now very hyper-vigilant when driving, drives very slow and is hesitant when driving. He doesn't like driving anymore, he says. If he could avoid driving, he would. This crash has stopped him from going places.

Mr Lynch says he has never been in such a bad place. He says that his mental state has consistently gone downhill since the accident and his patience with life has gone. He couldn't see himself doing counselling, it's 'not in his DNA' and he was reared never to ask for help and has solved all his own problems to date. He's become more down in himself since the crash. For the last 18 months he has been dragging himself out of bed due to lack of interest and motivation. He has become more tearful. He has suicidal thoughts, he says. He has never shared those thoughts with anyone before now.

Mr Lynch does not sleep very well. He does not drink often anymore and has never smoked. He has not had any counselling or has not been prescribed any anti-depressants."

Mr Lynch's social life was described as limited. Previously he used to go point-to-point racing on a weekly basis all over the country but no longer did so because of the driving.

68. The psychologist's report incorrectly states that he set up his own business in 1997 and that he "*was working for himself and has been ever since as a sub-contractor*". In fact, as Mr Lynch acknowledged in evidence, his business as a stonemason ended following the economic recession and he was working on greenways. The report also quotes the Plaintiff as saying that his stonemason's career is over due to his injuries and that, since he stopped work as a stonemason, "*his life is falling to pieces*". However, the psychologist also referred to Mr Lynch's new business (showing that the Plaintiff referenced his new employment, even if the position was not clear to Dr Aherne) and noted that the Plaintiff:

"*gets anxious about work, thinking about whether his work is worth it. He describes himself as poor at paperwork. However, the more successful the business becomes, the more paperwork it brings. He lacks concentration and finds himself worrying about it. It is a business involving bringing American tourists to Ireland for hunting. He has no support with his new venture. He is not doing any stonemason jobs anymore. He will help his son as his son has a passion for it.*"

69. The report notes that the Plaintiff claims that family life has been affected since the incident, with a strain placed on the relationship between himself and his partner of 27 years, with tension due to both partners being at home every day. The results of the clinical examination suggested that the Plaintiff:

"*is currently experiencing a high degree of psychological distress. These results are consistent with data collected from clinical interview*."

70. The summary and conclusions were that:

"*This 57 year old man was in a serious road traffic accident resulting in significant physical and psychological injury. Physically, he injured his shoulder, back and hips. He has had physiotherapy and taken anti-pain medication regularly, as well as surgery to his hip, but he continues to be in significant pain daily and this is likely to have had a deleterious effect on his mood. Mr Lynch report how his back condition has deteriorated more and more over the past eight years.*

Psychologically Mr Lynch has developed reactions consistent with a severe degree of post-traumatic stress in relation to this crash. Specifically, he has had regular flashbacks of the accident, he is avoidant of driving whenever possible and he is hypervigilant when in a car. His mood has been very low, to the point where at times he has felt suicidal. His social life has ceased since the crash due to his difficulty travelling. Family life has also been affected, with him being at home quite a lot more than before the crash, leading to conflict with his partner.

Mr Lynch, who had no history of psychiatric illness or of psychological problems prior to the crash, is currently experiencing a severe degree of psychological distress and in my opinion is in need of professional psychological intervention. He is not very keen on sharing his feelings and this is probably one of the reasons he is feeling so down. The prognosis is cautious at this point considering Mr Lynchs difficulty with engaging in counselling and the fact that his presentation has not improved in the eight years since the accident – in fact it would appear to have worsened as time goes by. A review in six months time is advised to monitor progress."

71. The report said that the criteria for a post-traumatic stress diagnosis were met and that:

"*this man reports being bothered almost always during the past month due to issues such as having upsetting thoughts or images about the traumatic event that came into his head*

when he didn't want them to, not being able to remember an important part of the traumatic event, having much less interest or participating much less often in important activities, feeling distant or cut off from people around him, feeling as if his future plans or hopes will not come true, having trouble falling or staying asleep and having trouble concentrating".

Dr Aherne's supplemental report - June 2024 review

72. The supplemental report following a further review on 4 June 2024. It concluded that the Plaintiff was again currently experiencing severe psychological distress and that his reports were consistent with data collected from clinical overview. It noted that the Plaintiff:

"*completed his psychometric assessment very quickly and explained how he sees what he wants to see without actually looking at whats in front of him.*"

Once again, Dr Aherne noted that the Plaintiff could benefit from ongoing psychotherapy but was reluctant to avail of such support. Dr Aherne described his prognosis as:

"*guarded under the circumstances as his pain condition shows no sign of abating and a considerable amount of time has elapsed since his trauma.*"

Mr Tansey's reports

73. Mr Tansey examined the plaintiff five times on the Defendant's behalf between 31 March 2017 and 14 June 2024. His initial report described him as "*Not at work*":

"*He states that he was able to get out of his car and stand and walk after the accident. He states that he was shaken after the accident. He states that the next day he had pain over his right shoulder, over the point of his right shoulder. He states that the next day he had pain on the right side of the back of his neck radiating to the back of his head*."

74. The report noted the Plaintiff's reference to previous intermittent problems for about 2 years (rather than 4) affecting his right shoulder, on and off, prior to the accident, and that he had previously had 2 or 3 physiotherapy sessions but no other significant treatment. The report referenced the problems experienced by the Plaintiff with his right shoulder since before the

incident and appeared to suggest that the incident could have involved soft tissue injuries above the right shoulder and to the cervical spine, aggravating probable pre-existing degeneration about the right shoulder. By the time of the initial examination, nearly two years after the incident, the Plaintiff said that he had made at least five GP visits and approximately five visits to the rheumatologist, receiving three injections to his right shoulder, which resulted in a significant improvement, although his last injection (in February 2017) had only resulted in transient improvement. He was not attending physiotherapy or taking painkillers and could not take certain painkillers because of his cardiac medication. The report noted that the Plaintiff was not at work and did not report any problems doing domestic chores and that he was able to go shooting and to manage the discomfort. It noted the probable aggravation of the Plaintiff's pre-existing condition and a mild impact in terms of reaching, bending, kneeling, squatting and climbing stairs and a moderate impairment in terms of lifting and carrying. However, the Plaintiff was otherwise normal in most respects (including mental health, learning, intelligence, consciousness, seizures, balance, coordination, vision, hearing, speech, continence, manual dexterity, sitting, standing and walking). The examination of his cervical spine confirmed slightly reduced active lateral flexion bilaterally and slightly reduced active extension, tenderness over the right upper trapezius and over the right infra-spinous fossa of the scapula. However, he had normal upper limb neurology, power, sensation, reflexes and tone. Localised tenderness was noted on the examination of the right shoulder, and he was mildly scarf test positive and Hawkins sign negative. He had a full range of motion in his right shoulder. Rotator cuff, deltoid and biceps were clinically intact. Stressing infraspinatus caused some discomfort. Mr Tansey concluded that the Plaintiff had sustained a soft tissue injury to his right shoulder and had aggravated preexisting degeneration and had sustained a soft tissue injury to his cervical spine. He expected the Plaintiff's symptoms to improve with physiotherapy and did

not anticipate further treatment being required other than physiotherapy and the management of pre-existing degeneration above his right shoulder.

75. Mr Tansey's second report noted his review of an MRI scan of the Plaintiff's right shoulder as showing degenerative change in the acromioclavicular joint with oedema and inferior osteophytes and tendinosis of the supraspinatus and infraspinatus tendons with partial tears. His prognosis was unchanged. He did not anticipate long term symptoms or disability.

76. Mr Tansey's third report dated 24 July 2020 was on similar lines and noted that the Plaintiff was working on a CE Scheme. His recurrent complaints were noted, and his mental health recorded as normal. The position as to treatment was similar but he was intermittently taking Tylex or Arcoxia. The prognosis was unchanged. Mr Tansey noted a mild impact in terms of reaching and lifting/carrying but considered the Plaintiff otherwise normal in all respects, including mental health, balance, coordination, bending, kneeling, squatting, sitting, climbing stairs, and walking. The Plaintiff's responses to Mr Tansey's questionnaire recorded: (i) very mild pain; (ii) washing, dressing, etc. was painful and he had to be slow and careful; (iii) he could only lift light weights and could hardly read at all because of severe pain in his neck; (iv) he had headaches almost all the time, and experienced a fair degree of difficulty in concentrating; (v) he could not do his usual work; (vi) he could drive as long as he wanted to, but with moderate pain in his neck; and (vii) he was able to engage in all his recreational activities with some neck pain (but the questionnaire also recorded an alternative, inconsistent answer that he could hardly do any recreational activities because of neck pain). The cervical spine examination noted: (i) 60 degrees of active rotation bilaterally; (ii) reduced active lateral flexion bilaterally; (iii) satisfactory active extension and forward flexion; (iv) tenderness over the right upper trapezius muscle; and (v) normal neurology, power, sensation, reflexes and tone in both upper limbs. The examination of his right shoulder confirmed that he: (i) could actively forward flex and abduct to above 150 degrees; (ii) had about 50% of active extension, with

slightly reduced active external rotation with his arm by his side; (iii) could get his hand to the back of his head and had near normal active internal rotation; (iv) was Hawkins sign positive and mildly scarf test positive; (v) had some tenderness over the shoulder and over the outer arm; and (vi) his rotator cuff, deltoid and bicep were clinically intact. While noting that the Plaintiff's reported symptoms had not improved since his March 2017 assessment, Mr Tansey observed that he had had:

> "*very limited appropriate treatment in over 5 years since this accident and in particular he has only 2-3 sessions of physiotherapy in over 5 years since this accident*".

77. Mr Tansey concluded that he would have expected any soft tissue neck symptoms directly related to the incident to have settled long before. He remained of the view that the Plaintiff should not have significant long-term symptoms or disability in relation to his neck as a direct result of the incident, although x-rays of the cervical spine showed some degeneration of C6/7. Mr Tansey still considered that the Plaintiff should not have long-term symptoms or disability related to his right shoulder as a direct result of the incident that was not entirely related to the pre-existing degeneration above his right shoulder, which would need to be managed on its own merits. He still did not think that anything further was required other than physiotherapy and the ongoing management of pre-existing degeneration of the right shoulder. Mr Tansey's report acknowledged his duty as an expert, a declaration repeated in other reports.

78. Mr Tansey's fourth report, following an examination on 7 February 2023, noted the Plaintiff's occupation as "*trying to get a small business up and running*". By this time, the Plaintiff had had approximately 11 GP and 13-15 specialist visits. Mr Tansey's prognosis was unchanged (he still did not anticipate treatment being required, save for physiotherapy and the management of pre-existing degeneration). The clinical examination noted moderate impact with regard to reaching and mild impact with regard to sitting, but no effects with regard to the Plaintiff's mental health, learning/intelligence, consciousness/seizures, balance/coordination,

vision, hearing, speech, continence, manual dexterity, lifting/carrying, standing, climbing stairs, bending/kneeling/squatting, or walking. The Plaintiff again reported ongoing issues, but Mr Tansey concluded that:

> "*reported worsening symptoms over time is not directly related to this accident and may be related to possible progression of pre-existing previously symptomatic degeneration about the right shoulder*".

79. Mr Tansey's final report recorded his analysis of an MRI scan, reiterated his previous prognosis, and conclusion.

The Vocational Assessor's report

80. The Plaintiff was interviewed by the Defendant's Vocational Assessor and was cross-examined as to the veracity of his statements to the assessor. However, the latter did not give evidence, nor was his report admitted.

The Law

Legislation

The Civil Liability and Courts Act 2004 ("the Act")

81. While the deliberate provision of false testimony is a longstanding and very serious criminal offence, Irish law contains specific provisions in the context of personal injury litigation. Section 25 of the Act renders it a criminal offence to knowingly give false and misleading evidence in a personal injury action, whereas S. 26 provides for the civil consequences of such actions, providing (in relevant part) that:

> "*(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.

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

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

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

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

In *O'Sullivan v Brozda and Ors* [2022] IECA 163 ("*Brozda*"), Collins J. described section 14 as *"symmetrical"* to Section 26. Section 14 provides that:

"*(1) Where the plaintiff in a personal injuries action –*

(a) serves on the defendant any pleading containing assertions or allegations, or

(b) provides further information to the defendant,

the plaintiff…shall swear an affidavit verifying those assertions or allegations, or that further information.

…

(5) If a person makes a statement in an affidavit under this section –

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

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

he or she shall be guilty of an offence.

…

(7) An affidavit sworn under this section shall include a statement by the deponent that he or she is aware that the making of a statement by him or her in the affidavit that is false or misleading in any material respect and that he or she knows to be false or misleading is an offence."

Case Law

Section 26 Applications

82. There are numerous examples of the Courts dismissing s. 26 applications, where the plaintiff innocently furnished incorrect information. For example, in *Ahern v Bus Éireann*

[2006] IEHC 207, [2011] IESC 44 ("*Ahern*") the application ultimately failed in both the High Court and the Supreme Court on the basis of the former's finding that the plaintiff's misstatement reflected her genuine assessment. There are analogies with the present case because, at the start of the hearing, the plaintiff withdrew a large claim for carer costs. Associated reports had been exchanged prior to the hearing but were not put in evidence. The defendant argued that the action should be struck out under both limbs of s. 26, on account of false or misleading evidence, and on the basis that the associated affidavit of verification was false and misleading. The Supreme Court noted that no misleading evidence was actually "*given*" or "*adduced*" in relation to the actuary or the nursing experts, which were ultimately not put in evidence, so the application under s. 26(1) failed. The action could still have been dismissed pursuant to s. 26(2) on the basis of a materially false affidavit of verification but for the High Court's finding that the affidavit reflected the plaintiff's genuine belief (it follows from the Supreme Court decision that the action would have been dismissed pursuant to s. 26(1) on the basis of the provision of incorrect information to the experts if: (a) this had led to false evidence being adduced at trial, in the oral or written testimony from such experts; and (b) the plaintiff was shown to be aware that the information was materially false).

83. Other examples of the dismissal of s. 26 applications where plaintiffs were deemed *bona fide*, albeit "*poor historians*", with inaccuracies in their evidence, include *Singleton v Doyle* [2009] IEHC 382 (where the plaintiff had not deliberately and materially concealed relevant information to exaggerate her claim, nor had she deliberately misled the Court or the medical professionals or sought to induce them to give evidence which she knew to be misleading), *Donovan v Farrell and Ors* [2009] IEHC 617, *Behan v AIB plc* [2009] IEHC 554 (where the Court noted that it might have regard to non-disclosure of relevant illnesses and treatments as affecting the plaintiff's credibility) and *Dunleavy v Swan Park Ltd t/a Hair Republic* [2011] IEHC 232. In a seminal passage approved, *inter alia*, by the Supreme Court

in *Platt v OBH Luxury Accommodation Limited* [2017] 2 IR 382 ("*Platt*") and the Court of Appeal in *Brozda*, O'Neill J. observed (at para. 38) that:

> "*s. 26 of the Civil Liability and Courts Act 2004, is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. Great care should be taken to ensure, in a discriminating way, that clear evidence of fraudulent conduct in a case, exists before a form of defence is launched which would unjustly do grave damage to the good name and reputation of a worthy plaintiff.*"

84. Likewise, in *Waliszewski v McArthur And Co (Steel And Metal) Ltd* [2015] IEHC 264, Barton J. observed that a successful application had:

> "*serious and potentially penal consequences for the plaintiff. Accordingly, the provisions of the section must receive and be given a strict construction*".

85. In *Browne v Van Geene & Anor* [2020] IECA 253 ("*Browne*"), at para. 98, the Court of Appeal rejected a submission that a s. 26 must be determined on the basis of the evidence at trial, as opposed to particulars provided and verified on affidavit but later withdrawn. Noonan J. noted that Irvine J. had observed in *Platt* (at p. 411) that:

> "*s. 14 … mandates the plaintiff to swear a verifying affidavit as to the truth of all assertions, allegations and information provided to the defendant and this includes the contents of pleadings or schedules of special damages (my emphasis)… it would undermine the effectiveness of the legislation if a plaintiff, intending to defraud the court and a defendant by making a grossly inflated claim based upon reports contrived for such a purpose, could, on being made aware that the defendant had evidence to undermine that claim, withdraw those reports and proceed to recover damages as if they had done nothing wrong.*"

Noonan J. continued (at para. 99) that the plaintiff's pleadings:

> "*made a very substantial claim for past and future loss of earnings on an entirely false premise. That claim was put forward on at least two separate occasions shortly prior to the trial and was sworn by the plaintiff on at least two occasions to be true. To suggest that this alone could not provide a basis for dismissing the claim is manifestly erroneous.*

The fact that in opening the case, counsel for the plaintiff resiled from that position does not excuse it in any way".

A significant feature of *Browne* is that the controversial particulars had been verified on affidavit (which was not the case in this instance). Nevertheless, the Court declined to reverse the dismissal of the s. 26 application because the High Court had concluded that the affidavit of verification had been sworn in good faith. It follows from the Court of Appeal decision, however, that, the application would have succeeded on the basis of the affidavit of verification, notwithstanding its subsequent withdrawal, if the Plaintiff had sworn the affidavit knowing it to be materially false.

86. At para. 30 of his judgment in *Harty v Nestor* [2022] IEHC 108 ("*Harty*"), Barr J. suggested that a Plaintiff's provision of false information to a treating or reporting doctor would only trigger s. 26(1) if it impacted on the evidence led at trial. These comments should be understood on the basis that: (a) as noted, the plaintiff must have provided the information knowing it to be materially false; (b) if the position is corrected prior to trial and prior to any false evidence being adduced or caused to be adduced, then s. 26(1) will not have been triggered; (c) if an affidavit of verification has been sworn, then s. 26(2) may have been triggered, in which case the subsequent withdrawal of the claim will generally not redeem the position; and (d) s. 26 applies where the plaintiff has given or adduced evidence *or caused it to be given or adduced*. I do not consider that it is necessary to prove a conspiracy to meet such a requirement. To take a hypothetical example, if a plaintiff deliberately provided materially false information to either side's expert in order to influence their testimony, so as to ensure their (*bona fide*) provision of materially false testimony on the plaintiff's behalf, then such conduct could trigger s. 26(1). Barr J. also noted, at para. 31 of *Harty*, that, if the plaintiff has given misleading evidence to doctors examining him for the purposes of the action, then that

fact can be taken into account when considering the recoverability of damages, even if s. 26 criteria are not met.

87. The decisions of Sanfey and Collins JJ. in *Foxe v Codd* [2022] IEHC 351 ("*Foxe*"), and *Brozda* provide helpful summaries of the principles and there was no real dispute between the parties as to those principles. In *Foxe*, the Court accepted that disclosures and evidence as to the plaintiff's preexisting injuries were objectively misleading but there was no intention to mislead. Accordingly, the application failed. Sanfey J. reviewed the authorities and summarised the principles, noting that the burden of proof lies on the defendant and that, while the civil standard of proof applies;

> "*regard must be had to the seriousness of the matter being alleged, the gravity of the issue and the consequences in considering the evidence necessary to discharge the onus of proof".*

88. Points from Sanfey J.'s summary which are particularly relevant include the following:

a. "*Caution must be exercised, and "the required inference must…not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud…"*".

b. "*the defendant "…must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect*".

c. "*…Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim so that it can be said to render the claim itself fraudulent…however, this does not mean that a defendant must establish that the entirety of a plaintiff's claim is false or misleading in order to succeed on such an application. It is clear that proof that a plaintiff's claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim…*"" (*per* Irvine J. in *Nolan v O'Neill* [2016] IECA 298 ("*Nolan*")).

d. "*the court in deciding whether the plaintiff has acted knowingly, applies a subjective test …the subjective state of knowledge of the plaintiff may be deduced by way of inferences from the evidence*".

e. "*if the court is satisfied that false and/or misleading evidence has been knowingly given and it is material, the court must consider whether the dismissal of the claim would result in an injustice being done. Unless the court is satisfied in this regard, the court must dismiss the action…*".

89. At paragraph 7 of his judgment in *Brozda*, Collins J. summarised the authorities (including *Nolan, McLaughlin v Motor Insurers Bureau of Ireland* [2018] IECA 5, *Platt*, and *Browne*). The points most relevant to this case are as follows:

a. Materiality has two aspects. The evidence must be material to the claim advanced and it must be false and misleading to a material degree. The defendant need not establish that the entire claim is false or misleading.

b. The test is subjective - actual knowledge/dishonesty must be established.

c. Where both threshold requirements are established, the Court must dismiss the entire action unless doing so would result in injustice being done.

d. The applicant undertakes a significant burden of proof - the threshold requirements must be clearly established in view of the draconian consequences of an order - the application of the balance of probabilities standard should "*be proportionate to the nature and gravity of the issue*" (*per* Hamilton C.J. in *Georgopolous v Beaumont Hospital Board* [1998] 3 IR 132). The defendant must prove, "*as a high probability*" (*per* Quirke J. in *Farrell v Dublin Bus* [2010] IEHC 327 ("*Farrell*")), that the evidence was (and was known to be) false or misleading in a material respect. The judge must be absolutely satisfied that the defendant has discharged the requisite burden of proof.

e. The serious consequences of such an order require procedural safeguards. The allegation must be put squarely and directly to plaintiffs (this was certainly done).

f. If the threshold requirements are met, the Court must consider whether the dismissal of the action would result in injustice. The onus is on the defendant.

g. The fact that dismissal would deprive the plaintiff of damages to which he or she would otherwise be entitled cannot, by itself, be considered unjust. However, to ignore the consequences for the plaintiff would offend against the obligation to construe the section in accordance with constitutional principles of fairness and proportionality. Although the right to recover damages for personal injuries is qualified by s. 26, s. 26 must operate within constitutional parameters. The fact that the sanction would deny a plaintiff's constitutional right to bodily integrity is a relevant factor when assessing whether dismissal would cause injustice. However, this does not mean that Article 40.3 is a bar; it is a factor in the overall assessment of whether dismissal would result in injustice. That assessment depends on the individual circumstances.

h. If s. 26(2) is relied on, the defendant must establish that the plaintiff swore a verifying affidavit knowing it to be false or misleading in a material respect.

i. Defendants should exercise caution in seeking a s. 26 order. The provision is intended to deter and disallow fraudulent claims. Collins J. agreed with the often-cited observation of O' Neill J. in *Smith v HSE* [2013] IECA 360 ("*Smith*"), at para. 92, that such an application*:*

> "*should not be seen as an opportunity to prey on the frailty of human recollection or the incidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled*".

j. Collins J. added, citing *Nolan*, at para 56, that:

> "*Neither is it intended to be used to deny a plaintiff their lawful entitlement to compensation "because they have taken an overly optimistic view as to the earnings they might have enjoyed but for their injuries". Future loss of earnings*

claims "are always a matter of some speculation and … this is why actuaries, when they prepare their reports, often offer a range of options to a court as to the level of earnings which a plaintiff might have expected to earn had they not been injured".

k. A defendant that makes an application under s. 26 without an appropriate basis could have an award of aggravated damages made against them, as a mark of the Court's disapproval (there was no suggestion that this was such a case and the Plaintiff's counsel did not invoke this aspect of the decision in this case).

90. *Brozda* focussed on particulars of loss served on the plaintiff's behalf and verified on affidavit in circumstances in which the ultimate claim proved to be far lower. The trial judge concluded (and the Court of Appeal agreed) that, on the basis of the evidence available when the particulars were served, there was a reasonable basis for the assumption underpinning the calculations. Paragraph 40 of the judgment notes that questioning of the plaintiff was "*particularly unfair*", as the particulars made clear that earlier figures were only indicative and based on assumptions that may not be borne out.

Withdrawal of particulars or heads of claim

91. An article by Anthony Barr SC (as he then was), *"Fraudulent and Exaggerated Personal Injury Claims - a Word of Warning"* (2012) 17(2) Bar Review 26, provides a helpful summary of the jurisprudence to that point. The article also warns that the Courts will not allow Plaintiffs at trial to simply jettison parts of their claim, citing *Farrell*, *McKenna v Dormer* (Unreported, High Court, 15 March 2011) ("*McKenna*"), and *Higgins v Caldark Ltd* [2010] IEHC 527. In *Farrell*, the plaintiff furnished an actuarial report showing loss of earnings less than a week before a scheduled hearing in July 2008. The defendants secured an adjournment to investigate the new claim. When the action came on for hearing in 2010, the plaintiff discontinued her claim for future earnings and proposed to confine her claim for past loss of

earnings to the date on which she commenced driving a taxi. Quirke J. noted discrepancies between the plaintiff's accounts to doctors and the evidence recorded by a private investigator. Quirke J. dismissed the claim, *inter alia*, in the absence of credible explanations as to why the plaintiff had abandoned her future loss of earning claim or of her divergent accounts and due to the lack of documentary evidence to support the loss of earnings claim or to explain her lifestyle, when she had claimed to have been dependent upon social welfare benefits. Quirke J. rejected the attempt to excuse the issues on the basis that the plaintiff was portrayed as a naïve, unquestioning person, unaware of appropriate legal procedures who, unwittingly, failed to disclose earnings, which she considered to be unimportant and irrelevant, noting that she had been legally represented:

> "*When the plaintiff swore her affidavit on 30th June, 2008, she was represented and fully advised by professional legal advisers with considerable experience.*
> *It is, I believe, highly probable that such experienced legal advisers explained to her the significance of averring on oath on affidavit. It is also highly probable that they warned the plaintiff of the consequences of giving false or misleading evidence or information…*
> *It is therefore highly probable that the plaintiff, with the benefit of experienced professional advice, gave or adduced evidence which she knew was misleading.*"

92. Quirke J. did not accept that the head of claim could simply be discontinued without evidence as to why the claim had been made in the first place:

> "*Where, as in this case, a claim for particular losses (in this case a sum up to €343,000), is simply abandoned when challenged, it is inappropriate for a plaintiff to simply proceed with his/her claim as if nothing unusual has occurred. Something unusual has occurred must be satisfactorily explained to the court* [*sic*].
> *There is an obligation, in such circumstances for the plaintiff, preferably at the commencement of the hearing, to provide the court with an adequate explanation why a claim was advanced in the first place and why it was abandoned. Failure to provide such an explanation will often give rise to an inference that the claim was not bona fide.*"

Likewise, in *McKenna*, it appears that the plaintiff alleged that he had not worked for 9½ years following the accident, but that it emerged that he had been working for the defendant for the entire period and had insisted on being paid in cash since shortly after the accident. Quirke J. refused to allow the plaintiff to abandon his loss of earning claim and dismissed the action on account of the false evidence.

Parties bound by their pleadings

93. The Court of Appeal decision in *Naghten v Cool Running Events* [2021] IECA 17 ("*Naghten*") reiterates that a party cannot disassociate themselves from the actions of their legal advisors in their names. In that case, inappropriate defence pleas had been advanced:

> "*50. This plea was thus also advanced without any evidential basis and indeed, on the contrary, in the teeth of the evidence which was at all times in the defendant's possession…*
>
> *51. As if this were not bad enough, Mr Cremin under cross-examination expressly distanced himself from these pleas and stated that they were not made on his instructions and therefore, presumably, neither on the instructions of any other officer or agent of the defendant. No explanation was forthcoming at the trial as to how each of these pleas came to be made in the defendant's defence but not only that, why they were not withdrawn and why no apology was offered for them either to the plaintiff, her mother or indeed the court.*
>
> *52. Quite apart from any issues of professional propriety, the days of making allegations in pleadings without a factual or evidential basis, if they ever existed, have long since passed. Section 14 of the Civil Liability in Courts Act, 2004 obliges plaintiffs and defendants alike to swear an affidavit which verifies any assertions or allegations contained in pleadings in personal injuries actions. A person who makes a statement in such affidavit that is false or misleading in any material respect and that he or she knows to be false or misleading shall be guilty of an offence. The penalties for such an offence are severe being a fine of €3,000 or imprisonment for 12 months or both on summary trial or on indictment, to a fine not exceeding €100,000 or imprisonment for up to 10 years or both (s. 29).*

53. The focus of s. 14 is most commonly on plaintiffs, particularly when taken in conjunction with s. 26 dealing with fraudulent claims. This case provides a timely reminder that s. 14 applies with equal force to defendants and careful consideration is required before pleas of the kind that are seen in this case are advanced, which I would deprecate in the strongest terms. Before affidavits of verification are sworn, it is of importance that solicitors explain to deponents that this is not a form filling exercise. Lay people may often not fully appreciate the niceties of legal language used in pleadings drafted by professional lawyers, who have a duty to advise deponents what it is they are swearing to and the serious consequences that may ensue if what is sworn transpires to be incorrect".

94. Hardiman J. expressed similar views in *Vesey v Bus Éireann* [2001] 4 IR 192 ("*Vesey*"):

"*It is quite true that, in providing the particulars which a defendant is entitled to require, a plaintiff may rely on the advice of his lawyers, doctors, engineers and other professionals. But none of these professional advisers are responsible for the factual content of the replies. These replies are the plaintiff's document for which he is personally responsible.*"

95. Similar observations were also made in *Keating v Mulligan* [2022] IECA 257 ("*Keating*"). Although that s. 26 application which failed in the absence of an intention to mislead, in terms of responsibility for the incorrect information, the Court of Appeal noted the acceptance by the trial judge (Cross J.) (and indeed counsel for the plaintiff) that the plaintiff could not "*differentiate from any actions of her solicitors and is bound by what they have done*".

Expert Evidence

96. The obligations of experts in personal injury litigation and the practice of such experts being directly instructed by the plaintiff's solicitors have been considered in many decisions including *Harty*, *Dardis v Poplovka* [2017] IEHC 149 ("*Dardis*"), *Cahill v Forristal* [2022] IEHC 705 ("*Cahill*"), *Egan v Castlerea Co-Operative Livestock Mart Ltd* [2023] IEHC 16, *McLaughlin v Dealey & Anor* [2023] IEHC 106 ("*McLaughlin*") and, most recently,

Jautusenkiene v Fynes Phone Watch Ltd and Marrion Fleet Management Ltd [2024] IEHC 582 ("*Jautusenkiene*")*.*

97. In *Dardis,* Barr J. expressed the view that it is inappropriate for solicitors to refer clients for specialist examination for two reasons:

> "*156…Firstly, normally, a plaintiff's G.P. plays a central role in relation to his rehabilitation. Often, the G.P. is the person who is first consulted by the plaintiff in relation to his injuries. He or she deals with the plaintiff on an ongoing basis. His primary aim is to make the plaintiff better. Accordingly, it is the G.P., who should decide when and to what specialist a patient should be referred. A plaintiff's case is much stronger if the decision to refer him to a specialist is made by the G.P., rather than by the plaintiff's solicitor.*
>
> *157. The second reason why this is preferable, is that if the plaintiff is referred by his G.P. to a specialist, that consultant becomes a treating doctor. This means that he assumes the responsibility of advising the plaintiff as to what treatment is best suited to make him better. He will decide what treatment is appropriate for the plaintiff and will oversee its implementation. If a given course of treatment is not successful in relieving the plaintiff's symptoms, he will advise what further treatment should be undertaken, or he will refer the plaintiff on to another specialist in a different field. As a treating doctor, he will also liaise with the plaintiff's G.P. and keep him updated as to the progress of treatment. In this way, there is continuity and communication between the various medical professionals, who are treating the plaintiff at any given time.*
>
> *158. When a plaintiff is referred to a specialist by his solicitor, he does not become a treating doctor, but remains merely a reporting doctor. He will give an opinion as to the plaintiff's injuries and may recommend a possible line of treatment in respect of these. However, he will not communicate with the plaintiff's G.P., but merely furnish a report to the solicitor. This can lead to a situation, such as happened in this case, where the G.P. was aware that the plaintiff had been referred to a number of specialists, but because the referral came from the solicitor, he was not aware as to what treatment was recommended by them…*"

98. The Law Society of Ireland has published detailed guidance setting out its view as to best practice in terms of the legal profession's obtaining of medical evidence. The 2008 guidance on "*Medico/Legal recommendations*" includes a section in the following terms:

"***Protocol for direct referral to consultants by solicitors***

A solicitor has a professional duty to his client and to the court hearing the client's case, to fully present every aspect of the client's claim to the court. This is to ensure that the court is fully aware of all of the relevant details of all personal injuries suffered by the client which are the subject-matter of a claim and what effect these injuries have had on him to date and into the future.

This information is crucial in order for the court to do justice between the parties.

A medical witness is an expert witness who gives evidence to assist the court in determining the issues in dispute between the parties.

There will be occasions when the client's treating doctor (who is often a general practitioner) will not have the expertise of a specialist and will not, by reason of that, be in a position to provide expert specialist evidence to the court.

In those circumstances, where the client who has not already been referred to a specialist with the relevant expertise continues to complain of symptoms and sequelae from his injuries, it is in order for a solicitor, having regard to the professional duties already referred to, to advise his client to request his GP to refer him to a consultant who specialises in the relevant area or areas.

If a GP is unwilling to make such a referral, the solicitor should then adopt the following procedure:

1. Write to the GP setting out the ongoing symptoms of which the client complains and requesting the GP to refer the client to an appropriate specialist;
and
2. Request a response from the GP confirming referral within a period of 21 days and advising the GP that if confirmation of a referral is not received within 21 days, the solicitor intends writing directly to an appropriate consultant.

3. In the event that the GP refuses to confirm a referral to a specialist within 21 days, then the solicitor may write directly to an appropriate consultant requesting an appointment."

99. The Law Society of Ireland's guidance to the profession also stipulates, *inter alia*, that:

"*Reports should be factual and true and should not be influenced by the fee or by pressure from anyone to omit some details or to embellish others and strict accuracy must be observed. Reports should focus on the relevant medical issues only.*
Solicitors must be careful to avoid influencing the contents of a doctor's medical report (or whatever evidence the doctor may give in Court if he or she is called to give evidence).

The doctor has a duty to provide his or her independent medical opinion on the matters the subject of the report. However, where there is a manifest error or misunderstanding on the facts in the doctor's report, it is proper for the solicitor to bring this to the attention of the doctor".

100. In *McLaughlin*, having comprehensively analysed the authorities, Ferriter J.:

a. rejected submissions that reduced weight should be accorded to the plaintiff's medical testimony that depended on his solicitor's direct referral or that it was impermissible for a solicitor to engage a medical expert directly to provide an opinion for use in litigation;

b. confirmed his agreement with the Law Society of Ireland's guidance, noting that it envisaged that a referral to a specialist would generally be through the client's GP in the first instance, but that this was not always practicable and was not "*a hard rule*";

c. concluded that the particular evidence (arising from a direct referral) was credible - the expert had been sufficiently briefed and had carried out appropriate examinations;

d. summarised, at para. 21, legal principles applicable to expert testimony, including:

i. the importance of independence and objectivity and what was described (by Noonan J. in *Duffy v McGee* [2022] IECA 254 ("*Duffy*")) as the "*classic statement of the duties of experts*" by Cresswell J. in *National Justice Compania*

Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyds Rep 68 at p. 81.

ii. noting at para. 28 that:

> "*… his or her opinion should be based on relevant, accurate and complete information. As Cresswell J. put it …:*
>
> > "*3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
> >
> > *…*
> >
> > *5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.*
> >
> > *6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.'*"";

e. cited the observation of Noonan J. in *Duffy* (at para. 91):

> "*the overriding duty of the expert is owed to the court and includes the duty to provide an objective opinion. Objectivity by definition requires that one has regard to both sides of the case. A central component of the duty of the expert is to ascertain all relevant facts whether they support the client's case or not.*";

f. endorsed the summary by McGrath's *Evidence* (3rd edn., 2020), at para. 6-134, that:

> "*The weight to be attached to the evidence of a particular expert witness will depend on a number of factors including the qualifications and experience of the expert, his or her degree of expertise, the extent to which the particular*

area of expertise is recognised by the courts, whether the views or methodology of the expert accord with those generally accepted in that field of expertise, the extent to which the facts upon which the opinion of the expert is based have been proved in evidence, the extent of the expert's first hand knowledge of the facts upon which he or she has based his or her expert opinion, the nature and extent of the investigations carried out by the expert, the extent to which the expert has relied on information provided by the party who has engaged him or her or has sought to verify that information from other sources, and the extent to which the expert has applied his or her expertise in a critical manner to the information provided by the engaging party.";

g. observed at para. 36 that:

"*Harty v Nestor is a good example of an expert witness not being in a position to properly assist the court because she was not armed with all the relevant information necessary to give an informed opinion, one of the key requirements of reliable expert evidence*";

h. concluded that ultimately it is for the Court to:

"*evaluate the cogency of the evidence given by any medical expert witness and any question-marks over the weight of that evidence which may arise from the quality of the information on which the expert's opinion is based, the objectivity of the witness and the quality of the analysis contained in the opinion itself. All of these matters are the routine stuff of cross examination of medical witnesses called on either side of personal injuries litigation, as they were in this case.*";

i. concluded that the expert's objectivity was not the real focus of the objection so much as the information he relied on, including that he had not seen the plaintiff's medical records before examining him, observing at para. 48 that:

"*The critical obligation is to ensure that such a medical expert witness is properly briefed with all relevant information and past medical history and that the medical expert witness prepares his or her opinion thereafter in accordance with his or her overriding duties to the court. A failure to comply with such obligations*

will inevitably be exposed in cross-examination and will most likely result in reduced – and, depending on the level of non-compliance, potentially very reduced – weight being attached to that expert's evidence";

j. was satisfied that, despite shortcomings in his initial briefing, the expert elicited the necessary information directly from the plaintiff. He conducted his own examinations of the plaintiff and sent her for scans. It was not suggested that he had overlooked material prior medical history or that the plaintiff misled him. Nor was it suggested that his independence was compromised due to his being retained directly by the solicitor; and

k. he compared the approach of the medical experts on each side (which were similar in terms of materials reviewed), concluding that:

"*All three expert witnesses were agreed as to the credibility and reliability of the plaintiff's account of her injuries and symptoms arising from them*".

101. Certain passages of the judgment of Ferriter J. appear particularly germane:

"*40. Plaintiffs who have suffered personal injuries (often in life-transforming ways) through no fault of their own and as result of the actionable wrongdoing of another party are perfectly entitled to bring a claim for damages for such injuries before the courts. A plaintiff is entitled, subject to the rules of court and the legal principles applicable to expert witnesses, to engage and call an independent medical expert in personal injuries litigation just as a plaintiff is entitled to call an independent expert witness in other forms of civil litigation. A solicitor is entitled in accordance with their duties to their client to advise a plaintiff to engage the services of a medical expert. A solicitor with experience in personal injuries litigation will typically be in a position to recommend suitably qualified and experienced medical experts who may be able to assist in the litigation. A solicitor acting for a plaintiff in a personal injuries case does not have to be a medical expert in order to responsibly advise the plaintiff to engage an appropriate specialist medical expert to assist in advancing his or her claims in litigation, just as a solicitor does not have to be an engineer in order to responsibly advise the retention of an engineering expert.*

41. In advancing a personal injuries claim, a plaintiff is entitled to call evidence, subject to the rules of court and the legal principles applicable to expert witnesses, from independent medical expert witnesses. Those witnesses may be the subject of a referral from the GP particularly if they are treating specialists. There is no provision in Irish law or court rules which says that the plaintiff in a personal injuries action may only call a treating doctor with whom they have an ongoing relationship. There is nothing in principle prohibiting an independent medical expert being called on behalf of a plaintiff (subject to the requirement in Order 39 rule 58(1) that such expert evidence is reasonably required to enable the court determine the issues). What is important is that any independently retained expert is properly informed as to the plaintiff's relevant medical history, has had appropriate opportunity to examine the plaintiff and provides his or her expert opinion to the court objectively and in accordance with their overriding duty to the court. A medical expert who is ignorant of material aspects of a plaintiff's medical and treatment history is not going to be in a position to give meaningful assistance to the court (and through such assistance, to the plaintiff's case). A solicitor who does not strive to ensure that any expert engaged by them complies with the requirements the law imposes on expert witnesses (medical or otherwise) will not be doing their best by their client. That applies to solicitors on both sides of personal injuries litigation….

44. The protocol, having set out (correctly) that "a medical witness is an expert witness who gives evidence to assist the court in determining the issues in dispute between the parties" then notes that "there will be occasions when the client's treating doctor (who is often a general practitioner) will not have the expertise of a specialist and will not, by reason of that, be in a position to provide expert specialist evidence to the court." This latter statement reflects an obvious but important reality of personal injuries litigation. As a broad rule, in more serious cases, and subject to the nature of the injuries involved, and the rules governing the tendering of expert evidence, a court is more likely to get expert assistance from a specialist rather than a general medical practitioner…

46. The (Law Society of Ireland) recommendations do not, of course, have legal status. However, they correctly proceed on the basis that there is nothing inappropriate per se in a solicitor acting for a plaintiff advising his or her client to obtain the opinion of a medical expert in order to allow the plaintiff's case be best advanced at trial. This is all the more so where it is almost inevitable that a defendant (very often a better

resourced party) will seek to retain expert medical opinion on its side in the event of there being any dispute as to the injury type or severity.

47. The recommendations also understandably envisage that a referral to a specialist be done through the client's GP in the first instance, while accepting that this is not a hard rule. One can envisage various situations where it may not be practicable for the plaintiff's solicitor to go through the plaintiff's GP before seeking a specialist medical legal opinion: the GP may not have been involved in treating the relevant injuries; the plaintiff may not be happy with their GP's handling of the relevant injuries; the GP may not be in a position to assist in a timely fashion due to pressure of work; the plaintiff and his or her solicitor may have to meet pressing deadlines (e.g. in respect of a PIAB application) which may render it impractical to go to the plaintiff's GP before retaining a medical specialist to give an opinion.

48. In conclusion, in light of the duties a plaintiff's solicitor owes to his or her client, such a solicitor cannot be faulted for engaging a medical expert witness directly in an appropriate case. The critical obligation is to ensure that such a medical expert witness is properly briefed with all relevant information and past medical history and that the medical expert witness prepares his or her opinion thereafter in accordance with his or her overriding duties to the court. A failure to comply with such obligations will inevitably be exposed in cross-examination and will most likely result in reduced – and, depending on the level of non-compliance, potentially very reduced – weight being attached to that expert's evidence."

102. A different view was expressed in *Jautusenkiene* (but *McLaughlin* does not appear to have been cited in argument). The judgment of Twomey J:

a. noted reasons for considerable scepticism about the evidence in the particular case, including that: (i) the reports in question were procured years after the plaintiff had recovered; (ii) the plaintiff, whose minor ailment had not even led to a single sick day "*ended up being referred to a Consultant Psychiatrist and a Consultant Orthopaedic Surgeon, to support her claim for damages*"; and (iii) the plaintiff's own GP had advised that the injuries did not require specialist advice;

b. noted that the report from a Consultant Psychiatrist, regarding the anxiety allegedly suffered as a result of accident was:

> "*of little value to the Court because it consists mainly of the plaintiff's description of the accident and the plaintiff 's description of her symptoms, repeated by Dr. Lyster in her Report. In this sense the plaintiff's evidence is given the apparent gravitas of a consultant's report simply by being stated by a consultant in her report. However, it is still the plaintiff's allegations of what happened to her and a description of the psychiatric injuries she allegedly suffered. The plaintiff's claims regarding her injuries do not become of greater evidential value simply because it is a consultant who is repeating those allegations*";

c. expressed similar concerns about the second report, from a Consultant Orthopaedic Surgeon, which consisted mainly of the plaintiff's description of the accident and of her alleged symptoms, which were repeated in the report. Twomey J. observed that the plaintiff's claims do not assume greater evidential value simply because a consultant repeats those allegations;

d. concluded that "*in addition to the limited value of these reports for this reason*", the Court did not regard either report "*as 'proper' medical evidence…because there was no medical basis for the consultations that led to the reports…they were generated solely for legal reasons*", to support the damages claim;

e. suggested that the practice (of solicitors instructing experts directly) involved the inappropriate use of hospital consultants (contrary to the direction of Barr J. in *Dardis)*, so as to substantiate claims with inappropriate medical evidence. Such evidence obtained to increase the prospect of a larger award or settlement was:

> "*inappropriate as there is no medical basis for it, since it does not arise out of a medical need. This is because it does not arise from a GP referral. Instead, it is generated solely for legal reasons as it arises from a referral by a solicitor to a consultant*";

f. noted that such evidence was used to support damages claims simply because it had been provided by a consultant, thus giving apparent weight to the claim;

g. considered that the use of such evidence called the plaintiff's credibility into question as:

> "*the plaintiff was involved in attending two consultants, without any medical basis (since there was no good medical reason for her referral) but solely for legal reasons, i.e., to gather evidence to add apparent substance and gravitas to her claim by having a consultant's report to support it and thereby, it seems, increase the sum that she might receive in damages*";

h. concluded that no weight should be attached to the reports which, rather than supporting the plaintiff's claim, called into question her credibility regarding the nature of the accident, and her alleged injuries;

i. cited his previous decision in *Cahill*, in which he suggested that there should be no referrals to consultants unless there was a medical basis for them (which could only be determined by a healthcare professional) – absent such a medical basis there should be no referral, even if such a referral was likely to lead to a greater settlement/award; and

j. noted his observation in *Cahill*, that in the interests of their clients, solicitors should not make solicitor-referrals to consultants, because it impacts on the credibility of the claim by implying that there is no medical basis for the referral.

103. More generally as regards the use of experts, Murray J. commented in *Ryan v Dengrove* [2021] IECA 38 ("*Dengrove*"), on the extent to which the Court will be persuaded by expert evidence (in a non-personal injury context, litigation in which an unsubstantiated expert opinion had asserted that a sale by a receiver was likely to be at an undervalue):

> "*70. … an abrupt statement of opinion by an expert (even if he were a witness) is not proof of anything. Before a court can act on opinion evidence, it must both understand the basis of the opinion, and be confident from the face of the expert's evidence that he has taken all relevant matters into account informing it. The legal position was explained by Stewart-Smith LJ in Loveday v. Renton [1989] 1 Med. LR 117 in a passage quoted with approval by Charleton J. in James Elliott Construction Ltd. v. Irish Asphalt Ltd. [2011] IEHC 269 at para. 12:*

> *"The mere expression of opinion or belief by a witness, however eminent … does not suffice. The Court has to evaluate the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence." …*
>
> *73. Expert opinion that is not referenced to the expert's understanding of the relevant factual context in which their opinion is tendered is properly disregarded for that reason alone, not least of all because the Court does not know if the expert has complied with their obligation to make a full and proper assessment and disclosure of the information they have relating to the issues on which they are expressing an opinion. The position was explained by Charleton J. in Condron v. ACC Bank plc [2012] IEHC 395, [2013] 1 ILRM 113 at para. 19:*
>
> *"Experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which long study and experience has equipped them so that, armed with that analysis and the elements of arriving there, the court may be enabled to take a different view to their opinion."*"

Quantum – assessment of multiple injuries

104. In *Meehan v Shawcove Ltd and Ors* [2022] IECA 208 ("*Shawcove*"), Noonan J. noted that, while the Book of Quantum can be of considerable assistance where the injury links to a well-defined category, the quest for consistency is more difficult in multiple injury cases. However, the Book of Quantum does not become redundant simply because more than one injury is involved. Noonan J. referenced his comments in *Griffin v Hoare* [2021] IECA 329 (at para. 64) on the Book of Quantum's suggested approach to multiple injury cases (rather than simply adding up values for individual injuries the Court should make an adjustment within the value range):

> "*53. Having said that, it has I think to be recognised that in complex multiple injury cases, such as the present, the application of the Book of Quantum or indeed the*

Guidelines may prove considerably more problematic. A variety of potential approaches might be adopted. One such is advocated by the Book of Quantum itself (at p. 10):

"4. Consider the effect of multiple injuries.

If in addition to the most significant injury as outlined above there are other injuries, it is not appropriate to simply add up values for all the different injuries to determine the amount of compensation. Where additional injuries arise there is likely to be an adjustment within the value range."

54. What this appears to suggest is that the court should attempt to identify "the most significant injury" which of course in many cases may not be possible. If it is however, the Book of Quantum suggests an adjustment "within the value range" and presumably, the value range being referred to here is the range for the most significant injury".

105. Noonan J. agreed with the observation of Faherty J., in *Brozda*, that the Book of Quantum's recommended approach to multiple injuries is not "*set in stone*":

"*55. Indeed, I would go further and suggest that in principle, this approach cannot be correct. To take an example, if one were to say that the clearly identified principle or most significant injury was in the €10,000 to €20,000 value range set out in the Book of Quantum, assume then that the injury is at the top of that range such as would merit an award of the full amount of €20,000, it cannot be correct to suggest that the plaintiff can be entitled to no additional compensation for all his or her other injuries because the limit has been reached in the most significant category.*"

General Approach to the assessment of general damages

106. Irvine J. summarised considerations for the assessment of general damages at paragraphs 43 to 45 of her judgment in *Shannon v O'Sullivan* [2016] IECA 93 ("*Shannon*") (at para. 145, I reference elements of her summary which appear to apply in this case).

The Parties' Submissions

107. The Defendant submitted that s. 26 is relevant in two respects. Firstly, the Plaintiff advanced a claim for loss of earnings in the sum of €620,388 based on an actuarial report, itself

based on the Plaintiff's instructions, which was furnished to the Defendant in both a "*discrete*" affidavit of discovery and a schedule of special damages. That claim was not, ultimately, pursued, but was only withdrawn on the eve of the commencement of the proceedings. In the course of cross-examination, the Plaintiff distanced himself from that claim, calling the figures "*pie-in-the-sky*". It is the Defendant's case that this claim, intentionally made part of the case, "*was clearly false, it was clearly misleading*". Secondly, the Plaintiff maintained throughout the proceedings that he is unable to work, including in further particulars delivered on 19 June 2024 just before the hearing of the action, which stated that he was unable to work due to the injury to his right shoulder. He told both sides' experts that he was not at work and/or cannot work. For instance, the Plaintiff: (a) told Professor Farrell on 3 April 2024 that the pain in his lower back, right shoulder and right hip is aggravated by "*activities of daily living*", preventing him from returning to work as a stonemason and that he was less able to guide hunting expeditions due to the pain, that the pain is worse at night and that the pain prevented him from doing normal jobs around his house and garden, such as painting; and (b) told the Vocational Assessor that he struggled to engage in household activities and DIY around his home, particularly tasks that involve "*stooping and bending*", that he was unable to lift weights and that he avoided aggravating his back.

108. The Defendant submitted that such claims were contradicted by its video footage, on the basis that the 14 September 2020 video shows the Plaintiff working, "*bending, stooping, lifting, lifting weights, lifting buckets of water*" and the 2 April 2024 video likewise shows him working, building a fence, and lifting and moving planks, tools and equipment, and that the evidence showed that the Plaintiff had deliberately set out to mislead the Court and the experts. The Defendant argued that, far from taking advantage of an error of recollection or oversight, its application concerned the Plaintiff's deliberate and conscious decision to claim that he could not work or earn a living, and that he had suffered a loss, as disclosed in the original schedule

of special damages. The subjective interpretation of the Plaintiff's comments urged on the Court were dismissed as an attempt to "*sidestep*" the issue, by claiming that he can work but not to such a degree as to be able to earn a living. It was reiterated that the video footage proved that the Plaintiff "*deliberately misled the experts…as regards his ability to work*".

109. The Plaintiff submitted that the test for a S. 26 application is subjective and stringent, and that the Plaintiff's statements to the effect that he was "*not at work*" or incapable of working must be understood in the light of his cross-examination and that:

> "*the clear sense that emerged was that, in the Plaintiff's concept of what he was addressing, was the notion that his inability to work – he could not earn a living with his tools. He was consistent about this throughout vigorous cross-examination. In other words, his concept of the question of his ability to work is intertwined inextricably with the concept of being involved in gainful employment, as opposed to his physical ability to do a given task*".

110. Neither of the (edited) videos showed the Plaintiff engaged in gainful employment; rather, it was what he described as "*a labour of love*". He professed himself to be "*ashamed*" watching himself moving "*like an eighty-year-old*" and did not believe himself to be capable of earning a living at his current physical capacity. That subjective understanding must inform the Court's assessment as to whether the Plaintiff's statements to various experts were deliberately "*false or misleading*". The loss of earnings claim had been withdrawn from the schedule of special damages furnished on the eve of the hearing. The Plaintiff himself in this case did not promote the loss of earnings claim, seeing it as "*pie-in-the-sky*". The Plaintiff relied on the oft-cited observations of O'Neill J. at para. 91 of *Smith*, which I have referenced above, and also upon the comments of Irvine J. in *Platt*, that the Court must be very satisfied before acceding to a s. 26 application. He submitted that the threshold of dishonesty is not reached if the Plaintiff's evidence as to his subjective understanding is accepted. The Plaintiff also submitted in respect of the psychological reports that the fact that a solicitor refers a

plaintiff for consultation does not deprive such evidence of its legitimacy, particularly since people can be reserved and reluctant to discuss such issues.

Discussion

111. Before dealing with the s. 26 application, I will address the fact that the Plaintiff's experts were directly instructed by his solicitors. Much of the cross-examination focussed on the fact that the Plaintiff's medical experts, apart from Professor Fraser (with the disputed exception of the Plaintiff's GP), were instructed by the Plaintiff's solicitors. As appears from paras. 96-102, High Court judges have expressed divergent views as to the propriety of solicitors instructing medical experts for personal injury claims. Appellate guidance would be useful to resolve the issue. My own perspective is as follows:

a. The Law Society of Ireland's guidance mirrors my understanding of legal practice and professional obligations (based on experience as a commercial litigator rather than as a personal injury lawyer) and I would endorse that guidance save that I would emphasise that the solicitor should bring any misunderstanding as to the underlying facts to the expert's attention, *whether or not such points favour their client*. Every expert opinion must be based on correct premises.

b. It is considered preferable, where possible, that referrals should be via the clinical team for, inter alia, the reasons noted by Barr J. in *Dardis* as summarised in para. 97 above. As Barr and Twomey JJ. and others have noted, evidence from treating clinicians (of their actual diagnosis and treatment) may carry greater weight than evidence secured purely for forensic purposes. Such a clinical referral will also help ensure that the expert is properly briefed with all relevant information (and may reduce the scope for criticism of the plaintiff and their advisors for any perceived deficiency in that regard). Most importantly, as Barr J. has noted, it facilitates the exchange of

information between the medical professionals and the prompt provision of any clinical support that may be required following any such assessment (such as the counselling recommended here).

c. In *Dardis*, Barr J. described the practice of solicitors directly instructing medical experts as inappropriat*e* for the reasons which he identified, but he did not go so far as to make a direction in respect of the practice generally (and I am unsure as to the jurisdiction for such a direction in any event), nor did he suggest that such evidence was inadmissible or that it would undermine the credibility of a plaintiff relying on citing such evidence. To the contrary, while explaining his reservations (which go to the weight accorded to such evidence), he himself relied upon such evidence in his substantive judgment, notwithstanding the direct instruction.

d. I agree with the comprehensive summary provided by Ferriter J. in *McLaughlin*, including his conclusion that there is no prohibition on plaintiffs' solicitors seeking to support their client's cases by obtaining second opinions or instructing other medical experts directly. Lawyers cannot be criticised for obtaining evidence to reinforce their client's case on liability and quantum (so long as the evidence meets the standards noted by Ferriter and Murray JJ. and referenced above). Indeed, solicitors could be accused of breaching their professional duties if they failed to obtain such evidence when necessary and appropriate. Plaintiffs' solicitors must take reasonable steps to ensure that the court is aware of all relevant details of their clients' personal injuries which are the subject-matter of a claim and of the effect of these injuries on their clients. Such evidence may legitimately go beyond treatment required for purely clinical purposes.

e. With regard to the parties' right to call evidence of their choosing (subject to the court's power to exclude irrelevant or unnecessary evidence, etc), I note that, in *BOC Aviation (Ireland) Limited & Ors v. Lloyd's Insurance Company S.A. & Ors* [2024]

IEHC 162, McDonald J. held that a party's entitlement to select and engage an expert of its choice is an important element of the right to litigate and the right of access to the courts. That observation was made in the rather different context of multi-million-euro international litigation in the Commercial List of the High Court, but the rights extended to large, multi-national litigants must surely be extended to private individuals seeking redress for alleged bodily injury.

f. The treating physician cannot dictate the evidence necessary for presentation of a case – the issue before the court is not the same as that facing the physician. However, the fact that the clinical team did not consider a referral necessary is a legitimate matter for cross-examination. The court will generally have more confidence in reports from experts instructed by the treating physician because the authors of such reports are more likely to be sufficiently, accurately and objectively briefed in respect of the plaintiff's medical history (which was not always evident to me from the face of the reports in this case). Furthermore, the absence of such a clinical referral may tend to suggest that the plaintiff's injuries were less severe than they contend.

g. Accordingly, the plaintiff's solicitors are entitled to instruct medical experts. However, it is preferable, where possible, for a solicitor to first ask the client's GP to consider whether such a referral is warranted, particularly a referral for a psychological assessment. As Ferriter J. noted, such a referral may not always be possible, in which case there is no objection to a direct instruction, provided the strictures noted by Ferriter J. are scrupulously observed, and situations such as those noted by Twomey J. in paragraph 102 above are avoided).

h. At most the direct instruction goes to the weight accorded to evidence. As in *McLaughlin*, the real issue is whether the expert considered all relevant matters before

expressing an independent opinion. In this case, I do have concerns about the information furnished on which the reports were based.

i. While I have a different perspective on the alternative basis for the decision in *Jautusenkiene* and on certain (possibly *obiter*) observations therein, I certainly agree with the result in the circumstances outlined in para. 102 (a), (b) and (c) above and I particularly endorse the concerns expressed by Twomey J. as to forensic reports procured years after the event, especially if they essentially rehash the plaintiff's description of symptoms in an attempt to give them a veneer of authenticity.

j. However, I am less concerned with whether an expert is instructed directly, and more by whether they have demonstrated competence and objectivity, demonstrating that any conclusions are soundly based on objective analysis, the approach which auditors would describe as "*an attitude of professional scepticism*". A court will not be overly impressed by the report of an expert (whether or not directly instructed) which uncritically regurgitates the client's instructions (ironically, consultants examining a plaintiff purely for the purpose of litigation may be better placed in some respects to offer such an objective clinical assessment).

k. I assume that treating physicians would routinely assess the reliability of their patient's subjective assessments (for example, the significance of complaints may vary due to an individual's personal pain sensitivity, rather than solely reflecting the severity of an underlying condition). However, when a patient is seeking advice solely for treatment purposes, they have an incentive to be open with their doctor and their doctor is entitled to assume such candour on their client's part. The fundamental issue is that when a report is being prepared for litigation – whether by a treating doctor or otherwise – the court must be satisfied that the conclusions are based on objective evidence rather than on an uncritical adoption of the particular client's account.

Section 26 application – information supplied to experts

112. Even leaving aside the withdrawn particulars (which I consider separately), I am satisfied that material information furnished by the Plaintiff to the experts retained by the respective parties was objectively incorrect or incomplete to such an extent as to be materially misleading. Such information included the severity of his pre-existing injuries, the nature of his employment prior to the incident and the extent to which injuries sustained in the incident prevented him from undertaking any physical exertion or paid or unpaid employment. The Plaintiff should have provided more considered, precise, comprehensive and accurate responses on a number of points to, *inter alia*, Messrs O'Farrell, Tansey and Aherne. For example, when asked about his ability to work, if the Plaintiff wished to make clear that he was unable to work for a lengthy period, in a professional capacity as a stonemason or without recourse to anti-inflammatories, then he should have made those qualifications clear. Although he says he did so, several reports suggest that the respective experts had a different understanding.

113. Furthermore, if, on receipt of the various reports, he or his solicitor considered that they were inaccurate or that they misstated the position, then they should have asked the expert to consider and, if necessary, clarify the point to avoid any confusion. Alternatively, they should have stipulated any reservation when serving the report. Delivering reports without such reservations clearly implies that the party tendering them accepts and is bound by their contents. It would be misleading to put into evidence reports which were not premised on an accurate understanding of the position, unless the party tendering them simultaneously disclosed such points.

114. Accordingly, it is not open to the Plaintiff to resile from the contents of reports submitted on his behalf when it suits him under cross-examination. Finally on this issue, although the point is not central to the determination of the proceedings, I accept the statement

by the Plaintiff's General Practitioner that the Plaintiff initially consulted him on the advice of his solicitor. In my view, the February 2016 statement by the GP is more likely to be accurate than the alternative explanation volunteered by the Plaintiff under the pressure of cross-examination, eight years later.

115. I have disregarded communications with the Vocational Assessor in regard to the s. 26 application because his report was not adduced. However, the Plaintiff's communications with Messrs O'Farrell, Tansey and Aherne were for the purposes of their testimony and are therefore capable, in principle, of grounding a s. 26(1) application. It seems to me that the outcome of this aspect of the s. 26 application must depend upon whether the Defendant has discharged the onus of proving the Plaintiff's subjective intention, namely an intention to mislead those three experts so as to influence their testimony.

116. The Plaintiff's cross-examination was robust but fair. There are legitimate concerns as to the accuracy, completeness and objectivity of the information furnished. The Defendant's application would be unanswerable if the test was purely objective or dependent on constructive knowledge. However, the test is subjective, and the Defendant bears a significant burden in proving such a serious allegation on the balance of probabilities. In the absence of an admission by the Plaintiff, such proof will often depend on the credibility of the Plaintiff's explanations, including whether the Defendant has satisfied the Court that inferences can safely be drawn that the Plaintiff was seeking to mislead.

117. I have noted concerns about information furnished by the Plaintiff. However, he steadfastly maintained that he had never sought to mislead the experts or the Court and that, when he referred to being unable to work, he meant "*as a stonemason*". In fact, his career as a full-time stonemason seems to have effectively ended 15 to 16 years ago, six to seven years before the incident. However, he still saw himself as a stonemason and seemed to use that term loosely to encompass his ongoing work in the CE scheme and any other physical work.

118. The Defendant relied on the video footage which certainly appeared to confirm the Plaintiff's ability to undertake physical construction and DIY work and to be difficult to reconcile with the characterisation of the Plaintiff's condition in the experts' reports. However, the Defendant has not satisfied me that the Plaintiff was dishonest when he discussed his ability to work as a stonemason. He seems to have genuinely believed that he was not operating at the level expected of a professional within the industry (as opposed to what he might be able to do, literally, in his own backyard). Whatever may be the objective position, in his own mind, he seems to have thought that he was unable to operate at the level required in order to operate full-time as a stonemason or in a similar capacity.

119. Although I believe that the Plaintiff's answers should (objectively) have been in different terms, there are reasons to believe that his approach may have been genuine. Firstly, on at least some occasions, he appears to have explicitly stipulated that when he said he couldn't work, he meant "*as a stonemason*". While it would have been better if he had done so more consistently, it seems to me that, if he had been seeking to mislead the experts, then he would have been consistent in such a deception. Secondly, the fact that on some occasions he did make clear that he could not work "*as a stonemason*" gives rise to the possibility that he may also have said something to that effect to other experts which may not have been captured in their summary. The latter are scarcely verbatim accounts, and the possibility of misunderstandings cannot be excluded (particularly when I have not heard oral testimony from the experts). There is no evidence from the experts that they felt that they were misled, nor have they criticised how the Plaintiff presented to them. Accordingly, I resolve this issue on the basis of the Plaintiff's evidence because his testimony to me did not appear dishonest so much as misguided in some respects. Thirdly, although the video footage certainly seemed to demonstrate the Plaintiff's mobility and dexterity when undertaking domestic DIY construction work, skills rather more advanced than the author of this judgment might have

been able to demonstrate in such a context (although that measure is, admittedly, as low as it is irrelevant), the footage shown to the Court appeared to comprise "highlights" of longer surveillance periods. It was suggested in cross-examination that the other footage was to similar effect. However, in the absence of more comprehensive disclosure of the video evidence, I would be wary of placing excessive reliance upon it. Last, but certainly not least, I scrutinised the Plaintiff carefully in terms of his demeanour as a witness and reviewed the totality of his evidence. I was not satisfied that all answers were objective or accurate. Nor did I agree that all conclusions were justified. However, the Defendant did not satisfy me that he was being deliberately dishonest or evasive. Even where I considered his replies unreasonable, it seemed to me that he was saying what he believed. A s. 26 order cannot be made if a witness is merely misguided or mistaken (or even if they are stubbornly but genuinely deluded). Furthermore, although this point was not explicitly canvassed in submissions, I note the observation in the psychologist's report that the Plaintiff "*completed his psychometric assessment very quickly and explained how he sees what he wants to see without actually looking at whats in front of him*" [*sic*]. Such a tendency (which would by no means be unique to the Plaintiff) might explain issues which have arisen. However, issues of comprehension, communication or expression would not justify a s. 26 order. There must be an intent to mislead.

120. There may well be a bias in the Plaintiff's testimony, particularly the way he perceives his current symptoms and the extent to which he attributes current ailments to the incident, as opposed to pre-existing injuries or other elements or the effects of his advancing years, a challenge all of us eventually face. Accordingly, I accord reduced weight to his evidence on such points. However, I am not satisfied that the Defendant has discharged the onus of showing that he deliberately or dishonestly sought to cause false evidence to be adduced by misleading the experts as to the extent of his injuries or as to his pre-existing injuries.

Section 26 application – withdrawn particulars of loss

121. Different issues arise in respect of the withdrawn particulars. Those particulars were based on false premises as to the Plaintiff's income and employment before and after the incident. The particulars were highly material, grounding a €620,388 claim. The Plaintiff acknowledged that the premises were incorrect, and euphemistically described the figures as "*pie-in-the-sky*". He did not seriously push back on the Defendant's characterisation of the figures as "*bogus*". I am underwhelmed by the Plaintiff's explanation to the effect that he was guided by his solicitors (who continue to act for him). His explanation that neither he nor they seriously expected to recover such figures makes the situation worse, as it confirms that neither he nor his advisors believed the figures which they were advancing (without qualification).

122. Ethically, no Irish lawyer is entitled to draft or file pleadings on behalf of or in a client's name, except in accordance with the client's instructions. If certain losses have yet to be ascertained, it is permissible to file particulars to that effect, confirming that the precise figure remained "to be ascertained" and that it would be provided as soon as possible. Likewise, if figures can only be put forward on a qualified or contingent basis, they should be presented on that basis, subject to such explicit qualification. That was the course followed and accepted by the Court of Appeal in *Brozda*. However, it is not permissible to claim specific losses unless the party making the claim has a *bona fide* belief that they are entitled to do so. It appears from the cross-examination that the Defendant had pressed for particulars of the Plaintiff's alleged losses. The Plaintiff and his lawyers appreciated the need for expert evidence to substantiate his claim. They instructed an expert actuary. The actuary acknowledged his obligations as an expert. Accordingly, neither he, nor the Defendant, nor his lawyers, could have been under any misapprehension as to their duties to the Court. As *Naghten, Vesey* and *Keating,* make clear, a party cannot simply blame their lawyers for inaccuracies in particulars furnished on his behalf.

123. The actuary's analysis, like most expert opinions, was dependent on conclusions based on the underlying facts. Expert reports are irrelevant unless they can be shown to be founded on primary evidence - parties and their lawyers and the experts themselves must ensure that such reports are well anchored on objective evidence. The professional standards cited in the actuary's report (the Society of Actuaries' "*Actuarial Standard of Practice EXP-1, The Actuary as Expert Witness*") acknowledge the actuary's obligations as to the quality of underlying data:

> "*The actuary is normally provided with the data necessary for an actuarial analysis. The actuary should satisfy himself/herself that the data provided is reasonable and sufficient to enable him/her to prepare a report, and should seek additional information if this is not the case. In particular, the actuary should disclose any data limitations or shortcomings that might affect or have implications for the results*".

124. While those obligations are expressed in the context of the actuarial profession, they are equally applicable in the context of other expert disciplines (as appears from *McLaughlin* and *Dengrove*). It must follow that parties (and their lawyers) seeking to adduce expert testimony have a corresponding duty to the court to ensure experts are fully and objectively briefed (and the Law Society of Ireland guidance supports this conclusion). The Plaintiff and his lawyers should have ensured that the actuary was given actual, accurate and comprehensive instructions as the basis for his report. For reasons which are unclear, this did not occur in relation to the loss of earnings claim in particular, a serious lacuna (the Defendant contends that the same issue arises, albeit to a lesser degree in my view, with the medical reports).

125. In *Farrell,* Quirke J. noted the need for an explanation when a damages claim is withdrawn by a plaintiff. In this case, a rudimentary explanation was volunteered at the start of the trial to the effect that, although at one point loss of earnings had been introduced, it was no longer part of the case, having been a notional view of what the Plaintiff's stonemasonry capacity would have been historically and what that would have projected as. Counsel noted that such a head of claim had no foundation because the Plaintiff was only on a CE scheme

before the incident, but the element was briefly introduced into the case while the issue was explored. That explanation fails to explain how or why the actuary was instructed to prepare a report on the basis of flawed factual instructions. Nor as to why this was not identified by the Plaintiff and his advisers sooner, particularly since the Plaintiff's change of occupation did appear to have been identified (as appearing in his statements as to his occupation in the affidavits of discovery, where he described himself as a seasonal operator rather than a stonemason). The Plaintiff testified that he agreed to withdraw the particulars at a consultation the day before the hearing. That was the correct (if surprisingly belated) decision for which those responsible are, in fairness, to be commended. However, there is no explanation as to how and when the Plaintiff and his lawyers concluded that the actuary's report and the associated particulars might be based on false premises.

126. The parties and their lawyers should appreciate that the grave concern as to the service of incorrect particulars is not necessarily cured by their abandonment on the eve of trial. The Defendant could have been seriously misled by the particulars and the actuary's report when determining whether to make a lodgment or settlement offer and at what level. In the circumstances, the particulars should have been withdrawn immediately, when the issue emerged. In my view, it would be extremely unethical for a plaintiff or their lawyers to serve particulars (or to fail to withdraw them immediately or to negotiate) once they were aware that they were based on a false premise - particularly if there were settlement discussions underway or anticipated. However, I make no specific finding in this case in the absence of more detailed evidence and submission as to the background to and evolution of the issue. Although the particulars should not have been served (and perhaps should have been withdrawn sooner), those responsible for finally preparing the case for trial eventually determined that there was no basis for the particulars of loss, leading them to withdraw the loss of earnings claim in its entirety. However, the abandonment of the claim does not allay the concern that such a large

and highly specific fully particularised claim should have been maintained for more than a year before trial, before being abandoned with no meaningful explanation. Genuine mistakes can be made. Views change. Factual or legal developments can occur which necessitate the reassessment of heads of loss. In such circumstances, the appropriate step must be taken without delay. In this case, the Court (and the Defendant) deserved a fuller explanation as to how the actuary's report came to be secured on a false premise and how the particulars came to be maintained for more than a year - until the eve of the trial. The absence of such an explanation does not enhance the credibility of the Plaintiff's case as a whole.

127. Turning to the s. 26(2) application, insofar as it relies upon the abandoned loss of earnings claim, I am satisfied that the contents of the particulars and the actuary's report were material and that (in subjective terms) the Plaintiff knew that there was no basis for the figures. The Plaintiff's reliance on his solicitors does not excuse the provision of false information to the Court or to the other party to the proceedings.

128. That said, the particulars of loss of earnings were withdrawn prior to trial and the actuary's report was never put in evidence at trial (save as part of the discovery and in circumstances in which it was no longer relied upon). Furthermore, no evidence was given or adduced at trial in support of the particulars, nor was there an affidavit of verification. I would have had no hesitation in dismissing the proceedings (notwithstanding their subsequent withdrawal) if the Plaintiff had sworn an unqualified affidavit of verification knowing material particulars to be unsubstantiated. However, no such affidavit was sworn.

129. I have considered whether s. 26 could be triggered by the Plaintiff having sworn (for reasons which are not entirely clear) a supplemental affidavit of discovery exhibiting the actuary's report. Such an affidavit confirms the existence of relevant documents which are or have been within the deponent's possession (rather than confirming the veracity of the contents of such documents). However, it would certainly be seriously misleading if a party listed in a

discovery affidavit documents created on his behalf and on his instructions, if he knew that their contents were materially misleading (unless he disclosed the position in that regard). As the Supreme Court noted in *Ahern v Bus Éireann* [2006] IEHC 207, a plaintiff swearing an affidavit "*has an unquestioned responsibility to ensure that* [it] *is factually accurate irrespective of the position under section 26(2)*". However, although I have concerns about the issue and the affidavit of discovery, I do not consider that an affidavit of discovery can trigger s. 26, particularly in view of the specific reference to a section 14 affidavit of verification in subsection (2).

130. Although I do not consider that the Defendant has established a basis to dismiss the proceedings pursuant to s. 26 by reference to the withdrawn particulars, the actions of the Plaintiff and his lawyers in maintaining such a substantial unjustified claim for an extended period do not enhance the credibility of his case. However, the particulars issue does not affect my conclusion that the Plaintiff's engagement with the various experts over the years has not been shown to have been dishonest (even if it was less fulsome than it should have been). While not justifying a s. 26 order, my concerns about the instructions given to the actuary (on which he based his report) and about the Plaintiff's communications with medical experts for both sides (on which they based their respective reports) do affect my assessment of the evidence. These issues impact on the weight to be accorded to the Plaintiff's testimony and to the expert testimony on which he relies. It is axiomatic (and confirmed by the observations of Ferriter and Murray JJ. in *McLaughlin* and *Dengrove*) that an expert opinion must be based on facts. The Plaintiff has not satisfied me that this was the case.

131. Finally, for completeness in respect of s. 26, I should note that the Defendant also relied on the Plaintiff's continued assertion, in the particulars of special damages filed the day before the start of the hearing, to the effect that the Plaintiff was or had been unable to work, a claim which was not entirely correct. While that statement unsurprisingly attracted criticism from the

Defendant in the light of the video footage, it is less controversial than the particulars and it is not obvious to me that it would fall within the terms of s. 26, which concerns the giving or causing to give false evidence, as opposed to inappropriate pleadings. The general comment in the 19 June 2024 particulars add little weight to the Defendant's application.

Conclusions on Liability

132. There was significant damage to the car. It was undriveable and was later written off. However, from the photographs, one would not necessarily have expected the driver to have suffered significant physical or psychological injuries. The impact on the Plaintiff's son, who was closer to the point of impact, appears to have been relatively minor (albeit he was obviously younger and presumably in better health). I accept the Plaintiff's evidence that he was travelling uphill at a spend of approximately 30 to 40 km per hour. The physical impact was limited to that speed because the two cars did not come into contact. Accordingly, while, like any motor accident, the incident may have come as a shock at the time, based on the photographs and the circumstances, it seems remarkable that it should be suggested that it gave rise to physical or psychological injuries of the severity or permanence for which the Plaintiff contends. The timing of the development of the various complaints reinforces the concern as to whether symptoms of which the Plaintiff currently complains can fairly be attributed to the incident.

133. I accept as a matter of probability that: (a) a relatively minor incident did occur in 2015 and that it was broadly as described by the Plaintiff contemporaneously (but I would be less persuaded as to the reliability of his later elaborations); (b) I also accept that the Plaintiff sustained injuries to his neck, shoulder and back; (c) the Plaintiff also had significant extensive pre-existing injuries and entirely independent health issues; and (d) eight years later, the Plaintiff has significant ongoing physical and psychological health issues and, in his mind, such issues seem to be generally attributable to the 2015 incident.

134. Having carefully considered the factual and expert evidence, including, in particular, the extent to which the latter is premised on the Plaintiff's instructions to such experts, I am not satisfied that the Plaintiff has proved that his ongoing physical and psychological health issues are due to the incident to anything like the extent for which he contends. I have no reason to doubt the sincerity of the Plaintiff's belief in this regard. However, I find it difficult to reconcile that conclusion with the objective or contemporaneous facts, including the circumstances of the single vehicle impact at a low speed with insufficient force to trigger the airbags and the minimal impact on the Plaintiff's son (who was closer to the point of impact). Nor, on their face, do the terms of the reports satisfy me that these issues have been adequately addressed by the respective experts. I am also concerned about the accuracy of the detail of the pre-existing injuries furnished to the various experts. On the face of the reports there are numerous respects in which information furnished by the Plaintiff appears to have been less than comprehensive and accurate. This necessarily calls into question my willingness to rely on the conclusions reached in such reports and the weight to be accorded to them.

135. In this context, I also have reservations as to the evolution of the Plaintiff's complaints of physical and psychological injury over the years since the incident in 2015. It seems to me that he is blaming the incident for his current health issues without establishing a credible basis for doing so and without sufficiently or fairly allowing for his preexisting or independent ailments. In the circumstances, my assessment as to the impact of the incident on the Plaintiff is informed more by Mr Tansey's reports than by the Plaintiff's evidence or by the medical reports furnished on his behalf save for the report from his GP which, in my view, is more convincing than subsequent reports submitted on the plaintiff's behalf. Mr Tansey concluded that the Plaintiff had sustained a soft tissue injury to his right shoulder and acknowledged that it had aggravated preexisting degeneration and that the Plaintiff had sustained a soft tissue injury to his cervical spine. His initial report expected the Plaintiff's symptoms to improve with

physiotherapy and did not anticipate further treatment being required other than physiotherapy and the management of pre-existing degeneration above his right shoulder. I also regard as significant Mr Tansey's subsequent conclusion that the Plaintiff had had:

> "*very limited appropriate treatment in over 5 years since this accident and in particular he has only 2-3 sessions of physiotherapy in over 5 years since this accident*".

136. Mr Tansey's later reports concluded that he would have expected any soft tissue neck symptoms directly related to the incident to have settled long before. He remained of the view that the Plaintiff should not have significant long-term symptoms or disability in relation to his neck as a direct result of the accident. Mr Tansey concluded that the Plaintiff should not have long-term symptoms or disability related to his right shoulder as a direct result of the accident that was not entirely related to the pre-existing degeneration above his right shoulder, which would need to be managed on its own merits. He reiterated his earlier conclusion that nothing further was required other than physiotherapy and the ongoing management of pre-existing degeneration of the right shoulder. Mr Tansey's final report recorded his analysis of an MRI scan, reiterated his previous prognosis, and again concluded that:

> "*reportedly worsening symptoms over time is not directly related to this accident and may be related to possible progression of pre-existing previously symptomatic degeneration about the right shoulder*".

137. I am also concerned that, while attributing his psychological and physical injuries to the 2015 incident, the Plaintiff has failed to undertake recommended treatment such as psychotherapy and physical therapy. I am not convinced by the explanations advanced for the Plaintiff's failure to avail of such treatment over nine years. I suspect that if physical or psychological consequences of the incident had been as severe as the Plaintiff now contends, he may have been more likely to have undertaken appropriate treatment, including physiotherapy (notwithstanding that he found it painful) and psychotherapy or counselling (notwithstanding his reluctance to discuss such issues). His failure to do so and his agitation of

such symptoms for litigation rather than treatment purposes further diminishes the credibility of his complaints (and suggests that he has failed to take reasonable steps to mitigate his loss).

138. In assessing the physical consequences of the accident, I note that – although this does not always appear to have been made clear to the various experts – the Plaintiff only sought initial treatment from his GP eleven days after the incident, after he contacted his solicitor and, it appears, on the latter's recommendation. I would not place too much weight on that fact, since parties sometimes wait to see if they need medical attention, but the position as to his psychological injuries is more stark. As his own counsel acknowledged, the Plaintiff did not reference the psychological injuries in his discussions with any doctor over eight years – certainly that is the position appearing from the documents and the reports. Although the Plaintiff asserted under cross-examination that, at one stage, his GP suggested treatment for depression, I attach no weight to that vague and belated claim absent evidence from the GP.

139. For completeness, I should note that my evaluation of the medical evidence has been complicated in the absence of oral evidence. Dispensing with cross-examination has huge benefits in terms of saving of legal costs and court time and by reducing the extent to which medical personnel need to be diverted from their primary clinical responsibilities to testify in court. However, it deprives the Court of the opportunity to assess the qualities brought to bear in formulating the expert opinion (a point which particularly concerned me in the context of the s. 26 application). If the experts had been cross-examined, they would have been asked about the pre-existing shoulder injury, the failure to undergo physiotherapy, the impact of the unrelated arthritis and hip injuries impacted, and the fact that the Plaintiff was apparently not too restricted in his activities in the light of Mr Cian Kennedy's report and also in view of the fact that he delayed his second hip replacement so as to avoid impacting on his participation in the hunting season. Their perspective on the video footage would have been interesting, including the extent to which it was consistent with their discussions with the Plaintiff. While

each side agreed to the admission of the other's reports, effectively representing what would have been their evidence in chief (on a basis similar to the Bula/Fyffe formula sometimes applied by agreement as a basis for the admission of documentary evidence in civil litigation), such principles of practice and procedure are more difficult to apply in such circumstances (for example, if there was cross-examination then key points would need to be put to relevant witnesses but his opportunity is lost when there is no cross examination). At the end of the day, I must determine the weight to be accorded to the evidence on the basis of the face of the reports, but also with regard to the surrounding evidence. In the absence of cross-examination, I must rely on the reports on their face in order to assess the extent to which the criteria outlined by Ferriter and Murray JJ. are satisfied, and to reach a conclusion as to the weight to be accorded to such reports. No issue was raised as to the competence, expertise or integrity of any of the experts. However, statements which were made to them by the Plaintiff which appear factually questionable, potentially undermining their conclusions. In *McLaughlin*, a similar lacuna (the failure of the instructing solicitor to disclose the plaintiff's history) was remedied because the plaintiff directly provided such information to the consultant, and the ultimate opinion reflected the full picture. I have considered whether infelicities in the factual information furnished by the Plaintiff to the various experts considering his physical and psychological health were counterbalanced by their clinical examination of the Plaintiff or by other evidence (such as the scans reviewed by the orthopaedic consultants which put them on notice of the damage due to issues predating the incident). Based on the reports which I have reviewed in detail and the evidence as a whole, I am not satisfied that the examinations and briefings were sufficiently rigorous, informed and comprehensive to address the concerns as to the factual basis on which the opinions were premised. Accordingly, while they are admissible, I place limited weight on the opinions expressed by the Plaintiff's experts as to the extent to which the Plaintiff's current physical and psychological symptoms are attributable to the 2015

accident. The Plaintiff has not satisfied me that those opinions are based on a rigorous, objective and independent briefing with and review of all relevant evidence. Nor (although he was one of the clinical team rather than an expert instructed solely for litigation purposes) am I satisfied that Professor Fraser has satisfactorily explained his bald assertion that the preexisting shoulder problems were aggravated by approximately 80%. Professor Fraser's report does not review the detail of the results of his earlier examinations of the Plaintiff. It refers to certain examinations, but the evolution of the Plaintiff's symptoms and treatments is not analysed with the care which I would expect in order to justify the suggested 80% attribution, which seems to me to be mere assertion (or, at least, the analysis is not sufficiently set out in the report). I am also concerned that Professor Fraser does not refer to the fact that the Plaintiff was originally referred to him due to his long-standing shoulder issues before the incident. He has not explained how the conclusion in his report fits with his letter to the Plaintiff's GP on 13 October 2015 which referred to the Plaintiff as having been suffering from his shoulder injury for the previous four years. I would discount his opinion for the reasons outlined by Murray J. in *Dengrove.* Accordingly, the Plaintiff has not established the 80% attribution.

140. I also have concerns as to the factual foundations for Mr Aherne's conclusions with regard to the psychological impact of the incident on the Plaintiff. Mr Aherne has provided more than 700 forensic reports. I have no reason to doubt his evidence as to the Plaintiff's current psychological condition and as to his current need for counselling, therapy and other support. However, while he suggested in his 2023 report that the Plaintiff needs psychological treatment (counselling), this does not appear to have been sought by the Plaintiff in practice. Accordingly, the Plaintiff's sole objective of obtaining the report appears to have been to reinforce the damages claim. It would have been prudent for him to share the reports with his GP and to seek appropriate treatment. Although it might go beyond the scope of their professional retainer, I would hope that his solicitors had encouraged him to share the report

with his GP. At the end of the day, any genuine concerns as to the Plaintiff's physical and mental health should be the priority, with his damages claim subordinate to that issue. I am concerned that such a large proportion of the Plaintiff's recent time with medical professionals appears to have been directed at his claim rather than his treatment. This must impact on my assessment of the severity of his injuries. In any event, having considered Mr Aherne's reports, I am not satisfied that the Plaintiff has established that any current psychological issues can be attributed in whole or in part to the 2015 incident. If I was to place any reliance on Mr Aherne's conclusion, I would first need to be satisfied that he fully understood the circumstances of what was, objectively speaking, a relatively minor road traffic accident coupled with the context of the Plaintiff's pre-existing and other health ailments. I am not so satisfied.

141. The lack of any reference to such psychological issues in the various other notes or records of medical consultations over the years speaks volumes. Furthermore, I note that, while being outside his area of particular expertise, Mr Tansey surveyed the Plaintiff's psychological and physical condition (admittedly at a high level), confirming that the position appeared satisfactory in that regard, and this was not challenged by the Plaintiff. I expect that if Mr Tansey had identified possible issues, he would have recommended that the Plaintiff should be examined by the appropriate expert. Mr Tansey's report (and, indeed, the reports of the other medical experts who examined the Plaintiff over the years) thus provides "negative reassurance" that there was nothing in the Plaintiff's demeanour which caused them to suspect that a psychological referral was warranted in the years prior to 2023. I am not suggesting that, as an orthopaedic surgeon, Mr Tansey would have any expertise required for a mental health assessment, but he and the other experts were experienced in their respective fields and I expect they would have flagged the issue, if they considered that a psychiatric assessment was merited.

Quantum

142. The Defendant submitted that, in Book of Quantum terms, the right shoulder injury was most significant. Noting the shoulder issues before the incident, it submitted that the injury should be categorised as "moderate" (suggesting damages in the range of €22,000 to €60,900), that the injury lay at the lower end of the scale, that any suggestion of psychological injury had no merit - the Plaintiff attended numerous medical practitioners since 2015 without any such complaint until symptoms were first explored on a solicitor referral. It challenged the plausibility of the claim as to such symptoms.

143. The Plaintiff agreed with the Defendant's identification of the injury to the shoulder as the primary injury and its categorisation as "moderate" but, citing *Shawcove*, in particular, submitted that the Court ought to "uplift" the quantum to take account of the multiple injuries and that the upper limit of the "moderate" category could be too restrictive.

144. In my view, many of the Plaintiff's current alleged injuries and symptoms are more likely to be attributable to the preexisting degenerative change in his shoulder, and his other physical ailments, including the arthritis which has necessitated to two hip replacements. I accept that the Plaintiff may be experiencing current emotional and psychological problems, but I am not satisfied that these can fairly be attributed to the incident eight years before a psychological assessment was sought. While I have no reason to doubt the sincerity of the views expressed by the authors of the various medical reports as to the extent to which the Plaintiff's current physical and psychological injuries are due to the incident, they are necessarily predicated and dependent upon the instructions which they have provided and the documents to which they have reviewed. It is not obvious to me from the reports that they have had the benefit of a sufficiently detailed account of the incident or of the Plaintiff's pre-existing condition, nor, in the circumstances, do they appear to have addressed the way in which the Plaintiff's account of the incident and his injuries have evolved. I might be more persuaded if

it appeared from the face of the reports that there had been a rigorous examination of alternative explanations, including, in particular, the effects of the pre-existing degenerative change, but I am not satisfied from the reports that this was the case. I am also concerned about the quality of the Plaintiff's self-reporting of his injuries, on which the various reports were largely premised. Even if the Plaintiff were genuine in this regard, as I believe he probably was, it still affects the weight to be accorded to the conclusions based on such self-reports.

145. In terms of the *Shannon* criteria, it seems to me that the position is as follows:

a. I regard the episode as traumatic, but less so than it is now characterised by the Plaintiff. His position is difficult to reconcile with the photographs, his son's experience, his delay in reporting to the Gardaí and in seeking medical attention (and then only on his solicitor's advice). The distress attributed to the incident has increased over the years, but I do not consider that that is fairly attributed to the incident itself.

b. I am not convinced that the Plaintiff suffered acute pain and discomfort or lack of dignity in the immediate aftermath of the incident. He did not require hospitalisation at the time and chose not to avail of physiotherapy over years, despite the repeated advice to do so. If the pain had been more acute, he might have come to a different conclusion.

c. The Plaintiff has had GP and consultants' visits over the years (many for litigation, rather than treatment, purposes). There has been no surgical intervention or treatment other than pain relief, including a number of injections over the years. There has been no need to attend a rehabilitation facility.

d. The Plaintiff has remained capable of independent living at all times. There was a reference in one expert report to difficulties with cleaning up after going to the toilet, but the evidence does not suggest a major issue save for some limited impact on the Plaintiff's driving and some of his hunting activities.

e. I have disregarded how long the Plaintiff may have been out of work in the light of the abandonment of the loss of earnings claim. In any event, although there were broad assertions, the evidence did not justify specific conclusions.

f. Although it has been suggested that the Plaintiff's relationships have suffered, the Plaintiff has not satisfied me that any such experience was the result of the incident.

g. Very limited treatment, therapy and medication was required or availed of – other than occasional injections over the years or other forms of pain relief. These may have been required in any event due to the preexisting or independent ailments. Conversely, the Plaintiff has failed to address his physical and psychological injuries by attending physiotherapy and counselling. The subordination of certain medical treatment, such as his hip replacements (which, admittedly are of limited relevance to these proceedings) to the Plaintiff's hunting activities is not entirely insignificant.

146. I accept the Defendant's submissions that the appropriate guidance from the Book of Quantum is that this should be classified as, principally, a moderate soft tissue shoulder injury, with a recommended range of €22,000 to €60,900. I also consider that the injuries to the shoulder and upper arm would fall at the lower end of the applicable range.

147. In summary, I accept that the Plaintiff has experienced, and may continue to experience, pain and suffering due to the incident and that it exacerbated existing injuries to some degree, but I am not satisfied that he has established that the pain and suffering which is due to the incident or its likely future effects on the Plaintiff's future enjoyment of life are or will be as severe at the Plaintiff maintains. The Plaintiff did not appear to suffer significant consequences at the time of the incident. I am not convinced that many of the subsequent symptoms of which he complains are due to the incident to a material degree. Nor has the Plaintiff undertaken the treatment which would be warranted if the injuries were as serious as he maintains.

148. Accepting the right shoulder injury as the most significant for Book of Quantum purposes, I consider that the Book of Quantum approach to multiple injuries is appropriate in this case. I would have been inclined to make an award at the lower end of the recommended range. However, in order to make some allowance for the Plaintiff's other, lesser physical injuries (and for any psychological issues to the limited extent that they are related to the incident) and to allow for the possibility that the Plaintiff's preexisting injuries may well have been exacerbated to a limited extent as a result of the incident (albeit not to the extent for which the Plaintiff contends), I will increase the total pain and suffering and general damages award to €45,000 to cover both past and future pain and suffering due to the incident.

Conclusion

149. Accordingly, for the reasons outlined I consider and direct that: (a) the Defendant's s. 26 application should be dismissed; and (b) judgment should be entered for the Plaintiff, with special damages as agreed, and I will award €45,000 by way of general damages, past and future pain and suffering and any aggravation of the Plaintiff's pre-existing condition.

150. The parties may furnish written submissions (of 3,000 words or less), to be furnished within 14 days, as to costs, including as to whether the issues raised on the s. 26 application and on cross-examination should affect the exercise of the Court's discretion as to costs, and the matter will be listed on 21 November 2024 to deal with any outstanding issues.