

THE HIGH COURT

Record Number: 2004 No. 987P

BETWEEN

DAMIEN CARMELLO

PLAINTIFF

AND

TERENCE CASEY AND GERALDINE CASEY

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 26th day of October 2007

1. On the 25th October 2002 the plaintiff was a passenger in a car being driven by the first named defendant and owned by the second named defendant. The first named defendant appears to have lost control of the vehicle at a bend, hit a ditch and rolled over, causing injury to the plaintiff. The plaintiff has stated that he was wearing his seatbelt and there is no evidence to the contrary. Liability is not in issue in this case. It is an assessment of damages only.

2. However, the plaintiff's case has been complicated by the fact that the defendants' insurers are alleging that the plaintiff both in his evidence, in the manner in which he has instructed his solicitors, and by swearing an affidavit verifying particulars of his injuries, has deliberately given false and misleading evidence in order to exaggerate his claim, and has misled the court, and they urge this Court to exercise its power under s. 26 of the Civil Liability and Courts Act, 2004 to dismiss the entire of the plaintiff's case as a result.

3. The alleged exaggeration is in respect of a *numbness* on the left side of the plaintiff's face which he says is a result of the injuries sustained in the accident on the 25th October 2002 which is the subject of the within proceedings. The defendants contend that this numbness was the result of another incident in May 2003 about which, unknown to the plaintiff, they have learned about, and in which a branch of a tree stuck the plaintiff on the left side of his face, and for which he received treatment in Limerick Hospital, but which the plaintiff failed to disclose in his Replies to Particulars, although other accidents in the past were disclosed.

4. The Plenary Summons was issued in this case on the 27th January 2004. It was served on the defendants on the 23rd June 2004, and an Appearance was entered some eighteen months later on the 13th December 2005 which called for a Statement of Claim to be delivered. Shortly afterwards on the 4th January 2006 such a Statement of Claim was delivered, and this document set forth the details of the plaintiff's injuries in the following way:

"The plaintiff sustained injuries to his nose upper back and chest. He attended at Limerick Regional Hospital after the accident and was kept on the observation ward for a number of hours and thereafter was discharged. The plaintiff broke his nose as a result of the accident and has difficulty with nasal breathing. In relation to his cervical spine, he was tender over same and flexion was painful. He was tender over his sternum on palpitation. He was tender at the junction of the nasal bone and nasal cartilage, and he had an inflamed nasal mucosa. He was treated with analgesics and painkillers."

5. The Statement of Claim indicated that the plaintiff was under the care of Dr K.P. Manning, a Consultant Ear Nose and Throat Surgeon regarding his nasal difficulties, and that the plaintiff's injuries were of a continuing nature and the plaintiff reserved the right to furnish further particulars in due course.

6. Those details appear to have been gleaned for the purposes of the Statement of Claim from a medical report which the plaintiff's solicitors received from the plaintiff's general practitioner, Dr T.P. Casey which is dated 9th January 2003, since the wording of the particulars in the Statement of Claim mirror to a great extent what Dr Casey has stated in his report. That report states that the plaintiff presented to Dr Casey for the purpose of that report on the 6th January 2003, which is just over two months post-accident.

7. Dr Casey states in his report that "he [the plaintiff] informed me that he broke his nose as a result of this accident and he was having difficulty breathing". This report of course pre-dates the alleged incident involving the branch of a tree on the 1st May 2003 to which I have already made reference, and to which I shall refer again when detailing the plaintiff's evidence in relation to that incident when he was cross-examined about it by Liam Gaynor SC for the defendants. But it is at least noteworthy at this point that Dr Casey makes no comment about any complaint by the plaintiff of facial numbness.

8. By the time the Statement of Claim was delivered on the 4th January 2006, the plaintiff's solicitors had also received a report dated 17th September 2003 from Mr Manning, the Ear Nose and Throat Surgeon already referred to. That report was prepared just over three months after the alleged incident involving the branch of the tree, and in it, Mr Manning gives the history as given to him by the plaintiff. That history as given to Mr Manning by the plaintiff states as follows:

"Mr Carmello gives a history of having been involved in a car crash on 25.10.2002. While going around a bend travelling at approximately 70 or 80 mph the car sustained a blow-out. He was the front seat passenger in the car. He hit his nose on the dashboard. At the time he was wearing a seat belt. He was taken to the Regional Hospital, Limerick. He had bleeding from his nose. He was referred to my outpatient clinic. He says that he was told that his nose was straight and no operation was necessary."

9. Under the heading "*Complaints*", Mr Manning states as follows:

"Mr Carmello is now complaining of a blocked nose on the left side. He is complaining of pins and needles and a numb feeling on the left side of his nose and cheek. The numb feeling extends from the bridge of his nose under his eye to the midline of his upper lip. He also complained of having double vision for a few weeks following the accident."

10. Under the heading "*Examination*", Mr Manning states:

"Examination shows no abnormality of his external nose. The nose appears to be straight. There is some deviation of his nasal septum both to the left and the right. He had no feeling for touch on the left side of his face over the distribution of the left infra-orbital nerve.

An x-ray of the nasal bones *taken at the time of the accident showed no fracture to be present*. A CT scan of his sinuses showed mucosal swelling in the maxillary antrum. No bony abnormality was seen. There was *no evidence of a fracture*." (my emphasis)

11. Under the heading "Opinion", Mr Manning states:

"Mr Carmello is complaining of nasal obstruction on the left side of his nose. He has mild deviation of his nasal septum. This could be contributing to his symptoms of obstruction. It is possible that the septum was damaged at the time of the accident from hitting his nose off the dashboard of the car.

The numbness on his left cheek would suggest damage to the infra-orbital nerve. In general damage to the infra-orbital nerve would be a result of a fracture of the rim of the orbit or the floor of the orbit. There was no evidence of this on the CT scan as reported by Dr Sean Darby.

In the absence of a fracture it is possible that the nerve was damaged from a direct injury as it comes out from the bone of the inferior rim of the orbit onto the cheek".

12. Finally under the heading "Disability", He states:

"This numb sensation which Mr Carmello has would be very unpleasant. In general it would tend to become less noticeable over time. As it has been present for more than twelve months it is not likely to improve and is not likely to recover".

13. There are some further comments about the nasal obstruction which I need not refer to in any detail.

14. Of importance to note for the moment is that Mr Manning states that an x-ray taken at the time of the accident showed no fracture of the nose. Neither did the CT scan taken at the time show any bony abnormality, yet in January 2003 the plaintiff had told Dr Casey that he had broken his nose in the accident. Secondly it is worth stating again that before the Statement of Claim was delivered, the plaintiff's solicitors had in their possession this report from Mr Manning, and yet it refers to a broken nose, and there is no mention therein of the numbness to the left side of his face. Remarkable also is the fact that Mr Manning makes no reference to any incident with a tree in May 2003 (a mere four months previously), and in his evidence Mr Manning confirmed that he had not been given any information about that by the plaintiff. But I will come to that evidence in due course.

15. Mr Manning's Registrar at Limerick Regional Hospital, Mr Ullah, at the time the plaintiff attended immediately following this accident on the 25th October 2002, wrote to the plaintiff's GP Dr Casey by letter dated 6th November 2002 in order to appraise him of what had happened. Therein Mr Ullah stated:

"I saw this 21 year old who was involved in a road accident on the 25/10/2002 with facial injury which has subsided now. There is no nasal obstruction, no dysplasia and no headache. The nose bridge is straight. Septum seems to be intact but according to him there is no pain. The rest of the face and ear, nose and throat examination was normal. I am waiting for the x-ray of the nasal bone report but the shape of the nose seems to be straight to me but I'll see him next week here in the clinic."

16. That x-ray, as already mentioned, confirmed no fracture.

17. I will refer now also to a report dated 28th February 2007 which the plaintiff's solicitors received from Mr Roderick Galvin, a Consultant Neurologist. That report states that the plaintiff attended for a neurological assessment on the 24th January 2007. Mr Galvin had been furnished with the reports of Dr Casey and Mr Manning to which I have referred. Giving the history of the accident in October 2002 as recounted by the plaintiff, Mr Galvin states, *inter alia*:

"He was not rendered unconscious and said the roof caved in, the seat-belt broke and *the left side of his face forcibly hit the dashboard*. As well as his face he also hurt the nape of his neck and his lower back.

He was brought by ambulance to Limerick Regional Hospital, was x-rayed *and said he was told that he had a broken nose.*" (my emphasis)

18. Mr Galvin recounts the injuries and symptoms as given by the plaintiff to him and states:

"He said that his most troublesome symptom is a constant feeling of pain, numbness and tingling in his left cheek between his eye and upper lip. He said that his left nostril feels blocked all the time. I note that Mr Manning states that X-Rays at the time of the accident didn't show any fracture and that a subsequent CT of nasal bones showed some mucosal swelling in the maxillary sinus but again no nasal fracture."

19. In his conclusions, Mr Galvin states in relation to the facial numbness as follows:

"His main ongoing symptom is left facial numbness and this is almost certainly due to a crush injury to the left infra orbital nerve from blunt trauma to the cheek. This type of injury typically occurs with orbital fractures but can occur in the absence of fracture. It is over four years since the accident and this facial numbness is likely to be permanent at this stage. It is more in the nature of a discomfort and nuisance symptom rather than a major physical disability. *It is a direct result of his injuries.*"

20. The plaintiff had intended to call Mr Galvin to give evidence but on the day the case was heard Mr Galvin was unavailable and his report was handed into court. Clearly Mr Galvin was not told by the plaintiff anything about any incident with a tree branch in May 2003 from which it is alleged by the defendants he received an injury to the left side of his face, otherwise it is safe to assume that he would have mentioned such a relevant matter in his report. His opinion in the final sentence above must therefore be seen as given in the light of facts as given by the plaintiff, and significantly in the light of the information given to him that in the accident, namely that "the left side of his face forcibly hit the dashboard". That is the first occasion as far as this Court is aware that the plaintiff stated that it was his left face which forcibly hit the dashboard. Previously, as seen above, Mr Manning reported from the history given to him by the plaintiff that "he hit his nose on the dashboard". The Statement of Claim delivered in 2006 made no reference to his left face striking the dashboard at all. The injury identified in the Statement of Claim delivered as late as January 2006 is to the nose.

21. I have set out the material from these medical reports as they relate to the area of controversy in this case, namely the claim for damages being made against these defendants in respect of the permanent numbness to the left side of the plaintiff's face. It is the most significant element of the plaintiff's claim.

22. I will turn next to the Notice for Particulars served on the plaintiff and the Replies thereto. By Notice for Particulars dated 8th February 2005, the defendants at paragraph 19 asked if the plaintiff "ever suffered any injury in any accident/incident either prior to or subsequent to the alleged accident referred to in the Statement of Claim", and if so to give details. In response to this question the plaintiff replied as follows on the 20th January 2006:

"Yes, the plaintiff had an accident on a funfair machine on the 30th December 1994, when he suffered an injury to his head. The case settled for £7000 and these injuries are not relevant to the claim the subject matter of these proceedings. The plaintiff was in a road traffic accident on the 30th November 1998 when he suffered neck and back injuries and a right thigh cut. These injuries have long since resolved prior to the accident the subject matter of these proceedings. On the 10th February 1999 he had an accident at work leading to a partial amputation of the second and third fingers of his left hand. This injury is not relevant to the claim the subject matter of these proceedings. The plaintiff was also involved in a road traffic accident on the 25th February 2004 when he was rear-ended by another vehicle and I am attaching herewith a copy of the pleadings and medical reports thereon."

23. While there are details of accident both prior to a subsequent to the 25th October 2002, there is no mention of any accident, incident or facial injury sustained on 1st May 2003 involving the branch of a tree.

24. At Paragraph 16 of the Notice for Particulars the defendants had asked whether it was accepted that all injuries had resolved, and if so, to state the date of resolution. In answering this question, the plaintiff for the first time made reference to a numbness in the left cheek.

25. The plaintiff's Replies to Particulars were dated 20th January 2006, and as was by then required, an affidavit of verification of these particulars was sworn by the plaintiff on the 10th April 2006 in which he stated that the assertions, allegations and information contained both in the Statement of Claim and the Replies for Particulars which are within his own knowledge are true, and that he honestly believes to be true any assertions, allegations and information which are not within his own knowledge.

26. The opening of the case for the plaintiff referred to a bad injury to his nose and it was indicated that there might be some question as to whether it was fractured or not. It was indicated that there were ongoing difficulties with his nose but that these were not significant. However it was stated in opening that the plaintiff suffered a facial numbness and that Dr Galvin, if necessary, would come to Court on the following day in order to state that "this was almost certainly due to a crush injury to the left infra-orbital nerve from a blunt trauma to the left cheek. It was stated that this can occur in the absence of a fracture, and that "it is a direct result of his injury". There is no doubt that it is the permanent numbness to the plaintiff's face which is regarded by the plaintiff as by far the most serious aspect of his claim, the other injuries having substantially recovered.

27. The opening of the case in this respect was in line with what was contained in Mr Galvin's report to which I have referred. That report was not admitted into evidence at the time of the opening but was admitted by the end of the case as Mr Galvin was not available.

The plaintiff's evidence:

28. In his direct evidence the plaintiff described briefly how the accident happened, and stated that he hit the dashboard his seatbelt having broken. In relation to his injuries he stated (Q. 13):

"I suffered a broken nose and my cheek here [left cheek] just under my left nostril - the whole way to the corner of my eye is numb and it is tingly all the time. I hurt my neck and my back, but that is not ... that goes away, it is not there all the time. But this pain here - it is not a pain it is just discomfort is there all the time" (sic)

29. His Counsel, Gerard Tynan SC asked him about his nose. He stated in reply that it had swelled and was bloody for a few days, and that he had been unable to breathe for a few months through his left nostril. His right nostril was not affected in that way. He stated that his nose even now gave him pain three or four days per week.

30. In relation to the numbness in his left cheek he stated that it is not so much a pain but a numbness, like pins and needles and it is in his face all of the time. When asked for how long he had this symptom he stated "since I had the crash" (Q.28).

31. He gave evidence also of the other injuries to his neck and back, but there is no need to set out that evidence in full detail.

32. Mr Gaynor cross-examined the plaintiff and put to him what appears in the letter from Mr Ullah to the plaintiff's GP, Dr Casey namely that he had attended at the hospital on 25th October 2002 "with facial injury which has subsided now" and so on. He asked the plaintiff if he had said that to Mr Ullah but the plaintiff was unable to remember (Q.54). But the plaintiff stated that he remembered that he was in the A&E Department and said that he was told there that he had broken his nose and that they had released him (Q.55).

33. Mr Gaynor asked him also about his Replies to Particulars delivered in 2006 and in particular about the history of previous injury as given at paragraph 19 thereof and which I have set forth above. The plaintiff stated that these particulars were truthful and accurate. It would appear from this questioning that the plaintiff remembers little about the first injury at the funfair in 1994 which was settled for £7000. That accident was when he was only thirteen years of age. But he was unable to recall the precise nature of the injury to his head for which he received damages. He was able to recall the next accident in November 1998 when he received injuries to his neck and back. He recalled the later accidents also in both 1999 and 2004 as detailed above. Mr Gaynor asked him again whether these details were an accurate account of his history, and when the plaintiff replied that none of them was relevant to this present case, Mr Gaynor asked him directly if there was any other accident. The plaintiff said that he did not understand, and Mr Gaynor clarified the question by asking if there had been any other accident which occurred between the accident of October 2002 and that which he recalled in 2004. He answered that he had had the accident in 2004, and when asked directly if he had had an accident in 2003 he answered "No" (Qs 72-75).

34. He was asked specifically then if he had had an accident on the 1st May 2003 for which he was admitted to hospital, and he replied "Not that I recall" (Q.76). He was asked if he had an accident when a branch fell on the left side of his face causing him injury to the left side of his face and his eye for which he was admitted to the emergency department of the hospital, to which the plaintiff replied "I don't remember". It was suggested that this was the case and that it was this which caused the problems to the left side of his face, but the plaintiff denied this (Q. 78). He was asked if he was telling the Court that he had had no accident on the 1st May 2003, and he replied "I am not telling the Court that I didn't - I can't remember" (Qs.79-80). Mr Gaynor then put it to him that he was in hospital on that occasion and asked him if he had suffered an injury to his face then - to which the plaintiff replied: "If it says I did I must. I can't remember" (Q.81 and Q. 83).

35. It was suggested to him that he had misled the Court and that he had misled Mr Manning whom he saw in September 2003 by telling him that all his complaints emanated from the October 2002 accident. The plaintiff denied this, and when he was asked how it was that he could not remember what happened to him in May 2003, he replied:

"I don't know why I can't remember. *It just must have slipped my mind.*"(Q.90) (my emphasis)

36. Mr Tynan on re-examination asked the plaintiff about Mr Gaynor's suggestion about some other incident in May 2003 about the branch of a tree. The plaintiff stated to Mr Tynan in reply; "I don't know - I can't remember what he is on about" (Q. 93) and in answer to a follow-up question to the same effect stated in reply: "I don't know to be honest - If I remembered I would have said it. I don't remember it", and when asked if he was telling the court that the problem with his cheek was caused by the October 2002 crash, the plaintiff replied "Yes" (Q.94).

37. Dr Manning gave evidence for the plaintiff and confirmed that it was in September 2003 when he saw the plaintiff for the purpose of his report that the plaintiff complained about the numbness in his left cheek. Dr Manning went on to say that it was his "assumption" and that he was lead to believe that it was from the October 2002 accident. He examined the plaintiff in relation to his nasal difficulties and found the septum to be deviated, but said that there is no objective way of evaluating the loss of sensation in the face and that he had taken the plaintiff at his word about it (Qs. 114-115).

38. When Mr Gaynor cross-examined Mr Manning he asked him whether, if he had been informed by the plaintiff that on the 1st May 2003 a branch had fallen on him to the left side of his face and that he had been admitted to hospital in relation to this, it would have been of importance in relation to arriving at a conclusion as to the aetiology of his facial complaints. Mr Tynan objected to this type of question but I allowed it on the basis that the plaintiff had been equivocal in his answer as to whether the incident with the branch had happened. In this regard he had stated amongst other things that if the hospital notes showed that he attended with such an injury then it must have happened. At other times he could not remember. At another time he stated that it must have slipped his mind. Mr Gaynor explained that the information about the incident of the 1st May 2003 was available to him because his solicitor was acting in relation to another claim by the plaintiff in which this information came to hand, and that if the plaintiff had disclosed the incident in these proceedings as he ought to have done, the defendants would have sought discovery of documentation in relation to the incident.

39. At any rate, Mr Manning replied:

"Well, if it was a significant injury from a tree branch, it could cause similar symptoms." (Q. 140)

40. Finally, Dr Casey gave evidence. He stated that while the plaintiff had attended his surgery in November 2002 it was just to collect a prescription for an antibiotic, and that he did not examine him. The first occasion that he examined him for the injuries arising from the accident in October 2002 was on the 6th January 2003 for the purpose of preparing a medical report for this case. I have already set out what his report states relevantly. In his evidence he confirmed that his complaints were in relation to his neck, sternum and shoulder, and the plaintiff had told him also that he had been told at the hospital that he had broken his nose. He has seen the plaintiff in relation to other matters since that date but not in relation to any injury relevant to this case. He also confirmed that he had received the letter dated 6th November 2002 from Mr Ullah already referred to.

41. Mr Galvin, the consultant neurologist was not available to give oral evidence but his report was handed in and I have already referred to that above. It will be recalled that in that report he opined, *inter alia*, that the numbness to the left cheek was "almost certainly due to a crush injury to the left infra orbital nerve from blunt trauma to the cheek. This type of injury typically occurs with orbital fractures but can occur in the absence of fracture", and that "it is a direct result of his injuries". I have already stated that this last comment must be read in the light of what history he was given by the plaintiff.

42. Working on the basis that the numbness and tingling sensation in his left face, which is permanent, is a probable result of this accident, the plaintiff is entitled to general damages both past and future, and in the latter regard it is relevant that he is now only in his mid twenties.

43. In addition he would be entitled to general damages for past pain and suffering in respect of the injury to his nose. In that regard I should add that I am completely satisfied that this injury did not cause any fracture. That is clear from the objective evidence of x-ray and CT scan reported on by Mr Manning. He also sustained a soft tissue injury to his neck and sternum all of which cleared up. By far the most significant element of this claim is that relating to numbness and tingling in the left face. But taking all these elements I would assess general damages for past pain and suffering in the sum of €20,000. For future pain and suffering in relation only to the facial claim, and bearing in mind the life-long nature of this, I would assess general damages in the sum of €30,000, making a total award of €50,000. The Court has not been given any details of any claim for special damages.

44. There remains the Court's consideration of the application that the Court should dismiss the entire of the plaintiff's claim on the basis of the provisions of s. 26 of the Civil Liability and Courts Act, 2004. That section provides as follows:

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

(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 injury actions –

(a) brought on or after the commencement of this section, and

(b) pending the date of such commencement.”

45. Under this section, where the plaintiff has knowingly given false or misleading evidence in some material respect, or has sworn an affidavit which he knew to be false or misleading, the Court must dismiss the claim unless to do so would result in injustice being done. This latter consideration does not arise in this case. The question is whether, on the balance of probability, the Court can be satisfied that in relation to his evidence and/or his verifying affidavit in respect of his Statement of Claim and Replies to Particulars, the plaintiff has knowingly given false or misleading evidence in a material respect.

46. The first thing to be said is of course that the defendants have adduced no evidence themselves as to the fact that the plaintiff suffered an injury to the left side of his face on the 1st May 2003 as a result of a tree branch hitting him. No hospital record has been produced in evidence, neither has any other witness been called who treated him for that injury.

47. But Mr Gaynor relies upon the plaintiff's answers to questions in cross-examination and submits that these answers include one which is already referred to above, namely that "if it [presumed by me to refer to a hospital record] says I did I must. I can't remember". It included another answer referred to already, namely: "I don't know why I can't remember. It must have slipped my mind". It includes another already referred to, namely: "I am not telling the Court that I didn't – I can't remember".

48. Mr Tynan on the other hand submits that the plaintiff has honestly stated that he did not remember any incident with a branch of a tree and that his answers to Mr Gaynor must not be seen as amounting to an admission of such an incident. Mr Tynan points to the absence of any other evidence of that incident, if it happened, and submits that the defendants should have produced their own evidence in that regard. In turn, Mr Gaynor says that if the plaintiff had disclosed the incident and the injury in his Replies to Particulars the defendants would have sought discovery of the hospital records in this suit. As it is, he has stated that his solicitors became aware of the injury on the 1st May 2003 since they were acting in other proceedings in which this information was available to them.

49. I must look to the plaintiff's answers given in evidence first of all, and then all the surrounding circumstances including what is contained in pleadings and particulars and medical reports, and arrive at a conclusion as to the truthfulness of the plaintiff on the balance of probabilities.

50. I have had the benefit of observing the plaintiff when he was giving his evidence. He is an articulate man, clearly not suffering from any deficiency of mind, and who has shown the capacity to recall injuries and accidents which have befallen him over the years. If he did indeed have an altercation with a branch of a tree on the 1st May 2003 and was taken to the emergency department of Limerick Regional Hospital where he received treatment to the left side of his face, I do not accept that there is the slightest possibility that he would not recall such a thing. It would defy any credibility in a young man such as the plaintiff, and I simply would not believe him when he says that he does not recall it.

51. What is not in doubt is the fact that when the plaintiff presented at hospital in the immediate aftermath of the accident on the 25th October 2002, there was no mention whatsoever of a left facial injury from the doctor, Dr Ullah, who attended upon him. If there was an injury sustained by his left face hitting the dashboard "forcibly" one would expect that to be in the account of how the accident occurred. Anything which Mr Ullah observed on the 25th October 2003 had "subsided" by the 6th November 2002, so the Court is entitled to presume that no problem of any kind remained after the 6th November 2002. This sits uncomfortably beside the plaintiff's evidence in answer to Mr Tynan in direct examination that the facial numbness and tingling sensation has existed "since I had the crash". I would have expected that he would have mentioned the matter to his own GP at some stage in order to have it further investigated, rather than simply endure it without seeking investigation and treatment. It appears that he mentioned it first only to Mr Manning in September 2003 when outlining what had happened to him in this accident.

52. It sits equally uncomfortably beside his Statement of Claim delivered in January 2006 where there is no mention of this injury at all. On the other hand he had mentioned it to Mr Manning in September 2003 which was after the 1st May 2003 when the tree incident is alleged to have happened.

53. Another problem with the Statement of Claim is that it pleads that the plaintiff broke his nose, whereas at the time the Statement of Claim was delivered the plaintiff's own medical report had made it abundantly clear that there was no evidence of nose fracture from both an x-ray and Ct scan. All the plaintiff can say is that he was told at the hospital that his nose was broken, but that in my view cannot simply be pleaded as fact in the face of contrary objective evidence. The plaintiff has sworn an affidavit, as required by s. 14 of the Act, that what is pleaded is true and accurate, and that cannot be so given the contrary evidence in his own medical report. That fact must weigh heavily also against the plaintiff's overall credibility, quite apart from constituting another possible factor in the consideration of s. 26 of the Act.

54. What is noticeably absent from the plaintiff's answers to questions is a categorical statement that he was never at any time involved in any incident where he was hit in the face by a branch of a tree, and that if such a thing had occurred there is no possibility that he would not remember it. His demeanour during this evidence before me was unsure, and he relied heavily on a lack of recollection, and weakened his position considerably by statements such as those to which I have made specific reference a couple of paragraphs ago. He adduced no evidence to corroborate his assertion that his face was injured in this way.

55. These factors combined with the lack of any mention of facial difficulties by Mr Ullah in his letter to Dr Casey, no mention of that in the Statement of Claim or Replies to Particulars, and the fact that the first mention of his left face hitting the dashboard as part of his history appears in Mr Galvin's report as late as February 2007, as well as the other matters to which I have already referred, convince me on the balance of probabilities that the plaintiff has been deliberately untruthful in his pleadings, his evidence and in his affidavit in an effort to obtain an award of damages to which he is not entitled against the defendants.

56. I am satisfied that it is safe to conclude as a matter of probability that the plaintiff did indeed receive a blow from a branch of a tree on 1st May 2003 and that he failed to disclose this. His lack of recollection is not credible, and I am satisfied that the way he answered certain of the questions put to him amounts to a tacit admission that something of that nature in fact occurred. If I were to accept everything which the plaintiff has stated about his lack of recollection as amounting to a denial of the fact that something

happened, then the onus would certainly have shifted back to the defendants to produce positive evidence of the incident with the tree. But the plaintiff's answers were the kind given by somebody who has been caught out. They are not a denial. In addition, there is sufficient in the other matters to which I have already referred to corroborate the absence of left facial symptomology in the aftermath of the October 2002 accident.

57. I would be doing a grave injustice to the defendants if I were to make an award of damages to the plaintiff in respect of the left facial injury, since, apart altogether from the s. 26 implications, I could not as a matter of probability be satisfied that those symptoms were caused by this particular accident. That is in spite of Mr Galvin's positive statement that it is a direct result of the injury. That statement, I am quite satisfied, was made on limited facts as disclosed to him by the plaintiff in the history given.

58. But I must go further in this case and comply with the obligation upon me to dismiss the entire of the plaintiff's claim on the basis that the claim is substantially fraudulent. The plaintiff has in my view deliberately set out to attribute a later injury to his face to the accident in October 2002. I am satisfied that in his evidence he has knowingly given false or misleading evidence in answer to the questions asked of him in relation to his injury, and as such that is "a material respect" within the meaning of the section. He therefore comes within the terms of s. 26, sub-section (1) of the Act. But he comes also within sub-section (2) because he swore an affidavit for the purpose of section 14 of the Act verifying the assertions of fact contained in his Statement of Claim and his Replies to Particulars, and I am satisfied that he knew that some of what was contained therein in respect of the facial injury was false or misleading. I include in that remark his reference to having sustained broken nose, because, as I have stated already, there was irrefutable objective evidence available at the time the Statement of Claim was delivered, in the form of his own doctor's report that there was no evidence of a fracture of the nose on either x-ray or CT scan, and it was not appropriate to plead it in that way, and then verify that by affidavit. In fairness, Mr Tynan in his opening made it absolutely clear that there was uncertainty surrounding the fracture to the nose.

59. 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 give knowingly 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.