

THE HIGH COURT

[2013 No. 5167 P.]

BETWEEN

P.J. MALONEY

PLAINTIFF

AND

PATRICK WHITE

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 28th day of January, 2016

1. The plaintiff in this case is a self-employed builder. He had done some construction work on behalf of the defendant's son and daughter-in-law. The plaintiff felt that he had not been fully paid what was due under the contract. When he was unable to secure payment by the usual means, he decided to bring his dispute to a new level.

2. On 14th December, 2011, the plaintiff drove his jeep to the village of Cloneen. He parked his jeep across the road from the national school where the defendant's daughter-in-law worked. He placed signs on the front, side and rear of his jeep. These signs were in the following terms:

"Padraig & Aileen White – please pay the money you owe for your new house."

3. The plaintiff parked his vehicle at the locus at approximately 13.15 hours, which was the time when the junior and senior infants classes would be let out of school.

4. After some short period of time, the defendant's sons, Martin and Richard White, arrived on the scene. They said to the plaintiff that this was not the way to make a protest. The plaintiff stated that he told them that the matter was nothing to do with them.

5. A short while later, the defendant arrived in his car. According to the plaintiff, the defendant parked his car to the rear of the jeep. He got out of his car and took a photograph of the rear of the plaintiff's jeep. He then tried to pull the sign from the rear of the jeep. The plaintiff said that the defendant stated *"You are nothing but f...ing bastards"*.

6. According to the plaintiff, the defendant then got back into his car and drove it up the side of the jeep. The defendant then wound down his window and leant out and tried to pull the sign off the side of the jeep. The plaintiff states that at this point he walked down between the jeep and the defendant's car. He stated that the car was approximately two feet, six inches away from the jeep. He stated that he prevented the defendant from removing the sign.

7. The plaintiff stated that at this point, the defendant said *"I'll fix you"*. He then pulled his car to the right, pinning the plaintiff against the side of his jeep. The plaintiff said that he cried *"Stop! Stop!"* as did the defendant's sons. He stated that the defendant then drove off. The plaintiff said that the defendant definitely turned his car in towards his jeep, thereby pinning the plaintiff between the car and the jeep.

8. Evidence was also given by Mr. Jamie Maloney, the plaintiff's son, who had been with him at the time of the incident. He stated that having parked the jeep across the road from the national school and having put signs on the vehicle, they then stood at the pub door a short distance from the jeep. He stated that two of the defendant's sons then arrived on the scene and were annoyed about the signs on the plaintiff's jeep.

9. Mr. Jamie Maloney described the defendant arriving in his car and parking behind the jeep. He then got out, took photographs of the back of the jeep and then got back into his car. He then brought the car up parallel with the plaintiff's jeep.

10. He described how the defendant had tried to remove the sign from the side of the jeep. When the plaintiff had prevented him from doing so, he stated that the defendant turned his vehicle in towards the jeep and pinned the plaintiff against the jeep. Mr. Maloney stated that he shouted *"Stop!"* The defendant then drove off. The witness stated that he had been standing at the rear left corner of the jeep, facing his father, when these events took place.

11. Mr. Jamie Maloney was positive that the defendant had turned his steering wheel and brought his vehicle in towards the jeep. He stated that when the defendant drove off, he drove to the top of the street and then turned and drove back down past the scene. After the incident, the plaintiff and his son removed the signs from the jeep and sat in the jeep for a while, as his father was greatly shaken by the incident.

12. The defendant stated that on the morning of 14th December, 2011, he received a telephone call from his son to say that there was something going on down at the school. He drove down to the school to see what was happening. He saw signs on the plaintiff's vehicle which stated that his son, Padraig, owed money to the plaintiff. He stated that having parked his vehicle, he got out of the car and took photographs of the plaintiff's jeep and of the posters on the jeep. He then got back into his car and drove parallel to the plaintiff's jeep. He stated that he put his hand out of the window to take the side poster down and that the plaintiff then came in between his car and the jeep.

13. The defendant denied that he pinned the plaintiff against the jeep. He stated that he did not strike the plaintiff or his vehicle. He stated that he did not make contact with the plaintiff. He just drove away.

14. In the course of cross examination he denied that he knew anything about the dispute between his son, Padraig, and the plaintiff. He stated that he was just told that there was trouble at the school and that his son Padraig asked him to go down and see what

was happening.

15. The defendant stated that he could not recall if he parked behind the jeep. He did remember getting out of his car. He stated that he did not go near the sign at the back of the jeep. He stated that he did not touch that sign. He did not try to remove it. He got out of his car and took a photograph of the sign on the back of the plaintiff's jeep. He stated that there was always a camera in the front of his car. He stated that somebody had said that you should take a photograph to have a record of the sign.

16. The defendant stated that he then moved his car to the side of the jeep. He agreed that he was approximately two feet, six inches away. He stated that he wound down his window and tried to remove the sign from the side of the jeep. He denied that he was shouting at any stage. He stated that he was cross about what had happened, but he did not shout at anyone. He stated that when the sign would not come away from the side of the vehicle, he just drove away.

17. He stated that the plaintiff had come in between the vehicles to stop him removing the sign. He stated that he did not say anything to him at this stage. He stated that he may have turned in towards the jeep accidentally. He did not hear anybody shout "Stop! Stop!". He stated that just drove off. He stated that *"Maybe the car turned in. I was not aware of that. My car may have come in contact with him accidentally."*

18. When asked as to whether it was probable that his vehicle did turn in before driving off down the street, he said that it would be 50/50 that he may have turned in.

19. The defendant stated that he could see no danger. He was not sure if there was contact with the plaintiff. He said that there was no danger when he pulled off down the street. He stated that there was no mark on his vehicle. He said that he checked the side of his car. When asked as to why he had done that, he stated that *"anybody would look at the side of the car"*.

20. The defendant stated that he did not hear anyone shouting anything at that time. He said that there were a lot of children around. He could have missed something being said. It was put to him that in his garda statement he had heard someone say "Go on squeezing". He stated that he did not hear that. He told the gardaí that he had heard something coming behind him. He could not say why he had said that in his statement. The defendant stated that he told the gardaí that there was no contact between his vehicle and the plaintiff. He accepted that now he was not so sure; his vehicle could have turned in a little bit. He said that he would go with whatever he had said in his statement to the gardaí.

21. It was put to the defendant that he had left the scene because he knew that he had hurt the plaintiff. The defendant denied that this was the reason why he had left the scene. He agreed that he did not wait around to see what happened, nor to see how his daughter-in-law was. He stated that he wanted to remove the signs, but that he saw no point in staying around.

22. Evidence was also given on behalf of the defendant by Mr. Martin White, a son of the defendant. He stated that he got a phone call from Ms. Aileen White that there was a jeep parked across the road with signs on it. Mr. Martin White and his brother went down to the school and saw the jeep with the signs on it. They parked in front of the plaintiff's jeep. They walked towards the jeep and said to the plaintiff that there was no need for this kind of action. Mr. Martin White then got back into his car.

23. Mr. Martin White stated that his father then arrived on the scene and got out of the car and took a photograph of the sign on the rear of the jeep. He then pulled up parallel with the jeep. The defendant went to pull the poster from the side of the jeep and the plaintiff walked down between the jeep and the car. He said that nothing else happened. The plaintiff stopped the defendant removing the sign and the defendant then drove off.

24. He did not see the defendant's car colliding with the plaintiff or his jeep. The plaintiff did not complain of being hit. There was no damage whatever done to the vehicles.

25. Mr. Martin White stated that the plaintiff was agitated about the debt that was allegedly due to him. The witness stated that his father, the defendant, was not agitated. He did not see the defendant attempt to remove any sign from the rear of the jeep.

26. The witness stated that when the defendant tried to take the poster from the side of the jeep, the plaintiff stopped him doing so. The defendant then drove off. The witness denied that he shouted "Stop!" at any stage, as there was nothing to stop. He said that there was no shouting at the scene. The defendant simply turned out onto the road and drove down the other side of the road. He had not turned in towards the jeep at any stage.

27. On the day of the incident, the plaintiff made a detailed statement to Garda Orla Walsh at Clonmel Garda Station. The matter was then transferred to Garda Kelly for investigation. In the course of his investigation he took statements from all the relevant witnesses. He stated that he did not find any evidence of contact between the defendant and the plaintiff. He decided that the best way to deal with the matter was to issue a warning to Mr. Padraig White and Aileen White and also to Mr. Maloney.

In cross examination he accepted that the plaintiff had gone to the gardaí immediately after the incident. The plaintiff did not allege that the vehicles struck each other.

Conclusions on liability

28. I am satisfied that while the plaintiff walked down between the two vehicles, in an effort to prevent the defendant from removing the poster on the side of the jeep, the defendant's vehicle was caused to turn in towards the jeep, prior to driving off down the road. Under cross examination, the defendant accepted that there could have been some slight movement of his vehicle towards the plaintiff's jeep. He stated that the chances of this happening were probably 50/50. He conceded that there may have been a movement of his car towards the jeep, but he denied making any contact with the plaintiff.

29. I accept the account of this incident as given by the plaintiff. He gave his evidence in a clear and straightforward manner. His actions subsequent to the incident, in particular, making a detailed statement of complaint to the gardaí and trying to obtain an appointment with his GP, are consistent with his version of events, i.e. that he was caused to suffer an injury as a result of the defendant's car moving towards the jeep.

30. While there may have been no contact between the respective vehicles, I find that the defendant's action in checking the front driver side of his vehicle, is only consistent with a belief on his part that there may have been some contact with either the plaintiff or his vehicle. Furthermore, the action of the defendant in driving off before the matter was resolved, or before he had a chance to see if his daughter-in-law was all right, is consistent with a knowledge on his part that he may have caused an injury to the plaintiff.

31. In the circumstances, I am satisfied that the defendant's vehicle did indeed turn in towards the plaintiff's jeep, thereby effectively pinning the plaintiff against his jeep. Accordingly, liability for this incident, must rest with the defendant.

32. However, the plaintiff must accept some responsibility for the circumstances giving rise to the incident. His action in posting signs up on his vehicle and then parking his vehicle in clear sight of the school, where the defendant's daughter-in-law worked, was highly provocative. It must have been clear to the plaintiff that he would cause maximum embarrassment to the defendant's son and daughter-in-law by placing these signs directly opposite the national school where the defendant's daughter-in-law worked. In such circumstances, it was easily foreseeable that there would be a risk of erratic driving on the part of the members of the White family, who would be agitated and upset by the presence of the signs on the plaintiff's vehicle. The plaintiff must accept some responsibility for creating this state of affairs. In the circumstances, I find that the plaintiff was twenty-five per cent responsible for the situation that ensued. Accordingly there will be a finding of twenty-five per cent contributory negligence against the plaintiff.

Quantum

33. The plaintiff is fifty-three years of age and works as a self-employed builder. He stated that after the incident he sat into his jeep and stayed in the vehicle for a while before driving home. He knew that something was wrong with his lower back and hip areas. When he got home, he rang his GP, but was not able to obtain an appointment for that day. He was given an appointment for the following morning. He then went to the Garda Station and made a statement about the matter. He then returned home.

34. On the following day his lower back and right hip area were very stiff and painful. He went to his GP and was seen by Dr. Carmel Condon. He was given a course of anti-inflammatory tablets to take over the following ten days. He also had some physiotherapy treatment which he paid for privately. He returned to his GP and obtained more analgesic medication.

35. At that time the plaintiff was experiencing pain in his right hip which would radiate to the upper back and down into his leg. He was unable to do the heavy work involved in construction. He could do light work and was able to supervise his son, who did the heavy work. He stated that while he could do the light work, he still had pain particularly when bending and kneeling. The plaintiff stated that the building industry generally was a disaster at that time, due to the downturn in the economy. He did whatever jobs he could get at that time.

36. The plaintiff was heavily involved in karate. He had been a European champion and world champion in karate when he was younger. At the time of the accident, he was heavily involved in coaching karate. He was the coach to the Irish national team. He also competed in local and national veteran competitions, but had retired from international competitions in 2007. He also ran a karate club in Cloneen village.

37. After the accident, the plaintiff states that he was severely restricted in the sporting aspects of his life. He was no longer able to compete in competitions, nor could he demonstrate, to those that he was training, how to do the requisite karate movements. In particular, he was not able to do high kicking actions. He had to give up running the club in Cloneen. He could only participate in an advisory context. The plaintiff stated that due to his inability to participate fully in sport, or to do the heavy demands of his work, he put on a considerable amount of weight after the accident.

38. The plaintiff stated that he had had some lower back pain prior to the accident. He had sought medical attention in relation to these pre-existing complaints. He had been referred for an MRI scan, which had been carried out on the 25th February, 2010. This had been a scan of his lumbar spine.

39. The report on the MRI scan taken on the 25th February, 2010, was in the following terms:

"The lumbar discs are well preserved in signal and height no significant focal disc herniation, thecal sac or nerve root compression. Pulmonary alignment is normal. No sinister focal pulmonary lesion is demonstrated. Canal dimensions are well maintained."

40. The plaintiff stated that while he had had back pain prior to the date of the accident, it did not prevent him training or working fully.

41. The plaintiff stated that in 2012 he had had further physiotherapy treatment. This had given temporary relief, but the pain had returned. He also had received treatment from an osteopath, but this had the same result as the physiotherapy treatment. The plaintiff stated that he became very unfit during this period due to the fact that he could not train or participate in karate.

42. The plaintiff stated that in 2012 he had been referred to Mr. Eanna Falvey, sports and exercise medicine physician in Cork. While Dr. Falvey did not give evidence, a report dated 28th March, 2014, was admitted in evidence. He noted that an MRI scan had been carried out on 14th March, 2012. This revealed large iliopsoas bursae in front of both hips. There was early degenerative change in the joint with loss of articular cartilage and morphology consistent with femoroacetabular impingement. The official report confirmed degenerative change of the hip joint, with a small paralabral cyst indicative of underlying labral injury. A repeat MRI scan of the lumbar spine confirmed the earlier findings. At that time Dr. Falvey performed an image guided aspiration of the iliopsoas bursae and injection of the hip joint. The plaintiff stated that this injection gave him good relief for a while, but the pain returned.

43. The plaintiff also came under the care of Mr. Carton in relation to his hip pain. He has advised that the plaintiff will require a full hip replacement. However, the plaintiff states that he cannot afford to take the requisite time off work, which would be a period of six months to one year. He did accept that he would have to undergo the hip replacement operation in the relatively near future.

44. In cross examination, the plaintiff accepted that he did not have any visible mark on his body after the incident on 14th December, 2011. The plaintiff was asked why he had not referred to a previous MRI scan in 2010 when examined by the defendant's doctor. The plaintiff accepted that he did not tell this doctor about this scan, because it had been clear and he had not had any operations or treatment based upon it.

45. The plaintiff accepted that he was able to carry out a number of duties involved in his work as a builder. He accepted that he was able to climb a ladder and get up on to scaffolding. However he was adamant that he was not able for the heavy aspects of the work and that it was his son who did the heavy work. The defendant introduced in evidence a number of photographs dated 12th and 13th March, 2014, showing the plaintiff standing on scaffolding and apparently doing work in relation to the re-slatting of a roof. The plaintiff accepted that he was shown in photographs; however, he stated that he was there in a supervisory capacity and that it was his son who lifted the slates onto the scaffolding and did the actual work on the roof itself.

46. In relation to his karate activity, he accepted that he was still involved as a coach and general advisor. He stated that he would

attend at championships and he is on a number of committees of the organising body. However, he stated that he had last participated in a karate competition some four years ago. He stated that he is now only able to act in an advisory capacity, as he cannot demonstrate the high kicking actions required of competitors. The plaintiff also accepted that he had made a reference to receiving treatment from a psychotherapist in his evidence, but had not told the defendant about that. He also accepted that he had not told the defendants that he had a bad back prior to the time of the accident.

47. Evidence was also given by Ms. Breda Maloney, the plaintiff's wife. She stated that she had been working on the day of the incident. That evening the plaintiff had been in shock and was also in considerable pain. He made an appointment with his GP for the following day. She stated that his injuries have had a severe effect on his life and had "*turned his life around*". She stated that he had loved karate. He had retired from international competitions in 2007, but did local and veteran competitions. He is now reduced to participating in an advisory role, as he is not able to do the training required for competitive karate. He advises competitors what to do. He is one of the coaches of the Irish national team.

48. In relation to work, she stated that the plaintiff had continued to work after the accident, but was not able to do heavy lifting. She stated that she did the books in relation to his work and she stated that the plaintiff had had to turn down some jobs due to his injuries.

49. Ms. Maloney had stated that she had gone with the plaintiff to what he described as a "*psychotherapy*" session in Limerick. In fact this was a visit made to a rehabilitation consultant, Mr. Dennison. There had been just one visit and it had been carried out in early 2015.

50. The witness accepted in cross-examination that the plaintiff had aches and pains in his back pre-accident. She did not think that his back was that bad in 2010. The MRI scan taken at that time had been clear. She stated that while he had suffered some pain due to his work as a builder, she felt that his working activity had kept him fit and healthy. She stated that her husband had changed considerably since the accident.

51. Evidence was also given by Dr. Kirsten Fuller, who is in partnership with Dr. Carmel Condon at the Northgate Medical Centre, Fethard, Co. Tipperary. She stated that the plaintiff had attended at the practice on the 15th December, 2011. He described an incident which had occurred on the previous day, when he was rammed up against his jeep by a person in a car. He described it as being a very stressful situation. He developed pain in his back at the time and also had pain radiating to the right leg. He found it difficult to sleep the night after the incident. He denied any paraesthesia of the leg. Examination revealed full flexion of his lumbar-sacral spine with a good range of movement of his hips. Straight leg raising was normal and reflexes of the lower limb were also normal. He was treated at this point as having a soft tissue injury. He was given a course of anti-inflammatory tablets to take for the following ten days.

52. The plaintiff was reviewed at the practice on 14th February, 2012, when he had attended for another medical reason. He requested some analgesic medication for a flare-up of his low back pain. He was given a further ten day course of tablets to take when necessary.

53. He re-attended on 24th February, 2012, at which point he described still getting right sided lower back pain. He described a nagging pain since the incident. He had previously done karate training, but felt unable to do this since the accident. There was occasional right sciatica radiation to the knee area. He had physiotherapy sessions on a private basis. Spinal examination revealed no spinal tenderness. There was a full range of movement and there was tenderness on the right side of his lumbar sacral area. Straight leg raising was ninety degrees on the right and the left and the reflexes of his lower limb were intact. He was advised to do the exercises as recommended by the physiotherapist. He was also prescribed further anti-inflammatory medication. At this time Dr. Fuller booked an MRI scan of his lower back area. The scan was performed on 14th March, 2012. It confirmed that there was disk space narrowing with disc degeneration in the lumbar spine. There was mild broad based posterior bulging of two disks spaces (L4/5 and L5/S1 spaces) each of which was possibly causing minimal encroachment of the emerging respective nerve roots.

54. When reviewed on 23rd March, 2012, the plaintiff still complained of lower back pain with right sciatica leg radiation. He described the pain shooting to his right groin area on occasions and also radiating as far as the knee. He was getting physiotherapy, approximately every fortnight, and was feeling some benefit from this. Examination revealed a good range of movement of his spine. Straight leg raising was ninety degrees right and left. There was tenderness of the muscles on the right side of the lumbar sacral area. In view of his persisting symptoms and an MRI confirming bulging disks in two levels, with some nerve involvement, he was referred to the neurosurgeon, Mr. Kaar, in Cork University Hospital.

55. The plaintiff re-attended on 6th March, 2013, complaining of pain in the right groin, which was ongoing since the accident in 2011. He described power on the right being decreased and he had been unable to do karate for the past year and a half. He described that he was unable to cross his right hip. He had tenderness in the right groin for which he was going to an osteopath and also getting physiotherapy treatment. Examination revealed decreased movement in the right hip. He was advised to lose some weight and to attempt if possible to increase his fitness. He was referred for an x-ray, and blood tests and was also treated with anti-inflammatory medication. The plaintiff's bloods were done, including inflammatory markers, which were normal. X-rays of his hips and pelvis were done on 2nd May, 2013, and showed mild to moderate changes in both hips of osteoarthritis with reduced joint space.

56. The plaintiff attended the practice on 30th September, 2013. He complained that he was still getting lower back pain. He was due to attend Dr. Eanna Falvey in the sports clinic in Dublin the following week. The plaintiff re-attended on 23rd December, 2013. He described having got an injection from Dr. Falvey, with regards to his right hip pain. The injection had improved his pain a bit. He described ongoing lower and mid back pain and right shoulder pain which has been there since the accident in 2011. He described how lying or sitting seemed to exacerbate his pain. Examination revealed tenderness on the right side of his mid-back and lumbar area. There was also tenderness of the anterior of the right shoulder on movement. He was due for follow-up with Dr. Falvey in January. In 2014, Dr. Fuller prescribed the plaintiff more anti-inflammatory tablets and also another analgesic tablet (Kapake).

57. On 6th November, 2014, the plaintiff re-attended the practice. He had been seen by a specialist in the Wheatfield Clinic and stated that he was advised to organise x-rays of his pelvis. This was done on 13th November, 2014, and it showed mild to moderate narrowing of the superior joint compartment at both hips. Sacroiliac joints were well preserved.

58. At a consultation on 22nd May, 2015, the plaintiff described how since being pinned against his jeep in 2011, his pains had worsened. He described lower back pain especially in the right hip area. He described the right hip pain radiating upward on the right posterior side and radiating into the right groin area and also radiated to the right knee area. He also described left knee pain. He described intermittent pains on the right side of his neck and the right shoulder area. He stated that he never had these pains prior to the incident. He admitted to stresses and worries with regard to financial issues, as he was unable to do much work since the

accident. He described being unable to do strenuous work and only being able to do very light work as a supervisor. He also admitted to gaining three to four stone due to lack of activity over the previous number of years. He was trying to eat less and lose body weight slowly in the last five months. Examination revealed that his weight was sixteen stone, nine pounds. He stated that five months prior to this, his weight was eighteen stone, seven pounds. Neck examination revealed no spinal tenderness. There was tenderness in the muscles on the right side of his neck. Examination of his range of movement of the neck, showed restriction of extension and left lateral gaze. Examination of his right shoulder showed tenderness anteriorly, with restriction of range of movement and elevation of his shoulder. Lumbar sacral spine examination revealed tenderness on the right side of the lumbar sacral area and tenderness of the right hip. Straight leg raising was fifty degrees on the right and ninety degrees on the left. His reflexes of the lower limbs were intact. There was tenderness in the superior aspect of his right knee and in the lateral aspect of his left knee. Knee movement was satisfactory. Examination of the right hip revealed reduced internal rotation and spinal examination revealed reduced right lateral flexion and forward flexion.

59. The plaintiff described taking anti-inflammatories on alternate days. A particular anti-inflammatory called Difene caused some GI upset so he was tending to use anti-inflammatories, which were more tolerable. He described being unable to exercise much. He had attended a specialist and was advised that he was likely to need a right hip replacement in the future. He continued to have physiotherapy treatment on a regular basis. Dr. Fuller prescribed further anti-inflammatory medication, together with stomach protecting medication and he was also given an anti-inflammatory gel to use when not using the tablets. The doctor also prescribed paracetamol and an analgesic patch to use when necessary on areas of pain.

60. In her summary, Dr. Fuller stated that since the accident in 2011, Mr. Maloney continued to experience pain and restriction of movement. This included numerous areas of joint pain, especially lower back pain, right hip pain, intermittent pain of the right side of the neck and the right shoulder area. He was unable to carry out his work as a self-employed building contractor and had to work in a supervisory role, which added to his worries about his financial future. He had also gained weight due to lack of activity, which he was slowly losing over the previous number of months. He continued to require analgesia.

61. In relation to a future prognosis, Dr. Fuller stated that she did not see the plaintiff getting back to full duties as a building contractor. In her opinion he would only be fit for light duties. She did not see the plaintiff being able to return to active sport and in particular to karate. Due to the arthritis in his hip, he will need pain killing medication in the future.

62. In relation to his pre-accident condition, Dr. Fuller stated that the plaintiff had had lower back pain in 2010. An MRI scan had been carried out, which was normal. There was a significant difference between the MRI carried out in 2010 and that done in 2013, which showed disc space narrowing and bulging discs pressing on the nerves at L/5 and L/S1. Dr. Fuller stated that arthritis would not show at the early stages; this is likely to have been a gradually progressive condition. Trauma can exacerbate the progress of this condition. She stated that pre-accident the plaintiff was not a frequent attendee at the clinic; he had never come to her with back problems. The ongoing pain since the accident had had a big effect on him. He was not able to return to karate and this had a significant effect on him.

63. In cross examination, Dr. Fuller stated that the records indicated that the plaintiff had attended with the practice on two occasions in 2010. On the first attendance on 17th February, 2010, the plaintiff complained of lower back pain on the right side going into his knee. He was not able to do high kicking actions in karate. He was referred by the practice to the Santry sports clinic for an MRI. The witness was asked about the letter of referral which had been sent by Dr. Carmel Condon when requesting that MRI scan. It was dated 19th February, 2010, and was in the following terms:

"Dear Dr.

Thank you for seeing this man who has had low back pain ongoing for the last number of years, which is now worse mainly in his right side. It radiates to his sides and above his knees. He has no paraesthesia and no numbness. He has no pain on sudden movements. He cannot do high kicking in karate. He works as a karate teacher doing karate three times a week. He gets regular massages.

He has attended a chiropractor who has been keen for him to have this MRI done. Physical examination is normal. He has excellent flexibility. His reflexes are normal.

I wonder if you would see him for an MRI of his lumbar sacral spine

please.

Thank you.

Yours sincerely

Dr. Carmel Condon."

64. Dr. Fuller stated that the plaintiff had attended with her practice for the first time in 2010. He had seen a chiropractor prior to that time and had been attending with him since July 2004 complaining of a ten-year history of lower back pain. In 2009, the plaintiff had complained of right-sided lower back pain. The plaintiff had suffered a lumbar sacral joint dysfunction. As of October 2009 she had recommended a course of osteopathic care. The plaintiff had improved, but had not made a full recovery.

65. Dr. Fuller stated that she did not speak with Dr. Falvey but had received a letter and a copy of his medical report. In that medical report it was stated that the plaintiff had no prior problem with his hip or lower back. She stated that she was surprised with that statement as the plaintiff had complained of back pain from 2004 to 2010. Dr. Fuller accepted that there was no reference in the notes from the examination taken the day after the incident, to any mark on the plaintiff's body. However he was complaining of low back pain at that time. She accepted that he had been complaining of low back pain from in or about 2004. However, it was her understanding that the plaintiff had been working and training in karate fully prior to the accident. During the consultation he had informed her that since the accident he was not able for activities that he had done prior to the accident. The accident had had a significant impact on the plaintiff in the work aspects of his life giving rise to significant financial worries. He was only capable of doing light work and as a consequence there had been considerable weight gain which was likely due to lack of activity. He had attended the practice twice in 2010 and on numerous occasions after the accident. Dr. Falvey had said that the plaintiff was struck by the defendant's car and had suffered a twisting injury to his back. The absence of bruising would depend on how close the car came to him. Dr. Fuller said that you could have a twisting injury without any bruising to the affected area.

66. As already noted a report was submitted from Dr. Eanna Falvey dated 28th March, 2014. He had arranged for an MRI scan to be carried out on the 14th March, 2012, as referred to above. In the wake of that scan, he had given an injection to the hip joint, which had proved beneficial but of limited duration. When reviewed on 30th August, 2013 the plaintiff complained of right sided low back pain and lateral hip and groin pain. Dr. Falvey noted that as a high level karate practitioner prior to his injury, he had been struggling a good deal since the accident. On examination, the plaintiff was unable to squat. Slump testing however for a neurological compromise was negative. Straight leg raise was to eighty-five degrees bilaterally with slightly diminished knee jerk, but otherwise normal neurological examination. On examination of the hips there was zero internal rotation and external rotation was limited to twenty degrees. Flexion beyond eighty degrees was painful. This was compared to one hundred degrees of flexion on the left side, twenty degrees of internal rotation and thirty-five degrees of external rotation.

67. The plaintiff re-attended on 16th January, 2014. His symptoms had improved a little following the injection of the right hip. The iliopsoas bursa had largely settled. The plaintiff complained of a feeling of deadness in the right leg, with buttock pain and pain radiating down the lateral aspect of his leg. A repeat MRI scan of the lumbar spine was carried out. This did not show any interval change in comparison to scans performed on 14th March, 2012. As to his current position, the doctor noted that the plaintiff had degenerative changes in his right hip against a background of pain and stiffness in his lower back. The plaintiff related his symptoms to the injury which occurred in the accident.

68. In relation to prognosis, Dr. Falvey was of the opinion that the degenerative change and morphology of Mr. Maloney's hip would predate his injury to a certain extent, though the injury itself may have been a factor in the advance of his symptoms. He stated that it was known that limitation in movement due to morphology and underlying degenerative change can be greatly worsened by acute injury, such as a twisting motion at the time of his injury. His symptom pattern could have been worsened by this problem. The doctor went on to state that to this end Mr. Maloney had no symptoms in relation to his hip or lower back prior to the accident. This particular finding will be referred to in more detail later in the judgement. He had been practising karate at a very high level but since the accident he had been curtailed in both his daily work and his sporting exploits. His hip degenerative change was considerable and would warrant arthroplasty at some stage. He will continue to have ongoing pain and restriction of activity as a result of this.

69. Evidence was given on behalf of the defendant by Mr. Michael O'Riordan, Consultant Orthopaedic Surgeon. He saw the plaintiff on 1st October, 2013. The plaintiff complained that he had no power in his right leg. He used to train and coach karate, but at that time could only advise in the sport. Sometimes the pain would radiate to his buttock, or on occasion down to the right knee. The plaintiff took nurofen from time to time for pain relief. He found that he was unable to do the sort of work that he had been able to do previously and often had to employ people to help with his work.

70. On examination the plaintiff walked with a limp on the right side. Movements of the lumbar spine were such that in forward flexion the tips of the fingers reached the mid tibia. Extension and lateral bending appeared to be fifty per cent of normal. He could heel walk and toe walk. On asking him to stand on each leg individually he showed a positive Trendelenberg test on the right side. On carrying out the straight leg raise test the doctor found that his right hip was extremely stiff. On further questioning the plaintiff told him that he was unable to cut his own toenails. Neurological examination of the lower limbs was normal.

71. Mr. O'Riordan was of the view that from the point of view of the plaintiff's back, he thought that the prognosis was quite good. The plaintiff had had an MRI scan, which showed degenerative change at the lowest two discs in the lumbar spine. This was generally not a great source of problems. It was almost a universal finding in a man of his age and with good physiotherapy it should resolve. Mr. O'Riordan stated that he believed that Mr. Maloney had undiagnosed arthritis of the right hip. His symptoms of groin pain radiating to his right knee and the inability to cut his toe nails, were characteristic of arthritis of the hip and he had an extremely stiff hip. This would contribute very significantly to his disability and is often associated with back pain as well. Mr. O'Riordan was of the opinion that if the arthritis in his hip were treated, the plaintiff's disability would be a lot less. He stated that the accident caused neither the degenerative change in the lumbar spine, nor the arthritis in his hip; at most it might have precipitated some symptoms in his lower back which should revert to its pre-accident state.

72. In his evidence, Mr. O'Riordan stated that he was not aware that the plaintiff had had lower back pain since 2004 and had had an MRI scan in 2010. He stated that the plaintiff's degenerative changes pre-dated the accident. In cross examination he stated that in relation to the MRI scan done in 2010, he had seen the report of that scan. The content of that report could be due to the reporting style of the radiologist. He would prefer not to comment on the earlier scan because he had not seen the scan itself. He stated that bulging discs were a normal finding on an MRI scan for someone of the plaintiff's age. Some radiologists would not comment on this finding. He accepted that if there had been signs of impingement, in the 2010 scan, it would probably have been commented on. He stated that it was his practice to ask a patient if he had any serious illnesses in the past. The plaintiff told him that he had trained and coached karate. Prior to the accident, he worked and trained three times per week. These activities were curtailed after the accident. He stated that the plaintiff had arthritis in the hip and that this was not caused by the accident and would have affected his ability to work and to do karate and could also be the cause of his back pain. A twisting injury would not greatly accelerate the hip arthritis. He was of opinion that the plaintiff required a hip replacement.

73. Mr. O'Riordan stated that he could not comment on how much the plaintiff could have worked prior to the accident. The plaintiff had a degenerative disc condition, he had arthritis and was getting older. These conditions could have had an adverse effect on his capacity for work even without an accident having occurred.

74. Before coming to a conclusion in relation to the quantum of damages, it is necessary to consider an application which was made by the defendant at the conclusion of the hearing to the effect that the plaintiff's case should be dismissed pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004.

Application pursuant to Section 26 of the Civil Liability and Courts Act 2004

75. The defendant submitted that the plaintiff had not been truthful in relation to the accounts that he had given both in the course of the proceedings and to various doctors. In particular, they stated that the plaintiff had not admitted to having any pre-accident lower back pain, when it would appear from the evidence of Dr. Fuller that the plaintiff had had back pain since in or about 2004 and this had warranted the carrying out of an MRI scan in 2010.

76. Section 26 of the 2004 Act is designed to punish plaintiffs who have given false or misleading evidence or have dishonestly caused such evidence to be given by others. Section 26 of the 2004 Act is in the following terms:-

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

(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.”

77. The defendant submitted that the plaintiff deliberately failed to disclose that he had suffered from low back pain for a number of years prior to the accident. They pointed out that in his PIAB Application Form, the plaintiff was asked the following question: Have you suffered any other injury or from any relevant medical condition or have been involved in any other accident in the past five years, whether or not resulting in a claim for compensation, which is relevant to your current claim? In response to this question the plaintiff had ticked the box marked “No”.

78. In a notice for particulars dated 16th July, 2013, the plaintiff was asked at item 10 thereof:-

“Was the plaintiff suffering from any mental or physical disability or degenerative disease prior to or at the time of the accident the subject matter of these proceedings?

To this question the plaintiff gave the following reply:-

“The plaintiff was not suffering from any mental or physical disability however Mr. Karr does say that the plaintiff did have preceding degenerative changes in the lumbar spine, particularly at the L4/L5 level prior to the accident. The MRI scan of 14th March, 2012, showed degenerative change at the L4/L5 disc in facet joint in the right. This protrusion at L4/L5 or some degree of protrusion is likely to have been present prior to the accident. However, without an MRI scan prior to that accident it would not be possible to be categorical regarding this. Mr. Karr also advises that the injury was significant and believes that there was a significant twisting strain to the lower lumbar spine. The plaintiff developed symptoms in the lower back and right leg immediately following the accident and these have persisted. The area of maximal change in the lower back was at the L4/L5 level where there was disc protrusion and facet joint changes particularly on the right. It is likely that this area in particular was strained. Discs with preceding protrusion are more vulnerable to injury.

In addition the degenerate spine develops progressive stiffness and restricted range of movement and sudden movement beyond these slowly acquired thresholds may give rise to chronic symptoms.

Mr. Karr found that it is likely that the accident aggravated or contributed to the changes at L4/L5 in particular.”

79. The defendant also submitted that the plaintiff had not been frank with Dr. Falvey in relation to his pre-accident condition. They stated that it was clear from the report issued by Dr. Falvey that he had not been told that the plaintiff had suffered from back pain since in or about 2004, because Dr. Falvey had stated *“To this end Mr. Maloney had no symptoms in relation to his hip or lower back prior to this accident”*.

80. The defendant also submitted that the plaintiff had failed to bring to the attention of their expert, Mr. O’Riordan, the fact that he had suffered from back pain for a number of years prior to the accident. In cross examination, the plaintiff stated that the 2010 scan had been obtained to rule out any damage to the spine. The plaintiff thought that he had brought this scan to the examination by Mr. O’Riordan. He stated that he did not mention the 2010 scan to him when asked about previous injuries, because that scan had been totally clear.

81. The defendant also sought to rely on a letter dated 18th December, 2009, from Dr. Douglas Meckelborg, who had given chiropractic treatment to the plaintiff since in or about 2004. The defendant also sought to rely on the letter dated 19th February, 2010, sent by Dr. Carmel Condon to the Sports Medicine Clinic in Santry requesting the MRI scan in 2010. The plaintiff objected to the admission of these letters in evidence, as to do so would breach the rule prohibiting the admission of hearsay statements.

82. The court has had regard to the letter sent by Dr. Condon to the Sports Medicine Clinic in Santry, because while the letter was not actually written by Dr. Fuller, it was written by another doctor in the same practice. In such circumstances, where there are a number of doctors in a medical practice, it is appropriate that any letter written by any of the doctors, can be admitted in evidence and can be dealt with by the doctor from the practice who actually gives evidence before the court. In this regard, Dr. Fuller was able to give evidence in relation to the content of this letter, notwithstanding that it was actually authored by Dr. Carmel Condon. In the circumstances, while there may have been a technical breach of the rule against hearsay evidence, the court considered that it was appropriate to allow that letter be admitted in evidence.

83. The same cannot be said for the letter written by Dr. Meckelborg. This was a letter written by a third party, who was not called to give evidence at the trial. It was written to the plaintiff’s GP practice concerning the treatment which he had received prior to December 2009. It seems to me that this letter does breach the rule against hearsay evidence. The plaintiff was not given any opportunity to deal with the content of that letter. It was only handed in subsequent to the conclusion of the hearing of the action. In the circumstances, the court feels that this letter does breach the rule against hearsay evidence and accordingly, I have not had

regard to it in reaching my judgment herein.

84. In support of the application under s. 26 of the 2004 Act, the defendant cited the decision in *Waliszewski v. McArthur & Company (Steel and Metal) Limited* [2015] IEHC 264, where the plaintiff had failed to make full disclosure of his pre-accident medical history or disclose a subsequent accident to the defendant's doctor. In particular, Barton J. held that the failure to make such disclosure was an attempt to mislead the defendant's medical expert. The learned judge stated as follows at paras. 91 and 92 of his judgment:-

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

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

85. The defendant submitted that the plaintiff had failed to give a full account of his pre-accident medical condition to his doctors and in particular to Dr. Falvey and to Mr. Kaar. In relation to what may have been said to Mr. Kaar, this appears to be irrelevant, as Mr. Kaar was not called to give evidence at the trial, nor was any medical report from him submitted in evidence.

86. In response, the plaintiff stated that he had made reasonable disclosure of his pre-accident medical condition in the replies furnished on 1st August, 2013. Furthermore, the plaintiff's solicitors by letter dated 9th November, 2015, made further disclosure in relation to the plaintiff's pre-accident medical history:-

"Dear Sirs

We refer to the above case which is listed for hearing in Kilkenny High Court.

Please note that in relation to our client's pre-accident medical condition he did have treatment for his back but at the time of the accident he was not symptomatic."

87. In support of their submission, the plaintiff referred to the decision of the Supreme Court in *Goodwin v. Bus Éireann* [2012] IESC 9 and in particular to para. 62 of the judgment of Fennelly J.:-

"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 Éireann [2011] IESC 44). Counsel for the defendant correctly accepted that this amounted to an allegation that the claim was fraudulent."

88. The plaintiff also referred to the decision in *Smith v. Health Service Executive* [2013] IEHC 360 and in particular to para. 92 of the judgment of O'Neill J.:-

"92. 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 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. Ó Corraoin & 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.

It behoves defendants to use prudent discernment before taking the very serious step of making a s. 26 application."

89. Having considered the submissions of the parties, I am satisfied that the plaintiff in his evidence gave a fair and accurate account of both the incident and of the injuries which he sustained as a result thereof. I am satisfied that he has given his evidence in a fair and straightforward manner. There is no basis for alleging that he gave any false or misleading evidence.

90. The core of the defendant's application relates not to the evidence given by the plaintiff at the trial, but in relation to what disclosure he may have given to various doctors who treated him. I am satisfied that he did not intentionally seek to mislead his treating doctors, or the defendant's doctor, in relation to his pre-accident medical condition. I accept Dr. Fuller's evidence that the plaintiff was not a frequent attender at her practice prior to the time of the accident. It is entirely reasonable that the plaintiff, who was involved in heavy manual work and who also participated in karate to a very high level, would suffer back pain from time to time. While he received treatment for such condition from a chiropractor, I accept the plaintiff's evidence that his back pain did not interfere with his ability to carry out heavy work, or to participate in karate. This is supported by the MRI scan taken in 2010 which was entirely clear.

91. In relation to the statement in Dr. Falvey's report to the effect that the plaintiff had no symptoms in relation to his hip or lower back prior to the accident, I am satisfied that this statement appears in the report probably due to a miscommunication between the plaintiff and the doctor. In particular, the plaintiff's pre-accident medical condition has to be viewed in light of the evidence given by

the plaintiff, which I accept, that he was able to carry out all the demands of his work and to train at a high level for karate prior to the accident, notwithstanding that he suffered from back pain from time to time. Such pain as he had at that time did not prevent him from training or working.

92. In these circumstances, I am satisfied that there was no attempt by the plaintiff to dishonestly cause his doctors to give evidence that he knew to be false or misleading. Accordingly, I refuse the defendant's application to dismiss the plaintiff's action pursuant to s. 26 of the Civil Liability and Courts Act 2004.

Conclusions on Quantum

93. As already noted, I accept that the plaintiff has not tried to exaggerate his symptoms, or his level of disability. As a result of the accident, he suffered an injury to his right hip and lower back area, together with a more minor injury in the area of the right shoulder and right side of his neck. This injury was superimposed upon pre-existing degenerative changes in his back and arthritis in his right hip.

94. I accept the evidence of Dr. Fuller that it is unlikely that the plaintiff will return to doing full duties as a builder, nor will he be able to return to full participation in karate. However, not all of the plaintiff's current disability has been caused by the injury sustained in the accident. It appears that the plaintiff has significant arthritic changes in his right hip joint and that this condition pre-dated the accident. Dr. Falvey is of the view that the injury sustained in the accident may have been a factor in the advance of the arthritic condition in his hip. It seems to me that it has to be accepted that a significant amount of the plaintiff's current pain and disability is due to the arthritic condition in his hip, rather than to the injuries sustained in the accident. In addition, some of his symptoms would be referable to the degenerative changes in his lumbar spine, which were not caused by the accident. I accept the evidence of Mr. O'Riordan that when the plaintiff undergoes a hip replacement operation to deal with the arthritis in his hip joint, this should eliminate the pain in his hip and will also reduce the pain in his lower back, which should revert to its pre-accident state. Doing the best that I can to isolate those medical complaints which are referable to the accident, I award the plaintiff general damages of €65,000.00 for pain and suffering to date and €25,000.00 for pain and suffering into the future.

95. The plaintiff has also claimed the sum of €2,500.00 as special damages. This includes 16 visits to an osteopath in the period May 2012 to January 2013, amounting to €1,825.00. I find that it was reasonable for the plaintiff to incur this treatment; accordingly he is entitled to the special damages claimed of €2,500.00.

96. The total award of €92,500.00 has to be reduced by twenty-five per cent for contributory negligence on the part of the plaintiff, giving a net award to the plaintiff of €69,375.00.