Neutral Citation Number: [2010] IEHC 327

THE HIGH COURT

2004 11668 P

BETWEEN

MARY FARRELL

PLAINTIFF

AND

DUBLIN BUS/BUS ÁTHA CLIATH

DEFENDANT

JUDGMENT of Mr. Justice John Quirke delivered on the 30th day of July, 2010

In these proceedings, the plaintiff claims that she was injured in a road traffic accident on 14th June, 2004, when a bus, owned by the defendant, collided with the rear of her vehicle at the junction between North Circular Road and Dorset Street in Dublin. Her vehicle was stationery at traffic lights when the collision occurred and she stated in evidence that she was propelled forward and then backward and then forward again and suffered a "*whiplash*" type injury to her neck.

A Plenary Summons was issued on behalf of the plaintiff on the 16th July 2004 and a Statement of Claim was delivered on the 31st January 2006 in which loss of earnings were claimed.

Particulars delivered on behalf of the plaintiff on the 13th March claimed ongoing loss of earnings on the grounds that she had been unable to return to her former employment as a housekeeper/ cleaner with Jury's Hotel.

Updated particulars of injuries were pleaded on behalf of the plaintiff and served upon the defendant on 11th January, 2008. They listed a large number of ongoing physical symptoms and restrictions but provided no details in relation to loss of earnings.

Liability has been admitted by the defendant and the case has proceeded as an assessment of damages only.

The trial of these proceedings was listed for hearing on 9th July, 2008.

On 30th June, 2008, which was some ten days before the trial date, an affidavit of voluntary discovery was sworn by the plaintiff in which she purported to discover all of the records, notes and memoranda within her possession or power of procurement relating to her earnings for the five-year period prior to the date of her accident and for the period from 14th June to the date of the trial.

Those documents indicated that she had been in receipt of no earnings (other than Social Welfare benefits) between the date of her injury on 14th June, 2004, and 30th June, 2008.

Less than a week before 9th July, 2008, (the date when these proceedings were due to be heard), the plaintiff's solicitors wrote to the defendant's solicitors enclosing her affidavit of discovery and also enclosing a report from Messrs. Seagrave, Daly & Lynch, dated 2nd July, 2008, wherein it was suggested that, based upon the plaintiff's instruction, she had suffered a loss of income between the date of her road traffic accident and the date of the trial in July 2008, of approximately €71,000.

The report also indicated that, based upon the plaintiff's instructions, she would sustain loss of earnings in the future, ranging between a minimum of €161,452 and a maximum of €343,000, by reason of the injuries which she had suffered in her road traffic accident.

When the proceedings came before this court on 9th July, 2008, the defendant sought and obtained an order adjourning the proceedings in order to enable them to adequately investigate the plaintiff's claim for past loss of earnings in the region of €71,000 and future loss of earnings of between €161,452 and €343,000.

On the 15th March 2010 the plaintiff swore an affidavit in which, *inter alia*, she averred that she had earned €280 in 2007, and a sum just in excess of €3000 in 2008, driving a taxi. Her affidavit was silent in relation to earnings between 2008 and March 2010.

The proceedings have now come before the court for final determination.

The plaintiff has discontinued her claim for future loss of earnings and the case was opened on the basis that she was confining her claim for past loss of earnings to the period of time between the date when she suffered her injuries on 14th June, 2004, and October 2007, when she commenced driving a taxi.

The defendant contends that, whilst the plaintiff did suffer injury in the road traffic accident on 14th June, 2004, she was, in July 2008, prepared to prosecute a claim which she knew to be false and misleading in a number of material respects, and would have continued to pursue that claim in court if the defendant had not been successful in adjourning the proceedings.

The defendant further contends that after the commencement of these proceedings on 13th of July, 2010, the plaintiff has continued to give false and misleading evidence to this court, which she knew to be false and misleading, in respect of her injuries and their consequences for her, and in respect of the loss of earnings which she claims she sustained between June 2004 and October 2007.

The defendant claims that, by reason of the false and misleading testimony which has been adduced by the plaintiff in these proceedings, her claim must be dismissed by the court pursuant to the provisions of s. 26(1) of the Civil Liability and Courts Act 2004.

The plaintiff's evidence

Although she was able to leave her car to inspect damage to the vehicle, the plaintiff was taken the Mater Hospital where she complained of pain and stiffness in her neck and along her left elbow.

On examination, she demonstrated a full range of movement in her neck and had no bruising or lacerations in her neck region. X-rays, taken in the hospital, excluded fractures of the cervical spine, left elbow and left shoulder, and she was placed in a soft cervical collar and her left elbow was immobilised in a collar and cuff support.

She was subsequently reviewed at a fracture clinic and the collar and cuff supports were removed and she was advised to mobilise.

She stated, in evidence that, thereafter, her symptoms worsened and she required ongoing treatment including physiotherapy and pain treatment and therapy including cervical facet joint injections in August 2005.

She stated that she has suffered ongoing pain from the date of the accident which has been sufficient to exclude her from a number of domestic and occupational pursuits.

She said she tries to block out the pain when it gets really bad and takes medication. She said that when the pain is at its highest, she is unable to engage in meaningful activity for two or three days and has to relax and rest. She said that she has physiotherapy every three or four months.

She said that until the summer of 2008, and indeed, thereafter, even up to the present, she has been unable to work fulltime as a taxi driver and has been capable of working only on an infrequent basis.

When asked to explain inconstancies between her pictorially recorded capacity to undertake significant physical work (mowing grass and raising her left arm repeatedly above horizontal) on 21st April, 2006, and the history which she gave to expert medical advisers a very short time earlier, she insisted that, whilst it might have appeared otherwise, she was actually in significant pain.

When challenged, similarly, in relation to her recorded capacity to lift a heavy paint tin with her left arm above the horizontal (contrary to the history which she had related to medical experts a short time earlier), she gave similar replies.

She agreed that she received an award of damages of IR£12,500 to compensate her for injuries which she suffered in a road traffic accident in 1995.

She agreed that she had suffered further injuries in another road traffic accident in 1999, for which she received damages of approximately €18,000.

In addition, she received the sum of €5,620 from the defendant to compensate her for the damage to her car which resulted from the road traffic accident which is the subject of these proceedings.

In evidence, she accepted and acknowledged that the case pleaded on her behalf and provided in writing to the defendant's legal advisers in July, 2008, was based upon the contention that she had not worked at any time between the date of the road traffic accident and the date of the trial in July 2008, and that, in July 2008, she was still incapacitated by reason of her injury.

She agreed that, in making that claim, her legal advisers were acting upon her personal instructions. She further agreed that the claim that she had not worked during that period was not true and that she knew that it was not true when the claim was advanced on her behalf in July 2008.

She agreed that, in October 2007, she had obtained a Small Public Service Vehicle and a Taxi Plate which entitled her to work as a taxi driver. The purchase of her taxi licence, plate and other ancillary documentary requirements had cost her approximately €6,700.

She stated, in evidence, that her sole earnings for 2007 amounted to approximately €280 which she earned whilst driving a taxi between October 2007 and the end of December 2007. She said that her sole earnings for 2008 comprised the sum of approximately €1,940 earned driving her taxi between January and June of 2008, and the further sum of €1,145 earned from the same activity during August, September and October 2008.

She also stated that she had worked in both a supervisory and in an active capacity within a "fish and chip" premises in Harold's Cross in July and December 2007, and in January and June 2008. She stated that had not been in receipt of any payment for that work because she was friendly with the owners of the premises.

She agreed that she purchased a new black Toyota Avensis motorcar in 2005 at a cost of "€25,000 or €26,000". She said that she bought the vehicle on hire purchase, with repayments of €460 per month.

She also agreed that she purchased a new black Toyota Corolla vehicle in 2006at a cost between €26,000 and €28,000 because, she said in evidence, she was having difficulty changing the gear stick in the Avensis vehicle.

She stated, in evidence, that, between 1999 and 2007 she flew to the United States, twice each year, at an approximate cost of between €600 and €800 per flight. Most of her visits to the United States lasted for ten days or thereabouts.

She also stated, in evidence, that she flew to Italy at least once every year on holiday. She said that she stayed in the home of an Italian friend who, she stated, was the owner of the fish and chip premises in Harold's Cross where she claims to have worked in 2007 and 2008 without pay.

She agreed that, between June 2004 and August 2008, she was in receipt of a Social Welfare illness benefit of €148 per week. In these proceedings, she has claimed until July 2008 (the date when her case was first listed for hearing) to have had no other earnings.

When the case was opened on 13th July 2010, it was indicated that the plaintiff was now confining her claim for loss of earnings to the period from the date of her injury until October 2007.

Later in the proceedings, it was indicated on her behalf that she continues to claim damages to compensate her for loss of earnings allegedly sustained from the date of her injury up to the present, arising from the symptoms, which, she claims, continue to interfere with her capacity to drive her taxi.

She has stated, in evidence, that her total earnings in 2007 amounted to €280, and between January and October 2008, amounted to €3,085. No evidence of her earnings from October 2008 to date has been adduced.

Medical evidence

When the plaintiff was examined by Mr. Brazil, on 5th October, 2004, he found that she had experienced a whiplash associated disorder to her neck and a soft tissue injury to her left elbow.

He felt that the left elbow had fully recovered and full, normal function was evident. He did not anticipate any long-term complications in relation to that injury.

He found that she was symptomatic regarding the soft tissue neck injury and was experiencing ongoing painful symptoms and a decreased range of movement in her neck.

He advised her to continue with the physiotherapy which she was then undertaking and he also told her to return to work, indicating that it was important that she should attempt to resume work as soon as possible.

Mr. Brazil thought that there was a significant psychological component to the plaintiff's injuries.

He did not refer the plaintiff to a psychiatrist but noted that she was due to see a pain specialist, Dr. Valerie Pollard.

When he saw her in 2007, he found that her movements had been reduced in all three planes, although they were somewhat better than they had been previously.

He said that she had not told him of the injuries sustained in her earlier road traffic accidents or of the fall which she had suffered in April 2005.

When told that the plaintiff had been recorded mowing without apparent difficulty and pulling the flex of the lawnmower beyond the horizontal without apparent difficulty, Mr. Brazil said that he found this "extraordinary" and that it was not consistent with his examination.

She saw her General Practitioner, Dr. Hickey, in June 2004, August 2004, and on the 30th September, 2004 when she was complaining of continuing pain in the back of her neck after painting a garden fence.

When Dr. Hickey saw her again on 3rd November, 2004 she still had neck pain and on 4th February, 2005, her neck was still painful. However, her complaints were restricted to symptoms in her neck and restricted movements of her shoulders. She indicated that she was having physiotherapy. He prescribed the anti-inflammatory medication, Difene.

On 21st April, 2005, she presented to Dr. Hickey with a history of having fallen down stairs in her home on that day. She complained of having sustained soft tissue injuries to the right side of her body and indicated that it did not make her neck any worse.

Dr. Hickey said that he saw her on 16th June, 2005, when she presented with severe pain in her upper thoracic region, her neck and her left shoulder. On that occasion, she told him she was waiting to see a specialist for injections to her neck.

He said that the last time he examined the plaintiff was on 8th October, 2007. On that occasion, she had limited neck extension and flexion and a very limited turning capacity of the neck to the right side. He considered that those findings would have made taxi driving inappropriate.

He agreed that, when making clinical findings and reaching conclusions, he was totally dependent on the truth and accuracy of what he was told by the plaintiff about her symptoms.

Mr. Hannan Mullett, who is a consultant orthopaedic surgeon, practising in Beaumont Hospital, stated, in evidence, that he saw the plaintiff on 24th April, 2006, in his clinic in the Sports Surgery in Santry.

He said that she reported significant pain which she reported as being "seven to eight out of ten" and when severe, "ten out of ten". He said that, during his examination, he had had the reports of other practitioners available to him and he referred her for nerve conduction studies which were normal.

He said he had not been made aware by the plaintiff that she had suffered other injuries in previous road traffic accidents or that she had fallen down stairs approximately twelve months before he saw her in April 2006.

He said that although the plaintiff told him that she was unable to drive a car when he examined her, he found that unusual, because she had a full range of motion of her shoulder, elbow and wrist.

He said that most of his patients with a similar range of movement would have been able to drive a car. He said that he recorded that she was making complaints of symptoms including pain in her neck and right shoulder. That was why he referred her for nerve conduction studies.

He agreed that the plaintiff's complaints were inconsistent with complaints which she had made five weeks earlier to Mr. Pegun, indicating pain in the midline at the back of her neck spreading to the left shoulder and down her left arm to her middle three fingers.

Mr. David Fitzgerald, who is a physiotherapist, stated that the plaintiff had been referred to him by her employer's doctor. On examination, she had complained of pain radiating to her left arm and what he described as "a myriad of symptoms".

Mr. Fitzgerald saw her on 15th December, 2004, which was six months after her injury and concluded that there was "not the remotest possibility that this lady could tolerate a return to work in her current state". He referred her for pain management treatment by Dr. Valerie Pollard.

Dr. Pollard stated, in evidence, that she first examined the plaintiff on 11th April, 2005, when the plaintiff complained of neck pain radiating to her left elbow which the plaintiff rated as "eight to ten out of ten".

She was aware that the plaintiff was on medication for pain and discovered that an MRI scan of the plaintiff had shown mild spondylotic changes at C5/6.

Dr. Pollard said that she performed cervical facet joint injections on the plaintiff's left side which did not give her any relief.

She said when she saw her again on 20th February, 2006, she detected possible psychological symptoms. She said that if the plaintiff's symptoms were purely physical, she would have had more localised pain rather than generalised restriction.

She felt there were a number of psychological factors contributing to her getting well.

She thought that the plaintiff might be suffering from Post Traumatic Stress Disorder and referred her to Dr. Maguire, who is a psychiatrist. However, Dr. Maguire was of the opinion that the plaintiff was not suffering from Post Traumatic Stress Disorder. Dr. Maguire had suggested to the plaintiff that she should undergo eight or ten sessions of cognitive therapy but the plaintiff had not undertaken that treatment for a variety of reasons.

She said the plaintiff had not told her that she had suffered earlier injuries in road traffic accidents in 1995 and 1999, and had not told her of the fall which she had suffered on the stairs in April 1005.

She agreed that she had referred the plaintiff to a neurosurgeon, Mr. Bolger, who was of the opinion that there was "a fair degree of psychological involvement and overlay" evident from his examination of the plaintiff.

When advised that the plaintiff had been observed cutting her lawn for some forty minutes and emptying a grass box over a party wall, she indicated that this was inconsistent with the plaintiff's account to her that she had difficulty hoovering in her home.

She believed that if the plaintiff could cut grass in the manner recorded, then she should be able to undertake household activities. She stated that she was obliged to take a patient's word when she asked questions and received answers.

Mr. Michael Pegum, who is a consultant orthopaedic surgeon, stated, in evidence, that he examined the plaintiff on 15th March, 2006, on the instructions of the defendant.

She had complained of pain which began at the midline of the back of her neck and spread to her left shoulder and down the arm to her middle three fingers. She had complained of severe pain on the top of her left shoulder on raising her arm or putting it behind her back.

On examination, he found that she could hardly look upwards or downwards, and on trying to raise her left arm, she could not bring it higher than ten degrees below the horizontal or further from the waist on putting her hand behind her back. He expected her symptoms to settle down within six or nine months.

He said he saw her again in April 2008. On that occasion, she was complaining of pain at the back of her neck.

He said that, on examination, he found that her left shoulder had a full range of movement, but she could not raise her right arm more than twenty degrees above the horizontal on this occasion.

He noted, in particular, that when he had examined the plaintiff in March 2006, she had been complaining of pain spreading down her left arm to the middle three fingers, whereas on this occasion, she was complaining of a tingling sensation spreading down her right arm to her fingers, and whereas her left shoulder joint was markedly restricted in movement in 2006, it was normal in 2008, and her right shoulder was markedly restricted. He stated that these complaints were conflicting and inconsistent.

When shown a video recording of the plaintiff cutting grass at her home in April 2006, some four or five weeks after his examination, Mr. Pegum noted that, on one occasion, she was able to raise her arm to a level of one hundred and thirty degrees, which was forty degrees more than had been possible for her on his examination and, on another occasion, to forty-five degrees more than she had demonstrated on examination with him. He noted that she was capable of shaking a grass box in order to empty cuttings at a level of ninety degrees with her left arm.

He stated that, based upon that recording, she had "either made a very dramatic and surprising recovery, or she wasn't as bad as she made out when I saw her".

On cross-examination, he indicated that the plaintiff was "not as bad as she makes out". He said he thought that she suffered a relatively minor injury and that her complaints were not consistent with her injuries. He said that psychological overlay is sometimes used by surgeons as shorthand for exaggeration.

He said the plaintiff's symptoms did not fit in with her history and her claimed injuries. He said that when the plaintiff, on her second visit, complained of symptoms on the right side, he became very suspicious that they were not genuine symptoms.

He said, on balance, that he did not think the plaintiff's symptoms were genuine.

The Law

Sections 14, 25 and 26 of the Civil Liability and Courts Act 2004, were enacted for the purpose of discouraging plaintiffs in personal injuries actions from making false, dishonest and exaggerated claims for damages.

Section 14 of the Act requires all parties to personal injuries actions to swear affidavits verifying the assertions and allegations contained in pleadings.

Section 14(5) of the Act provides that it is a criminal offence for a person to swear a verifying affidavit which is false or misleading in any material respect when the person swearing the affidavit knows that it is false or misleading.

Section 25 of the Act provides that any person who dishonestly causes to be given or adduces (or dishonestly causes to be adduced)

evidence in a personal injuries action which is false or misleading in any material sense, shall be guilty of an offence.

Penalties for such offences include fines not exceeding €100,000 and/or imprisonment for a term not exceeding ten years. A summary conviction in the District Court can result in fines not exceeding €3,000 or imprisonment for a term not exceeding twelve months or both.

Section 26 of the 2004 Act provides as follows:

> "26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that-
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> (a) is false or misleading, in any material respect, and
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> (b) he or she knows to be false or misleading,
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> 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.
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> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that-
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> (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."

It has been contended on behalf of the defendant that the plaintiff in these proceedings has given or adduced evidence (a) which is false and misleading in a material respect and (b) which she knows to be false and misleading.

It is, accordingly, contended that the plaintiff's claim should be dismissed under the provisions of s. 26 of the Act.

Since the section is mandatory, the court, if it is satisfied that the plaintiff has given or adduced evidence which is false or misleading in any material respect, must dismiss the plaintiff's claim unless it concludes that the dismissal of the action will result in an injustice being done.

The purpose of the section is clear. As I have already indicated, it has been enacted in order to discourage false and exaggerated claims, and to express the community's disapproval of such dishonest behaviour.

The implications for a plaintiff of a dismissal on such grounds are obvious and grave and a defendant seeking dismissal on the grounds that the claim comes within the provisions of s. 26 of the Act, undertakes a significant burden of proof. However, the burden is not as weighty as the burden which rests upon the State during the prosecution of a criminal offence.

The standard of proof required to discharge the onus of proving that a plaintiff has knowingly given or adduced false or misleading evidence, is not the criminal standard of proof "beyond a reasonable doubt" applicable to criminal offences such as fraud, perjury or offences contrary to the provisions of section 25 of the 2004 Act.

The application of such a standard would, for practical purposes, render s. 26 of the Act ineffective and unworkable.

The appropriate standard of proof has been identified by Hamilton C.J. in *Georgopoulos v. Beaumont Hospital Board* [1998] 3 I.R. 132 (at pp. 149-15) in the following terms:

> ". . . The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature. It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation. This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities', bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

In *Banco Ambrosiano SPA and Others v. Ansbacher & Company Ltd. and Others* [1987] I.L.R.M. 669, the Supreme Court (Henchy J.) discussed the standard of proof in cases involving fraud in the following terms:

> "Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the court is satisfied on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find."

I would respectfully adopt those two statements of the law as identifying the standard of proof applicable to the findings which I am required to make in these proceedings.

Applying that standard to the facts of the instant case, I take the view that an adverse finding under s. 26 of the Act, has such grave implications and consequences for a plaintiff that the court should not make such a finding unless it is satisfied that it is highly probable that the evidence which has been given or adduced by the plaintiff has been false or misleading in a material respect.

The defendant must, therefore, discharge the onus of proving, as a high probability, that the evidence which has been given or adduced by the plaintiff has been false or misleading in a material respect. If that onus is discharged, the court must dismiss the plaintiff's claim unless otherwise satisfied, as required under the provisions of the section.

Facts

The following facts have been established and are not in contention:

1. The plaintiff suffered an injury on 14th June, 2004, as a result of the defendant's negligence. She commenced these proceedings in the High Court claiming damages to compensate her for her injuries and consequent losses.

2. In an affidavit sworn by the plaintiff on 30th June, 2008 (nine days before the date when these proceedings were listed for hearing), the plaintiff discovered a number of documents. Those documents were discovered in order to support her contention that she had been in receipt of no earnings (other than Social Welfare benefits) between the date of her injury on 14th June, 2004, and the 30th June, 2008.

3. Between 2004 and 2007, the plaintiff travelled to the United States on approximately eight occasions for holidays averaging approximately ten days. Most of the flights for these trips were procured at a cost in the region of €600 to €800. She had accommodation and other costs associated with those holidays.

During the same period, she travelled to Italy on approximately four occasions. She stated that she travelled on a low cost airline and had little or no accommodation or other holiday costs.

4. In 2007 and 2008, on occasions which have not been identified, the plaintiff worked in a "fish and chip" premises in Harold's Cross, deputising for the owner of the premises. She supervised the activities of the establishment and, apparently, also assisted in the cooking and catering work. She said she undertook this work occasionally whilst the owner of the premises was on holiday.

She said that she had not been paid in respect of that work. She said the owner of the premises was an Italian friend who provided her with accommodation without charge during her holidays in Italy.

5. On 9th July, 2008, the plaintiff came to the High Court with the intention of giving evidence in support of a claim for damages which included loss of earnings from the date when she suffered her injury on 14th June, 2004 and the date of the trial of the proceedings in July 2008. Her claim was based on the contention that she had no earnings from any source other than social welfare benefits during that period. She also came to court on 9th July, 2008 with the intention of giving evidence in support of a claim for alleged future loss of earnings, ranging between €161,452 and €343,000.

She knew at that time that she had, in fact, been in receipt of earnings from taxi driving in October 2007 and thereafter.

6. At the request of the defendant these proceedings were adjourned on the 9th July 2008 to enable further investigation of the claim for earnings. A few weeks later, the plaintiff discontinued claiming Social Welfare benefit. She stated, in evidence, that she did so because she had "made a decision to go completely full-time with the taxi"

7. When the case was opened on 13th July 2010, it was indicated, on the plaintiff's behalf, that she was claiming damages for loss of earnings confined to the period from the date of her injury until October 2007, and that she wished to abandon her claim for future loss of earnings.

On the second day of the trial, it was indicated on her behalf that she wished to reinstate her claim for past loss of earnings from the date of her injury up to the present but was not seeking to reinstate her claim for future loss of earnings.

8. The plaintiff was awarded of damages of IR£12,500 in 1995 to compensate her for injuries to her neck and back which she suffered in a road traffic accident.

She was awarded damages of approximately €18,000 in 1999 to compensate her for injuries to her low back which she suffered in another road traffic accident.

She neglected to tell Mr. Brazil, Mr. Mullett and Dr. Pollard that she had been involved in those traffic accidents and had suffered those injuries.

She also neglected to tell those medical practitioners that she had suffered a fall down a stairway in April 2005 (although she stated, in evidence, that this fall did not exacerbate the injury which has given rise to these proceedings).

9. The symptoms which the plaintiff described to Mr. Brazil and to Mr. Pegum in March and April 2006, and the restricted movements about which she complained on those occasions, were wholly inconsistent with the physical capacity and range of movements which she demonstrated and which were recorded on 16th April, 2006, and 21st April, 2006. She gave conflicting accounts to Mr Pegum on different dates in relation to the location of her symptoms.

FINDINGS

The plaintiff has been portrayed as a naïve, unquestioning person, uninformed and unaware of appropriate legal procedures who, unwittingly, failed to disclose earnings, which she considered to be unimportant and irrelevant to the claim which was being advanced on her behalf. I reject that portrayal.

At all material times, the plaintiff has been advised and represented by a solicitor and by counsel. She has also had other expert professional advice and assistance during these proceedings.

In particular, she had expert professional advice and assistance when it was made clear to her, in July 2008, that the defendant was investigating her claim in order to establish whether or not it was based upon false and misleading information and evidence.

I have little doubt that her legal advisers explained to her the gravity of the defendant's investigation and the consequences for her of an adverse finding against her resultant upon it. If the defendant's contention is unfounded, as is alleged, the plaintiff's response ought to have been a determined rebuttal (possibly marked by annoyance and indignation).

It is inconceivable that her professional advisers would not have told her to take whatever steps were necessary to vindicate her reputation and to be in a position to disprove any serious allegation made against her.

It is highly unlikely that they would have failed to advise her that it was necessary for her to assemble all documentary and other evidence necessary to disprove any allegation of impropriety made by the defendant. No such evidence was forthcoming and no such

evidence was adduced during these proceedings.

It is very difficult for this court to accept that the plaintiff would have "thrown away" records of her earnings from taxi driving between July 2008 and July 2010, as she indicated she had done. Those records related to a claim for loss of earnings which was expressly reinstated on the plaintiff's behalf during the trial. They related to a period of time during which the plaintiff and her advisers were well aware that the plaintiff's claim was being investigated by the defendant on grounds of potentially misleading information and evidence.

The plaintiff did not choose to challenge the defendant's suggestion that her claim for earnings was dishonest. Instead, she discontinued claiming her social welfare benefit within a few weeks after 9th July, 2008, on the grounds that she had "made a decision to go completely fulltime with the taxi" and abandoned her claim for loss of earnings from October 2007 to 9th July 2008 (before reinstating it during the trial). She abandoned her claim for future loss of earnings altogether.

That decision is incomprehensible if the plaintiff's evidence that she was incapacitated and unable to earn any meaningful income throughout 2007 and 2008 is to be believed. It is also inconsistent with her testimony in these proceedings as to her driving capacity and earning capacity between July 2008 and the trial of these proceedings in July 2010.

The defendant has pointed to the plaintiff's lifestyle between 2004 and 2008, and in particular, her capacity to travel overseas on holiday, and to purchase new motorcars. It is suggested that her lifestyle has been inconsistent with a person whose sole earnings amounted to €148 per week by way of Social Welfare benefit.

The defendant also questions the plaintiff's credibility in relation to catering work which the plaintiff undertook and for which she claimed she was not paid at any time.

The defendant points to the established fact that the symptoms which the plaintiff described to Mr. Brazil and Mr. Pegum in March and April 2006, and her seemingly restricted movements on those occasions, were inconsistent with the physical capacity and range of movements which Mr. Price recorded on 16th April, 2006, and 21st April, 2006.

It is contended on behalf of the plaintiff that the medical evidence adduced includes evidence that some of the plaintiff's symptoms were psychological rather than physical in nature and that a number of the medical expert witnesses have suggested a "psychological overlay" as the possible cause for her symptoms.

In summary, it is contended that the plaintiff believes that her symptoms are more severe than they actually are and that, in consequence, she has not knowingly given or adduced false or misleading evidence in these proceedings.

I accept the evidence of the various medical witnesses who testified and who made it clear that it is impossible for any one person to be certain of the state of mind of another person at any particular time.

However, the test which this court must apply is not whether the court can be certain of the plaintiff's state of mind at relevant times during the course of these proceedings. The court must raise inferences from facts which are admitted or proved and make findings on the balance of probabilities which are proportionate to the nature and gravity of the issue to be investigated.

It is inescapable that the plaintiff adduced or caused to be adduced misleading evidence when she discovered documentary evidence in an affidavit which she swore on 30th June, 2008. I do not accept the explanation offered on her behalf that she did not understand the relevance of her earnings as a taxi driver at that time. I have explained why that is so.

It has been contended that the earnings between October 2007 and June 2008 which the plaintiff failed to disclose were so small that, to dismiss her claim under the provisions of s. 26 of the 2004 Act on that account would be disproportionate and unfair to the plaintiff and would result in an injustice being done. I cannot accept that contention.

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. The provisions of the 2004 Act, and in particular, the penal provisions of s. 26 of that Act, were, or should have been, to the forefront of the minds of all legal practitioners at the relevant time.

It is therefore highly probable that the plaintiff, with the benefit of experienced professional advice, gave or adduced evidence which she knew was misleading. It is also probable that she did so in order to support the claim which she knew was being advanced on her behalf that her injuries had deprived her of any income whatever from the date of her accident until 30th June, 2008 and thereafter.

If successful, that claim would have resulted in an award to her of significant six figure proportions. It is highly probable that she knew that.

It follows that I am satisfied that the plaintiff gave or caused to be given misleading evidence in these proceedings which she knew to be misleading in a material respect and in support of her claim for damages.

That finding, on its own, requires that the court must dismiss the plaintiff's claim unless the dismissal of her action would result in an injustice being done.

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.

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 the 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.*

I find that no credible explanation has been provided by the plaintiff for the undisputed fact that she abandoned claims for very large sums of money when advised that she was being investigated by the defendant.

I further find that no credible explanation has been offered for her failure to adduce any documentary or other evidence to support her claim for loss of earnings and to contest the defendant's allegation that her claim has been false and misleading although she has known for some time that it has been challenged on those grounds.

I further find that no evidence has been adduced which adequately explains the plaintiff's comfortable lifestyle between 2004 and 2008 at a time when she has claimed to have been incapable of earnings and dependent upon social welfare benefits.

Finally I find that no adequate explanation has been provided for the fact that the plaintiff failed to disclose relevant matters to her medical experts gave conflicting accounts to Mr Pegum in relation to the location of her symptoms and was recorded demonstrating physical capacity and movement wholly inconsistent with symptoms described to medical practitioners.

It follows that the plaintiff's claim must be dismissed and I so order.