Neutral Citation: [2014] IEHC 564

THE HIGH COURT

[2012 No. 9317 P]

BETWEEN/

MICHAEL LOOBY

PLAINTIFF

AND

GREGORGZ DAMIEN FATALSKI AND MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 3rd day of December, 2014

Background

1. This action arises out of a RTA which occurred on 27th April, 2010, when the plaintiff was knocked from his bicycle as a result of a collision with a vehicle driven by the first named defendant. The accident occurred on the road at Colgan near Dungarvan, Co. Waterford. Liability is not in issue between the parties.

2. The defendants maintain that the plaintiff's action should be dismissed pursuant to s. 26 of the Civil Liability and Courts Act 2004, due to the fact that the plaintiff told lies to his doctor and to his solicitor in relation to the number of hours that he could cycle on his bicycle after the accident. It is also alleged that the plaintiff swore an affidavit of verification which he knew to be false and misleading in a material respect. It is necessary to look at what the plaintiff told his advisers at various stages of the proceedings.

The Plaintiff's Pre-Trial Statements

3. The plaintiff was first seen by his GP, Dr. Sullivan, on 13th October, 2011. In his report dated 16th October, 2011, Dr. Sullivan states as follows in relation to the plaintiff's complaints at that time:-

> *"Mr.Looby complains of intermittent back pain particularly after sitting for long periods or standing for long periods. He states that he still gets episodes of insomnia and states that he has been depressed since the accident. He states that he went back to riding his bicycle on 7th May, 2011, and he has been increasing the amount of hours since that period. However, after one hour on the bicycle, he states that he does get back pain. However, incidentally he injured his left lower leg two weeks ago prior to this visit on 13th October, 2011, and was seen in hospital. As a result, on examination today he had a very swollen left lower leg with oedema and cellulitis."*

4. A personal injuries summons was issued on 13th September, 2012. An appearance thereto was entered on behalf of the defendants on 2nd November, 2012. A notice for particulars was raised by the defendants on 8th February, 2013. In the notice for particulars, the plaintiff was asked to supply full and detailed particulars of the medical treatment currently being afforded to him in relation to the alleged complaints arising out of the accident on 27th April, 2010. In response thereto, the plaintiff stated at item 11 of his reply, dated 26th February, 2013:-

> *"The plaintiff has been prescribed painkilling medication and also medication for depression and sleeping tablets. The plaintiff is in constant pain in his back. He cannot settle into a position in which to sleep. Prior to the accident, the plaintiff would go on five hour trips and have no difficulty cycling one hundred miles in a day which included mountain cycling. Since the accident, the plaintiff is very limited in the amount of cycling that he can do. He is confined to cycling largely on the flat and for a maximum of one and a half hours. The plaintiff cannot sit properly on the bicycle because of his back."*

5. The plaintiff re-attended with his GP on 4th April, 2013. In a report dated 17th April, 2013, Dr. Sullivan noted as follows:-

> *"His main complaint when I saw him on 4th April, 2013, was low mood and quite down in himself over his lack of work and ongoing pain. I restarted antidepressant medication and I asked him to come back to see me in one month. He states that he is not playing soccer and he can ride his bicycle for approximately an hour and a half whereas previously he could do four to five hours in a day. He is doing regular exercises and he has had physiotherapy. However, he still experiences ongoing back pain."*

6. On 12th August, 2013, the plaintiff swore an affidavit of verification pursuant to s. 14 of the Civil Liability and Courts Act 2004, in the following terms:-

> *"1. I beg to refer to all the pleadings to date, to include the personal injuries summons dated 17th September, 2012, and the notice of replies to particulars dated 26th February, 2013, delivered herein on behalf of the plaintiff.*
>
> *2. The assertions, allegations and information contained in the said pleadings which are within my own knowledge are true. I honestly believe that the assertions, allegations and information contained in the said pleadings which are not within my own knowledge are true.*
>
> *3. I am aware 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."*

7. On 13th March, 2014, the plaintiff attended with his GP, who noted as follows in the ensuing medical report:-

> *"Finally, I do agree that Michael has ongoing back pain even though it has improved and I think it is unlikely that he is fit for heavy work for the foreseeable future. I would agree with Michael's assessment on that and in my opinion he is unlikely to be fit for doing heavy work for the foreseeable future. As per my report dated 17th April, 2013, Michael was a*

very active cyclist and his distance in cycling has reduced considerably due to his ongoing back pain."

The Plaintiff's Evidence at Trial
8. In his evidence, the plaintiff admitted that he had told lies to his solicitor for the purpose of providing details for insertion into the replies to the notice for particulars. In particular, he admitted that by the autumn of 2012 he had been able to resume cycling for up to five hours at a time. He was able to do a route known as the "*Sean Kelly Route*" which was a demanding cycle between Clonmel and Dungarvan involving a number of challenging assents.

9. The plaintiff also admitted swearing the affidavit of verification to the effect that the replies furnished were the truth. He knew that the reply given at item 11 was not the truth. He stated that he did this to give his case a better value.

10. The plaintiff also admitted that he had told lies to his GP in relation to the amount of time that he could cycle his bicycle. He told the doctor on a number of occasions that he could only cycle for one to one and a half hours, when in actual fact he could cycle for up to five hours. The plaintiff admitted that he told these lies in order to get more money in his case.

11. In cross-examination, the plaintiff stated that he had been interviewed by Mr. Frank Walsh, a careers consultant, on 11th February, 2014. As appears in Mr. Walsh's report, the plaintiff described his general situation as follows:-

> *"He related that he continues to suffer pain and discomfort in his lower back which is progressively aggravated by heavy or prolonged physical effort typical of which is heavy lifting, repetitive lifting or bending and cycling for long periods or up hills (he had been regularly cycling an average of six hours and up steep hills prior to the accident and now his maximum is two hours and on the flat)."*

12. The plaintiff admitted that that was a deliberate lie in relation to the length of time he was able to cycle. He stated that he had told the lie because he wanted to get more money in his claim.

13. The plaintiff maintained that he had told the truth in his evidence because he wanted to get the truth out into the open. He denied that he only told the truth because the defendants had listed a private investigator on their list of witnesses. He conceded that he was aware that the game was up, so he had to tell the truth. He admitted that he had done the *"Sean Kelly Route"* in November 2012, which was the time when the defendants' private investigator had photographed the plaintiff on this route. He accepted that on 21st November, 2012, when the private investigator had followed him, he may have done some extra mileage, giving an overall trip of approximately 105km. He admitted that he had gone this distance without a break.

14. It was put to the plaintiff that some days earlier, on 15th November, 2012, the private investigator had followed him to Dungarvan, which was a round trip of 80km. The plaintiff said that he could not recall the dates, but he accepted that he had told lies in relation to his capacity for cycling.

15. The plaintiff was also questioned about his reply to item 8 in the notice for particulars. He had been asked whether he had had any illness, sickness, disease, handicap, surgical operation, or medical complaint, physical or otherwise, either prior to or subsequent to the incident on 27th April, 2012, referred to in the summons. If he did have any of the above conditions, he was asked to give certain information in relation thereto. In his reply to question 8, the plaintiff had stated that to the best of his recollection, with the exception of an incident involving exposure to ammonia, he had not required treatment in twenty years. It was stated that he would make voluntary discovery of his medical records to confirm that that was the position. The plaintiff did not believe that he had ever suffered from any injuries or medical condition relevant to the injuries, the subject matter of these proceedings.

16. It was put to the plaintiff that he had told a lie in this reply because he had not disclosed a leg injury which he had sustained in September 2011 when he had slipped while ascending a flight of stairs. He had gone on to develop cellulitis as a result of this injury. The plaintiff did not accept that he had told a lie in this regard.

17. The plaintiff's GP, Dr. Sullivan, also gave evidence. He stated that the plaintiff had been seen by Dr. Kelly, Consultant Orthopaedic Surgeon, who had confirmed a fracture of L1 vertebra which had been treated conservatively with a back brace. Mr. Kelly was satisfied that the fracture had healed with excellent alignment.

18. Dr. Sullivan stated that he relied to some extent on what the plaintiff told him during the examination. The plaintiff had told Dr. Sullivan that he could only cycle for one and a half hours per day. However, the doctor stated that he would also rely on his own examination of the plaintiff when making his diagnosis. He said that in pursuing his hobby of cycling, the plaintiff was making every effort to get better. He approved of the plaintiff's cycling more than one and a half hours if he felt up to it. He felt that the cycling was beneficial not only from the point of view of recovery of the back injury, but was also having a beneficial effect on the plaintiff's mood, which had been somewhat depressed after the accident. The doctor said that he would encourage the plaintiff to cycle. He did not think that there was much significance to the fact that he could cycle for four to five hours rather than two hours as stated.

The Defendants' Submissions
19. The defendants referred to s. 26 of the Civil Liability and Courts Act 2004, which is in the following terms:-

> *"(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that –*
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> *(a) is false or misleading, in any material respect, and*
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> *(b) he or she knows to be false or misleading,*
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> *the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.*
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> *(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that –*
>
> *(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."

20. The defendant accepted that while the plaintiff had repeatedly told lies to his solicitor and doctor, he had not given false evidence at the trial of the action. He had admitted that he had told these lies with the intention of having his doctor give false evidence at the trial of the action. The plaintiff admitted that his intention was to mislead the court with a view to obtaining more money.

21. The defendant accepted that as no false evidence was in fact given, subsection (1) of s. 26 was not relevant.

22. The defendant referred to the decision of Peart J. in *Carmello v. Casey* [2007] IEHC 362, where the rationale for s. 26 was stated as follows:-

"Section 26 was introduced by the Oireachtas for the very clear purpose of avoiding injustice to, inter alios, defendants against whom false or exaggerated claims are mounted in the hope of recovering damages to which such plaintiffs are not entitled. Such actions are also an abuse of the process of the court. It has always been a very serious criminal offence to knowingly give false evidence under oath. The proof of such an offence is required to be beyond a reasonable doubt. This court is not so constrained, and makes its finding on the balance of probability. The section is certainly of a draconian nature, but it is deliberately so in the public interest, and is mandatory in its terms, once the court is so satisfied on the balance of probability, unless to dismiss the action would result in injustice being done. As I have said, I am satisfied in the present case that no injustice will result from a dismissal of the plaintiff's action, and I so order."

23. The defendant accepted that the burden of proof rested on them to establish a breach of s. 26. The defendant also submitted that it did not matter that the plaintiff had suffered injuries which were accepted before the court. They referred to the decision in *Higgins v. Caldark Limited* [2010] IEHC 527, where it was stated specifically that the fact that the plaintiff, who, apart from his lies, would have been entitled to compensation, was not relevant. In the course of his judgment, Quirke J. stated as follows:-

"The 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.

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.

The sanction must be imposed unless its imposition 'would result in injustice being done'.

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.

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.

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.

…

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.

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.

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.

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.

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

24. The defendant also referred the court to the decision in *Salaco v. O'Carroll* [2013] IEHC 17, which is authority for the proposition that a false account given to a medical expert can trigger the provisions of s. 26(1) of the 2004 Act. The defendant submitted that the giving of false evidence even once can trigger the operation of the section resulting in dismissal of the action.

25. The defendant pointed out that in *Farrell v. Dublin Bus* [2010] IEHC 327, the abandonment of a loss of earning claim did not save the action from dismissal pursuant to s. 26. In the course of his judgment, Quirke J. held that where a significant loss of earnings claim was abandoned, the plaintiff cannot just proceed as if nothing unusual has occurred. The plaintiff must explain why the claim was put forward and later abandoned.

26. The defendant also referred to the inherent jurisdiction of the court to protect its own processes as laid down in *Shelly-Morris v. Dublin Bus* [2003] 1 I.R. 232, where it was established that the court can protect its own processes, so that if a plaintiff told lies, this can undermine the entirety of the plaintiff's claim. This is a discretionary jurisdiction.

27. The defendant submitted that the case had to be considered under s. 26(2) as the plaintiff had sworn an affidavit of verification stating that his replies were truthful when, in fact, he knew that the response he had given to item 11 of the affidavit was incorrect and misleading.

28. The defendant further submitted that the operation of s. 26 was mandatory. It stated that the court "*shall*" dismiss the action if the elements in subs. (1) or (2) are established. In the circumstances, the defendant submitted that the plaintiff's action should be dismissed in accordance with s. 26 of the 2004 Act.

The Plaintiff's Submissions
29. The plaintiff submitted that it was accepted that the accident had occurred, that the plaintiff had suffered injuries as a result of that in the form of a fracture of one of his lumbar vertebrae and depression. It was also accepted that he had missed out on a job offer due to his injuries.

30. The plaintiff stated that in order for s. 26 to be activated, the plaintiff had to provide evidence that was false or misleading in a material respect. Looking at the section in its entirety, the effect of the section is to deal with false or misleading evidence. The plaintiff submitted that there was no evidence before the court that the plaintiff's pre-trial statements were false or misleading in a material respect. There was no evidence that the doctors were misled by the plaintiff's answers. In the circumstances, it was submitted that the plaintiff's lies were not material.

31. The plaintiff also submitted that regard must be had to the principle of proportionality. They referred to *Rock v. Ireland* [1997] 3 I.R. 484, and in particular to the following dictum of Hamilton C.J.:-

> *"The principle of proportionality is by now a well-established tenet of Irish constitutional law. It surfaced obliquely in Cox v. Ireland [1992] 2 I.R. 503, in which the Supreme Court held s. 34 of the Offences Against the State Act, 1939, to be 'impermissibly wide and indiscriminate' in its restriction of the constitutional right to earn a livelihood. In Heaney v. Ireland [1994] 3 I.R. 593 at p. 607 it was explained by Costello J. as follows: -*
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> > *'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Ltd. v. United Kingdom (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-*
> >
> > *(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
> >
> > *(b) impair the right as little as possible, and*
> >
> > *(c) be such that their effects on rights are proportional to the objective: Chaulk v. R. [1990] 3 S.C.R. 1303 at pages 1335 and 1336.'"*

32. The plaintiff stated that the defendant had referred to the *Carmello* case, but it was important to look at the facts of each case. The plaintiff in that case had tried to ascribe an injury suffered elsewhere to the accident, the subject matter of the action. The plaintiff had not done this in the instant case.

33. The plaintiff pointed out that in the *Salako* case, the court had to rely on the subjective evidence of the plaintiff in relation to the injuries suffered. In the present case, the plaintiff had an objective injury in the form of a fracture of the vertebrae. The ongoing complaints of the plaintiff were consistent with the objective evidence of the injury.

34. The plaintiff submitted that when one looks at the test of materiality, there is no evidence that the plaintiff's lies had any material bearing on the claim. It was submitted that it would be a grave injustice to the plaintiff to have his action dismissed. Here, the plaintiff had a definite injury and had lost a job offer. When looking at where the justice of the case lay, it was submitted that: (a) the action was not within s. 26; and/or (b) it would be an injustice to throw the case out altogether.

35. The plaintiff submitted that the court should have regard to the fact that the defendant chose not to go into evidence. They referred to the decision in *Doran v. Cosgrove* [1999] IESC 74 as authority for the proposition that the court can draw an inference from the fact that the defendant has not gone into evidence. In this case, it was common case that the plaintiff had told lies to his own doctor. The defendant had medical evidence which they chose not to call. The court was asked to infer that the reason they did not call that evidence was because it was adverse to the defendants' case. The court is not satisfied that any inference can be drawn from the fact that the defendants chose not to call any medical evidence. We do not know what the plaintiff told the defendants' doctors. Nor do we know what opinion was reached by them in relation to the plaintiff's injuries and ongoing complaints. The court will not speculate as to what evidence may have been given to the defendant's doctors.

36. It was submitted that there was no materiality to the lies told by the plaintiff to his doctor. There was the evidence of Dr. Sullivan that he was not misled by the plaintiff's statement to him.

37. The defendant in reply submitted that the lies told by the plaintiff were material and relevant to the plaintiff's claim. The relevance lay in the fact that there was a lie about the nature and extent of the plaintiff's injury and also a contention by the plaintiff that he had lost the benefit of a recreational activity. This was material to the assessment of damages. A lie about one's capacity to engage in a sport can be material. The evidence as to the nature of his impairment was material to the case.

38. Furthermore, the plaintiff had pleaded a reduced capacity to cycle, so this was relevant and material to his claim. The defendant referred to *Nolan v. Mitchell & O'Neill* [2012] IEHC 151 where damages had been assessed in favour of the plaintiff in the sum of €192,000.00. The claim was dismissed under s. 26 due to admission of exaggerated income figures and a statement by the plaintiff to the defendants' vocational assessor to the effect that he could no longer participate in his pastime of "*car drifting*". He had told the

vocational assessor that he had had to give up this hobby. This was untrue. Due to these matters, the case was dismissed.

39. The defendant submitted that, in terms of the exemption provided for in s. 26 in relation to an injustice being done if the case is dismissed, Quirke J., in the *Farrell* case, stated that the relevant test was whether the dismissal of the action would result in injustice being done. It was submitted that in this case there would be no injustice to the plaintiff if his action was dismissed.

Decision on the Section 26 Issue
40. In this case, the plaintiff had told a number of lies to his solicitor and to his doctor. The essence of the lies was that he said that he could only pursue his hobby of cycling for one and a half hours, when in actual fact he was able for much longer cycles of up to five hours in duration. The plaintiff came clean about his lies when he came to give evidence. He candidly admitted that he had told the lies so that he would get more money in his claim.

41. Due to the fact that neither the plaintiff nor his doctor gave false or misleading evidence subs. (1) of s. 26 does not apply.

42. As already noted, subs. (2) provides that the court shall, if satisfied that a person has sworn an affidavit under s. 14 that: (a)is false or misleading, in any material respect; and (b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

43. In this case, the plaintiff had pleaded in his replies that since the accident, he was very limited in the amount of cycling that he could do. He stated that he was confined to cycling largely on the flat and for a maximum of one and a half hours. He stated that he could not sit properly on the bicycle because of his back injury. The replies were delivered on 26th February, 2013. This was at a time when the plaintiff could cycle for up to five hours. On 12th August, 2013, he swore an affidavit of verification in respect of the pleadings, including the replies. I am satisfied that in swearing that affidavit, the plaintiff did so in breach of s. 26(2) of the 2004 Act.

44. The consequence of a breach of the section is dismissal of the action. However, there is a saver to the effect that the action shall be dismissed unless the court shall be of the opinion that dismissal of the action would result in an injustice being done. I am satisfied that in this case there would be an injustice if the action were to be dismissed. The doctor has stated that there was not much significance from a clinical point of view between cycling between one and a half hours or for four hours. It does not appear that the doctor was misled in his diagnosis or treatment as a result of the lies told to him by the plaintiff.

45. In the circumstances, I am satisfied that the lies were not of great significance to the plaintiff's overall claim. The injury suffered was an objectively verifiable injury in the form of a fracture of the L1 vertebra. He had required immobilisation in a body brace for three months. Thereafter, he had gradually got back to full fitness. The lies told were not sophisticated and were liable to be found out, as indeed they were by the private investigator. They related to his capacity to pursue his hobby of cycling. As such they did not relate to a central issue in the case. In these circumstances, I am satisfied that it would be an injustice to dismiss the plaintiff's claim on account of the lies told by the plaintiff to his solicitor and his doctor.

46. The lies related to how much he could engage in his sporting pursuits. He admitted to cycles of up to one and a half hours in duration. This shows that he had attained a reasonable level of fitness. If he had admitted to doing the longer hours, his compensation would not have been much less than on the actual number of hours that he could cycle. It would be an injustice to dismiss the entire claim on account of the lies told in relation to his sporting pursuits. Accordingly, I refuse the defendant's application for dismissal of the action pursuant to s. 26 of the Civil Liability and Courts Act 2004.

Assessment of damages
47. The plaintiff suffered a fracture of the L1 vertebra and was immobilised in a back brace for three months. Thereafter, he gradually weaned off the use of the brace. The fracture healed in an excellent position.

48. He returned to his hobby of cycling in May 2011. He built up the distance in the time that he could cycle. Certainly, by the winter of 2012, he could cycle to a high level of fitness. The overall distance was in the region of 80/100km. It would take him four to five hours to complete the round trip. In the circumstances, the plaintiff must be seen as having made a fairly complete functional recovery by late 2012.

49. Also of some relevance was the fact that the plaintiff had an injury to his left leg in September 2011. He hurt his leg while ascending a flight of stairs going up two to three steps at a time. As a result of the injury, he developed cellulites in his leg in the area of his knee. This lasted for a number of months. It was not related to the injuries sustained in the accident.

50. The plaintiff also suffered from depression as a result of his back pain and consequent disability. In the medical report dated 17th April, 2013, Dr. Sullivan stated that he had seen the plaintiff in the past and had given him anti-depressant medication for one month, which the plaintiff felt had helped. In a report dated 13th March, 2014, Dr. Sullivan stated that he saw the plaintiff on 20th September, 2012, with depression and poor sleep. The doctor started the plaintiff on anti-depressant medication and he has been on this medication since that date. The doctor felt that the depression was secondary to the plaintiff's frustration with his ongoing back injury and the fact that he was not working.

51. Dr. Sullivan was of the opinion that in March 2014, that the plaintiff had ongoing back pain although it had improved. He thought it unlikely that he would be fit for heavy work for the foreseeable future. The opinion and prognosis given in this report has to be seen in the light of the fact that the plaintiff had lied about his ability to go on long cycles due to back pain.

52. I am satisfied that the plaintiff suffered a significant injury to his lower back in the accident in April 2010. This was in the form of a fracture of the L1 vertebra. It rendered him totally disabled for the period of three months, while he was wearing the back brace. Thereafter he gradually returned to full fitness. He was able to undertake strenuous exercise by the winter of 2012. In the circumstances, I award the plaintiff general damages in the sum of €45,000 for pain and suffering to date. In light of his ability to perform strenuous exercise as and from 2012, I do not award any damages for pain and suffering into the future.

53. In relation to special damages, at the time of the accident the plaintiff was unemployed, but was second on a list of people who could be called on by Clonmel Borough Council to do manual work as required. The plaintiff had worked for the Council previously. On 3rd June, 2010, the plaintiff was offered a job as a general operative by the Council for a four month period. Due to the fact that he was wearing a back brace at the time, he could not take up this offer of employment. The job was given to the man who was third on the list. He was apparently kept on permanently when the four month contract was up.

54. The court heard evidence from Mr. Martin Nolan, an administrative officer with Clonmel Borough Council and now with Tipperary Council. He could not say with certainty that the plaintiff would have been kept on at the end of the four month contract. It would be speculative to say that the plaintiff would have been given a permanent job. He would have been on probation and he may not have been kept on. Mr. Nolan said that the plaintiff would have received €544.00 gross per week in the job.

55. I do not think that the court can make the assumption that the plaintiff would have been kept on permanently at the end of the contract period. However, the plaintiff is entitled to some damages for the loss of the four month contract. Given a gross weekly wage of €544.00, that would have amounted to €8,704. This would give a net loss after tax and Universal Social Charge of something in the region of €5,744.00. I will allow this sum as special damages.

56. Accordingly, the plaintiff is entitled to €45,000 for general damages and special damages of €5,744 giving a total of €50,744.