Neutral Citation: [2015] IEHC 264

THE HIGH COURT

[2010 No. 410 P]

BETWEEN

LUKASZ WALISZEWSKI

PLAINTIFF

AND

McARTHUR AND COMPANY (STEEL AND METAL) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 24th day of April 2015

Background

1. The plaintiff was born on the 16th March 1981, is a Polish national, and at the time of the institution of these proceedings resided at 55 Raheen Road, Springfield, Tallaght, Dublin 24.

2. In 2007 the defendant was one of the largest suppliers of steel for the construction industry in Ireland. It's warehousing, storage and distribution operations were carried out from two premises; one at Ballymount and the other at Blessington, County Wicklow.

3. When the plaintiff left school at the age of eighteen he did his national service and following that he trained to be a truck and forklift driver. In 2005 he was unemployed and living in Posnan, Poland. As a result of a contact from a friend he came to Ireland looking for work and obtained employment with the defendant in July 2006.

4. When he commenced employment with the defendant, he initially worked at the Ballymount site. His work there was mainly indoors and involved driving a mobile crane and in respect of which he had received training. Having worked for approximately seven months at Ballymount he was transferred to the Blessington site where his duties were principally outdoors. Approximately 80% of his time was spent operating and driving what was described in the evidence as side loaders. Initially he drove a Lancer side loader and subsequently a Jumbo side loader.

5. A full defence was delivered to the plaintiff's claim in these proceedings, incorporating a plea of negligence and contributory negligence on the part of the plaintiff; the essence of which was that the plaintiff was the author of his own misfortune.

Pleadings and discovery.

6. The case made by the plaintiff on the pleadings and opened to the court was that between July 2006 and September 2007 his duties required him to drive one of these side loaders on a constant basis over uneven surfaces for which neither of the side loaders were designed nor intended. The consequence of this was that he was exposed to what was described in the evidence as 'whole body vibration' which, together with the necessity of his having to twist his body in his seat in order to face the lifting forks of the side loader, caused the plaintiff the injuries and loss in respect of which he brings these proceedings.

7. Whilst the plaintiff did not in the general body of the endorsement of claim on the personal injury summons plead any specific accident as such, it was pleaded in the particulars of personal injury that on the 27th September, 2007, that whilst operating a work system which involved his body being constantly twisted in the course of driving over uneven ground, he suffered a seizure of the muscles in his back and as a result of which he fell to the ground. The plaintiff swore an affidavit of verification in respect of the personal injury summons on the 28th of January, 2010.

8. Replies were furnished on the 1st of March 2010 in response to the defendant's notice for particulars dated the 15th of February 2010. This initial reply to particulars was followed by a request for further and better particulars dated the 26th July 2010 and that was ultimately responded to by a reply dated the 27th of January, 2011. A verifying affidavit in relation to the replies was sworn on the 12th May 2011. This was followed by an affidavit of discovery sworn by the plaintiff on the 21st July 2011.

9. The action ultimately came on for hearing before Hanna J. on the 17th of July 2014. Following an objection from counsel for the defendant that the case, as opened, was at variance with the pleadings and the disclosure of another accident involving the plaintiff in late 2010, the trial judge adjourned the case on terms.

10. Further supplemental replies to particulars were furnished and made the subject matter of an affidavit of verification sworn by the plaintiff on the 18th of July 2014.

11. Finally, on the 3rd of February 2015, two days prior to the opening of the case before me, the plaintiff swore a further affidavit for the purposes of clarifying certain matters and proffering an explanation in relation to previous replies which had been given, as well as for the purposes of giving details in relation to a road traffic accident involving the plaintiff which had occurred on the 14th of December 2010. In that road traffic accident, the plaintiff had sustained injuries and had made a claim for compensation in respect thereof. The affidavit exhibited medical reports in connection with that claim and which had been prepared on behalf of the plaintiff by Dr. Jean O'Sullivan and Mr. Esh Kessopersadh.

12. The further affidavit, sworn by the plaintiff on the 18th of July, 2014 following the adjournment of the action, sought to clarify the circumstances of the accident which had occurred on the 27th September 2007 and which had been referred to in the particulars of personal injury. In answer to para. 5 of the initial notice for particulars, the plaintiff had responded by referring the defendant back to the personal injury summons. In the supplemental replies to particulars dated the 27th of January, 2011 and referring to an initial response which had been made to para. 5 of the initial notice for particulars, the plaintiff stated:-

> *"The plaintiff cannot specifically point out any one particular incident which caused the injuries. The plaintiff was required to use a side loader over a long period, and continuous usage of the side loader over rough ground over a period of time*

damaged and weakened his back. In addition, the consistent repetition of work and strain to his back of the manipulations required of him while using the side loader damaged and weakened his back. On the 27th September 2007, the plaintiff was lifting wood onto steel and then lifting steel onto wood, etc. building up a pile involving steel and wood. It was in the course of doing this job, which involved the manual lifting of wooden beams, that the plaintiff's back went into spasm and the injuries were made manifest to him.

For the sake of clarity, no case is being made to suggest that the weight of the wooden beams would have caused him injury but for the damage and weakness in his back which had been caused by the continuous use of the side loader in the manner described."

After a lengthy trial and at the conclusion of the evidence, counsel on behalf of the defendant invoked the provisions of s.26 of the Civil Liability and Courts Act 2004.

The Law

13. Given the nature of the application and the circumstances of the case pertinent to this issue and to which I will refer in this judgment, it is considered appropriate in the first instance to set out the full text of the section here.

"26. (1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or introduces, or dishonestly causes to be given or adduced, evidence that –

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

(b) he or she knows to be false or misleading, the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

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

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

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

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

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

(4) This section applies to personal injuries actions –

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

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

14. By virtue of the Civil Liability and Courts Act (Commencement) Order S.I. No. 544 of 2004 a number of the sections of the Act, including s.26, came into force on the 20th of September 2004. By the same Statutory Instrument other sections including s.14 came into force on the 31st March 2005.

15. The provisions of s.26 have been considered by the court on a number of occasions since they became law.

16. This section is by its terms confined to plaintiffs in a personal injury action. It is a provision which places in the hands of a defendant a weapon to attack and destroy a plaintiff's case where evidence in any material respect which the plaintiff knows to be false or misleading has been given by the plaintiff, or where the plaintiff dishonestly causes such evidence to be given or adduced and, when successfully invoked, there are serious and potentially penal consequences for the plaintiff. Accordingly, the provisions of the section must receive and be given a strict construction.

17. The burden of proof under the section rests with the defendant who must satisfy the requirements on the balance of probability. See *Ahern v. Bus Eireann [2011] IESC; 44 Meehan v. BKNS Curtain Walling Systems Ltd and Another [2012] IEHC 441; and Salako v. O'Carroll [2013] IEHC 17.* The purpose of this section is to deter and disallow fraudulent claims. It was not intended to be nor should it be viewed as a vehicle for a defendant to have a plaintiff's claim dismissed in the presence of unexplained circumstances where there are anomalies or inconsistencies in the evidence. See *Dunleavy v. Swan Park Ltd* [2011] IEHC 232. See also the useful review of authorities on the section in the judgement of Smyth J. (HC) in *Nolan v. Mitchell and Anor [2012] IEHC 151.*

18. Where a defendant invokes s.26 of the 2004 Act inappropriately the defendant may be liable for both aggravated and exemplary damages. In this regard Cross J. in *Lackey v. Kavanagh [2013] IEHC 341* stated:-

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

In Philip v. Ryan [2005] 4 I.R. 241 where the Supreme Court held aggravated damages were to be awarded due to the behaviour of the defendants in the preparation and presentation of their case, direct blame was found against the defendant and their legal advisors for improper behaviour in effect hiding information from the plaintiff."

19. Whilst no such case was made against the defendant in that suit, Cross J. continued:-

"Be that as it may, I believe the court must be vigilant in not allowing an unwarranted allegation of fraud or any unwarranted invocation of the provisions of s.26 of the 2004 Act to go unpunished if the circumstances allow."

20. In reply to the defendant's submissions in this case on the invocation of s.26, the plaintiff submitted that it was the evidence which had been given and not the particulars which had been furnished which was relevant. The defendant had done no more than engage in a mud slinging exercise and that it would be a remarkable proposition to suggest that not only should somebody lose their case, but that they should be branded a liar and a fraud because they showed what was described as every single wart and all of the inconsistencies in their case.

21. It was also submitted that consideration had to be had for the fact that the plaintiff was a Polish national who had very poor English and that whilst he had a reasonable level of comprehension, he certainly had difficulty, without the benefit of an interpreter, in conveying information or responses which, for him, would be more complicated such as when giving instruction to solicitors or counsel or speaking with doctors on medical matters. It was submitted that the whole approach of the defendant was one which could be best categorised as attempting to wound but not to strike. A smell was left hanging in the air but no credible evidence was led by the defendant which would warrant the court in making an order dismissing the plaintiff's claim. It was freely accepted that there were inconsistencies, anomalies and unexplained circumstances but, when taken together in conjunction with the plaintiff's language difficulty, the court could not be satisfied that the plaintiff had knowingly given, or caused or permitted to be given, false or misleading evidence in any material respect.

22. Where the court is satisfied on the balance of probability that the requirements of s.26 have been met, then the provisions are mandatory; namely, that the court is required to dismiss the plaintiff's claim. However, both subs. (1) and subs. (2) give the court a discretion not to do so if, for reasons that the court is required to state in its decision, the dismissal of the action would result in injustice being done.

23. The provisions of the section may be successfully invoked if the defendant establishes, on the balance of probabilities, that the evidence which was given by the plaintiff or which the plaintiff dishonestly caused to be given or adduced was known by the plaintiff to be false or misleading. Similar language is used in the provisions of subs. (2) of the section which relates to affidavits of verification sworn under s.14 of the Act.

24. It follows that where such evidence is given which is material to the establishment of any part of the claim, the court is empowered to make an order under the section even where that would result in very severe consequences for a plaintiff and notwithstanding that other aspects of the claim were *bona fide* and established on the evidence . With regard to the exercise of its discretion not to make such an order, it follows from the requirement to state the reason for not doing so that the court must identify the nature and extent of the injustice that would be done to the plaintiff by making such an order. See *Higgins v.Caldark Ltd [2010] IEHC 527; Nolan v. Mitchel [2012] IEHC 151; Meehan v. BKNS Curtain Walling Systems Ltd [2012] IEHC 441*. The latter case is also authority for the proposition that an order may also be made under the section as a consequence of information known to be misleading and given in pleadings, particulars and/or information prior to the hearing.

25. The false and misleading evidence necessary to satisfy the requirements of the section must go to evidence which is material to the plaintiff's claim. Construing the section strictly, it follows that evidence which may be false or misleading, but which is given in relation to some immaterial matter or in relation to matters or other claims which are not the subject of the proceedings, would be insufficient for the purposes of the section. Whilst the plaintiff would not be permitted to benefit from such evidence it would clearly be unjust to dismiss the entirety of the claim in such a case.

26. Evidence which has been given by the plaintiff, or where the plaintiff dishonestly causes another person to give such evidence and which constitutes an exaggeration in some material respect of the plaintiff's claim, also comes within the meaning of the section. See *Farrell v. Dublin Bus [2010] IEHC 327; Higgins v. Caldark Ltd; Nolan v. Mitchell; Meehan v. BKNS Curtain Walling Systems Ltd; and Salako v. O'Carroll, infra.*

27. Having regard to the fact that the defendant invokes not only the provisions of subs. 1 but also the provisions of subs. 2 of s.26 of the Act to have the plaintiff's claim dismissed, and having regard to the potential consequences for the plaintiff in the event of the court acceding to the defendant's application it is, in my view, necessary and desirable to refer in some further detail to the pleadings and discovery made in this case.

28. In the initial reply to particulars dated the 1st of March, 2010 the plaintiff had stated, amongst other things:

(a) He had brought his injuries to the immediate attention of his manager, David Dooley,

(b) That David Dooley had brought him to Dr. James Clarke, Rathcoole, and County Dublin.

(c) That he was scheduled for an MRI scan the 18th March, 2010 followed by orthopaedic review by Mr. Jacques Noel on the 29th April, 2010.

(d) That subsequent to the cessation of his employment with the defendant, he had been largely unemployed but that he had obtained occasional light work.

(e) That he had not had any prior or subsequent injury or accident

(f) That his future employment prospects were dependant on the result of ongoing medical investigation and

(g) That he was granted a medical card in August 2009.

29. By the further replies to particulars dated the 27th January, 2011 the plaintiff stated, amongst other things, that

(a) To the best of his recollection the accident had occurred towards the end of his working day.

(b) That he had reported the accident to David Dooley.

(c) That he had returned to work for a few days after the 27th September, 2007 with the defendant but that apart from that he had not returned to work and was awaiting further medical advice as to whether or not he could consider returning to work.

(d) That he was receiving €440 per week prior to the date of the accident,

(e) That he had received approximately €196 per week in terms of disability.

(f) That he had been without employment for 173 weeks since the incident.

(g) That he was at a net loss from the date of the accident (September 2007) to the date of the replies in the sum of €42,212 being €440 less €196 multiplied by 173.

(h) That he thought he was on unemployment benefit in relation to a claim for disability allowance.

(i) That in the past he had experienced some back pain prior to the 27th of September 2007. In that regard it was stated that he had attended hospital in or about December 2006. Otherwise it was stated that he had had some symptoms of back pain in or about three weeks prior to the incident on the 27th September, 2007. This was broadly similar to the subsequent replies save that it did not specify that he was involved in lifting a wooden beam when his injuries were made manifest to him.

30. The plaintiff swore an affidavit of verification in relation to the replies to particulars of the 1st of March, 2010 and those of the 27th of January, 2011. In that affidavit the plaintiff acknowledged the reference in reply number 17 to his being in receipt of disability benefit was incorrect and that, in fact, he had been in receipt of unemployment benefit. He confirmed that what he had received was unemployment benefits, that he had applied for unemployment benefit, but that this was an error and that his intention was and that the correct application ought to have been for disability benefit. Other than that, however, the plaintiff verified on affidavit that the content of the replies to the supplemental notice for particulars was correct

Discovery.
31. The plaintiff swore an affidavit of discovery on the 21st July, 2011 in respect of four categories of documents which may be summarised as follows:

(i) Any medical attendance notes regarding the plaintiff's first attendance at his GP subsequent to the incident of the 27th September, 2007.

(ii) The letter of referral from the plaintiff's GP to the Accident and Emergency Dept of the Meath Hospital.

(iii) The initial attendance notes regarding the plaintiff's attendance at the Adelaide and Meath Hospital on referral from the plaintiff's GP subsequent to the incident of the 27th September, 2007 and

(iv) All medical notes and records regarding the plaintiff's pre-accident health governing his spinal column for a period of five years prior to the 27th September, 2007.

32. The discovered notes of the plaintiff's GP commence on the 5th February, 2008 and run to the 30th August, 2010. The first reference to an x-ray is on the 12th September, 2009 and the first entry in relation to lower back pain was on the 17th September, 2009. Both in replies to particulars and in his own evidence, the plaintiff stated that he had attended Dr. Clarke, his GP, on the 27th of September, 2007 but that attendance was not, apparently, recorded by Dr. Clarke either on that date or on any date immediately thereafter. The discovered medical notes and records of the Emergency Department of the Adelaide and Meath Hospital show that the plaintiff attended there at 7.35am on the 27th September, 2007 and the triage notes record:-

"Low back pain since 3/52 ago; had same complaint 8/12 ago".

33. The triage time is given at 7:42am. In relation to a question on the form as to previous episodes, the number "3" is inserted. The discovered medical notes and records from the same hospital in relation to the plaintiff's attendance there in December 2006 show that the plaintiff's lumbar spine, sacrum and coccyx were x-rayed on the 4th of December, 2006. No fracture was identified.

34. A letter from the plaintiff's GP of even date refers to the plaintiff being involved in an accident on that day. As to that, the note commenced with a question mark followed by the words "fell two feet off forklift". A similar entry appears in the triage notes. The actual clinical notes, however, specifically refer to the plaintiff falling from the forklift at about 2pm on that date and that the plaintiff fell onto his feet standing up but immediately felt pain in his lower back. He denied falling on his back or having any leg pain.

35. The same medical notes and records show that after discharge from hospital following the accident of the 4th of December, 2006, the plaintiff attended for some eight sessions of physiotherapy. An undated physiotherapist's report, but commissioned on a date after the eight sessions of physiotherapy, states that the plaintiff made good progress until some two weeks prior to the date on which that report was written, when it is stated that the plaintiff reported that he had experienced an acute episode of low back pain with radiation of right leg pain down his thigh. Clinical examination showed spinal movements to be decreased and straight leg raising was recorded at 50 degrees on the right and 75 on the left. Reference was made in this report to the plaintiff's symptoms being aggravated by his job as a forklift driver and of the plaintiff spending long periods of the day in aggravating postures. No other medical notes, records or receipts were discovered.

Other accidents.
36. On the 4th of December 2006 the plaintiff gave evidence that he was getting off a forklift and that, when he put his right foot on the ground and then placed his left foot on the ground, and let go of the forklift handrail, he felt some discomfort like somebody sticking a needle into him. He lost control and fell to the ground. That accident was witnessed by David Dooley. He was a metre away from the forklift and gave evidence that it appeared to him that the plaintiff had missed his footing whilst he was getting down from the side loader and fell to the ground. I accept that evidence as to what most likely happened and that, as a result, the plaintiff suffered a soft tissue injury to his back.

37. Reference has already been made to the undated physiotherapy report prepared by the physiotherapist detailing the treatment afforded to the plaintiff for his injuries resulting from that accident and exhibited in his affidavit of discovery.

38. The plaintiff gave evidence that immediately following that accident he had been brought to Dr. Clarke by Mr. Dooley and that he was then brought to Tallaght Hospital where he was seen in the Emergency Department. Following an x-ray and examination, he was given an injection and underwent a course of physiotherapy. He said he was off work for a couple of weeks and when he came back to work he was assigned to light duties for a month with half hour breaks as and when he needed them. The plaintiff gave evidence

that he thought he'd had around thirteen sessions of physiotherapy in all and that, after he was rehabilitated, he felt that he had substantially recovered in the sense that he didn't really feel any pain or any sort of problem and certainly didn't need any further treatment and was able to carry out his normal duties until the incident on the 27th of September 2007. The accident of the 4th of December 2006 is the same accident which is referred to at para. 15 of supplementary replies to particulars of the 27th of January 2011.

39. On the 14th of December 2010 the plaintiff was involved in a road traffic accident when a car he was driving along a motorway was struck by another vehicle and as a result of which he suffered injuries. The plaintiff brought a claim in respect of his injuries arising as a result of that accident and his solicitors – the same firm of solicitors having carriage of these proceedings – obtained medical reports from Dr. Jean O'Sullivan and Mr. Kessopersadh which were exhibited in the plaintiff's affidavit.

40. Dr. Jean O'Sullivan's report is dated the 19th of July 2011. This report describes the accident in similar terms to the plaintiff's averment in his affidavit and then goes on to describe the injuries sustained and the treatment obtained immediately following that accident. According to this report, the plaintiff sustained a flexion and extension injury to his back for which he attended the emergency department of the Adelaide and Meath Hospital, Tallaght. It is said that the plaintiff was unable to be seen at the time and re-attended on the next day complaining of lower back pain. According to this report, the plaintiff told Dr. O'Sullivan that he'd had back pain since two previous accidents in 2006 and 2007 but that now, following the road traffic accident in December 2010, his back pain was much worse.

41. It appears that the plaintiff was prescribed anti-inflammatory medication and it was noted that he was awaiting an appointment in the back pain clinic scheduled for March 2011. He was referred for a course of physiotherapy. Dr. O'Sullivan recommended that the plaintiff have a follow-up MRI scan. According to this report, the plaintiff's relevant medical history, including previous accidents, were of a fall from a fork lift in 2006 sustaining an injury to his lower back, and a further back injury at work in 2007.

42. Dr. O'Sullivan expressed the opinion that the plaintiff had aggravated the pre-existing back pain which she described as being radicular in nature with occasional paraesthesia down both legs and in both feet. The plaintiff is recorded as telling Dr. O'Sullivan that he was in constant lower back pain with radiation of symptomology and paraesthesia and that he couldn't sit for any more than ten to fifteen minutes without having to get up and walk around. He is also recorded as telling Dr. O'Sullivan that he found it difficult to stand or walk for prolonged periods of time as well as finding it uncomfortable at night. His back pain was very distressing and he was unable to work and, as a result, he was experiencing enormous financial difficulty. He had been unable to participate in any sporting activities since 2006. He had been a keen basketball player.

43. Dr. O'Sullivan examined the plaintiff and reported that he appeared to her to be in distress with bilateral straight leg raising being limited to about ten degrees. His power bilaterally was diminished to about 4/5 because of pain against resistance.

44. Dr. O'Sullivan had recommended a follow-up MRI scan because she was made aware by the plaintiff that he had had an MRI scan prior to the accident in 2010. She was keen to have a follow-up scan for the purposes of differentiating between the findings, if any, on any new scan and those apparent from the previous scan. She noted that the plaintiff was to be followed up in respect of his back pain by Mr. Kiely. However, it became apparent during the course of the trial that the plaintiff did not follow that advice. Mr Kessopersadh ,the plaintiff's orthopaedic surgeon, accepted that he ought to have had a further MRI scan carried out but did not order or advise that this should be done.

45. Finally, it was the opinion of Dr. O'Sullivan that the plaintiff would require intensive physiotherapy. It seems that she wanted to see the results of the MRI scan before giving a final prognosis but she concluded her report by referring to the plaintiff telling her that, as a consequence of his most recent accident, his back pain was much worse.

46. The plaintiff was also seen in respect of that accident by Mr. Kessopersadh, orthopaedic surgeon. He was seen for examination on the 4th of October 2011 and, on the next day, Mr. Kessopersadh prepared a medical report outlining his findings on examination and giving an opinion.

47. This report gives a graphic description of the accident, including the fact that the car which the plaintiff was driving rotated from left to right. According to this report the plaintiff was seen in Tallaght Hospital two or three days after the accident. The plaintiff did not attend his GP. He was first seen by Mr. Kessopersadh on the 7th of September 2011. At that stage the plaintiff was complaining of pain at both trapezius muscles, anterior capsules, the right sterno-clavicular joint, the first sternal bone, the third and fourth sternal bones, the right third costochondral junction and both right and left caracoid processes. Pain was elicited on clinical examination of all of these areas. No examination was carried out to the plaintiff's back. However, this report records the plaintiff as telling Mr. Kessopersadh that, at the time of the accident, the plaintiff was also aware of pain in his back as well as in his neck, shoulders and chest. No record of any complaint concerning the plaintiff having sustained a neck, chest or shoulder injury was made in the report of Dr O'Sullivan. No satisfactory explanation was given by or on behalf of the plaintiff at the trial for this omission.

48. In his opinion Mr. Kessopersadh stated that the plaintiff had sustained severe head, neck, shoulder and chest injuries as well a severe left to right lateral rotational injury to his lower back involving the lumbosacral area.

49. On the face of these reports and in the absence of any explanation for the omission, it appears that when the plaintiff was seen by Dr. O'Sullivan on the 19th of July, 2011, some six weeks prior to being seen by Mr. Kessopersadh, the plaintiff made no complaint to Dr. O'Sullivan of having sustained any injury involving his neck, shoulders or chest as a consequence of the road traffic accident. Had he done so, it seems to me that it is highly unlikely that Dr O'Sullivan would not have noted a complaint of such injuries.

50. Returning to the defendant's notice for particulars dated the 15th of February, 2010, para. 15 sought particulars of any injuries in any accident prior or subsequent to the accident the subject matter of these proceedings. The response to that question in the replies to particulars of the 1st of March 2010 was:-

> *"The plaintiff has not had any prior or subsequent injury or accident."*

51. That reply was corrected by the supplementary replies to particulars of the 27th January 2011 which did refer to the accident of 2006 but made no reference to the accident which had occurred on the 14th of December 2010.

52. In the supplemental replies to particulars of the 27th January 2011 the plaintiff had also stated that, to the best of his recollection, the accident of the 27th September 2007 occurred at the end of his working day. He gave evidence that that incident had occurred in the afternoon shortly before 4pm and that he went to see his GP, following which he went to Tallaght Hospital where an injection was administered and where he was advised to have an x-ray. His evidence was that he left the hospital at about

1.30am. However, evidence was given on behalf of the defendant that the plaintiff had not worked on the 27th of September, 2007 and that, in this regard, he had been docked a day's pay. That evidence is consistent with the record of the plaintiff's attendance at the emergency department of the Adelaide and Meath Hospital on the same date at 7.35am.

53. The plaintiff intimated a claim arising as a result of the road traffic accident which, according to his affidavit of the 3rd of February 2015, was settled in the sum of €28,000 inclusive of costs and of special damages which included a sum of €7,550 in respect of repairs to the vehicle and a sum of €2,000 in respect of depreciation to the vehicle. The material damage claim is consistent with the severity of the impact involved in the road traffic accident described in the report of Mr Kessopersadh.

54. It is apparent from the foregoing that the initial information given at para.15 of the reply to particulars on the 1st of March 2010 (concerning any prior accidents) was wholly incorrect since not only had there been an accident on the 4th of December 2006 but, in that accident, the plaintiff had also injured his back. That much was admitted by the plaintiff who sought to correct that reply when referring to the initial reply to para. 15 in the supplemental replies to particulars. Although the supplemental replies of January 27th 2011 disclose the accident of December 2006, no reference was made to the road traffic accident of the 14th of December 2010. It follows that the amended reply to para. 15 of the original replies to particulars set out in the supplemental reply was also incorrect insofar as it did not make any reference to a road traffic accident or the injuries resulting from that accident, including injuries to the plaintiff's back.

55. It has to be said that in relation to the information given in the supplemental replies to particulars concerning the previous accident in December 2006, the injuries referable to it were furnished voluntarily without any request from the defendant's solicitors.

56. In his affidavit of the 3rd of February 2015 the plaintiff, however, sought to explain the absence of any reference to the road traffic accident in the replies of 27th January 2011 in the following terms:-

> *"Unfortunately, unbeknownst to counsel who drafted the supplemental information provided in January 2010, in addition to the details provided, I had – since the initial replies had been furnished – suffered an accident in December 2010. Because I had already answered the query at 15 in my first reply and because the answer had been accurate at the time, I did not know that it was necessary to provide the information about the subsequent accident and to update the information in relation to subsequent accidents and injuries".*

57. The plaintiff instructed his solicitors to deal with the claim arising as a result of the road traffic accident in May 2011. That claim was settled for €28,000 in respect of general and special damages together with costs in November 2011.

58. The affidavit included an averment that the failure to disclose the occurrence of the road traffic accident in December 2010 before the date when this action was first listed for hearing before Hanna J. in July 2014, arose as a result of an oversight of the plaintiff's solicitors and that, when this was drawn to the plaintiff's attention, he swore that affidavit for the purposes of remedying any default or failure on his part to fully reply to query 15.

59. Given that the plaintiff sought to make a virtue of furnishing the information in relation to the accident of December 2006 by way of the supplemental reply to para. 15 of the original notice for particulars without the request of the defendant, and made for the purposes of clarifying and rectifying a manifestly incorrect answer to a question previously put to him by the defendant's solicitor, the explanation proffered by him in his affidavit of the 3rd of February 2015 for failing to disclose at that time the occurrence of the road traffic accident in 2010 is hardly credible. The plaintiff freely accepts that he did not instruct or advise the solicitors, when instructing them in relation to briefing counsel for the purposes of drafting the supplemental replies to particulars of the 27th January 2011, that he had been involved in a road traffic accident in December 2010.

60. The explanation he gives for this is that because the reply on the 1st of March 2010 was accurate – that is to say that, at the time that reply was given, the response to the query in relation to subsequent accidents was correct; the accident of December 2010 not having taken place – he considered it unnecessary to provide information about the subsequent accident or about any injuries resulting from that accident.

61. Having regard to the fact that the plaintiff was, apparently, instructing his solicitors for the purposes of clarifying and correcting the reply to particulars of the 1st of March 2010 seeking particulars of both prior and any subsequent accidents, the plaintiff could not, in my view, have reasonably concluded that the circumstances of the RTA and the injuries sustained by the plaintiff as a result of it in December 2010 were not material to the particulars and could properly be withheld. Moreover, it would appear on the face of the affidavit of the 3rd of February, 2015 that, as and from the time when the plaintiff instructed his solicitors in respect of the road traffic accident – they being the same solicitors as have carriage of these proceedings – for the purposes of pursuing a claim arising from the road traffic accident, they too must also have known that the information furnished in para. 15 of the supplemental replies to particulars was incorrect. In this regard it is to be noted that the affidavit of verification dated the 12th May, 2011 in relation to the replies to the supplemental notice for particulars, was sworn in or about the same time that the plaintiff now says that he instructed his solicitors to bring a claim in relation to the road traffic accident.

62. On the face of it, therefore, the plaintiff swore an affidavit of verification on the 12th of May 2011 in relation to the supplemental replies to particulars at a time when he knew not only that he had been involved in the accident of December 2010, which involved injuries to his back, but that he had also instructed or intended to instruct those same solicitors to pursue a claim on his behalf in respect of that accident and that, therefore, the reply by way of clarification and correction to para. 15 of the replies to particulars of the 1st of March 2010 and contained in the replies of the 27th January 2011 was wholly incorrect insofar as it referred to and purported to be a reply dealing with a query concerning any subsequent accidents.

63. However, I have little doubt but that had the plaintiff's solicitors been informed in January 2011, as they ought to have been, that the plaintiff had been involved in a significant accident the previous month and as a result of which he had sustained a further injury to his back, that that fact would have been disclosed; especially as those replies were being furnished with a view to clarifying and correcting replies which had been previously given to the same question.

64. It is clear, in my view, on the face of the pleadings, on the discovery made, and the affidavits sworn that the plaintiff withheld from his solicitors information which was relevant to the matters in issue in these proceedings and that the plaintiff did so at a time when he was required to swear affidavits of verification.

65. Whilst the plaintiff did not seek on affidavit to explain his failure to inform his solicitors when instructing them for the purposes of correcting and clarifying previous replies in January 2011 – it being a date subsequent to the road traffic accident – by reference to his poor level of English, counsel for the plaintiff submitted, as has already been referred to earlier in this judgment, that the plaintiff's

ability to communicate in English was in fact very poor, especially when it came to matters involving instructions or communicating on medical matters with doctors. However, insofar as any part of the submissions that relate to comprehension or communication difficulties, or misunderstandings on the part of the plaintiff in relation to instructions given for the purposes of replying to particulars and in the swearing of affidavits of verification might be considered as excusing his omissions, these are rejected by the court, since counsel also advised the court that the solicitor instructing him and being a member of the firm of solicitors representing the plaintiff was Polish and must therefore have been able to communicate with the plaintiff in his own language.

66. Mr. Kessopersadh, in his evidence, stood over the content of his medical report of the 5th of October, 2011 – prepared by him for the purposes of the claim being brought by the plaintiff and arising as result of the road traffic accident. It is quite clear from that report and also from his evidence that the plaintiff sustained injuries to his back as a result of the road traffic accident. On the account given by the plaintiff to Dr. O'Sullivan for the purposes of her report, also commissioned for the purposes of the claim arising as a result of the road traffic accident, the plaintiff's pre-existing back symptoms had been rendered much worse as a result of that accident. Moreover, in the course of the trial it became apparent that following his examination of the plaintiff in October 2011, Mr. Kessopersadh gave the plaintiff a medical certificate for use by him with third parties that he was unfit to work as a result of a severe back injury and that injury was attributable to the road traffic accident. This certificate was not conditional in any way. There was no mention of back injuries referable to the accidents of December 2006 or September 2007; both of which were known to Mr. Kessopersadh when he issued the certificate. It is clear from his reports and the evidence which he gave that if the plaintiff had suffered an injury to his back rendering him unfit to work as a result of the accident of September 2007 in particular, then it should have been referred to in the certificate.

67. The principle injury in respect of which the plaintiff brings these proceedings and arising as a result of the matters complained of by the plaintiff against the defendant relates to his lower back. On the evidence, therefore, the court cannot come to any other conclusion but that the plaintiff, in withholding information from his solicitors in January 2011 in relation to the occurrence of the accident in December 2010 and the injuries – including an injury to his lower back – sustained by him as a consequence of that accident, must have known that the replies which were given, insofar as they related to any subsequent accident, were incorrect and that this was so when he swore the affidavit of verification in relation to those replies. Given the nature of the injuries in respect of which he brings these proceedings, the fact that the plaintiff had reinjured or aggravated back injuries as a result of the RTA was a material matter which ought to have been made known to the defendant. Accordingly, the plaintiff cannot but have known that, insofar as that matter was concerned, the reply was untrue and misleading. It is also apparent that this matter was not disclosed to the defendant prior to the date on which this case first came on for hearing before Hanna J. in July 2014. It was only then and thereafter that the matter came to light and was disclosed.

68. So much for the history of the proceedings in this matter prior to the commencement of the hearing before me.

The Trial
69. It quickly became evident in the course of the hearing that there was a serious question mark over the plaintiff's credibility and that there was also a serious issue which fell to be determined in relation to causation.

Causation of Injuries
70. The case as opened and pleaded by the plaintiff was that whilst the plaintiff had sustained soft tissue injuries as a result of an accident in December 2006, these had essentially resolved by the time that the injuries in respect of which he brings these proceedings became manifest as a result of lifting a wooden beam at work on the 27th of September 2007. It was accepted that any claim in respect of injuries sustained by the plaintiff as a result of the accident in December 2006 was statute barred. However, so far as those injuries were concerned, the plaintiff had all but recovered by September 2007. No case was pleaded nor made against the defendant in either negligence or for breach of duty, including breach of statutory duty, relating to the lifting of the wooden beam in September 2007. It was the plaintiff's case that the injuries which he sustained and the subject of these proceedings were occasioned to him as a result of 'whole body vibration' caused by driving defective side loaders over heavily rutted, rough and uneven ground at the defendant's premises in Blessington. The significance of the lifting episode on the 27th of September 2007 was that that event had merely made manifest the back injury already sustained as a result of the carrying out of his driving duties at work.

71. According to the plaintiff, when he returned to work following the accident of December 2006 he was assigned light duties. He had undergone approximately thirteen sessions of physiotherapy which came to an end when he felt he had no longer any need for such treatment. As far as he was concerned, and after a period of rehabilitation, he was able to return to full work duties. His evidence was that he did not feel almost any discomfort and that even at the end of a day's work he did not really feel any pain or any sort of problems until the 27th of September 2007 when, on lifting a wooden beam, he suffered a severe pain in his lower back causing him to drop the beam and fall onto his knees.

72. It was not the plaintiff's evidence that his work duties in driving the side loaders were causing him any difficulty in the sense of resulting in him experiencing any pain or disability. On the contrary, he was able to perform his full work duties without any difficulty.

73. Consistent with this evidence are the accounts of what happened to him which the plaintiff gave both to Mr Kessopersadh and Professor Damien McCormack; namely, that he had injured his back when lifting a wooden beam at work. It was Mr Kessopersadh's evidence that the disc prolapse and angular tear seen on an MRI scan taken on the 18th of March 2010 were most likely caused by the lifting of the wooden beam. Mr Kessopersadh was not given to understand by the plaintiff that the injuries he claimed that he had sustained in the course of his work for the defendant had any cause other than that recounted and, in particular, no suggestion was made by the plaintiff that his injuries may well have been contributed to or caused by driving side loaders over uneven ground.

74. Professor McCormack's report was submitted in evidence. He saw the plaintiff on the 8th of May 2012. The plaintiff is reported as telling him about the accident in December 2006 and also of the episode in 2007 when, according to his report, the plaintiff was lifting some wooden pallets and that, as he did so, he took the weight of these and fell onto his knees with a sudden onset of low back pain. It was Professor McCormack's opinion that the plaintiff injured himself lifting a heavy beam, apparently in 2007, and that as a result the plaintiff probably suffered an angular tear to one of his lumbar discs at that time.

75. The plaintiff was seen on behalf of the defence by Mr J. P. McElwain on two occasions; the first on the 26th of March 2010 and the second on the 21st of July 2011. At all medical examinations for the purposes of medical reporting the plaintiff was accompanied by an interpreter. According to the first report of Mr McElwain, the plaintiff told him that he was sitting in a cramped position with his knees and hips flexed and with his body rotated to the right and that this had heralded the onset of back pain. This occurred in or about September 2007. He was also given an account that one day he got out of the fork lift and his legs went from underneath him and had bad back pain. This would appear to have been a reference to the accident of December 2006, though not actually identified as such by reference to a date in the report. Mr McElwain was not given the same account by the plaintiff as had been given to Mr. Kessopersadh and Professor Mc Cormack. He gave evidence that he knew nothing about an accident involving the lifting of a wooden

beam. To this extent the account given by the plaintiff to Mr McElwain was more in line with the case being made by the plaintiff that his injuries were caused by whole body vibration and the way in which he was seated and had to work whilst driving the side loaders.

76. Although the MRI scan of the plaintiff's back showed significant degenerative changes, it was Mr McElwain's evidence that these were of long standing. He did not think that the plaintiff had suffered any significant injury as a result of the matters the plaintiff reported to him.

77. Mr Dooley, to whom the plaintiff reported at work, was called to give evidence on behalf of the plaintiff. He described the working conditions at the Blessington depot and in particular the ground conditions over which the plaintiff was required to drive the side loaders. He likened these to the black hole of Calcutta. Mr Tennyson, consulting engineer, gave evidence on behalf of the plaintiff that the side loaders were unsuitable and not designed for use in such conditions and that the use of such side loaders, which were in any event defective, over such ground conditions would have resulted in whole body vibration which would have had an effect on the plaintiff's back.

78. These matters appeared to have been unknown to Mr Kessopersadh or to Professor McCormack. Not surprisingly, therefore, they were not mentioned in their reports nor indeed in the direct evidence of Mr Kessopersadh.

79. Mr Cathal Maguire, consulting engineer, gave evidence on behalf of the defendant. He took issue with the evidence of Mr Tennyson as did Mr McElwain who doubted, from a medical perspective, whether such matters could have given rise to the plaintiff's injuries. In any event, his view of the MRI scan findings was that these were long standing.

80. It was not Mr Kessopersadh's evidence that the plaintiff was experiencing conditions in the course of his work that had the effect of aggravating the soft tissue injury which he had received in December 2006 or otherwise causing injury. If that had been so it would have resulted in pain and about which the plaintiff would have been aware. As it is and consistent with the plaintiff's own evidence, Mr Kessopersadh was given to understand by the plaintiff that he had almost fully recovered from the accident of December 2006 and was essentially asymptomatic by the time he experienced the severe back pain when lifting a wooden beam at work on the 27th of September 2007.

81. About a week or so following the 27th of September 2007, the plaintiff gave evidence that he had informed the defendant of his accident and of his injuries, and that he had sought assistance in the carrying out of his work and also sought a pay rise. According to the plaintiff, the defendant's response to this request was to dismiss him. The defence's case, however, was that by letter dated the 2nd of October 2007 the plaintiff resigned from his employment to take up employment with a Mr Sean Phelan; whom the plaintiff admitted in evidence had encouraged him to bring these proceedings.

The Issue of Credibility

82. In relation to the credibility of the plaintiff which was called into question by the defendant, significant emphasis was laid by the defendant on both the plaintiff's accounts of his medical history or absence thereof and the way in which Mr Kessopersadh had prepared reports for the purposes of these proceedings. It was abundantly clear from the evidence that Mr Kessopersadh was fully aware of the injuries sustained by the plaintiff as a result of the accident in December 2006 as well as those suffered by him as a result of the RTA in December 2010. He prepared reports for the purposes of enabling the plaintiff to bring a claim in respect of that accident and in respect of which Dr O'Sullivan had also reported. Her report was also admitted in evidence. In his report prepared for the purposes of these proceedings, Mr Kessopersadh made no reference to the RTA or to the fact that the plaintiff had sustained an injury to his back consequent upon that accident. His explanation for this when questioned was that he did not want to cause any confusion. It was not suggested that this approach to medical reporting was at the behest of the plaintiff or his solicitors, nor was there any evidence to suggest that this approach was anything other than one originating with Mr Kessopersadh.

83. Whilst it might be perfectly permissible for a physician to adopt such an approach in respect of two completely separate and unrelated incidents or accidents not involving the same or similar injuries or an aggravation thereof, that was plainly not the position in this case. On the contrary, the evidence was that the plaintiff had sustained a significant back injury as a result of the RTA, rendering his back sympomology much worse.

84. In addition to these matters, Mr Kessopersadh issued a certificate to the plaintiff in November 2011 for use by the plaintiff with third parties in connection with his inability to work. According to this certificate, the plaintiff was unable to work due to severe back pain arising as a result of the road traffic accident. It was not conditional in any way and made no reference to either the accident of December 2006 or the incident of September 2007. Mr Kessopersadh's explanation for this was that he had omitted reference to those events through inadvertence. His evidence, and in particular the manner in which the reports prepared by him for the purposes of these proceedings, excluding as they did any reference to the road traffic accident and its consequences for the plaintiff's back, was, in the submission of senior counsel for the defendant, Mr O'Hagan, nothing short of preposterous.

85. In my view, not only was it proper and appropriate but it was necessary that the RTA of December 2010 and its consequences in relation to the plaintiff's back injury should have been fully dealt with by Mr Kessopersadh in the reports prepared by him for the purposes of these proceedings . His failure to do so is reprehensible and is to be deprecated. I reject his explanation that this was due to his desire not to cause confusion. No question of confusing the court, in particular, would arise by a full and frank disclosure of the RTA.

86. Although senior counsel for the plaintiff, Mr Harty, submitted that the plaintiff had laid his case, warts and all including its many inconsistencies, fairly and squarely before the court, that does not, in my view, operate to excuse the plaintiff from the consequences of what has happened prior to and during the trial of this action. I am not satisfied, however, that the approach adopted by Mr Kessopersadh was one connived at or caused by any dishonesty on the part of the plaintiff with regard to reporting of the medical evidence.

87. Regrettably, that is not the end of the matter. Mr McElwain re-examined the plaintiff for the purposes of a medical report on the 21st of July 2011 only three days after a medical examination of the plaintiff by Dr Jean O'Sullivan in respect of the RTA and during which the plaintiff had told Dr O'Sullivan that that had made his existing back symptomology much worse.

88. Mr McElwain gave evidence that in the course of his medical examinations of the plaintiff he was careful to obtain a full medical history including the history of any other relevant injuries or accidents. On his evidence none were disclosed. Quite obviously, at the time of the first medical reporting, the road traffic accident had not yet occurred. However, there could not have been any doubt but that by the time of the second medical examination in July 2011 it had. The claim arising from the RTA was settled before action on medical reports prepared both by Mr Kessopersadh and Dr Jean O'Sullivan. The significance of that accident and its relevance to the plaintiff's back injury cannot but have been to the forefront of the plaintiff's mind at a time when he knew that he was being re-

examined by Mr McElwain on behalf of the defendant and that that examination was being carried out for the purposes of preparing a medical report for the defendant in relation to the plaintiff's claim in these proceedings. No satisfactory explanation for this omission was offered by or on behalf of the plaintiff.

89. Finally, it is considered necessary, in the context of the issue of the plaintiff's credibility, that reference should be made to the medical opinion of Mr McElwain in relation to the plaintiff's injuries expressed in his medical reports prepared for the assistance of the court. It was his opinion, reiterated in his evidence, that there were a huge amount of inappropriate symptoms and signs on medical examination and although Mr McElwain was of the opinion that the plaintiff did sustain a soft tissue injury to his back, he thought the symptoms were totally out of proportion to the injury and that the plaintiff was capable of doing an awful lot more than he let on. He went further and expressed the opinion that a lot of the plaintiff's symptoms were put on.

Decision

90. Having carefully considered all of the evidence and the submissions of counsel, I am satisfied, and find as a fact, that the plaintiff intentionally withheld from Mr McElwain not only the occurrence of the RTA of 2010 but also the consequences of that accident for his back injury. Counsel for the plaintiff laid a considerable amount of emphasis on the fact that the plaintiff was a Polish national with poor English which necessitated that his evidence be given through an interpreter. Mr Dooley, however, a former employee of the defendant and called as a witness on behalf of the plaintiff, gave very clear evidence that as far as he was concerned, the plaintiff would not have been employed by Mr Dooley unless he had had a sufficient competency in the English language and that this was principally so for reasons of health and safety. Whilst there was some question as to the level of his competency, it being submitted on behalf of the plaintiff that it was insufficient for the purposes of enabling him to deal with legal and medical matters, it seems to me unnecessary to determine precisely what his level of competency was at the time of medical examinations since, on the evidence in this case, medical examinations took place with the benefit of an interpreter. That being so, any such language difficulties which the plaintiff may have afford no satisfactory explanation for the plaintiff's omissions, in particular those relating to the RTA.

91. In my view of the evidence, the court is warranted in coming to a conclusion that the plaintiff cannot but have known that at the time when he was being re-examined by Mr McElwain in July 2011, the RTA and the aggravation caused by it to his back injury was a matter material to be known to Mr McElwain and that his failure to make such disclosure was misleading and misled Mr McElwain.

92. Whilst various efforts were made, albeit very late in the day, to clarify and rectify the plaintiff's case immediately before the commencement of these proceedings, that cannot and, in my view, does not excuse the plaintiff's failure to inform Mr McElwain of the RTA or the affect that that had on his back. In my view, the plaintiff's failure to disclose the RTA and its consequences for his back to Mr. McElwain in July 2011 was inexcusable.

93. Furthermore, it is clear from the history of the proceedings in this case up to the time of the commencement of the trial, and recited earlier in this judgment, that such failure was not an isolated occurrence.

94. During the hearing I had the opportunity of observing the demeanour of the plaintiff sitting in court; walking to and from and in the witness box and noted that on many occasions he held his back as if in agony. The plaintiff obtained a medical card in 2009. He had been advised in relation to certain treatments including surgery. His evidence was such that he was so disabled he spent most of his day on a couch looking at television. He was really unable to do anything else. Had he really wanted treatment to deal with such disabling injuries as he claimed he had suffered, he had a way to provide for it but chose not to do so.

95. I accept the evidence of Mr McElwain that, in his view, the plaintiff's injuries were not as serious symptomologically as the plaintiff presents and has presented himself. Mr McElwain's evidence is such as warrants the court coming to the conclusion that the plaintiff was guilty of exaggeration as well as of misrepresentation in relation to his injuries.

96. I accept the evidence of the defendant that following the accident of September 2007 the plaintiff resigned his position to take up a better paid job because the defendant refused his request to give him a pay rise. I reject the plaintiff's evidence that he was dismissed. He was no more credible in this regard than with regard to the injuries the subject matter of these proceedings. In respect of those there cannot, on all the medical evidence now before the court, be any finding of fact other than that any such injuries were exacerbated and aggravated by the RTA of December 2010.

97. Whilst I have formed the view, for reasons already given earlier in this judgment, that the plaintiff ought not to be visited with the consequences of the medical approach to reporting adopted by his orthopaedic surgeon, the same cannot be said for the other matters directly involving the plaintiff and to which I have already referred above. Moreover, there is not, in my view, any proper basis which would justify the court concluding that it would be unjust to dismiss the plaintiff's claim. On the contrary, a manifest injustice would be done by not doing so and, accordingly, I will accede to the application of the defendant under Section 26 of the Act of 2004.

98. Consequently, the decision of the court on the question of causation is, in essence, moot. However, for the sake of completeness, had the court decided to refuse the defendant's application, I would, in any event, have dismissed the plaintiff's claim on that issue alone since I am satisfied on the evidence that, insofar as the plaintiff did suffer an injury to his back in the course of his employment with the defendant otherwise than as a result of the accident in December 2006, this most likely arose as a result of the lifting of a beam by him in September 2007.

99. It is questionable as to whether that incident actually took place on the 27th since, according to the defendant's evidence, which I accept, the plaintiff was not at work on that day and was docked a day's pay. Furthermore, according to the medical notes and records, he attended hospital at 7.35 am that morning. Consequently the accident may have occurred on the previous day. Whether or not that is the case, the plaintiff's own medical evidence attributes his back injury to the lifting of the beam and not to 'whole body vibration' which the plaintiff contended had been the cause of his injuries.

100. There being no case pleaded or made by the plaintiff in negligence or for breach of statutory duty against the defendant in respect of that incident, and having regard to my findings in so far as they relate to the issue of causation, the plaintiff has failed to discharge the onus of proof placed upon him by the law to establish ,on the balance of probabilities, that his injuries were caused by and are attributable to 'whole body vibration' experienced in the course of his employment by the defendant .

101. Having due regard to this judgment, I will discuss with counsel the form of the final orders to be made.