

**THE HIGH COURT**

**2004 1440 P**

**BETWEEN**

**PATRICK HIGGINS**

**PLAINTIFF**

**AND**

**CALDARK LIMITED**

**AND**

**MICHAEL QUIGLEY**

**DEFENDANTS**

**JUDGMENT of Mr. Justice John Quirke delivered on the 18th day of November 2010**

1. The plaintiff, Patrick Higgins, claims damages for personal injuries suffered and losses allegedly sustained by him as a result of negligence on the part of the defendants.
2. At all times material to this case, he has been in the employment of the first named defendant, which is a limited company largely owned and operated by his brother, John Higgins.
3. He suffered serious injuries on 19th March, 2002, when his coat sleeve became entangled in the shaft of a tractor which he was examining on behalf of his employer and which was the property of the second named defendant.
4. The injuries which he suffered were very severe and included a de-gloving injury to his right thumb and to the dorsum of his right hand. He also suffered a rupture of the flexi digitorum profundis of his little finger and a subluxation of his right acromioclavicular joint. Despite significant emergency surgery, his right thumb required amputation.
5. The first named defendant has indemnified the second named defendant in respect of the plaintiff's claim and costs.
6. As I have indicated, the plaintiff claims that his injuries and consequent losses resulted from negligence on the part of the defendants.
7. The defendants deny that the plaintiff's injuries and losses resulted from any negligence on their part, and claim that if the plaintiff suffered any injuries or loss, then they were caused or contributed to by his own negligence.

**Liability**

8. The plaintiff had suffered a similar injury some years earlier, in circumstances which were quite similar to those which have given rise to these proceedings. On that occasion, he was bending or crouching behind a lawnmower when it was started unexpectedly, and he suffered a severe injury to his left hand. He recovered damages for that injury from the person who negligently started the lawnmower.
9. His evidence outlining the circumstances which gave rise to his injuries has not been challenged by way of any evidence adduced on behalf of the defendants.
10. I am satisfied, therefore, that his injuries and the consequent loss which he has suffered were primarily caused by the negligence of the defendants' servant and agent (another brother of the plaintiff) who activated a revolving shaft when it was unsafe and negligent to do so.
11. I am satisfied also, however, that the defendants have established, by way of cross-examination of the plaintiff and of Mr. Conlon (who is the engineer who testified on behalf of the plaintiff), that the plaintiff contributed to his injury by failing to keep a proper lookout, in the circumstances, and by positioning himself close to a revolving shaft which he knew, or ought to have known, could be activated and was capable of causing him injury.
12. Since he had suffered an earlier hand injury in very similar circumstances, he had a particular reason to take care for his safety when he was bending at the rear of a mechanical vehicle which also was capable of causing him injury.
13. I find, therefore, that 75% of fault for the event which caused the plaintiff's injuries must be attributed to the defendants and 25% to the plaintiff.

**Application for dismissal**

14. The defendants have contended that the plaintiff has adduced evidence in these proceedings and has sworn an affidavit under s. 14 of the Civil Liability and Courts Act 2004, which has been false and misleading in a material respect. It is further contended that the plaintiff knew this when he was adducing the relevant evidence and swearing the relevant affidavit.
15. The defendants therefore contend that the plaintiff's claim should be dismissed, pursuant to the provisions of s. 26 of the 2004 Act, and have made an application for dismissal of his claim on that ground.

16. Section 26 of the Act, provides as follows:

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

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

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

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

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

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

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

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

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

18. It is contended on behalf of the plaintiff that the plaintiff did not knowingly include within his verifying affidavit any evidence which was false or misleading in a material respect, but it is argued that if he did so, the court should not dismiss his claim because a dismissal "*would result in injustice being done*" within the meaning ascribed to that term by sub-section (b) of s. 26(2) of the 2004 Act.

19. In *Mary Farrell v. Dublin Bus/Bus Átha Cliath* (Unreported, 30th July, 2010), this court adopted the standard of proof in respect of a finding of fraud in civil proceedings as the appropriate standard of proof required to prove that a plaintiff has knowingly given or adduced false or misleading evidence for the purposes of s. 26 of the 2004 Act.

20. The standard in respect of a finding of fraud in civil cases has been identified by the Supreme Court (Henchy J.) in *Banco Ambrosiano SPA and Others v. Ansbacher & Company Limited and Others* [1987] I.L.R.M. 669, as 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."*

21. In *Farrell v. Dublin Bus (Supra)*, this court additionally took the view that an adverse finding under s. 26 of the 2004 Act, has such grave implications and consequences for a plaintiff that the court should not make such a finding unless it is satisfied as a high probability that the evidence adduced or given by the plaintiff has knowingly been materially false or misleading.

22. In his Statement of Claim, delivered on 9th July, 2004, the plaintiff claimed that he had suffered loss of earnings as a result of his injuries and would furnish particulars of those losses at a later date.

23. In Replies to Particulars dated 4th February, 2005, the plaintiff claimed *inter alia* (i) that prior to 2002, he had been employed as a subcontractor to the first named defendant with monthly earnings amounting to €2,891.09 net and (ii) that he had commenced employment with the first named defendant in February 2002, and had received remuneration for his first month's work (amounting to payments of €3,174.35 by cheque, and €1,269.74 in cash) prior to his injury.

24. Subsequently, the plaintiff's solicitors furnished actuarial reports to the defendants' solicitors, outlining the plaintiff's claims for (a) loss of earnings and (b) ongoing medical and assistive aid costs.

25. By letter dated 12th June, 2008, the defendants' solicitors wrote to the plaintiff's solicitors, referring to a revised actuarial report in the following terms:

*"... it is suggested in your letter that the report has been amended to reflect the plaintiff's post-injury earnings. We would respectfully suggest that there is nothing in the report to indicate what the plaintiff's post-injury earnings have been. We have made a number of requests to be furnished with this information. Please confirm by return that you will, on the basis of urgency, furnish us with the details of the plaintiff's earnings from every source, naming the sources and the amounts paid to him since the date of the accident."*

26. The plaintiff's solicitors responded by letter dated 9th December, 2008, stating expressly that the plaintiff had, "*since May 2005 . . . worked periodically with the defendant*" and had in February 2008 "*. . . ceased his employment with the defendant company.*"

27. Details of payments allegedly paid to the plaintiff by the first named defendant between January 2005 and February 2008, were included within the letter which also claimed that, subsequent to his injuries, he had also achieved earnings from his farm which had produced a profit for him of approximately €5,000 per annum.

28. In fact, the plaintiff had been paid a significant salary and associated expenses by the first named defendant during 2002, 2003 and 2004. No reference to or disclosure of that income was made in the letter (or later within the plaintiff's pleadings).

29. The letter also stated that, "*the content of this letter should be read in conjunction with the Actuary Report of Mr. John Byrne . . . which was furnished to you under cover of letter dated 11th June, 2008, by way of updated particulars of special damage.*"

30. The actuarial report (dated 18th September 2007) of Mr. John Byrne which was referred to in the letter stated, *inter alia*, that, "on the basis of the information supplied to me, I estimate that if the plaintiff had continued with his pre-accident work, his net earnings from 19th March, 2002, to date, would have amounted to approximately €150,500. This would be reduced by net earnings received since the accident and by deductible Social Welfare benefits received up to 19th March, 2007 . . ."
31. Mr Byrne's report also contained calculations which indicated that the plaintiff was likely to incur future costs totalling €137,415 for home and gardening help and for items such as grab rails, soap dispensers, electric toothbrushes, wet towels shaves, slip-on shoes, trolleys, banisters, bottle openers, peelers, painting and decorating, and ongoing Automobile Association membership.
32. This additional alleged future loss was based upon a report prepared by an occupational therapist, Ms. Margot Barnes.
33. An Affidavit of Verification was sworn by the plaintiff on 9th of December 2008.
34. In that affidavit, the plaintiff expressly referred to the letter sent by his solicitors to the defendants' solicitors dated 9th December 2008, and to the actuarial report of Mr. John Byrne which accompanied that letter.
35. In the affidavit he averred that, *"the assertions, allegations and information contained in the said Notice of Particulars and Special Damage and the report of Mr. Byrne, which are within my own knowledge, are true. I honestly believe that the assertions, allegations and information contained in the said Notice of Particulars of Special Damage and report of Mr. Byrne which are not within my own knowledge, are true.... I know that it is an offence to make a statement in this affidavit that is false or misleading in any material respect and that I know to be false or misleading"*.
36. During the course of cross-examination in these proceedings, the plaintiff admitted (a) that he had received payments totalling €19,620 for forty-seven weeks work allegedly carried out by him for the first named defendant during 2002; (b) that he also had received payments of €2,547 for work allegedly done by him for the first named defendant for a period of weeks in 2003, and (c), the he had received payments totalling €21,250 for an alleged thirty-five weeks work done on behalf of the first named defendant in 2004.
37. He also agreed that the first defendant provided him with a 4x4 vehicle in 2002, and that he was paid petrol and other expenses on a regular basis associated with the vehicle and with the work for which he was being paid by the first named defendant. He still retains the vehicle.
38. He stated, in evidence that, although he was paid for long periods of work which he allegedly completed on behalf of the first defendant, he was not, in fact, physically capable of working as he had formerly done, and had not been working for all of the periods of time for which he had been paid. He stated that, for instance, although he had been paid for thirty-five weeks work, allegedly done in 2004, he estimated that, in fact, he had only worked for fourteen weeks during that period.
39. When asked why he was claiming compensation for earnings which he had, in fact, received, he stated that in 2002, he had entered into an agreement with his brother, John Higgins, which provided that the first named defendant company would pay him a salary continually during 2002, 2003, 2004 (and thereafter, until February 2008), on terms that he would reimburse the first named defendant company out of the proceeds of the compensation which he expected to receive in these proceedings. He said that this agreement was verbal and had not been reduced to writing or otherwise recorded.
40. The plaintiff's brother, John Higgins, stated, in evidence, that he and his wife, Denise, were the sole shareholders and directors of the first named defendant company. He said that his brother had supported him during earlier hard times and he continued to employ and pay him after his injury, notwithstanding the fact that he was not capable of the type of physical work which he had done before he suffered his injury.
41. He said that he would have expected the plaintiff to reimburse him, to some extent, out of the proceeds of these proceedings.
42. He agreed that he had also given the plaintiff separate sums in the amounts of €30,000 and €6,000. He said that these sums were loans made to the plaintiff to assist him to repay debts. They appear to have no relevance to these proceedings.
43. A letter, dated 12th May, 2010 and signed by Ms. Denise Higgins, was handed into court during these proceedings. It was addressed *"To Whom It May Concern"* and provided *"this is to certify that Mr. Pat Higgins owed the above company €54,935 at 30th June, 2009, and has yet to discharge this debt in full"*.
44. It was indicated that this letter (headed "Caldark Ltd"), was handed to the plaintiff's solicitors by the plaintiff in May 2010 (five months after this case was first listed for hearing. It was not furnished to the defendants' solicitors. Its relevance to these proceedings has not been adequately explained.
45. On five occasions, between 5th October, 2005, and 26th February, 2008, the plaintiff was videorecorded, carrying out work on behalf of the first named defendant on building sites in Dublin and Longford. Those recordings were adduced in evidence.
46. Most of the plaintiff's recorded work appeared to be supervisory in nature. He was seen to be (a) busily and actively supervising and directing substantial work then in progress on building sites during lengthy periods of time; (b) capable of lifting planks, scaffolding and metal fencing using both hands; (c) capable of operating a mechanical mini-digger for significant periods of time and transporting a mechanical digger onto the site on a trailer connected to his 4x4 vehicle and (d) capable of using a lump hammer and chisel to break up parts of a roadway prior to its removal by mechanical mini-digger.
47. I am satisfied, on the evidence, that in the immediate aftermath of his injury, the plaintiff was unable to work. Thereafter, he was unable to undertake heavy manual work or to work for very lengthy periods. I am satisfied that his brother (through the medium of the first named defendant) paid the plaintiff a salary on a regular basis, even whilst he was totally disabled.
48. It is likely that by 2004, the plaintiff was working on a regular basis for his brother's company, and was providing significant services, and that he continued to work (relatively productively) throughout 2005, and thereafter until 2008, when the company's business reduced dramatically.
49. I am satisfied that there was a loose understanding between the plaintiff and his brother that if the plaintiff recovered damages to compensate him for loss of earnings he would make some payment to his brother to reimburse him for the payments which the plaintiff had received in the immediate aftermath of his injury.

50. The difficulty, of course, is that within these proceedings, the plaintiff failed to disclose that he was paid substantial sums during 2002, 2003 and 2004, and had provided valuable services for some of those payments.

51. Of considerable importance is that the plaintiff, in evidence, acknowledged that prior to swearing his Affidavit of Verification on 9th December, 2008, he was expressly advised by his solicitors of the need for candour and full disclosure in respect of the evidence within his affidavit, and, in particular, that his attention had been drawn to the Notice for Particulars of Special Damage and the report of Mr. Byrne.

52. He agreed that he had been advised of the consequences of permitting a claim to be advanced on his behalf, which was in any way false or misleading in a material respect.

53. Notwithstanding those warnings, he nonetheless purported to verify on affidavit his alleged earnings "*from every source . . . since the date of the accident*" without including the substantial payments which he had received during 2002, 2003 and 2004.

54. It is inescapable that the plaintiff's earnings, throughout 2002, 2003 and 2004, formed a significant part of his earnings "*from every source . . . since the date of the accident*".

55. He was paid sums in excess of €40,000, together with expenses, during that period. It is scarcely credible that he overlooked these payments. If he believed that he was obliged to make some repayments to his brother's company, then there was nothing to prevent him disclosing that belief to his solicitor who could have undertaken relevant investigations and made appropriate disclosure to the defendants' solicitors.

56. However, he concealed the payments. His concealment accommodated a financial advantage for him (and possibly for his brother). Consequently, it is difficult to believe that he did not do so deliberately.

57. It is undeniable that the averments within the plaintiff's verifying affidavit, which relate to his purported earnings "*from every source . . . since the date of the accident*" were false and misleading.

58. It is highly probable that the plaintiff knew this when he swore his affidavit on 9th December, 2008.

59. Furthermore, the plaintiff purported to verify on affidavit that a claim advanced on his behalf for the future costs of home and gardening help and various assistive appliances (amounting to a sum in excess of €137,000) was based upon accurate information.

60. In cross-examination, he agreed that in May 2005, he had told Ms. Margot Barnes, who is an occupational therapist, that he was at that time "*virtually confined to the house*" and that his wife was now the "*main breadwinner*". He had advised Ms. Barnes that he was "*anxious to explore the possibility of some form of active work outside the house*".

61. In May 2005, he also told Ms. Patricia Coghlan, who is vocational rehabilitation consultant, that his daily activities were largely confined to walking around his land, checking on his stock, and doing light maintenance work on his land and that he was unable to return to his former job or to do any work that would require constant manual dexterity.

62. Ms. Coghlan concluded that, "*it might be possible for him to negotiate some work with his brother within his brother's landscaping company, perhaps in the form of supervisory or light driving work. Whether or not this would be available on a fulltime capacity, or at all, would remain to be seen*".

63. It was acknowledged, in evidence by the plaintiff, that when he spoke to Ms. Barnes and Ms. Coghlan, in May 2005, he failed to disclose to them that he had, in fact, been in receipt of substantial income on an ongoing basis from the first named defendant and was working for periods of time with the first named defendant and had been provided with transport and expenses to facilitate that work. He was paid by the first named defendant for 35 weeks work in 2004 and 24 weeks work in 2005.

64. On 2nd December 2009 (three days before this case was first listed for hearing), an amended actuarial report from Mr. Byrne was furnished to the defendants. Within the amended report, the plaintiff's claim for some ongoing costs of assistive aids and appliances was abandoned and the capital cost of the claim under that heading was reduced from €137,415 to €55,897.

65. A sum in excess of €49,500 for "*home help*" and "*painting and decorating labour allowance*" was, however, still included within the amended claim. It was not supported by any evidence adduced in these proceedings.

66. In evidence, the plaintiff accepted that during the period of more than eight years which has elapsed since he suffered his injuries, he has not sought or obtained home help or painting and labouring assistance, and the only assistive aids or appliances which he has fitted in his home have been two sets of grab rails.

67. I am satisfied that the claim advanced on behalf of the plaintiff in December 2008, for future costs totalling €137,415, was largely based upon false and misleading information which the plaintiff gave to Ms. Barnes and Ms. Coghlan.

68. Although it has now been (properly) acknowledged on behalf of the plaintiff that a number of the averments within his affidavit were false and were misleading in a material respect, it is contended on his behalf that those averments were made without any intention to mislead and that when he swore his verifying affidavit on 9th December, 2008, he did not know or was not fully aware that some of the sworn testimony within his verifying affidavit was false and was misleading.

69. I cannot accept that contention. The plaintiff, in evidence, acknowledged that, before swearing the relevant affidavit on 9th December, 2008, his solicitor advised him of the importance of ensuring that the contents of his affidavit were accurate and were not misleading in any respect. He acknowledged that he was also advised of the gravity of the consequences for him if any of the averments within his affidavits were inaccurate or untrue or misleading, and he confirmed that his solicitor had, contemporaneously, explained to him the implications of sections 14, 25 and 26 of the Civil Liability Courts Act 2004.

70. In the light of that evidence, I cannot accept that the plaintiff did not know or was not fully aware that, within his verifying affidavit, he was testifying on oath (a) that he had not been in receipt of earnings throughout 2002, 2003 and 2004, and was entitled to be compensated for loss of earnings during that period, and (b) that he had been so disabled by his injuries that he would incur future costs for home and gardening help and assistive appliances amounting to a sum in the region of €137,000. The affidavit expressly referred to the documents which contained those claims.

71. I therefore reject the contention advanced on behalf of the plaintiff that he did not know or was not fully aware that some of the contents of his verifying affidavit were false and misleading.

72. It follows that the averments within the plaintiff's verifying affidavit sworn on 9th December, 2008, were materially false and misleading and the plaintiff knew this when swearing his affidavit.

73. I am therefore satisfied, on the evidence, that the defendant has discharged the onus of proving that the plaintiff has sworn an affidavit under s. 14 of the 2004 Act, which was (and is) false and misleading in a material respect.

74. I am also satisfied that it is highly probable that he knew, when swearing the affidavit, that some of his averments were false and misleading.

75. I am not satisfied, on the evidence, that the defendant has discharged the onus of proving that the plaintiff has given or adduced evidence during the hearing of these proceedings which has been materially false or misleading.

76. The consequence of my first finding, however, is that the plaintiff's claim must be dismissed unless the court is satisfied that the dismissal of the action "*would result in injustice being done*".

77. Mr. O'Connell S.C. points out that the plaintiff has suffered serious and disabling injuries, one of which resulted in the amputation of his right thumb. Those injuries were caused by the defendants' negligence and, *prima facie*, the plaintiff is entitled to recover damages from the defendant to compensate him for his injuries and any consequent losses which he has sustained.

78. Mr. O'Connell S.C. says that it would be unjust and disproportionately harsh to deprive him of any compensation, even if he has adduced some evidence on affidavit which is materially false and misleading. He says that such a harsh penalty "*would result in injustice being done*" within the meaning ascribed to that term by s. 26 of the 2004 Act.

79. In summary, Mr. O'Connell S.C. contends that the court should award the plaintiff (i) a sum for general damages to compensate him for the pain, suffering and loss of amenity of life resulting from his injuries, and (ii) reduced damages to compensate him for his consequential losses which would take into account and penalise the plaintiff for the false and misleading evidence which he has adduced in support of his claim. It is argued that this outcome would avoid an injustice to the plaintiff.

80. It is very much to the plaintiff's credit that he returned to work at the earliest possible opportunity and performed such work as he was capable of in a determined and vigorous manner. I am satisfied, on the evidence, that he is a quiet and hardworking man who has suffered a severe and disabling injury which has detrimentally affected his earning capacity in the past and will continue to do so in the future. In evidence, he made no attempt to exaggerate the nature and extent of his injuries or their consequences.

81. It is true that the plaintiff has a common law entitlement to recover damages from the defendants to compensate him for his injury and his consequent losses. However, that entitlement has been statutorily qualified by the provisions of s. 26 of the 2004 Act.

82. That section was enacted in order to discourage plaintiffs in personal injuries actions from making false, dishonest and exaggerated claims for damages. It is penal in nature and identifies a precise sanction which the court must impose where there has been a finding of the kind which has been made in these proceedings.

83. The imposition of the sanction has the effect of depriving the claimant of damages to which he or she would otherwise be entitled. The court must disallow both that part of the claim which has been based upon materially false and misleading averments, and also that part of the claim which would otherwise have been valid and would have resulted in an award of damages.

84. The sanction must be imposed unless its imposition "*would result in injustice being done*".

85. What Mr. O'Connell S.C. has suggested is that the court should disallow that part of the plaintiff's claim which has been based upon his false and misleading averments and should allow that part of his claim which is valid and which would otherwise have resulted in an award of damages. He contends that the relevant provision within s. 26 of the Act confers a discretionary power upon the court to make such an award.

86. However, when the court has made a finding of the kind made in this case, its power to award damages is restricted and may only be exercised for certain stated reasons based upon evidence of certain exceptional circumstances. It must be satisfied, on the evidence, that dismissal will result in injustice and it must identify the nature and extent of the injustice.

87. The fact that the dismissal of an action will deprive a plaintiff of damages to which he or she would otherwise be entitled cannot, by itself, be considered unjust. Section 26 of the Act contemplates and requires such a consequence.

88. Evidence in some proceedings may disclose the likelihood of injustice consequent upon a dismissal.

89. For instance, it may be unjust if the claim of a catastrophically injured claimant for the cost of ongoing care is dismissed because he or she has knowingly adduced some (perhaps trivial) misleading evidence in respect of some other category of damages.

90. Similarly, the dismissal of a fatal injuries claim based upon misleading evidence knowingly adduced by an adult plaintiff, may unjustly penalise infant or incapacitated dependents.

91. In this case, dismissal of the plaintiff's action will have severe consequences for him. It will deprive him of significant compensation for his injuries and their consequences. It will affect his life and lifestyle in the future.

92. However, the court's discretion is limited. It may not be exercised simply because the statutory sanction required will have very severe consequences for a hardworking and likeable man who has suffered a serious injury.

93. The misleading evidence within the plaintiff's verifying affidavit was not trivial. It was intended to support claims for very substantial sums by way of damages.

94. No evidence of exceptional or other circumstances has been adduced which would enable this court to find that dismissal of the action would result in an injustice.

95. This court is therefore obliged to dismiss the plaintiff's claim and I so order.