



**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 221

**Record No. 2016/71**

**Finlay Geoghegan J.  
Peart J.  
Irvine J.**

**BETWEEN/**

**JASON PLATT**

**PLAINTIFF / APPELLANT**

**- AND -**

**OBH LUXURY ACCOMMODATION LIMITED AND CIARAN FITZGERALD**

**DEFENDANTS / RESPONDENTS**

**JUDGMENT of Ms. Justice Irvine delivered on the 28th day of July 2017**

1. Did the learned High Court judge (Barton J.) err in law or in fact when by his order of the 19th January, 2016, he dismissed the plaintiff's claim pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004? That is the core issue on this appeal.

**Background facts**

2. The plaintiff/appellant, Mr. Jason Platt ("Mr. Platt"), now a man of some 45 years, sustained very significant injuries when he fell out the window from a window seat in a bedroom of the defendants' hotel premises in Kinsale on the 15th February, 2009.

3. It is not in dispute that Mr. Platt's injuries were life threatening at the outset and that he will never fully recover therefrom. He sustained, *inter alia*, five fractures to his vertebrae, seven fractured ribs and a fractured right femur. He also developed psychological problems as a result of his physical injuries.

4. Because it is of significance to issues that will be dealt with later in this judgment it is convenient at this point to note that it was initially believed that the stabilisation of the fracture of Mr. Platt's right hip had been a success. However, as a result of x-rays requisitioned by Mr. Michael O'Driscoll, consultant orthopaedic surgeon, in July, 2014 it became apparent for the first time that the subtrochanteric fracture had not achieved bony union and that the interlocking nail that had been used in the stabilisation procedure had fractured.

5. As a result of these events Mr. Platt commenced proceedings claiming damages for negligence against the hotel. He maintained that his injuries had been caused as a result of the defendants' negligence in having a defective and dangerous window ope in the bedroom that had been allocated to him. It is not necessary to dwell upon the circumstances surrounding Mr. Platt's fall as the same are not material to this appeal. Suffice to state that the High Court judge in his judgment found the defendants liable to compensate him in respect of his injuries subject to a finding that his damages should be reduced by 40% to reflect his own blameworthiness for the circumstances in which he sustained his injuries.

**The pleadings and pre-trial procedures**

6. The personal injury summons which was issued on the 3rd March, 2011, claimed that as a result of his injuries Mr. Platt was unable to live independently and was very much dependent upon his partner for assistance. It was, he maintained, anticipated that such assistance would be required on an ongoing basis and that he would need "limited assistance during the day and care at night".

7. In replies to particulars delivered on the 13th September, 2011, Mr. Platt's condition was stated to have deteriorated. He was, according to the information provided, unable to keep medical appointments and had been referred to a pain clinic. It was stated that he required two crutches to stand and that he needed a significant amount of assistance to mobilise. It was also asserted on his behalf that he could not bear any weight on his right leg albeit that he had been advised by Mr. Manning, his own consultant orthopaedic surgeon, that the fracture to his right femur had healed in a good position. It was stated that his disabilities were such that he required two carers to attend him four times each day, a cost which was at that time being defrayed by the NHS. Mr. Platt's claim as pleaded and particularised at that time was verified in two affidavits of verification dated the 7th and filed on the 16th December, 2011.

8. The last of three disclosure schedules was forwarded to the defendants on the 2nd June, 2015. Further, on a date which is not obvious from the book of pleadings, a 25 page schedule of special damages and future loss was delivered to the defendants. This is exhibit "JP1" to the third affidavit of verification sworn by Mr. Platt on the 30th April, 2015, some five weeks prior to trial. It was the delivery of this schedule that warranted the swearing of the said affidavit. In his affidavit Mr. Platt deposed to the fact that he had studied the contents of the schedule and was in a position to confirm that it was correct, true and accurate in every respect and that it had been drafted pursuant to his instructions. The total sum claimed in the schedule of special damages was GBP£1.493m.. Some of the more significant component claims therein specified include the following:-

**GBP£**

- Personal care support: 115,776.78
- Future loss of earnings 278,965.96
- Future personal care and support 224,521.19
- Future aids and equipment 151,418.12

9. In the schedule of special damages, it was stated that the sums claimed were based on the recommendations and reports of a number of Mr. Platt's treating doctors as well as those of the expert witnesses therein identified. Ms. Gail Russell, occupational therapist, Ms. Jane Toplis, rehabilitation consultant, Mr. Paul Jackson, vocational rehabilitation and employment consultant, Mr. Michael O'Driscoll, consultant orthopaedic surgeon and Prof. Green, consultant psychiatrist are amongst those identified in the schedule.

10. As to the witnesses he intended to call to support his claim and as to the substance of the evidence that they would give, Mr. Platt delivered his final disclosure schedule on the 2nd June, 2015, identifying his witnesses and the reports upon which they would rely.

### **The High Court hearing**

11. The within proceedings were heard by Barton J. in the High Court over a period of seven days in June, 2015. Following the conclusion of the evidence the defendants applied to the High Court judge to dismiss Mr. Platt's claim pursuant to the jurisdiction conferred on him by s. 26 of the Civil Liability and Courts Act 2004 ("the Act"). It is convenient at this point in the judgment to refer to that section which 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.

(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."

12. In brief, the defendants maintained that:-

(i) The plaintiff himself at trial had knowingly given false and/or misleading evidence to the Court as to the extent and nature of his injuries in breach of s. 26(1) of the Act;

(ii) he had knowingly caused false and/or misleading evidence to be adduced on his behalf in breach of s. 26(1) of the Act in that he had given a false account of his abilities and disabilities to each expert witness retained to examine him with the purpose of inflating his claim; and

(iii) he had, in breach of s. 26(2)(a) and (b) of the Act, sworn three affidavits of verification two dated the 7th December, 2011, and the final one dated 30th April, 2015, verifying a range of disabilities and alleged financial consequences knowing them to be false and/or misleading in several material respects.

13. Core to the defendants' application was seventeen minutes of video surveillance footage capturing Mr. Platt's movements and activities on seven separate occasions over the period March, 2014 to March, 2015. I will return to describe that video evidence later in the judgment given that it was critical to the findings of the High Court judge and his decision to invoke his jurisdiction under s. 26 of the Act.

14. It had been argued on Mr. Platt's behalf that whilst he had exaggerated the extent of his injuries and disabilities when giving his evidence in chief and in the course of his reporting to the experts who had been retained to examine him, s. 26 did not apply as he had an honest subjective belief that he was seriously injured to the extent claimed. The same applied in respect of his affidavit of verification. Mr. Platt did not consider his reporting of his injuries and disabilities to have been exaggerated. The Court was encouraged to conclude that his account of his injuries as given to the various experts was a manifestation of his subjective perception of his condition in response to the refusal of his doctors to acknowledge the pain which he complained of in light of their belief that his hip fracture had united.

15. It was further submitted on Mr. Platt's behalf that even if the Court was satisfied that he had knowingly given false evidence it would be unjust to dismiss his claim as he had serious physical injuries and his witnesses had given their evidence having taken into account his capabilities as demonstrated on the video surveillance footage. It was urged that the Court should treat him in accordance with the common law principles as emerged from the decision in *Shelly Morris v. Bus Atha Cliath* [2003] 1 I.R. 232 where

Denham J. stated, in respect of a plaintiff whose claim the defendant had sought to dismiss as fraudulent, that if a claim was genuine and exaggerated because of a subjective belief on the part of the plaintiff that their injuries were worse than they actually were, that the court might determine their damages in accordance with the evidence but would not condemn the claim because of the evidence of the plaintiff. In other words, the Court should in such circumstances disallow that part of Mr. Platt's claim as the Court considered false or misleading but allow that part of his claim which it considered remained valid.

16. The defendants' application was supported by written submissions to the trial judge and like submissions were made and delivered on behalf of Mr. Platt. Having considered these in a lengthy and detailed judgment delivered on the 11th November 2015, the trial judge expressed himself satisfied that the defendants had discharged the burden of proof in respect of both s. 26(1) and (2) of the Act. Having regard to the fact that he was not, in the circumstances of the case, satisfied that it would perpetrate an injustice upon the plaintiff if he were to dismiss the action, he did so and awarded the costs of the proceedings to the defendants, the same to be taxed in default of agreement.

#### **The conclusions of the High Court judge concerning the s. 26 application**

17. In the course of his judgment the High Court judge emphasised certain aspects of Mr. Platt's evidence. He stated that Mr. Platt had claimed that he was in severe pain and that his symptoms were worsening. He had described himself as having been destroyed and in agony for about 21 hours a day and that the pains in his legs were akin to what might be expected following electrocution. The trial judge noted Mr. Platt's evidence to the effect that he was compelled to mobilise using either crutches, a wheelchair or a commode, the latter appliance being one which he used also for toileting and getting as far as his front door. He referred to Mr. Platt's evidence that he was essentially housebound and needed assistance with washing and to his evidence that he had a mobility scheme car which he could use to go the shops, the chemist or to his medical appointments and otherwise in the case of an emergency.

18. As to the evidence which Mr. Platt had given when under cross examination, the trial judge highlighted the fact that whilst he initially accepted that he had not told any of his doctors or experts that he was able to drive he later changed his evidence to state he was sure he would have told them he was able to do so. He also noted that, contrary to what had been stated by his own witnesses in their oral testimony and in their reports, Mr. Platt maintained that he had told them that he could drive and walk short distances without crutches and that he could weight bear on his right leg.

19. The trial judge also referred to the pleadings wherein Mr. Platt had claimed that he spent most of the time lying in bed or on the sofa, that he was effectively housebound and imprisoned as a result of his injuries and would need limited assistance during the day and night time care into the future.

20. In his judgment Barton J. then referred to Mr. Platt's presentation whilst in court. He stated that he presented as a profoundly disabled person who had sat, except when giving his evidence, in a wheelchair and sometimes then in a semi-reclined position. He also described the physical difficulty which Mr. Platt had demonstrated when moving into the witness box from his wheelchair with the assistance of crutches.

21. The trial judge then proceeded to refer to the claim made for special damages which amounted to £1,493,103.13 and to the type of appliances, equipment and accommodation which Mr. Platt maintained he needed because of his injuries. In particular he referred to the reports of Ms. Russell and Ms. Toplis in this regard. He also noted the report of Mr. Paul Jackson, rehabilitation consultant, concerning the alleged vocational implications for Mr. Platt as a result of his injuries. These were all reports which the trial judge noted had been prepared following upon interview with Mr. Platt.

22. The trial judge next referred to the evidence of the various medical witnesses called by the parties and to their respective expert reports which had been compiled following examination and/or consultation with Mr. Platt and which had been delivered pursuant to S.I. No. 391 of 1998 as containing the substance of the evidence which they intended to give. All of these reports, the trial judge noted, had been handed into Court during the trial. From what was stated by these witnesses in the course of their evidence the trial judge was satisfied that Mr. Platt had presented himself to them as almost incapable of doing anything and then only with the assistance of others. In particular he referred to the fact that he had told several witnesses he could not drive or shop, that he couldn't bear any weight on his right leg and that he needed either crutches or a wheelchair to mobilise.

23. The High Court judge expressed himself satisfied that the video evidence established that Mr. Platt could negotiate the steps of his house unaided, that he could open the gates to his driveway, that he could do the supermarket shopping and could walk without the use of crutches and that he could raise his arm above his head to close the boot of his car. This was in contrast to his presentation at his medical appointments when he attended using crutches and a wheelchair. He described the presentation of plaintiff on the video as being in "stark contrast" to how he had reported to his own experts and those retained on behalf of the defendants.

24. The trial judge referred to the evidence given by several of Mr. Platt's own witnesses after they had seen the video evidence. He noted that Ms. Russell, contrary to what she had stated in her report, was of the opinion that Mr. Platt would need little by way of personal care in the future. Dr. Wiles, the plaintiff's pain specialist, had agreed that the video depicted a man much different to the almost immobilised man who had presented to him. He referred to the evidence of Prof. Wilkinson, consultant psychiatrist, who said he was satisfied that Mr. Platt had deliberately exaggerated his symptoms on presentation. Mr. Parkinson, rehabilitation consultant, said the video showed a different man to the one that had presented to him who had claimed that he could not walk or drive or raise his arm over his head. Even his own orthopaedic surgeon, Mr. O'Driscoll, had conceded that Mr. Platt had exaggerated his symptoms.

25. Mr. Platt had, according to the trial judge, given conflicting evidence in his attempt to explain the contradiction between what he had told his own experts as to his disabilities and about which he had been cross-examined, and his abilities as seen in the video footage. He had also sought to avoid answering difficult questions by claiming memory loss. The trial judge concluded that Mr. Platt's evidence which was designed to explain how the expert witnesses had come to report his injuries and lifestyle limitations in the manner in which they had done was simply not credible.

#### **Video surveillance**

26. Material to the conclusions reached by the High Court judge in his judgment was evidence tendered by the defendants in respect of seven periods of surveillance carried out on Mr. Platt between March, 2014 and March, 2015. In total, the video evidence covered a period of seventeen minutes. Given that I had the opportunity in the course of the appeal to view this evidence and that it is material to my conclusions I will briefly summarise what that surveillance footage depicts.

27. The video shows Mr. Platt walking to and from his car on several occasions without crutches, albeit it with a significant limp. He is seen on one occasion mobilising briskly when walking across the road between moving traffic and on another occasion is shown wheeling a shopping trolley around a Tesco store without any apparent difficulty. On a number of occasions he is seen driving his car.

He is shown raising his right arm overhead to close the boot of his car in what can only be described as a brisk and fluid movement.

28. On the 6th May, 2014, that being the date upon which Mr. Platt was due to see Mr. Pennie, the defendants' orthopaedic consultant, he is seen walking from his house to his car carrying his crutches but not using them. However, when he arrives for his medical appointment he is to be seen mobilising with crutches in an immensely laborious and slow fashion once he gets out of his car.

29. On the 6th January, 2015, that being the date upon which Mr. Platt flew to Ireland for a medical examination with Prof. Phillips, the defendants' neurosurgeon, he is seen leaving his home mobilising without the assistance of crutches. When he arrives in Dublin he is mobilised in a wheelchair and taken to his appointment by ambulance. It is common case that his physical presentation in the course of that examination was such that Prof. Phillips felt he had to examine Mr. Platt whilst he remained in his wheelchair. He is seen, however, later that evening mobilising without crutches. The following day on arrival back in England he is mobilised at the airport in a wheelchair. However, at approximately 5 p.m. he is seen parking his car after which he is shown walking briskly across and back a busy roadway.

#### **Summary of the findings of the High Court judge relevant to the s. 26 application**

30. Having referred to a number of judicial authorities as to how s. 26 of the Act should be interpreted and applied such as *Ahern v. Bus Eireann* [2011] IESC 44, *Meehan v. BKNS Curtain Walling Systems Ltd.* [2012] IEHC 441, *Higgins v. Caldack* [2010] IEHC 527, *Salako v. O'Carroll* [2013] IEHC17 and *Waliszewski v. McArthur & Co* [2015] IEHC 264, the trial judge set out his conclusions commencing at para. 167 of his judgment.

31. The trial judge concluded that the video footage represented the truth concerning the plaintiff's ability to mobilise independently of crutches or a wheelchair, to drive, to go shopping and to walk on his right leg. He found as a fact that the expert reports accurately recorded what Mr. Platt had told them was his situation in terms of his condition and the extent of his disabilities and that in so stating he had intended to mislead those experts for the purposes of maximising his claim.

32. Barton J. then went on to express himself satisfied that Mr. Platt had given evidence that was dishonest, unreliable and lacking in credibility. The extent of his disabilities and the level of his pain as suggested by his demeanour in the course of the trial and the manner in which he sat and moved from the wheelchair to the witness box was false and not in keeping with the true extent of his abilities as was the statement as to the extent of his disabilities made by counsel on his behalf on the opening of the case.

33. The trial judge rejected the submission that Mr. Platt had an honest subjective belief in the seriousness of his injuries and disabilities. Even allowing for the fact that his hip fracture had not united, his disabilities as portrayed to the court and to the experts retained to examine him and give evidence on his behalf were a gross exaggeration of the truth. He concluded that Mr. Platt had deliberately exaggerated his injuries and in so doing relied upon the evidence of Prof. Wilkinson who had stated this could be inferred from the fact that Mr. Platt had withheld from those who had examined him details of what he was capable of doing. The trial judge also had regard to the evidence of Prof. Wilkinson to the effect that he would expect someone elaborating their physical symptoms for psychological reasons to behave consistently and this was not the case here as was evident from the discrepancy between the claim made by Mr. Platt and what he had observed on the video footage.

34. The trial judge went further and concluded that Mr. Platt had sworn his affidavit of the 30th April, 2015 knowing it to be false and/or misleading and that it was based on the manner in which he had presented his injuries and disabilities to his own experts and that these had been grossly exaggerated. He also concluded that he had done so in order to maximise his claim for damages. The fact that his claim for special damages was substantially modified or abandoned in the course of the trial afforded no defence to the defendants' application. The trial judge was satisfied that in the absence of the video surveillance Mr. Platt would have proceeded with his claim with his experts giving evidence in accordance with their reports.

35. The trial judge factored into his consideration the fact that there was no video surveillance footage to show the extent of Mr. Platt's ability to mobilise prior to 2014, during which period he had been assessed by a number of experts for the purposes of the proceedings. However, Mr. Platt had been assessed by Ms. Toplis in November, 2014, Mr. Pennie in May, 2014, Mr. Bukowski in November, 2014 and Prof. Phillips and Mr. Parkinson in January, 2015 and in the course of those assessments had asserted that he was incapable of carrying out the types of activities which he was seen carrying out in the video footage taken over the same period.

36. Finally, as required to do under the section the trial judge considered whether it would, in the circumstances, be unjust to dismiss Mr. Platt's action. He took into account the extent of Mr. Platt's injuries and the fact that the misleading evidence was not trivial or excusable. The trial judge rejected the submission made on Mr. Platt's behalf that he could award damages in respect of those parts of the claim about which there was no dispute. He was not satisfied that there was any evidence or exceptional circumstances which would warrant him exercising his discretion not to dismiss the claim.

#### **The appellant's submissions**

37. Mr. Sean Lynch S.C., on behalf of Mr. Platt, accepts that his client undoubtedly exaggerated his symptoms and disabilities when reporting to those experts who examined him for the purposes of the proceedings. He nonetheless submits that there was insufficient evidence to support the finding of the trial judge that he did so knowingly as is required before the section may be invoked. The test under s. 26 is a subjective one.

38. Counsel relied in this regard on the evidence of Mr. O'Driscoll, consultant orthopaedic surgeon. He referred to that aspect of Mr. O'Driscoll's evidence where he had explained to the Court that patients whose account of their pain is rejected by their doctors had a tendency to engage in "behavioural shouting" concerning the severity of their pain or disabilities in the hope that their complaints would receive greater attention. In the present case, until July, 2014 Mr. Platt had been told that his hip fracture had united the inference being that his complaints concerning his hip symptoms were unfounded.

39. While Mr. O'Driscoll had accepted that Mr. Platt had exaggerated the severity of his condition, he felt that some of the difference between what was seen on the video footage and how Mr. Platt presented was attributable to behavioural factors such as "behavioural shouting". He was not being believed as to the extent of his problems. Mr. Lynch drew the Court's attention to the fact that Prof. Phillips had agreed that Mr. Platt's psychological state and his medication for depression might have fed into his perception of his pain and that Prof. Green had stated that there was a high association between the use of high potency cannabis, to which Mr. Platt had stated he was addicted, and psychosis. Even Mr. Pennie, the defendants' consultant orthopaedic surgeon, had accepted that chronic pain affects the way people perceive their injuries. Accordingly, Mr. Lynch submits that the evidence as to Mr. Platt's subjective belief concerning the extent of his pain and disabilities strongly favoured a finding that he did not knowingly give or dishonestly cause to be given or adduced evidence that was false or misleading in any material respect.

40. Mr. Lynch submits that Mr. Platt's injuries as pleaded in the personal injuries summons and in his replies to particulars as

subsequently verified by affidavit were not knowingly false or misleading but rather were a manifestation of his subjective perception of his condition and a response to the failure of a series of doctors to identify the cause of his pain. No specific submission was however made concerning the claim made that the third affidavit of verification sworn for the purpose of seeking to stand up his special damage claim of circa. GBP£1.49m. was such as would justify the court invoking its jurisdiction under s. 26(2) of the Act.

41. Mr. Lynch also seeks to argue that even if the defendants discharged the burden of proof as required for the purpose of s. 26 that the Court should view the defendants as estopped from pursuing that relief because of the manner in which the defendants sought to minimise the extent of Mr. Platt's injuries. By the manner of their conduct they were guilty of the same type of moral wrong as a plaintiff who seeks to maximise their injury. The defendants knew that Mr. Pennie, having seen an x-ray of Mr. Platt's hip some weeks before trial, would not be standing over the content of his report wherein he had expressed his opinion based on his belief that the fracture to Mr. Platt's right hip had united. That fact notwithstanding, Mr. Pennie's report was not withdrawn and Mr. Platt had been cross examined based on that report.

42. Counsel further submits that even if the High Court judge was correct to conclude that Mr. Platt had conducted himself so as to fall foul of the provisions of s. 26(1) and/or (2) of the Act, he nonetheless erred in law and in fact in failing to conclude that an injustice would be done if he were to dismiss the action. The Court had a discretion to look at a broad range of factors when deciding whether the dismissal of the action would perpetrate an injustice. He submits that the approach of Quirke J. in *Higgins v. Caldack Limited* [2010] IEHC 527 was too draconian and restrictive. The Court was obliged, Mr. Lynch contends, to consider the issue of injustice in the context of s. 26 having regard to the following: -

1. The requirement that the section be construed in accordance with the constitutional principles of fairness and proportionality.
2. The requirement that the section be construed so as to vindicate where possible a person's constitutional right to bodily integrity as guaranteed by Article 40.3.2 of the Constitution and their right to be compensated for the wrongful interference with that right.
3. The fact that Mr. Platt's experts, having seen the video evidence, had given their evidence having adjusted the opinions which they had earlier expressed in their reports. This meant that the Court was not misled in any way as a result of the account he had given them concerning the extent of his injuries.
4. That in seeking through its management of Mr. Pennie's evidence to minimise unfairly Mr. Platt's symptoms the defendants had perpetrated a moral wrong and this was conduct to be factored into the Court's consideration of whether it would be unjust to dismiss the action. Mr. Lynch relies upon the decision in *McLoughlin v. McDaid* [2015] IEHC 810 to support his submission that in considering whether dismissing the claim would perpetrate an "injustice" the Court must look at the behaviour of both sides.
5. That Mr. Platt's overall presentation of his symptoms and disabilities had been adversely affected by the systemic failure on the part of those who had examined him to accept the extent of his disability and pain.
6. That Mr. Platt's evidence as given to the Court was fundamentally honest. In his evidence to the Court he admitted he could do all of the things shown in the video. He had admitted his ability to drive and walk on his good days.

43. Mr. Lynch lays emphasis on the fact that s. 26 can only be triggered where the court is satisfied that a plaintiff had adduced or caused to be adduced evidence that was false or misleading in a *material* respect or where they had sworn an affidavit knowing it to be false or misleading in any *material* respect (my emphasis). Thus, before the court gets to consider whether the dismissal of the action would result in an injustice the court will have already concluded that the effect of the plaintiff's conduct was material. Accordingly, the fact that a plaintiff's wrongful conduct was material to the claim does not constitute a bar to the judge refusing the relief sought.

44. Finally, Mr. Lynch submits that s. 26 of the Act does not preclude the applicability of common law principles already referred to, and therefore does not prevent the court from imposing a sanction on a plaintiff for breach of the section which is less terminal than that provided for by the section. He submits that the Court might assess the true value of Mr. Platt's claim and then reduce that sum to reflect the Court's displeasure.

#### **The respondents' submissions**

45. Mr. John Lucey S.C., on behalf of the defendants, submits that the trial judge was entitled, having regard to the evidence, to conclude that Mr. Platt had given false evidence which was material to his claim and that he had done so knowingly. He had heard evidence from many of Mr. Platt's own experts who had said that the surveillance footage portrayed a person whose abilities were entirely different to those which he had presented to them. The trial judge had also observed Mr. Platt's demeanour, how he had comported himself in the courtroom and how he had given his evidence before he knew of the video surveillance footage, and was entitled to infer from what he saw that the Mr. Platt had set out to give false and misleading evidence with a view to inflating his claim.

46. The evidence, according to Mr. Lucey, established clearly that the exaggeration by Mr. Platt of the extent of his pain and disabilities had been done with the intention of convincing his experts, and hence the Court, that his injuries were of a catastrophic nature rather than injuries which, whilst serious and in some respects permanent, were of a completely different and less significant character.

47. As to Mr. Platt's wilful promulgation of an exaggerated claim, Mr. Lucey relied upon the fact that at no time prior to trial or even after the video surveillance footage was shown in evidence did Mr. Platt seek to resile from the claim he was making, and in particular his claim for GBP£1.49m. special damages. He could have withdrawn the special damages claim at any stage. Likewise, he could have withdrawn his expert reports seeking future loss of earnings, bungalow accommodation, future aids and appliances and future care in an attempt to protect himself against the invocation of s. 26, yet he had not done so.

48. According to Mr. Lucey, no effort had been made to suggest that there could be any flaw in the trial judge's finding that Mr. Platt had sworn an affidavit of verification in circumstances such as would trigger the Court's entitlement to dismiss the action under section 26. In that affidavit Mr. Platt had stated that he had authorised the delivery of the schedule of special damages claiming GBP£1.49m. and that he was fully conversant therewith. He had done so knowing that the schedule was based on expert reports which he knew to be false but which he swore represented the truth as to what was stated therein. Each of the relevant experts had resiled from those reports as a result of the video surveillance footage they had seen. In particular, he referred to the evidence of

Ms. Russell, Ms. Toplis and Dr. Jackson who had dealt with the claims made in respect of future care, aids and appliances and loss of earnings.

49. Counsel submits that the trial judge was quite entitled to infer from the evidence which was introduced at trial that Mr. Platt's evidence was not credible, reliable or honest and that he had deliberately given a false account as to the extent of his disabilities and limitations for the purpose of making a false claim.

50. As to the plaintiff's reliance on the evidence of Mr. O'Driscoll to explain why Mr. Platt had exaggerated his levels of pain and the extent of his disabilities when reporting to the experts and the Court, the High Court judge had rejected that evidence, as he was entitled to do. Mr. Lucey points to the fact that Mr. Platt himself never accepted that he had exaggerated the extent of his injuries and neither did he accept that he had overstated the level of his pain and disabilities to the experts because he considered that was the only way he might convince them as to the extent of his ongoing problems with his right hip. Further, there was the evidence of Prof. Phillips and that of Prof. Wilkinson to the effect that they were satisfied that Mr. Platt's conduct was only consistent with that of a person who was knowingly giving a false account of their injuries. Counsel submitted that it was noteworthy that Prof. Green, Mr. Platt's psychiatrist, had given no evidence to support the evidence of Mr. O'Driscoll that some of his behaviour was consistent with the "shouting out" that patients often engage in if their symptoms are not accepted by their doctors. Further, Mr. Lucey relied upon the fact that Mr. O'Driscoll had said in his evidence that he had no expertise to say whether this was why Mr. Platt had conducted himself as he had done in this case.

51. Mr. Lucey contends that the trial judge was correct to conclude that Mr. Platt had not established the existence of special circumstances to demonstrate that the trial judge was in error when he concluded that, having regard to the provisions of the statute and the circumstances of the case, it would not effect an injustice if the claim were to be dismissed. This was precisely the type of case the Oireachtas had in mind when the legislation was enacted. It was, he submits, an outrageous level of exaggeration.

52. According to counsel, once the Court was satisfied that the burden of proof had been discharged by the defendants it was not open to the trial judge to sever any part of the claim that was not fraudulent from that which was fraudulent. It was an all or nothing situation. Neither could the Court, in respect of any aspect of the claim where there had been fraudulent or misleading evidence, reduce the damages to reflect what the Court considered might be the appropriate award of damages absent the misleading evidence.

53. As to the submission that the defendants were estopped by reason of their management of the evidence of Mr. Pennie and what was put to Mr. Platt concerning his intended evidence, Mr. Lucey makes two points. First, the doctrine of estoppel has no application to the Court's consideration of the s. 26 application. Second, as a matter of fact there was no evidence to support the contention that the defendants had sought to minimise Mr. Platt's injuries or symptoms such that the trial judge was bound to conclude that they had been guilty of the type of moral wrong contended for by Mr. Lynch in his submission.

54. According to Mr. Lucey the evidence established that until very shortly before trial Mr. Pennie had considered that Mr. Platt's hip had achieved bony union with the result that he should only have been experiencing mild to moderate pain. As a result of obtaining sight of Mr. O'Driscoll's second report and further x-rays he had not previously seen, Mr. Pennie for the first time found himself in agreement with Mr. O'Driscoll that the fracture had not achieved bony union. Nonetheless he considered that there had been fibrous union and that being so he remained of the opinion that Mr. Platt should only have been experiencing the level of pain which he had referred to in his expert report, namely moderate pain. According to Mr. Lucey, Mr. Pennie did not abandon his opinion as to the level of pain which he expected Mr. Platt would experience as a result of his injuries regardless of the fact that bony union had not been achieved.

55. Mr. Lucey stressed that it had not been put to Mr. Platt under cross examination that his fracture had united. What was put to him was Mr. Pennie's opinion as to the level of pain he would have expected him to have had and which opinion he continued to hold notwithstanding that bony union had not occurred. Further, the substance of the evidence given by Mr. Pennie was in accordance with what was in his report and that was what had been put to Mr. Platt on cross examination. Mr. Lucey laid emphasis on the fact that notwithstanding the moral wrong contended for arising out of the manner in which the defendants managed Mr. Pennie's evidence, no application had been made to stop the trial or recall Mr. Platt as would be expected in the case of wrongdoing of the nature contended for.

### **The jurisdiction of this Court on the hearing of the appeal**

56. The parties are in agreement that the jurisdiction of this Court is a limited one for the reasons explained by McCarthy J. in his frequently cited judgment in *Hay v. O'Grady* [1992] 1 I.R. 210 where he described the role of the appellate court in the following terms at page 217:-

"1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in "*Gairloch*," *The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.

4. A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference — in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

5. These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

### **The 2004 Act**

57. As I stated in my judgment in *Nolan v. O'Neill and Mitchell* [2016] IECA 298, the Act was intended to change the manner in which parties would conduct personal injuries litigation. The old regime was to be abandoned in favour of a system designed to be open, transparent and honest. It was to herald the end of what was often described as the "cloak and dagger approach" to litigation. That this is so is apparent from, for example, s. 14(1) of the Act which requires the plaintiff to swear a verifying affidavit as to the truth of all assertions, allegations and information provided to the defendant. Likewise, the defendant under s. 14(2) must swear a verifying affidavit in respect of the assertions and allegations that it makes in its pleadings.

58. What is clear from the Act as a whole is that it was designed to ensure that false or misleading assertions, allegations or information will not lightly be tolerated in the context of personal injury litigation, and that any material failure to meet the statutory requirements will be met, save in the limited circumstances to which I will later refer, with a mandatory sanction provided for, whose objective is to deter and eliminate false and/or misleading claims.

59. When s. 26 is invoked it has what can only be described as draconian consequences for a plaintiff. Their claim must be dismissed as the section is mandatory save for where the court considers that dismissal would result in an injustice. The change heralded by the Act is perhaps even more acutely evident from the fact that the statute makes it a criminal offence for a litigant to give false or misleading evidence or to give false or misleading instructions to their solicitor or to any expert. Such an offence is, under s. 25 of the Act, punishable by significant penalties. On indictment, a fine of up to €100,000 or a prison term not exceeding ten years or both may be imposed.

60. Under s. 26 the potential sanction is, as already stated, the dismissal of the action. Severe as the consequences are which flow from the successful deployment of the section in the context of a claim which, but for some material fraudulent or misleading evidence, would otherwise result in a substantial award of general and/or special damages, that is what the Act envisages. Thus, there can be no doubt that the section was intended to operate as a significant deterrent to claimants who might be minded to achieve an unjust result by misleading the court and/or their opponent concerning the truth of their claim in some material respect.

### **General Principles which emerge from the prevailing jurisprudence in relation to s. 26 applications**

#### **The burden of proof**

61. It is accepted that the onus of proof in relation to a s. 26 application lies upon the defendant. The extent of the proof required has been the subject matter of several judgments including that of Feeney J. in *Ahern v. Bus Eireann* (Unreported, High Court, Feeney J., 16th February, 2006) where he stated as follows:-

"In the light of the approach outlined by the Supreme Court in *Georgopolus v. Beaumont Hospital Board* [1998] 3 I.R. 132 in the judgment of Hamilton C.J., this Court must have regard to the fact that even though a civil standard of probability applies rather than a criminal standard, regard must be had to the seriousness of the matter being alleged, the gravity of the issue and the consequences in considering the evidence necessary to discharge the onus of proof."

#### **Caution is required**

62. In *Farrell v. Dublin Bus* [2010] IEHC 327, Quirke J. cautioned against any rush to judgment in favour of a defendant who seeks to invoke s. 26 having regard to the draconian consequences of that section. In particular he cautioned on any rush to judgment based on inferences that might be drawn from facts admitted or proved against a plaintiff. In particular he referred to the following statement of Henchy J. in *Banco Ambrosiano S.P.A. and Others v. Ansbacher & Company Ltd. and Others* [1987] I.L.R.M. 669 at 702 concerning the standard of proof in cases involving civil fraud:-

"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."

It seems to me that once the court is satisfied that the plaintiff has knowingly sought to mislead the court to a material extent the onus must be on the plaintiff to then establish, by whatever means or argument as may be available to him or her, that it would be unjust to dismiss the action.

#### **What s. 26 was not designed to achieve**

63. Having regard to the harshness of the penalty that must be imposed by a court where it is satisfied that the burden of proof has been discharged, it is material to consider what s. 26 was not designed to achieve. This was aptly described by O'Neill J. in his decision in *Smith v. Health Service Executive* [2013] IEHC 360.

64. *Smith* was a case in which the plaintiff had initially failed to disclose the existence of any prior medical history, a history which was later exposed on discovery in a case where there was really no dispute concerning the extent of the plaintiff's injuries. At para. 89 of his judgment O'Neill J. described the defendant's application as a wholly unjustified and opportunistic attempt to evade liability for the plaintiff's injuries by a misconceived invocation of section 26. He then went on to state at para. 92 as follows:-

"I have no hesitation in dismissing the defendants' application under s. 26 of the Act of 2004. I would like to add that this section is there to deter and disallow fraudulent claims. It should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled. There is a world of a difference between this plaintiff's case and the fraudulent claims that have been exposed in the cases that were opened to this court in dealing with this s. 26 application, namely:

(i) *Folan v. ÓCorraoin & Ors.* [2011] IEHC 487, Murphy J.

(ii) *Rahman v. Craigfort Taverns Ltd.* [2012] IEHC 478, O'Neill J.

(iii) *Montgomery v. Minister for Justice, Equality and Defence & Anor.* [2012] IEHC 443, O'Neill J.

(iv) *De Cataldo v. Petro Gas Group Ltd. & Anor.* [2012] IEHC 495, O'Neill J.

(v) *Salako v. O'Carroll* [2013] IEHC 17, Peart J.

(vi) *Ludlow v. Unsworth & Anor.* [2013] IEHC 153, Ryan J."

#### **What evidential proof is required for a successful s. 26 application?**

65. At paras. 43 and 44 of my judgment in *Nolan I* stated as follows concerning the proof required to trigger s.26 (1):-

"43. What is clear from the wording of the section is that the defendant must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect. Thus false or misleading evidence even if intentionally advanced if not material to the claim made cannot justify invocation of the section. Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent. That this is so would appear to be supported by the following short passage from the decision of Fennelly J. in *Goodwin v. Bus Eireann* [2012] IESC 9 concerning s. 26 and where at para. 62 he stated as follows:-

"62. For this section to apply, the defendant must discharge the burden of showing that some material evidence has been given which is false or misleading and that the plaintiff knew that it was false or misleading. (See the judgment of Denham C.J. of 2nd December 2011 in *Ahern v Bus Eireann* [2011] IESC 44). Counsel for the defendant correctly accepted that this amounted to an allegation that the claim was fraudulent."

44. However, this does not mean that a defendant must establish that the entirety of a plaintiff's claim is false or misleading in order to succeed on such an application. It is clear that proof that a plaintiff's claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim."

66. In the course of my judgment in *Nolan I* also make clear that it is not open to a defendant to make an application under section 26 of the Act unless the plaintiff in the course of the hearing is afforded an opportunity of countering the assertion that they gave false or misleading evidence or caused such evidence to be adduced on their behalf, knowing it to be fraudulent.

67. In *Nolan* the plaintiff had been significantly injured in a road traffic accident and had been left with some permanent disability. On foot of a s. 26 application the claim was dismissed in the High Court. In this Court, it was held that the defendants had not discharged the burden of proof required to succeed in their application. The material facts are that the plaintiff had been employed by his father's alarm installation company and had given evidence of his pre-accident earnings which were above those stated on his P.60. His actuary had prepared two reports setting out his expected earnings for the five years post accident. The first was based upon figures supplied by the company accountant. The second, which advanced a slightly higher figure, was based on figures supplied by the company's bookkeeper, the plaintiff's sister. The plaintiff's father advanced a yet higher figure based on his expectation that his son would have taken over the running of the company but from his injuries.

68. Whilst the loss of earnings figures advanced on behalf of Mr. Nolan were internally inconsistent it had never put to him in cross examination that he had been responsible for the figures which had been used by his actuary. Neither was it put to him or his witnesses that the figures in the two reports were false or misleading and it had never been suggested to him that he had caused these reports to be put forward on his behalf for the purpose of either misleading the court or inflating his claim. That being so, I concluded that the trial judge should not have acceded to the defendant's application under s. 26.

69. The decision in *Nolan* is also one which is of some small assistance when it comes to consider what amounts to evidence which is to be considered false and misleading in a "material" respect for the purpose of the section. The trial judge had found that Mr. Nolan had misled one of the experts in relation to his post-accident involvement in the sport of "car drifting". The expert concerned told the court, based upon what she had written in her report, that Mr. Nolan had told her that he was no longer able to engage in this activity because of his injuries, evidence which Mr. Nolan himself disputed. He maintained that what he had stated was that he had not competed since the accident rather than that he had not participated in the sport. In the course of my judgment, I noted that Mr. Nolan had not claimed damages on the basis that he was no longer in a position to engage in this sport as a result of his injuries and that in those circumstances even if the trial judge had resolved the evidential dispute in favour of the defendant, the falsehood was not sufficiently material to warrant the dismissal of the action.

#### **The claim as a whole must fail**

70. It follows from the decision in *Ahern* that a trial judge faced with an application under s. 26 must adjudicate upon the plaintiff's knowledge of their actions by reference to a subjective test.

71. Once satisfied that false and/or misleading evidence has been knowingly given and it is material within the meaning of the section, unless the court concludes that the dismissal of the claim would result in injustice being done it cannot proceed to award damages for that part of a claim which is not infected by the misleading evidence. The legitimate parts of the claim cannot survive. That proposition was approved of by Ryan J. in *Meehan v. BKNS Curtain Walling Systems Ltd.* [2012] IEHC 441, a case in which the plaintiff had testified repeatedly that he had not worked since the accident whereas on the evidence he was found to have been involved in a substantial business of ticket sales. At p. 13, paras. 34 and 35, of his judgment the Ryan J. described the consequences of such a finding as follows:-

"Section 26 is mandatory. If it applies to the case, the legitimate parts of the claim cannot survive with only the false or misleading elements dismissed.... It is, however, clear on the authorities that [it] is not open to this court to separate out the good from the bad. That is what the court might have done before section 26 but the situation is different now and the cases make it clear that the sanction is to be applied, unless there are quite specific features that would lead to injustice."

72. The plain and ordinary meaning of the words make clear that if the evidence is false and misleading in a material respect "the action" shall be dismissed. The section is simply incapable of any other construction.

#### **The concept of "injustice" within the meaning of s. 26**

73. As to circumstances or factors which would justify a court declining to invoke the sanction provided for in s. 26 notwithstanding the discharge by the defendants of the necessary burden of proof, there is little by way of authority. However, the fact that a



plaintiff will be shut out from recovering any damages for injuries negligently inflicted which, but for the false or misleading evidence or like verifying affidavit, would have entitled him or her to significant damages, of *itself* cannot amount to the type of injustice anticipated by the section. This is what the section anticipates as was noted by Quirke J. in his decision in *Higgins v. Caldack* at para. 87 where he stated:-

“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.”

74. Quirke J. held that the Court’s discretion was limited and could not be exercised just because it would have serious consequences for a hard working and likable man who suffered a serious injury.

75. Whilst I am in agreement with what was stated by Quirke J. above, that is not to say that the Court should ignore the consequences for a plaintiff of having their action dismissed as part of its overall assessment, where a plaintiff seeks to establish circumstances sufficient to warrant refusing the defendant’s the relief sought.

76. To interpret the section otherwise than as requiring the court to have regard, amongst other factors, to the consequences for the plaintiff of having their action dismissed in their own particular and individual circumstances, would, in my view, offend the court’s own obligation to construe the section in accordance with the constitutional principles of fairness and proportionality (see *McDonald v. Bord na gCon* [1965] 2 I.R. 217). On the other hand, for a court to allow plaintiffs to readily escape the sanctions so clearly signposted and mandated by the Oireachtas would be to emasculate the section.

### **Decision**

77. Having considered the evidence and the submissions of the parties, I am fully satisfied that the finding of the trial judge that Mr. Platt, gave evidence that was false and misleading in a material respect knowing it to be false, is well supported by the evidence.

78. I have rehearsed earlier in this judgment many of the findings of the High Court judge concerning the evidence given by Mr. Platt, and that upon which he relied for the purposes of concluding that he had given false and misleading evidence to the Court. I will not repeat that evidence. Suffice to state that having regard to the fact that the trial judge accepted that the video footage represented the truth concerning Mr. Platt’s ability to mobilise independently of crutches or a wheelchair, to drive, to go shopping and to walk on his right leg, there was more than adequate evidence upon which he was entitled to find that he had given false and misleading evidence.

79. A reading of the transcript of Mr. Platt’s evidence reveals that he told the Court that if he needed to get to the front door of his house he could only do so using a commode to mobilise. He claimed that he had not been able to take a shower or bath for 6½ years because of his mobility issues and that he needed the doors of his house widened to get around in his wheelchair. Most of the time, according to his evidence, he had to lie in bed because of the severity of his pain. Mr. Platt swore that he could not come down two steps without assistance and that because of his disabilities and pain he only went out in emergencies, such as if he and his partner had gone without food for three days, and only then using a wheelchair or crutches. He later contradicted that evidence when he said he might drive the car every day.

80. Comparing the plaintiff’s own evidence with his presentation as demonstrated in the video footage, the trial judge was entitled to conclude that Mr. Platt had given false and misleading evidence to the Court.

81. It further cannot be disputed that the trial judge was also entitled on the evidence to conclude that the false and misleading evidence advanced by Mr. Platt was material to his claim as is required under s. 26. In the context of the claim made for general damages, if Mr. Platt’s evidence had been accepted as truthful, it would certainly have resulted in an award of general damages significantly beyond that which his injuries, tested against the capabilities demonstrated in the video footage, would have warranted. Further, that evidence, had it not been ‘rumbled’ by the defendants, would also likely have led to a significantly inflated claim for special damages that could not have been secured absent that evidence.

82. I am also satisfied that the trial judge was entitled to conclude on the evidence that Mr. Platt gave the false and misleading evidence knowing it to be false. Unlike an appellate court, the trial judge was uniquely positioned to assess Mr. Platt’s credibility. In the course of his judgment he refers to Mr. Platt’s demeanour and how he depicted the extent of his injuries when present in, and moving about, the courtroom and while giving his evidence. Further, in coming to his conclusions as to Mr. Platt’s subjective belief in the truth of his evidence the trial judge was entitled to rely, as he did, upon the fact that he found the answers given by Mr. Platt to be inconsistent, evasive and/or contradictory. He also had the benefit of the evidence of Prof. Philips and Prof. Wilkinson to the effect that they were satisfied that he had knowingly misled the various experts as to the extent of his pain and disabilities. This was additional evidence upon which the High Court judge was entitled to rely in reaching his conclusion that the false and misleading evidence concerning the extent of Mr. Platt’s injuries was deliberate and had been given for the purpose of dishonestly inflating his claim.

83. I am also satisfied that there was overwhelming evidence entitling the High Court judge to conclude that Mr. Platt, swore a third affidavit of verification, which was false and misleading within the meaning of s. 26(2) of the Act. For the purpose of demonstrating that this is so I will identify but one aspect of the special damages claim supported by that affidavit. Mr. Platt maintained a claim for £285,448.33 for a specially adapted bungalow which Ms. Toplis had advised he required based on what he had told her concerning the extent of his injuries and disabilities. When called to give evidence she confirmed that she could not stand over that claim in the light of what she had seen regarding his capabilities in the video surveillance footage. That is but one aspect of the evidence that supported the finding of the trial judge that Mr. Platt swore a false and misleading affidavit within the meaning of s. 26(2) of the Act.

84. The fact that the affidavit was false and misleading in a material respect, as required by the section, is clear from the size of the special damages claim and requires no further comment. Likewise, the trial judge’s finding that the affidavit of verification was made by Mr. Platt knowing it to be false was well supported by the evidence. In that affidavit Mr. Platt deposed to the fact that he had studied the content of the schedule of special damages and future loss appended thereto and that the same had been drafted on his instructions and that every particular therein contained was correct, true and accurate in every respect. This was not a case where Mr. Platt might have sought to assert that a claim had been made on his behalf without his knowledge.

85. That Mr. Platt knowingly put forward a false and dishonest claim for past and future special damage with the intention of misleading the Court is well supported also by the evidence of Prof. Philips and Prof. Wilkinson to which I have already referred apart from the inferences which the trial judge himself was clearly entitled to draw concerning that affidavit having regard to his observations of the plaintiff in the course of the trial and the video surveillance footage to which I have already referred.

86. In circumstances where I am satisfied that there is no basis upon which the trial judge's finding that Mr. Platt's third verifying affidavit offended s. 26 of the Act can be challenged it is not necessary to separately consider the consequences for a plaintiff such as Mr. Platt who gives a false account of their injuries and disabilities to their own experts for the purpose of inducing them to adduce evidence which he knows to be false and misleading.

87. Neither is it necessary to consider to what extent the withdrawal of reports prepared on such a basis, either before or after the proceedings have commenced, might have on a defendant's application that the claim be dismissed under s. 26 of the Act. Those are matters that can be left over to be argued in another case on another day. It should nonetheless be observed that s. 14 of the Act is one which mandates the plaintiff to swear a verifying affidavit as to the truth of all assertions, allegations and information *provided* to the defendant and this includes the contents of pleadings or schedules of special damages (my emphasis). The provisions of s. 26(2) as they refer to s. 14 do not seem to confine the defendant's entitlement to invoke that section to circumstances in which the plaintiff has actually pursued the claim as supported by such an affidavit at the trial. Without wishing to advance any definitive view on the matter, I will do no more than observe that it would undermine the effectiveness of the legislation if a plaintiff, intending to defraud the court and a defendant by making a grossly inflated claim based upon reports contrived for such a purpose, could, on being made aware that the defendant had evidence to undermine that claim, withdraw those reports and proceed to recover damages as if they had done nothing wrong.

88. As to whether the trial judge erred in law when it came to his consideration of whether there were circumstances which would render it unjust to dismiss the claim, once again I am not satisfied that the trial judge's decision to invoke the section can be faulted.

89. As stated earlier the Court must construe s. 26 in a manner which is proportionate and fair. For myself, I am satisfied that once the defendant discharges the burden of proof required under the section the onus must then fall to the plaintiff to demonstrate by reference to the circumstances of the case that it would be unjust to dismiss their action.

90. On the facts, available to the trial judge in these proceedings it cannot, in my view, be stated that the decision of the trial judge to dismiss this claim was in all of the circumstances unjust or in any respect lacking in proportionality or fairness.

91. I consider that it would be inadvisable for me to attempt to set out an exhaustive list of all of the factors which might be material to a court's consideration as to whether it would be unjust to dismiss a claim notwithstanding its conclusion that the plaintiff had knowingly sought to advance a claim that was false and misleading in a material respect. I propose to confine myself to a consideration of the submissions advanced by the parties and the facts which I consider support the trial judge's decision to dismiss Mr. Platt's claim.

92. I am firstly satisfied that the High Court judge's decision to dismiss Mr. Platt's action cannot be set aside on the basis that his evidence was fundamentally honest, as was submitted by Mr. Lynch S.C. because the trial judge found to the contrary and there was more than sufficient evidence to warrant that conclusion.

93. Secondly, whilst Mr. Lynch is correct in his submission that s. 26 must be construed in accordance with the constitutional principles of fairness and proportionality, in my view the rigours of s. 26 cannot be defeated by Mr. Platt's efforts to rely upon his right to bodily integrity as guaranteed by Art. 40.3.2 of the Constitution and his right to be compensated in respect of any wrongful interference with that right. His entitlement to have such rights vindicated by the court has been limited by the Oireachtas in the manner provided for in the Act and this Court must give effect to the provisions therein contained.

94. Thirdly, I accept as a theoretical proposition, as was asserted by Mr. Lynch, that there may be circumstances in which the conduct of a defendant could be material to the court's assessment as to whether it would be unjust to dismiss an action even where the burden of proof has been discharged. If, as was submitted on behalf of Mr. Platt, the defendants had in their management of the defence been guilty of some moral wrong equivalent to that of the plaintiff in giving false and misleading evidence, perhaps the Court might consider it unjust to make the order sought. However, I find it difficult to envisage the type of conduct that could lead to that result particularly given the mandatory terms in which the section is worded, and for that reason I do not intend to speculate further on the matter. What I am, however, content to conclude is that the manner of the defendants' approach to the cross examination of Mr. Platt and Mr. O'Driscoll, in light of the evidence which they knew Mr. Pennie would give, was not such as to afford any grounds upon which it might be advanced that it would be unjust for the section to be invoked.

95. I have considered the transcript of Mr. Platt's cross examination, as I have the substance of Mr. Pennie's intended evidence as flagged in his medical reports of the 7th December, 2012, and the 12th May, 2014, as well as the entirety of his oral evidence. Having done so I am not satisfied that the defendants engaged in conduct of a type which warrants any particular criticism. There was nothing, in my view, inappropriate about the cross examination Mr. Platt or his orthopaedic surgeon, Mr. O'Driscoll. It was never suggested to Mr. Platt that it would be Mr. Pennie's evidence that bony union had been achieved in respect of the fracture to the right hip.

96. It was, however, put to Mr. Platt on cross examination that it was Mr. Pennie's opinion that his orthopaedic injuries had healed, and strictly speaking that is not an accurate summary of what Mr. Pennie said when he was called to give evidence. However, having reviewed the entirety of Mr. Platt's cross examination concerning his examination by Mr. Pennie and Mr. Pennie's own evidence, I am quite satisfied that no injustice was perpetrated by this very modest error on the part of counsel for the defendants. The substance of what was put to Mr. Platt under cross examination was that Mr. Pennie would say that he could find no explanation for the type of symptoms which Mr. Platt had advised at the time of his assessment and that, having regard to his injuries, he should have been experiencing nothing more than mild to moderate pain.

97. In evidence, Mr. Pennie accepted that bony union of the hip fracture had not been achieved but he emphasised that fibrous union had occurred with the result that he continued to hold the opinion that he could find no clinical explanation for Mr. Platt's presentation or for the level of pain which he complained of. In circumstances where I am satisfied that no mischief was created by the manner in which Mr. Pennie's intended evidence was put to Mr. O'Driscoll or to Mr. Platt, this is not a factor to which weight ought to have been attached by the trial judge when considering whether it would be unjust to dismiss the action. Certainly nothing was done or said by the defendants that could come even remotely close to conduct which might be categorised as a moral wrong equivalent to that perpetrated by Mr. Platt, as was asserted by Mr. Lynch.

98. Fourthly, when seeking to construe the section in a proportionate and fair manner I believe it is relevant to consider the extent of the falsity of the evidence and that to which Mr. Platt had hoped to gain from his own false evidence and in particular that which was included in his schedule of future loss and special damages as verified by his third affidavit.

99. Mr. Platt's own evidence was designed to depict him as a man who had suffered relentless pain and enjoyed little or no

independent mobility and that this would be his plight for the rest of his life. He would not be able to work and would be dependent for almost all activities of daily living on significant care from his partner and care givers. If believed he stood to recover an award of general damages at the very upper end of awards made for general damages and in circumstances where awards of that nature are reserved for those who are truly catastrophically injured. The video evidence disclosed a very different picture of Mr. Platt's injuries.

100. In addition to his efforts to inflate his claim for general damages, Mr. Platt swore an affidavit of verification seeking to stand up a claim for past and future special damages of circa GBP£1.49m. which he might have extracted from the defendants by way of settlement in advance of trial or by court award, had it not been for the astute and significant surveillance deployed by the defendants which ultimately unearthed his dishonesty.

101. Fifthly, whether the fact that Mr. Platt deceived his own experts as well as those of the defendants when he attended for medical assessment would have had consequences for him under s. 26 of the Act need not, as I have already stated, be decided in the context on this appeal. However, the fact that he did so is in my view material to the court's consideration as to whether it would be unjust to dismiss his claim.

102. Mr. Platt's false and misleading evidence was no once off rush of blood to the head, not that proof of such a state of affairs might save a plaintiff who has been found to be in breach of their obligations under s. 26 from the sanction provided. His dishonesty was repeated and determined.

103. For my part I can see no injustice or lack of proportionality in the decision made by the trial judge when he decided it would not be unjust, having regard to all of circumstances, to dismiss Mr. Platt's action.

### **Conclusion**

104. I am satisfied that the trial judge was entitled to conclude on the evidence before him that Mr. Platt gave false and misleading evidence which was material to his claim, knowing it to be false, and that he did so for the purposes of recovering damages to which he was not entitled.

105. I am also satisfied that the third affidavit of verification which Mr. Platt swore on the 30th April, 2015 for the purpose of supporting his claim in respect of past and future special damages in the region of GBP£1.49m. was false and misleading and that he swore that affidavit with the intention of misleading the Court. In each instance the evidence that was false and misleading was clearly material to his claim as required under the section.

106. In the aforementioned circumstances the trial judge was obliged to dismiss Mr. Platt's action unless he was satisfied that to do so would perpetrate an injustice in all of the circumstances.

107. Mr. Platt is precisely the type of plaintiff which the Oireachtas sought to target when it enacted s.26 of the Civil Liability and Courts Act 2004. His dishonesty was relentless. He gave misleading evidence and provided details of a claim for past and future loss which went to the very heart and core of his claim. He acted in a determined fashion to literally rob the defendants of what, by any standards, was a colossal sum of money. Were it not for the extreme vigilance of the defendants in their investigations, something which undoubtedly put them to enormous expense, the fraud which Mr. Platt intended to perpetrate would likely have gone undetected.

108. For my part I am quite satisfied that, notwithstanding the seriousness of his injuries, it was neither unfair nor disproportionate of the High Court judge to dismiss Mr. Platt's action in these circumstances.

109. For all of the reasons earlier stated in this judgment I would dismiss the appeal.