THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 5

Record No. 2016/96

Irvine J.
Hogan J.
Whelan J.

BETWEEN/

DAVID McLAUGHLIN

PLAINTIFF/

RESPONDENT

- AND -

DAMIEN McDAID, MICHAEL McDAID, CHARLES McDAID, McDAID QUARRIES LIMITED AND THE MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 24th day of January 2018

Procedural Background
1. This judgment concerns an appeal brought by the second, third and fourth named defendants/appellants against the judgment and order of the High Court (Hanna J.) dated the 10th December 2015 whereby the plaintiff/respondent, David McLaughlin ("Mr. McLaughlin") recovered damages in the sum of €453,000 and costs as against each of them. The trial judge also awarded Mr. McLaughlin his costs to be taxed in default of agreement.

2. On the 8th July 2016, this court made an order permitting the appellants take up the digital audio recording of the High Court hearing. Regardless of that fact, they did not do so, with the result that this court has determined the within appeal without the benefit of a transcript of the evidence given in the court below. This was only possible because a summary of the evidence given by each witness is contained in the judgment of the trial judge.

3. On the 11th November 2016 the appellants were directed to file and deliver written submissions supporting their appeal by the 31st December 2016. As of the date of the hearing of the appeal (*i.e.*, the 14th December 2017) no submissions had been filed by Charles McDaid or McDaid Quarries Limited. In the week scheduled for the hearing of the appeal Mr. Michael McDaid filed papers purporting to be submissions in the court of Appeal office. However, this bundle of documents, with the exception of the order made by Noonan J. on the 12th October 2017, is comprised of materials which could have no conceivable bearing on the matters raised by any of the appellants in their notice of appeal.

4. Finally, from a procedural perspective, it should be noted that no books of appeal were lodged by the appellants and the appeal was only able to proceed by reason of the fact that the solicitors on record for Mr. McLaughlin lodged books of appeal with the court some days before the hearing date.

Preliminary rulings
5. Before engaging upon the substantive issues to be considered on the appeal it is material to record that prior to the commencement thereof, the solicitor then on record for McDaid Quarries Limited, Mr. Barry Rafferty, applied to come off record on the company's behalf. He did so in circumstances where he maintained that the relationship of trust and confidence between himself and his client had broken down. Given that there was no objection to Mr. Rafferty's application from Mr. Michael McDaid and/or Mr. Charles McDaid who were present at the time he made his application, the court made the order sought. Accordingly, the appeal proceeded in the absence of any representation on behalf of the company and in circumstances where the court received no written or oral submissions demonstrating why the liability found by the High Court judge against the company should not be upheld.

6. In a separate ruling the court also rejected the submission made by Mr. Michael McDaid that the court, constituted as it was with two female members, could not validly determine his claim. Finally, the court rejected an application made by Mr. Michael McDaid and Mr. Charles McDaid that the appeal be adjourned to await the outcome of a criminal investigation into matters allegedly touching upon the circumstances in which Mr. McLaughlin had sustained his injuries and which they each maintained was crucial to the fair disposal of the appeal.

7. The court rejected the aforementioned application for a number of reasons. First, while the investigation concerned, according to the McDaid's, had commenced further to a complaint which they had made to An Garda Síochána in September 2016, they had waited until the day fixed for the hearing of the appeal to seek an adjournment. Second, the court had no evidence concerning the nature of the complaint and was thereby unable to consider whether the same was material to the appeal. Third, the role of this court is to review the lawfulness of decisions made at first instance based upon the evidence that was available to the court when they were made. In this case the judgment of the High Court judge was delivered on the 10th December 2015. Accordingly, any facts emerging after that date would not be admissible on the appeal, without special leave.

Substantive appeal: Background Facts
8. The within proceedings concern injuries sustained by Mr. McLaughlin on the 26th June 2003. He was seventeen years of age at the time, having been born on the 24th August 1985. He suffered devastating injuries to his right foot at a quarry at Crislaghkeel, Burnfoot, County Donegal which the trial judge found belonged to one or more of the appellants.

9. The trial judge found as a matter of fact that Mr. McLaughlin had been working for McDaid Quarries Limited at the relevant time and that his injuries had been sustained when a fifty five ton Halla 555 track excavator was driven over his foot by a Declan Doherty who was, on the day in question, working for the appellants. As a result of his injuries he was taken to the casualty department of Altnagelvin Hospital where he was diagnosed as having sustained multiple fractures to the toes of the right foot. Mr. McLaughlin spent approximately four weeks in hospital during which time his foot became infected. He underwent a number of surgical procedures in the hope that his toes might be retained. Ultimately the distal half of the right foot had to be amputted with the result that the same is approximately half its normal size and is without toes. He was then wheelchair bound for several weeks before commencing mobilisation with the assistance of crutches. The wounds took several months to heal during which time Mr. McLaughlin suffered significant pain and discomfort.

10. The trial judge found that as a result of his injuries Mr. McLaughlin had been left with an unsightly right foot. He noted the presence of a seventeen centimetre scar to the front of his ankle. He accepted that Mr. McLaughlin had difficulty climbing stairs, that he was unable to perform heavy household tasks and that it was difficult for him to participate in outdoor activities. The trial judge also referred to the fact that he had not been able to engage in any sporting activities since his accident. He also noted that, to his credit, Mr. McLaughlin had managed to return to the work market not long after his injury and that he had managed to remain in full time employment, albeit with the aid of a prosthesis which he would have to wear for the rest of his life.

Judgment of the High Court

11. By his judgment and order, Hanna J. found the appellants negligent and in breach of duty and in breach of statutory duty. He found that they had failed to take proper or adequate precautions for the safety of Mr. McLaughlin. They had failed to provide him with proper training and had permitted him to work with another machine operator in the absence of proper supervision or any means of communication. It was these failings that the trial judge concluded were responsible for the fact that Mr. Declan Doherty ran over Mr. McLaughlin's foot whilst driving the Halla 555 track excavator on the 26th June 2003.

12. The trial judge proceeded to award Mr. McLaughlin a sum of €100,000 in respect of pain and suffering to date and a further sum of €150,000 in respect of pain and suffering into the future. He allowed the claim for special damages to the date of trial (to include loss of earnings and the cost of prosthetic devices) in the sum of €3,000. Finally, he awarded Mr. McLaughlin a sum of €200,000 in respect of future aids and appliances, that being the sum which reflected the capitalised cost of the prosthetic devices and other aids that Mr. McLaughlin would need for the duration of his life.

13. By notice of appeal dated the 26th February 2016 Michael McDaid, Charles McDaid and McDaid Quarries Limited have sought to challenge the lawfulness of the judgment and order of Hanna J.. Whilst the notice of appeal is to say the least extensive, many of the grounds of appeal overlap. The principal grounds of appeal pursued before this court can be summarised as follows:-

> (i) that the learned trial judge erred in law and in fact when he failed to dismiss Mr. McLaughlin's claim pursuant to s. 26(2) of the Civil Liability and Courts Act 2004, ("the Act") and
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> (ii) that the quantum of damages awarded both in respect of general damages and special damages was excessive having regard to the evidence.

14. In the course of this appeal Mr. Michael McDaid and Mr. Charles McDaid maintained that on the evidence before him the High Court judge ought to have dismissed Mr. McLaughlin's claim as one which was fraudulent. In that regard it has to be said that the failure of these appellants to file written submissions or provide the court with relevant extracts from the transcript made consideration of this aspect of their appeal extremely problematic. Nonetheless, from the notice of appeal, the booklet of pleadings filed by the respondent's solicitor and the judgment itself it has been possible to identify the factual matters core to the submissions advanced in the High Court in support of the appellants' contention that the claim should be dismissed by reason of the provisions of the provisions of s.26 of the Act. I will now try to summarise these.

15. The original statement of claim in this action was delivered on the 1st March 2006. Therein it was maintained that Mr. McLaughlin had sustained his injury when a motor lorry, bearing registered letters and numbers 98 DL 3021, allegedly owned by the second, third and / or fourth named defendants, was driven over his right foot at the Burnfoot quarry. The Motor Insurers Bureau of Ireland (hereinafter "MIBI") was joined to the proceedings so that Mr. McLaughlin might obtain an order directing it to satisfy any judgment he might obtain against the other defendants on foot of what is commonly referred to as the MIBI Agreement of the 21st December 1988 ("the Agreement").

16. In the context of the aforementioned plea it is perhaps relevant to observe that s. 56 of the Road Traffic Act 1961 requires that a vehicle such as a lorry shall not be used in a public place unless it is covered by an approved policy of insurance and that the Agreement provides that in the absence of such a policy the MIBI will satisfy any judgment obtained in respect of injuries sustained by reason of the negligent use of such a vehicle. Thus, from Mr. McLaughlin's perspective, if his injuries were caused by a vehicle required to be covered by an approved policy of motor insurance he was in a greatly improved position as compared to that in which he would have been if he had been injured by a vehicle such as a digger in respect of which no such policy would normally be required. In the former case, subject to certain pre-conditions, he would be entitled to an indemnity from the MIBI in respect of any unsatisfied judgment concerning his injuries whereas in the later case he would enjoy no such entitlement by reason of the fact that a digger, if it is not for use in a "public place" [see .56 of the Road Traffic Act 1961], does not require compulsory insurance with the result that any judgment as might be obtained in respect of injuries caused by its negligent use would not be satisfied under the terms of the Agreement.

17. The aforementioned claim was purportedly verified by Mr. McLaughlin in an affidavit dated the 5th September 2006. The face of that affidavit identifies the Commissioner for Oaths present at the time the affidavit was sworn, as a Mr. Leo Porter. There appears beside the attestation clause the name of David McLaughlin in handwriting.

18. Further to information received from Mr. McLaughlin in consequence of demands made under clause 3.2 of the Agreement, by application dated the 22nd April 2009 the MIBI sought to have Mr. McLaughlin's claim dismissed on the grounds that he could obtain no relief against it. The affidavit grounding that application relied upon two factors. The first was that Mr. McLaughlin had identified the locus of the accident as having occurred on private property, *i.e.* within the confines of the quarry site owned by the second named defendant. It was claimed on that application that the liability of the MIBI would not extend to any judgment Mr. McLaughlin might obtain in respect of his injuries as an approved policy of insurance was only required in order for such a vehicle to be used in a public place. The second was that it was apparent from the hospital records that Mr. McLaughlin had advised that it was the track of a digger rather than the tyre of a lorry that had had been driven across his foot. If the injuries were caused by a digger rather that a lorry than Mr. McLaughlin could obtain no relief under the Agreement, the digger being a vehicle which did not require compulsory

insurance under the Road Traffic Act 1961 as it would never be used in a "public place".

19. As further evidence of the fact that the injuries concerned had been caused by the track of a digger rather than the wheel of a lorry the MIBI relied upon the statement of Sergeant Daniel Devlin, a member of An Garda Síochána attached to Moville Garda Station, who had interviewed Mr. McLaughlin post accident and who had been advised that his foot had been caught in the track of a digger.

20. Although the court was not furnished with the order made on the aforementioned motion and because it was not furnished with any replying affidavit contesting the aforementioned evidence advanced by the MIBI, I nonetheless consider it highly probable from the other papers lodged that the court made an order that the proceedings be dismissed against the MIBI.

21. Perhaps not unsurprising in light of the aforementioned facts, in April 2014 Mr. McLaughlin sought leave of the court to amend his statement of claim to substitute the word "digger" for the words "motor vehicle registered letters and numbers 98DL3021" at para. 3 of the statement of claim. That relief was granted by order of Ryan J. made on the 28th July 2014. Accordingly, from that point in the proceedings Mr. McLaughlin maintained that the injuries he sustained to his foot were caused by a digger driven over his foot by Mr. Damien McDaid, then the first named defendant, when he was working at Burnfoot quarry, property which he claimed was owned by the second, third and / or fourth named defendants. That statement of claim was allegedly verified by an affidavit sworn by Mr. McLaughlin on the 22nd December 2014. As with the earlier verifying affidavit, this affidavit on its face suggests that it was sworn by Mr. McLaughlin before Mr. Leo Porter, Commissioner for Oaths.

22. Whilst this court was not furnished with the transcript of the High Court hearing, it would appear that Mr. McLaughlin did not dispute the fact that his original statement of claim was fraudulent insofar as he had set out to convince the court that his injuries were caused by the negligent use of a motor lorry which he believed would entitle him to recover any award of damages made in his favour from the MIBI without recourse in the first instance to the McDaids, an entitlement he would not have enjoyed if his injuries been found to have been caused by the digger, as in fact had been the case.

23. Some additional assistance as to the basis upon which the defendants, in the course of the High Court hearing, sought to invoke s. 26 of the Act can be gleaned from the judgment of the High Court judge where he refers to the submissions of the parties on the issue. These commence at para 72 thereof.

24. Counsel for the second, third and fourth named defendants had urged Hanna J. to dismiss Mr. McLaughlin's proceedings on the basis that it had clearly been his intention to advance a claim which was materially false and misleading on its facts. They relied upon the decisions in *Carmelio v. Casey* [2008] IEHC 527 and *Higgins v. Caldark and Quigley* [2010] IEHC 527 in support of their application to have the claim dismissed. The fact that to do so would deprive Mr. McLaughlin of damages to which he would otherwise have been entitled, could not by itself, they submitted, be considered unjust.

25. Counsel for the second, third and fourth named defendants had also submitted that there was no evidence to suggest that Mr. McLaughlin had been bullied into making the claim which he had advanced in his first statement of claim, namely, that he had been injured in an accident involving the wheel of a lorry. In that regard the defendants had relied upon the fact that by the time the affidavit verifying that statement of claim was sworn, *i.e.*, in September 2006, Mr. McLaughlin had moved to the US where he could no longer claim to have been under the control of the defendants.

26. What is less clear is whether, in the course of their submissions to the High Court judge, the second, third and fourth named defendants had sought to assert that the verifying affidavits themselves were in some way fraudulent. Neither is it possible to ascertain whether Mr. McLaughlin was ever challenged while under cross-examination as to the circumstances in which his name came to be appended in handwriting to the verifying affidavits. Certainly, in the course of this appeal the second and third named appellant's referred the court to these affidavits for the purpose of supporting their assertion that the trial judge erred in law in failing to dismiss the claim, not only by reason of the content of the first statement of claim, but on the basis that he had committed fraud insofar as he had not signed the verifying affidavits, as alleged, he being in the United States at the relevant time.

27. Counsel for Mr. McLaughlin at first instance had argued that the evidence had established that the first statement of claim was the result of the influence which Mr. Charles McDaid had exercised over his client in and about the time of his injuries. He submitted that the narrative in the first statement of claim had been promoted and devised by the McDaids with a view to setting up a false insurance claim which would result in Mr. McLaughlin being compensated for injuries for which they were liable. Counsel emphasised the fact that Mr. McLaughlin had not exaggerated his claim and had disclosed the true facts concerning his injury both prior to and in the course of the trial. He also relied upon the fact that the narrative proposed in the first statement of claim was one which was particularly advantageous to the McDaids. On the facts therein pleaded their liability to Mr. McLaughlin would be indemnified whereas Mr. McLaughlin would have been in a position to seek to recover any judgment which he obtained against them regardless of whether the McDaids were indemnified in respect of his injuries. Finally counsel submitted that it would be unjust in all of the circumstances if Mr. McLaughlin's claim was to be dismissed as those responsible for his injuries would then be entitled to walk away from their liabilities notwithstanding their own egregious conduct.

The jurisdiction of this court on the hearing of the appeal

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

> "1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
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> 2. If the findings of fact made by the trial judge are supported by credible evidence, this court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
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> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *"Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.

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

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

Section 26 of the 2004 Act

29. Of particular importance in the context of this appeal is s. 26 of the 2004 Act which 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 injuries actions:-

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

(b) pending on the date of such commencement.

30. As is apparent from the aforementioned section a judge hearing a personal injuries action is obliged to dismiss a plaintiff's claim if satisfied that he or she knowingly gave false or misleading evidence or knowingly swore a verifying affidavit that was false or misleading in any material respect. In such circumstances the judge must dismiss the action unless satisfied, for reasons to be stated in the judgment, that it would be an unjust to do so in all of the circumstances.

31. As has often been stated, the 2004 Act was designed to ensure that false or misleading assertions, allegations or information would not lightly be tolerated in the context of personal injury litigation. The legislation, the provisions of which have often been described as draconian, was clearly introduced to reduce and potentially eliminate false and / or misleading claims. However, having regard to the fatal sanction provided for in s.26, as Quirke J. cautioned in *Farrell v. Dublin Bus* [2010] IEHC 327, there should be no rush to judgment in favour of a defendant who seeks to invoke the section.

32. As to the circumstances that will give rise to the invocation of the section, the following is what I stated in my judgment in *Nolan v. O'Neill and Mitchell* [2016] IECA 298, concerning the proof required to trigger s. 26(1):-

"43. What is clear from the wording of the section is that the defendant must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect. Thus false or misleading evidence even if intentionally advanced if not material to the claim made cannot justify invocation of the section. Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent. That this is so would appear to be supported by the following short passage from the decision of Fennelly J. in *Goodwin v. Bus Éireann* [2012] IESC9 concerning s. 26 and where at para. 62 he stated as follows:-

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

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

33. The same considerations apply in relation to the proof required of a defendant who seeks to invoke the provisions of s. 26 (2).

They must establish, on the balance of probabilities, that the plaintiff swore a verifying affidavit knowing it to be false or misleading in a material respect. Clearly, proof that a plaintiff knowingly swore an affidavit verifying a claim which they knew to be false would trigger the section, subject to the discretion vested in the trial judge.

34. It is also the case, as I observed in *Nolan*, that it is not open to a defendant to make an application under s. 26 of the Act unless the plaintiff in the course of the hearing was afforded an opportunity of countering the assertion that they gave false or misleading evidence or caused such evidence to be adduced on their behalf, knowing it to be fraudulent.

Decision

35. Of importance in the context of this appeal is the interplay between the factors identified in *Hay v. O'Grady* and the jurisprudence pertaining to s. 26 of the Act.

36. In the present proceedings the High Court judge, having heard the evidence of Mr. McLaughlin concerning his relationship with Mr. Michael McDaid and in particular Mr. Charles McDaid, made a number of findings of fact which fed into his decision not to dismiss the claim under s. 26.

37. At para 93 of his judgment the following is what the trial judge stated concerning the original statement of claim and the verifying affidavit purportedly sworn in September 2006, both of which Mr. McLaughlin knew to be false :-

> "95. I took considerable care in observing the witnesses who were more personally involved in the case. The plaintiff, firstly, had undoubtedly been the author, in nominal terms, at the very least, of what was a false claim. I am satisfied that he did so at the behest of and under the influence of the second and third named defendants. This frame of mind continued and extended, in my view, to the affidavit of verification sworn by the plaintiff in September, 2006 notwithstanding that, by then, this vulnerable plaintiff had left the jurisdiction. By the time the matter came on before me, however, circumstances had altered considerably in the manner described above and this case proceeded in its entirety before me on the basis of the case as set out in the amended statement of claim. Such evidence as the plaintiff brought before this court was, I am satisfied, truthful, to the best of the plaintiff's knowledge and efforts and was not done with any attempt to mislead this court. It goes without saying, of course, that the earlier statement of claim was an unlawful fiction."

38. At para 98 of his judgment the trial judge rejected the evidence of Mr. Damien McDaid that he and Mr. McLaughlin had concocted the account of the accident pleaded in the original statement of claim on the way to hospital. Of even greater significance is what he stated at para 109 of his judgment namely:-

> "109. I am satisfied that the description of the accident involving the lorry as opposed to the digger was, in all probability, created and promulgated by the second and/or third named defendants. This was done with a view to ensuring that there would be indemnity from an insurance company to meet any claim which the plaintiff might bring against the defendants. I am satisfied that this was a deliberate attempt at engineering a false and misleading claim against the insurance company. I accept the evidence of the plaintiff's mother that when ever she visited the plaintiff in hospital a McDaid was always present. This was to ensure that the intended narrative was not disturbed in any way. I say that the plaintiff was persuaded to go along with the story because of the emotional hold which Charlie McDaid seemed to exercise over him, the fact that the plaintiff was a minor and someone suffering from learning difficulties. The plaintiff was a vulnerable person."

39. From the aforementioned findings of fact it is clear that the High Court judge concluded that the claim as originally advanced in the 2006 statement of claim was, to the knowledge of Mr. McLaughlin, both false and misleading, as was the verifying affidavit. It had been his intention to support the McDaids' account of how he had sustained his injuries so as to advance a claim that would be indemnified and would be to their personal benefit. However, regardless of those findings the High Court judge remained entitled, as matter of law, not to invoke s. 26 if satisfied that to do so would be unjust in all of the circumstances.

40. Whilst it is undoubtedly the case that the statement of claim of the 1st March 2006 was, to Mr. McLaughlin's knowledge, both false and misleading, he did not *give or adduce* evidence in accordance with its content (emphasis added). Thus, having regard to the precise wording of s. 26(1), the delivery of the statement of claim *in and of itself* could not have formed the basis of a successful application under that particular subsection. To deliver a pleading which is false or misleading does not amount to giving or adducing evidence which is false. However, a false and misleading statement of claim cannot be viewed in isolation and thereby ignored given the requirement of s. 14 of the 2004 Act, as implemented by Ord. 1A, r. 10 of the Rules of the Superior Courts, that parties to personal injuries actions swear an affidavit to verify the truthfulness of all assertions and/or allegations made in their pleadings.

41. What is of real importance in this case, having regard to s.26 (2), is the fact that Mr. McLaughlin, in the verifying affidavit which purports on its face to have been sworn by him on the 5th September 2006, swears as follows concerning the statement of claim of the 1st March 2006:-

> "2. The assertions, allegations and information contained in the statement of claim which are within my knowledge are true. I honestly believe that the assertions allegations and information contained in the statement of claim which are not within my knowledge are true.
>
> 3. I am aware that it is an offence to make a statement in this affidavit that is false or misleading in any material respect and that I know to be false or misleading."

42. In the course of their submissions to this court the McDaids sought to attach great weight to what purports to be the signature of Mr. McLaughlin on the affidavits purporting to verify both the original and the amended statement of claim. In my opinion, however, whether or not the signature that appears on the affidavit of the 5th September 2006 is or is not that of Mr. McLaughlin is not of any great significance to the s. 26 issue. The more important point is that given that he never sought to maintain that it was authored without his consent, he must be taken as having approved of its content and authorised its service on all of the defendants to the proceedings including the MIBII. That the claim so verified by Mr. McLaughlin was false and misleading in a material respect is beyond doubt. Thus he was in breach of the provisions of s. 26(2) of the Act with the result that the High Court judge was required to dismiss his action unless he was satisfied that to do so would result in an injustice being done.

43. Given the wording of the section the essential question for this court on appeal is whether the reasons identified by the trial judge provide good and sufficient reason for his decision that it would have been unjust in all of the circumstances to have dismissed Mr. McLaughlin's claim by reason of his aforementioned breach.

44. As required by s. 26(2)(b) the High Court judge in the course of his judgment made clear the reasons why he considered it would perpetrate an injustice upon Mr. McLaughlin if he were to dismiss his claim.

45. First, it is clear from the passages of his judgment to which I have earlier referred that the High Court judge was satisfied that Mr. McLaughlin was young, naïve and of poor intellectual capacity at the time he agreed to participate in the intended fraud by delivering and verifying a claim which he knew to be false and misleading. That was a finding of fact made by the trial judge, *inter alia*, based on his assessment of Mr. McLaughlin as witnesses and, as such, is the type of finding with which an appellate court, not having heard his evidence and in the absence of clear objective evidence to the contrary, could not interfere.

46. Second, the trial judge was also satisfied as a matter of fact that Mr. McLaughlin was under the control and influence of Mr. Charles McDaid, regardless of where he was living at the time the original statement of claim was delivered and verified. For the purposes of reaching that determination the trial judge had to assess the credibility of the witnesses called in support of Mr. McLaughlin's claim and those who gave evidence on behalf of the defendants. Having heard and seen all of the witnesses give their evidence he was satisfied that Mr. McLaughlin had given his evidence truthfully and had not attempted to mislead the court. He also found his mother to be an impressive witness who had been both forthright and truthful.

47. Third, the High Court judge was satisfied that the false and misleading account of how Mr. McLaughlin had sustained his injuries as described in the first statement of claim had been created, promulgated and engineered by the second and third named defendants rather than by the plaintiff himself. In coming to this conclusion he stated that he had found the evidence of Damien McDaid implausible and, in light of the very serious nature of Mr. McLaughlin's injuries, had rejected as untruthful his contention that together they had concocted the original account of how the accident had occurred in the car on the way to the hospital. Once again these are findings concerning the credibility of witnesses who were observed and scrutinised by the trial judge and as such are findings that an appellate court is in no position to interfere with.

48. It is probably relevant to state at this point that the ability of the court on this appeal to assess whether or not all of the findings of fact made by the trial judge were supported by credible evidence has not been assisted by the appellants' failure to provide the court with a copy of the transcript of the High Court hearing. The same can be said of the court's ability to assess reasonableness of the credibility findings made by the trial judge.

49. Another factor which the trial judge took into account in exercising the discretion vested in him under s. 26 was the fact that Mr. McLaughlin had withdrawn the false claim originally made and had delivered an amended claim with the result that what had been put before the court was a claim which he considered to be bona fide in every material respect.

50. If the last mentioned factor had been the only reason advanced by the trial judge to support his decision to excuse Mr. McLaughlin his breach of s. 26(2) of the Act I would likely have concluded that he had erred in law in the manner in which he had exercised the discretion afforded him under the section. I say this because the delivery of a false statement of claim and verifying affidavit can have very serious consequences indeed.

51. Many claims for damages in respect of personal injuries are brought in circumstances where the events alleged to constitue negligence have not been witnessed with the result that the defendant has often little choice but to accept at face value the account of the accident as pleaded and verified. Because there is no way of challenging the truth of such claims they are often, of necessity, settled at an early stage and regularly at very significant costs to the defendant and/or their indemifier.

52. It seems to me that s. 26(2) was enacted to ensure that a plaintiff who verifies a false and or misleading claim can be sanctioned and that he or she cannot hope to avoid the dismissal of their claim by later delivering an amended claim or fresh particulars disclosing the true facts when they realize that the falsity of the claim as originally advanced may have been uncovered. Such avenues are often pursued by plaintiffs when they suspect that they may have been placed under close surveillance for some period of time and may have been observed carrying out activities of a type which they had claimed they were unable to perform by reason of their injuries.

53. Thus, absent a finding that Mr. McLaughlin had been under the control and influence of the McDaids at the time the original statement of claim was prepared and verified, the High Court judge, in my opinion, would not have been entitled as a matter of law to excuse Mr. McLaughlin's verification of the original fraudulent and misleading claim by reason only of the fact that he later delivered an amended statement of claim in March 2014 and went on to give truthful evidence in relation to that claim.

54. The fact is, however, that Hanna J. found that the false account as to how the accident had occurred as described in the original statement of claim had likely been created, promulgated and engineered by the second and or third named defendants and had been advanced by Mr. McLaughlin at a time when he was under their control and influence. Further, he concluded that the false claim as thus formulated had been designed to ensure that their liability *qua* defendants for this dreadful accident was passed on to an innocent party, namely the MIBI, and so that they might thereby avoid their potential liability to Mr. McLaughlin. In light of these unusual and special circumstances and the findings of fact to which I have just referred I consider that Hanna J. was fully justified in holding that the dismissal of the action on this ground "would result in an injustice being done" for the purposes of s. 26 of the Act.

55. It follows that I am fully satisfied that the matters relied upon by Hanna J. as the basis for refusing to dismiss Mr. McLaughlin's claim under s.26 of the Act were matters material to the proper exercise of his discretion and that they provide good and sufficient reason to support his conclusion that it would have been unjust having regard to all of the circumstances to have dismissed his claim.

Damages

56. It is clear from the notice of appeal that it was the intention of the appellants to claim that the damages awarded by the trial judge in respect of all heads of claim were excessive. However, in the absence of any written or oral submissions on this aspect of the appeal, with the exception of one to which I will later refer, it is not, in my view, necessary to revisit with any great particularity the evidence underpinning the trial judge's findings. Nonetheless, in light of the appellant's grounds of appeal, I have considered the sums awarded by the trial judge in respect of the various heads of claim and I have, for the reasons hereinafter set forth, concluded that there can be no valid challenge to the sums so awarded.

Special Damages to the date of trial

57. It is difficult to see what legitimate complaint could be made by the appellants concerning the sum of €3,000 awarded in respect of special damages to the date of trial. It was not disputed in the course of the appeal that the uncontroverted evidence in the High Court was that Mr. McLaughlin, in the immediate aftermath of his injuries, had been unable to work for ten weeks and had sustained a loss income of €300 per week.

Future Special Damages
58. As to the sum of €200,000 in respect of special damages into the future, it is difficult to see how it could be maintained that this award was not supported by the evidence. I must assume that the evidence given by Ms Margo Barnes, Consultant Occupational Therapist, was in accordance with her report of November 2014, which advised as to the current cost and recurring frequency of each of the aids and appliances that would be needed by Mr. McLaughlin into the future as a result of the partial amputation of his right foot. The figures in her report were capitalised by Mr. Nigel Tennant, consulting actuary, in the sum of €361,408. Nothing was advanced by the McDaids in the course of the appeal to suggest that these figures had been challenged by them in the High Court.

General Damages for pain and suffering to the date of trial
59. As to general damages, the injury sustained by Mr. McLaughlin is one which must be considered severe when viewed in the context of the types of injuries which commonly come before the courts in personal injury litigation. The amputation of all of the toes and half of his right foot was clearly a permanent and life changing injury.

60. Mr. McLaughlin was 17 years of age as of the date of trial. He was 30 as of the date of the High Court hearing. In awarding him a sum of €100,000 to compensate him in respect of his pain and suffering over that period, the High Court judge cannot in my view be faulted. First, it is clear from his judgment that he was satisfied that Mr. McLaughlin had endured great pain, distress and suffering in the months immediately post dating his injury when efforts were made to save the toes on his foot and during which period he had to suffer the consequences of opportunistic infection. Second he obviously factored into his consideration the effects that the injury likely had on Mr. McLaughlin's life for all of thirteen years in respect of which that sum was awarded.

61. Whilst not so stated in his judgment, it is a fact of life that the years between seventeen and thirty are the years when most people expect to be at in their physical prime and capable of participating in all types of physical, vocational and social activities. Absent the type of catastrophe that occurred in this case, Mr. McLaughlin should have been able to continue with his sporting activities and ought to have enjoyed unrestricted mobility. Unfortunately, he was denied the ability to participate in any sporting activity and he was significantly curtailed in all of his physical activities both from a work and leisure perspective. During all of this period Mr. McLaughlin had to live with the embarrassment of his horrendous foot injury and was denied a life of moving and living amongst his peers with equal ease and pride. In my view, the sum of €100,000 in respect of this type of pain and suffering cannot be stated to be excessive.

General Damages for pain and suffering into the future
62. I take a similar view in respect of the sum awarded for pain and suffering into the future. Apart from the restrictions which I have already mentioned, which will be lifelong, it is important to reflect upon the fact that the sum of €150,000 awarded was to compensate Mr. McLaughlin for all that he will endure as a result of his injuries for the rest of his life. Unlike most plaintiffs, for him there will be no day where he does not feel or have to accommodate to the consequences of his injury. The trial judge had to assume, as of the date of trial, that Mr. McLaughlin would enjoy a normal life expectancy. That being so, he had to compensate him for the fact that he would continue to experience ongoing pain and suffering for something in the region of a further fifty years. During all of that period his injuries will remain as they are now and he will continue to need to apply a prosthetic device to afford him anything close to normal mobility.

63. For the aforementioned reasons I am satisfied that the overall award of €250,000 in respect of pain and suffering was just, fair and appropriate in respect of such a severe injury sustained by a man so young. I am also satisfied that the award made was proportionate within the scheme of awards commonly made in respect of other injuries of greater and lesser significance to that experienced by Mr. McLaughlin.

Novus Actus Interveniens
64. Finally, I must reject the argument advanced in the course of the appeal to the effect that the sum awarded in respect of general damages was excessive by reason of the fact that Mr. McLaughlin's outcome was poorer than would otherwise have been the case had his foot not became infected whilst he was in hospital. My reasons for so doing, briefly stated are as follows.

65. First, the notice of appeal does not contend that the trial judge erred in law or in fact in failing to reduce the amount of damages awarded to Mr. McLaughlin, by reason of the fact that his infection was not a forseeable consequence of the defendants' negigence. Second, and more importantly, the High Court proceedings were not defended upon that basis. The defendants did not allege negligence on the part of the hospital and there was no plea of *novus actus interveniens* . T hat being so the defendants have no entitlement to mount any challenge to the decision of the High Court judge on those facts before this court.

Conclusion
66. For the reaons earlier stated in this judgment, I am satisfied that the findings of fact made by the trial judge, which were principally made based on his assessment of the credibility of the witnesses who gave evidence before him, cannot on the facts of this case, be disturbed.

67. I am also satisfied that the matters relied upon by Hanna J. as the basis for his refusal to dismiss Mr. McLaughlin's claim under s. 26 of the Act were material to the proper exercise by him of his discretion and when taken together provide good and sufficient reason to support his decision that it would have been unjust in all of the circumstances to have dismissed his claim.

68. As to the sums awarded by the trial judge in respect of special damages to date and into the future, the same were clearly supported by the evidence and cannot by reason of that fact be successfully challenged. As to sums awarded in respect of damages for pain and suffering to date and into the future, I am satisfied that the same were just, fair and proportionate having regard to the injuries sustained by Mr. McLaughlin and were also proportionate when considered in the context of the scheme of awards commonly made by the courts in respect of injuries of a greater or lesser intensity.

69. For these and the reasons earlier advanced in this judgment I would dismiss these appeals.